

Comments of the Government of Antigua and Barbuda on the International Law Commission's Sixth Report on Protection of the Atmosphere

Antigua and Barbuda would like to thank Special Rapporteur Shinya Murase for his excellent work so far on the topic of Protection of the Atmosphere, consisting of a draft preamble and 12 draft guidelines with accompanying commentaries.

As a preliminary matter, Antigua and Barbuda regrets that the Special Rapporteur has been limited in the scope of his work since this project began in 2013. During that year's session, the International Law Commission (ILC) adopted Protection of Atmosphere as a topic in its programme of work, subject to an understanding which excluded the consideration of several international environmental law principles. Antigua and Barbuda believes the work of the ILC should not be limited by this understanding, particularly on such an important topic.

Draft preamble

Antigua and Barbuda recommends striking the term "and degrading" from draft preambular paragraph 2, for reasons explained in our commentary on draft guideline 1. For greater clarity, only "polluting substances" should be used, as all air pollution by its nature degrades the atmosphere.

Antigua and Barbuda underscores draft preambular paragraph 3's note of the "close interaction between the atmosphere and oceans," a fact that our country knows firsthand. Caribbean regional organizations, such as the Caribbean Environmental Programme (CEP) and Organisation of Eastern Caribbean States (OECS) have stated this fact for over 20 years. A 1992 OECS report expressed particular concern with the effect of climate change on biodiversity in the Caribbean region, including aquatic and terrestrial ecosystems.¹ In 1993, the CEP noted the

¹ Organisation of Eastern Caribbean States, *OECS Regional Report on Environment and Development* (OECS 1992) 61 (1992 OECS Regional Report).

impact of climate change on the Inter-American Seas (IAS), which comprise the Caribbean Sea and Gulf of Mexico.² The LBS Protocol recognized "the serious threat to the marine and coastal resources and to human health in the Wider Caribbean Region posed by pollution from land-based sources and activities," defined in Article I(d) to include "atmospheric deposition originating from sources located on its territory."³

Antigua and Barbuda acknowledges that the formulation of draft preambular paragraph 4 results from a careful attempt to comply with the 2013 understanding. However, like many States, we support using the phrase "common concern of humankind," found in the Paris Agreement and United Nations Framework Convention on Climate Change,⁴ as opposed to "pressing concern of the international community as a whole."

Antigua and Barbuda echoes CARICOM's statement from last session thanking the Special Rapporteur for recognizing "the special vulnerability of small island developing States and low-lying coastal areas, with regards to the effect of sea-level rise" in draft preambular paragraph 6. As the OECS noted in 1992, "[s]mall island and low lying developing countries by virtue of their extreme vulnerability to economic and ecological destruction, will require particular attention by the international community if these environmental problems, to which these countries' contributions have been minimal, are not to overwhelm them environmentally

² George Maul, *Ecosystem and Socioeconomic Response to Future Climatic Conditions in the Marine and Coastal Regions of the Caribbean Sea, Gulf of Mexico, Bahamas, and the Northeast Coast of South America* (CEP 1993) 2, 5.

³ Protocol Concerning Pollution from Land-Based Sources and Activities to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (adopted 6 October 1999, entered into force 13 August 2010) TIAS 10-813 (LBS Protocol) preamble para. 6, art. I.

⁴ Paris Agreement to the United Nations Framework Convention on Climate Change (adopted 12 December 2015, entered into force 4 November 2016) TIAS 16-1104 (Paris Agreement) preamble para. 11; United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC) preamble para. 1.

