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Provisional summary record of the 3509th meeting
Held at the Palais des Nations, Geneva, on Tuesday, 27 April 2021, at 11 a.m.

Contents

Present:

Chair:	Mr. Hmoud
Members:	Mr. Aurescu
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Hassouna
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Nguyen
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 11.05 a.m.

Protection of the atmosphere (agenda item 5) (*continued*) (A/CN.4/735 and A/CN.4/736)

The Chair invited the Commission to resume its consideration of the sixth report of the Special Rapporteur on the protection of the atmosphere (A/CN.4/736).

Ms. Lehto, speaking via video link, said that the Special Rapporteur's sixth report provided an excellent basis for the successful conclusion of the topic at the current session.

She wished to commend the Special Rapporteur for drawing attention, in chapter I (A) (2), to the fact that the 2013 understanding still figured in the text of the draft guidelines. She agreed with him that the references to the understanding in the draft preamble and in draft guideline 2 served no useful purpose at the time of the second reading. His proposal to delete them was sensible. Instead, a factual reference to the understanding could be included in the general commentary or in a footnote.

She supported the Special Rapporteur's proposals regarding the draft preamble, all of which were well-founded. The words "a limited natural resource" should be added to paragraph 1, as had been proposed by Portugal. Alternatively, reference could be made to "a natural resource with a limited assimilation capacity", in line with draft guideline 5. She supported deleting the second preambular paragraph and moving its contents to draft guideline 1, on the use of terms, which was a more suitable place for it. She agreed with the proposal made by Estonia to reorder the paragraphs of the preamble, and was open to discussing in the Drafting Committee the addition of other preambular paragraphs.

With regard to the fourth preambular paragraph, she agreed with other members of the Commission who had said that the wording "pressing concern of humankind" was confusing; she would much prefer to replace it with language that had some pedigree in international environmental law, particularly conventions relating to climate change. The United Nations Framework Convention on Climate Change and the Paris Agreement both acknowledged climate change as a common concern of humankind. As the Special Rapporteur had indicated, all the States that had commented on the matter in the Sixth Committee preferred the wording "common concern of humankind". States had long held that view, as evidenced by General Assembly resolution 43/53, in which climate change was explicitly recognized as a common concern of humankind.

With regard to the reasons that had led the Commission to adopt, in 2015, the wording "pressing concern", she wished to add that the primary function of mentioning a "common concern of humankind" in the draft preamble was, firstly, to underline the need to protect the atmosphere and, secondly, to convey the message that threats to the atmosphere were global and that addressing them required international cooperation. It would be difficult to invest such a preambular paragraph with further legal effects.

She supported moving the second preambular paragraph back to paragraph (a) of draft guideline 1, as proposed by the Special Rapporteur. She also supported inserting the words "or energy" after the word "substances" in the definition of atmospheric pollution in paragraph (b) of that guideline, as several States had suggested, in order to be consistent with the major conventions mentioned in paragraph 39 of the report. The explanation that the word "substances" included "energy", as set out in paragraph (9) of the commentary to draft guideline 1, was unconvincing and was inconsistent with how environmental pollution was generally defined.

With regard to draft guideline 2, on the scope of the guidelines, she was in favour of deleting paragraphs 2 and 3, which reflected the 2013 understanding. As that understanding had simply been intended to guide the Commission's work on the topic, it had no place in the text of the final set of guidelines.

The comment made by the Netherlands, noting that the Commission had not adopted the view of the atmosphere as "a common concern of humankind" that determined the legal status of the atmosphere, had struck her as very pertinent. While it was perhaps too late to address that issue, it might be possible for the Special Rapporteur to find a way to acknowledge it in the commentary.

Turning to draft guideline 3, on the obligation to protect the atmosphere, she said that she supported the Special Rapporteur's sensible proposal to align the language with that of the United Nations Convention on the Law of the Sea.

Paragraph (7) of the commentary to draft guideline 3 stated that the obligation of States to prevent significant adverse effects was clearly a customary obligation in the context of transboundary atmospheric pollution but not with regard to global atmospheric degradation. She did not see the justification for such a distinction. The relevant customary obligation was not limited to transboundary contexts and applied to significant adverse effects on both the environment of other States and areas beyond national jurisdiction.

With regard to the issue of the protection of the atmosphere as an obligation *erga omnes*, as raised in paragraph 51 of the Special Rapporteur's report, it was clear that atmospheric pollution and atmospheric degradation were global environmental problems. As stated in the preamble to the draft guidelines, life on Earth, human health and welfare and various ecosystems depended on how well the atmosphere could be protected and preserved. Furthermore, the issue was not new to the Commission. In his third report on State responsibility (A/CN.4/507), the Special Rapporteur, Mr. Crawford, had mentioned that examples of obligations *erga omnes partes* might arise in the field of the environment, for instance in relation to biodiversity or global warming. In its paragraph (7), the commentary to article 48 of the articles on responsibility of States for internationally wrongful acts stated that such obligations "might concern, for example, the environment or security of a region", and also referred, in its paragraph (10), to "an obligation aimed at protection of the marine environment in the collective interest" as an example of obligations that protected the international community as such. In paragraph (14) of the commentary to article 33 of the articles on State responsibility, in its report on the work of its thirty-second session (A/35/10), the Commission had furthermore referred to "safeguarding the ecological balance" as an "essential interest" of all States.

