United Nations A/CN.4/735

General Assembly

Distr.: General
11 February 2020

Original: English/French/Russian/
Spanish

International Law Commission
Seventy-second session
Geneva, 27 April–5 June and 6 July–7 August 2020

Protection of the atmosphere

Comments and observations received from Governments and international organizations

Contents

		Page
I.	Introduction	3
II.	Comments and observations received from Governments	3
	A. General comments and observations	3
	B. Specific comments on the draft preamble and guidelines	10
	1. Draft preamble	10
	2. Draft guideline 1 – Use of terms	16
	3. Draft guideline 2 – Scope of the guidelines	18
	4. Draft guideline 3 – Obligation to protect the atmosphere	21
	5. Draft guideline 4 – Environmental impact assessment	24
	6. Draft guideline 5 – Sustainable utilization of the atmosphere	26
	7. Draft guideline 6 – Equitable and reasonable utilization of the atmosphere	28
	8. Draft guideline 7 – Intentional large-scale modification of the atmosphere	29
	9. Draft guideline 8 – International cooperation	31
	10. Draft guideline 9 – Interrelationship among relevant rules	33
	11. Draft guideline 10 – Implementation	36
	12. Draft guideline 11 – Compliance	37
	13. Draft guideline 12 – Dispute settlement	39

20-01057 (E) 020320

III. Comments and observations received from international organizations 40
A. General comments and observations 40
B. Specific comments on the draft preamble and guidelines 41
1. Draft preamble 41
2. Draft guideline 1 – Use of terms 42
3. Draft guideline 2 – Scope of the guidelines 42
4. Draft guideline 3 – Obligation to protect the atmosphere 43
5. Draft guideline 4 – Environmental impact assessment 43
6. Draft guideline 5 – Sustainable utilization of the atmosphere 43
7. Draft guideline 6 – Equitable and reasonable utilization of the atmosphere 44
8. Draft guideline 7 – Intentional large-scale modification of the atmosphere 44
9. Draft guideline 8 – International cooperation 44
10. Draft guideline 9 – Interrelationship among relevant rules 44
11. Draft guideline 10 – Implementation 45
12. Draft guideline 12 – Dispute settlement 45
13. Additional draft guidelines 45

I. Introduction

1. At its seventieth session (2018), the International Law Commission adopted, on first reading, the draft guidelines on the protection of the atmosphere, together with preamble.[1] In accordance with articles 16 to 21 of its statute, the Commission decided to transmit the draft guidelines, through the Secretary-General, to Governments and international organizations for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 15 December 2019.[2] The Secretary-General circulated a note dated 19 September 2018 to Governments transmitting the draft guidelines on the protection of the atmosphere, together with preamble, with commentaries thereto, and inviting them to submit comments and observations in accordance with the request of the Commission. The draft guidelines and commentaries thereto were also sent to international organizations and others by letters dated 18 September 2018, inviting them to provide comments and observations. By its resolution 74/186 of 18 December 2019, the General Assembly drew the attention of Governments to the importance for the Commission of having their comments and observations on the draft guidelines adopted on first reading by the Commission at its seventieth session.

2. As of 23 January 2020, written comments had been received from Antigua and Barbuda (30 December 2019); Argentina (17 December 2019); Belarus (13 December 2019); Belgium (13 December 2019); Czech Republic (19 December 2019); Estonia (12 December 2019); Finland (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden) (11 December 2019); Germany (13 December 2019); Japan (13 September 2019); Netherlands (9 December 2019); Portugal (7 January 2020); Togo (8 January 2019); United Kingdom of Great Britain and Northern Ireland (20 December 2019); United States of America (13 December 2019).

3. As of 23 January 2020, written comments had also been received from the following international organizations: European Union (3 December 2019); United Nations Environment Programme (18 December 2019).

4. The comments and observations received from Governments are reproduced in chapter II below, while the comments and observations from international organizations and others are reproduced in chapter III.[3]

II. Comments and observations received from Governments

A. General comments and observations

Antigua and Barbuda

[Original: English]

Antigua and Barbuda regrets that the Special Rapporteur has been limited in the scope of his work since this project began in 2013. During that year's session, the Commission included the topic in its programme of work, subject to an understanding which excluded the consideration of several international environmental law principles. Antigua and Barbuda believes the work of the Commission should not be limited by this understanding, particularly on such an important topic. Antigua and Barbuda looks forward to the Commission's discussion of the topic, which Antigua

[1] Report of the International Law Commission on the work of its seventieth session, *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), para. 77.

[2] *Ibid*., para. 76.

[3] In each of the chapters below, comments and observations received are arranged by States, international organizations and others, which are listed in English alphabetical order.

and Barbuda hopes will reflect the vulnerability of developing States to atmospheric change.

Argentina

[Original: Spanish]

Argentina appreciates the continuing work of the Commission in the development of the set of guidelines on the protection of the atmosphere, in view of the fact that pollution and degradation of the atmosphere constitute a current problem of great importance to States given their transversality and universality.

In this regard, Argentina welcomes the systemic approach that has been used, not only in a normative sense and on the basis of a recognition of the relationships that are being woven between the rules of international law relating to the atmosphere and the rules in other legal areas, but also in order to allow for the collective action of States in adopting mitigation measures that take into account the entire atmosphere, the hydrosphere, the biosphere and the geosphere, and their interactions.

With regard to the working methodology, Argentina notes that it is positive that a wide range of applicable international law standards has been considered in the development of the draft. Furthermore, it appreciates that a commentary has been drafted for each draft guideline, explaining the basis of the drafting.

Belgium

[Original: French]

Belgium aligns itself with the comments made by the European Union but also wishes to present comments on its national capacity.

Belgium notes that the draft guidelines stress the fact that the atmosphere is essential for the survival of humans, plants and animals on Earth and that the protection of the atmosphere is therefore necessary. Belgium welcomes the creation of a legal framework supporting this principle.

However, on a joint reading of the draft preamble and the draft guidelines, Belgium questions the limited nature of the scope of the draft guidelines. The scope seems so limited that important questions arise as to the draft guidelines' effectiveness. Belgium refers in particular to the following limitations:

– the draft guidelines must not interfere with relevant political negotiations concerning, in particular, climate change, ozone depletion and long-range transboundary air pollution (the last preambular paragraph)

– the draft guidelines are not intended to "fill" the gaps in existing treaty systems or to supplement them with new rules or new legal principles (the last preambular paragraph)

– the draft guidelines will also not deal with pollution at domestic or local level (commentary to draft guideline 2)

– the draft guidelines do not deal with questions relating to the polluter-pays principle, the precautionary principle, common but differentiated responsibilities, the liability of the State and its nationals and the transfer of funds and technology, including intellectual property rights, to developing countries, but is without prejudice to these issues (draft guideline 2)

– the draft guidelines do not deal with certain substances, such as black carbon, tropospheric ozone and other double impact substances, which are the subject of inter-State negotiations (draft guideline 2)

– nothing in the draft guidelines calls into question the status of airspace in international law or questions relating to outer space, including its delimitation (draft guideline 2)

In this respect, Belgium notes that the last preambular paragraph mentions that the draft guidelines are not to interfere with relevant political negotiations, which deal with various important issues related to the atmosphere. This exclusion from the scope is so wide that it is difficult to read it in conjunction with draft guideline 2, paragraph 1, which mentions that the "present draft guidelines concern the protection of the atmosphere from atmospheric pollution and atmospheric degradation". In addition, the commentary to draft guideline 2 states that the guidelines "will also not deal with domestic or local pollution",[4] which further limits their scope. Belgium is of the view that such a limitation of the field of application undermines the relevance and the added value of the draft guidelines. It could also give the impression that the international community does not attach much importance to clear agreements on the protection of the atmosphere.

Czech Republic

[Original: English]

In view of the 2013 understanding concerning the overall approach to the topic, the Czech Republic concurs with Commission's conclusion that the outcome of the work should be a set of guidelines.

Despite being categorized as "guidelines", several draft provisions are missing the element of "guidance". Some consist of a simple statement of a factual situation or a restatement of a well-established principle of international law; other draft guidelines do contain interesting elements, some of which could be further developed. In order to provide a valuable tool to the States, in view of the Czech Republic, it is necessary that the Commission formulate more precisely the purpose of individual draft guidelines.

