Chapter VIII

PROTECTION OF THE ATMOSPHERE

A. Introduction

77. The Commission, at its sixty-third session (2011), decided to include the topic "Protection of the atmosphere" in its long-term programme of work,[783] on the basis of the proposal, which was reproduced in annex II to the report of the Commission on the work of that session.[784] The General Assembly, in paragraph 7 of its resolution 66/98 of 9 December 2011, took note of the inclusion of the topic in the Commission's long-term programme of work.

78. At its 3197th meeting, on 9 August 2013, the Commission decided to include the topic "Protection of the atmosphere" in its programme of work, together with an understanding,[785] and to appoint Mr. Shinya Murase as Special Rapporteur for the topic.

B. Consideration of the topic at the present session

79. At the present session, the Commission had before it the first report of the Special Rapporteur (A/CN.4/667). The Commission considered the report at its 3209th to 3214th meetings, on 22, 23, 27, 28 and 30 May and on 3 June 2014.

1. Introduction by the Special Rapporteur of the first report

80. The first report sought to address the general objective of the project, including providing the rationale for work on the topic, delineating its general scope, identifying the relevant basic concepts and offering perspectives and approaches to be taken with respect to the subject. In this connection, the report provided an overview of the evolution of international law on the protection of the atmosphere, discussed the relevant sources of law, including customary international law, treaty practice, and jurisprudence, and analyzed definitional aspects of the topic, elements pertinent to delineating the scope and the question of the legal status of the atmosphere, while offering draft guidelines therefor.

81. In introducing the report, the Special Rapporteur, recalling the background to the inclusion of the topic in the agenda of the Commission, as well as the debates in the Sixth Committee of the General Assembly, underlined that he took seriously the criticisms made regarding the feasibility of the topic, given its highly technical nature, as well as the treaty-based rules of the law in this field. He, together with the Commission, would seek to consult the experts in the field for scientific and technical advice, as an understanding of the scientific and technical aspects of atmospheric degradation was essential to effectively addressing the protection of the atmosphere. Moreover, he stressed that the report was prepared in full compliance with the 2013 understanding and assured the Commission, in particular, that he had neither the intention to interfere with relevant political negotiations nor to deal with specific polluting substances. At the same time, he noted that, as the understanding was "without prejudice", the Commission was not precluded from referring to certain questions mentioned in paragraph (*a*) of the understanding in the study of the topic. The main task for the Commission consisted in identifying custom, whether established or emerging, regarding the topic and identifying, rather than filling, any gaps in the existing treaty regimes, while also seeking to explore possible mechanisms of international cooperation.

82. Recalling that the deteriorating state of the atmosphere had made its protection a pressing concern for the international community, the Special Rapporteur noted that the topic presented an opportunity for the Commission to address issues pertaining to special regimes from the perspective of general international law, a functional responsibility that the Commission was well placed to discharge. In his view, there was abundant evidence of State practice, including treaties, judicial precedents, and other normative documents, which would enable the Commission to address the topic essentially as a legal question rather than a political one. The Special Rapporteur also offered a historical sketch of the development of international law relating to the atmosphere, beginning in the sixth century, to the eighteenth century, when its modern history begins, leading to the *locus classicus* in relation to transboundary air pollution in the *Trail Smelter* award of 1941[786] and culminating in the concretization of international environmental law as a specialized field of study in subsequent years, including in the 1970s with the adoption

[783] *Yearbook … 2011*, vol. II (Part Two), p. 175, paras. 365–367.

[784] *Ibid*., pp. 189–197.

[785] *Yearbook … 2013*, vol. II (Part Two), p. 78, para. 168. The Commission included the topic in its programme on the understanding that: "(*a*) work on the topic will proceed in a manner so as not to interfere with relevant political negotiations, including on climate change, ozone depletion, and long-range transboundary air pollution. The topic will not deal with, but is also without prejudice to, questions such as liability of States and their nationals, the polluter-pays principle, the precautionary principle, common but differentiated responsibilities and the transfer of funds and technology to developing countries, including intellectual property rights; (*b*) the topic will also not deal with specific substances, such as black carbon, tropospheric ozone and other dual-impact substances, which are the subject of negotiations among States. The project will not seek to 'fill' gaps in the treaty regimes; (*c*) questions relating to outer space, including its delimitation, are not part of the topic; (*d*) the outcome of the work on the topic will be draft guidelines that do not seek to impose on current treaty regimes legal rules or legal principles not already contained therein. The Special Rapporteur's reports would be based on such understanding."

