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International Law Commission

Seventy-second session (first part)

Provisional summary record of the 3514th meeting
Held at the Palais des Nations, Geneva, on Tuesday, 4 May 2021, at 11 a.m.

Contents

Present:

Chair:	Mr. Hmoud
Members:	Mr. Aurescu
	Mr. Cissé
	Ms. Escobar Hernández
	Mr. Forteau
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	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. Valencia-Ospina
	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).

Mr. Valencia-Ospina, in a pre-recorded video statement, said that he wished to express his deep appreciation to the Special Rapporteur for his untiring efforts over the course of the project. The protection of the atmosphere was a matter of universal concern, and the degradation of the atmosphere was a phenomenon with extremely perilous consequences for mankind. The absence of a unified legal framework addressing the subject and the existence of other frameworks of potential relevance underscored the significance of the Commission's work on the topic. The Special Rapporteur had constructively led the Commission to the final stage of its work, despite the limits within which he had had to work.

It was important to keep in mind that the Commission was at the second-reading stage and was therefore proceeding on the basis of a draft approved on first reading and responding only to the comments submitted thereon and the corresponding proposals made by the Special Rapporteur. Only by adhering to that time-honoured practice could the Commission possibly fulfil its task of completing work on the topic at the current session.

Turning to the Special Rapporteur's proposals concerning the preamble, he said that he had no objection to the addition of the words "a limited natural resource" in the first paragraph, although they did shift the emphasis of the paragraph. It should be borne in mind that the inclusion of those words at the very beginning of the preamble would drive the analysis of the entire text.

Concerning the controversial matter of the 2013 understanding, it could not be denied that it would be helpful for any reader who was to interpret or apply a text, especially a legal one, to be aware of the limitations within which it had been drafted. In the case at hand, the limitations were quite significant, as was made abundantly clear in the sixth report. The fact that the limitations had been followed by the Special Rapporteur and the Commission was all the more reason to mention them. Whether the limitations could be properly attributed to the sole initiative of the Commission itself or could be regarded as in some way being inspired by the Sixth Committee was not relevant. To the extent that a reference to the genesis and existence of the 2013 understanding might prove useful, a brief mention in the general commentary should suffice.

As to what should be done with text that conformed to the understanding, it was clear to him that there should be no question of reproducing or referring to the understanding as such in the text of the draft guidelines or the preamble. Indeed, the text adopted on first reading did not contain even the slightest reference to the understanding as such. The question was whether it was beneficial to mention in the final product specific limitations on the scope of the project, regardless of their source. Such a mention would protect the professional integrity and dignity of the Special Rapporteur and would result in a more accurate assessment of the Commission's work.

Analysing each limitation individually, he agreed that the final preambular paragraph, which stated that the draft guidelines were not to interfere with political negotiations, should be removed. Such language had no place in a legal text. As for the remaining preambular paragraphs, he agreed with the proposals to move the third preambular paragraph so that it appeared after the fifth preambular paragraph, and to move the second preambular paragraph to draft guideline 1.

At the current stage of the Commission's work, where time was at a premium, he did not support the idea of elaborating, in the third preambular paragraph, on the interaction between the atmosphere and ecosystems other than the oceans. Whatever the potential utility of adding more ecosystems, now was not the time to embark on the thorough and careful prior assessment that such a decision would require.

Like the majority of States and members who had spoken on the matter, he supported changing the phrase "pressing concern of the international community as a whole" to "common concern of humankind" in the fourth preambular paragraph. It was clear that States

considered “common concern of humankind” to be the accepted phrase in international environmental law. The use of the phrase “pressing concern” might therefore cause confusion. The reference in the Paris Agreement of 2015 to a “common concern of humankind” obviated any concern that the phrase was no longer used by States. As to the concern that the formulation “common concern of humankind” had unclear legal implications, the same could just as easily be said of “pressing concern of the international community”. Moreover, any correct interpretation of the Commission’s text would not carry with it the legal implications feared by some members, since it would be unreasonable to assume that the Commission intended consequences so far removed from those accepted without making its intentions clear. The Commission must proceed on the assumption that readers of its texts would not interpret them unreasonably. The specific legal implications raised by some members could be clarified in the commentary.