Should their goal be, for example, to provide guidance to the negotiators of future treaty instruments dealing with issues of the protection of the atmosphere, several existing draft guidelines, with some modifications, could indeed assist States in such processes. The commentaries accompanying individual draft guidelines could be in particular helpful in the course of such negotiations, by informing negotiators and directing them towards specific instruments in which they would find examples of methods and formulations "tailoring" the general text of the guideline to the more specific (technical) content of the particular instrument. This would also enable the Commission to be more specific in the text of individual guidelines.

Those guidelines, which are supposed to provide the guidance to the States in the process of implementation of legal instruments to which they are parties, should be clearly formulated "without prejudice" to legal obligations that States have under such instruments. Accordingly, their main function would be a complementary one.

Estonia

[Original: English]

Estonia expresses its appreciation for the work done by the Commission and the Special Rapporteur and welcomes 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 draft guidelines, Estonia

[4] Para. (3) of the commentary to draft guideline 2, A/73/10, para. 78, at p. 173.

stresses the high value of the in-depth analysis of relevant international judicial and arbitral practice, as well as the exhaustive overview of the legal theory presented in the commentary.

Finland (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

The Nordic countries welcome the work of the International Law Commission and the Special Rapporteur on the protection of the atmosphere and are, overall, supportive of the draft guidelines.

The Nordic countries commend the skill with which the Special Rapporteur has conducted his work on this weighty and complex subject, acknowledging the difficulty of the task given the restricted mandate of the topic at hand. It should be recalled that the original plan, according to the syllabus attached to the Commission's 2011 report, was to prepare draft articles on the protection of the atmosphere as a basis for a framework convention comparable to the United Nations Convention on the Law of the Sea.[5] The Nordic countries have, from the outset, recognized the importance of the protection of the atmosphere as a topic for the work of the Commission[6] and only regret that the draft guidelines inevitably reflect the tight constraints of the Special Rapporteur's mandate.

Germany

[Original: English]

Germany welcomes the work of the Commission on this highly relevant topic. Germany thanks the Special Rapporteur, Mr. Murase Shinya, for his reports and commends the Commission for having finalized the first reading. Germany looks forward to the successful outcome of this important project. The protection of the atmosphere by preventing the introduction of harmful substances is crucial for sustaining life on Earth, human health and welfare and ecosystems. Transboundary air pollution, ozone depletion and changes in the atmospheric conditions leading to, *inter alia*, climate change are common concerns that need to be addressed by the international community.

Japan

[Original: English]

Japan acknowledges the importance of this topic in finding common legal principles arising from the existing treaties related to the environment. Japan would like to congratulate the Commission and the Special Rapporteur, Mr. Murase Shinya, on the successful completion of the first reading of this topic and the adoption of the preamble and 12 draft guidelines.

[5] *Yearbook of the International Law Commission 2011*, vol. II (Part Two) annex II, p. 191, para. 5, United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3.

[6] A/C.6/66/SR.18, para. 30.

Japan appreciates that the Commission upholds the 2013 understanding that was established as a condition and guiding principle for its consideration of the topic.[7] Japan notes that the Commission and the Special Rapporteur have faithfully respected the 2013 understanding in completing the first reading of the topic. A question may be raised as to whether it is necessary to repeat the content of the 2013 understanding in the draft guidelines. Therefore, Japan considers it appropriate for the Commission to discuss in the second reading all possible formulas, including the deletion of the eighth preambular paragraph, as well as paragraphs 2 and 3 of draft guideline 2 on "Scope of the guidelines."

Netherlands

[Original: English]

The Netherlands requested and received a report of its Advisory Committee on Issues of Public International Law and invited the Secretary-General to take note of the report. Except as provided hereinafter, the full text of the report appears on the website of the International Law Commission.

That the Commission has put the important issue of the protection of the atmosphere on its agenda is applauded. Treating the atmosphere as a "single global unit" is a positive development.

However, the Commission appears to be in two minds about this. On the one hand, it considers the issue of the protection of the atmosphere to be of great importance, one which belongs on the international agenda. On the other hand, however, it displays a great deal of caution and almost appears to be divided on the question as to whether it is a matter of international politics or international law.

The Netherlands' focus during its membership of the Security Council on conflict prevention, aimed in part at climate-related root causes and the flood risks posed by rising sea levels to, among others, small island developing States, has provided the Government of the Netherlands with an opportunity to convey this ambition in this context, too.

The Commission has stated that, with the draft guidelines, it seeks, through the progressive development of international law and its codification, to provide guidelines that may assist the international community as it addresses critical questions relating to transboundary and global protection of the atmosphere.

It appears to have been only moderately successful. Instead of preparing a number of draft articles on the protection of the atmosphere, it 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

[7] 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 an understanding."

Yearbook of the International Law Commission 2013, vol. II (Part Two), para. 168.

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.

Moreover, it would not even be possible to "impose on current treaty regimes legal rules or legal principles not already contained therein", as this would far exceed the powers of the Commission.

Inasmuch as there might be gaps in existing treaty regimes, there is indeed a certain risk that the draft guidelines, insofar as they comprise proposals for rules or principles of general international law, could play a role in addressing them, but the Commission has endeavoured to rule that out in any case too, which could be considered regrettable.

The recognition in the preamble that the protection of the atmosphere from atmospheric pollution and atmospheric degradation is "a pressing concern of the international community as a whole", intended as a factual observation and in itself not incorrect, also demonstrates a certain reluctance. The fear of the legal consequences of including the notion of a "common concern of humankind" in a preamble is not convincing. This notion is generally accepted, and introducing new notions such as "a pressing concern of the international community as a whole" creates unnecessary confusion.

In the draft guidelines, the Commission remains extremely vague about what exactly the status of the atmosphere is under international law. It should provide more clarity on this point. Furthermore, the Commission should provide more clarity on what atmosphere-related problems could exist in addition to those already known.

Given the restrictions the Commission imposed on itself, it is pleasing to note that, as regards the substance of the draft guidelines, the Commission has formulated draft guidelines 3 (protection), 4 (environmental impact assessment), 8 (international cooperation), 10 (implementation), 11 (compliance) and 12 (dispute settlement) in terms of "obligations". The Commission thus creates the impression that it is taking existing rules and principles as its starting point after all.

Portugal

[Original: English]

Portuguese delegations to the Sixth Committee of the General Assembly have argued that the interrelationship between the rules of international law relating the atmosphere and human rights raises many problems, such as the interpretation of jurisdiction, identification and implementation. It is the hope of Portugal that the finished work of the Commission will provide guidance for solving some of those problems. Portugal believes the draft guidelines as they were adopted on first reading are 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.

Portugal underlines the scientific evidence showing that atmospheric degradation has a profound and long-term negative impact on the sustainability of ecosystems, with prejudice to the full enjoyment of human rights and to the environment as a common good of humankind.

The prevention, mitigation and reversal of such atmospheric degradation calls for the ability of human communities to change behaviours at the political, technological, economic and lifestyle levels. It is therefore of paramount importance that the legal analysis by the Commission on the protection of the atmosphere addresses the problem from a "cause and effect" perspective.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

Generally, the United Kingdom continues to emphasize the significance of various treaties concerning protection of the atmosphere. The United Kingdom notes the way in which these treaties continually evolve in response to new challenges or new understandings.

Despite reservations about the draft guidelines, the United Kingdom stresses its support for the need to protect the atmosphere and environment, and to tackle climate change. But it continues to have reservations about whether the Commission is the best or most effective forum to seek to pursue these objectives.

United States of America

[Original: English]

The United States recognizes the efforts of the Commission and its Special Rapporteur on this important topic.

The United States has repeatedly expressed its concerns, through statements in the Sixth Committee, that the Commission's work on this topic would complicate rather than facilitate negotiations regarding environmental issues related to the atmosphere and thus could inhibit progress in this area. The draft guidelines that have been adopted on first reading essentially confirm this broad concern, but also raise specific issues with regard to their form and substance. In accordance with the comments below, it is the view of the United States that the Commission's time could more profitably be spent on other topics and the draft guidelines should not be adopted at second reading, but instead reconsidered in a working group to determine whether completion of this project is viable, in light of the comments received.

