



General Assembly

Distr.: General
11 February 2020

Original: English

International Law Commission

Seventy-second session

Geneva, 27 April–5 June and 6 July–7 August 2020

Sixth report on the protection of the atmosphere

by Murase Shinya, Special Rapporteur*

Contents

	<i>Page</i>
Introduction	3
A. Work to date on the topic	3
B. Purpose and structure of the present report.	4
I. Comments and observations on the draft preamble and guidelines, as adopted on first reading	4
A. General comments and observations	5
1. Scope and methodology	5
2. The 2013 understanding	6
3. Observations of the Special Rapporteur	7
B. Draft preamble	8
1. Comments and observations	8
2. Recommendation of the Special Rapporteur	11
C. Draft guideline 1 (Use of terms)	13
1. Comments and observations	13
2. Recommendation of the Special Rapporteur	14
D. Draft guideline 2 (Scope of the guidelines)	15

* The Special Rapporteur wishes to thank Hiromi Masayuki, research assistant at Sophia University, Andrew Van Duyn and Philip Dalgarno, Juris Doctor candidates at New York University, and Zhang Maoli, PhD candidate at Peking University, for their assistance in preparing the present report. Special thanks go to the assistants sent by the Ministry of Foreign Affairs of Japan and to the interns sent by New York University School of Law over the years. The Special Rapporteur wishes to express his deep appreciation both to Nagai Masaharu, former Deputy Director of the Division of Environmental Law and Conventions of the United Nations Environment Programme, and Peter H. Sand for their support extended to him from the beginning of this project.



1.	Comments and observations	15
2.	Recommendation of the Special Rapporteur	16
E.	Draft guideline 3 (Obligation to protect the atmosphere)	16
1.	Comments and observations	16
2.	Recommendation of the Special Rapporteur	18
F.	Draft guideline 4 (Environmental impact assessment).	18
1.	Comments and observations	18
2.	Recommendation of the Special Rapporteur	19
G.	Draft guideline 5 (Sustainable utilization of the atmosphere)	20
1.	Comments and observations	20
2.	Recommendation of the Special Rapporteur	20
H.	Draft guideline 6 (Equitable and reasonable utilization of the atmosphere)	21
1.	Comments and observations	21
2.	Recommendation of the Special Rapporteur	21
I.	Draft guideline 7 (Intentional large-scale modification of the atmosphere).	21
1.	Comments and observations	21
2.	Recommendation of the Special Rapporteur	23
J.	Draft guideline 8 (International cooperation)	24
1.	Comments and observations	24
2.	Recommendation of the Special Rapporteur	24
K.	Draft guideline 9 (Interrelationship among relevant rules)	25
1.	Comments and observations	25
2.	Recommendation of the Special Rapporteur	27
L.	Draft guideline 10 (Implementation).	28
1.	Comments and observations	28
2.	Recommendation of the Special Rapporteur	30
M.	Draft guideline 11 (Compliance)	31
1.	Comments and observations	31
2.	Recommendation of the Special Rapporteur	33
N.	Draft guideline 12 (Dispute settlement)	33
1.	Comments and observations	33
2.	Recommendation of the Special Rapporteur	36
II.	Recommendation to the General Assembly.	36
Annex		
	Draft preamble and guidelines adopted by the Commission on first reading in 2018, with the Special Rapporteur's recommended changes	38

Introduction

A. Work to date on the topic

1. At its sixty-fifth session (2013), the Commission decided to include the topic “Protection of the atmosphere” in its programme of work, subject to an understanding, and appointed Murase Shinya as Special Rapporteur.¹

2. The Commission received and considered the first report of the Special Rapporteur at its sixty-sixth session (2014);² the second report at its sixty-seventh session (2015);³ the third report at its sixty-eighth session (2016);⁴ the fourth report at its sixty-ninth session (2017);⁵ and the fifth report at its seventieth session (2018).⁶

3. At its seventieth session in 2018, the Commission adopted, on first reading, a complete set of draft guidelines on the protection of the atmosphere, comprised of a draft preamble and 12 draft guidelines, with commentaries thereto.⁷ The Commission decided to transmit the draft guidelines through the Secretary-General to States and international organizations for comments and observations, with the request that they be submitted to the Secretary-General by 15 December 2019.⁸

4. During the debate on the annual report of the Commission in the Sixth Committee in 2018, 40 States made observations on this topic, including presentations on behalf of the Caribbean Community (CARICOM) and the Nordic countries.⁹ Observations were also made by the European Union and the Permanent Court of Arbitration.

¹ At its 3197th meeting, on 9 August 2013 (*Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10 (A/68/10)*), para. 168. The Commission included the topic in its programme of work 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.” The General Assembly, in paragraph 6 of its resolution 68/112 of 16 December 2013, took note of the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its sixty-third session (2011), on the basis of the proposal contained in annex B to the report of the Commission (*Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10 (A/66/10)*), para. 365).

² A/CN.4/667.

³ A/CN.4/681 and Corr.1 (Chinese only).

⁴ A/CN.4/692.

⁵ A/CN.4/705 and Corr.1.

⁶ A/CN.4/711.

⁷ See the report of the Commission on the work of its seventieth session, *Official Records of the General Assembly, Seventy-third session, Supplement No. 10 (A/73/10)*, paras. 67–78.

⁸ *Ibid.*, para. 76.

⁹ Presentations to the Sixth Committee on the topic in 2018 were made by: Austria; Bahamas (on behalf of CARICOM); Belarus; Chile; China; Columbia; Cuba; Czech Republic; El Salvador; Estonia; Finland (on behalf of the Nordic countries); France; Germany; India; Iran (Islamic Republic of); Israel; Italy; Japan; Malawi; Malaysia; Mexico; Micronesia (Federated States of); New Zealand; Peru; Poland; Portugal; Republic of Korea; Romania; Sierra Leone; Singapore; Slovakia; South Africa; Spain; Sri Lanka; Sudan; Tonga; Turkey; United Kingdom; United States; and Viet Nam.

5. As of 20 January 2020, written comments on this topic had been received from 13 States:¹⁰ Antigua and Barbuda; Argentina; Belarus; Belgium; Czech Republic; Estonia; Germany; Japan; Netherlands, Portugal; Togo; United Kingdom of Great Britain and Northern Ireland; and United States of America. Written comments were also received from two international organizations (or offices thereof): the United Nations Environment Programme (UNEP) and the European Union.

B. Purpose and structure of the present report

6. The purpose of the present report is primarily to review the comments and observations made by States and international organizations since the adoption, on first reading in 2018, of the draft preamble and guidelines on the protection of the atmosphere. Attention is also paid to comments and observations received prior to the adoption on first reading, where such comments appear to remain pertinent to the current text.

7. Although the comments and observations supported the majority of the text of the draft preamble and guidelines, there were also criticisms and calls for changes to some of their provisions. In the present report, the Special Rapporteur analyses all such comments and observations, assesses whether such changes are warranted and, if so, makes proposals for such changes.

8. Due to limitations on the length of the report, the comments and observations by States and international organizations, along with the relevant footnotes, had to be substantially shortened. Any comments and observations received after submission of the report (20 January 2020) will be considered by the Commission in the course of its seventy-second session.

9. Chapter I of the report begins with a discussion of the general comments and observations received with respect to the topic. Thereafter, there are a series of subsections on the various components of the draft guidelines (the draft preamble and each of the draft guidelines), providing in each instance: (a) the comments and observations received with respect to that text; and (b) the Special Rapporteur's recommendation on whether, in the light of those comments, any changes should be made either to the draft guidelines or to the Commission's commentaries thereto, together with the Special Rapporteur's proposed changes, as appropriate.

10. In chapter II, the Special Rapporteur addresses the final form of the draft guidelines and notes that, if the Commission completes the second reading on this topic at its seventy-second session, then it will also need to decide on a recommendation to the General Assembly regarding the draft guidelines.

I. Comments and observations on the draft preamble and guidelines, as adopted on first reading

11. States and international organizations provided comments and observations both in writing and in statements before the Sixth Committee at the seventy-third session of the General Assembly in 2018.¹¹

¹⁰ The written comments and observations received in response to the Commission's request in 2018 are reproduced and organized thematically in [A/CN.4/735](#).

¹¹ Certain statements to the Sixth Committee are available on the United Nations PaperSmart portal at <https://papersmart.unmeetings.org/ga/sixth/73rd-session/statements>.

A. General comments and observations

1. Scope and methodology

12. States in their statements before the Sixth Committee and their written comments in 2018 welcomed the adoption of the draft guidelines on protection of the atmosphere, with commentaries thereto, on first reading, and expressed their support for the work of the Commission on the topic, stressing its importance to the international community.¹² Tonga stated that “the draft guidelines as adopted on first reading, and the accompanying commentary can provide useful guidance to States in addressing the impacts of climate change that are rapidly degrading our planet”.¹³ Portugal underlined “that there should be a methodological approach based on the ‘cause and effect’ double element while addressing [the problem]”.¹⁴ Chile noted that the new draft guidelines “will require more development and precision”, as they “do not introduce innovative legal elements to solve the problems posed by the diversity of legal regimes that refer to the protection of the atmosphere ... or to effectively face the challenges concerning the observance by States of international obligations regarding the protection of the atmosphere”.¹⁵

13. States also expressed support in their written comments and observations. For instance, Portugal underscored the importance of the topic, stating that it was of paramount importance that the legal analysis by the Commission on the protection of the atmosphere address the problem from a “cause and effect” perspective.¹⁶ The Netherlands applauded the fact that the Commission had put the important issue of the protection of the atmosphere on its agenda, and that treating the atmosphere as a “single global unit” was a positive development.¹⁷ Belgium noted that the draft guidelines stressed the fact that the atmosphere was essential for the survival of humans, plants and animals and that the protection of the atmosphere was therefore necessary, and welcomed the identification of a legal framework supporting that principle.¹⁸ Estonia also welcomed the draft guidelines as the first international synthesis document consolidating the main principles and concerns regarding the protection of the atmosphere at the global level. Besides the relevant multilateral agreements, which are listed in the commentaries to the guidelines, Estonia stressed the “value of the in-depth analysis of relevant international judicial and arbitral

¹² Bahamas (on behalf of CARICOM), [A/C.6/73/SR.20](#), para. 34; Chile, statement to the Sixth Committee of 30 October 2018 (available on the PaperSmart portal); Colombia, [A/C.6/73/SR.27](#), para. 33; Czech Republic, statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal); Estonia, [A/C.6/73/SR.26](#), para. 41 and statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal); Finland (on behalf of the Nordic countries), [A/C.6/73/SR.24](#), para. 116; France, [A/C.6/73/SR.26](#), para. 2; Germany, [A/C.6/73/SR.26](#), para. 24, and comments from Germany ([A/CN.4/735](#)); Italy, [A/C.6/73/SR.25](#), para. 24; Japan, [A/C.6/73/SR.26](#), para. 32; Portugal, statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal); Singapore, [A/C.6/73/SR.25](#), para. 53, and statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal); South Africa, statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal); Turkey, statement to the Sixth Committee of 30 October 2018 (available on the PaperSmart portal); Viet Nam, statement to the Sixth Committee of 30 October 2018 (available on the PaperSmart portal).

¹³ Tonga, statement to the Sixth Committee of 30 October 2018 (available on the PaperSmart portal).

¹⁴ Portugal, statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal).

¹⁵ Chile, statement to the Sixth Committee of 30 October 2018 (available on the PaperSmart portal).

¹⁶ Comments from Portugal ([A/CN.4/735](#)).

¹⁷ Comments from the Netherlands ([A/CN.4/735](#)).

¹⁸ Comments from Belgium ([A/CN.4/735](#)).

practice, as well as the exhaustive overview of the legal theory presented in the commentaries”.¹⁹ Argentina took a positive view of the systemic approach that had been employed, not only in a normative sense and on the basis of a recognition of the relationships that were being woven between the norms of international law relating to the atmosphere and the norms of other legal areas, but in order to allow for collective action by States in adopting mitigation measures that took into account the entire atmosphere, hydrosphere, biosphere and geosphere, and their interactions. With regard to the working methodology, Argentina observed that it was encouraging that a wide range of applicable international law standards had been considered in the development of the project.²⁰

14. The United Kingdom observed that:

“Atmospheric pollution and atmospheric degradation (as defined by draft guideline 1) have multiple causes and sources, the cause/effect relationship is often complex, and any single State can be both a source and a victim while all States may contribute to a particular problem. These principles [laid down in draft guidelines 3 to 6], and their application to particular aspects of protection of the atmosphere, are in fact being addressed in the course of political (treaty) negotiations – and in particular those negotiations relating to climate change, ozone depletion, or long-range transboundary air pollution.”²¹

15. Some States expressed doubts regarding the usefulness of the work of the Commission on the topic.²² The United States indicated that it “has found many elements of this topic problematic”.²³ Slovakia indicated that “the Commission did not modify the highly abstract treatment of the topic, namely restating obvious and often very rudimentary general rules or principles of international law that are not specific for the protection of the atmosphere”.²⁴ Slovakia also stated that it saw “the potential value of the guidelines as model clauses or model provisions for future agreements on the topic, and not as a set of stand-alone guidelines with normative content”.²⁵

2. The 2013 understanding

16. Several States noted with concern the narrow focus of the 2013 understanding (see footnote 1 above). Antigua and Barbuda expressed regret that the work on the topic had been limited in its scope since the project began in 2013 and believed that the work of the Commission should not be limited by the understanding, particularly on such an important topic.²⁶ Colombia applauded the Special Rapporteur’s progress “despite the limits within which he had had to work”.²⁷ The Federated States of Micronesia expressed concern that: “While it is beneficial to limit the scope of a topic in order to make the work manageable and useful, it is not appropriate to limit that scope for primarily (if not purely) political reasons, especially when those limits

¹⁹ Comments from Estonia (A/CN.4/735).

²⁰ Comments from Argentina (A/CN.4/735).

²¹ Comments from the United Kingdom (A/CN.4/735).

²² Czech Republic, A/C.6/73/SR.25, para. 59; Slovakia, A/C.6/73/SR.26, para. 15; United Kingdom, A/C.6/73/SR.27, para. 65.