and financially."⁵ This principle has been consistently reaffirmed in multilateral treaties. However, the phrasing of this draft preambular paragraph may limit recognition of special situations. As the commentaries note, the Johannesburg Declaration affirms that the represented States "shall continue to pay special attention to the developmental needs of small island developing States and the least developed countries."⁶ Both the UNFCCC and Paris Agreement note the "specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change..."⁷ Antigua and Barbuda supports using the same language as the UNFCCC and Paris Agreement, rather than "special situation," which is used in those instruments only in reference to technology transfer. These documents do not limit special needs and specific circumstances to the consideration of sea-level rise. The adverse effects of climate change extend beyond sea-level rise, though it is one of the existential threats to small island developing States (SIDS). The IPCC recently described these effects, assuming humankind can hold global warming to 1.5 degrees Celsius: "Growth-rate projections based on temperature impacts alone indicate robust negative impacts on gross domestic product (GDP) per capita growth for SIDS."⁸ Beyond temperature impacts, there will also be an increase in "climate-related extreme weather events," greater risk of drought, and reduced income from industries dependent on marine systems.⁹ Draft preambular paragraph 6 should reflect these additional impacts, perhaps with a more inclusive formulation, for example:

⁵ 1992 OECS Regional Report (n 1) 54.

⁶ 'Report of the World Summit on Sustainable Development' (Johannesburg 26 August–4 September 2002) (4 September 2002) UN Doc A/CONF.199/20 (Johannesburg Declaration) annex para. 24.

⁷ Paris Agreement (n 4) preamble para. 5; UNFCCC (n 4) art 3(2).

⁸ Ove Hoegh-Guldberg and others, 'Impacts of 1.5°C of Global Warming on Natural and Human Systems' in Valérie Masson-Delmotte and others (eds), *Global Warming of 1.5°C* (Intergovernmental Panel on Climate Change 2018) 235.

⁹ Ibid.

"Aware of the specific needs and special circumstances of developing countries, in particular small island developing states and least developed countries, and the special situation of low-lying coastal areas." This would include least developed countries (LDCs), which are mentioned in the Paris Agreement, Stockholm Convention, and UNFCCC,¹⁰ and note the "specific needs" of SIDS and LDCs, which are not recognized in the current formulation in these three agreements.

Antigua and Barbuda supports considering the interests of future generations in draft preambular paragraph 7. The St George's Declaration desires that [i]nternational and regional economic relations that involve Member States equitably meet the developmental and environmental needs of present and future generations."¹¹ Similarly, the first object of Antigua and Barbuda's recent environmental legislation was to "establish an integrated system for the sound and sustainable management of the environment for the benefit of present and future generations[.]"¹² The Commission may also wish to take note of a recent decision from CARICOM observer Colombia's Supreme Court, which recognized the environmental rights of future generations.¹³

Much like draft preambular paragraph 4, Antigua and Barbuda recognizes that draft preambular paragraph 8 follows from the 2013 understanding. While the mission of the International Law Commission is to codify and progressively develop international law, its pronouncements, while influential, are not binding on States. Therefore, we do not agree that this project would "interfere with relevant political negotiations," as negotiators in those

¹⁰ Paris Agreement (n 4) art 4(6); Stockholm Convention on Persistent Organic Pollutants (adopted 22 May 2001, entered into force 17 May 2004) 2256 UNTS 119 (Stockholm Convention) preamble para. 11; UNFCCC (n 4) art 4 (9).

¹¹ Organisation of Eastern Caribbean States, *St George's Declaration of Principles of Environmental Sustainability in the OECS* (OECS 2006) 18 (St George's Declaration).

¹² Environmental Protection and Management Act 2019 s 3(1)(a).

¹³ STC 4360 of 5 April 2018 [Supreme Court of Colombia].

circumstances need not use the ILC draft guidelines. Further, the commentaries cite several treaties related to climate change, ozone depletion, and long-range transboundary air pollution. It is unlikely that negotiators on those topics would depart significantly from the current treaty regime, which form the basis of the project. Antigua and Barbuda recommends striking preambular paragraph 8.

Draft guideline 1

Antigua and Barbuda notes that both "atmospheric pollution" and "atmospheric degradation" do not need to be used as definitions. We recommend focusing on "atmospheric pollution" through an expanded definition that aligns with the common meaning in international law. Draft guideline 1 narrows the meaning of "atmospheric pollution" by adding the phrase "extending beyond the State of origin" to the definition of "pollution" found, as noted in the commentaries, in the Convention on Long-Range Transboundary Air Pollution and United Nations Convention on the Law of the Sea.¹⁴ Neither of these instruments narrow "pollution" to transboundary effects; the CLRTAP provides a separate definition of "long-range transboundary air pollution,"¹⁵ which the commentaries mention. A broader definition also aligns with the LBS Protocol, which defines pollution as "the introduction by humans, directly or indirectly, of substances or energy into the Convention area, which results or is likely to result in such deleterious effects as harm to living resources and marine ecosystems..."

