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Provisional summary record of the 3513th meeting

Held at the Palais des Nations, Geneva, on Monday, 3 May 2021, at 11 a.m.

Contents

* Reissued for technical reasons on 8 June 2021.

Present:

Chair:	Mr. Hmoud
Members:	Mr. Cissé
	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. Ruda Santolaria
	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 a.m.

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

Ms. Galvão Teles said that she was grateful to the Special Rapporteur for his sixth report on the protection of the atmosphere (A/CN.4/736) and his efforts to consolidate the Commission's work on the topic. With regard to the comments and observations received from Governments and international organizations (A/CN.4/735), it was regrettable that only 18 States – most of which belonged to the Group of Western European and other States – and 2 international organizations had submitted written comments on the draft preamble and draft guidelines adopted on first reading. Comments had been received from only one African State and only one Asian State. She wished to commend Antigua and Barbuda, which had submitted the most substantive comments. Some of the points raised by that State, such as those concerning the specific needs and special circumstances of developing countries, in particular small island developing States and least developed countries, deserved thorough consideration in the commentaries. In her view, the Commission and the Sixth Committee should reflect on how to increase the number and diversity of the States that submitted written comments on the Commission's work.

Turning to the draft preamble, she said that she supported the Special Rapporteur's proposal to insert the words "a limited natural resource" into the first preambular paragraph. She could also support Ms. Lehto's proposal to use the wording "a natural resource with a limited assimilation capacity", in line with draft guideline 5. The fact that natural resources, including the atmosphere, were limited and must therefore be protected could not be overstressed.

As for the fourth preambular paragraph adopted on first reading, she tended to agree with the Special Rapporteur's proposal to replace the words "pressing concern of the international community as a whole" with "common concern of humankind". The latter expression was used in various soft and hard law instruments and, in her view, was suitable in the context of protection of the atmosphere.

The "common concern of humankind" concept provided a framework for approaching global problems. According to scholars of international law, issues of common concern were those that inevitably transcended the boundaries of a single State and required collective action. The concept was particularly relevant to environmental problems, which did not respect national boundaries. The inclusion of a reference to the concept in the draft preamble would highlight the need for States to cooperate, through global institutions, to address what was a shared problem. That said, she agreed with those members of the Commission who had said that any reference to the concept should be explained in the commentary.

She supported the Special Rapporteur's proposal to delete the eighth preambular paragraph adopted on first reading, which was closely related to draft guideline 2 and to the 2013 understanding on the scope and outcome of the topic. In that regard, she fully agreed with Mr. Tladi that the eighth preambular paragraph could be deleted and that paragraph 2 of draft guideline 2 should be retained. She also agreed with Mr. Park that, as a compromise and a way of recalling the history and scope of the topic, the content of the eighth preambular paragraph could be incorporated into the commentary. In her view, the preambular paragraph in question added nothing of substance to the text and was appropriate only for the general commentary.

Turning to the draft guidelines, she said that, in her view, paragraph 2 of draft guideline 2 should be retained, not because it established a link to the 2013 understanding but because it helped to explain the limited scope of the project, which was without prejudice to various important concepts of relevance to the topic. She would nevertheless prefer to amend the paragraph by deleting the words "do not deal with, but", as Mr. Tladi had suggested. She could support the deletion of paragraph 3 and the inclusion of an explanation of its content in the commentary.

With regard to draft guideline 7, she supported the Special Rapporteur's proposal to insert a reference to environmental impact assessment at the end of the sentence. She would also support the reformulation of the draft guideline along the lines suggested by Ms. Oral, in accordance with the written comments received from the European Union. If the

Commission did not agree with that approach, she believed that Ms. Oral's proposal and the comments received from the European Union would enrich the commentary.

Concerning draft guideline 10, for the reasons explained by other members of the Commission, she did not support the Special Rapporteur's proposal to insert a new paragraph on State responsibility, which was a matter that had already been thoroughly discussed at the first-reading stage.

She supported the referral of the draft preamble and draft guidelines to the Drafting Committee, taking into account the comments made in the plenary. She was confident that, with the cooperation of all the members of the Drafting Committee and the able work of the Special Rapporteur, the Commission would be able to adopt a text on second reading and conclude its work on the topic at the current session.

Mr. Zagaynov said that he wished to thank the Special Rapporteur for the detailed sixth report on the protection of the atmosphere, which, like the previous reports on the topic, offered rich food for thought.

With regard to the first preambular paragraph, the Special Rapporteur's proposal to insert the words "a limited natural resource" was based on the finding of the Appellate Body of the World Trade Organization (WTO), in its report on the *United States — Standards for Reformulated and Conventional Gasoline* case, that clean air was an "exhaustible natural resource". However, clean air and the atmosphere were two different concepts. The atmosphere was not defined as an exhaustible or limited natural resource in international treaties that dealt with protection of the atmosphere. As noted in the written comments received from the United Nations Environment Programme (UNEP), it was unclear whether it could be argued that the atmosphere was an exhaustible natural resource.