If the suggestion to move the second preambular paragraph to draft guideline 1 (a) was accepted, he would propose deleting the word “the” before “polluting”, as there was no prior reference to specific “polluting and degrading substances”. As currently formulated, draft guideline 1 (a) was ambiguous. It had two possible interpretations: either the phrase that had been moved from the preambular paragraph was merely a factual statement; or else it altered the meaning of “atmosphere” by limiting it to the envelope of gases surrounding the Earth within which polluting and degrading substances were transported and dispersed. It should be clarified in the commentary which meaning was intended.

He agreed with the Special Rapporteur’s proposal to add the words “or energy” to draft guideline 1 (b). The resulting phrase would then have to be clarified in the commentary, however. Paragraph (9) of the commentary to draft guideline 1 adopted on first reading would be helpful in that respect. It was true that the phrase “substances or energy” was used in the Convention on Long-range Transboundary Air Pollution and the United Nations Convention on the Law of the Sea, but the meaning of a “release” of energy into the atmosphere was not clear in and of itself.

In his view, the three identified principles of international environmental law – the polluter-pays principle, the precautionary principle and “common but differentiated responsibilities” – should be referred to explicitly in draft guideline 2, on the scope of the draft guidelines. He would therefore propose amending the second paragraph of that draft guideline to read: “The present draft guidelines do not deal with, but are without prejudice to, questions concerning the polluter-pays principle, the precautionary principle, and common but differentiated responsibilities.” Such a formulation acknowledged the existence of the principles rather than leaving them conspicuously absent from the document – an absence that could well be misinterpreted. He did not agree that the double negative was ambiguous. Each part performed a different role: the first clarified that the document did not explicitly deal with the principles, while the second clarified that there was no prejudice in that choice. At most, it could be argued that the double negative was awkward, but that was not a criticism of the content. Paragraphs 2 and 4 of draft guideline 2 performed similar functions and could therefore use parallel language. He supported the Special Rapporteur’s proposed deletion of paragraph 3 of the draft guideline.

He also agreed with the Special Rapporteur that the word “or” should be replaced with “and” in draft guideline 3 so that the reference would be to the obligation to “prevent, reduce and control atmospheric pollution”. The word “or” simply made no sense in that context. There was no reason why a State that worked to reduce atmospheric pollution should have no obligation to prevent it, or why a State that controlled atmospheric degradation should have no obligation to reduce it.

He supported the Special Rapporteur’s conclusion not to make any changes to draft guideline 5 for the reasons given in paragraph 61 of the sixth report and in the commentary adopted on first reading, which clarified that the formulation “its utilization should be undertaken in a sustainable manner” was “presented more as a statement of international policy and regulation than an operational code to determine rights and obligations among States”. In addition, it was quite likely that the phrase “sustainable manner” did not carry so much content in and of itself as to permit an affirmative obligation along the lines of draft guideline 3.

He did not agree with the proposed addition of a reference to environmental impact assessments in draft guideline 7. Without the proposed addition, the affirmative obligation established in draft guideline 4 would still apply in the context of draft guideline 7, imposing an obligation to perform environmental impact assessments in cases of intentional large-scale modifications of the atmosphere.

In conclusion, he supported sending the preamble and draft guidelines to the Drafting Committee.

Ms. Escobar Hernández said that she wished to thank the Special Rapporteur for his sixth report, which provided an excellent basis for the Commission to complete its work on the topic at the current session.

The fact that the Commission's work on the topic had unfortunately been constrained by the 2013 understanding could not be ignored. The problems posed by the understanding had been highlighted by States in the Sixth Committee and in their comments on the draft guidelines, and had even called into question the scope of the Commission's mandate and its ability to contribute effectively to the progressive development and codification of international law. It was obvious that those problems could no longer be resolved and that the Commission could not change the past, but she trusted that it would be able to draw the right conclusions for the future.

Given that the draft guidelines being considered by the Commission on second reading were the result of a process that had been influenced by the limitations of the understanding, she did not fully agree with the Special Rapporteur's proposal to remove any reference to the understanding from the draft. After all, the draft guidelines could only be understood in the context in which they had been produced. It was true that a number of States had emphasized the negative impact the 2013 understanding had had on the draft guidelines adopted on first reading, but the mere removal of any reference to the understanding would not make that criticism disappear. On the contrary, she believed that such criticism might be reinforced if readers interpreted the omission of any reference to the elements, principles and substances set out in the understanding from the final guidelines as meaning that the Special Rapporteur and the Commission did not consider them relevant to the protection of the atmosphere. It was clear that that was not the case and that the omission had been determined by the understanding, which had been a *sine qua non* for the inclusion of the topic on the Commission's agenda and was based more on political expediency than on legal criteria.