The draft guidelines are likely to give rise to confusion by virtue of the incongruence among their title, substance and form. As we explained in general comments in the Sixth Committee regarding Commission's work products, "[a]s the [Commission] has increasingly moved away from draft articles, its work products have been variously described as conclusions, principles or guidelines. It is not always clear what the difference is among these labels, particularly when some of these proposed conclusions, principles, and guidelines contain what appear to be suggestions for new, affirmative obligations of States, which would be more suitable for draft articles".[8] In general international practice, documents entitled "guidelines" are not understood as setting forth international legal obligations. Draft guidelines 3, 4 and 8, however, all assert categorically that "States have the obligation" to undertake certain actions. While the Commission's Guide to Practice on Reservations

[8] See United States of America, statement of 29 October 2019, 24th meeting, Sixth Committee (available from the United Nations PaperSmart portal, https://papersmart.unmeetings.org/en/ga/sixth/74th-session/statements/); also A/C.6/74/SR.24, para. 73.

to Treaties[9] provides some precedent for considering the scope of a State's obligations in the context of "guidelines", that topic necessarily concerned the ability to make reservations to binding treaty obligations. Moreover, the form of the Guide to Practice on Reservations was chosen to make it clear that the document was providing guidance as opposed to setting forth obligations. The present draft guidelines, in contrast, are in a format that more closely resembles draft articles for a treaty or multilateral convention, with a preamble and apparent operative clauses that include provisions addressing "compliance" and "dispute settlement" that appear out of place in a non-binding set of guidelines.

Draft guidelines 9 to 12 each address topics of general applicability within public international law that do not warrant special or specific consideration in the context of protection of the atmosphere. Specifically, draft guidelines 9, 10, 11 and 12 address "interrelationship among relevant rules", "implementation", "compliance" and "dispute settlement", respectively. Any one of these topics could be, and at least two have been, considered as topics by the Commission in their own right, but by addressing these general areas of law in the draft guidelines the Commission introduces needless confusion.

B. Specific comments on the draft preamble and guidelines

1. Draft preamble

Antigua and Barbuda

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

Antigua and Barbuda underscores the third preambular paragraph's note of the "close interaction between the atmosphere and the oceans", a fact that it knows first hand. Caribbean regional organizations, such as the Caribbean Environment Programme and Organisation of Eastern Caribbean States have stated this fact for more than twenty years. A 1992 Organisation of Eastern Caribbean States report expressed particular concern with the effect of climate change on biodiversity in the Caribbean region, including aquatic and terrestrial ecosystems.[10] In 1993, the Caribbean Environment Programme noted the impact of climate change on the Intra-American Sea, which comprise the Caribbean Sea and the Gulf of Mexico.[11] 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 "the serious threat to the marine and coastal resources and to human health in the Wider Caribbean Region posed by pollution from land-based sources and activities", defined in article I (d) to include "atmospheric deposition originating from sources located on its territory".[12]

[9] *Yearbook of the International Law Commission 2011*, vol. II (Part Three).

[10] Organisation of Eastern Caribbean States, OECS regional report on environment and development prepared for the United Nations Conference on Environment and Development (1992), p. 61.

[11] George Maul, *Ecosystem and Socioeconomic Response to Future Climatic Conditions in the Marine and Coastal Regions of the Caribbean Sea, Gulf of Mexico, Bahamas, and the Northeast Coast of South America*, report CEP TR 22 (1993), pp. 2 and 5.

[12] 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 (Oranjestad, 6 October 1999), *Treaties and Other International Acts Series*, 10-813, sixth preambular para. and art. I.

Antigua and Barbuda acknowledges that the formulation of the fourth preambular paragraph of the draft guidelines results from a careful attempt to comply with the 2013 understanding. However, like many States, Antigua and Barbuda supports using the phrase "common concern of humankind", found in the Paris Agreement and the United Nations Framework Convention on Climate Change,[13] as opposed to "pressing concern of the international community as a whole".

Antigua and Barbuda echoes the statement of the Caribbean Community (CARICOM) at the seventy-third session of the General Assembly recognizing "the special vulnerability of small island developing States and low-lying coastal areas, with regards to the effect of sea-level rise" in the sixth preambular paragraph.[14] As the Organisation of Eastern Caribbean States noted in 1992:

> [s]mall island and low lying developing countries by virtue of their extreme vulnerability to economic and ecological destruction, will require particular attention by the international community if these environmental problems, to which these countries' contributions have been minimal, are not to overwhelm them environmentally and financially.[15]

This principle has been consistently reaffirmed in multilateral treaties. However, the phrasing of the sixth preambular paragraph may limit recognition of special situations. As the commentary notes, the Johannesburg Declaration on Sustainable Development affirms that the represented States "shall continue to pay special attention to the developmental needs of small island developing States and the least developed countries".[16] Both the United Nations Framework Convention on Climate Change and the Paris Agreement note the "specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change".[17] Antigua and Barbuda supports using the same language as the United Nations Framework Convention on Climate Change and the Paris Agreement, rather than "special situation", which is used in those instruments only in reference to technology transfer. These documents do not limit special needs and specific circumstances to the consideration of sea-level rise. The adverse effects of climate change extend beyond sea-level rise, though it is one of the existential threats to small island developing States. The Intergovernmental Panel on Climate Change recently described these effects, assuming humankind can hold global warming to 1.5 degrees Celsius: "Growth-rate projections based on temperature impacts alone indicate robust negative impacts on gross domestic

[13] Paris Agreement (Paris, 12 December 2015), *Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015*, Addendum: Part two: Action taken by the Conference of the Parties at its twenty-first session (FCCC/CP/2015/10/Add.1), decision 1/CP.21, annex, text also available from https://treaties.un.org, *Depositary, Certified True Copies*, eleventh preambular para.; United Nations Framework Convention on Climate Change (New York, 9 May 1992), United Nations, *Treaty Series*, vol. 1771, No. 30822, p. 107, first preambular para.

[14] Bahamas, on behalf of CARICOM, statement of 22 October 2018, 20th meeting, Sixth Committee (available from the United Nations PaperSmart portal, https://papersmart.unmeetings.org/en/ga/sixth/73rd-session/statements/).

[15] Organisation of Eastern Caribbean States, OECS regional report on environment and development, p. 54.

[16] *Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August–4 September 2002*, document A/CONF.199/20, annex, para. 24.

[17] Paris Agreement, fifth preambular para.; United Nations Framework Convention on Climate Change, art. 3, para. 2.

product (GDP) per capita growth for [small island developing States]". [18] Beyond temperature impacts, there will also be an increase in "climate-related extreme weather events", greater risk of drought, and reduced income from industries dependent on marine systems. [19] The sixth preambular paragraph should reflect these additional impacts, perhaps with a more inclusive formulation, for example: "Aware of the specific needs and special circumstances of developing countries, in particular small island developing States and least developed countries, and the special situation of low-lying coastal areas". This would include least developed countries, which are mentioned in the Paris Agreement, the Stockholm Convention and the United Nations Framework Convention on Climate Change, [20] and note the "specific needs" of small island developing States and least developed countries, which are not recognized in the current formulation in these three agreements.

Antigua and Barbuda supports considering the interests of future generations in the seventh preambular paragraph. 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". [21] Similarly, the first object of the 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". [22] 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. [23]

Much like the fourth preambular paragraph, Antigua and Barbuda recognizes that the eighth preambular paragraph follows from the 2013 understanding. While the mission of the Commission is to codify and progressively develop international law, its pronouncements, while influential, are not binding on States. Therefore, Antigua and Barbuda does not agree that this project would "interfere with relevant political negotiations", as negotiators in those circumstances need not use the Commission's draft guidelines. Further, the commentary cites several treaties related to climate change, ozone depletion and long-range transboundary air pollution. It is unlikely that negotiators on those topics would depart significantly from the current treaty regime, which forms the basis of the project. Antigua and Barbuda recommends striking out the eighth preambular paragraph.

Argentina

The wording of the second preambular paragraph could be confusing and, in that regard, taking into account the relevant commentary of the draft guidelines, it considers that wording could be used in order to clarify its meaning in the following

[18] Ove Hoegh-Guldberg and others, "Impacts of 1.5°C of global warming on natural and human systems" in Valérie Masson-Delmotte and others (eds.), *Global Warming of 1.5°C: 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* (Intergovernmental Panel on Climate Change, 2018), p. 235. Available at www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15_Full_Report_Low_Res.pdf.

[19] *Ibid*.

[20] Paris Agreement, art. 4, para. 6; Stockholm Convention on Persistent Organic Pollutants (Stockholm, 22 May 2001), United Nations, *Treaty Series*, vol. 2256, No. 40214, p. 119, eleventh preambular para.; United Nations Framework Convention on Climate Change, art. 4, para. 9.