[786] *Trail Smelter,* UNRIAA, vol. III (Sales No. 1949.V.2), p. 1905.

of the Declaration of the United Nations Conference on the Human Environment ("Stockholm Declaration").[787] He advocated a detailed and critical study of the topic based on the various sources of international law on the subject.

83. The Special Rapporteur highlighted that the contemporary challenges to the atmosphere concerned three areas, namely (*a*) tropospheric transboundary air pollution, (*b*) stratospheric ozone depletion and (*c*) climate change, while also noting, in that regard, that there was no treaty regime that covered all areas of atmospheric problems, nor treated the atmosphere as a global single unit, even though treaty-making activities had been undertaken with respect to each area.

84. The Special Rapporteur offered relevant information on the physical characteristics of the atmosphere, serving as the basis for the definition of "atmosphere" for the purposes of the draft guidelines; broad outlines of the various elements comprising the scope of the project, with a view to identifying the main legal questions to be covered; and an analysis of the question of the legal status of the atmosphere, which he considered to be a prerequisite for the Commission's consideration of the topic. In particular, he favoured the application of the concept "common concern of humankind" to characterize the legal status of the atmosphere rather than either *res communis* or common heritage of mankind. In this context, he also introduced three draft guidelines, which were of a general nature, proposed in his first report, concerning the (*a*) definition of the term "atmosphere", addressing both its substantive aspect, as a layer of gases, and its functional aspect, as a medium within which the transport and dispersion of airborne substances occurs;[788] (*b*) the scope of the draft guidelines,[789] which would encompass addressing atmospheric degradation caused by anthropogenic activities that involve the introduction of deleterious substances or energy into the atmosphere and the alteration of its composition, seeking to protect both the natural and human environment, and drawing interlinkages between the atmosphere with other areas such as the sea, biodiversity (forestry, desertification and wetland), and other aspects of human activity and the law governing such activities; and (*c*) the legal status of the atmosphere,[790] projecting the atmosphere as a natural resource, distinguishing it from "airspace", whose legal status was unprejudiced, and offering the proposition that the protection of atmosphere was a common concern of humankind.

2. Summary of the debate

(a) *General comments*

85. Members of the Commission acknowledged that the protection of the atmosphere was extremely important for humankind, while echoing the concerns, supported by scientific data, posed to the atmosphere, in particular, by air pollution, ozone depletion and climate change. It was asserted that the topic, which was legally, politically and technically and scientifically complex, and which concerned a real and pressing issue, with visible adverse impacts on people's daily lives as, for instance, natural disasters that wrought havoc in many parts of the globe and pollution that caused premature deaths and many significant health problems. At the same time, members were more than aware of the intractable difficulties pertaining to the topic and appearing in discussions among States and recognized that the challenge for the Commission was what role it could play to make a proper contribution to the overall global endeavours to protect the environment.

86. For some members, it was essential—more so, given the background to the inclusion of the topic on the Commission's agenda and the diversity of the comments made in the Sixth Committee in 2012 and 2013— that the Commission take a more deliberate and cautious approach. In this connection, there was a detailed discussion of the 2013 understanding and its implications for the Commission's work. In the view of some members, the understanding needed to be taken seriously, regardless of whether or not one liked its content. It was a condition *sine qua non* for commencing work on the topic. Furthermore, some members expressed concern that the Special Rapporteur, in preparing and introducing his report, had not been fully compliant with the terms of the understanding; with others finding it disquieting that he seemed to downplay its importance, by seeking to evade its clear terms, or to steer the project in a direction that would not be faithful to the letter or spirit of the understanding. It was noted in particular, that the implication that new rules would be developed or gaps in the law would be filled contradicted the understanding. Moreover, the concern was expressed that the proposal by the Special Rapporteur to focus on air pollution, ozone depletion and climate change would conceivably interfere with political negotiations on those subjects.

87. According to another view, by adopting the 2013 understanding, the Commission had placed the Special Rapporteur in an untenable position, as any realisable

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[787] *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), Part One, chap. I, p. 3.