²³ United States, statement to the Sixth Committee of 31 October 2018 (available on the PaperSmart portal). See also A/C.6/73/SR.29, para. 35.

²⁴ Slovakia, statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal).

²⁵ Slovakia, A/C.6/73/SR.26, para. 17.

²⁶ Comments from Antigua and Barbuda (A/CN.4/735).

²⁷ Colombia, A/C.6/73/SR.27, para. 30.

undercut much of the value that the work can provide to the international community.”²⁸ The Netherlands regretted that:

Instead of preparing a number of draft articles on the protection of the atmosphere, [the Commission] has confined itself to preparing draft guidelines, while subjecting itself to a great many restrictions. In view of the developments that have already taken place in international law concerning long-range transboundary air pollution, ozone depletion and climate change – all parts of the atmosphere – there would seem to be insufficient reason for the restrictions the Commission has imposed on itself by means of the 2013 understanding, particularly with regard to points (a) and (d).

... It is unclear why important, recognized international principles of environmental law, such as the polluter-pays principle, the precautionary principle and common but differentiated responsibilities, needed to be disregarded. The fear that the draft guidelines would interfere with “relevant political negotiations, including on climate change, ozone depletion and long-range transboundary air pollution”, also seems exaggerated.²⁹

Italy appreciated “the attention of the Special Rapporteur in avoiding interference with ongoing political negotiations on environmental protection”.³⁰ The Czech Republic observed that, despite being categorized as “guidelines”, several draft provisions were missing any element of “guidance”. In the view of the Czech Republic, it was necessary for the Commission to formulate more precisely the purpose of individual draft guidelines in order to provide guidance to the negotiators of future treaty instruments dealing with issues related to the protection of the atmosphere.³¹

17. In contrast, the United Kingdom expressed concern that the scope of the draft guidelines went beyond the limitations agreed to by the Commission in 2013.³² China and the Republic of Korea reminded the Commission to follow the understanding.³³

18. Nonetheless, States noted that the Special Rapporteur and the Commission had fully complied with the understanding in completing the first reading of the topic. Germany “has noted with satisfaction that both the report and the draft guidelines clearly remain within this understanding”.³⁴ Japan also noted that “the Commission and the Special Rapporteur have faithfully respected the 2013 understanding in completing the first reading of the topic” and thus: “A question may be raised as to whether it is necessary to repeat the content of the 2013 understanding in the draft guidelines.”³⁵

3. Observations of the Special Rapporteur

19. As noted above, the Commission and the Special Rapporteur have faithfully complied with the conditions of the 2013 understanding. There is therefore no need to reiterate its contents in the draft guidelines on second reading. As some members of both the Sixth Committee and the Commission noted, imposing conditions on the Special Rapporteur had never been done before and was “a disgrace” and “unethical”

²⁸ Federated States of Micronesia, statement to the Sixth Committee of 30 October 2018 (available on the PaperSmart portal).

²⁹ Comments from the Netherlands (A/CN.4/735).

³⁰ Italy, statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal).

³¹ Comments from the Czech Republic (A/CN.4/735).

³² Comments from the United Kingdom (A/CN.4/735).

³³ China, A/C.6/73/SR.25, para. 11; Republic of Korea, A/C.6/73/SR.27, para. 79.

³⁴ Comments from Germany (A/CN.4/735).

³⁵ Comments from Japan (A/CN.4/735).

for the Commission,³⁶ not to mention “humiliating” for the Special Rapporteur,³⁷ who had nonetheless complied with them faithfully. The Special Rapporteur wishes to propose that references to the understanding in the preamble, as well as in draft guideline 2, paragraphs 2 and 3, be deleted during the second reading of the topic in 2020. Furthermore, these conditions were imposed not by the Sixth Committee (which took note of the topic as proposed in 2011 without any conditions), but by the Commission itself. Some States and international organizations proposed in their oral and written comments to insert references in the draft guidelines to the “precautionary principle”, “common but differentiated responsibilities” and “dual-impact substances”, which are explicitly prohibited in the 2013 understanding. This is certainly legitimate for States and international organizations that are not bound by the understanding. Thus, the Special Rapporteur proposes that the Commission consider: (a) deleting those provisions that were copied and pasted verbatim from the 2013 understanding, namely, the eighth preambular paragraph and draft guideline 2, paragraphs 2 and 3; and (b) referring to some of the principles and substances in the relevant preambular paragraphs and draft guidelines, as recommended by the Special Rapporteur below and supported by certain States and international organizations.

B. Draft preamble

1. Comments and observations

20. There is broad support for the preamble among States. Chile applauded the preamble for managing to “adequately encompass the various topics related to the protection of the atmosphere”.³⁸ Attention was drawn to the relevance of developments in relation to the Paris Agreement,³⁹ and the Global Pact for the Environment.⁴⁰ The European Union reiterated its suggestion to include “in the preamble references to specific agreements such as the Montreal Protocol on Substances that Deplete the Ozone Layer, the Convention on Long-range Transboundary Air Pollution, including the 1999 Gothenburg Protocol to Abate Acidification, Eutrophication and Ground-level Ozone, and the need for its ratification, and resolution 3/8 of the United Nations Environment Assembly regarding air pollution”.⁴¹ It also “urged the Commission to consider incorporating a science-based policy as a general principle in the draft [guidelines]”.⁴²

21. Belgium noted that, as stated in the first preambular paragraph, the draft guidelines stressed the fact that the atmosphere was essential for the survival of humans, plants and animals and that the protection of the atmosphere was therefore necessary.⁴³ Portugal proposed to insert the words “a limited natural resource”

³⁶ Mr. Enrique Candiotti, [A/CN.4/SR.3212](#); Mr. Chris Peter, [A/CN.4/SR.3247](#) and [A/CN.4/SR.3358](#).

³⁷ Mr. Murase, [A/CN.4/SR.3413](#).

³⁸ Chile, statement to the Sixth Committee of 30 October 2018 (available on the PaperSmart portal).

³⁹ Finland (on behalf of the Nordic countries), [A/C.6/73/SR.24](#), para. 118. See also the Paris Agreement (Paris, 12 December 2015), [FCCC/CP/2015/10/Add.1](#), annex.

⁴⁰ European Union, [A/C.6/73/SR.24](#), para. 106; France, [A/C.6/73/SR.26](#), para. 2; Cuba, [A/C.6/73/SR.28](#), para. 18.

⁴¹ European Union, [A/C.6/73/SR.24](#), para. 103. See also the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal, 16 September 1987), United Nations, *Treaty Series*, vol. 1522, No. 26369, p. 3; the Convention on Long-range Transboundary Air Pollution (Geneva, 1979), United Nations, *Treaty Series*, vol. 1302, No. 21623, p. 217; the Protocol to the 1979 Convention on Long-range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-level Ozone (Gothenburg, 30 November 1999), United Nations, *Treaty Series*, vol. 2349, No. 21623, p. 81.

⁴² *Ibid.*, para. 108.

⁴³ Comments from Belgium ([A/CN.4/735](#)).

between the words “is” and “essential” (in paragraph (2) of the commentary it mentions “limited resource”).⁴⁴

22. Belarus proposed to specify, in the second preambular paragraph, what was being polluted (in the Russian version of the text, which was unclear).⁴⁵ Estonia proposed to refer to the role of the atmosphere in the transport and dispersion of polluting and degrading substances, rather than limiting the transport and dispersion to the atmosphere alone (excluding other media like water), as might be understood from the present wording.⁴⁶ Antigua and Barbuda recommended deleting the term “and degrading”, believing that only the term “polluting substances” should be used, as all air pollution by its nature degraded the atmosphere.⁴⁷

23. Peru expressed its appreciation that the third preambular paragraph addressed “the close interaction between the atmosphere and the oceans”, which “confirmed the effect of climate change on oceans and the importance of increasing the scientific understanding of the oceans-atmosphere interface”.⁴⁸ Antigua and Barbuda underscored the mention in the third draft preambular paragraph of the “close interaction between the atmosphere and the oceans”, a fact that the country knew first hand. Caribbean regional organizations, such as the Caribbean Regional Environmental Programme and the Organisation of Eastern Caribbean States, had been stating that fact for more than twenty years.⁴⁹

24. With regard to the fourth preambular paragraph, the European Union, referring to the “pressing concern of the international community”, considered that it deviated from the more established expression “common concern of humankind, which was often used in international environmental law”. The European Union therefore suggested that the Commission use the wording “common concern of humankind”.⁵⁰ Finland, on behalf of the Nordic countries, questioned the use of “a pressing concern of the international community as a whole”, rather than “common concern of humankind”, as found in the Paris Agreement. It also stated that: “The Nordic countries would like to encourage the Commission to elaborate on the implications of the legal concept of ‘common concern of humankind’ in the context of environmental law on the protection of the atmosphere.”⁵¹ Germany stated that it

⁴⁴ Comments from Portugal (A/CN.4/735).

⁴⁵ Comments from Belarus (A/CN.4/735).

⁴⁶ Comments from Estonia (A/CN.4/735).

⁴⁷ Comments from Antigua and Barbuda (A/CN.4/735).

⁴⁸ Peru, A/C.6/73/SR.27, para. 75.

⁴⁹ Comments from Antigua and Barbuda (A/CN.4/735). A report by the Organization of Eastern Caribbean States in 1992 expressed particular concern with the effect of climate change on biodiversity in the Caribbean region, including aquatic and terrestrial ecosystems (*OECS Regional Report on Environment and Development* (Saint Lucia, 1992), p. 61). In 1993, the Caribbean Environment Programme noted the impact of climate change on the Intra-Americas Sea, which comprises the Caribbean Sea and the Gulf of Mexico (see G.A. 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* (1993)). The Protocol concerning Pollution from Land-based Sources and Activities to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region recognized (in its sixth preambular paragraph) “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”, which are defined (in article I (d)) so as to include “atmospheric deposition originating from sources located on its territory”. The Protocol was adopted on 6 October 1999 and entered into force on 13 August 2010 (Treaties and Other International Acts Series 10-813).

⁵⁰ European Union, A/C.6/73/SR.24, para. 104, and comments from the European Union (A/CN.4/735).

⁵¹ Finland (on behalf of the Nordic countries), statement to the Sixth Committee of 25 October 2018 (available on the PaperSmart portal). See also A/C.6/73/SR.24, para. 119.

might be justified to follow the initial recommendation by the Special Rapporteur and to classify atmospheric protection as a “common concern of humankind”.⁵² The Netherlands also preferred “common concern of humankind”, which was generally accepted, finding that the use of the expression “a pressing concern” could create unnecessary confusion.⁵³ Portugal argued that the protection of the atmosphere should be referred to as “a common concern of humankind”, in accordance with international legally binding instruments such as the United Nations Framework Convention on Climate Change,⁵⁴ advocating that, for progressive development of international law, a normative statement was preferable over a purely factual one.⁵⁵ Antigua and Barbuda, Colombia, Iran (the Islamic Republic of), Japan, Sri Lanka and Viet Nam also supported the use of “a common concern of humankind”.⁵⁶

25. Sri Lanka supported the inclusion of the fifth preambular paragraph, stating that it was “entirely consistent with the current trend of legal instruments dealing with the global commons”.⁵⁷

26. Sri Lanka suggested strengthening the language of the sixth preambular paragraph “to reflect scientific warnings” on the effect of sea-level rise.⁵⁸ Antigua and Barbuda proposed the following language for the paragraph in line with the Paris Agreement, the Stockholm Convention on Persistent Organic Pollutants⁵⁹ and the United Nations Framework Convention on Climate Change: “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.”⁶⁰

27. Estonia believed that the order of the paragraphs should be rearranged so that the reference in the seventh preambular paragraph to “the interests of future generations of humankind” in relation to the quality of the atmosphere appeared before the fourth preambular paragraph.⁶¹ Antigua and Barbuda supported “considering the interests of future generations”.⁶²

⁵² Comments from Germany (A/CN.4/735), stating that: “In the United Nations Framework Convention on Climate Change and in General Assembly resolution 43/53, climate change is already explicitly classified as a common concern of humankind. The international community has confirmed this with the adoption of the Paris Agreement in 2015.”

⁵³ Comments from the Netherlands (A/CN.4/735).

⁵⁴ See United Nations Framework Convention on Climate Change (New York, 9 May 1992), United Nations, *Treaty Series*, vol. 1771, No. 30822, p. 107.

⁵⁵ Comments from Portugal (A/CN.4/735).

⁵⁶ Comments from Antigua and Barbuda (A/CN.4/735); Colombia, A/C.6/73/SR.27, para. 33; Iran (Islamic Republic of), A/C.6/73/SR.27, para. 113; Japan, A/C.6/73/SR.26, para. 32; Sri Lanka, A/C.6/73/SR.26, para. 121; Viet Nam, A/C.6/73/SR.27, para. 91.

⁵⁷ Sri Lanka, statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal). See also A/C.6/73/SR.26, para. 121.

⁵⁸ Sri Lanka, statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal). See also A/C.6/73/SR.26, para. 123.

⁵⁹ See Stockholm Convention on Persistent Organic Pollutants (Stockholm, 22 May 2001), United Nations, *Treaty Series*, vol. 2256, No. 40214, p. 119.

⁶⁰ Comments from Antigua and Barbuda (A/CN.4/735).

⁶¹ Comments from Estonia (A/CN.4/735).

⁶² Comments from Antigua and Barbuda (A/CN.4/735), which highlight the following (footnotes omitted): “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’.” Similarly, the first object of recent environmental legislation of Antigua and Barbuda was to “establish an integrated system for the sound and sustainable management of the environment for the benefit of present and future generations”. The Commission may also wish to take note of a recent decision from the Supreme Court of CARICOM observer Colombia, which recognized the environmental rights of future generations.”