[21] Organisation of Eastern Caribbean States, St George's Declaration of Principles of Environmental Sustainability in the OECS, adopted in 2006 (hereinafter, "St George's Declaration"), p. 18.

[22] Environmental Protection and Management Act 2019, sect. 3 (1) (a).

[23] Colombia, Supreme Court, STC 4360-2018 of 5 April 2018.

terms: "*Bearing in mind* the different types and levels of transport and dispersion of polluting and degrading substances that occur in the atmosphere".

It appreciates that the third preambular paragraph has taken into account that the protection of the atmosphere is intrinsically linked to the oceans and the law of the sea in view of the close physical interaction between the atmosphere and the oceans.

The last preambular paragraph delimits, together with draft guideline 2, the scope of application of the draft guidelines. However, Argentina considers that last preambular paragraph to be clearer and more specific than guideline 2 itself. In this regard, the inclusion of the phrase "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" is particularly welcome, since it recognizes that international environmental law has advanced in recent decades mainly through instruments and conventions of increasing specificity.

At this point, it is necessary to emphasize the importance of safeguarding the balance between conservation and protection of the environment, avoiding disguised restrictions to international trade with an environmental basis and sustaining in parallel the three dimensions that constitute sustainable development (environmental, social and economic). In this regard, Argentina considers it essential not to undermine the existing negotiations and agreements; to respect the particularities of the special regimes of international law (trade, investment, intellectual property, nuclear, maritime, etc.) and of those environmental regimes established through multilateral environmental agreements and related instruments (climate change, biodiversity, chemicals, ozone, etc.), as well as their own evolutionary processes and ongoing negotiations; and to respect the particularities of the regional regimes, which respond to the circumstances, priorities and capacities of the States involved.

Belarus

[Original: Russian]

To ensure the uniform interpretation of the text of the draft guidelines on the protection of the atmosphere, it is proposed to specify, in the second preambular paragraph, what is being polluted. If it is the atmosphere, the possessive adjective "*ee*" should be inserted after the word "*vyzyvayushchikh*". If it is other elements of the environment that are being polluted, the text should specify which ones are meant (water, air, the ecosystem) (In the English text, the phrase "polluting and degrading substances" would have to be replaced with "substances that pollute and degrade", plus a direct object or objects (either the atmosphere or other elements of the environment (water, air, the ecosystem), depending on what is being polluted)).

The link between the protection of the atmosphere, atmospheric pollution and atmospheric degradation and the special needs of developing countries is not clear. A high concentration of a given polluting substance will have the same effects on human beings and the ecosystem in any country. Accordingly, there appears to be no justification for retaining the fifth preambular paragraph.

The provisions on the need to take into account the interests of future generations should, however, be included in the preamble, given that the legal interpretation of the concept of mutual responsibility of generations is one of the main areas for the further progressive development of international law.

Belgium

Belgium wonders why the third preambular paragraph is limited to accentuating the interactions between the atmosphere and the oceans. It would be recommended to

emphasize that interactions with other ecosystems, such as forests, are equally important, both in terms of climate and air pollution.

As indicated above, Belgium questions the considerable limitation of the scope of application of the draft guidelines included in the last preambular paragraph when this is read in conjunction with the draft guidelines and the commentary.

Estonia

Regarding the second preambular paragraph, Estonia would propose referring 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 may be understood from the present wording.

Estonia notes that the preambular paragraphs of the draft guidelines follow certain logic – moving from more general considerations to more specific. Therefore, Estonia would like to propose that the reference to interests of future generations of humankind as related to the quality of the atmosphere appear before the mention of the recognition of the pressing concern of the international community as a whole. According to the understanding of Estonia, the interest of future generations is the general aim, causing the pressing concern of the international community today, and therefore the order of the fourth and seventh preambular paragraphs should be rearranged.

Regarding the last preambular paragraph, Estonia would support, in addition to listing all the aspects with which the guidelines are not to interfere, the inclusion of a list of relevant international treaty regimes serving as an existing context for the guidelines. This could be done together with encouraging States to consider joining and implementing these existing multilateral environmental agreements.

Finland (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

In their previous comments, the Nordic countries have noted with regret that the expression "pressing concern of the international community as a whole" was used in paragraph 4 of the preamble to the draft guidelines in lieu of "common concern of humankind", the latter being a more established choice of expression in international environmental law.[24] Opting for a criterion that has been used in another, and completely different, context – that of selection of topics for the Commission's own long-term programme of work – has not been an obvious choice.

While acknowledging the Commission's explanation for this choice of terminology in the relevant commentary,[25] the Nordic countries nevertheless find it disappointing that a reference to the protection of the atmosphere as a "common concern of humankind" was omitted from the draft guidelines and propose its introduction to the preamble. The Nordic countries wish to stress that inclusion of the term "common concern of humankind" would be well-founded in light of the subject matter of the draft guidelines and the close connection between the protection of the atmosphere and climate change. Insofar as the omission of a reference to the protection of the atmosphere as "a common concern of humankind" was related to a lack of clarity as to the precise legal implications of the concept, the Nordic countries

[24] See the preamble to the United Nations Framework Convention on Climate Change, as well as instruments such as those listed in footnote 821 in the 2018 annual report of the Commission, para. (9) of the commentary to the draft preamble, A/73/10, para. 78, at p. 165.

[25] Para. (9) of the commentary to the preamble, *ibid*., at pp. 164–165.

would consider the draft commentaries a worthy opportunity for the Commission to contribute to its clarification.

Germany

Germany welcomes the decision of the Commission to acknowledge in the preamble the importance of the atmosphere and its essential role for sustaining life on Earth, human health and welfare and ecosystems. Germany furthermore appreciates that the Commission recognizes the urgency and the global character of atmospheric protection by calling it in the preamble a "pressing concern of the international community as a whole". Indeed, no State will be able to protect the atmosphere on its own. Instead, this is a matter of concern for all States, and in fact for all people living on our planet. From the perspective of Germany, it may therefore be justified to follow the initial recommendation by the Special Rapporteur and to classify atmospheric protection as a "common concern of humankind". 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.

In the view of Germany, the understanding reached in 2013 to include the topic "protection of the atmosphere" in the Commission's programme of work only subject to certain thematic limitations is still pertinent. Germany has noted with satisfaction that both the report and the draft guidelines clearly remain within this understanding. As draft guideline 2 fully respects this understanding, the last preambular paragraph appears to be redundant.

Japan

Japan recalls that the fourth preambular paragraph of the draft guidelines states that "the protection of the atmosphere from atmospheric pollution and atmospheric degradation is a pressing concern of the international community as a whole". Taking into consideration the fact that the Paris Agreement in 2015 recalled the concept of "a common concern of humankind"[26] in its preamble, Japan considers it appropriate for the Commission to reconsider this paragraph in the second reading and to update the discussions on this concept.

Netherlands

According to the commentary concerning the fourth paragraph of the preamble,[27] the Commission preferred using the concept "a pressing concern of the international community as a whole" and not the concept of "common concern of humankind" for the characterization of the problem, as the legal consequences of the latter remain unclear at the present stage of development of international law relating to the atmosphere.

The Netherlands would like to note that the concept "common concern of humankind" has been used in several multilateral environmental instruments, including instruments related to the atmosphere, and has become an integral part of international environmental law. The Netherlands would therefore prefer that the concept be used in connection with the protection of the atmosphere.

[26] Paris Agreement, eleventh preambular para.

[27] Para. (9) of the commentary to the preamble, A/73/10, para. 78, pp. 164–165.