In addition, the question arose as to how the wording proposed by the Special Rapporteur related to draft guideline 5 (1), where the atmosphere was described as "a natural resource with a limited assimilation capacity". That description seemed to correspond more closely both to the actual state of affairs and to the finding of the WTO Appellate Body. It would be better to avoid using two different formulations in the text, and he would be grateful if the Special Rapporteur could provide clarification in that regard.

In response to comments received from States regarding the reference in the second preambular paragraph to the functional aspect of the atmosphere, namely its role in the "transport and dispersion of polluting and degrading substances", the Special Rapporteur was proposing that the paragraph in question should be deleted and that the reference to the functional aspect should be incorporated into the definition of the term "atmosphere" contained in draft guideline 1 (a), as had originally been proposed. However, the Special Rapporteur's proposal did not address any of the concerns that had been expressed by States in that regard. Although States had put forward specific proposals regarding the wording used to refer to the functional aspect of the atmosphere, the Special Rapporteur had evidently decided not to accept them. In addition, the incorporation of that wording into the definition of the term "atmosphere" would give the impression that such transport and dispersion was an essential and, as noted in the commentary, desirable aspect of the atmosphere from a regulatory standpoint, which was hardly the case. The reference to the functional aspect of the atmosphere should thus be left in the draft preamble.

In view of the uneasiness expressed by some States regarding the definition of the term "atmosphere" as "the envelope of gases surrounding the Earth", the question of whether the term should be defined at all should perhaps be revisited. It was not defined in the international treaties that dealt with protection of the atmosphere.

Concerning the Special Rapporteur's proposal to delete the eighth preambular paragraph adopted on first reading and paragraphs 2 and 3 of draft guideline 2, which reproduced the 2013 understanding, he agreed with other Commission members on the importance of reflecting the limits that had originally been set for the project. Without that context, the logic of the Commission's work on the topic would be difficult to follow. In his view, the limits of the mandate could be set out clearly in the commentaries rather than in the draft preamble and guidelines, should the Special Rapporteur so prefer. In any case, the

Commission was required to comply with the understanding for the duration of its work on the topic.

Regarding draft guideline 3, the Special Rapporteur stated, in paragraph 51 of the report, that the obligation to protect the atmosphere was an obligation *erga omnes* and that its *erga omnes* nature should be mentioned, at least in the commentary. At the first-reading stage, the Commission had discussed the question of whether the obligation to protect the atmosphere was indeed an obligation *erga omnes*, ultimately deciding not to take a position on the question. It was noted in the commentary that, while there was support for recognizing that obligations pertaining to the protection of the atmosphere were obligations *erga omnes*, there was also support for the view that the legal consequences of such a recognition were not yet fully clear. He was not sure that the situation had become much clearer in the intervening years. The Commission should exercise due diligence, prudence and caution in that regard.

He agreed with the Special Rapporteur's proposal not to amend the text of draft guidelines 5 and 6 as adopted on first reading. In the context of the draft guidelines, it would indeed be inappropriate to include wording expressing an obligation. In addition, he wished to draw attention to the comments made by China and Turkey on the Commission's work on the topic, which implied that a similar approach was called for with regard to draft guideline 4.

As for draft guideline 8 (2), he supported the Special Rapporteur's proposal to expand the scope of the obligation to cooperate with other States to encompass the enhancement of technical knowledge relating to the causes and impacts of atmospheric pollution and atmospheric degradation.

Lastly, for reasons that had already been explained by several other members of the Commission, he did not support the Special Rapporteur's proposal to add a paragraph on responsibility of States to draft guideline 10.

Mr. Vázquez-Bermúdez said that the Special Rapporteur's sixth report offered an excellent basis for the Commission's discussion and adoption of the set of draft guidelines on second reading.

With regard to the first preambular paragraph, he agreed with the Special Rapporteur's proposal to insert the words "a limited natural resource", which underscored the fact that the atmosphere was not an inexhaustible natural resource and that, unless steps were taken to prevent, reduce and control atmospheric pollution and degradation, the capacity of the atmosphere to sustain life on Earth, human health and welfare, and aquatic and terrestrial ecosystems would be harmed. That fact should be explained in the commentary.

He did not agree with the Special Rapporteur's proposal to incorporate the content of the second preambular paragraph adopted on first reading, namely the reference to the transport and dispersion of polluting and degrading substances, into the definition of the term "atmosphere" in draft guideline 1 (a). That language could not be found in any other definition of the atmosphere, whether in a legal instrument or in the scientific domain. In addition, as Mr. Reinisch had noted, such transport and dispersion were not defining features of the atmosphere. The inclusion of such wording, which was incompatible with international environmental law, was unnecessary and would be confusing.