While unambiguous recognition of environmental obligations *erga omnes* by the International Court of Justice had not yet been forthcoming, there were elements in its jurisprudence, and in other international jurisprudence, that suggested a movement in that direction. The Advisory Opinion on the Environment and Human Rights issued in 2017 by the Inter-American Court of Human Rights was a case in point.

Turning to draft guideline 7, she said that she supported the Special Rapporteur's proposal to add a mention of environmental impact assessments. At the same time, that change alone was insufficient. Given that draft guideline 7 covered intentional large-scale modification of the atmosphere, an activity that might involve a risk of severe damage, the Commission should not give the impression that normal precautions could be dispensed with. The words "prudence and caution" seemed to stand for a clearer concept and, as explained in the commentary, had been inspired by the case law of the International Tribunal for the Law of the Sea. According to the Special Rapporteur, those words were "close to" the notion of "precautionary measures", if not that of the "precautionary principle". While she could see why the Commission had chosen not to use the exact term "precautionary principle" in draft guideline 7 in 2016, there was nevertheless reason to ask why the term "precautionary approach" could not be used instead. That notion already appeared in draft article 12 of the Commission's draft articles on the law of transboundary aquifers and was, after all, one of the cornerstones of international environmental law. In that connection, the language that had been proposed by Mr. Grossman Guiloff at the previous meeting was worthy of study.

With regard to draft guideline 8, on international cooperation, she supported the addition of the word "technical" in paragraph 2. She would welcome further development of the commentary, as the Special Rapporteur had proposed, regarding the general aspects of the obligation to cooperate, including its origin.

She agreed with the formulation of draft guideline 9, on the interrelationship among relevant rules, as adopted on first reading, and looked forward to the proposals the Special Rapporteur would be making to strengthen the commentary, in particular with respect to vulnerable groups of people.

With regard to draft guideline 12, on dispute settlement, a number of useful considerations had been raised in the written comments by States and by the Permanent Court

of Arbitration. She agreed with the Special Rapporteur that some of those comments could be reflected in the commentary, including the comment that all large disputes, not only those related to the protection of the atmosphere, were likely to be fact-intensive, and that the use of scientific or technical experts depended on the nature of the dispute. At the same time, the emphasis on the distinctive nature of disputes related to the environment generally, and to the protection of the atmosphere in particular, should not be lost.

Lastly, she wished to second Mr. Jalloh's comments about the references to the Charter of the United Nations. As Article 33 of the Charter concerned only disputes that were likely to endanger international peace and security, while Article 2, paragraph 3, applied to all disputes, it would be appropriate to mention both.

Mr. Hassouna, speaking via video link, said that he wished to thank the Special Rapporteur for his work on the sixth report. While the inclusion of the topic of protection of the atmosphere on the Commission's agenda had been endorsed by a large number of States from the outset, other States had questioned its suitability. However, the Commission had clearly succeeded in adopting a positive and balanced approach to the subject by identifying the main legal principles applicable to the protection of the atmosphere while avoiding policy debates related to political negotiations on environmental issues.

Turning to the draft preamble, he said that it highlighted the close interaction between the atmosphere and the oceans. However, since the interaction between the atmosphere and the seas, lakes and rivers was no less significant, a reference to those bodies of water could also be added to the relevant draft preambular paragraph. In connection with the recognition that the protection of the atmosphere from atmospheric pollution and atmospheric degradation was a "common concern of humankind", the commentary should include an explanation and clarification of the notion of "common concern", including references to the concerns raised by the effects of atmospheric pollution on, *inter alia*, the environment, human health, soil, agriculture and production, forests, and life in lakes, rivers, oceans and seas.

While the draft preamble already contained a reference to the special situation and needs of developing countries, he wished to propose that the special situation and specific needs of the most vulnerable of such countries should be highlighted. Reflecting the text of the preamble to the Paris Agreement, the additional wording could read:

> "Aware of the special situation and needs of developing countries, especially those that are particularly vulnerable to the adverse effects of atmospheric pollution and degradation, and of the specific needs and special situations of developing countries with regard to funding and transfer of technology."

In addition to noting the special situation of low-lying coastal areas and small island developing States due to sea-level rise, the draft preamble should also include mention of other especially vulnerable States, such as those affected by desertification due to drought caused by atmospheric pollution and degradation – most of which were located in Africa and Asia. He agreed with the suggestion to refer in the draft preamble to the human rights implications of the protection of the atmosphere, since they were obviously relevant.

With regard to draft guideline 1, as the Special Rapporteur proposed to include the words "or energy" after the word "substances" in paragraph (b), they should also be added after the words "degrading substances" in paragraph (a). In paragraph (b), the words "or likely to contribute" should be added after the word "contributing", in line with the text of the Montreal Guidelines for the Protection of the Marine Environment against Pollution from Land-based Sources. That insertion could provide additional protection in cases of scientific uncertainty where there was scientific debate about the harmful effects of a pollution source.