The Special Rapporteur and the Commission had been scrupulous in adhering to the 2013 understanding. The Commission now had no choice but to complete its work on the topic within the limited framework in which it had started. Any proposal to go back would be counterproductive, as doing so would further delay the adoption of a text on the protection of the atmosphere, which was of the utmost relevance and urgency. The Commission must complete its work with maximum transparency and not withhold from the final readers of the work any element – including the 2013 understanding – that would allow them to assess it properly. Having said that, she did not believe that references to the understanding should be ubiquitous throughout the draft.

Some members had drawn attention to issues that had not been included in the draft guidelines. Unfortunately, regardless of how relevant those issues were, she did not believe that they should be added at such a late stage. However, that was not to say that the 2013 understanding should be used as an excuse not to make certain improvements to the text in order to better reflect the current stage of developments in international law. Not to do so would amount to renouncing the Commission's mandate to contribute to the progressive development and codification of international law.

With respect to the preamble, she supported the Special Rapporteur's proposal to include the term "a limited natural resource" in the first paragraph, although she would also be open to the term "natural resource with a limited assimilation capacity". In the fourth preambular paragraph, she would prefer the phrase "common concern of humankind", which was already used in various international instruments, over "pressing concern of the international community as a whole", which seemed excessively vague and potentially misleading.

She had doubts about the proposal to delete the second preambular paragraph and incorporate the second part of it into draft guideline 1 as part of the definition of "atmosphere". Like others, she was not convinced that the transport and dispersion of polluting and degrading substances was really a component of the definition of the atmosphere. On the contrary, it had more to do with atmospheric degradation and would thus be better kept in the preamble.

She had no objection to the proposal to delete the last paragraph of the preamble, as she did not believe that that was the best place for a reference to the limitations imposed by the 2013 understanding. She also supported the reordering of the preambular paragraphs as proposed by the Special Rapporteur.

Concerning draft guideline 1, she did not believe that the definition of the term "atmosphere" needed to be changed in paragraph (a). She agreed with the Special Rapporteur's proposal to add the words "or energy" in paragraph (b), however, as it was clear that it was not equivalent to "substances" but was nevertheless one of the elements that contributed to atmospheric pollution.

She did not support the Special Rapporteur's proposal to delete paragraphs 2 and 3 of draft guideline 2, which she was concerned might have the pernicious indirect effects to which she had referred in her opening remarks. She believed that both paragraphs provided useful information and that the use in paragraph 2 of a "without prejudice" clause was essential to avoiding any unintended interpretation. In any event, the reasons for the inclusion of the two paragraphs should be explained in the commentary in order to avoid their being incorrectly interpreted in the future.

In draft guideline 3, she had no objection to replacing the word "or" with "and". It would also be useful to include a reference to the *erga omnes* nature of the obligation to protect the atmosphere, although the Special Rapporteur had not made a proposal to that effect.

In draft guideline 4, she regretted that the Special Rapporteur had not considered it necessary to include a reference to the procedural dimension of environmental impact assessments, as suggested by the United Nations Environment Programme (UNEP). In her view, the importance of principle 10 of the Rio Declaration on Environment and Development could not be ignored, particularly as it had inspired two important international treaties: the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention) and the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean. The Drafting Committee should consider including in draft guideline 4 an express reference to access to information, public participation and access to justice in environmental matters, which were fully applicable to environmental impact assessments in relation to the protection of the atmosphere.

Concerning draft guideline 5, she believed that it would be useful to mention "social development" in paragraph 2, as proposed by UNEP.

With regard to draft guideline 7, she had doubts as to the desirability of including an express reference to the environmental impact assessment already covered in draft guideline 4, but she would not object to it if there was a consensus in the Commission. Although she understood the reasons given by the Special Rapporteur for keeping the words "with prudence and caution", she believed that they could be replaced with the expression "precautionary approach", which the Commission had used in the past.

Regarding draft guideline 8, she supported the Special Rapporteur's proposal to add the words "and technical" after "scientific" in paragraph 2.