He supported the Special Rapporteur's proposal to change the position of the third preambular paragraph adopted on first reading, since a progression from more general considerations to more specific ones would improve the structure of the draft preamble.

As Mr. Grossman Guiloff had noted, the connection between the atmosphere and forests was as close as that between the atmosphere and oceans, and that fact should be acknowledged in the commentary. In its written comments, Belgium had questioned why the third preambular paragraph accentuated only the interactions between the atmosphere and the oceans and had recommended that the text should emphasize that interactions with other ecosystems, such as forests, were equally important in terms of both climate and air pollution. On the one hand, atmospheric pollution and degradation disturbed the delicate balance of the forest ecosystem and led to deforestation, which caused serious damage to biodiversity and wildlife and had an impact on human rights, in particular those of indigenous peoples. On the other, it had been scientifically proven that forests were a key asset in fighting climate change

and protecting the atmosphere. In fact, forests were an important part of the carbon cycle: they acted as carbon stores and were constantly exchanging carbon dioxide with the atmosphere. According to the Food and Agriculture Organization of the United Nations, forests had the potential to absorb about one tenth of the global carbon emissions projected for the first half of the current century in their biomass, soil and products, and to store them, in principle in perpetuity.

The purpose of the preambular paragraph in question was to highlight the fact that changes in the atmosphere had an impact not only on air quality but also on an especially fragile ecosystem, namely that of the oceans. The same argument could easily be extended to forests. In addition, the inclusion of a reference to forests would be consistent with recent international environmental law; for example, the Paris Agreement contained an article dedicated to forests. For those reasons, the interconnection between the atmosphere and forests, like that between the atmosphere and oceans, should be noted in the draft preamble or in the commentary thereto.

With regard to the fourth preambular paragraph, he supported the Special Rapporteur's proposal to replace the words "pressing concern of the international community as a whole" with "common concern of humankind". That proposal was based on comments received from various States. The concept of a common concern of humankind was well established in international environmental law and was used in the context of climate change. The Netherlands, in its written comments, had referred to the concept as "an integral part of international environmental law". The expression "common concern of humankind" could be traced back to the United Nations Framework Convention on Climate Change and the Convention on Biological Diversity, both of which had been signed in 1992. As Germany had noted in its written comments, climate change had been explicitly recognized as such a concern in both the United Nations Framework Convention on Climate Change and General Assembly resolution 43/53. In 2015, that recognition had been confirmed by the adoption of the Paris Agreement, in which climate change was identified as a common concern of humankind in the eleventh preambular paragraph.

Moreover, the phrase "common concern of humankind" pointed to concepts that were important for the protection of the atmosphere. First, it was related to intergenerational equity and international cooperation because of its intrinsic links to concerns about situations that had long-lasting effects that might be detrimental to future generations. Reference was made to "future generations" in both the draft preamble and draft guideline 6. It therefore seemed appropriate to use language that left no doubt as to the link between those concepts. Second, the phrase had been defined by academics as describing "issues … that inevitably transcend the boundaries of a single state and require collective action in response". Indeed, there was a strong link between the phrase and international cooperation.

Some members of the Commission had expressed concern about that wording on account of the uncertainty surrounding its legal implications. However, many States had suggested that it should be introduced and did not seem worried about such implications. Furthermore, as had already been noted, the concept had been recognized by States in a number of binding and non-binding international instruments, and the commentary could help to clarify its scope.

The expression "pressing concern of the international community as a whole", which currently appeared in the fourth preambular paragraph, could lead to unnecessary interpretative disputes. It was far removed from the language commonly used in relation to international environmental law issues in general and, especially, to the most recent efforts in the area of climate change. In other words, using such language would be a departure from current State practice. He therefore agreed with the amendment proposed by the Special Rapporteur.

He also agreed that the eighth preambular paragraph should be deleted, for the reason given by the Special Rapporteur. That view was shared by Japan and Antigua and Barbuda, which had explicitly suggested its deletion, while Germany considered the paragraph redundant. If he recalled correctly, the idea of including the full text of the so-called "understanding" in the draft guidelines had been proposed by Mr. Park and accepted by the Special Rapporteur. He was glad that the Special Rapporteur, based on various considerations

presented in his sixth report and on the opinion of several States, had changed his mind in that regard.

It should be noted, however, that excluding all reference to the understanding might lead to confusion. Readers might be surprised by the limited scope of the set of guidelines and by the absence of references to important principles of international environmental law, such as the precautionary principle. A reference to the understanding could provide readers with the context needed to understand the Commission's decisions.

Nevertheless, for the reasons that he had already outlined, he believed that such a clarification should be included not in the text of the draft preamble but in the commentaries: either the general commentary to the draft guidelines or the commentary to draft guideline 2. An alternative approach that would be interesting to discuss in the Drafting Committee was the one proposed by Mr. Grossman Guiloff, namely to include a reference to the understanding in a footnote to draft guideline 2 (1). The reader would be given the necessary context, but the effect would be less jarring than it would have been if the reference had been included in the text of the draft guidelines or the draft preamble.