Turning to draft guideline 2, he said that he had noted the Special Rapporteur's recommendation to delete the references to the 2013 understanding. The Special Rapporteur had dealt with the subject skilfully, despite the restrictions and limitations imposed by the understanding. To omit any reference to the 2013 understanding would, however, be misleading to readers and would represent a lack of transparency about the approach adopted by the Commission. He therefore supported the proposal to make reference to the understanding either in the introduction to the commentary or in a footnote to the draft guidelines. It should be made clear that the draft guidelines were without prejudice to any

other rules and principles of international environmental law that might be applicable in that regard pursuant to any international treaty or custom.

Referring to draft guideline 3, he said that, in the commentary thereto, the nature of the obligation to protect the atmosphere should be clarified by specifying that it was an obligation *erga omnes*. In line with the text of article 20 of the Convention on the Law of the Non-navigational Uses of International Watercourses and with the text of article 194 of the United Nations Convention on the Law of the Sea, draft guideline 3 should be amended to state that the obligation to protect the atmosphere fell on each State individually and also on States jointly. The words "and preserve" should be inserted after the word "protect", to reflect article 20 of the Convention on the Law of the Non-navigational Uses of International Watercourses and article 192 of the United Nations Convention on the Law of the Sea. In addition, a new paragraph should be added to draft guideline 3 to address the obligation of States to ensure that activities undertaken in their jurisdiction by non-State actors were so conducted as not to cause damage to other States by atmospheric pollution or degradation. Article 194 (2) of the United Nations Convention on the Law of the Sea contained a similar provision.

Draft guideline 4 contained no reference to the procedural details relating to the obligation to conduct an environmental impact assessment, whereas such details could be found in both the United Nations Convention on the Law of the Sea and the Convention on the Law of the Non-navigational Uses of International Watercourses. For the purposes of the draft guidelines, the Commission's draft articles on prevention of transboundary harm from hazardous activities might provide a source of inspiration.

In draft guideline 7, further details should be given regarding what was meant by "intentional large-scale modification of the atmosphere". It should be stressed that any such modification activities should be undertaken on the basis of reliable scientific studies and must be subject to all the requirements mentioned in the draft guidelines.

With regard to draft guideline 8, he wished to remind the Commission that international cooperation provisions, especially those relating to the environment, such as were found in the Paris Agreement, generally reflected the special attention that should be given to the needs and special situation of developing States. He wished to propose the addition of a paragraph to that effect.

Paragraph 2 of draft guideline 9 should be amended to highlight the role of scientific evidence and technical knowledge in the development by States of new rules on protection of the atmosphere. In paragraph 3 of that draft guideline, the peoples of developing States affected by desertification should be included among the groups that should receive special consideration.

With regard to draft guideline 10, obligations on implementation already existed under treaty and customary law on the protection of the atmosphere from pollution. In fact, the Special Rapporteur's proposed wording for paragraph 1 was less binding than existing obligations in international law. It should therefore be reformulated, drawing on draft article 5 of the Commission's draft articles on prevention of transboundary harm from hazardous activities. He did not support the addition of a new paragraph stating that failure to implement such obligations amounting to breach thereof entailed the responsibility of States under international law.

Turning to draft guideline 11, he said that in paragraph 2 (a), concerning facilitative procedures, the needs of developing States should be highlighted by inserting the words "especially developing States" after the words "assistance to States". Paragraph 2 (b), concerning enforcement procedures, should include a reference to the need for particular flexibility with regard to non-complying developing States. An additional example, stating that enforcement measures should be taken "in accordance with the principle and rules of international law", should be added to ensure that the paragraph did not affect the applicability of all the other rules and procedures under the regime of State responsibility or any special regime in other applicable agreements.

Lastly, draft guideline 12, on dispute settlement, was important, since it was likely that disputes would arise, but its paragraph 1 was less binding and less specific than the

provisions of Article 33 of the Charter of the United Nations. The draft guidelines should therefore provide for specific means of dispute settlement, while emphasizing the option of resorting to the competent international organizations or bodies due to the science-dependent character of atmospheric disputes. In addition, the fact-intensive character of atmospheric disputes required a compulsory fact-finding procedure that would provide the necessary expertise to facilitate the settlement of the disputes. Such procedures had been adopted in several instruments, including the Convention on the Law of the Non-navigational Uses of International Watercourses and the Commission's draft articles on prevention of transboundary harm from hazardous activities. A third paragraph could be added to draft guideline 12 to provide for a compulsory conciliation procedure if parties failed to settle a dispute pursuant to paragraphs 1 and 2. Such procedures had been adopted in several multilateral agreements relevant to the environment.