Portugal

Portugal advocates that first preambular paragraph should be clearer about acknowledging the atmosphere as a finite and natural resource. In this sense, Portugal proposes the following text:

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

Concerning the fourth preambular paragraph, Portugal argues that the protection of the atmosphere should be referred to as "a common concern of humankind", in line with international legally binding instruments such as the United Nations Framework Convention on Climate Change. Portugal advocates that, for a progressive development of international law in this subject, a normative statement is preferable to a simply factual one ("a pressing concern of the international community"). Consequently, Portugal proposes the following text:

> "*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 **a common concern of humankind**,"

2. Draft guideline 1 – Use of terms

Antigua and Barbuda

Antigua and Barbuda notes that both "atmospheric pollution" and "atmospheric degradation" do not need to be used as definitions. It recommends focusing on "atmospheric pollution" through an expanded definition that aligns with the common meaning in international law. Draft guideline 1 narrows the meaning of "atmospheric pollution" by adding the phrase "extending beyond the State of origin" to the definition of "pollution" found, as noted in the commentary, in the Convention on Long-Range Transboundary Air Pollution and the United Nations Convention on the Law of the Sea.[28] Neither of these instruments narrow "pollution" to transboundary effects; the Convention on Long-Range Transboundary Air Pollution provides a separate definition of "long-range transboundary air pollution",[29] which the commentary mentions. A broader definition also aligns with 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, which defines pollution as "the introduction by humans, directly or indirectly, of substances or energy into the Convention area, which results or is likely to result in such deleterious effects as harm to living resources and marine ecosystems".[30]

However, the draft guidelines address protection of the atmosphere beyond transboundary effects, as the definition of "atmospheric degradation" indicates. The commentary to this draft guideline notes that "atmospheric degradation" is meant to include the "problems of ozone depletion and climate change".[31] Given the nature of the atmosphere, those problems will necessarily have "deleterious effects extending beyond the State of origin" and so also fall within the definition of "atmospheric pollution".

---

[28] United Nations Convention on the Law of the Sea, art. 1, para. 4; Convention on Long-Range Transboundary Air Pollution (Geneva, 13 November 1979), *ibid*., vol. 1302, No. 21623, p. 217, art. 1 (a).

[29] Convention on Long-Range Transboundary Air Pollution, art. 1 (b).

[30] 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, art. I (c).

[31] Para. (11) of the commentary to draft guideline 1, A/73/10, para. 78, at p. 172.

As a more general matter, Antigua and Barbuda does not find that the phrases "significant deleterious effects" or "atmospheric degradation" have enough support in international law to affirm their use in the draft guidelines. "Atmospheric degradation" has not yet been used in the international treaty regime. As stated in the commentary, "significant deleterious effects" can be found in the Vienna Convention for the Protection of the Ozone Layer and the United Nations Framework Convention on Climate Change.[32] However, both use "significant deleterious effects" in the definition of "adverse effects", not of "pollution" itself. Simply using "deleterious effects" would be more in line with the definition of "pollution" used in various multilateral treaties, such as the 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.[33] However, Antigua and Barbuda recommends more clarity on when atmospheric effects are "deleterious", which should not be a self-judging standard.

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

Belarus

In interpreting the term "atmospheric pollution", it is worth noting that the main sources of such pollution are natural and human-caused (transport, industry, everyday activities). The latter pollutants are transboundary in nature; in other words, substances emitted in the territory of one State are deposited both in its own territory and in the territory of neighbouring States and continents. Taking into account these specific aspects, Belarus believes it is necessary to review the wording of the definition proposed in draft guideline 1 and to state that atmospheric pollution is, for example, "the introduction or release by humans, directly or indirectly, into the atmosphere of substances or energy resulting in harmful effects of such a nature as to endanger human life and health and harm living resources and the Earth's natural environment, both in the territory of the State of origin and in territory under the jurisdiction of another State".

Estonia

Paragraph (b) of draft guideline 1 defines "atmospheric pollution". It is not clear, however, why "energy" is excluded from the definition and is understood to be included *per se* in the term "substance" (as explained in paragraph (9) of the commentary to draft guideline 1),[34] despite the fact that the clear distinction between the two is made in two relevant international instruments referred to in paragraph (8) of the commentary to draft guideline 1.[35] Estonia does not see merit in such generalization and prefers to see the terminology coherent to the extent possible, in line with existing treaty practice, the principle also referred to in paragraph (7) of the commentary to draft guideline 1.[36] Energy, as heat, light, noise and radioactivity, does not associate with a substance in the common understanding of the word. Hence, the term "substance" would need additional, and to an extent artificial, explanation each time it was referred to, in order to avoid confusion or misinterpretation.

[32] Vienna Convention for the Protection of the Ozone Layer (Vienna, 22 March 1985), United Nations, *Treaty Series*, vol. 1513, No. 26164, p. 293, art. 1, para. 2; United Nations Framework Convention on Climate Change, art. 1, para. 1.

[33] Protocol Concerning Pollution from Land-Based Sources and Activities, art. I (c).

[34] A/73/10, para. 78, at p. 171.

[35] *Ibid*., pp. 170–171.

[36] *Ibid*., p. 170.

Japan

Japan recalls that draft guideline 1, subparagraph (b), states that "'[a]tmospheric pollution' means the introduction or release by humans, directly or indirectly, into the atmosphere of *substances* contributing 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" (emphasis added). Taking into consideration the fact that the 1982 United Nations Convention on the Law of the Sea adopts "*substances or energy*" (emphasis added) in its article 1, paragraph 1 (4), Japan considers it appropriate for the Commission to reconsider this subparagraph in the second reading and to update the discussions on this concept.

Netherlands

While the definitions of "atmospheric pollution" and "atmospheric degradation" are in principle adequate, 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".

It is also noteworthy that in both definitions the deleterious effects are limited to those "of such a nature as to endanger human life and health and the Earth's natural environment".

It is worth comparing this with the definition of "air pollution" in the 1979 Convention on Long-range Transboundary Air Pollution:

> For the purposes of the present Convention: "Air pollution" means the introduction by man, directly or indirectly, of substances or energy into the air resulting in deleterious effects of such a nature as to endanger human health, harm living resources and ecosystems and material property and impair or interfere with amenities and other legitimate uses of the environment, and "air pollutants" shall be construed accordingly.[37]

Or the definition of "impact" in the 1991 Convention on Environmental Impact Assessment in a Transboundary Context:

> For the purposes of this Convention:
>
> …
>
> "Impact" means any effect caused by a proposed activity on the environment including human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interaction among these factors; it also includes effects on cultural heritage or socio-economic conditions resulting from alterations to those factors.[38]

The definitions of "atmospheric pollution" and "atmospheric degradation" are based on a notion of harm that is too limited.

3. Draft guideline 2 – Scope of the guidelines

Antigua and Barbuda

The commentary to paragraph 1 of draft guideline 2 notes "that whatever happens locally may sometimes have a bearing on the transboundary and global

[37] Convention on Long-range Transboundary Air Pollution, art. 1 (a).

[38] Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991), United Nations, *Treaty Series*, vol. 1989, No. 34028, p. 309, art. 1 (vii).

context in so far as the protection of the atmosphere is concerned".[39] As the St George's Declaration states, "land and marine areas in the small island states constitute a single unit" and there is a "close inter-relationship between the various ecological systems in them".[40] Antigua and Barbuda reiterates the need for a broad definition of "atmospheric pollution" that reflects this reality.

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

Paragraph 3 notes that the present draft guidelines do not address "dual-impact substances", of which a non-exhaustive list is given. Considering that the phrase "dual-impact substances" has not been used in the international treaty regime, it is unclear what it means in this context. The two examples given, black carbon and tropospheric ozone, both have an adverse effect on human health in addition to causing environmental damage. However, if that is the case, those two substances would "endanger human life and health" and therefore fall within the definition of "atmospheric pollution". At least two Protocols to the Convention on Long-Range Transboundary Air Pollution have dealt with tropospheric ozone;[41] it would be odd for the commentary to cite the Convention on Long-Range Transboundary Air Pollution, but then exclude consideration of its Protocols. Antigua and Barbuda recommends striking out this paragraph unless a definition of "dual-impact substances" is provided.

Argentina

The clarification in paragraph 4 of draft guideline 2 that the provisions of the draft guidelines do not affect the legal status of airspace or outer space issues is welcomed.

Belarus

Today, there is controversy as to which substances are dual-impact substances; this controversy concerns black carbon in particular.[42] Belarus therefore thinks it necessary, in draft guideline 2, paragraph 3, to list all the main dual-impact substances or not to refer to any of them, leaving the question to the discretion of States.

Belgium

Belgium considers 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 draft guidelines or does it only concern the dual-impact substances that are the subject of negotiations? This is not specified in the commentary relating

[39] Para. (3) of the commentary to draft guideline 2, A/73/10, para. 78, at p. 173.

[40] St George's Declaration, preamble.

[41] 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. 2319, No. 21623, p. 80, art. 5, para. 1 (c); Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution concerning the Control of Emissions of Volatile Organic Compounds or their Transboundary Fluxes (Geneva, 18 November 1991), United Nations, *Treaty Series*, vol. 2001, No. 34322, p. 187, fourth preambular para.