In addition, he considered that addressing the matter in the commentaries or in a footnote to the draft guideline on the scope of the guidelines was more appropriate than doing so in the text of the draft preamble. Indeed, preambles were often worded "positively"; they shed light on the object and purpose of a treaty or other instrument by listing its objectives and the rationale behind them. It was rare to find preambular paragraphs concerning limitations on the impact and scope of an instrument.

Mr. Grossman Guiloff had proposed that new preambular paragraphs should be introduced to address two issues: the urgency of intervening to protect the atmosphere and the need to adopt a science-based approach. He agreed with the substance of that proposal. On the first issue, it was generally acknowledged that the atmosphere was degrading rapidly and that damage, some of which might be irreversible, was being done to it. The insertion of a reference to the "urgency" of responding to threats was a common practice in the preambles of instruments related to international environmental law. For example, the fourth preambular paragraph of the Paris Agreement read: "*Recognizing* the need for an effective and progressive response to the urgent threat of climate change on the basis of the best available scientific knowledge." The inclusion of such a reference in the recent and almost universally ratified Paris Agreement seemed particularly significant. Moreover, Germany had mentioned in its comments that it "appreciates that the Commission recognizes the urgency … of atmospheric protection".

Similar arguments could be made with regard to the second part of Mr. Grossman Guiloff's proposal. It seemed clear from their comments that virtually all States and international organizations agreed on the importance of using the scientific method. In conclusion, if the Special Rapporteur decided to take up Mr. Grossman Guiloff's suggestion, a preambular paragraph similar to the one he had cited from the Paris Agreement would be a welcome addition. The paragraph could read: "*Recognizing* the need for an effective and progressive response to the urgent threat of atmospheric pollution and atmospheric degradation on the basis of the best available scientific knowledge."

Regarding draft guideline 1 (a), he had already stated his view that the definition of "atmosphere" should not be expanded and that the text of what was currently the second preambular paragraph should remain in the preamble.

With regard to draft guideline 1 (b), which defined the term "atmospheric pollution", the Special Rapporteur had proposed the addition of a reference to "energy" alongside the mention of "substances". He found the proposal wise and fully supported it. The suggested insertion of the word "energy" was consistent with the contemporary understanding of "atmospheric pollution". First, as highlighted by the Special Rapporteur, it would bring the definition into line with that found in the Convention on Long-range Transboundary Air Pollution and with the United Nations Convention on the Law of the Sea. As noted by Antigua and Barbuda, "energy" was also mentioned in the definition of "pollution of the Convention area" in article 1 (c) of the Protocol concerning Pollution from Land-based Sources and Activities to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region.

In addition, energy or specific types of energy were systematically included in the definitions of "pollution" adopted by several United Nations agencies and programmes. For example, in the UNEP report *Towards a Pollution-Free Planet*, it was stated that "pollution can take many forms, ranging from organic compounds and other chemical substances to different types of energy". The *Glossary of Environment Statistics* published by the United Nations Statistics Division defined pollution as the "presence of substances and heat in environmental media (air, water, land) whose nature, location, or quantity produces undesirable environmental effects". The World Health Organization also systematically referred to energy when addressing the issue of air pollution. Those examples, which were not exhaustive, demonstrated that the inclusion of a reference to "energy" was widely accepted within the United Nations system and, more broadly, within the international legal system.

Second, there was widespread support for the proposal in the comments made by States. All the States that had addressed draft guideline 1 (b), namely Antigua and Barbuda, Belarus, Estonia, Japan and the Netherlands, had stressed the need to broaden the definition of "atmospheric pollution". Belarus, Estonia and Japan had explicitly recommended the addition of the words "or energy".

Furthermore, the commentary to the draft guideline already mentioned the concept of energy. It seemed rather awkward and confusing to refer to it in the commentary but not in the text of the draft guideline, since energy was not a specific example of a substance; it was a separate concept, with the same level of generality as "substance".

Lastly, it was widely accepted that, in efforts to protect the atmosphere, and in environmental legislation in general, a science-based approach should be adopted. Scientific data clearly showed that energy could play an important role in causing harmful effects and atmospheric pollution. Consequently, he reiterated his support for the insertion of a reference to "energy", as suggested by the Special Rapporteur.

He fully agreed with Mr. Tladi that draft guideline 2 (2) should be retained, for the reasons that Mr. Tladi had given. Indeed, the paragraph was clear and not at all confusing. It pointed out that the draft guidelines did not deal with certain questions concerning certain principles, and that that fact was without prejudice to those questions. He also agreed with Mr. Tladi that draft guideline 2 (3) could be deleted. It was superfluous, since, as Mr. Tladi had rightly indicated, the draft guidelines clearly did not deal with specific substances. Rather, they addressed general principles related to the protection of the atmosphere, regardless of the type of substance involved.