Concerning draft guideline 10, she had serious doubts about the Special Rapporteur's proposal to include a new paragraph on the responsibility of States under international law. As the wording of the new paragraph was very generic and merely repeated a general rule of international law, she did not believe that it added value to the draft guidelines. Nor was it clear which were the obligations whose non-implementation would entail State responsibility. A paragraph containing an express reference to State responsibility might be better placed elsewhere – perhaps in draft guideline 11.

Concerning draft guideline 11 (1), she proposed that, in the Spanish text, "*la protección de la atmósfera de la contaminación atmosférica*" should be replaced with "*la protección de la atmósfera frente a la contaminación atmosférica*".

In conclusion, she recommended that the proposals put forward in the Special Rapporteur's sixth report should be sent to the Drafting Committee, on the understanding, as always, that they would be addressed together with the comments and suggestions made in plenary.

Mr. Murase (Special Rapporteur), speaking via video link and summing up the discussion on his sixth report on the protection of the atmosphere (A/CN.4/736), said that he wished to thank the members of the Commission for their contributions to the debate. Although he would not be able, in his summing-up, to address each and every one of the points made, he would endeavour to touch upon as many as possible.

He greatly appreciated the proposals intended to render the draft guidelines more meaningful with regard to, *inter alia*, scientific input and the human rights dimension of environmental protection. However, since the second reading was limited to responding to the comments made by States and international organizations on the text adopted on first reading, he regretted that it was not possible to accommodate those proposals.

Some members had made valuable suggestions relating to the commentary, which he would take into account once he began to prepare the commentary following the adoption of the draft guidelines by the Drafting Committee. He would endeavour to submit the draft commentary as soon as possible after the presentation of the report of the Chair of the Drafting Committee. Sir Michael Wood's apparent insistence on being provided with the commentary alongside the proposed changes to the draft guidelines ran counter to the Commission's established practice. If no changes were made to the draft guidelines, the commentary would, in principle, remain as it was in the Commission's report on its seventieth session (A/73/10).

With regard to the so-called 2013 understanding, the majority of the members who had spoken had expressed agreement with the proposal to delete the related passages in the draft preamble and in draft guideline 2. Some members had asserted that the passages should remain as they had been in the first-reading text, while others had suggested retaining them for the purpose of informing readers that it had not been possible to make the draft guidelines deeper or broader owing to the restrictions imposed by the 2013 understanding.

He strongly disagreed with Mr. Reinisch's comment that a reference to the 2013 understanding could serve as guidance for future special rapporteurs working on non-traditional topics if the intended implication was that a similar understanding might be imposed again. Never before in the history of the International Law Commission had restrictions been imposed on a special rapporteur, and, in his view, they never should be again. Members were free to criticize proposals made by special rapporteurs in their reports but should not restrict their work before it began.

He agreed with the observation made by a number of members that the 2013 understanding should be mentioned at the beginning of the commentary; in fact, it was already mentioned and reproduced in full in the first paragraph and first footnote of the chapter of the report of the International Law Commission on its seventieth session (A/73/10) containing the text adopted on first reading and the commentary thereto. The explanation therein was factual, and transparency was therefore fully safeguarded. The commentary would remain as it was for the moment and might perhaps be supplemented further in the second-reading text.

He disagreed with the proposal made by some members to retain paragraph 2 of draft guideline 2. Mr. Tladi had interpreted the emphasis in the "double negative" formulation as being on the phrase "without prejudice to", rather than on the phrase "do not deal with". That conclusion was not borne out by a plain reading of the sentence, since both phrases referred to the same matters, including "common but differentiated responsibilities". Ms. Galvão Teles had proposed deleting the words "do not deal with" and retaining the words "without prejudice to". While that would nicely avoid the problem of the double negative, in his view, the opposite course of action, namely, deleting "without prejudice to" and retaining "do not

deal with", would reflect more closely the history of the topic. Retaining only the phrase "without prejudice to" would give the impression that the principles and other issues listed could have been dealt with in the draft guidelines, when in fact that approach had been prohibited under the 2013 understanding. In any case, the paragraph was confusing, which was why he had initially proposed its deletion.

He agreed with the overall points raised by Mr. Tladi and Ms. Galvão Teles, who were mostly concerned with how readers would interpret the draft guidelines if they were unaware of the 2013 understanding. If the references to it in the preamble were deleted, it should at least be noted somewhere in the text that limits beyond the control of the Special Rapporteur had been imposed on the draft guidelines. The phrase "do not deal with" indicated that the draft guidelines did not intend to address those principles, while the phrase "without prejudice to" indicated that the omission was not meant to have legal significance.