28. Japan proposed deletion of the eighth preambular paragraph, as it noted that, considering that the Commission and the Special Rapporteur had faithfully respected the 2013 understanding, it was not necessary to repeat the content of the understanding in the draft guidelines.⁶³ According to UNEP, there was a need to identify the gaps that existed under the current treaty regimes and, once identified, there would be more clarity on which gaps the draft guidelines should seek to fill. UNEP observed that, if the guidelines did not address what was already in treaty regimes and they did not address what was not accounted for in treaty regimes (by filling gaps), the scope of the guidelines is unclear.⁶⁴ Germany considered that the eighth preambular paragraph appeared to be redundant.⁶⁵ Belgium was of the opinion that such a limitation on the field of application undermined the relevance and the added value of the draft guidelines and could also give the impression that the international community did not attach much importance to clear agreements on the protection of the atmosphere.⁶⁶ This sentiment was shared by Antigua and Barbuda, Colombia, Sri Lanka and Viet Nam,⁶⁷ while Argentina welcomed the paragraph.⁶⁸

2. Recommendation of the Special Rapporteur

29. The Special Rapporteur recommends, as proposed by Portugal, to insert in the first preambular paragraph the words “a limited natural resource” between the words “is” and “essential”, as indicated in paragraph (2) of the commentary to the preamble, which states that: “As a natural resource, the atmosphere was long considered to be non-exhaustible and non-exclusive, since it was assumed that everyone could benefit from it without depriving others. That view is no longer held. It must be born in mind that the atmosphere is a limited resource with limited assimilation capacity.”⁶⁹ The Special Rapporteur considers it essential to refer to this notion at the very beginning of the draft guidelines.

30. With regard to the second preambular paragraph, the Special Rapporteur notes the discomfort expressed by some States, including Antigua and Barbuda, Belarus and Estonia. This is understandable because this paragraph was initially proposed as part of the definition of the term “atmosphere” in draft guideline 1, paragraph (a), but was moved to the preamble. The commentary explains why it was moved: “The Commission considered it appropriate to refer to this functional aspect in the

⁶³ Japan, statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal). See also [A/C.6/73/SR.26](#), para. 34, and [A/CN.4/735](#).

⁶⁴ Comments from UNEP ([A/CN.4/735](#)).

⁶⁵ Comments from Germany ([A/CN.4/735](#)).

⁶⁶ Comments from Belgium ([A/CN.4/735](#)).

⁶⁷ Comments from Antigua and Barbuda ([A/CN.4/735](#)); Colombia, [A/C.6/73/SR.27](#), para. 31 (“The understanding of the Commission on the inclusion of the topic in its programme of work ... risked jeopardizing any potential effectiveness of the work, and his delegation hoped that the Commission would remove all references to that understanding during the second reading of the text”); Sri Lanka, [A/C.6/73/SR.26](#), para. 123 (“to avoid redundancy, the Commission should consider eliminating the references to the 2013 understanding in the eighth preambular paragraph”); Viet Nam, [A/C.6/73/SR.27](#), para. 91 (“Recalling that the eighth preambular paragraph had been included to reflect the understanding that the draft guidelines must not interfere with the Paris Agreement negotiations in 2013, and that the Paris Agreement had been adopted in 2015 ... it was no longer necessary to reflect that understanding in the draft guidelines and that the Commission should reconsider its decision to include that paragraph”).

⁶⁸ Comments from Argentina ([A/CN.4/735](#)).

⁶⁹ *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10 (A/73/10)*, para. 78. This was reiterated in paragraph (1) of the commentary to draft guideline 5 on sustainable utilization of the atmosphere (*ibid.*). A reference to “natural resource” was proposed by the Special Rapporteur in his first report ([A/CN.4/667](#), paras. 84–85). Draft guideline 3 (legal status of the atmosphere) stated that “[t]he atmosphere is a natural resource essential for sustaining life on earth” (*ibid.*, para. 90).

preamble. This decision reflects a concern that the inclusion of the functional aspect as part of the definition, as originally proposed, may suggest that this transport and dispersion is desirable, which is not the intention of the Commission.”⁷⁰ It should be admitted that this explanation does not make sense. First, the sentence is perfectly suitable to form part of the definition; if it were not, it should also be considered unsuitable as a preambular paragraph. Second, the expression “transport and dispersion” is merely a factual description, which does not say anything about what is desirable. It is only the expression “polluting and degrading substances” that conveys what the problem is. Thus, the Special Rapporteur proposes deleting this second preambular paragraph and moving it back to draft guideline 1, paragraph (a), where it belongs (see the Special Rapporteur’s proposal below, para. 38).

31. The Special Rapporteur recommends replacing the phrase “pressing concern of the international community as a whole” with “common concern of humankind” in the fourth preambular paragraph. While the Special Rapporteur’s initial proposal in his second report in 2015 was “common concern”, the expression “pressing concern” was adopted as a compromise as it was suggested when the report was discussed in May 2015 that the international community had abandoned the expression “common concern” after 1992. In December 2015, however, the Paris Agreement adopted the language of “common concern”.⁷¹ All the States that commented agreed to change the phrase to “common concern”, and there was no State that favoured “pressing concern”.

32. The Special Rapporteur recommends, as mentioned in paragraph 19 above, the deletion of the eighth preambular paragraph. The paragraph might have had some meaning at the outset of the work on this topic, but it is now meaningless since the project has been completed in full compliance with the restrictions mentioned in the understanding. Most States that commented agreed with the deletion.

33. The Special Rapporteur recommends, following Estonia’s suggestion, changing the order of the preambular paragraphs, that is moving the third paragraph (“*Noting* the close interaction between the atmosphere and the oceans”) so that it appears after the fifth paragraph (“*Aware* of the special situation and needs of developing countries”). This modification requires changing the first words of the sixth paragraph from “*Aware also ... of*” to “*Noting also*” and, in the seventh paragraph, changing “*Noting*” to “*Recognizing*”. The Commission may wish to consider making changes to the commentary to take into account some of the above-mentioned comments. The Special Rapporteur will make proposals to this effect in due course.

The Special Rapporteur proposes the following text for the draft preamble:

Preamble

Acknowledging that the atmosphere is a limited natural resource essential for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystems,

~~*Bearing in mind* that the transport and dispersion of polluting and degrading substances occur within the atmosphere,~~

~~*Noting* the close interaction between the atmosphere and the oceans,~~

Recognizing therefore that the protection of the atmosphere from atmospheric pollution and atmospheric degradation is a ~~pressing concern of the international community as a whole~~ common concern of humankind,

⁷⁰ *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10 (A/73/10)*, para. 78, paragraph (3) of the commentary to the preamble.

⁷¹ Paris Agreement, 11th preambular paragraph.

Aware of the special situation and needs of developing countries,

Noting the close interaction between the atmosphere and the oceans,

Noting also ~~*Aware also*~~, in particular, of the special situation of low-lying coastal areas and small island developing States due to sea-level rise,

Recognizing ~~*Noting*~~ that the interests of future generations of humankind in the long-term conservation of the quality of the atmosphere should be fully taken into account,

~~*Recalling that the present draft guidelines are not to interfere with relevant political negotiations, including those on climate change, ozone depletion, and long-range transboundary air pollution, and that they also neither seek to “fill” gaps in treaty regimes nor impose on current treaty regimes legal rules or legal principles not already contained therein,*~~

C. Draft guideline 1 (Use of terms)

1. Comments and observations

34. With regard to draft guideline 1, paragraph (a), some States expressed uneasiness about the simple definition of the term “atmosphere”. Indonesia observed that “the atmosphere moved and circulated around the Earth through atmospheric circulation. That natural characteristic should be added as a component of the definition.”⁷²

35. Colombia observed that “draft guideline 1 (b), defining the term ‘atmospheric pollution’, should be aligned more closely with the 1979 Convention on Long-range Transboundary Air Pollution and the United Nations Convention on the Law of the Sea through the insertion of the phrase ‘and energy’ after the word ‘substances’”.⁷³ This had also been mentioned by Austria and Spain on previous occasions.⁷⁴ Belarus,⁷⁵ Estonia,⁷⁶ Japan⁷⁷ AND Sri Lanka⁷⁸ also favoured the insertion of the words “and energy”. Estonia questioned why the term “energy” was excluded from the definition as: “Energy, as heat, light, noise and radioactivity, does not associate with a substance in the common understanding of the word.”⁷⁹

36. The Netherlands stated that “it is somewhat puzzling that the definition of ‘atmospheric pollution’ does not include the adjective ‘significant’ before ‘deleterious effects’, all the more so because the texts of conventions and protocols on transboundary air pollution always assume that the deleterious transboundary effects must be ‘significant’”.⁸⁰

⁷² Indonesia, [A/C.6/69/SR.27](#), para. 61.

⁷³ Colombia, [A/C.6/73/SR.27](#), para. 33. See also the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3.

⁷⁴ Austria, [A/C.6/70/SR.17](#), para. 82; Spain, [A/C.6/70/SR.18](#), para. 64.

⁷⁵ Belarus, statement to the Sixth Committee of 26 October (available on the PaperSmart portal) and comments from Belarus ([A/CN.4/735](#)).

⁷⁶ Comments from Estonia ([A/CN.4/735](#)).

⁷⁷ Japan, statement to the Sixth Committee of 26 October (available on the PaperSmart portal) and comments from Japan ([A/CN.4/735](#)).

⁷⁸ Sri Lanka, [A/C.6/73/SR.26](#), para. 122.

⁷⁹ *Ibid.*

⁸⁰ Comments from the Netherlands ([A/CN.4/735](#)).

37. Belarus expressed the view that paragraph (b) should also cover the “substances or energy resulting in harmful effects” located within the territory of the State of origin and thus proposed adding the phrase “both in the territory of the State of origin and in the territory under the jurisdiction of another State” at the end of paragraph (b).⁸¹ UNEP noted that, in paragraph (c), there was no mention of substances as a cause of “atmospheric degradation”, and as a result, it was not clear whether there was a distinction between a “polluting substance” and a “degrading substance”.⁸² Antigua and Barbuda, for the sake of clarity, recommended using only the phrase “atmospheric pollution” and simplifying its definition by striking the phrase “extending beyond the State of origin”.⁸³

2. Recommendation of the Special Rapporteur

38. As proposed by the Special Rapporteur in paragraph 30 above, the second preambular paragraph should be moved back to draft guideline 1, paragraph (a), where it belongs, so as to read: “‘Atmosphere’ means the envelope of gases surrounding the Earth, within which the transport and dispersion of the polluting and degrading substances occur.”⁸⁴

39. The Special Rapporteur recommends adding the words “or energy”, after the word “substances”, to draft guideline 1, paragraph (b), on the definition of “atmospheric pollution”, as suggested by a number of States. Although the Convention on Long-Range Transboundary Air Pollution⁸⁵ and the United Nations Convention on the Law of the Sea⁸⁶ include “energy”, as well as substances, as a cause of pollution, the Commission decided on first reading not to include “energy” in its definition of atmospheric pollution. It was said in the commentary that: “It is the understanding of the Commission that, for the purposes of the draft guidelines, the word ‘substances’ includes ‘energy’.”⁸⁷ However, the Special Rapporteur considers that this should be corrected on second reading. “Energy”, including heat, light, noise and radioactivity, is normally understood to be separate from “substances” in the context of pollution.⁸⁸

40. The Special Rapporteur recommends no other changes. The omission of the word “significant” before “deleterious” in draft guideline 1, paragraph (b), was intentional on first reading, given that both of the above-mentioned instruments did not include the word “significant” in that regard. In the event that the Commission wishes to change the commentary in light of some of the comments received from States, the Special Rapporteur will make proposals to this effect in due course.

⁸¹ Belarus, statement to the Sixth Committee of 26 October (available on the PaperSmart portal) and comments from Belarus (A/CN.4/735).

⁸² Comments from UNEP (A/CN.4/735).

⁸³ Comments from Antigua and Barbuda (A/CN.4/735).

⁸⁴ In this way, the definition of the atmosphere becomes complete, covering both the substantive definition (the envelope of gases) and the functional definition (the transport and dispersion of degrading substances). See the Special Rapporteur’s second report (A/CN.4/681, paras. 12–13).

⁸⁵ Article 1, paragraph (a), of the Convention on Long-range Transboundary Air Pollution provides: “[a]ir pollution’ means the introduction ... of substances or energy into the air resulting in deleterious effects”.

⁸⁶ Article 1, paragraph 1 (4), of the United Nations Convention on the Law of the Sea defines “pollution of the marine environment” as “the introduction ... of substances or energy into the marine environment”.

⁸⁷ *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10 (A/73/10)*, para. 78, paragraph (9) of the commentary to draft guideline 1.

⁸⁸ *Ibid.*, see footnote 858.

The Special Rapporteur proposes the following text for draft guideline 1:

Guideline 1
Use of terms

For the purposes of the present draft guidelines,

(a) “Atmosphere” means the envelope of gases surrounding the Earth, within which the transport and dispersion of the polluting and degrading substances occur;

(b) “Atmospheric pollution” means the introduction or release by humans, directly or indirectly, into the atmosphere of substances or energy contributing to deleterious effects extending beyond the State of origin of such a nature as to endanger human life and health and the Earth’s natural environment;

(c) “Atmospheric degradation” means the alteration by humans, directly or indirectly, of atmospheric conditions having significant deleterious effects of such a nature as to endanger human life and health and the Earth’s natural environment.

D. Draft guideline 2 (Scope of the guidelines)

1. Comments and observations

41. Sri Lanka expressed the view that “the Commission should consider eliminating the references to the 2013 understanding ... in draft guideline 2, paragraphs 2 and 3.”⁸⁹ It also stated that the double negative in paragraph 2 might be “awkward”.⁹⁰ This point has been raised before.⁹¹ Japan also considered it appropriate to consider deleting paragraphs 2 and 3 in view of its observation discussed above on the 2013 understanding.⁹² Antigua and Barbuda believed that the Commission could not address the topic of the protection of the atmosphere without reference to the principles stated in paragraph 2 and without a definition of “dual-impact substances” in paragraph 3, and therefore both paragraphs should be deleted.⁹³ UNEP observed that most of the language in the draft guideline was defined in the negative and remained unclear.⁹⁴

42. Colombia regretted the decision “to exclude everything related to substances such as black carbon, tropospheric ozone and other dual-impact substances”.⁹⁵ Belarus noted that paragraph 3 should “list the names of all dual-impact substances or not include any and leave the issue to the discretion of States, especially as there were differences of opinion about some of those substances, such as black carbon”.⁹⁶ Belgium considered that draft guideline 2, paragraph 3, should be clarified: “Does this point mean that all the substances that are the subject of negotiations fall outside the scope of the directives or does it only concern the dual-impact substances which are the subject of negotiations? This is not specified in the

⁸⁹ Sri Lanka, [A/C.6/73/SR.26](#), para. 123.