Draft guideline 3 was one of the most important guidelines of the entire project. Several countries, including Antigua and Barbuda, Germany, the Netherlands and Portugal, along with UNEP, had commented on the draft guideline, recommending greater clarity and more efficient language to ensure compliance with the obligation to protect the atmosphere. The change suggested by the Special Rapporteur went some way towards achieving that. The proposed text described the measures to be taken in compliance with the obligation to protect the atmosphere, namely measures to prevent, reduce and control atmospheric pollution and atmospheric degradation, and presented them as cumulative rather than alternative. Antigua and Barbuda had noted that the use of the word "and" instead of "or" implied a greater obligation. As mentioned by the Special Rapporteur, Antigua and Barbuda, Belarus and UNEP had explicitly suggested that change, which was consistent with the language of the United Nations Convention on the Law of the Sea. He therefore agreed with the Special Rapporteur's proposal.

Draft guideline 7 addressed a new phenomenon, intentional modification of the atmosphere, that involved a possible large-scale impact on the atmosphere and a number of risks. The Commission's approach seemed well balanced, as pointed out by Germany, because it recommended prudence and caution, and specified that such activities should be subject to any applicable rules of international law. Finland, on behalf of the Nordic countries, had recommended that the draft guideline should expressly mention the precautionary principle. As that principle was far more established in international environmental law than the concept of "prudence and caution", the comment from Finland was understandable. However, while the 2013 understanding was not binding on States, it prevented the

Commission from including the precautionary principle in the draft guidelines, although that was without prejudice to its applicability as a principle of international law. The reference to "prudence and caution" thus seemed to be the best alternative, as it conveyed a similar idea and had been used before, in the jurisprudence of the International Tribunal for the Law of the Sea.

The new language that the Special Rapporteur was suggesting for the draft guideline might, at first glance, seem unnecessary, because it was already covered by the phrase "subject to any applicable rules of international law". However, other considerations should be taken into account. Environmental impact assessment was one of the most effective ways of preventing the harmful effects of human activity. Many States seemed wary and concerned about the risks associated with activities aimed at the intentional large-scale modification of the atmosphere. Others had pointed out that there was little or no regulation of such activities. The explicit inclusion of environmental impact assessment might give States more certainty and provide an example of an applicable rule of international law. Moreover, given the importance of the guidelines and the impact they were certain to have on international environmental law, it might not be appropriate to mention such assessment only in the commentary. Germany had explicitly recommended the inclusion of a reference, while Antigua and Barbuda had indicated that, owing to its concern that some States might claim that they could carry out intentional modifications without an environmental impact assessment because so-called "benign" actions would not trigger the requirement, the need for an environmental impact assessment should be clarified in the main text of the draft guideline, rather than, or not only, in the commentary. In view of the large-scale impact of the measures and the risk of possible damage on an equally large scale, he supported the Special Rapporteur's proposal to include, in draft guideline 7, an explicit reference to environmental impact assessment as an example of an applicable rule of international law.

The Special Rapporteur had suggested that the words "and technical" should be inserted in paragraph 2 of draft guideline 8, in line with a proposal by UNEP. The aim was to broaden the scope of cooperation, which was important for the protection of the atmosphere, as recognized by the United Kingdom in its comments. That point had also been emphasized by Antigua and Barbuda, which had suggested that cooperation should go beyond "enhancing scientific knowledge".

Cooperation was one of the most important tools in international environmental law and was included in virtually all instruments; broadening its scope was thus a positive step towards the effective protection of the atmosphere. Technical knowledge, including technical tools, was of fundamental importance for studying the atmosphere, monitoring atmospheric degradation and mapping the causes of pollution and the impact of various elements. Its inclusion in the scope of the obligation to cooperate was therefore logical and important. Furthermore, a similar reference could be found in article 4 of the Convention on Long-range Transboundary Air Pollution. For those reasons, he supported the Special Rapporteur's proposal.

The Special Rapporteur's proposed additional paragraph in draft guideline 10 was problematic. It seemed to be superfluous, since any breach of international law by a State entailed its international responsibility, regardless of the field of law concerned. The provision would merely reiterate a rule of international law that had been codified in the 2001 articles on responsibility of States for internationally wrongful acts, without adding any relevant new elements. Moreover, such provisions were not generally included in the Commission's texts. The paragraph's inclusion in the draft would raise questions as to its legal value and to how the topic differed from others with regard to State responsibility. If the provision was included, a similar provision would logically need to be included in all the Commission's texts. In the light of those considerations, the inclusion of the paragraph did not seem appropriate.