Having considered the issue at length, he wished to recommend that a reformulated paragraph 2 of draft guideline 2 should be retained, on the assumption that the relevant draft preambular paragraph would be deleted. To avoid confusion, paragraph 2 could be reformulated to read: "The omission of certain principles of international environmental law from the draft guidelines is without prejudice to their legal status." That would avoid the double negative while recognizing that the principles had been omitted. It would also be clear to the reader why certain important principles were missing, without having to read the commentary. The principles in question could be acknowledged in the commentary.

With regard to the first draft preambular paragraph, his proposal to insert the words "a limited natural resource" had been supported by most members who had commented on it. In response to Mr. Zagaynov's question as to whether the reference to the finding of the Appellate Body of the World Trade Organization, in its report on the *United States — Standards for Reformulated and Conventional Gasoline* case, was appropriate for the description of the atmosphere as being "a limited natural resource", he wished to assert that "clean air" was the central part of atmospheric protection. Some members had proposed the addition of the words "with a limited assimilation capacity"; however, that might be unnecessary since they already appeared in draft guideline 5 (1).

While a small number of members had supported his proposal to delete the second draft preambular paragraph and move it to draft guideline 1 (a), several others had expressed doubt. He was therefore prepared to withdraw the proposal in favour of retaining the second draft preambular paragraph in its current position.

Most members had supported his proposal to replace the words "pressing concern", in the fourth draft preambular paragraph, with the words "common concern of humankind". Sir Michael Wood had based his argument against using the term "common concern" on the outcome of discussions among a group of legal experts convened by UNEP in 1990 and 1991, thereby ignoring all the developments that had occurred between the adoption in 1992 of the United Nations Framework Convention on Climate Change and the adoption in 2015 of the Paris Agreement on climate change, as well as those that had occurred since 2015. Most of the States that had commented on the point had agreed that the phrase "common concern" should be used. Strangely, Mr. Murphy had stressed that the Commission should study the views expressed by certain States in 2014 and 2015, prior to both the adoption of the first-reading text and the signing of the Paris Agreement. States were entitled to have changed their views since then or to choose to remain silent on the issue.

With regard to the draft preambular paragraph on the interaction between the atmosphere and the oceans, some members had proposed referring to biodiversity and other ecosystems such as forests, lakes and rivers, in addition to oceans. While the atmosphere was, of course, also essential to the preservation of those ecosystems, he tended to agree with Mr. Valencia-Ospina's view that, at the current stage, the Commission should refrain from moving beyond the oceans. He appreciated the relevant sources provided by other members, States and international organizations relating to the interaction between the atmosphere and other ecosystems; they would be represented in the commentary as appropriate.

In his report, he had recommended the deletion of the final draft preambular paragraph, containing the reference to the 2013 understanding. A number of members had agreed that it

was not an appropriate place for that reference. He instead proposed to place it in his newly reformulated draft guideline 2 (2).

In line with the suggestion made by Estonia, he recommended moving the third draft preambular paragraph so that it appeared after the fifth draft preambular paragraph. As a consequence, he had proposed changing the first words of the sixth draft preambular paragraph from "*Aware also*" to "*Noting also*" and the first word of the seventh draft preambular paragraph from "*Noting*" to "*Recognizing*".

Turning to draft guideline 1, he said that he had proposed moving the second draft preambular paragraph back to draft guideline 1 (a). Although certain members had agreed with him, a number were opposed; therefore, he wished to withdraw the proposal.

Mr. Zagaynov had questioned whether it was necessary to provide a definition of the atmosphere. The Commission had decided in 2015 that, at a minimum, a short definition should be included in the text so that it could be developed further in the commentary.

His recommendation to add the words "or energy" after the word "substances" in draft guideline 1 (b), as had been suggested by a number of States, was in line with article 1 (a) of the Convention on Long-range Transboundary Air Pollution and article 1 (1) (4) of the United Nations Convention on the Law of the Sea. A small number of members had disagreed with the addition, but most had agreed. He therefore maintained his recommendation.

With regard to draft guideline 2, having initially proposed the deletion of paragraph 2, he had subsequently put forward the amended version he had just read out. He wished to maintain his recommendation to delete paragraph 3 because the Commission, whose members were not scientists, would certainly not be able to deal with the issue of chemical substances contributing to atmospheric pollution and degradation.