Ms. Oral said that she wished to thank the Special Rapporteur for his excellent, clear and well-structured sixth report. The Special Rapporteur had begun his work on the topic of protection of the atmosphere in 2011 with a broad vision to develop a comprehensive set of draft articles. That vision had represented an opportunity to address the existing problem of the fragmentation of international law and to consolidate a set of well-accepted principles of environmental law under one overarching international legal instrument dedicated to the protection of the atmosphere. However, in 2013, the Commission had regrettably imposed a lengthy list of restrictive conditions on the topic. In many ways, those restrictions ran counter to the statutory mandate of the Commission to promote the progressive development and codification of international law. As a result, the work of the Commission had received criticism from States and academics. The Government of the Netherlands, for example, had commented that the Commission had only been moderately successful in achieving its stated aim of providing guidelines to assist the international community in addressing critical questions related to the transboundary and global protection of the atmosphere. The Government of Belgium had commented that the limited scope of the draft guidelines raised questions as to their effectiveness. She agreed with those comments. The Commission had an opportunity, during the second reading, to make the draft guidelines more meaningful and relevant and to ensure that they better reflected contemporary State practice. Indeed, it was encouraging to read the many comments made by States seeking a more ambitious set of draft guidelines.

Several States had suggested that the preamble should include a reference to the interaction between the atmosphere and other ecosystems in addition to the oceans. Their concern was a valid one; such a reference would underscore the importance of the protection of the atmosphere for all ecosystems. She supported the Special Rapporteur's proposals to insert the words "a limited natural resource" in the first preambular paragraph and to delete the second preambular paragraph and revert to the original wording of draft guideline 1. There was strong support among States for replacing the phrase "pressing concern of the international community as a whole" with "common concern of humankind". The latter phrase was used in existing instruments with universal membership of States, such as the Paris Agreement, the United Nations Framework Convention on Climate Change and the Convention on Biological Diversity. Replacing the well-accepted principle of "common concern of humankind" with "pressing concern of the international community as a whole" was an example of where the Commission had veered away from accepted State practice. Any justification of such a change based on uncertainty as to the legal implications of the concept of "common concern of humankind" was unconvincing, especially within the context of non-legally binding guidelines. In summary, she supported the revised version of the preamble as proposed by the Special Rapporteur, with some additions as suggested by others, including the addition of references to the Declaration of the United Nations Conference on the Human Environment and the Rio Declaration on Environment and Development.

With regard to draft guideline 1, on the use of terms, several States had recommended that the definition of "atmospheric pollution" should be aligned with the Convention on Long-range Transboundary Air Pollution and the United Nations Convention on the Law of the Sea through the insertion of the phrase "or energy" after the word "substances". She fully supported that proposal. It was unusual that the Commission had initially decided not to include a reference to "energy" in the definition, given that such a reference appeared in

definitions of pollution that were widely accepted by States. She agreed with the Special Rapporteur's decision not to propose that the word "significant" should be inserted before "deleterious effects". There was ample support in State practice for that decision.

She supported the revised version of draft guideline 2. As previously remarked, many States had expressed their dissatisfaction with the idea of including references to the limitations imposed by the 2013 understanding in the body of the final output of the Commission's work on the topic. She noted, for example, that the Government of Belgium had observed that the exclusion of "a large number of pollutants" from the scope of the draft guidelines would constitute "a very significant restriction". It made no sense to include restrictions that excluded certain substances, given the broad scope of the draft guidelines. The result of such restrictions – namely that the obligation to protect the atmosphere under draft guideline 3 would not apply to black carbon, tropospheric ozone and other dual-impact substances – would undermine the effectiveness of the Commission's work.

Likewise, the exclusion of accepted principles of environmental law that were widely used both in international instruments and in the domestic laws of many States would further undermine the impact and relevance of the Commission's work. Several States had commented that the draft guidelines should include a wide range of international law principles. She proposed that the Commission should include in the draft guidelines those principles of environmental law that enjoyed broad acceptance, as reflected in international instruments. Such principles should include: the principle of intergenerational equity; common but differentiated responsibilities; the principle of the specific needs and special circumstances of developing countries, especially those particularly vulnerable to the adverse effects of climate change; the precautionary principle; and the "polluter pays" principle. She would also add a reference to the right to a healthy environment.

As remarked by the Government of the Netherlands, draft guideline 3 was central to the draft guidelines as a whole. With that in mind, she fully agreed with the Government of Antigua and Barbuda that draft guideline 3 should be formulated in stronger terms. She also agreed that the protection of the atmosphere, as a recognized global commons and natural resource, was an obligation *erga omnes*. In that context, she wished to suggest that the language of draft guideline 3 should be aligned with that of articles 192 and 194 of the United Nations Convention on the Law of the Sea. The draft guideline would thus read: "States have the obligation to protect and preserve the atmosphere and to ensure that the necessary measures are taken to prevent, reduce and control pollution and degradation of the atmosphere", without reference to "due diligence". The words "to ensure" triggered the due diligence obligation.

With regard to draft guideline 4, the duty of States to conduct an environmental impact assessment in a transboundary context was recognized as part of customary international law and of the due diligence obligations of States. Overall, draft guideline 4 had been welcomed by those States that had submitted comments. However, a number of States, as well as the United Nations Environment Programme (UNEP), had made additional relevant comments and proposals, particularly with regard to the actions that triggered the requirement to conduct an environmental impact assessment, the consultation of neighbouring States during the environmental impact assessment process, and the procedural aspects of environmental impact assessments. In her view, there was room to include at least a reference to the minimum procedural requirements for environmental impact assessments.