He wished to conclude by reiterating his appreciation for the Special Rapporteur's valuable and tenacious work in guiding the Commission's consideration of an important topic despite the limitations imposed by the so-called "understanding". He was confident that the Commission would succeed in adopting the draft guidelines and commentaries on second reading by the end of the current session and that they would represent a major contribution to a sensitive area of international law that was of concern to all humankind.

Mr. Ouazzani Chahdi, speaking via video link, said that he wished to congratulate and thank the Special Rapporteur for the quality of his sixth report, which concluded the Commission's work on a topic that was far from simple. As the Commission had noted in its 2011 report on the work of its sixty-third session (A/66/10), the degradation of atmospheric conditions had long been a matter of serious concern to the international community.

In his report, the Special Rapporteur provided an interesting summary of the comments and observations made by States and international organizations, which he had taken into account remarkably well in his work. The comments concerned matters of both form and substance. Some States had even questioned the usefulness of the Commission's work on the topic, bearing in mind that the set of draft articles for a framework convention on the protection of the atmosphere announced in 2011 had been reduced to mere guidelines.

However, the questions raised had also touched upon the conditions imposed on the Special Rapporteur's work in 2013. That did not mean that all mention of those conditions should be completely eliminated, since the Commission had fulfilled its commitments in carrying out its work. He fully understood the Special Rapporteur's concerns and difficulties in addressing the topic, but the relevant decisions and parameters had been adopted by the Commission and had been duly observed by the Special Rapporteur to date.

Although he had not been a member of the Commission in 2013, he understood that the reason it had stipulated that the work should be carried out in such a way as not to interfere with political negotiations, particularly on climate change, was that those negotiations had not been easy to conduct. For example, the Kyoto Protocol, which had been adopted on 11 December 1997, had not entered into force until 16 February 2005 precisely because of the difficulties that had arisen at the time of the negotiations and because of the conditions that had been imposed for its entry into force. The Kyoto Protocol was part of the so-called international climate change regime established by the United Nations in several stages, through the 1992 United Nations Framework Convention on Climate Change and the 2009 Copenhagen Accord.

The negotiations for a post-2020 climate regime that had been launched in Durban in 2011 had not concluded until the adoption of the Paris Agreement in December 2015. The Commission had adopted its 2013 understanding so as not to interfere with those negotiations. As a result, he was not in favour of deleting the eighth preambular paragraph, which set forth one of the guiding principles for the Commission's work on the topic. Conversely, he did not object to the deletion of paragraphs 2 and 3 of draft guideline 2, provided that their content was included in the commentary.

He agreed with the Special Rapporteur's suggestion to insert the words "a limited natural resource" in the first preambular paragraph, as proposed by Portugal, and was also in favour of adding a reference to forests to the fourth preambular paragraph, as proposed by Mr. Grossman Guiloff. In the fourth preambular paragraph adopted on first reading, the word "therefore" would no longer be relevant if the two preceding paragraphs were deleted.

He supported the proposal to use the expression "common concern of humankind", which could be found in certain international instruments such as the Paris Agreement and the United Nations Framework Convention on Climate Change, and in General Assembly resolution 43/53. However, the commentary should take account of the observations of the Nordic countries, which, according to paragraph 24 of the sixth report, had encouraged the Commission "to elaborate on the implications of the legal concept of 'common concern of humankind' in the context of environmental law on the protection of the atmosphere".

Turning to the draft guidelines, he said that he agreed with the Special Rapporteur that the word "substances" should be followed by "or energy" in draft guideline 1 (b) because, as explained in the report, energy was not a "substance". He also supported the Special Rapporteur's proposal to replace "or" with "and" in draft guideline 3, which would strengthen the obligation to protect the atmosphere. The commentary should include an indication that the obligation referred to in that draft guideline was of an *erga omnes* nature.

The observation made by Peru regarding the "due diligence obligation" and the international case law that the State cited, including that of the International Tribunal for the Law of the Sea, should be included in the commentary to draft guideline 4. In draft guideline

8 (2), he saw no reason not to add the words “and technical” after “scientific” so as to reflect an important aspect of cooperation, provided that the reasons for the addition, which had been proposed by UNEP and inspired by the Vienna Convention for the Protection of the Ozone Layer, were explained in the commentary.

A reference to “States experiencing water stress because of ozone depletion-related climate change” [*États souffrant de stress hydrique du fait du réchauffement climatique dû à la dégradation de la couche d’ozone*] should be added to draft guideline 9 (3). Such States had barely participated in the discussions on the protection of the atmosphere, unlike the island States that were facing the other main consequence of climate change, namely sea-level rise. Participation by States experiencing water stress would help steer the direction of future negotiations on the topic.

In the interests of consistency with the understanding reached in 2013, the proposed paragraph on State responsibility should not be added to draft guideline 10. He did not see the advantage of including such a paragraph, especially since only two States had referred to the subject. Furthermore, the proposed paragraph seemed not to fit with the other two paragraphs of the draft guideline, particularly paragraph 1, which dealt with the incorporation of obligations under international law into States’ domestic legal systems.