[42] The current wording refers to black carbon, a substance that is claimed to have an impact on the climate. There have been attempts to include black carbon in lists of restricted or prohibited substances under international treaties, including the Convention on Long-range Transboundary Air Pollution. However, no one has a methodology for calculating/measuring/assessing it.

to this draft guideline. Belgium can therefore ask the question of the exclusion or not of CH_4 from the scope of the draft guidelines.

In this context, it can 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, NH_3, heavy metals, etc.). If these pollutants are also excluded from the scope of the draft guidelines, this would again constitute a very significant restriction.

Netherlands

Paragraph 4 of draft guideline 2 contains a saving clause concerning the status of airspace under international law and questions related to outer space, including its delimitation.

In the words of the Commission:

> The atmosphere and airspace are two entirely different concepts, which should be distinguished. Airspace is a static and spatial-based institution over which the State, within its territory, has "complete and exclusive sovereignty". (…) The airspace beyond the boundaries of territorial waters is regarded as being outside the sovereignty of any State and is open for use by all States, like the high seas. On the other hand, the atmosphere, as an envelope of gases surrounding the Earth, is dynamic and fluctuating, with gases that constantly move without regard to territorial boundaries. The atmosphere is invisible, intangible and non-separable.[43]

This may be the case, but what is the legal status of the atmosphere? Is it different from that of the high seas or international watercourses?

The view of the atmosphere as a "common concern of humankind" that determines the legal status of the atmosphere was not adopted by the Commission.

United Kingdom of Great Britain and Northern Ireland

The United Kingdom is concerned that the scope of the draft guidelines goes beyond the limitations agreed to by the Commission when it included this topic in its programme of work in 2013, and in particular the understanding that "work on the topic will proceed in a manner so as not to interfere with relevant political negotiations, including those on climate change, ozone depletion, and long-range transboundary air pollution". The United Kingdom recognizes that this aspect of the understanding upon which the Commission adopted this topic is referenced in the final paragraph of the preamble to the draft guidelines. The United Kingdom suggests, however, that this preambular reference is not, of itself, sufficient to avoid the risk that the draft guidelines (as described in draft guideline 2) interfere with political negotiations relating to protection of the atmosphere.

A possible solution may be to add a new paragraph to draft guideline 2 clarifying that the draft guidelines do not extend to matters that are the subject of political negotiation, in particular political negotiations relating to climate change, ozone depletion or long-range transboundary air pollution. The concept of "political negotiation" could be clarified to make clear that it is not confined to the negotiation of new treaties, but extends to the review of existing treaties, political negotiations regarding the implementation of those treaties and other work taking place within the framework of those treaties.

[43] Para. (6) of the commentary to draft guideline 2, A/73/10, para. 78, at p. 174.

4. Draft guideline 3 – Obligation to protect the atmosphere

Antigua and Barbuda

The commentary to draft guideline 3 notes that it is based on the Stockholm and Rio Declarations, while also incorporating language from the United Nations Convention on the Law of the Sea and the United Nations Framework Convention on Climate Change. Antigua and Barbuda believes the formulation of draft guideline 3 should be stronger, given the context of the sources cited. The Stockholm and Rio Declarations simply state that activities within the State cannot "cause damage to the environment of other States".[44] The "prevent, reduce or control" formulation from the United Nations Convention on the Law of the Sea replaces "cause" and imposes a positive obligation on States. The commentary also draws on the notion in the United Nations Framework Convention on Climate Change that States "should take precautionary measures to anticipate, prevent or minimize the causes of climate change".[45]

However, there are important contextual differences in the United Nations Convention on the Law of the Sea and the United Nations Framework Convention on Climate Change. First, the United Nations Convention on the Law of the Sea uses "prevent, reduce *and* control" (emphasis added). The word "and" rather than "or" implies a greater obligation. Second, that article has an additional paragraph stating a similar obligation as the Stockholm and Rio Declarations to "not cause damage by pollution to other States and their environment".[46] "Prevent, reduce and control" cannot be understood independently from the context of the entire article, which imposes a "do no harm" obligation. Additionally, the United Nations Framework Convention on Climate Change formulation is described in the context of the precautionary principle, which is specifically excluded by draft guideline 2. Again, the meaning of these terms cannot be understood without reference to their context, as noted in the Vienna Convention on the Law of Treaties.[47] Antigua and Barbuda suggests that draft guideline 3 could read as follows: "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."

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

Belarus

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

[44] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992, Volume I: Resolutions Adopted by the Conference* (A/CONF.151/26/Rev.1 (vol. I) and Corr.1; United Nations publication, Sales No. E.93.I.8) (Rio Declaration), annex I, principle 2; Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972 (A/CONF.48/14/Rev.1; United Nations publication, Sales No. E.73.IIA.14) (Stockholm Declaration), chap. I, principle 21.

[45] United Nations Framework Convention on Climate Change, art. 3, para. 3.

[46] United Nations Convention on the Law of the Sea, art. 194, para. 2.

[47] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331, art. 31, para. 1.

up to States to apply their national laws in cases where they contain higher standards than those set by international law.

In addition, consideration should be given to the appropriateness of separating out the concepts of prevention and reduction, on the one hand, and control, on the other. These concepts seem to be different aspects of one and the same obligation, namely that of "due diligence".

Estonia

Estonia would propose adding a second paragraph to the guideline encouraging 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 in this context would be relevant as guideline 3 is seen as central to the draft guidelines (as per paragraph (1) of the commentary to draft guideline 3[48]) and international multilateral agreements are the only platform at the global level to tackle the challenges of the protection of the atmosphere.

Germany

Germany welcomes the reflection of the obligation to protect the atmosphere in the draft guideline 3, which in its view is an obligation of *erga omnes* character.

Netherlands

The draft guidelines alternate between using the terms "obligation", "should" and "may".

Draft guideline 3 is central to the draft guidelines. Draft guidelines 4, 5 and 6 are closely connected with it and seek to apply various principles of international environmental law to the specific situation of the protection of the atmosphere.

The text of draft guideline 3 was inspired, *inter alia*, by principle 21 of the 1972 Stockholm Declaration and principle 2 of the 1992 Rio Declaration.

According the Commission, draft guideline 3 is without prejudice to whether or not the obligation to protect the atmosphere is an *erga omnes* obligation in the sense of article 48 of the articles on responsibility of States for internationally wrongful acts.[49] There were different views on this matter within the Commission.[50]

Draft guideline 3 constitutes a "due diligence" obligation for the States (or a duty of "best efforts") which is appropriate given the state of the law.

While the Commission recognizes that the obligation of States to prevent significant adverse effects from transboundary air pollution is "firmly established as customary international law", it also believes that "the existence of this obligation is still somewhat unsettled for global atmospheric degradation. ... The views of members diverged as to whether … the obligation to prevent, reduce, or control global atmospheric degradation exists under customary international law".[51]

[48] A/73/10, para. 78, at p. 175.

[49] General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77.

[50] Para. (4) of the commentary to draft guideline 3, A/73/10, para. 78, at p. 175.

[51] Para. (7) of the commentary to draft guideline 3, *ibid*., at pp. 176–177.

Portugal

Portugal welcomes the clear statement on a State obligation to protect the atmosphere as read in draft guideline 3. Portugal supports the doctrine recognizing that a human right to environment is becoming a staple in international human rights law. A human right to environment – as encompassing a sustainable atmosphere – must correspond to clear and enforceable State obligations of preventing, reducing and controlling atmospheric degradation.

As such, Portugal firmly supports the idea behind draft guidelines 3, 4, 5 and 6 of addressing the transboundary nature of the harm caused by atmospheric degradation. Recalling the work of the Commission on the draft articles on the prevention of transboundary harm from hazardous activities,[52] Portugal praises the coherence shown in the comments in paragraph (7) of the commentary to draft guideline 3 [53] and the acknowledgement of a customary international norm establishing a State obligation to prevent significant adverse effects derived from atmospheric pollution.

United Kingdom of Great Britain and Northern Ireland

The commentary to draft guideline 3 recognizes that draft guidelines 3, 4, 5 and 6 are interrelated. Together, this group of guidelines, according to the commentary, "seek to apply various principles of international environmental law to the specific situation of the protection of the atmosphere".[54]

The United Kingdom recognizes that each draft guideline relates to principles that are being developed in the context of transboundary pollution. However, as recognized in the commentary to draft guideline 3, these principles are unsettled for atmospheric pollution and atmospheric degradation. The United Kingdom suggests that this is because of the particular nature of atmospheric pollution and atmospheric degradation. 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, 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. Political (treaty) negotiations on particular subject matter relevant to protection of the atmosphere are the better vehicle for developing principles that account effectively for the complexities of that subject matter.