As for draft guideline 5, on the sustainable utilization of the atmosphere, while the draft guideline did not refer to sustainable development *per se*, it was implicit in the term "sustainable". In that regard, UNEP was correct to state that the three pillars of sustainable development included "social development". Either the term "sustainable utilization" should be explained in the commentary to the draft guidelines or a reference to "social development" should be inserted in the text itself.

She agreed with the comment submitted by UNEP regarding the vague nature of draft guideline 6, on equitable and reasonable utilization of the atmosphere. It was not clear to whom the draft guideline applied; she presumed that it applied to States, but that was not made explicitly clear. By contrast, article 4 of the draft articles on the law of transboundary

aquifers of 2008 stated clearly that the obligation to ensure equitable and reasonable utilization fell to aquifer States.

With regard to draft guideline 7, on the intentional large-scale modification of the atmosphere, she was in full agreement with the European Union that an explicit reference to precaution was needed, instead of the vague "prudence and caution", which was not reflective of State practice. The precautionary principle or approach was widely applied in international and regional instruments and in domestic law. The phrase "prudence and caution", however, came from the decision on provisional measures of the International Tribunal for the Law of the Sea in the case concerning *Southern Bluefin Tuna* (*New Zealand v. Japan; Australia v. Japan*), which had been issued over 20 years ago.

International cooperation was a fundamental obligation under international environmental law, as affirmed in several cases. She proposed that the language of draft guideline 8, on international cooperation, should mirror that of article 197 of the United Nations Convention on the Law of the Sea. Draft guideline 8 (1) would thus read: "States shall cooperate, as appropriate, directly or through competent international organizations for the protection of the atmosphere from atmospheric pollution and atmospheric degradation." Draft guideline 8 (2) was especially important for developing countries, but it was also an important part of the obligation to protect the atmosphere. She supported the addition of "and technical" after "scientific". However, the language of that paragraph could be strengthened by aligning it with that of the United Nations Convention on the Law of the Sea. The final sentence of draft guideline 8 (2), in which only two examples of cooperation were given, diminished the importance of the draft guideline. For example, there was no reference to capacity-building.

She had reservations about the value of draft guideline 10. Implementation was one of the most important objectives of any environmental protection instrument, but draft guideline 10 provided only a very weak framework for promoting implementation. It was simply a loose reiteration of some of the elements of the due diligence obligation, which was already implicit in draft guideline 3. While she fully agreed with the Special Rapporteur regarding the import of the new paragraph 2 of draft guideline 10, it too was only a restatement of an accepted legal consequence.

Mr. Reinisch said that he wished to thank the Special Rapporteur for his sixth report, which highlighted, in an admirably detailed fashion, the comments submitted by States on the draft guidelines as adopted on first reading. In addition to summarizing the comments made by States, the report specifically highlighted the question of the so-called 2013 understanding, which had limited the scope of the work to be undertaken by the Commission and the Special Rapporteur. In his report, the Special Rapporteur suggested that the final paragraph of the preamble, which referred to the 2013 understanding, should be deleted. While good arguments had been put forward in favour of doing that, he wished to caution against it; maintaining a reference to the 2013 understanding in the preamble would make it clear to future readers why the present draft guidelines were limited in the way that they were. Such a reference would also protect the Special Rapporteur and the Commission from potential future criticism that the guidelines were too limited to deal adequately with the topic. Furthermore, a reference to the Special Rapporteur's limited mandate in the final version of the draft guidelines would serve as guidance for future special rapporteurs working on non-traditional topics of international law.

It was an unfortunate reality that the Commission's work had always been bound by various constraints, including limited time, limited resources and sometimes limited mandates. Nonetheless, the work of the Special Rapporteur had provided greater clarity on the topic of protection of the atmosphere and had established a precedent for the Commission's role in dealing with and codifying non-traditional topics. It did not necessarily follow from the limited scope of the draft guidelines that States and the international community were prevented from applying them more broadly. States might define a wider scope of application of the draft guidelines in their respective domestic legal frameworks and through their practice. Moreover, the international community might elaborate broader agreements through traditional political decision-making processes. The draft guidelines could serve as a stepping stone for such developments.

With regard to the other proposed changes to the preamble and the restructuring of some of its paragraphs, he was in agreement with the Special Rapporteur. In particular, he agreed with the proposal to replace the phrase "pressing concern of the international community as a whole" with "common concern of humankind". Such a change would ensure coherence with environmental treaty language and avoid unintentionally introducing a new, possibly normative, concept.

For the reasons given by the Special Rapporteur, he agreed with the proposal to insert a reference to "energy" after "substances" in draft guideline 1 (b). However, he was not convinced by the proposal to insert the words "within which the transport and dispersion of the polluting and degrading substances occur" in the definition of "atmosphere". While it was certainly correct that the main concern of protecting the atmosphere was to counter pollution and degradation that occurred in the atmosphere, he did not consider the transport and dispersion of polluting and degrading substances to be a crucial aspect of the definition of the atmosphere. The "atmosphere" would be the "atmosphere" even if no such transport and dispersion occurred there. Indeed, the fact that pollution and degradation might affect the atmosphere was not a defining element of the atmosphere itself.