However, the draft guidelines address protection of the atmosphere beyond transboundary effects, as the definition of "atmospheric degradation" indicates. The

¹⁴ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entry into force 16 November 1994) 1833 UNTS 3 (UNCLOS) art 1(4); Convention on Long-Range Transboundary Air Pollution (adopted 13 November 1979, entry into force 16 March 1983) 1302 UNTS 217 (CLRTAP) art 1(a).

¹⁵ CLRTAP (n 13) art 1(b).

commentaries to this draft guideline note that "atmospheric degradation" is meant to include the "problems of ozone depletion and climate change." Given the nature of the atmosphere, those problems will necessarily have "deleterious effects extending beyond the State of origin" and so also fall within the definition of "atmospheric pollution."

As a more general matter, Antigua and Barbuda does not find that the phrases "significant deleterious effects" or "atmospheric degradation" have enough support in international law to affirm their use in the draft guidelines. "Atmospheric degradation" has not yet been used in the international treaty regime. As stated in the commentaries, "significant deleterious effects" can be found in the Vienna Convention for the Protection of the Ozone Layer and the UNFCCC.¹⁶ However, both use "significant deleterious effects" in the definition of "adverse effects," not of "pollution" itself. Simply using "deleterious effects" would be more in line with the definition of "pollution" used in various multilateral treaties, such as the LBS Protocol.¹⁷ However, we recommend more clarity of when atmospheric effects are "deleterious," which should not be a self-judging standard.

For the sake of clarity, Antigua and Barbuda recommends only using the phrase "atmospheric pollution" and simplifying its definition by striking the phrase "extending beyond the State of origin."

Draft guideline 2

The commentary to paragraph 1 of draft guideline 2 notes "that whatever happens locally may sometimes have a bearing on the transboundary and global context in so far as the protection of the atmosphere is concerned." As the St George's Declaration states: "land and

¹⁶ Vienna Convention for the Protection of the Ozone Layer (adopted 22 March 1985, entry into force 22 September 1988) 1513 UNTS 293 (Vienna Convention) art 1(2); UNFCCC (n 4) art 1(1).

¹⁷ LBS Protocol (n 3) art I(c).

marine areas in the small island states constitute a single unit" and there is a "close inter-relationship between the various ecological systems in them." Antigua and Barbuda reiterates the need for a broad definition of "atmospheric pollution" that reflects this reality.

Paragraph 2 states that the present draft guidelines do not deal with several principles of international environmental law. However, other draft guidelines refer to "applicable rules of international law." We believe the Commission cannot address protection of the atmosphere without reference to the principles stated, which are applied in many of the international instruments cited in the commentaries.

Paragraph 3 notes that the present draft guidelines do not address "dual-impact substances," of which a non-exhaustive list is given. Considering the phrase "dual-impact substances" has not been used in the international treaty regime, it is unclear what it means in this context. The two examples given, black carbon and tropospheric ozone, both harm human health in addition to causing environmental damage. However, if that is the case, those two substances would "endanger human life and health" and therefore fall within the definition of "atmospheric pollution." At least two Protocols to the CLRTAP have dealt with tropospheric ozone;¹⁸ it would be odd for the commentaries to cite the CLRTAP, but then exclude consideration of its Protocols. Antigua and Barbuda recommends striking this paragraph unless a definition of "dual-impact substances" is provided.

Draft guideline 3

¹⁸ Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-Level Ozone (adopted 30 November 1999, entry into force 17 May 2005) 2319 UNTS 81 (Gothenburg Protocol) art 5(1)(c); Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution concerning the Control of Emissions of Volatile Organic Compounds or their Transboundary Fluxes (adopted 18 November 1991, entry into force 29 September 1997) 2001 UNTS 187 (1991 VOC Protocol) preamble para. 4.