United States of America

The actual content of the draft guidelines does nothing to clarify the confusion introduced by the choice of format. The core of the draft guidelines appears to be draft guideline 3, yet this draft guideline is confusing at best. This draft guideline states that the purported "obligation to protect the atmosphere" is to be fulfilled by "exercising due diligence in taking appropriate measures, in accordance with applicable rules of international law, to prevent, reduce or control atmospheric pollution and atmospheric degradation". The best reading of draft guideline 3 is that it constitutes a simple assertion that States should comply with existing "applicable

[52] Articles on prevention of transboundary harm from hazardous activities, General Assembly resolution 62/68 of 6 December 2007, annex. The draft articles and the commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 97–98.

[53] *Ibid*.

[54] Para. (1) of the commentary to draft guideline 3, *ibid*., at p. 175.

rules of international law" concerning atmospheric pollution and atmospheric degradation, and thus adds nothing to existing law. Even so, however, draft guideline 3 introduces needless confusion.

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, specifically to: (a) prevent atmospheric pollution; (b) prevent atmospheric degradation; (c) reduce atmospheric pollution; (d) reduce atmospheric degradation; (e) control atmospheric pollution; and/or (f) control atmospheric degradation. There are, therefore, at least six potentially independent legal obligations that the Commission is asserting require distinct actions on the part of States. Yet there appears to be little basis for making that assertion. The commentary notes that the "prevent, reduce, or control" framework is borrowed from the United Nations Convention on the Law of the Sea. The United Nations Convention on the Law of the Sea, however, is not addressing atmospheric pollution and degradation. Moreover, even in the context of protecting the marine environment, the United Nations Convention on the Law of the Sea includes specific provisions addressing what is meant by "prevent, reduce, or control" at Part XII, Section 5. The absence of detailed provisions in the draft guidelines that would correspond to Part XII, Section 5, of the United Nations Convention on the Law of the Sea in the context of atmospheric pollution and atmospheric degradation only contributes to the confusion introduced by draft guideline 3.

5. Draft guideline 4 – Environmental impact assessment

Antigua and Barbuda

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

Admittedly, the evidence cited in the commentary better supports a *prima facie* environmental impact assessment obligation only under the current definition of "atmospheric degradation", which includes the qualifier "significant" for "deleterious effects". The word "significant" is used, for example, in the *Pulp Mills* case.[55] 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 requires an environmental impact assessment in situations "likely to cause substantial pollution".[56] However, recent legislation in Antigua and Barbuda requires an environmental impact assessment when "the proposed development is likely to have any negative impact on the environment".[57] Therefore, Antigua and Barbuda proposes that draft guideline 4 read: "States have the obligation to ensure that an environmental impact assessment is undertaken of proposed activities under their jurisdiction or control which are likely to cause atmospheric pollution". This assumes the definition of "atmospheric pollution"

[55] *Pulp Mills on the River Uruguay (Argentina v Uruguay), Judgment, I.C.J. Reports 2010*, p. 14.
[56] Protocol concerning Pollution from Land-Based Sources and Activities, art. VII, para. 2.
[57] Environmental Protection and Management Act (see footnote 22 above), sect. 41 (2).

proposed in the comments by Antigua and Barbuda on draft guideline 1. Antigua and Barbuda could also accept the insertion of "significant" or "substantial" before the phrase "atmospheric pollution", if better defined in the commentary. That would not be necessary in front of the phrase "atmospheric degradation", if it is also used, as that term already includes "significant" in its definition and thus *prima facie* triggers an environmental impact assessment.

Argentina

While the prescriptive nature of the draft guideline is qualified by draft guideline 11, which introduces the notion of facilitative procedures, and by draft guideline 2, which provides that the scope of the guidelines would not affect the *ad hoc* impact assessment procedures of each particular convention or regime dealing with climate change, ozone, chemicals, etc., it is considered desirable that draft guideline 4 be supplemented by a phrase along the following lines: "according to national capabilities and circumstances". The inclusion might also be considered of the phrase "depending on the availability of means of implementation, in its threefold aspect of financing, technology transfer and capacity-building".

The latter two suggestions could also find their place in other sections of the draft guidelines, such as draft guideline 3 and/or complementing subparagraph (a) of paragraph 2 of draft guideline 11, where reference is made to "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".

Belarus

It is proposed that draft guideline 4 should read as follows: "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 a transboundary impact on the atmosphere in terms of atmospheric pollution or atmospheric degradation, including in the territory of foreign States."

Estonia

Estonia would like to see guideline 4 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 [58]). 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.

Germany

Germany welcomes that the obligation to conduct an environmental impact assessment in draft guideline 4 applies in a transboundary context as well as to activities that are likely to have significant adverse effects on the global atmosphere.

Netherlands

Draft guideline 4, formulated as an "obligation", concerns the environmental impact assessment, and follows from draft guideline 3. The Commission observes the following in that respect:

[58] A/73/10, para. 78, at pp. 177–178.

> While the relevant precedents for the requirement of an environmental impact assessment primarily address transboundary contexts, it is considered that there is a similar requirement for projects that are likely to have significant adverse effects on the global atmosphere, such as those activities involving intentional large-scale modification of the atmosphere.[59]

The Commission recognizes that international case law confirms that the obligation regarding an environmental impact assessment is "a general obligation under customary international law".[60]

United Kingdom of Great Britain and Northern Ireland

See comments to draft guideline 3 above.

6. Draft guideline 5 – Sustainable utilization of the atmosphere

Antigua and Barbuda

Antigua and Barbuda agrees with the conception of the atmosphere as a "natural resource with limited assimilation capacity". The St George's Declaration refers to the need of Caribbean States to "manage their … atmospheric resources … to assure optimum sustainable productivity".[61] The recent Intergovernmental Panel on Climate Change report used the idea of a "carbon budget" extensively, which it defined as "cumulative CO_2 emissions compatible with a specific level of warming".[62] Phrases like "carbon space", "atmospheric space",[63] "ecological space",[64] "greenhouse gas budget"[65] and "emissions budget"[66] have also been used. Any of these conceptions supports the notion expressed in draft guideline 5. Given the uncertainty surrounding the proper term, Antigua and Barbuda considers it is best to proceed with a description of the concept, as the draft guidelines currently provide, rather than selecting one or another of the various formulations.

While it is clear the atmosphere has limited assimilative properties, access to that resource is controversial among States. The St George's Declaration notes that "Member States [of the Organisation of Eastern Caribbean States] remain unsustainably dependent on costly, non-renewable or poorly managed sources of fuel that pollute the air and contribute to climate change".[67] The Barbados Declaration described the "urgent need in small island developing States to address the constraints to sustainable development … which lead to … limited means available to exploit

[59] Para. (6) of the commentary to draft guideline 4, A/71/10, para. 78, at pp. 178–179.
[60] Para. (1) of the commentary to draft guideline 4, A/73/10, para. 78, at pp. 177–178.
[61] St George's Declaration, p. 18.
[62] Joeri Rogelj and others, "Mitigation pathways compatible with 1.5°C in the context of sustainable development" in Masson-Delmotte and others (eds.), *Global Warming of 1.5°C* (see footnote 18 above), p. 101.
[63] The Plurinational State of Bolivia unsuccessfully proposed, on behalf of the Bolivarian Alliance for the Peoples of Our America (ALBA) group, using these two phrases in the Paris Agreement. María Pía Carazo, "Analysis of the provisions of the Agreement, Contextual provisions (preamble and article I)" in Daniel Klein and others (eds.), *The Paris Agreement on Climate Change: Analysis and Commentary* (Oxford University Press, 2017), pp. 107 ff., at p. 112, footnote 37.
[64] Tim Hayward, "Human rights versus emissions rights: Climate justice and the equitable distribution of ecological space", *Ethics and International Affairs*, vol. 21 (2007), pp. 431–450.
[65] Michael Obersteiner and others, "How to spend a dwindling greenhouse gas budget", *Nature Climate Change*, vol. 8 (2018), pp. 7–10.
[66] David R. Morrow, "Fairness in allocating the global emissions budget", *Environmental Values*, vol. 26 (2017), pp. 669–691.
[67] St George's Declaration, p. 14.

natural resources on a sustainable basis".[68] The Mauritius Declaration affirmed that small island developing States "continue to be a special case for sustainable development".[69] The five-year review of the Mauritius Strategy for Implementation, to which the Mauritius Declaration was appended, recognized that "[t]he small size, remoteness, narrow resource and export base, and exposure to global environmental challenges of most small island developing States have worked against efforts towards sustainable development".[70] The SAMOA Pathway reaffirmed that "small island developing States remain a special case for sustainable development in view of their unique and particular vulnerabilities".[71]

Antigua and Barbuda recommends reflecting more than twenty years of State practice by noting the special needs and specific circumstances of small island developing States in draft guideline 5 or 6. The commentary notes that paragraph 2 is meant "more as a statement of international policy and regulation" than a source of rights and obligations.[72] The special situation of small island developing States has been consistently affirmed in the political declarations reflecting such a policy. This could be noted in the commentary. However, Antigua and Barbuda also believes that recognizing the special situation of developing countries, including small island developing States, is a legal principle that should be stated in draft guideline 6.