As for draft guideline 3, UNEP and a number of States had suggested that the words "prevent, reduce or control" should be amended to read "prevent, reduce and control", in line with article 194 of the United Nations Convention on the Law of the Sea. It could be argued that the use of the word "or" would mean that the obligation would be selective, since only one of the three requirements would need to be fulfilled, while using the word "and" would mean that the obligation would be cumulative and all three requirements would need to be met. If the three notions overlapped in substance, then either word could be used. A number of members had agreed with the change, as he himself did. The point could be discussed by the Drafting Committee.

Several members had suggested that the obligation under draft guideline 3 was *erga omnes* in nature. That issue could perhaps be considered during the discussion of paragraph (3) of the commentary thereto.

Some members had proposed that draft guideline 4, on environmental impact assessment, should include a reference to procedural rights, including notification, participation, consultation and review, while others had agreed with his own proposal to include such a reference only in the commentary.

It had been suggested that the word "the" should be inserted before the word "protection" in draft guideline 5 (2).

With regard to draft guideline 6, some of the comments by States would be reflected in the commentary.

In draft guideline 7, he had recommended adding the words "including those relating to environmental impact assessment". The suggestion had gained the approval of a number of members, while a handful of them had opposed it; the Drafting Committee could discuss the issue further. He supported Mr. Grossman Guiloff's proposal to insert the word "only" between the words "should" and "be". Some members had stressed the importance of replacing the words "prudence and caution" with the words "precautionary approaches". Given that the Commission had agreed on the phrase "prudence and caution" after a lengthy discussion, it was unclear whether it could be changed at the current stage. The phrase "precautionary approaches" could perhaps be referred to in the commentary. As had been noted at the first-reading stage, the term "precautionary principle" was not appropriate, since it implied that the "principle" would result in a shift of the burden of proof.

With regard to draft guideline 8 (2), several members had agreed with his proposal to add the words “and technical” after the word “scientific” in order to broaden a little the scope of international cooperation, although a small number of members had expressed scepticism.

While he had no changes to recommend in respect of draft guideline 9, there would undoubtedly be some additions to the commentary thereto, based on the comments that had been received.

Turning to draft guideline 10, he said that, on the basis of the comments made by some States and in a bid to do justice to the comments by South Africa and the Federated States of Micronesia, he had proposed the insertion of a new paragraph 2, which would read: “Failure to implement the obligations amounting to breach thereof entails the responsibility of States under international law.” Sir Michael Wood had objected because he considered it contrary to the 2013 understanding. He wished to remind the Commission once again that the understanding prohibited only liability, not responsibility. Commission members were well versed in the difference between the two concepts. As Ms. Oral had indicated, the proposed new provision merely stated an accepted principle of international law. However, as many members were not in favour of the proposal, he wished to withdraw it.

Mr. Jalloh and Mr. Tladi had expressed support for the inclusion of a reference to “common but differentiated responsibilities”. That concept, with “responsibilities” in the plural, was not directly related to State “responsibility”, in the singular, for internationally wrongful acts. While it had been strictly adhered to in the Kyoto Protocol to the United Nations Framework Convention on Climate Change, it had undergone significant change following the negotiation of the Durban Platform for Enhanced Action and the adoption of the Paris Agreement. However, discussion of the concept of “common but differentiated responsibilities” was unfortunately prohibited pursuant to the 2013 understanding.

He had no recommendations to make with respect to draft guidelines 11 and 12, but he took note of Ms. Escobar Hernández’s suggested improvement to the Spanish version of draft guideline 11.

Regarding the recommendations to the General Assembly in paragraph 102 of his report, he had no objection to Mr. Jalloh’s proposal to add wording encouraging States to ratify relevant treaties.

Summing up his remarks, he said that he wished to propose the following changes to the recommendations he had made in his sixth report. The second draft preambular paragraph should remain as it was in the first-reading text. In draft guideline 1 (a), the words “within which transport and dispersion of the polluting and degrading substances occur” should be deleted. Draft guideline 2 (2) should be amended to read: “The omission of certain principles of international environmental law from the draft guidelines is without prejudice to their legal status.” In draft guideline 5 (2), the word “the” should be inserted before the word “protection”. In draft guideline 6, the word “fully” should be inserted between the words “taking” and “into”. In draft guideline 7, the word “only” should be inserted between the words “should” and “be”. The proposed new paragraph numbered as draft guideline 10 (2) should be deleted. The rest of the amendments that he had proposed to the first-reading text remained unchanged. He would endeavour to be flexible when considering suggestions regarding the 2013 understanding and other pertinent issues in the Drafting Committee.