[788] The text of draft guideline 1, as proposed by the Special Rapporteur, read as follows:

"*Use of terms*

"For the purposes of the present draft guidelines,

"(*a*) 'Atmosphere' means the layer of gases surrounding the earth in the troposphere and the stratosphere, within which the transport and dispersion of airborne substances occurs."

[789] The text of draft guideline 2, as proposed by the Special Rapporteur, read as follows:

"*Scope of the guidelines*

"(*a*) The present draft guidelines address human activities that directly or indirectly introduce deleterious substances or energy into the atmosphere or alter the composition of the atmosphere, and that have or are likely to have significant adverse effects on human life and health and the earth's natural environment.

"(*b*) The present draft guidelines refer to the basic principles relating to the protection of the atmosphere as well as to their inter-relationship."

[790] The text of draft guideline 3, as proposed by the Special Rapporteur, read as follows:

"*Legal status of the atmosphere*

"(*a*) The atmosphere is a natural resource essential for sustaining life on earth, human health and welfare, and aquatic and terrestrial ecosystems; hence, its protection is a common concern of humankind.

"(*b*) Nothing in the present draft guidelines is intended to affect the legal status of airspace under applicable international law."

progress on the topic outside the parameters contained in the understanding depended on whether the interpretation to be given to it was a strict or flexible one. It was further pointed out that there was a fundamental problem with the understanding; the Special Rapporteur was presented with a dilemma, which effectively meant that practically all of the treaty practice on which the report was based could probably be subsumed under the subjects identified as not to be dealt with under the understanding. Some members viewed the understanding as unusual, and as setting a bad precedent for the Commission. Accordingly, it was suggested that the Commission could reconsider the understanding or agree on a flexible approach to its application.

88. Some other members stated that there was enough flexibility within the 2013 understanding for the Special Rapporteur to pursue a modest goal of identifying existing general principles of international environmental law, whether based on customary law or on general principles of law, and to declare their applicability to the protection of the atmosphere.

89. Viewing the whole task as not insurmountable, several members underlined the collegial and collective nature of the Commission's work and stressed the importance of taking a modest and sensible approach, as proposed by the Special Rapporteur, while affording him some leeway, mindful of the terms of the understanding. It had to be recognized that the most important decisions regarding the protection of the atmosphere were to be taken at the political level, and the Commission, in its work, could not be expected to prescribe or substitute for specific decisions and action at that political level.

90. Even though the Special Rapporteur had indicated in his report that he hoped to consider, in the remaining two years of the current quinquennium (2015 and 2016), questions relating to basic principles for the protection of the atmosphere, including the general obligations of States to protect the atmosphere, the *sic utere tuo ut alienum non laedas* principle, as well as principles of equity, sustainable development and good faith and, in the next quinquennium (2017–2021), to complete the consideration of other related matters, such as international cooperation, compliance with international norms, dispute settlement and interrelationships, some members expressed their concern that the whole picture was still not clearly discernible, as the information presented was not sufficient to give one a sense of the general orientation and direction of the topic. They sought a roadmap or workplan, which would set out the general objective of the project and identify the main problems, including the basic principles which should or might apply and their implementation, and raise questions that ought to be accorded priority by the Commission. It was suggested that such a roadmap could also detail how it was envisioned that the work of the Commission would be different from similar work done elsewhere, for example, the work of the International Law Association on the legal principles relating to climate change.

91. Some members also expressed views on their differences with the methodological approaches taken by the Special Rapporteur in the treatment of the topic. Instead of focusing on the atmosphere as a global single unit and on its protection, an approach that seemed favoured by the Special Rapporteur in his report, it was suggested that attention should be paid on how the activities of State and non-State actors, which directly or indirectly affected the atmosphere, could be regulated. Such an alternative approach would focus not on the atmosphere *per se* but on the "rights and obligations" of States and such non-State actors in the field; this was viewed as the best guarantee for protection and conservation of the atmosphere and was more consistent with State practice and practical realities. Drawing analogies from the law of the sea, where the sea was divided into zones according to the degree of exercise by the coastal State of sovereignty or control, it was suggested that consideration be given to dividing the atmosphere in terms of parts thereof, which were subject to or beyond the sovereignty or control of the State. On the other hand, the approach taken by the Special Rapporteur was not entirely without support, as other members felt that given the threat to the atmosphere, its treatment as a single unit best assured its protection for the benefit of humankind.