Lastly, he supported the Special Rapporteur’s proposed recommendation to the General Assembly. He saw no reason not to refer the draft preamble and draft guidelines to the Drafting Committee.

Mr. Ruda Santolaria, speaking via video link, said that he agreed with the Special Rapporteur’s recommended changes to the draft preamble adopted on first reading, including the addition of the phrase “a limited natural resource” in the first paragraph and, in the fourth, the replacement of “pressing concern of the international community as a whole” with “common concern of humankind”, which was supported by a number of States. He supported the proposed change in the order of the preambular paragraphs and the retention of the references to the close interaction between the atmosphere and the oceans and to the particular situation of low-lying coastal areas and small island developing States due to sea-level rise.

He agreed with the Special Rapporteur’s proposal to delete the eighth preambular paragraph, for the reasons given by the Special Rapporteur. Accordingly, he also supported the deletion of draft guideline 2 (2) and (3). He agreed with the Special Rapporteur that the words “reduce or control” should be replaced with “reduce and control” in draft guideline 3. The sustainable, equitable and reasonable utilization of the atmosphere, as set out in draft guidelines 5 and 6, was of particular importance, as was the explicit reference to “the interests of present and future generations” in draft guideline 6.

He fully supported the focus, in draft guideline 9 (3), on the special consideration that should be given to persons and groups particularly vulnerable to atmospheric pollution and atmospheric degradation, such as indigenous peoples, people of the least developed countries and people of low-lying coastal areas and small island developing States affected by sea-level rise. In draft guideline 10, the Special Rapporteur’s proposed new paragraph 2 referred to a consequence that seemed to be self-evident: that a failure to implement the obligations referred to in paragraph 1 amounting to breach thereof would entail the responsibility of States under international law. It was his understanding that neither that proposed provision nor the requirement under draft guideline 11 (1) that States must abide by their obligations under international law relating to the protection of the atmosphere from atmospheric pollution would change the non-binding nature of the draft guidelines.

The reaffirmation, in draft guideline 12 (1), of the principle of the peaceful settlement of disputes was important. Given the nature of the subject matter and the factors that could give rise to disputes between States, it was fitting to stress, in paragraph 2 of that draft guideline, the due consideration that should be given to the use of technical and scientific experts.

The Chair, speaking as a member of the Commission, said that the Special Rapporteur was to be commended for producing an outcome on the topic that was suitable to be recommended to the General Assembly and to States. Since most aspects of the Special

Rapporteur's sixth report had already been addressed by other members, he would limit himself to expressing his position on contentious matters. When the topic had first been presented for the Commission's consideration, it had been viewed as an important milestone that would enable the Commission to lay the foundation for a new specialized area of international law or at least coin a new term for it: the "law of the atmosphere". The ambitious original proposal had been to codify or give rise to a comprehensive set of legal principles on atmospheric protection. As a result of the Commission's debates and the 2013 understanding, among other factors, the scope and content of the topic had been scaled back. The core, however, had remained the same and allowed the Commission to address the necessary principles of atmospheric protection, while taking into account the progressive and emerging nature of the topic. The draft guidelines should form the basis for concerted legal action among States and international actors to achieve the goal of protecting the atmosphere. As the Commission reached the final stages of its consideration of the topic, he continued to support that endeavour.

However, certain legal concepts about which he had expressed reservations in the past had been reintroduced in the Special Rapporteur's proposals. First, regarding the 2013 understanding, he agreed with the Special Rapporteur that the references to the understanding in the draft preamble and draft guideline 2 should be removed. At the current stage, when the draft guidelines would soon be transmitted to the General Assembly, it was no longer necessary to mention those restrictions. Some aspects of the understanding had been fulfilled or had become obsolete, while others had not been complied with in the draft guidelines adopted on first reading. For example, certain draft guidelines, such as draft guidelines 3, 4, 5, 7, 9 (3) and 11 (2), contained elements of the precautionary principle and the principle of common but differentiated responsibilities. In addition, by proposing general rules, including on protection and cooperation, the draft guidelines filled certain gaps in terms of atmospheric protection in areas where treaties were silent. He did not object to the proposals made by Mr. Grossman Guiloff and other members of the Commission to refer to the understanding in a footnote or in the commentary. His only question for the Special Rapporteur was whether, with the proposed deletion of draft guideline 2 (3), specific substances would now fall within the scope of the draft guidelines.