The Chair said that he wished to commend the Special Rapporteur for his outstanding work over many years on the topic of protection of the atmosphere. Speaking as a member of the Commission, he wished to clarify that he had no objection to the proposal to replace the term “pressing concern” with “common concern of humankind”, noting that it would be in the context of *lex ferenda*.

Provisional application of treaties (agenda item 4) (A/CN.4/737 and A/CN.4/738)

Mr. Gómez-Robledo (Special Rapporteur), introducing his sixth report on provisional application of treaties (A/CN.4/738), said that the main purpose of what would undoubtedly be his last report on the topic, was to pave the way for the second reading of the set of draft guidelines. The report included a review of the Commission’s work on the topic over the years and a summary of the discussions that had taken place in the Sixth Committee

in 2018 at the seventy-third session of the General Assembly. It began by noting the general comments and observations received from States and international organizations on the set of draft guidelines as a whole and then those related to the individual draft guidelines. The suggestions for changes to the commentary had also been noted; they would be addressed once the Drafting Committee had adopted the final version of the draft guidelines.

Both the written comments and the contributions to the debate in the Sixth Committee, received from a total of 46 Member States and international organizations, indicated that there was general support for the draft guidelines, which were considered a useful compendium of the rules applied by most States and thus consistent with contemporary practice in relation to the topic they covered. Some States were of the view that greater emphasis should be put on the voluntary and flexible nature of the provisional application of treaties. He considered that that had already been made clear in the general commentary but acknowledged that it might be stated explicitly that the draft guidelines and the commentary to them should be read together and not interpreted partially or in isolation. It was also clear that the draft guidelines could not be understood to indicate any intention on the part of the Commission to promote or encourage the practice of provisional application of treaties. There was no doubt as to the subsidiary character of the provisional application of a treaty compared to the entry into force of a treaty; the draft guidelines should not be interpreted as seeking to make provisional application a default rule or to encourage its routine inclusion in the wording of treaties. He would look carefully at that aspect in the commentary to ensure that it was clear that the best form of provisional application was one that contributed to the entry into force of the treaty.

In draft guideline 1, entitled “Scope”, he proposed adding the words “by States and international organizations” for clarity. He was of the view that draft guideline 2, entitled “Purpose”, correctly identified the source of the provisional application of treaties as article 25 of the Vienna Convention on the Law of Treaties of 1969 and other relevant rules of international law. The absence of any mention of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations was intentional, firstly, because it had not yet come into force and, secondly, to avoid any debate as to whether it reflected customary law. He therefore proposed that no changes should be made to draft guideline 2.

There had been broad support for the wording of draft guideline 3, entitled “General rule”, which was aligned with article 25 of the 1969 Vienna Convention. The phrase “the States or international organizations concerned” had been discussed extensively both in plenary and in the Drafting Committee; the conclusion drawn was that it was desirable to encompass situations that might involve States or international organizations other than the negotiating States, as had become common in contemporary practice. The concerns expressed by Brazil and the United States of America in that respect could be addressed both in the commentary to draft guideline 3 and in draft guideline 4.

A large number of comments had been received from States and international organizations on paragraph (b) of draft guideline 4, entitled “Form of agreement”, expressing the view that, if a resolution of an international organization had not been adopted unanimously, it should be possible to object to the provisional application of the treaty concerned. Although the degree of support for a resolution, and thus for the provisional application of the treaty, should be assessed on a case-by-case basis, he had nevertheless decided to propose the inclusion of the words “if such resolution has not been opposed by the State concerned” to address those concerns. The amendment would also be reflected in the commentary.

Draft guideline 5, entitled “Commencement of provisional application”, had been worded so as to encompass the various scenarios that could arise and to avoid restricting flexibility in the use of provisional application. Therefore no amendment was required.