92. Another methodological concern related to the treatment by the Special Rapporteur of the various sources which he stated were relevant to the consideration of the topic and his reliance on them. It was noted that, on occasion, the Special Rapporteur put almost complete faith on the views of non-governmental actors and scholars, without reference to State practice, and, where State practice was relied upon, there was no clear analysis of non-binding instruments as a source for determining *opinio juris*. It was also not apparent to some members how the catalogue of treaty practice and case law cited in the report related to the topic and linked up with issues that the Special Rapporteur wanted to have addressed. Moreover, in some instances there was a sense that policy preferences were being made in the report as appropriate without being founded on any firm legal basis or meeting the rigours of their identification as law.

93. Members also expressed support for the possibility of consulting with technical and scientific experts in the development of the topic.

(b) *Comments on draft guideline 1 (Use of terms)*

94. Some members agreed with the Special Rapporteur on the need for a definition for the purposes of the draft guidelines, which would correspond with the scientific definition of the atmosphere. It was noted that such a definition would facilitate the work of the Commission. Given the scientific nature of the topic, some other members suggested it might be more useful to develop a glossary of scientific terms to be used. Other members noted that the consideration of a definition at this stage might be premature; a certain period of time would offer an opportunity to engage the scientific community, effectively enabling the Commission to elaborate a definition that was legally and also scientifically sound. The point was also made that the definition ought to be comprehensive, without mentioning such terms as "troposphere" and "stratosphere".

95. According to another view, the necessity for a definition was questioned. It was noted, especially, that the various treaties that directly dealt with atmospheric issues

such as long-range transboundary pollution, ozone depletion or climate change did not define the term "atmosphere". Similarly, the United Nations Convention on the Law of the Sea does not define the sea.

96. Some members also pointed out that the content of the proposed definition was problematic. The definition proposed seemed to have no basis in State practice, case law, or writings. Moreover, it was noted that the proposed definition included the troposphere and stratosphere, but excluded, somewhat arbitrarily and without any apparent reason, the mesosphere, thermosphere, and exosphere, which also formed part of the atmosphere. Even accepting, as was scientifically known, that the three contemporary problems affecting the atmosphere—air pollution, ozone depletion and climate change—impacted only the troposphere and stratosphere, some members, on the basis of the precautionary principle, warned against an approach that parcelled out certain segments of the atmosphere. Attention was, for example, drawn to the study of climate change in the mesosphere conducted by the Antarctic Program of the Australian Government, which detected a manifestation of the greenhouse effect (enhanced cooling) in the stratosphere and mesosphere.[791] A point was also made that environmental harm could be caused in the upper atmosphere by satellites launched into outer space. Accordingly, a more general definition of the atmosphere that corresponded to the scientific identification of the atmosphere as consisting of the troposphere, stratosphere, mesosphere and thermosphere or related to the impact that the atmosphere had on human existence and the environment, was considered ideal.

97. Some members also observed that, by defining the atmosphere as "the layer of gases surrounding the earth in the troposphere and the stratosphere" the definition might have impliedly imposed an upper limit, thereby encroaching into questions relating to "outer space", including its delimitation, which are excluded from consideration by the terms of the 2013 understanding. The notion of "the gaseous envelope surrounding the Earth" employed by the Intergovernmental Panel on Climate Change (IPCC) was preferred by other members to the phrase "the layer of gases" to describe the atmosphere. Some members also questioned whether the concept "airborne substances" could alone properly be used to characterize the atmosphere. In terms of another view, it was crucial to embed in the definition the natural characteristics of the atmosphere, namely the idea of atmospheric circulation.

98. It was also noted that although the draft guidelines were not intended to affect the legal status of airspace under applicable international law, the proposed definition, by including its physical characteristics, implicitly signalled an upper limit of airspace.

99. The proposal was also made, while mindful of the 2013 understanding, to also define "air pollution", "ozone depletion" and "climate change" for the purposes of the draft guidelines, as well as "protection".

[791] See www.antarctica.gov.au/about-antarctica/environment/atmosphere/studying-the-atmosphere/hydroxyl-airglow-temperature-observations/climate-change-in-the-mesosphere.