The commentaries to draft guideline 3 note it is based on the Stockholm and Rio Declarations, while also incorporating language from the UNCLOS and UNFCCC. Antigua and Barbuda believes the formulation of draft guideline 3 should be stronger, given the context of the sources cited. The Stockholm and Rio Declarations simply state that activities within the State cannot "cause damage to the environment of other States."¹⁹ The "prevent, reduce or control" formulation from the UNCLOS replaces "cause" and imposes a positive obligation on States. The commentaries also draw on the UNFCCC's notion that States "should take precautionary measures to anticipate, prevent or minimize the causes of climate change[.]"²⁰

However, there are important contextual differences in the UNCLOS and UNFCCC. First, the UNCLOS uses "prevent, reduce *and* control." "And" rather than "or" implies a greater obligation. Second, that article has an additional paragraph stating a similar obligation as the Stockholm and Rio Declarations to "not cause damage by pollution to other States and their environment[.]"²¹ "Prevent, reduce and control" cannot be understood independently from the context of the entire article, which imposes a "do no harm" obligation. Additionally, the UNFCCC formulation is described in the context of the precautionary principle, which is specifically excluded by draft guideline 2. Again, the meaning of these terms cannot be understood without reference to their context, as noted in the Vienna Convention on the Law of Treaties.²² Antigua and Barbuda suggests that draft guideline 3 could read as follows: "States

¹⁹ 'Report of the United Nations Conference on Environment and Development' (Rio de Janeiro, 3–14 June 1992) (12 August 1992) UN Doc A/CONF.151/26 (Vol. I) (Rio Declaration) annex I principle 2; 'Report of the United Nations Conference on the Human Environment (Stockholm, 5–16 June 1972) (1973) UN Doc A/CONF.48/14/Rev. 1 (Stockholm Declaration) ch I principle 21.

²⁰ UNFCCC (n 4) art 3(3).

²¹ UNCLOS (n 13) art 194(2).

²² Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 31(1).

have the obligation to exercise due diligence in taking appropriate measures to protect the atmosphere from atmospheric pollution, in accordance with applicable rules of international law."

Antigua and Barbuda believes, as a general matter, there is an *erga omnes* international obligation to protect the atmosphere from pollution, whether termed "atmospheric pollution" or "atmospheric degradation" in the present draft guidelines.

Draft guideline 4

Antigua and Barbuda agrees that States have an obligation to ensure an environmental impact assessment (EIA) is completed in certain situations. However, draft guideline 4 does not clearly state when an EIA would be required. The phrase "significant adverse impact" is not defined in the commentaries; further, the phrase "deleterious effects" is already used in the definition of "atmospheric pollution" and "atmospheric degradation." Projects producing emissions that fall into these categories (or a simplified definition of "atmospheric pollution") should *prima facie* trigger the obligation to produce an EIA, without a requirement of "adverse effects," given their definitions.

Admittedly, the evidence cited in the commentaries better supports a *prima facie* EIA obligation only under the current definition of "atmospheric degradation," which includes the qualifier "significant" for "deleterious effects." The word "significant" is used, for example, in the *Pulp Mills* case.²³ The LBS Protocol requires an EIA in situations "likely to cause substantial pollution."²⁴ However, recent legislation in Antigua and Barbuda requires an EIA when "the

²³ *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14 (*Pulp Mills* case).

²⁴ LBS Protocol (n 3) art 7(2).

proposed development is likely to have any negative impact on the environment[.]”²⁵ Therefore, Antigua and Barbuda proposes draft guideline 4 to read: "States have the obligation to ensure that an environmental impact assessment is undertaken of proposed activities under their jurisdiction or control which are likely to cause atmospheric pollution." This assumes the definition of "atmospheric pollution" proposed in our commentary to draft guideline 1. We could also accept the insertion of "significant" or "substantial" before the phrase "atmospheric pollution," if better defined in the commentaries. That would not be necessary in front of the phrase "atmospheric degradation," if it is also used, as that term already includes "significant" in its definition and thus *prima facie* triggers an EIA.