While he supported retaining a reference to the 2013 understanding in the preamble of the draft guidelines in order to explain the limitations imposed on the topic, the references to those limitations in paragraphs 2 and 3 of draft guideline 2 could be omitted or, alternatively, moved in their entirety to the preamble. He agreed with the Special Rapporteur that since the draft guidelines did not deal with the issues referred to in those two paragraphs, there was no need to mention those issues in relation to the scope of the guidelines.

He agreed with the suggestion to retain the wording of draft guideline 3 as adopted on first reading and merely to replace the word "or" by "and" and thus bring the text into line with the United Nations Convention on the Law of the Sea. With regard to draft guideline 4, he agreed with the Special Rapporteur's proposal to include a reference to procedural rights only in the commentary to the draft guidelines. As for draft guideline 5, he agreed with the Special Rapporteur that, given the balancing requirement inherent in sustainable development, there was no need to reformulate draft guideline 5 as an obligation of States. He wished to suggest, however, that the word "the" should be inserted before "protection" in paragraph 2 of draft guideline 5.

He agreed with the Special Rapporteur's proposal to keep the wording of draft guideline 7 largely unchanged. However, he wondered whether it was really necessary to insert the words "including those relating to environmental impact assessment". Such a procedural precaution was already covered by the call to act with "prudence and caution". Moreover, it followed from draft guideline 4 that an environmental impact assessment was required as an obligation under international law. Since the commentary regarding draft guideline 4 already referred to activities involving intentional large-scale modification of the atmosphere requiring an environmental impact assessment, the additional reference to environmental impact assessments in draft guideline 7 appeared to be redundant and might result in some confusion. Moreover, adding such a reference might overemphasize the procedural obligations. As paragraph 66 of the sixth report illustrated very well, there was a need to proceed with "caution and prudence" when undertaking any geo-engineering measures, since they entailed a number of uncertainties and risks.

With regard to draft guideline 8, he wondered whether, in paragraph (1), "an" obligation to cooperate might not be better than "the" obligation to cooperate. Furthermore, he did not think that it was appropriate to add the words "and technical" in paragraph (2). While he understood what was meant by "scientific knowledge" relating to the causes and impacts of atmospheric pollution and degradation, he was not sure what was meant by "technical knowledge" in that context. Technical knowledge might be required when taking steps to counteract pollution and degradation; indeed, the suggestion by UNEP, as referenced in paragraph 69 of the sixth report, specifically referred to "ways to prevent" atmospheric pollution and degradation. He doubted, however, whether technical knowledge was necessary for understanding the causes or impacts of pollution and degradation.

The Commission had held an extensive debate on draft guidelines 10, on implementation, and 11, on compliance, in 2018. The result of that debate was a very

carefully worded draft guideline 10 (1), which reflected the view that States were in principle free to decide how to implement international obligations in the domestic sphere. The Commission had also discussed the extent to which the protection of the atmosphere entailed any obligations to implement international commitments in the domestic sphere, given that States were generally free to decide how to ensure that they complied with international obligations. No examples had been identified. Rather, it seemed that a terminological misunderstanding had arisen with regard to the meaning of "implementation", which had seemingly been understood to signify "compliance with".

Unfortunately, the debate appeared to have resurfaced as a result of the Special Rapporteur's recommendation to introduce a new paragraph in draft guideline 10 stating that "failure to implement the obligations amounting to breach thereof entails the responsibility of States under international law". State responsibility was the consequence of a violation of a rule of international law or the failure to comply with an obligation under international law. Implementation into domestic law was not usually an obligation under international law. Therefore, failure to implement obligations did not necessarily entail State responsibility. For that reason, he strongly rejected the proposal to reintroduce language referring to State responsibility in guideline 10, which dealt with the different forms of implementation at the national level. If such language was to be reintroduced at all, it should be inserted in draft guideline 11, which dealt with compliance with obligations; however, even in draft guideline 11, such language might be superfluous, since it was clear that non-compliance with international obligations entailed State responsibility.

Moreover, the original paragraph 2 of draft guideline 10, according to which States "should endeavour to give effect to the recommendations contained in the present draft guidelines", might not be appropriate in the context of the draft guideline on implementation. Such soft language urging adherence to recommendations would be more appropriate in draft guideline 11, the first paragraph of which addressed the requirement to comply with obligations.

Mr. Tladi said that he wished to thank the Special Rapporteur for his very detailed and helpful sixth report. Given the difficulty of the topic and the many compromises that had had to be made to the text on first reading, he was pleased that the Special Rapporteur had not proposed too many amendments. The Commission should exercise caution in making further changes to the draft guidelines.

Since joining the Commission, he had very strongly supported the inclusion of the topic of protection of the atmosphere on the Commission's agenda in the hope that the Commission would be able to make an immense contribution to an area of international law that was of existential importance. However, its contribution would be less than it might have been because of the constraints placed on its work by the 2013 understanding, and the Commission must now make the best of the situation.