⁹⁰ Sri Lanka, statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal).

⁹¹ Philippines, [A/C.6/70/SR.19](#), para. 15.

⁹² Comments from Japan ([A/CN.4/735](#)).

⁹³ Comments from Antigua and Barbuda ([A/CN.4/735](#)).

⁹⁴ Comments from UNEP ([A/CN.4/735](#)).

⁹⁵ Colombia, statement to the Sixth Committee of 30 October 2018 (available on the PaperSmart portal). See also [A/C.6/73/SR.27](#), para. 30.

⁹⁶ Belarus, [A/C.6/73/SR.26](#), para. 92.

comments relating to this draft directive. Belgium can therefore ask the question of the exclusion or not of CH₄ [methane] from the scope of the draft guidelines.” Belgium also observed that it could also be noted that “a large number of pollutants, for which transboundary air pollution is particularly relevant, are the subject of negotiations and international treaties (e.g. NO_x, SO_x, NH₃, heavy metals, etc.). If these pollutants are excluded from the scope of the draft guidelines, this would again constitute a very significant restriction.”⁹⁷

43. Argentina welcomed draft guideline 2, paragraph 4, regarding the legal status of airspace and outer space.⁹⁸

2. Recommendation of the Special Rapporteur

44. Reference to the 2013 understanding might have had some meaning at the outset of the work on this topic, but it is meaningless now that the project has been completed in full compliance with the restrictions, as mentioned above in paragraphs 16 to 19. Paragraph 2 of draft guideline 2 does not make sense, as pointed out above by some States, because it is a “double negative” formula, which states “do not deal with, but without prejudice to”. Furthermore, the draft guidelines on this topic have not touched on the principles enumerated in this paragraph. Thus, this paragraph should be deleted. Paragraph 3 should also be deleted for the reason mentioned above.

The Special Rapporteur proposes the following text:

Guideline 2 **Scope of the guidelines**

1. The present draft guidelines concern the protection of the atmosphere from atmospheric pollution and atmospheric degradation.

~~2. The present draft guidelines do not deal with, but are without prejudice to, questions concerning the polluter pays principle, the precautionary principle, common but differentiated responsibilities, the liability of States and their nationals, and the transfer of funds and technology to developing countries, including intellectual property rights.~~

~~3. The present draft guidelines do not deal with specific substances, such as black carbon, tropospheric ozone and other dual impact substances, which are the subject of negotiations among States.~~

4.2. Nothing in the present draft guidelines affects the status of airspace under international law nor questions related to outer space, including its delimitation.

E. Draft guideline 3 (Obligation to protect the atmosphere)

1. Comments and observations

45. Germany welcomed the mention of the obligation to protect the atmosphere in draft guideline 3, which in its view was an obligation of *erga omnes* character.⁹⁹ Antigua and Barbuda believed, as a general point, that there was an international obligation *erga omnes* to protect the atmosphere from pollution, whether termed

⁹⁷ Comments from Belgium (A/CN.4/735).

⁹⁸ Comments from Argentina (A/CN.4/735).

⁹⁹ Comments from Germany (A/CN.4/735).

“atmospheric pollution” or “atmospheric degradation” in the present draft guidelines.¹⁰⁰

46. The European Union suggested that “the Commission should consider wording draft guideline 3 in such a way as to encourage States to join, ratify or implement multilateral environmental agreements”.¹⁰¹ Estonia likewise proposed, in the context of guideline 3:

to add a second paragraph to the guideline encouraging the States to consider joining, ratifying or acceding to the relevant international treaties referred to in the existing text of the guideline (‘applicable rules of international law’). Such encouragement would be relevant as guideline 3 is seen as central to the draft guidelines ... and international multilateral agreements are the only platform at the global level to tackle the challenges of the protection of the atmosphere.¹⁰²

47. Belarus underscored that international law should be considered a minimum standard and thus: “In draft guideline 3, the Commission should leave it up to States to apply their national laws in cases where they contained higher standards than those set by international law.”¹⁰³ It also observed that consideration should be given to the appropriateness of separating out the concepts of prevention (aspects of one and the same obligation, namely that of “due diligence”).¹⁰⁴ Antigua and Barbuda also pointed to the language of the United Nations Convention on the Law of the Sea (article 194) to “prevent, reduce and control”. It also referred to the notion in article 3, paragraph 3, of the United Nations Framework Convention on Climate Change that States “should take precautionary measures to anticipate, prevent or minimize the causes of climate change”. UNEP also considered that the word “or” should be replaced by the word “and”.¹⁰⁵ Antigua and Barbuda proposed that draft guideline 3 could read: “States 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.”¹⁰⁶ Portugal welcomed the clear statement regarding the obligation of States to protect the atmosphere, as seen in draft guideline 3, having argued at the Sixth Committee in favour of such a statement. Portugal supported the doctrine, recognizing that a human right to environment was becoming a staple in international human rights law and – as encompassing a sustainable atmosphere – must correspond to clear and enforceable State obligations of preventing, reducing and controlling atmospheric degradation. Portugal also recalled the work of the Commission on its draft articles on prevention of transboundary harm from hazardous activities, and praised the coherence shown in the comments in paragraph (7) of the commentary to draft guideline 3 and the acknowledgement of a customary international norm

¹⁰⁰ Comments from Antigua and Barbuda (A/CN.4/735).

¹⁰¹ European Union, A/C.6/73/SR.24, para. 103.

¹⁰² Comments from Estonia (A/CN.4/735).

¹⁰³ Belarus, A/C.6/73/SR.26, para. 92. See also comments from Belarus (A/CN.4/735):

“Environmental protection occupies an important place in the national policies of many countries, and States are taking appropriate measures in that area, not only at international but also – first and foremost – at national level. The rules of international law on preventing, reducing or controlling atmospheric pollution and atmospheric degradation must therefore be regarded as minimum standards and not as targets to which States must aspire. In draft guideline 3, it should perhaps be left up to States to apply their national laws in cases where they contain higher standards than those set by international law.”

¹⁰⁴ Comments from Belarus (A/CN.4/735).

¹⁰⁵ Comments from UNEP (A/CN.4/735).

¹⁰⁶ Antigua and Barbuda (A/CN.4/735). It gives a detailed and important explanation for this suggestion, which cannot be reproduced here due to limitations on the length of the present report.

establishing a State obligation to prevent significant adverse effects derived from atmospheric pollution.¹⁰⁷

48. China stated that “to date, no clear and specific rules of international law have emerged in the field of the protection of the atmosphere. In particular, explicit legal obligations placed on States to protect the atmosphere have yet to materialize, and the relevant practice and rules are still being developed.”¹⁰⁸

49. The United States observed that: “According to draft guideline 3, other ‘applicable rules of international law’ require States to ‘prevent, reduce or control atmospheric pollution and atmospheric degradation’. It is unclear, though, whether the Commission believes that international law at present requires States to do all the elements indicated in this draft guideline”.¹⁰⁹

2. Recommendation by the Special Rapporteur

50. As pointed out by Antigua and Barbuda, UNEP and Portugal above, the word “or” in the draft guideline should be changed to “and” in line with language of the United Nations Convention on the Law of the Sea.

51. As mentioned above by Germany and Antigua and Barbuda, the obligation to protect the atmosphere is an obligation *erga omnes*, which should be mentioned, at least in the commentary.¹¹⁰ Reference should also be made to “precautionary measures” in the commentary, as suggested by Antigua and Barbuda. The Special Rapporteur will make proposals to this effect in due course.

52. With regard to the suggestion of the European Union and Estonia to encourage States to ratify the relevant multilateral conventions, the Special Rapporteur considers that that is a matter outside the scope of the present draft guidelines.

The Special Rapporteur proposes the following text:

Guideline 3 Obligation to protect the atmosphere

States have the obligation to protect the atmosphere by exercising due diligence in taking appropriate measures, in accordance with applicable rules of international law, to prevent, reduce or and control atmospheric pollution and atmospheric degradation.

F. Draft guideline 4 (Environmental impact assessment)

1. Comments and observations

53. Germany welcomed that the obligation to conduct an environmental impact assessment in draft guideline 4 applied to transboundary context as well as to activities that were likely to have significant adverse effects on the global atmosphere.¹¹¹ Peru argued that there was “a general obligation under customary international law” to carry out an environmental impact assessment, citing the Advisory Opinion of the International Tribunal for the Law of the Sea of 1 February

¹⁰⁷ Comments from Portugal (A/CN.4/735). See also the draft articles on prevention of transboundary harm from hazardous activities (2001), *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 97 (reproduced in General Assembly resolution 62/68, annex, of 6 December 2007).

¹⁰⁸ China, statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal). See also A/C.6/73/SR.25, para. 12.

¹⁰⁹ Comments from the United States (A/CN.4/735).

¹¹⁰ See the Special Rapporteur’s second report (A/CN.4/681, paras. 42–51).

¹¹¹ Comments from Germany (A/CN.4/735).

2011.¹¹² Antigua and Barbuda proposed rewording 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.”¹¹³

54. Estonia wished to see the guideline make an:

expressis verbis reference also to the possible transboundary effects of such activities (in addition to the elaboration of transboundary harm in paragraph (1) of the commentary to draft guideline 4). Estonia finds it of utmost importance to involve the neighbouring States and the public in the environmental impact assessment process with the purpose of ensuring the widest possible discussion of the impacts of a planned activity.¹¹⁴

Belarus proposed that the words “including in the territory of foreign States” be added at the end of draft guideline 4.¹¹⁵

55. Argentina considered it “desirable that draft guideline 4 be supplemented by a phrase along the following lines: ‘according to national capabilities and circumstances’. It might also be considered to include the phrase ‘depending on the availability of means of implementation, in its threefold aspect of financing, technology transfer and capacity-building’.”¹¹⁶

56. UNEP expressed concern about paragraph (7) of the commentary to the draft guideline. It believed that the draft guideline should include procedural rights, which were, in its view, the key issue for environmental impact assessment.¹¹⁷

57. China noted that the rule had a “specific context and scope of application in the relevant treaties and cases and therefore, one can hardly claim that it has become a universally agreed concern”.¹¹⁸ Turkey noted that draft guideline 4 was a ‘new composition’ rather than a ‘present obligation’.¹¹⁹

2. Recommendation of the Special Rapporteur

58. It is true, as UNEP indicated, that an environmental impact assessment entails procedural considerations, but such considerations may not be appropriate for guidelines of this nature. It may be rather questionable to refer to “national

¹¹² Peru, *A/C.6/73/SR.27*, para. 76 (“the obligation of States to ensure that an environmental impact assessment was undertaken was a direct due diligence obligation deriving from article 206 of the United Nations Convention on the Law of the Sea and also a general obligation under customary international law. In that connection, in addition to recalling the judgment of the International Court of Justice in the case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, the Special Rapporteur should also consider the 2011 advisory opinion of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea in the case of *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, in reaction to that judgment”). See also International Court of Justice, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, *I.C.J. Reports 2010*, p. 14; International Tribunal for the Law of the Sea, *Responsibilities and Obligations of States with Respect to Activities in the Area (Request for Advisory Opinion submitted to the Seabed Dispute Chamber)*, Advisory Opinion, 1 February 2011, *ITLOS Reports 2011*, p. 10.

¹¹³ Comments from Antigua and Barbuda (*A/CN.4/735*).

¹¹⁴ Comments from Estonia (*A/CN.4/735*).

¹¹⁵ Comments from Belarus (*A/CN.4/735*). See also Belarus, statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal).

¹¹⁶ Comments from Argentina (*A/CN.4/735*).

¹¹⁷ Comments from UNEP (*A/CN.4/735*).

¹¹⁸ China, statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal). See also *A/C.6/73/SR.25*, para. 12.

¹¹⁹ Turkey, statement to the Sixth Committee of 30 October 2018 (available on the PaperSmart portal). See also *A/C.6/73/SR.27*, para. 106.

capabilities and circumstances” in the context of an environmental impact assessment. No change is suggested by the Special Rapporteur for the draft guideline. The Commission may wish to consider some of the concerns expressed by States in its commentary. The Special Rapporteur will make proposals to this effect in due course.

The Special Rapporteur proposes the following text:

Guideline 4
Environmental impact assessment

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 significant adverse impact on the atmosphere in terms of atmospheric pollution or atmospheric degradation.

G. Draft guideline 5 (Sustainable utilization of the atmosphere)

1. Comments and observations

59. Estonia stated that:

The wording of paragraph 1 should be coherent with that of draft guideline 3, which declares that the ‘States *have the obligation* to protect the atmosphere’. In the view of Estonia, the utilization of the atmosphere should also be implicitly connected to the protection of the atmosphere. Thus, Estonia proposes that paragraph 1 of draft guideline 5 be worded in the imperative (“Given that the atmosphere is a natural resource with a limited assimilation capacity, it is the obligation of the States to ensure that its utilization is undertaken in a sustainable manner.”). Estonia welcomes the notion of the need to reconcile economic development with protection of the atmosphere as an unavoidable path to be followed in the years to come.¹²⁰

Antigua and Barbuda recommended reflecting more than twenty years of State practice by noting the special needs and specific circumstances of small island developing States in the draft guideline.¹²¹

60. In contrast, Belarus argued that: “It is not possible to reconcile protection of the atmosphere with economic development or to find a balance between them. All countries are seeking to develop. Draft guideline 5, paragraph 2, should therefore read as follows: ‘Sustainable utilization of the atmosphere while increasing economic development includes the need to protect the atmosphere and reduce atmospheric pollution.’”¹²² UNEP suggested mentioning “social development” in paragraph 2, as it was one of the pillars of sustainable development.¹²³

2. Recommendation of the Special Rapporteur

61. The core aspect of the concept of sustainable development is the balance between economic development and environmental protection, for which an imperative (or obligatory) statement may not be fully fitting. Thus, no change is proposed by the Special Rapporteur. The Commission may wish to refer to some of the above-mentioned comments in the commentary. The Special Rapporteur will make proposals to this effect in due course.