Draft guideline 5

Antigua and Barbuda agrees with the conception of the atmosphere as a "natural resource with limited assimilation capacity[.]" The St George's Declaration refers to the need of Caribbean states to "manage their... atmospheric resources... to assure optimum sustainable productivity."²⁶ The recent IPCC report used the idea of a "carbon budget" extensively, which it defined as "cumulative CO₂ emissions compatible with a specific level of warming."²⁷ Phrases like "carbon space," "atmospheric space,"²⁸ "ecological space,"²⁹ "greenhouse gas budget,"³⁰ and

²⁵ Environmental Protection and Management Act (n 12) s 41(2).

²⁶ St George's Declaration (n 11) 18.

²⁷ Rogelj and others, 'Mitigation Pathways Compatible with 1.5°C in the Context of Sustainable Development' in Valérie Masson-Delmotte and others (eds), *Global Warming of 1.5°C* (Intergovernmental Panel on Climate Change 2018) 101.

²⁸ Bolivia unsuccessfully proposed, on behalf of the ALBA group, using these two phrases in the Paris Agreement. María Pía Carazo, 'Analysis of the Provisions of the Agreement, Contextual Provisions (Preamble and Article I)' in Klein and others (eds), *The Paris Agreement on Climate Change: Analysis and Commentary* (OUP 2017) n 37.

²⁹ Tim Hayward, 'Human Rights Versus Emissions Rights: Climate Justice and the Equitable Distribution of Ecological Space' (2007) 21 *Ethics & Int'l Affairs* 431.

³⁰ Obersteiner and others, 'How to Spend a Dwindling Greenhouse Gas Budget' (2018) 8 *Nature Climate Change* 7.

"emissions budget"³¹ have also been used. Any of these conceptions support the notion expressed in draft guideline 5. Given the uncertainty surrounding the proper term, Antigua and Barbuda considers it is best to proceed with a description of the concept, as the draft guidelines currently provide, rather than selecting one or another of the various formulations.

While it is clear the atmosphere has limited assimilative properties, access to that resource is controversial among States. The St George's Declaration notes that OECS "Member States remain unsustainably dependent on costly, non-renewable or poorly managed sources of fuel that pollute the air and contribute to climate change."³² The Barbados Declaration described the "urgent need in small island developing States to address the constraints to sustainable development... which lead to... limited means available to exploit natural resources on a sustainable basis."³³ The Mauritius Declaration affirmed that SIDS "continue to be a special case for sustainable development."³⁴ The five-year review of the Mauritius Strategy of Implementation, to which the Mauritius Declaration was appended, recognized that "[t]he small size, remoteness, narrow resource and export base, and exposure to global environmental challenges of most small island developing States have worked against efforts towards sustainable development."³⁵ The SAMOA Pathway reaffirmed that "small island developing

³¹ David R. Morrow, 'Fairness in Allocating the Global Emissions Budget' (2017) 26 *Env Values* 669.

³² St George's Declaration (n 11) 14.

³³ 'Report of the Global Conference on the Sustainable Development of Small Island Developing States' (Bridgetown, 25 April–6 May 1994) (October 1994) UN Doc A/CONF.167/9 (Barbados Declaration) part 2 art 6.

³⁴ 'Report of the International Meeting to Review the Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States' (Port Louis, 10–14 January 2005) (14 January 2005) UN Doc A/CONF.207/11 (Mauritius Declaration) annex I para 5.

³⁵ Outcome Document of the High-level Review Meeting on the Implementation of the Mauritius Strategy for the Further Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States, UNGA Res 65/2 (15 October 2010).

States remain a special case for sustainable development in view of their unique and particular vulnerabilities."³⁶

Antigua and Barbuda recommends reflecting more than 20 years of State practice by noting the special needs and specific circumstances of SIDS in draft guideline 5 or 6. The commentaries note that paragraph 2 is meant "more as a statement of international policy and regulation" than a source of rights and obligations. The special situation of SIDS has been consistently affirmed in the political declarations reflecting such a policy. This could be noted in the commentaries. However, we also believe that recognizing the special situation of developing countries, including SIDS, is a legal principle that should be stated in draft guideline 6.