Draft guideline 6, entitled “Legal effect of provisional application”, was perhaps one of the most important of the draft guidelines. As noted in paragraph 86 of the report, the phrase “as if the treaty were in force” had been the subject of debate since the Commission had first begun to consider the topic. He was of the view that the wording “the provisional application of a treaty or a part of a treaty produces a legally binding obligation” obviated

the need for any comparison with the situation where a treaty was in force; if the comparison was included, the draft guideline might appear to indicate that the provisional application of a treaty and its entry into force amounted to the same thing. The Commission should maintain its position that the provisional application of a treaty did not have the full legal effects of a treaty that had entered into force. It had been careful not to engage in analogies that might prove to be excessively burdensome or contrary to treaty law. He considered that inclusion of the phrase would only create more problems, but he would welcome the views of Commission members on the subject, as some States and international organizations had expressed support for the wording adopted on first reading.

On draft guideline 7, entitled "Reservations", the fundamental question was whether it served any useful purpose in the set of draft guidelines. It appeared that no one objected to the possibility of reservations being formulated when a State accepted the provisional application of a treaty, but the absence of practice and other issues raised by a number of States spoke for its deletion. Some States, however, had favoured its retention as it opened up an option for States and international organizations. Before making a proposal, he would welcome the views of Commission members on the desirability of keeping the draft guideline, so as to avoid any unnecessary delays in the work of the Drafting Committee.

There seemed to be no disagreement on draft guideline 8, entitled "Responsibility for breach", which followed directly from the provisions of draft guideline 6. It simply clarified that any breach of an obligation arising pursuant to the provisional application of a treaty or part of a treaty was subject to the applicable rules of international law, in accordance with the principle of *pacta sunt servanda*.

Two main issues had been raised in respect of draft guideline 9, entitled "Termination and suspension of provisional application": one concerned the causes of termination of provisional application, and the other the question of whether the safeguard clause in paragraph 3 should specifically mention the consequences of the termination of a treaty that was being provisionally applied, as set out in paragraph 70 (1) (b) of the 1969 Vienna Convention. As paragraphs 1 and 2 of draft guideline 9 were based on paragraphs 1 and 2 of article 25 of the 1969 Vienna Convention, they could be left as they stood. However, in order to safeguard the flexible nature of provisional application, it was important not to link the procedure under article 25 (2) of the 1969 Vienna Convention to the "intention not to become a party" to the treaty concerned. He therefore proposed adding the words "so" and "irrespective of the reason for such termination" to paragraph 2 of the draft guideline, which would then read:

> "Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or international organization is terminated if that State or international organization so notifies the other States or international organizations between which the treaty or a part of a treaty is being applied provisionally, irrespective of the reason for such termination."

In view of the calls from some States for the inclusion of other possible situations related to responsibility for breach of obligations arising from provisional application, the safeguard clause in draft guideline 9 (3) could be strengthened by adding a paragraph 4 that read: "Unless the treaty otherwise provides or it is otherwise agreed, the termination of the provisional application of a treaty or a part of a treaty does not affect any right, obligation or legal situation created through such provisional application prior to its termination."

Several States had raised the question of the relationship between the article 25 regime and the article 18 regime of the 1969 Vienna Convention. As noted in paragraph 114 of the report, the two regimes could exist side by side, as they were intended to serve different purposes and did not overlap.

Draft guideline 10, entitled "Internal law of States and rules of international organizations, and the observance of provisionally applied treaties", had received broad support and its close alignment with article 27 of the 1969 Vienna Convention had been welcomed. No changes were proposed.

Draft guideline 11, entitled "Provisions of internal law of States and rules of international organizations regarding competence to agree on the provisional application of

treaties", had also received general support from States and its close alignment with article 46 of the 1969 Vienna Convention had been welcomed. He therefore proposed to leave it unchanged, but possibly to mention in the commentary that there was no repository of practice on the subject.

Draft guideline 12, entitled "Agreement to provisional application with limitations deriving from internal law of States and rules of international organizations", as well as being a safeguard clause, was crucial to ensuring that the draft guidelines struck a balance between, on the one hand, addressing the needs arising from the requirements of the internal law of States or the rules of international organizations – since the failure to address them could lead to a situation where the provisional application of a treaty was at odds with the internal law of a State or the rules of an international organization – and, on the other hand, preserving the flexibility inherent in the concept of provisional application. He therefore proposed that the draft guideline should be maintained as adopted on first reading and that the additional examples provided by the Council of Europe should be included in the commentary.

The meeting rose at 1 p.m.