¹²⁰ Comments from Estonia (A/CN.4/735).

¹²¹ Comments from Antigua and Barbuda (A/CN.4/735).

¹²² Comments from Antigua and Barbuda (A/CN.4/735).

¹²³ Comments from UNEP (A/CN.4/735).

The Special Rapporteur proposes the following text:

Guideline 5
Sustainable utilization of the atmosphere

1. Given that the atmosphere is a natural resource with a limited assimilation capacity, its utilization should be undertaken in a sustainable manner.
2. Sustainable utilization of the atmosphere includes the need to reconcile economic development with protection of the atmosphere.

H. Draft guideline 6 (Equitable and reasonable utilization of the atmosphere)

1. Comments and observations

62. Estonia agreed “with paragraph (1) of the commentary to draft guideline 6 regarding the importance of the need to utilize the atmosphere in an equitable and reasonable manner, taking into account the interests of present and future generations”. However, it preferred to use imperative wording in the draft guideline: “It is the obligation of the States to ensure that the atmosphere is utilized in an equitable and reasonable manner, taking into account the interests of present and future generations.”¹²⁴ Antigua and Barbuda recommended 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.”¹²⁵

2. Recommendation of the Special Rapporteur

63. No changes are proposed by the Special Rapporteur. Wording expressing an obligation may not be appropriate for this draft guideline. The Commission may wish to refer to some of the above-mentioned comments in the commentary. The Special Rapporteur will make proposals to this effect in due course.

The Special Rapporteur proposes the following text:

Guideline 6
Equitable and reasonable utilization of the atmosphere

The atmosphere should be utilized in an equitable and reasonable manner, taking into account the interests of present and future generations.

I. Draft guideline 7 (Intentional large-scale modification of the atmosphere)

1. Comments and observations

64. States generally welcomed the inclusion of the draft guideline and its emphasis on caution and prudence before undertaking any activities aimed at the intentional large-scale modification of the atmosphere.¹²⁶ Germany found that draft guideline 7 constituted “a well-balanced approach”. However, it considered that the need “to

¹²⁴ Comments from Estonia ([A/CN.4/735](#)).

¹²⁵ Comments from Antigua and Barbuda ([A/CN.4/735](#)).

¹²⁶ Italy, [A/C.6/71/SR.20](#), para. 90; Iceland (on behalf of the Nordic countries), [A/C.6/71/SR.24](#), para. 62; Republic of Korea, [A/C.6/71/SR.24](#), para. 85.

conduct an environmental impact assessment according to draft guideline 4 should be added in a second sentence of draft guideline 7 (e.g. ‘This may imply the necessity of an environmental impact assessment’).¹²⁷ Antigua and Barbuda suggested clarifying the need for an environmental impact assessment in the main text of the draft guideline, rather than in the commentary.¹²⁸ Togo asked for a clear explanation of the expression “intentional large-scale modification of the atmosphere”, as well as an indication of the activities envisaged.¹²⁹

65. The European Union welcomed the fact that “paragraph (9) of the commentary to draft guideline 7 explicitly states that the latter:

“does not seek either to authorize or to prohibit” geo-engineering. However, the European Union maintains its concern on the possible environmental impact from geo-engineering, and invites the Commission to consider further formulations of caution, in particular by reference to the precautionary principle. Although the European Union appreciates the effort to acknowledge many principles applying to international relations in paragraph 2 of draft guideline 2, the European Union finds it necessary to address intentional large-scale modification of the atmosphere by referring to the precautionary principle or other ways that incorporate environmental concerns. In that regard, the European Union has a specific drafting suggestion for the text of draft guideline 7, which is as follows:

Activities aimed at intentional large-scale modification of the atmosphere should be conducted with prudence and caution, subject to a positive opinion of all States Members of the United Nations, members of specialized agencies of the United Nations or regional economic integration organizations potentially concerned, following a multinational environmental impact assessment based on the precautionary principle, public consultations and any other applicable rules of international law.¹³⁰

Likewise, Finland, on behalf of the Nordic countries, stressed that “the precautionary principle also contains the obligation to refrain from an activity if the consequences and effects on the environment are unclear or cannot be assessed”.¹³¹ Antigua and Barbuda also referred to the precautionary principle.¹³²

66. Argentina considered it relevant, on this point, to refer to the conclusions of the Intergovernmental Panel on Climate Change in its report *Global warming of 1.5°C* (2018),¹³³ stating that the Intergovernmental Panel moved away from the widespread concept of “geo-engineering” to “solar radiation modification measures” and “carbon dioxide removal measures”. On solar radiation modification measures, it said that the Intergovernmental Panel recognized that, while they would be “theoretically effective”, they faced “significant uncertainties and knowledge gaps, as well as significant institutional and societal risks and implementation constraints related to governance, ethics and impacts on sustainable development. They also do not mitigate

¹²⁷ Comments from Germany (A/CN.4/735).

¹²⁸ Comments from Antigua and Barbuda (A/CN.4/735).

¹²⁹ Comments from Togo (A/CN.4/735).

¹³⁰ Comments from the European Union (A/CN.4/735). See also A/C.6/73/SR.24, para. 105.

¹³¹ Finland (on behalf of the Nordic countries), statement to the Sixth Committee of 25 October 2018 (available on the PaperSmart portal). See also A/C.6/73/SR.24, para. 117.

¹³² Comments from Antigua and Barbuda (A/CN.4/735).

¹³³ Valérie Masson-Delmotte and others (eds.), *Global Warming of 1.5°C: An IPCC Special Report on the Impacts of Global Warming of 1.5°C Above Pre-industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty*. Available at www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15_Full_Report_Low_Res.pdf.

ocean acidification”.¹³⁴ With regard to the latter, Argentina noted that the Intergovernmental Panel concluded that “existing and potential [carbon dioxide removal] measures include afforestation and reforestation, land restoration and soil carbon sequestration, [bioenergy with carbon capture and storage], direct carbon dioxide capture and storage ... enhanced weathering and ocean alkalisation. These differ widely in terms of maturity, potentials, costs, risks, co-benefits and trade-offs.” In this connection, Argentina pointed out that the idea contained in draft guideline 7, namely that such interventions “should be conducted with caution and prudence”, was ambiguous and general. On the idea that they must be undertaken “in accordance with the applicable rules of international law”, Argentina emphasized that, since this was an unprecedented matter, scientific knowledge concerning such interventions was still incipient and uncertain and that the “applicable law” did not exist.¹³⁵

67. The Netherlands observed that the guideline had wrongly been formulated as a “should” requirement and that draft guideline 3 should be considered to apply also to intentional large-scale modification of the atmosphere.¹³⁶

2. Recommendation of the Special Rapporteur

68. As Germany and the European Union stressed, the Special Rapporteur agrees that, while environmental impact assessment is referred to in the commentary,¹³⁷ it should be mentioned in the draft guideline. Therefore, the Special Rapporteur proposes adding the phrase “including those relating to environmental impact assessment” at the end of the sentence. The European Union and Finland proposed adding the term “precautionary principle” to this guideline, which was prohibited by the 2013 understanding. Of course, the understanding is an internal restriction within the Commission, which in no way binds States. The words “prudence and caution” were carefully chosen by the Commission based on the language used by the International Tribunal for the Law of the Sea, which had also avoided the expression “precautionary principle” in its decisions.¹³⁸ It is nonetheless understood that the expression “prudence and caution” implied a notion close to that of “precautionary measures”, if not “precautionary principle”. Thus, no other change is proposed by the Special Rapporteur. The Commission may wish to refer to some of the above-mentioned comments in the commentary. The Special Rapporteur will make proposals to this effect in due course.

The Special Rapporteur proposes the following text:

Guideline 7

Intentional large-scale modification of the atmosphere

Activities aimed at intentional large-scale modification of the atmosphere should be conducted with prudence and caution, subject to any applicable rules of international law, including those relating to environmental impact assessment.

¹³⁴ “Summary for policymakers”, *ibid.*

¹³⁵ Comments from Argentina (A/CN.4/735). See also the above-mentioned report by the Intergovernmental Panel on Climate Change.

¹³⁶ Comments from the Netherlands (A/CN.4/735).

¹³⁷ *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10 (A/73/10)*, para. 78, paragraph (11) of the commentary to draft guideline 7.

¹³⁸ *Ibid.*, see footnotes 915–916.

J. Draft guideline 8 (International cooperation)

1. Comments and observations

69. The need for international cooperation was emphasized by a number of States.¹³⁹ Chile requested clarification on the origin of the obligation to cooperate, as “the general obligation to cooperate in binding international instruments pertaining to other specific areas of environmental law would not necessarily imply the existence of an obligation to cooperate in the matter of the protection of the atmosphere”.¹⁴⁰ Antigua and Barbuda observed, while agreeing that States must cooperate in protecting the atmosphere, that such cooperation should go beyond “enhancing scientific knowledge”, and suggested 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.”¹⁴¹ UNEP suggested inserting the words “and technical” after the word “scientific”, along with other drafting changes.¹⁴² The United States observed that the purported obligation in draft guideline 8, paragraph 1, was best understood as a recommendation that States cooperate and not as encompassing a legal obligation.¹⁴³

2. Recommendation of the Special Rapporteur

70. The Special Rapporteur agrees with the suggestion by some States that cooperation should go beyond “enhancing scientific knowledge” and with the drafting suggestion by UNEP to add the words “and technical” after the word “scientific” in the second paragraph. The Commission may wish to refer to some of the above-mentioned comments in the commentary, including the origin of the obligation to cooperate as referred to by Chile.¹⁴⁴ The Special Rapporteur will make proposals to this effect in due course.

The Special Rapporteur proposes the following text:

Guideline 8 **International cooperation**

1. States have the obligation to cooperate, as appropriate, with each other and with relevant international organizations for the protection of the atmosphere from atmospheric pollution and atmospheric degradation.
2. States should cooperate in further enhancing scientific and technical knowledge relating to the causes and impacts of atmospheric pollution and atmospheric degradation. Cooperation could include exchange of information and joint monitoring.

¹³⁹ Singapore, [A/C.6/73/SR.25](#), para. 53; comments from Estonia ([A/CN.4/735](#)); Republic of Korea, [A/C.6/73/SR.27](#), para. 79.

¹⁴⁰ Chile, statement to the Sixth Committee of 30 October 2018 (available on the PaperSmart portal).

¹⁴¹ Comments from Antigua and Barbuda ([A/CN.4/735](#)).

¹⁴² Comments from UNEP ([A/CN.4/735](#)).

¹⁴³ Comments from the United States ([A/CN.4/735](#)).

¹⁴⁴ For discussion on the origin of the obligation to cooperate, see the Special Rapporteur’s second report ([A/CN.4/681](#), paras. 60–77).

K. Draft guideline 9 (Interrelationship among relevant rules)

1. Comments and observations

71. There was broad support for this guideline in the Sixth Committee. Portugal stated that one of the greatest endeavours of the Commission on the topic should be to clarify the interrelationship between the rules of different areas of international law, welcoming the emphasis on the need to follow the relevant principles of international law concerning interpretation and application, as read in draft guideline 9. Portugal hoped that the finished work of the Commission would provide guidance on solving some of those problems. It believed that the draft guidelines, as they were adopted on first reading, were on the right path to do so, by clarifying existing international norms and principles applicable to the protection of the atmosphere and thus encouraging States to consider adopting common norms, standards and recommended practices in connection with trade and investment law, law of the sea and human rights law.¹⁴⁵

72. With regard to paragraph 1, a number of States expressed support for interpreting and applying the rules of international law applicable to the protection of the atmosphere and other relevant rules of international law in line with the principles of harmonization and systemic integration, with a view to avoiding conflicts.¹⁴⁶ Belarus expressed some mixed feelings about paragraph 1 by stating that:

It would perhaps be more appropriate in this context to emphasize the mutually reinforcing effect of compliance with the rules of different branches of international law, a phenomenon identified by the Special Rapporteur. In the same vein, Belarus believes that it would be preferable – in terms of interrelationships and mutual reinforcement – to consider the interrelationship between protection of the atmosphere and protection of fundamental human rights.¹⁴⁷

Belarus also stated that, in paragraph 1, “the focus should not be on the avoidance of conflicts but on the development of norms of international law” in order to preserve the proper quality of atmospheric air.¹⁴⁸ The Czech Republic expressed the view that possible conflicts between treaty obligations relating to the protection of the atmosphere and other treaty obligations could hardly be resolved in the manner suggested in the first sentence of paragraph 1, since the rules on the law of treaties did not aim at reconciling, by means of interpretation, conflicting obligations deriving from various treaty instruments.¹⁴⁹

73. With regard to paragraph 2, the Netherlands suggested adding the words “involving relevant scientists and legal experts at an early stage of the development of such rules”.¹⁵⁰ The Czech Republic observed that paragraph 2 addressed the problem of harmonization of legal instruments in a more realistic manner than paragraph 1.¹⁵¹

74. With respect to paragraph 3, the Bahamas, on behalf of CARICOM, applauded “the recognition of the special vulnerability of small island developing States and

¹⁴⁵ Comments from Portugal (A/CN.4/735).

¹⁴⁶ Italy, A/C.6/72/SR.18, para. 142; Thailand, A/C.6/72/SR.23, para. 53; Greece, A/C.6/72/SR.23, paras. 71–72; Estonia, A/C.6/72/SR.24, para. 20; Republic of Korea, A/C.6/72/SR.24, para. 100; and Israel, A/C.6/72/SR.24, paras. 104–106.

¹⁴⁷ Comments from Belarus (A/CN.4/735).

¹⁴⁸ Belarus, A/C.6/73/SR.26, para. 92. See also Belarus, statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal).

¹⁴⁹ Comments from the Czech Republic (A/CN.4/735).