Draft guideline 6

Given the discussion of draft guideline 5, Antigua and Barbuda recommends updating draft guideline 6 to read as follows: "The atmosphere should be utilized in an equitable and reasonable manner, taking into account the interests of present and future generations and the special needs and specific circumstances of developing States, including small island developing States."

Draft guideline 7

Antigua and Barbuda agrees that State practice may be too limited on this topic to merit inclusion as a separate draft guideline.³⁷

It could be argued that some types of large-scale modification, like the carbon dioxide removal techniques cited in the commentaries, would not fall under the definitions of

³⁶ SIDS Accelerated Modalities of Action (SAMOA) Pathway, UNGA Res 69/15 (15 December 2014).

³⁷ See, for example, Conference of the Parties to the Convention on Biological Diversity, 'Climate-Related Geoengineering' (8 December 2016) CBD/COP/DEC/XIII/14 para. 4 (noting that "very few Parties responded to the invitation to provide information").

atmospheric pollution or degradation, as their effects might not be "deleterious." Then, those activities would also not trigger due diligence or an EIA under draft guidelines 3 and 4, contrary to the assumption in paragraph 11 of the commentaries on the latter draft guideline.

However, intentional large-scale modification of the atmosphere could be understood to be covered by draft guidelines 3 and 4, which cover conduct over which the State does not have direct control. These draft guidelines should then also apply to, *a fortiori*, atmospheric pollution or degradation over which the State does have direct control, as the commentaries to draft guideline 3 include a discussion of when State responsibility is invoked for atmospheric pollution or degradation. States, or actors within States, may undertake large-scale modifications that are intended to be beneficial, then argue those actions do not trigger the requirements of draft guidelines 3 and 4 because the intended effects are not "deleterious." The invocation of these draft guidelines depends on the likelihood of pollution or degradation, rather than the intention of the parties. Considering the precautionary principle, States should have to err on the side of caution when considering the likelihood of "deleterious" effects.

If large-scale intentional modifications of the atmosphere are not clearly covered by draft guidelines 3 and 4, that would support inclusion of a separate draft guideline dealing with atmospheric modification, like the one discussed here. However, given our concern that some States may wish to carry out international modifications without an EIA, by arguing that so-called benign actions would not trigger the requirement, we would suggest clarifying the need for an EIA in the main text of the draft guideline, rather than in the commentaries. The Conference of Parties to the Convention on Biological Diversity has stated that "the application of the precautionary approach as well as customary international law... may be relevant for

geoengineering activities but would still form an incomplete basis for global regulation[.]”³⁸ The Secretary-General recently noted that “[t]here are important gaps and deficiencies in specific sectoral regimes” of international environmental law, including “some geo-engineering activities.”³⁹ The ILC can and should step in to progressively develop this area of the law, while leaving room for States to address it through multilateral negotiations.

Draft guideline 8

Antigua and Barbuda agrees that States must cooperate in protecting the atmosphere. However, this cooperation should go beyond “enhancing scientific knowledge.” International instruments consistently emphasize the need for developed States to assist developing States.

The Paris Agreement states that “[d]eveloped country Parties shall provide financial resources to assist developing country parties” and that “[c]apacity-building under this agreement should enhance the capacity and ability of developing country parties [.]”⁴⁰ Other examples of developed country obligations to assist developing countries include, *inter alia*, the Nagoya Protocol, the Stockholm Convention, the Kyoto Protocol, and the UNFCCC.⁴¹ Caribbean regional instruments affirm this notion as well. The Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean notes in its article on cooperation that “[t]he Parties shall give particular consideration

³⁸ Conference of the Parties to the Convention on Biological Diversity, 'Climate-Related Geoengineering' (5 December 2012) CBD/COP/DEC/XI/20 para. 11.

³⁹ Report of the Secretary-General, 'Gaps in International Environmental Law and Environment-Related Instruments: Towards a Global Pact for the Environment' (2018) UN Doc A/73/419 para. 104.

⁴⁰ Paris Agreement (n 3) arts 9(1) & 11(1).