(c) *Comments on draft guideline 2 (Scope of the guidelines)*

100. While some members found draft guideline 2 to be satisfactory, other members pointed to the need to address questions concerning the scope of the guidelines from a perspective of "cause and effect", given that the place of origin of the pollution is often different from the place where the adverse consequence is occasioned. To this end, a suggestion was made to formulate the draft guideline on scope, bearing in mind, for possible coverage, three spatial dimensions, namely territorial, transboundary and global, with focus being given on the latter two aspects. Since, with respect to atmospheric degradation, a clear identification of the cause and origin was not always possible, it was submitted that it would be appropriate to approach questions of protection from a standpoint that sought a restriction on hazardous substances, an approach pursued in existing instruments.

101. Regarding subparagraph (*a*), while some members agreed with its essence, particularly its reference to impact on both the human and the natural environment, the view was expressed that it was both too broad and too narrow, in that it seemed to cover a wide range of conceivable human activity, while at the same time establishing, in the latter part of the subparagraph, a high threshold. The inclusion of "energy", to the extent that it covered problems of radioactive or nuclear pollution, was also considered problematic by some members, given in particular that the peaceful uses of nuclear energy was regulated by special regimes. According to another view, subparagraph (*a*) was misleading as it also seemed to delve into matters of substance, due to the use of such terms as "deleterious substances" or "significant adverse effects". To cure such a defect, a suggestion was made to recast the draft guideline in broad terms to encompass all human activities affecting the atmosphere, with a view to ensuring its protection or to completely suppress the subparagraph.

102. Concerning subparagraph (*b*), it was noted by some members that the reference to "the basic principles relating to the protection of the atmosphere" risked bringing the scope of the draft guidelines in conflict with the understanding reached in 2013. The point was also made that the subparagraph seemed to relate more to the nature of the exercise than to scope. It was suggested that the goal should, without being prescriptive, be to develop guidelines upon which States may draw in their efforts to address problems concerning the atmosphere. Some other members supported the formulation of subparagraph (*b*), as it was also declaratory of a goal.

103. Some members viewed the references to "basic principles" as limiting and to "as well as to their interrelationship" as unclear and uncertain in relation to the draft guideline as a whole. Some other members even questioned the usefulness and timeliness of having a guideline on scope. It was noted in this regard that the terms of the 2013 understanding should be borne in mind. In the light of the understanding's admonition not to deal with and not to prejudice such issues as the polluter-pays principle, the precautionary principle, and common but differentiated responsibilities, it was suggested that there should be a saving clause that would reflect the sense that the Commission,

by not addressing such principles, was doing so without prejudice to their status in international law.

(d) *Comments on draft guideline 3 (Legal status of the atmosphere)*

104. Draft guideline 3 elicited a diversity of comments from members on both the approach taken by the Special Rapporteur and on the substance of the draft guideline. In the main, some members doubted the grounding of the legal status of the atmosphere on the concept of common concern of humankind, as a legal concept, noting in particular that there was a risk that its existing position in international law was being overstated. As presently formulated, the draft guideline was viewed as broad and having far reaching implications.

105. There was a general sense among the members that more work might be needed to fully justify the propositions and policy choices that the Special Rapporteur makes in the draft guideline. In particular, in terms of approach, those members who felt that the Special Rapporteur should develop the draft guidelines in terms of rights and obligations of States were of the view that it was inconsistent with practice to view the atmosphere as integral or unified in relation to rights and obligations of States. Drawing from the law of the sea as well as case law, such as the *Trail Smelter* award,[792] it was considered important to view such rights and obligations in terms of sovereignty and control, which would entail, for example, that the atmosphere directly above a State should be dealt with in terms of sovereignty. From the report, it was not apparent why the Special Rapporteur had elected to deviate from an approach, established in practice, that assigned localized damage to the State in which the damage occurs or led to the invocation of the *sic utere tuo ut alienum non laedas* principle when there was transboundary damage. In this connection, it was wondered how the *sic utere tuo* principle would apply to "protection of the atmosphere". Some members, on the other hand, aligned themselves with the Special Rapporteur in noting that the area-based approach for the protection of the marine environment under the United Nations Law of the Sea Convention could not be simply applied to the protection of the atmosphere as it was inappropriate and impractical, pointing to the difficulty of establishing national jurisdiction over any segment of the atmosphere. Further, it was noted that, even if the law of the sea were adopted as a model, problems had arisen in that area, particularly in relation to areas outside national jurisdiction where States parties continue to have discussions and negotiations on the management of the shared resources of the oceans.