¹⁵⁰ Comments from the Netherlands (A/CN.4/735).

¹⁵¹ Comments from the Czech Republic (A/CN.4/735).

low-lying coastal areas”.¹⁵² Portugal praised the very clear reference made in paragraph 3 – in line with the text in the fifth and sixth preambular paragraphs – to persons and groups particularly vulnerable to atmospheric pollution. It observed that the interrelationship between the rules of international law related to the atmosphere and to human rights raised many problems, including the interpretation of jurisdiction, identification and implementation.¹⁵³ The Islamic Republic of Iran stated that due consideration must be “given to the special needs and priorities of developing countries”.¹⁵⁴ Antigua and Barbuda supported the inclusion of paragraph 3, but recommended striking out the phrase “affected by sea-level rise”, because that had the effect of limiting the “special consideration” to only damage from sea-level rise, and not the other consequences of atmospheric degradation and pollution, which disproportionately affected small island developing States. However, it considered that the commentary could and should recognize the impacts of sea-level rise.¹⁵⁵ China argued that there was not sufficient justification to transfer the “concept of countries in special situations” from the context of climate change to that of protection of the atmosphere.¹⁵⁶

75. The European Union reiterated its earlier comment in relation to vulnerable groups, namely, that paragraph 3 should also mention the less affluent members of the national population among vulnerable groups of people.¹⁵⁷ Belgium also recognized the importance of paying particular attention to particularly vulnerable people and groups, as provided for in paragraph 3. Although the list of those vulnerable groups was not exhaustive, Belgium believed that specific reference should also be made to vulnerable people in developed countries (e.g. children, older persons, people living in polluted neighbourhoods, etc.). In that context, Belgium proposed to take into account the concept of protection of health, which currently governed European and international work on air and which affected all groups of individuals, whether from developed or less developed countries.¹⁵⁸

76. The European Union drew the Commission’s attention to developments under the auspices of the United Nations and its subsidiary bodies in the field of human rights and the environment. In addition, the substantive recommendations of the ad hoc open-ended working group on strengthening the implementation of international environmental law and governance, as endorsed by the General Assembly in its resolution [73/333](#), could also be of relevance to the work of the Commission.¹⁵⁹

77. The United States observed that draft guideline 9 gave the appearance that issues concerning fragmentation of international law were to be treated in a special way in the context of the protection of the atmosphere.¹⁶⁰ The United Kingdom expressed concern with the “ambiguity” of the draft guideline.¹⁶¹ In its view, draft guideline 9

¹⁵² Bahamas (on behalf of CARICOM), statement to the Sixth Committee of 22 October 2018 (available on the PaperSmart portal).

¹⁵³ Comments from Portugal ([A/CN.4/735](#)).

¹⁵⁴ Islamic Republic of Iran, [A/C.6/73/SR.27](#), para. 113. See also the Islamic Republic of Iran, statement to the Sixth Committee of 30 October 2018 (available on the PaperSmart portal).

¹⁵⁵ Comments from Antigua and Barbuda ([A/CN.4/735](#)).

¹⁵⁶ China, [A/C.6/73/SR.25](#), para. 12. See also China, statement to the Sixth Committee of 30 October 2018 (available on the PaperSmart portal).

¹⁵⁷ Comments from the European Union ([A/CN.4/735](#)). See also [A/C.6/73/SR.24](#), para. 106, in which the European Union suggested that, in paragraph 3, “poorer parts of the national population should also be mentioned under vulnerable groups of people, since, even in developed countries, people in poorer neighbourhoods tended to be more affected by air pollution owing to their proximity to busy roads, their lifestyles or their limited access to health care”.

¹⁵⁸ Comments from Belgium ([A/CN.4/735](#)).

¹⁵⁹ Comments from the European Union ([A/CN.4/735](#)).

¹⁶⁰ Comments from the United States ([A/CN.4/735](#)).

¹⁶¹ United Kingdom, [A/C.6/73/SR.27](#), para. 66.

seemed to be an excessive and unnecessary means for ensuring harmony and integration as between separate instruments and bodies concerned with protection of the atmosphere. Draft guideline 8 was a sufficient and effective means of attaining that end.¹⁶²

78. Germany suggested adding a new paragraph in draft guideline 9 to encourage States to join, ratify and implement relevant multilateral environmental agreements.¹⁶³

2. Recommendation of the Special Rapporteur

79. The Special Rapporteur does not consider that the comments made above by States warrant any changes to the text of the draft guideline. The concern expressed by the Czech Republic regarding paragraph 1 may be based on an excessively rigid view of treaty interpretation. In practice, interpretation is a flexible process within the proper bounds of the relevant treaty provisions, which is the basic conception behind paragraph 1.¹⁶⁴ The suggestion of adding a new paragraph to encourage States to “join, ratify and implement” multilateral environmental agreements may be outside the scope of the present topic. If the Commission so wishes, some of the above-mentioned comments may be added to the commentary in order to strengthen its content. The Special Rapporteur will make proposals to this effect in due course.

The Special Rapporteur proposes the following text:

Guideline 9 **Interrelationship among relevant rules**

1. The rules of international law relating to the protection of the atmosphere and other relevant rules of international law, including, *inter alia*, the rules of international trade and investment law, of the law of the sea and of international human rights law, should, to the extent possible, be identified, interpreted and applied in order to give rise to a single set of compatible obligations, in line with the principles of harmonization and systemic integration, and with a view to avoiding conflicts. This should be done in accordance with the relevant rules set forth in the Vienna Convention on the Law of Treaties of 1969, including articles 30 and 31, paragraph 3 (c), and the principles and rules of customary international law.
2. States should, to the extent possible, when developing new rules of international law relating to the protection of the atmosphere and other relevant rules of international law, endeavour to do so in a harmonious manner.
3. When applying paragraphs 1 and 2, special consideration should be given to persons and groups particularly vulnerable to atmospheric pollution and atmospheric degradation. Such groups may include, *inter alia*, indigenous peoples, people of the least developed countries and people of low-lying coastal areas and small island developing States affected by sea-level rise.

¹⁶² Comments from the United Kingdom (A/CN.4/735).

¹⁶³ Comments from Germany (A/CN.4/735).

¹⁶⁴ Comments from the Czech Republic (A/CN.4/735).

L. Draft guideline 10 (Implementation)

1. Comments and observations

80. Italy applauded draft guideline 10 as “an essential completion of draft guideline 3, which limits its scope”.¹⁶⁵ Belgium considered that it was obvious that the obligations incumbent on States under international law must be implemented in domestic law.¹⁶⁶ The European Union welcomed the introduction of draft guideline 10 on implementation.¹⁶⁷ The Czech Republic observed that the guideline would be more practical if formulated as a guideline for negotiation of future instruments.¹⁶⁸

81. The Federated States of Micronesia, while supporting draft guideline 10, paragraph 1, regretted that “there is no reference in the draft guideline itself to the responsibility of States for failing to implement their obligations under international law relating to the protection of the atmosphere”. It acknowledged that such a reference was present in the commentary but argued that it should be included in the language of the draft guideline itself.¹⁶⁹ Furthermore, it expressed concern at the removal of the reference to damage, even though it did not necessarily agree with the original formulation, noting that an attempt at a standard was better than no reference at all.¹⁷⁰ South Africa also favoured a reference to State responsibility in the draft guideline.¹⁷¹

82. Cuba underscored that measures be taken “pursuant to the national constitution and legal system of each State and in accordance with the existing obligations that States already had under international law”.¹⁷² Italy also favoured “the discretionary approach vis-à-vis implementation”.¹⁷³ Poland recommended emphasizing that: “International law allows States to freely choose their means of abiding by international obligations in accordance with their preferences and in a way that is most suitable for them.”¹⁷⁴ India stated that it understood “that the obligations under

¹⁶⁵ Italy, statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal). See also [A/C.6/73/SR.25](#), para. 25 (“draft guideline 10 (Implementation) was an essential completion of draft guideline 3, which established that States had the obligation to protect the atmosphere by preventing, reducing or controlling atmospheric pollution and atmospheric degradation, but did not specify the means to implement that obligation”).

¹⁶⁶ Comments from Belgium ([A/CN.4/735](#)). It also stated: “It therefore seems even more important to encourage countries which have not yet acceded to certain multilateral instruments to do so. This would be possible, for example, by modifying the text of draft guidelines 3 or 8.”

¹⁶⁷ Comments from the European Union ([A/CN.4/735](#)).

¹⁶⁸ Comments from the Czech Republic ([A/CN.4/735](#)).

¹⁶⁹ Federated States of Micronesia, statement to the Sixth Committee of 30 October 2018 (available on the PaperSmart portal). See also [A/C.6/73/SR.27](#), para. 19.

¹⁷⁰ Federated States of Micronesia, [A/C.6/73/SR.27](#), para. 20 (“It was also regrettable that the Commission had not retained the reference to damage that had featured in the Special Rapporteur’s original proposed draft. By addressing the relevance of damage to the determination of State responsibility, the Special Rapporteur’s proposal would have helped to clarify what constituted an internationally wrongful act or omission that triggered State responsibility in connection with the protection of the atmosphere”).

¹⁷¹ South Africa, [A/C.6/72/SR.24](#), para. 18 (“The draft guidelines must deal with the issue of responsibility in an appropriate manner, possibly drawing on the body of international law on State responsibility to identify principles on responsibility that would be particularly helpful in guiding States in the field of atmospheric pollution and degradation”).

¹⁷² Cuba, [A/C.6/73/SR.28](#), para. 16. See also Cuba, statement to the Sixth Committee of 30 October 2018 (available on the PaperSmart portal).

¹⁷³ Italy, statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal). See also Italy, [A/C.6/73/SR.25](#), para. 25 (“His delegation took a favourable view of the discretionary approach to implementation: States were free to choose which protective actions to take in their own domestic legal orders”).

¹⁷⁴ Poland, statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal). See also [A/C.6/73/SR.25](#), para. 49.

international law referred to in the guidelines would mean for a State those agreed in an international instrument and to which that State is a party. Meaning thereby, the guidelines are not creating the binding international law themselves.”¹⁷⁵

83. Belarus argued that “in paragraphs 1 and 2 of guideline 10, it is necessary to clarify to which part of the ‘present’ guidelines the provisions of the said items refer”.¹⁷⁶ Finland, on behalf of the Nordic countries, requested a clarification of the “nexus between the guidelines and obligations under the Paris Agreement”.¹⁷⁷ Spain noted that, while the guidelines as a whole only referred to States, the commentary to draft guideline 10 also referred to the obligations of regional organizations, such as the European Union, and asked the Commission to clarify that reference.¹⁷⁸

84. With regard to paragraph 2, the European Union pointed out that the Commission’s recommendations contributed to the implementation of existing international law obligations, such as those under the Paris Agreement. Therefore, the European Union would appreciate it if the wording of paragraph 2 would encourage States to express their political commitment to giving effect to the recommendations contained in the guidelines.¹⁷⁹ Estonia also supported paragraph 2, noting “that States could endeavour to give effect to the recommendations contained in the draft guidelines, for example through political declarations”.¹⁸⁰ The Republic of Korea noted the need to clarify the scope of the “recommendations”, which was unclear in the commentary and might be better understood if included in the main text.¹⁸¹ Antigua and Barbuda suggested that paragraph 2 could read: “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.”¹⁸²

85. Austria stated that paragraph 1 was redundant as it only reflected general international law. In its view, paragraph 2 would be sufficient as it encouraged States to give effect to the recommendations contained in the draft guidelines.¹⁸³ The Czech Republic agreed, noting “that national implementation of an international obligation may take a form of legislative, administrative, judicial or other action is a simple statement of a known fact”.¹⁸⁴ Slovakia echoed this sentiment, stating that: “It is the well-known sovereign right of a [S]tate to choose forms of national implementation of its international obligations.”¹⁸⁵ The Czech Republic stressed that the most

¹⁷⁵ India, statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal). See also [A/C.6/73/SR.26](#), para. 78.

¹⁷⁶ Belarus, statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal).

¹⁷⁷ Finland (on behalf of the Nordic countries), statement to the Sixth Committee of 25 October 2018 (available on the PaperSmart portal). See also [A/C.6/73/SR.24](#), para. 118 (“the Nordic countries encouraged the Commission, in finalizing its work, to take account of the experiences gained since the entry into force of the Paris Agreement”).

¹⁷⁸ Spain, [A/C.6/73/SR.26](#), para. 62 (“the draft guidelines on protection of the atmosphere focused on States. However, in the commentary to draft guideline 10, it was noted that ‘the term ‘national implementation’ also applies to obligations of regional organizations such as the European Union’. The wording of that sentence was unclear”).

¹⁷⁹ Comments from the European Union ([A/CN.4/735](#)). See also [A/C.6/73/SR.24](#), para. 107.

¹⁸⁰ Estonia, [A/C.6/73/SR.26](#), para. 41. See also Estonia, statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal) and comments from Estonia ([A/CN.4/735](#)).

¹⁸¹ Republic of Korea, [A/C.6/73/SR.27](#), para. 80.

¹⁸² Comments from Antigua and Barbuda ([A/CN.4/735](#)).

¹⁸³ Austria, statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal).

¹⁸⁴ Czech Republic, statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal). See also [A/C.6/73/SR.25](#), para. 59.

¹⁸⁵ Slovakia, statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal). See also [A/C.6/73/SR.26](#), para. 16.

effective way in which States “should endeavour to give effect” to those recommendations was through a collective effort based on multilateral treaty arrangements, which should be mentioned in the draft guideline.¹⁸⁶ Romania also doubted the usefulness of the draft guidelines, arguing that: “a more direct link with the specificity of international obligations on protection of atmosphere is necessary”.¹⁸⁷ The United Kingdom expressed concern that the draft guidelines “do not address fundamental barriers to effective implementation such as lack of resources or political will”.¹⁸⁸

86. France, Israel, New Zealand and the United States expressed doubts about the utility of draft guidelines 10, 11 and 12.¹⁸⁹

2. Recommendation of the Special Rapporteur

87. The Special Rapporteur proposes, following the suggestions of the Federated States of Micronesia and South Africa, to insert a new paragraph 2, to read as follows: “Failure to implement the obligations amounting to breach thereof entails the responsibility of States under international law.” It is true that the Commission decided not to include a draft guideline on the responsibility of States originally proposed by the Special Rapporteur,¹⁹⁰ noting that the articles on responsibility of States for internationally wrongful acts adopted in 2001 “are equally applicable in relation to environmental obligations, including protection of the atmosphere from atmospheric pollution and atmospheric degradation”.¹⁹¹ The Special Rapporteur considers that it is useful to articulate it explicitly in the draft guideline itself.¹⁹² No other changes are proposed by the Special Rapporteur. The Commission may wish to refer to some of the above-mentioned comments in the commentary. The Special Rapporteur will make proposals to this effect in due course.