⁴¹ Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (adopted 29 October 2010, entry into force 12 October 2014) UN Doc C.N.625.2016.TREATIES-XXVII.8.b (Nagoya Protocol) art 22; Stockholm Convention (n 10) art 12; Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entry into force 16 February 2005) 2303 UNTS 162 (Kyoto Protocol) art 10(e); UNFCCC (n 4) art 9(2)(d).

to least developed countries, landlocked developing countries and small island developing States."⁴² The Treaty of Basseterre, when addressing environmental sustainability, notes the need for capacity building to ensure member States can implement the St George's Declaration.⁴³

Antigua and Barbuda suggests adding a third paragraph recognizing the special needs and specific circumstances of developing States, which could be formulated as follows: "Cooperation should reflect the special needs and specific circumstances of developing States, including small island developing States, such as through capacity building and technology transfer." We note that this is also addressed in draft guideline 11, paragraph 2, subparagraph a. However, capacity building is required not just to facilitate compliance when States are noncompliant with obligations, but also when cooperation occurs before a situation of noncompliance. This should be reflected in draft guideline 8.

Draft guideline 9

Antigua and Barbuda supports the inclusion of paragraph 3 of draft guideline 9; however, for the same reason discussed in our commentary to draft preambular paragraph 6, we recommend striking the phrase "affected by sea-level rise." Again, this has the effect of limiting the "special consideration" to only the damage of sea-level rise, and not the other consequences of atmospheric degradation and pollution, which disproportionately affect SIDS. However, the commentaries can and should recognize the impacts of sea-level rise.

Draft guideline 10

⁴² Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (adopted 4 March 2018, opened for signature 9 April 2018) UN Doc C.N.195.2018.TREATIES-XXVII.18 (Regional Agreement) art 11(2).

⁴³ Revised Treaty of Basseterre establishing the Organisation of Eastern Caribbean States Economic Union (adopted 18 June 2010, entry into force 20 January 2011) 2018 UN Statement of Treaties and Int'l Agreements 54946 (Treaty of Basseterre) protocol art 24.

Antigua and Barbuda supports inclusion of draft guideline 10, but suggests adding to paragraph 2 a phrase that recognizes the principle of common but differentiated responsibilities. Mirroring the Paris Agreement, paragraph 2 could read as follows: "States should endeavour to give effect to the recommendations contained in the present draft guidelines, in the light of different national circumstances, particularly those of developing States."

Draft guideline 11

Antigua and Barbuda supports the inclusion of draft guideline 11, which reflects the general principle of *pacta sunt servanda* in international law. As noted in our commentary on draft guideline 9, we welcome the recognition that facilitative measures should include capacity building in subparagraph (a) of paragraph 2. However, this should also be noted in subparagraph b of 2. Antigua and Barbuda recommends adding another sentence to this subparagraph, which could read as follows: "When determining appropriate enforcement procedures, States and international organizations should consider the capabilities and special conditions of the affected State."

Draft guideline 12

As a general matter, Antigua and Barbuda underscores the importance of the peaceful settlement of disputes. We welcome the role that "technical and scientific experts" can play in resolving disputes peacefully, particularly as it relates to protection of the atmosphere. The Commission should examine, for example, the role of *amici curiae* and expert witnesses before international courts and tribunals, and how consideration of such evidence could facilitate protection of the atmosphere, with due respect for the principle of *non ultra petita*. However, the appropriate role of such evidence must reflect the special needs and specific circumstances of developing States, particularly their lack of capacity to provide technical and scientific experts.

Opening the door to *amici* and expert witnesses should ensure the equality of States before the law. Developed States should not be able to overwhelm the proceeding with experts and supportive *amici* not available to developed States due to resource constraints. Affirmative measures should be considered to establish equality, like a trust fund for developing States to call expert witnesses.

Antigua and Barbuda would like to again thank Special Rapporteur Murase for his rigor and clarity in approaching a difficult topic. We look forward to the ILC's discussion at its upcoming session, which Antigua and Barbuda hopes will reflect the vulnerability of developing States to atmospheric change.