106. On the substance, some members welcomed the assertions in the report that the atmosphere was a natural resource; it was, however, doubted that practice evidenced that it was a resource that could be described as shared or common. It was noted by some members that the language of the draft guideline had no basis in State or treaty practice or in any case law. Moreover, the draft guideline did not seem to have anything to do with legal status of the atmosphere unless one ascribed meaning to the assertion that its protection was a "common concern of humankind." This was a concept whose normative content was unclear; it was not only controversial but also vague, given that it had a variety of interpretations, including the possibility that it created rights for individuals and future generations. Moreover, its application to the atmosphere did not seem to be supported in the practice of States.

107. In view of the paucity of practice, the treatment of the concept by the Special Rapporteur in the report was neither full nor comprehensive. It prematurely offered a text without providing a full analysis and implications, from a legal perspective, of the concept proposed. It did not, for instance, explore fully what legal implications were entailed by "common concern of humankind". A number of questions arose: Is there a legal responsibility to prevent damage? Does that legal responsibility devolve to all States? Does it create *erga omnes* obligations and would the responsibility of States be engaged thereby? Does it create obligations on society as a whole and on each individual member of the community? Does it establish standing to sue, including an *actio popularis*? Does it create a duty of international environmental solidarity? Is the draft guideline not inadvertently diminishing the relevance of the *sic utere* principle? Although the Special Rapporteur hinted in the report that the concept would lead to the creation of substantive legal obligations on the part of all States to protect the global atmosphere as enforceable *erga omnes*, he did so without providing a full analysis. Several members also underlined that was it not the atmosphere *per se* but rather its protection that was a common concern of humankind. The point, however, was made that the degradation of the conditions of the atmosphere should be an example of such concern.

108. Some other members indicated that the concept deserved favourable consideration, noting that the Commission could play a role in elucidating and articulating its scope with regard to the protection of the atmosphere. It was also suggested that there was merit in considering the concept as implying a need for international cooperation in the protection of the atmosphere, with the attendant duties of prevention and cooperation. It was also considered that, instead of focusing on the legal status of the atmosphere, attention should be on protection of the atmosphere as a common concern of humankind, and that the concept of "common concern" should form the basis of both a stand-alone guideline and a guideline articulating the basic principles relevant to atmospheric protection.

109. According to another viewpoint, the concept was too weak to be applied to the protection of the atmosphere. While some members were sympathetic to the possibility of reflecting the concept as applicable in relation to the protection of the atmosphere, it was still noted that the legal reasoning for such a preference in the report was scant. It was not clear, for example, why the concept of "common heritage of mankind" could not be ideal, without the "far-reaching institutional apparatus to control the allocation of exploitation rights and benefits" that seemed to have prompted the Special Rapporteur to dismiss it. In this regard, attention was drawn to the 1972 Convention for the protection of the world cultural and natural heritage and the 1997 Universal Declaration on the Human

[792] See footnote 786 above.

Genome and Human Rights[793] which refer to the "common heritage of mankind" but have no elaborate institutional structure. Indeed, some other members faulted the Special Rapporteur for dismissing rather quickly and without offering convincing reasons the possible application of the "common heritage of mankind" to the status of atmosphere.

110. Concerning paragraph (*a*), it was suggested that the reference to "aquatic and terrestrial ecosystems" be simplified.

111. As regards paragraph (*b*), the point was made that it was unnecessary. It was further understood that even if the legal status of airspace under applicable international law were not to be affected by the draft guidelines, it would not mean that the activities conducted in airspace would not be covered by the present project.

(e) *Other considerations*

112. Several members welcomed the indication by the Special Rapporteur that he would focus on cooperative mechanisms to address issues of common concern, and urged that this aspect be given priority. In the view of some members, there should also be some consideration of the obligations of States regarding not only the preservation but also the conservation of the atmosphere, and of the relationship between the already established rules of customary international environmental law and the regulation of the atmosphere, including the no harm and prevention principles, as well as principles of sustainable development.