The Special Rapporteur proposes the following text:

Guideline 10 Implementation

1. National implementation of obligations under international law relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation, including those referred to in the present draft guidelines, may take the form of legislative, administrative, judicial and other actions.

¹⁸⁶ Comments from the Czech Republic (A/CN.4/735).

¹⁸⁷ Romania, statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal). See also A/C.6/73/SR.26, para. 104.

¹⁸⁸ United Kingdom, statement to the Sixth Committee of 30 October 2018 (available on the PaperSmart portal). See also A/C.6/73/SR.27, para. 66.

¹⁸⁹ France, A/C.6/73/SR.26, para. 3; Israel, statement to the Sixth Committee of 30 October 2018 (available on the PaperSmart portal) and A/C.6/73/SR.27, para. 58; New Zealand, statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal) and A/C.6/73/SR.26, para. 97; comments from the United States (A/CN.4/735).

¹⁹⁰ See the Special Rapporteur’s fifth report (A/CN.4/711, para. 31).

¹⁹¹ *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10 (A/73/10)*, para. 78, paragraph (7) of the commentary to draft guideline 10. See also General Assembly resolution 56/83 of 12 December 2001. For the draft articles adopted by the Commission and the commentaries thereto, see *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77).

¹⁹² The Special Rapporteur’s original proposal in his fifth report read as follows: “Failure to implement the obligations amounting to breach thereof entails the responsibility of States under international law, if the actions or omissions are attributable to the States and the damage or risk is proven by clear and convincing evidence.” However, the Special Rapporteur’s proposal this time is simpler since it does not deal with the issue of attribution by deleting the phrase after the word “law”.

2. Failure to implement the obligations amounting to breach thereof entails the responsibility of States under international law.

~~2-3.~~ States should endeavour to give effect to the recommendations contained in the present draft guidelines.

M. Draft guideline 11 (Compliance)

1. Comments and observations

88. As Antigua and Barbuda observed, most States supported the inclusion of draft guideline 11, paragraph 1, which reflected the general principle of *pacta sunt servanda* in international law,¹⁹³ while some States noted that the guideline was simply stating the obvious.¹⁹⁴

89. With regard to paragraph 2, Estonia expressed strong support for the inclusion of subparagraph (a), which concerned compliance with international obligations and the limited capabilities of some States, welcoming the provision of assistance to States in case of non-compliance and the recognition of specific challenges that States could face. Estonia stated that: “In the view of the common responsibility to protect the atmosphere and different capabilities of States, assistance to States concerned is therefore an essential tool to improve the compliance with international obligations.”¹⁹⁵ Belarus supported “the approach of the Special Rapporteur, set out in paragraph 2 of guideline 11”.¹⁹⁶ The Republic of Korea and Romania echoed that sentiment.¹⁹⁷ Colombia agreed with the Special Rapporteur’s approach of preferring cooperative compliance mechanisms for States that did not comply with their obligations.¹⁹⁸ Italy favoured the Special Rapporteur’s preference for “cooperative compliance mechanism[s] over punitive or enforcement mechanisms”.¹⁹⁹ Tonga agreed that the “bifurcated approach helps in distinguishing between those States that

¹⁹³ Comments from Antigua and Barbuda (A/CN.4/735).

¹⁹⁴ Austria, statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal), in which it stated that “[d]raft guideline 11 [paragraph 1] only reiterates rules of general international law and, in particular as far as international agreements are concerned, the general *pacta sunt servanda* rule”. The Czech Republic (statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal) and A/C.6/73/SR.25, para. 60), Slovakia (statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal) and A/C.6/73/SR.26, para. 16) and the United Kingdom (statement to the Sixth Committee of 30 October 2018 (available on the PaperSmart portal) and A/C.6/73/SR.27, para. 66) echoed a similar sentiment.

¹⁹⁵ Comments from Estonia (A/CN.4/735). See also Estonia, statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal) and A/C.6/73/SR.26, para. 42.

¹⁹⁶ Belarus, statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal).

¹⁹⁷ Republic of Korea, A/C.6/73/SR.27, para. 81 (“Draft guideline 11 (Compliance) and the commentary thereto set out a clear explanation of measures that could be undertaken to achieve compliance, including facilitative or enforcement procedures, promoted a comprehensive understanding of the issue of compliance and could serve as an authoritative text of international law”); Romania, A/C.6/73/SR.26, para. 105 (“With a view to promoting progressive development on the topic, Romania supported the use of compliance mechanisms, which were important to ensure that States acted in good faith, in line with their international obligations”).

¹⁹⁸ Colombia, statement to the Sixth Committee of 30 October 2018 (available on the PaperSmart portal) and A/C.6/73/SR.27, para. 32 (“Colombia supported the principle of cooperation and therefore, like the Special Rapporteur, preferred cooperative compliance mechanisms over punitive or enforcement mechanisms that were based on the responsibility of States and were intended to place penalties on States that did not fulfil their obligations”).

¹⁹⁹ Italy, statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal) and A/C.6/73/SR.25, para. 25 (“In accordance with the requirements of distributive justice, cooperative compliance mechanisms were preferable to punitive or enforcement-based ones”).

wish to comply but cannot do so due to the limited capacity and resources and the States that have the capacity to comply but refuse to do so”.²⁰⁰ Romania noted that a facilitative mechanism could be used first, followed by an enforcement mechanism.²⁰¹ Turkey supported the approach in subparagraph (a), but expressed concern at the reference to an enforcement mechanism in subparagraph (b) of draft guidelines that were non-binding, and suggested more “open-ended language”.²⁰²

90. The Federated States of Micronesia applauded “the reference to the need to take into account the capabilities and special conditions of States when fostering their compliance”.²⁰³ Italy welcomed the fact that paragraph 2 dealt “albeit indirectly, with disparities among States”.²⁰⁴ Malaysia stressed the importance of recognizing “the challenges that [are] faced by developing and least developed countries in the discharge of their international environmental protection obligations”.²⁰⁵ Tonga appreciated the recognition that the necessary capacity and resources were “lacking for small island developing States” and noted that paragraph (4) of the commentary could also reference “financial mechanisms or other means of financial support”.²⁰⁶ The Czech Republic considered that the elements of periodic review and improvement provided by the procedures already available under existing agreements, in keeping with scientific and technological progress, could also be included in the guideline.²⁰⁷

91. With regard to subparagraph (b), Italy stressed the difference between “enforcement procedures” in draft guideline 11 and the invocation of international responsibility.²⁰⁸ Antigua and Barbuda recommended adding another sentence to subparagraph (b), which could read: “When determining appropriate enforcement procedures, States and international organizations should consider the capabilities and special conditions of the affected State.”²⁰⁹

²⁰⁰ Tonga, statement to the Sixth Committee of 30 October 2018 (available on the PaperSmart portal) and [A/C.6/73/SR.27](#), para. 25 (“By providing for a choice between facilitative and enforcement procedures in draft guideline 11, paragraph 2, the Commission had rightly made it possible to treat States that wished to comply but were unable to do so differently from those that refused to comply despite having the necessary capacity and resources”).

²⁰¹ Romania, [A/C.6/73/SR.26](#), para. 106. See also Romania, statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal).

²⁰² Turkey, statement to the Sixth Committee of 30 October 2018 (available on the PaperSmart portal) and [A/C.6/73/SR.27](#), para. 107.

²⁰³ Federated States of Micronesia, statement to the Sixth Committee of 30 October 2018 (available on the PaperSmart portal) and [A/C.6/73/SR.27](#), para. 21.

²⁰⁴ Italy, statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal) and [A/C.6/73/SR.25](#), para. 26 (“In paragraph 2 [of draft guideline 11], the Commission had, albeit indirectly, addressed the disparities among States by calling for facilitative procedures to assist States that were willing but unable to comply with their international obligations”).

²⁰⁵ Malaysia, statement to the Sixth Committee of 30 October 2018 (available on the PaperSmart portal) and [A/C.6/73/SR.27](#), para. 97 (“she noted that developing and least developed countries faced special challenges in the discharge of such obligations, making capacity-building measures especially important”).

²⁰⁶ Tonga, statement to the Sixth Committee of 30 October 2018 (available on the PaperSmart portal) and [A/C.6/73/SR.27](#), para. 26 (“One challenge for developing and least developed countries, in addition to the general lack of capacity referred to in paragraph (4) of the commentary, was their limited access to financing mechanisms and other means of financial support”).

²⁰⁷ Comments from the Czech Republic ([A/CN.4/735](#)).

²⁰⁸ Italy, statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal) and [A/C.6/73/SR.25](#), para. 26 (“the enforcement procedures referred to in paragraph 2 (b) should be distinguished from any invocation of international responsibility of States”).

²⁰⁹ Comments from Antigua and Barbuda ([A/CN.4/735](#)).

2. Recommendation of the Special Rapporteur

92. States generally supported the draft guideline, with no suggested changes to the text of the draft guideline. Thus, no change is proposed by the Special Rapporteur. The Commission may wish to refer to some of the above-mentioned comments in the commentary. The Special Rapporteur will make proposals to this effect in due course.

The Special Rapporteur proposes the following text:

Guideline 11 Compliance

1. States are required to abide with their obligations under international law relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation in good faith, including through compliance with the rules and procedures in the relevant agreements to which they are parties.

2. To achieve compliance, facilitative or enforcement procedures may be used, as appropriate, in accordance with the relevant agreements:

(a) facilitative procedures may include providing assistance to States, in cases of non-compliance, in a transparent, non-adversarial and non-punitive manner to ensure that the States concerned comply with their obligations under international law, taking into account their capabilities and special conditions;

(b) enforcement procedures may include issuing a caution of non-compliance, termination of rights and privileges under the relevant agreements, and other forms of enforcement measures.

N. Draft guideline 12 (Dispute settlement)

1. Comments and observations

93. Regarding paragraph 1, Cuba agreed that “disputes should be settled by peaceful means”.²¹⁰ The European Union expressed support for “the reaffirmation of the principle of the peaceful settlement of disputes in the context of the protection of the atmosphere”.²¹¹ Estonia noted its support for “the peaceful settlement of disputes”.²¹² New Zealand also supported the emphasis on the “settlement of disputes by peaceful means”.²¹³ Antigua and Barbuda underscored the importance of the peaceful settlement of disputes.²¹⁴ The Permanent Court of Arbitration appreciated how the guidelines emphasized the “peaceful resolution of disputes”.²¹⁵ Portugal and Tonga also echoed that sentiment.²¹⁶ Spain supported the inclusion of the draft guideline.²¹⁷ Austria and

²¹⁰ Cuba, statement to the Sixth Committee of 30 October 2018 (available on the PaperSmart portal) and [A/C.6/73/SR.28](#), para. 17.

²¹¹ European Union, [A/C.6/73/SR.24](#), para. 108; comments from the European Union ([A/CN.4/735](#)) (“The European Union also welcomes draft guideline 12 relating to dispute settlement. Considering that the desire for peace has always been embedded in the European Union’s policies and is at the core of European integration, the European Union fully supports reaffirming the principle of peaceful settlement of disputes in relation to the protection of the atmosphere from atmospheric pollution and atmospheric degradation”).

²¹² Estonia, statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal) and [A/C.6/73/SR.26](#), para. 43.

²¹³ New Zealand, statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal) and [A/C.6/73/SR.26](#), para. 97.

²¹⁴ Comments from Antigua and Barbuda ([A/CN.4/735](#)).

²¹⁵ Permanent Court of Arbitration, [A/C.6/73/SR.24](#), para. 70.

²¹⁶ Portugal, [A/C.6/73/SR.26](#), para. 110; Tonga, [A/C.6/73/SR.27](#), para. 27.

²¹⁷ Spain, statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal) and [A/C.6/73/SR.26](#), para. 63.

Slovakia noted that paragraph 1 simply stated the obvious.²¹⁸ Italy preferred “to include language excluding any interference with existing dispute settlement provisions in treaty regime[s] at the beginning of paragraph 1 of draft guideline 12”.²¹⁹ The United States saw “no need for the call in draft guideline 12, paragraph 1, to settle disputes relating to the protection of the atmosphere by peaceful means. Article 2, paragraph 3, of the Charter of the United Nations ... requires that international disputes be settled by peaceful means”.²²⁰ UNEP considered that referring to dispute settlement in the draft guidelines was not necessary as there were many other international venues to deal with disputes between States.²²¹

94. Colombia proposed, with regard to paragraph 2, that “the technical character of environmental disputes must be taken into account to ensure that scientific evidence was properly evaluated and that appropriate procedural rules were applied”.²²² Estonia emphasized “the need to take into account the knowledge of scientific and technical experts in the dispute settlement”²²³ and requested that the Commission consider adding an autonomous guideline stating *expressis verbis* the importance of underlying scientific knowledge for actions relating to the protection of the atmosphere.²²⁴ Italy appreciated “the initiative of considering technical and scientific expertise on account of the often fact-intensive and science-dependent character of most international disputes regarding atmospheric pollution”.²²⁵ The Permanent Court of Arbitration applauded the focus on the “distinctive, fact-intensive and science-dependent character” of disputes related to the protection of the atmosphere.²²⁶ The Republic of Korea and Viet Nam also echoed those sentiments.²²⁷

95. Austria stated, regarding paragraph 2, “the reference to the ‘fact-intensive character’ of a dispute is misleading, since large disputes, even other than those relating to the protection of the atmosphere, are very likely to involve a huge quantity of facts that the judges and not ‘technical and scientific experts’ have to deal with”.²²⁸ Tonga also recognized the need to use such experts only when “the circumstances of

²¹⁸ Austria, statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal) and [A/C.6/73/SR.25](#), para. 2; Slovakia, statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal) and [A/C.6/73/SR.26](#), para. 17.