The second general point that he wished to make concerned the reintroduction of the term "common concern of humankind" in the draft preamble. There had thus far been a lack of clarity as to the legal content and implications of the concept, even under environmental law. Environmentalists advocated an expansive interpretation of the concept that would allow for collective punitive action for breaches of core environmental principles and trigger obligations *erga omnes*, but that was an interpretation of activists. Furthermore, the term, as used in environmental law instruments such as the Convention on Biological Diversity and the Paris Agreement, had different legal implications depending on the treaty regime in which it appeared. Although the various treaty regimes did not take the same approach to giving effect to the concept, a review of those regimes showed that the concept contained certain key elements – intergenerational equity, international solidarity, shared decision-making and accountability, benefit- and burden-sharing and the balancing of sovereignty over natural resources with the common interest in environmental protection – that were present in the draft guidelines as adopted on first reading. Although he saw no reason not to describe the protection of the atmosphere as a "common concern of humankind" rather than as a "pressing concern", he noted that alternative terms, such as "common interest" or "common responsibility", could be used. The Drafting Committee could explore alternatives that reflected either the same elements as "common concern of humankind" or similar ones. Although the report indicated that certain States had supported the use of "common concern", their number was insufficient for the concept to be considered to have been established in the area of atmospheric protection; the concept therefore fell within the realm of *lex ferenda*.

He was concerned about the reintroduction of the notion of obligations *erga omnes*. The Special Rapporteur had previously urged the inclusion of that notion, stating not only that atmospheric protection entailed obligations *erga omnes*, but also that a breach of certain obligations could give rise to an *actio popularis*. Nothing in international law supported such propositions. The International Court of Justice approached obligations *erga omnes* very cautiously and had never cited environmental protection, let alone atmospheric protection, as an example of such an obligation. While there was consensus within the international

community that fundamental human rights, self-determination, freedom from genocide and the prohibition of slavery and racial discrimination were obligations *erga omnes*, there was no agreement that the protection of the atmosphere should be characterized as such. In order for such a characterization to be included in the draft guidelines or even in the commentaries, it would have to be well established in international law and based on State practice or, at least, on the pronouncements of the International Court of Justice, not on the writings of certain academics or the views of advocacy groups. He wished to highlight one State's observation that "atmospheric pollution and atmospheric degradation … have multiple causes and sources, the cause/effect relationship is often complex, and any single State can be both a source and a victim while all States may contribute to a particular problem". Proposing that States owed such obligations to the international community as a whole and that any State could invoke the responsibility of any other and seek collective action, including countermeasures, would be counterproductive and lead to chaos.

Turning to his specific comments on the draft preamble and draft guidelines, he said that he did not object to the Special Rapporteur's proposal to describe the atmosphere as "a limited natural resource" in the first preambular paragraph but wondered whether that contradicted the description of the atmosphere as "a natural resource with a limited assimilation capacity" in draft guideline 5 (1). The proposal to delete the phrase "transport and dispersion of polluting and degrading substances" from the second preambular paragraph and add it to the definition of the atmosphere in draft guideline 1 was confusing. Would that mean that, if no such substances were transported or dispersed in the atmosphere, there was no atmosphere? Like Mr. Vázquez-Bermúdez and other members, he would prefer to limit the definition to "the envelope of gases surrounding the Earth". The atmosphere should not be described in terms of a process or function, which could lead to a circular definition.

He did not oppose the addition of a reference to "energy" in draft guideline 1 (b). He supported the proposal made by one State to add the word "significant" before the phrase "deleterious effects", which would bring draft guideline 1 (b) into line with conventions on transboundary pollution and the Commission's articles on prevention of transboundary harm from hazardous activities. Such an addition would take on greater importance with the introduction of the phrase "common concern of humankind", as not every form of atmospheric pollution that produced deleterious effects extending beyond the State of origin would rise to the level of a common concern of humankind.

He did not object to the proposal to replace "reduce or control" with "reduce and control" in draft guideline 3. As both formulations had been used in international environmental conventions, the change would not affect the content or scope of the obligation. States had the legal flexibility to choose which measures they considered to be "appropriate" in that regard.

He agreed with the Special Rapporteur that, in draft guideline 7, the phrase "prudence and caution" should not be replaced with a reference to the precautionary principle. He had no strong views on whether the reference to environmental impact assessment should appear in the text of the draft guideline or in the commentary. In either case, the relevant obligation was provided for under draft guideline 4.

He did not support the new paragraph that the Special Rapporteur proposed to include in draft guideline 10. The Commission had agreed at the first-reading stage not to deal with State responsibility in the draft guidelines, and the Special Rapporteur had provided no plausible reason for doing so. Not every failure to implement obligations amounting to a breach of those obligations would entail State responsibility. For the responsibility of a State to be engaged, the act in question must be attributable to the State and there must be no circumstance that would preclude the wrongfulness of the act. The Commission should not try to rewrite its articles on State responsibility in connection with the topic before it. Moreover, the fact that the Special Rapporteur was also proposing that the phrase "common concern of humankind" should be used and that the relevant obligation should be described as having an *erga omnes* character provided an additional reason to oppose the new paragraph.

In conclusion, he recommended that the draft guidelines and draft preamble should be referred to the Drafting Committee.

The meeting rose at 12.35 p.m.