113. In view of the fact that the International Court of Justice in *Pulp Mills on the River Uruguay*[794] stated that undertaking an environmental impact assessment whenever there was a risk that the proposed activity may have significant adverse impact in a transboundary context had to be considered a requirement under general international law, the Commission could also make a meaningful contribution by *inter alia* addressing all aspects relating to the content of the obligation in relation to the topic.

114. It also suggested that the Commission, in addressing considerations of equity, could draw upon principles 6,[795] 9[796] and 11[797] of the Stockholm Declaration[798] in the treatment of the topic.

115. Some members expressed a preference for an alternative approach that would seek to identify specific "practice pointers", concretely grounded in State practice, that might be useful to policymakers as they grapple with problems relating to the atmosphere. In such an approach, draft guidelines could focus on such issues as cooperation among States at the global, regional, and bilateral levels, and the various approaches, frameworks and techniques that States pursue to enhance cooperative arrangements.

3. Concluding remarks of the Special Rapporteur

116. The Special Rapporteur welcomed the helpful comments, suggestions and constructive criticisms made by members. He reiterated the importance of the Commission addressing the topic in a modest and sensible manner, while agreeing with sentiments that consultations with the scientific community would benefit the Commission in its work. To this end, he expressed his intention to explore the possibility of organizing a briefing session for 2015. He also noted that he was inclined to defer referral of the draft guidelines to the Drafting Committee until next year, as he would be afforded an opportunity to reformulate parts thereof in the light of the comments made.

117. The Special Rapporteur acknowledged the wide-ranging opinions of members on the 2013 understanding. He stressed in particular that he did not envisage any conflict with his treatment of the topic, in particular the focus on air pollution, ozone depletion and climate change, with political negotiations. Advocating a middle-of-the road approach, he noted that there was no need to discard the understanding since it was the basis for the Commission's decision to take up the topic last year. At the same time, he expressed the hope that the Special Rapporteur would be given the flexibility to identify issues relevant to the topic in a manner that assists the Commission to make progress in its consideration.

118. The Special Rapporteur also noted that in paragraph 92 of his report he had provided a complete plan of work on the topic, and acknowledged the importance of international cooperation as the key element of atmospheric protection. In his second report, he intended to address the substance of the responsibilities of States with regard to protection of the atmosphere.

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[793] UNESCO, *Records of the General Conference, Twenty-ninth Session*, vol. I, *Resolutions*, resolution 16, adopted by General Assembly resolution 53/152 of 9 December 1998.

[794] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2012*, pp. 82–83, para. 204. See also *In the matter of the Indus Waters Kishenganga Arbitration before the Court of Arbitration constituted in accordance with the Indus Waters Treaty 1960 between the Government of India and the Government of Pakistan signed on 19 September 1960 between the Islamic Republic of Pakistan and the Republic of India*, Partial Award of 18 February 2013, Permanent Court of Arbitration, ILR, vol. 154, p. 1; the awards of the Permanent Court of Arbitration are available from www.pca-cpa.org. With regard to the Indus Waters Treaty 1960, signed at Karachi on 19 September 1960, see United Nations, *Treaty Series*, vol. 419, No. 6032, p. 125.

[795] Principle 6 reads as follows:

"The discharge of toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted in order to ensure that serious or irreversible damage is not inflicted upon ecosystems. The just struggle of the peoples of all countries against pollution should be supported."

[796] Principle 9 reads as follows:

"Environmental deficiencies generated by the conditions of underdevelopment and natural disasters pose grave problems and can best be remedied by accelerated development through the transfer of substantial quantities of financial and technological assistance as a supplement to the domestic effort of the developing countries and such timely assistance as may be required."

[797] Principle 11 reads as follows:

"The environmental policies of all States should enhance and not adversely affect the present or future development potential of developing countries, nor should they hamper the attainment of better living conditions for all, and appropriate steps should be taken by States and international organizations with a view to reaching agreement on meeting the possible national and international economic consequences resulting from the application of environmental measures."

[798] See footnote 787 above.