²¹⁹ Italy, statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal) and [A/C.6/73/SR.25](#), para. 27.

²²⁰ Comments from the United States ([A/CN.4/735](#)).

²²¹ Comments from UNEP ([A/CN.4/735](#)).

²²² Colombia, [A/C.6/73/SR.27](#), para. 33. See also Colombia, statement to the Sixth Committee of 30 October 2018 (available on the PaperSmart portal).

²²³ Estonia, statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal) and [A/C.6/73/SR.26](#), para. 43.

²²⁴ Comments from Estonia ([A/CN.4/735](#)).

²²⁵ Italy, statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal) and [A/C.6/73/SR.25](#), para. 27.

²²⁶ Permanent Court of Arbitration, [A/C.6/73/SR.24](#), para. 70.

²²⁷ Republic of Korea, [A/C.6/73/SR.27](#), para. 81 (“As disputes relating to atmospheric pollution and atmospheric degradation, including inter-State environmental disputes, were fact-intensive and science-dependent, her delegation supported the recommendation contained in draft [guideline] 12 (Dispute settlement) that technical and scientific experts be used”); Viet Nam, [A/C.6/73/SR.27](#), para. 91 (“Viet Nam supported the Special Rapporteur’s view that scientific evidence played an indispensable role in ensuring the fair adjudication of highly technical environmental disputes and safeguarding the interests of the parties to the dispute. Therefore, her delegation agreed that, rather than passively admit evidence submitted by the parties, international tribunals and courts should seek the assistance of scientists and experts when dealing with such disputes”).

²²⁸ Austria, statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal) and [A/C.6/73/SR.25](#), para. 2.

the case require it”.²²⁹ The Czech Republic echoed similar concerns, noting that: “If the dispute concerns questions such as the validity of a treaty, effects of a reservation etc., there is no need for such experts.”²³⁰ It stated that the need for the involvement of scientists or technical experts should be recognized and underscored at all stages of policy- and decision-making, as well as in the process of elaborating international legal instruments aimed at the protection of atmosphere, namely, not only in connection with dispute settlement. It also observed that the element of dispute prevention should be underscored.²³¹ Slovakia noted that “it is usually upon the relevant jurisdiction deciding the particular dispute to request or use the relevant expertise” and “what shall be of consideration to use in disputes of fact-intensive and science-dependent character are not experts but rather the relevant expertise”.²³² Furthermore, the Czech Republic stated that “the need for experts’ involvement should be recognized and highlighted in all stages of policy and [decision-making], as well as in the process of preparation of international legal instruments aimed at protection of [the] atmosphere, not only in connection with dispute settlement”.²³³

96. The Permanent Court of Arbitration noted that its recent case law supported draft guideline 12, while also “pointing to additional considerations arising from the distinctive nature of disputes related to the environment generally and protection of the atmosphere in particular”, including evidentiary difficulties, site visits, and questions of transparency and third-party participation.²³⁴ Spain also commented that the complex nature of disputes concerned the relationship between *iura novit curia* and *non ultra petita*, and noted that the Commission might wish to address that in the commentary during the second reading.²³⁵

97. Antigua and Barbuda welcomed the role that “technical and scientific experts” could play in resolving disputes peacefully, particularly those related to protection of the atmosphere, observing that 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*. It stressed, however, that 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 and that affirmative measures should be considered to establish equality with developed States, like a trust fund for developing States to call expert witnesses.²³⁶

²²⁹ Tonga, statement to the Sixth Committee of 30 October 2018 (available on the PaperSmart portal) and [A/C.6/73/SR.27](#), para. 27 (“His delegation supported draft guideline 12, on dispute settlement, and especially paragraph 2, relating to the need to use both technical and scientific experts in dispute settlement processes, as necessary, to ensure that the judicial bodies concerned took informed decisions when settling disputes”).

²³⁰ Czech Republic, statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal) and [A/C.6/73/SR.25](#), para. 60.

²³¹ Comments from the Czech Republic ([A/CN.4/735](#)).

²³² Slovakia, statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal) and [A/C.6/73/SR.26](#), para. 17.

²³³ Czech Republic, statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal).

²³⁴ Permanent Court of Arbitration, [A/C.6/73/SR.24](#), para. 73.

²³⁵ Spain, statement to the Sixth Committee of 26 October 2018 (available on the PaperSmart portal) and [A/C.6/73/SR.26](#), para. 64 (“In his fifth report ([A/CN.4/711](#)), the Special Rapporteur ... stated that *jura novit curia* put a limit on the restriction imposed by *non ultra petita*. ... The Commission had decided not to go further, and given the importance, complexity and topicality of the issue, his delegation believed that that was the right decision at the current time; the issue could perhaps be further developed in the commentary during the second reading”).

²³⁶ Comments from Antigua and Barbuda ([A/CN.4/735](#)).

98. The Federated States of Micronesia applauded “the decision by the Drafting Committee to refine the [Special Rapporteur’s] original draft guideline 12, particularly with respect to language on the use of experts by tribunals to assess evidence before them”. It also emphasized the role of “the traditional knowledge of indigenous peoples and local communities” in international environmental law and encouraged the Commission to recognize such knowledge in the language of draft guideline 12.²³⁷ Cuba suggested that the draft guideline specifically reference the principle of good faith.²³⁸

2. Recommendation of the Special Rapporteur

99. There are a number of useful comments that should be included in the commentary. However, there are few specific comments warranting changes to the guideline itself and, therefore, no change is proposed by the Special Rapporteur. If the Commission wishes to refer to some of the above-mentioned comments in the commentary, the Special Rapporteur will make proposals to this effect in due course.

Guideline 12 **Dispute settlement**

1. Disputes between States relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation are to be settled by peaceful means.
2. Given that such disputes may be of a fact-intensive and science-dependent character, due consideration should be given to the use of technical and scientific experts.

II. Recommendation to the General Assembly

100. According to article 23 of its Statute, it is for the Commission to submit its final draft report on a given topic to the General Assembly, accompanied by a recommendation regarding further action. The work on the present topic concerns the protection of the atmosphere, as confirmed by the Commission at the outset of the work.²³⁹

101. The proposed draft guidelines serve to reaffirm and to clarify the relevant rules of international law. The draft guidelines are therefore a contribution to the work of progressive development and codification of international law, without, however, aiming at replacing an existing convention or eventually becoming a convention themselves.

²³⁷ Micronesia, statement to the Sixth Committee of 30 October 2018 (available on the PaperSmart portal) [A/C.6/73/SR.27](#), para. 22 (“His delegation supported the amendments made to the Special Rapporteur’s proposal for draft guideline 12 (Dispute settlement), which were reflected in the text adopted by the Commission. The original proposal had been too restrictive, as it had not taken into account the important role of the traditional knowledge of indigenous peoples and local communities in dispute settlement in numerous domestic and regional regimes, in particular in disputes concerning environmental matters. ... his delegation encouraged the Commission to consider explicitly acknowledging the relevance of traditional knowledge in either the draft guideline or the commentary thereto”).

²³⁸ Cuba, statement to the Sixth Committee of 30 October 2018 (available on the PaperSmart portal) and [A/C.6/73/SR.28](#), para. 17.

²³⁹ *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10 (A/68/10)*, para. 168.

102. On this basis, the Special Rapporteur proposes that the Commission recommend to the General Assembly:

(a) To take note of the draft preamble and guidelines on the protection of the atmosphere in a resolution, to annex the preamble and the guidelines to the resolution, and to encourage their widest possible dissemination;

(b) To commend the draft preamble and guidelines, together with the commentaries thereto, to the attention of States and international organizations and all who may be called upon to deal with the relevant issue.

Annex

Draft guidelines adopted by the Commission on first reading in 2018, with the Special Rapporteur's recommended changes

Preamble

Acknowledging that the atmosphere is a limited natural resource essential for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystems,

~~*Bearing in mind* that the transport and dispersion of polluting and degrading substances occur within the atmosphere,~~

~~*Noting* the close interaction between the atmosphere and the oceans,~~

Recognizing therefore that the protection of the atmosphere from atmospheric pollution and atmospheric degradation is a ~~pressing concern of the international community as a whole~~ common concern of humankind,

Aware of the special situation and needs of developing countries,

Noting the close interaction between the atmosphere and the oceans.

Noting also ~~*Aware also*~~, in particular, of the special situation of low-lying coastal areas and small island developing States due to sea-level rise,

Recognizing ~~*Noting*~~ that the interests of future generations of humankind in the long-term conservation of the quality of the atmosphere should be fully taken into account,

~~*Recalling* that the present draft guidelines are not to interfere with relevant political negotiations, including those on climate change, ozone depletion, and long-range transboundary air pollution, and that they also neither seek to "fill" gaps in treaty regimes nor impose on current treaty regimes legal rules or legal principles not already contained therein,~~

Guideline 1

Use of terms

For the purposes of the present draft guidelines,

(a) "Atmosphere" means the envelope of gases surrounding the Earth, within which the transport and dispersion of the polluting and degrading substances occur;

(b) "Atmospheric pollution" means the introduction or release by humans, directly or indirectly, into the atmosphere of substances or energy contributing to deleterious effects extending beyond the State of origin of such a nature as to endanger human life and health and the Earth's natural environment;

(c) "Atmospheric degradation" means the alteration by humans, directly or indirectly, of atmospheric conditions having significant deleterious effects of such a nature as to endanger human life and health and the Earth's natural environment.

Guideline 2

Scope of the guidelines

1. The present draft guidelines concern the protection of the atmosphere from atmospheric pollution and atmospheric degradation.

~~2. The present draft guidelines do not deal with, but are without prejudice to, questions concerning the polluter pays principle, the precautionary principle, common but differentiated responsibilities, the liability of States and their nationals,~~

~~and the transfer of funds and technology to developing countries, including intellectual property rights.~~

~~3. The present draft guidelines do not deal with specific substances, such as black carbon, tropospheric ozone and other dual impact substances, which are the subject of negotiations among States.~~

~~4.2. Nothing in the present draft guidelines affects the status of airspace under international law nor questions related to outer space, including its delimitation.~~

Guideline 3

Obligation to protect the atmosphere

States have the obligation to protect the atmosphere by exercising due diligence in taking appropriate measures, in accordance with applicable rules of international law, to prevent, reduce ~~or~~ and control atmospheric pollution and atmospheric degradation.

Guideline 4

Environmental impact assessment

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 significant adverse impact on the atmosphere in terms of atmospheric pollution or atmospheric degradation.

Guideline 5

Sustainable utilization of the atmosphere

1. Given that the atmosphere is a natural resource with a limited assimilation capacity, its utilization should be undertaken in a sustainable manner.
2. Sustainable utilization of the atmosphere includes the need to reconcile economic development with protection of the atmosphere.

Guideline 6

Equitable and reasonable utilization of the atmosphere

The atmosphere should be utilized in an equitable and reasonable manner, taking into account the interests of present and future generations.

Guideline 7

Intentional large-scale modification of the atmosphere

Activities aimed at intentional large-scale modification of the atmosphere should be conducted with prudence and caution, subject to any applicable rules of international law, including those relating to environmental impact assessment.

Guideline 8

International cooperation

1. States have the obligation to cooperate, as appropriate, with each other and with relevant international organizations for the protection of the atmosphere from atmospheric pollution and atmospheric degradation.
2. States should cooperate in further enhancing scientific and technical knowledge relating to the causes and impacts of atmospheric pollution and atmospheric degradation. Cooperation could include exchange of information and joint monitoring.

Guideline 9
Interrelationship among relevant rules

1. The rules of international law relating to the protection of the atmosphere and other relevant rules of international law, including, *inter alia*, the rules of international trade and investment law, of the law of the sea and of international human rights law, should, to the extent possible, be identified, interpreted and applied in order to give rise to a single set of compatible obligations, in line with the principles of harmonization and systemic integration, and with a view to avoiding conflicts. This should be done in accordance with the relevant rules set forth in the Vienna Convention on the Law of Treaties of 1969, including articles 30 and 31, paragraph 3 (c), and the principles and rules of customary international law.
2. States should, to the extent possible, when developing new rules of international law relating to the protection of the atmosphere and other relevant rules of international law, endeavour to do so in a harmonious manner.
3. When applying paragraphs 1 and 2, special consideration should be given to persons and groups particularly vulnerable to atmospheric pollution and atmospheric degradation. Such groups may include, *inter alia*, indigenous peoples, people of the least developed countries and people of low-lying coastal areas and small island developing States affected by sea-level rise.

Guideline 10
Implementation

1. National implementation of obligations under international law relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation, including those referred to in the present draft guidelines, may take the form of legislative, administrative, judicial and other actions.
2. Failure to implement the obligations amounting to breach thereof entails the responsibility of States under international law.
- ~~2-3.~~ States should endeavour to give effect to the recommendations contained in the present draft guidelines.

Guideline 11
Compliance

1. States are required to abide with their obligations under international law relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation in good faith, including through compliance with the rules and procedures in the relevant agreements to which they are parties.
2. To achieve compliance, facilitative or enforcement procedures may be used, as appropriate, in accordance with the relevant agreements:
 - (a) facilitative procedures may include providing assistance to States, in cases of non-compliance, in a transparent, non-adversarial and non-punitive manner to ensure that the States concerned comply with their obligations under international law, taking into account their capabilities and special conditions;
 - (b) enforcement procedures may include issuing a caution of non-compliance, termination of rights and privileges under the relevant agreements, and other forms of enforcement measures.

Guideline 12
Dispute settlement

1. Disputes between States relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation are to be settled by peaceful means.
 2. Given that such disputes may be of a fact-intensive and science-dependent character, due consideration should be given to the use of technical and scientific experts.
-