Turning to the proposed amendments, he said that he supported the deletion of the final preambular paragraph. The purpose of that paragraph had never been clear, since it was obvious that the draft guidelines were not intended to interfere with any political negotiations, whether in the stated areas or in any others. For example, no one would claim that the draft guidelines were intended to interfere with trade negotiations that might have an impact on aspects of pollution or the ongoing negotiations on the biodiversity of areas beyond national jurisdiction.

On the other hand, he was very strongly opposed to the proposed deletion of paragraph 2 of draft guideline 2. The basis for the proposed deletion was not clear, as none of the comments and observations received from Governments and international organizations (A/CN.4/735) included a request to delete that paragraph. One reason advanced by the Special Rapporteur was that the paragraph contained a "double negative" formulation – "The present draft guidelines do not deal with, but are without prejudice to". While he did not consider the formulation to be a problem, if others believed it was, the solution would be to reformulate the paragraph rather than simply delete it. It was true that Antigua and Barbuda had criticized paragraph 2 for not dealing with the principles of international environmental law mentioned in it, but deleting the paragraph did nothing to address that substantive point.

The Special Rapporteur had also suggested that paragraph 2 of draft guideline 2 should be deleted because the 2013 understanding had been complied with. However, that suggested a misunderstanding of paragraph 2, whose purpose was to explain to the reader that the absence of the principles in question did not in any way reflect the Commission's view of the status of those principles. Whether the understanding was mentioned or not, or whether it had been faithfully respected or not, that concern remained. Deleting paragraph 2 of the draft guideline would signify, or at least suggest, that, in the view of the Commission, the precautionary principle and common but differentiated responsibilities were not applicable to the protection of the atmosphere. He would be willing to go along with the deletion of the words "do not deal with", but the "without prejudice" clause should, in his view, absolutely be maintained.

He would have no objection to the deletion of paragraph 3 of draft guideline 2, which in any case was a rather strange provision. It was clear that the draft guidelines did not deal with specific substances but rather with broad principles concerning the protection of the atmosphere. For example, the rule on environmental impact assessments established in draft guideline 4 did not deal with the substances mentioned in paragraph 3 of draft guideline 2 but with any activity involving those substances that was likely to cause significant adverse impact.

With respect to draft guideline 10, he did not believe that there was any real basis for the insertion of the new paragraph 2 on State responsibility as proposed by the Special Rapporteur. After all, suggestions had been received from only two States – South Africa and the Federated States of Micronesia – and they had not been submitted as written comments. In any case, he was not convinced that the proposed new paragraph would even address the concern expressed by South Africa, which had called on the Commission to identify principles on responsibility that would be particularly helpful in guiding States in the field of atmospheric pollution and degradation. In order to address that concern, it would be necessary to explore in detail whether there were peculiarities in the law of atmospheric pollution that called for a specific application or nuance in the law of State responsibility.

He was sympathetic to the proposals made by other members on how the draft guidelines could be further improved. However, the consideration of those proposals would likely make it difficult, if not impossible, for the Commission to complete a second reading at the current session.

Mr. Nguyen, speaking via video link, said that he wished to thank the Special Rapporteur, for his sixth and final report on the protection of the atmosphere. His dedication, expertise on the topic, guidance and cooperation had greatly facilitated the work of the Commission.

In the wake of the Paris Agreement, States expected the outcome of the Commission's work on the topic to be in the form of a future agreement on the protection of the atmosphere rather than just potential guidelines. The Commission's work on the topic might have been more useful had it not been limited by the 2013 understanding. Indeed, upon joining the Commission in 2017, he had been very surprised at the application of such an understanding to the topic of protection of the atmosphere. Many States did not support the 2013 understanding, which essentially limited the Commission's contribution on the topic to the progressive development of international law. While he appreciated the fact that the Special Rapporteur had complied fully with the understanding, he hoped that no such procedure would be imposed on the Commission in the future and that its work would thus be more independent. He therefore supported the Special Rapporteur's proposal, based on the comments made by several States, to remove any references to the understanding from the preamble and the draft guidelines, including deleting the final preambular paragraph.

Regarding the first preambular paragraph, he supported the Special Rapporteur's proposal to emphasize that the atmosphere was a limited natural resource. Indeed, the protection of the atmosphere was a common concern of humankind because of its limited assimilation capacity and exhaustible and exclusive character. However, for the sake of consistency, the wording should be the same – either "a limited natural resource" or "a natural resource with a limited assimilation capacity" – in the first preambular paragraph and draft guideline 5 (1). Alternatively, if the wording "a limited natural resource with a limited

assimilation capacity", which was used in paragraph (2) of the commentary to the preamble, were to be used in the first preambular paragraph, there would be no need to repeat the phrase "natural resource with a limited assimilation capacity" in draft guideline 5 (1).

Given that climate change had a cause-and-effect relationship with all components of the natural environment, he proposed reformulating what had originally been the third preambular paragraph to read: "Noting the close interaction between the atmosphere and other components of the environment, especially the oceans."