119. As regards draft guideline 1, the Special Rapporteur emphasized that it was intended to be a working definition for purposes of the draft articles, proposed as a matter of practical necessity, given that the existing instruments had not defined the atmosphere. He pointed out that his focus in the definition to the troposphere and the stratosphere was not arbitrary. Since the upper atmosphere comprises only 0.0002 per cent of the atmosphere's total mass, he considered it an insignificant portion to be excluded from coverage. Moreover, there was no meaningful evidence that climate change contributed to, or was responsible for, changes in the conditions of the mesosphere or thermosphere. He expressed doubt that the study of "climate change" in the mesosphere conducted by the Antarctic Program of the Australian government, which related to "solar flux", or the measure of the activity of the sun over the same period of time, specifically linked the changes that were detected "directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability"—the definition of climate change adopted in the United Nations Framework Convention on Climate Change. Moreover, the Special Rapporteur acknowledged that there was limited understanding of changes in the upper atmosphere owing to lack of scientific data, and for that reason to formulate a protective regime for that area, would be overly ambitious. Regarding the potential harm by satellites, the Special Rapporteur recalled that the environmental protection of outer space, including the question of space debris, is a subject within the purview of the Committee on the Peaceful Uses of Outer Space (COPUOS). The Special Rapporteur also underscored that airspace and the atmosphere, under international law, were two entirely different concepts. Accordingly, defining the limits of the atmosphere did not have implications for the borders of national airspace or of outer space. He nevertheless expressed a willingness to remove the reference to the troposphere and stratosphere from the definition in draft guideline 1, provided that any commentary would further clarify the atmosphere's relationship to outer space.

120. Concerning draft guideline 2, the Special Rapporteur confirmed that the focus of the project would be harm that has a transboundary or a global impact. He stated that the use of phrases like "deleterious substances", which "have or are likely to have significant adverse effects", is intended to appropriately limit the range of human activities and deleterious substances with which the draft guidelines are concerned. The Special Rapporteur recalled that the Commission has used substantive concepts in definitional provisions, as well as "significant" in its prior work. This was the case, for instance, with the Articles on the Prevention of Transboundary Harm from Hazardous Activities.[799] The Commission has noted that "significant" was a factual and objective determination, involving a value determination which depended on the circumstances of a particular case; it meant something more than "detectable" but need not be at the level of "serious" or "substantial". The Special Rapporteur also noted that the inclusion of "energy" in the proposed definition corresponded to the definition contained in the Convention on long-range transboundary air pollution, as well as the United Nations Convention on the Law of the Sea. Its inclusion was not intended to interfere with the policies of States with respect to nuclear energy and its use.

121. With respect to draft guideline 3, the Special Rapporteur confirmed that it was not the atmosphere but rather the *protection* of the atmosphere that was a common concern. Its scope was intended to be narrow, applied to establish a cooperative framework for atmospheric protection and not to establish common ownership or management of the atmosphere. It created substantive obligations of environmental protection, in addition to those already recognized by customary international law. He confirmed his belief that there was a close link between *erga omnes* obligations, and their enforcement, and the notion of "common concern", whose aspects, including the related concept of *actio popularis*, would be further explored in future reports. In his view, law-making was both inductive and deductive. It was the task of the Commission to explore the legal obligations that may be contained in the notion of "common concern", which was not devoid of normative content, and to articulate those obligations as part of the draft guidelines. He agreed with those members who said that the notion of "common concern" implied a duty to cooperate to ensure that the atmosphere was protected for future generations. He also did not see any obstacle in extending the *sic utere tuo* principle to atmospheric protection, given that its application was not limited to harm in bilateral transboundary context; both the United Nations Framework Convention on Climate Change (eighth preambular paragraph) and the Vienna Convention for the Protection of the Ozone Layer (art. 2, para. 2 (*b*)) have recognized the principle. The Special Rapporteur also noted that he was not fundamentally opposed to using the concept of "common heritage" to atmospheric protection, if the Commission opted for it for the project.

122. The Special Rapporteur also stressed the importance of viewing the atmosphere as a comprehensive single unit, not subject to division along State lines. It was fluid and dynamic such that it would be impractical, if not impossible, for purpose of the project, to divide it in terms of the air that was under the territorial jurisdiction and control of one State from the air that is outside that jurisdiction.

[799] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, paras. 97–98. The articles on prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm adopted by the Commission at its fifty-third session are reproduced in the annex to General Assembly resolution 62/68 of 6 December 2007.