He had three comments to make on the fourth preambular paragraph. Even in his first statement on the topic in 2017, he had objected to the use of the term "pressing concern", which he considered ambiguous and unquantifiable. It deviated from the more accepted expression "common concern of humankind" used in international environmental agreements such as the Convention on Biological Diversity, the United Nations Framework Convention on Climate Change and the Paris Agreement. He had previously recommended using the term "common concern or common objective" and therefore supported the Special Rapporteur's proposal to reinstate the words "common concern" in the fourth preambular paragraph. Second, he proposed replacing the word "recognizing" with either "recalling" or "emphasizing", because the existence of a common concern for the protection of the atmosphere was an objective fact and therefore did not require any recognition. Third, he recommended deleting the phrase "from atmospheric pollution and atmospheric degradation". Draft guideline 2, on the scope of the guidelines, would be sufficient to make it clear that the concern with respect to the protection of the atmosphere was limited to atmospheric pollution and atmospheric degradation.

In the original sixth preambular paragraph, he proposed inverting the order of "low-lying coastal areas and small island developing States", as the impact of sea-level rise would in fact make small island developing States more vulnerable than low-lying coastal areas because they faced additional problems related to statehood. The same observation applied to paragraph 3 of draft guideline 9.

He agreed with the Special Rapporteur's proposed deletion of the second and final preambular paragraphs and the modifications to the other preambular paragraphs.

Regarding the Special Rapporteur's intentional omission of the word "significant" before "deleterious effects" in draft guideline 1 (b), he noted that article 1 (1) (4) of the United Nations Convention on the Law of the Sea mentioned "such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities …", without qualifying that those effects must be "significant". However, the omission of the word "significant" before "deleterious effects" in relation to atmospheric pollution or degradation would increase the burden on developing States, which had limited capacity to fight any kind of atmospheric pollution or degradation. Such an omission was also incompatible with draft guideline 4, on the obligation to conduct an environmental impact assessment for activities likely to cause "significant adverse impact on the atmosphere in terms of atmospheric pollution or atmospheric degradation". He would therefore be in favour of adding the word "significant" before the word "deleterious" in both paragraphs (b) and (c) of draft guideline 1. The threshold of a "significant" adverse impact on the atmosphere should be clarified in the commentary.

Regarding paragraph 4 of draft guideline 2, the addition of the word "legal" before the phrase "status of airspace" would probably ensure the necessary effects under international and national laws and might also help distinguish the legal from the scientific status of airspace and outer space.

It should be recalled that, as a rule, the use of words of obligation was to be avoided in guidelines, which were not binding; indeed, almost all the draft guidelines used non-binding formulations such as "should" or "may". He therefore proposed that the phrase "States have the obligation to", used in draft guidelines 3, 4 and 8, should be changed to "States are required to fulfil their obligation to". Such an amendment would respond to the concern of certain States that the relevant practice and applicable rules of international law requiring States to prevent, reduce and control atmospheric pollution and atmospheric degradation were still being developed and that the application of those measures depended on States' financial resources, capacity-building and the transfer of technology.

With regard to draft guideline 4 in particular, it should be borne in mind that recent climate change litigation had focused on incomplete environmental impact assessments, and projects had been challenged for failing to take climate impacts into account as part of required environmental reviews. It should therefore be clarified in the commentary whether the term "environmental impact assessment" covered only the possibility of assessing planned activities in relevant legal instruments or of conducting new cumulative impact assessments.

Concerning draft guideline 7, the commentary or the text should clarify the scale, nature and consequences of activities aimed at intentional large-scale modification. Moreover, the guideline could be understood to refer to both civil and military geo-engineering activities, but the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques was binding on only 78 States, and it was unclear whether it represented customary international law. It was necessary to distinguish activities aimed at the intentional modification of the atmosphere on the basis of their consequences on human welfare. The protection of human life and environmental concerns were, after all, mutually inclusive. Without an international assessment, any unilateral civil or military activity aimed at the intentional modification of the atmosphere would go against the common concern of humankind to maintain a safe and clean atmosphere. To reduce the possible harmful effects of geo-engineering activities, the requirement that an environmental impact assessment must be conducted should come before the requirement that such activities should be conducted with "prudence and caution". A reference to the need to ensure that any activities causing extremely harmful effects to human welfare were excluded could possibly also be added.

Regarding paragraph 1 of draft guideline 12, it was obvious that any dispute, including disputes between States relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation, must be settled by peaceful means in accordance with the applicable rules of international law. As currently worded, paragraph 1 did not indicate a specific settlement mechanism for such disputes. Drawing on article 279 of the United Nations Convention on the Law of the Sea and the comments made by States, the paragraph could perhaps be reworded to read:

> "States are required to fulfil their obligation to settle any dispute between them relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations and, to this end, are required to fulfil their obligation to seek a solution by the means indicated in Article 33, paragraph 1, of the Charter."

He fully supported the approach taken by the Special Rapporteur in respect of the other draft guidelines. He was therefore in favour of submitting the set of draft guidelines contained in the sixth report to the Drafting Committee.

The meeting rose at 12.40 p.m.