Belarus

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."

Belgium

Belgium supports the content of draft guideline 5, but considers that this general principle should be included in the introduction.

Estonia

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" (emphasis added). 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

[68] *Report of the Global Conference on the Sustainable Development of Small Island Developing States, Bridgetown, 26 April–6 May 1994* (A/CONF.167/9; United Nations publication, Sales No. 94.I.18), annex I: Barbados Declaration, part one, art. VI.

[69] *Report of the International Meeting to Review the Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States, Port Louis, Mauritius, 10–14 January 2005* (A/CONF.207/11; United Nations publication, Sales No. E.05.II.A.4), annex I: Mauritius Declaration, para. 5.

[70] Outcome Document of the High-level Review Meeting on the Implementation of the Mauritius Strategy for the Further Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States, General Assembly resolution 65/2 of 25 September 2010, para. 5.

[71] SIDS Accelerated Modalities of Action (SAMOA) Pathway, General Assembly resolution 69/15 of 14 November 2014, annex, para. 5.

[72] Para. (4) of the commentary to draft guideline 5, A/73/10, para. 78, at p. 180.

development with protection of the atmosphere as an unavoidable path to be followed in the years to come.

Netherlands

Draft guideline 5 concerns sustainable utilization of the atmosphere, given that the atmosphere is a natural resource with a limited assimilation capacity. It recognizes that sustainable utilization of the atmosphere includes the need to reconcile economic development with protection of the atmosphere. The draft guideline is formulated as a "should" requirement. The Commission observes the following in that respect:

> The formulation "its utilization should be undertaken in a sustainable manner" in the present draft guideline is simple and not overly legalistic … It is presented more as a statement of international policy and regulation than an operational code to determine rights and obligations among States.[73]

Evidently the Commission considers the legal status of the principle of sustainable development to be uncertain at this stage.

United Kingdom of Great Britain and Northern Ireland

See comments to draft guideline 3 above.

7. Draft guideline 6 – Equitable and reasonable utilization of the atmosphere

Antigua and Barbuda

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

Belgium

Belgium supports the content of draft guideline 6, but considers that this general principle should be included in the introduction.

Estonia

Estonia agrees 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.[74] However, in line with its comment regarding draft guideline 5, Estonia would prefer the imperative to be used also in the wording of this 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.").

Netherlands

Draft guideline 6 concerns equitable and reasonable utilization of the atmosphere. Its formulation is partly derived from article 5 of the Convention on the Law of the Non-navigational Uses of International Watercourses[75] and article 4 of

[73] *Ibid*.

[74] *Ibid*., at p. 181.

[75] Convention on the Law of the Non-navigational Uses of International Watercourses (New York, 21 May 1997), available from https://treaties.un.org, *Depositary, Certified True Copies*.

the articles on the law of transboundary aquifers:[76] "It requires a balancing of interests and consideration of all relevant factors that may be unique to either atmospheric pollution or atmospheric degradation".[77]

It is noteworthy that draft guideline 6 is formulated as a "should" requirement, whereas the provision under the law of international watercourses is considered a binding obligation under general international law.

The "should" requirement appears to be based on the fact that the Commission considers the atmosphere to be more of a common global resource than a transboundary one.

United Kingdom of Great Britain and Northern Ireland

See comments to draft guideline 3 above.

8. Draft guideline 7 – Intentional large-scale modification of the atmosphere

Antigua and Barbuda

Antigua and Barbuda agrees that State practice may be too limited on this topic to merit inclusion as a separate draft guideline.[78]

It could be argued that some types of large-scale modification, like the carbon dioxide removal techniques cited in the commentary, would not fall under the definitions of atmospheric pollution or degradation, as their effects might not be "deleterious". Then, those activities would also not trigger due diligence or an environmental impact assessment under draft guidelines 3 and 4, contrary to the assumption in paragraph (11) of the commentary on draft guideline 7.[79]

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

If large-scale intentional modifications of the atmosphere are not clearly covered by draft guidelines 3 and 4, that would support inclusion of a separate draft guideline dealing with atmospheric modification, like the one discussed here. However, given its concern that some States may wish to carry out intentional modifications without an environmental impact assessment, by arguing that so-called benign actions would not trigger the requirement, Antigua and Barbuda would suggest clarifying the need for an environmental impact assessment in the main text of

[76] General Assembly resolution 63/124 of 11 December 2008, annex. The draft articles adopted by the Commission and commentaries thereto are reproduced in *Yearbook … 2008*, vol. II (Part Two), paras. 53–54.

[77] Para. (2) of the commentary to draft guideline 6, A/73/10, para. 78, at p. 181.

[78] See, for example, decision COP XIII/14 on climate-related geoengineering, adopted by the Conference of the Parties to the Convention on Biological Diversity (UNEP/CBD/COP/DEC/13/14, 8 December 2016), para. 4 (noting that "very few Parties responded to the invitation to provide information").

[79] A/73/10, para. 78, at p. 183.

the draft guideline, rather than in the commentary. The Conference of Parties to the Convention on Biological Diversity has stated that "the application of the precautionary approach as well as customary international law … may be relevant for geoengineering activities but would still form an incomplete basis for global regulation".[80] The Secretary-General of the United Nations recently noted that "[t]here are important gaps and deficiencies in specific sectoral … regimes" of international environmental law, including "some geo-engineering activities".[81] The Commission can and should step in to progressively develop this area of the law, while leaving room for States to address it through multilateral negotiations.

Argentina

It is considered relevant to refer to the conclusions applicable to this point of the Intergovernmental Panel on Climate Change in its report *Global warming of 1.5°C* (2018).[82] The Intergovernmental Panel moves away from the widespread concept of "geo-engineering" to "solar radiation modification measures" and "carbon dioxide removal measures".

On solar radiation modification measures, the Intergovernmental Panel recognizes that, while they would be "theoretically effective", they face "large uncertainties and knowledge gaps as well as substantial risks and institutional and societal constraints to deployment related to governance, ethics and impacts on sustainable development. They also do not mitigate ocean acidification".[83]

With regard to the latter, it concludes that "[e]xisting and potential [carbon dioxide removal] measures include afforestation and reforestation, land restoration and soil carbon sequestration, [bioenergy with carbon capture and storage], direct air carbon capture and storage …, enhanced weathering and ocean alkalinization. These differ widely in terms of maturity, potentials, costs, risks, co-benefits and trade-offs".[84]

In this connection, it is pointed out that the idea contained in draft guideline 7 that such interventions "should be conducted with prudence and caution" is ambiguous and general. On the idea that they must be undertaken "subject to any applicable rules of international law", it is emphasized that, since this is an unprecedented matter, scientific knowledge concerning such interventions is still incipient and uncertain and that the "applicable law" does not exist: it should be negotiated and created.

Finland (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

The Nordic countries note the use of less-established terminology in draft guideline 7 on intentional large-scale modification of the atmosphere. Specifically, while supporting the objective of draft guideline 7, they question the choice to employ the expression "prudence and caution" rather than "precautionary approach" in the text. Although the Commission has explained the choice of terminology with reference to a number of cases of the International Tribunal for the Law of the Sea in which the expression "prudence and caution" was used,[85] the Nordic countries

[80] Decision XI/20 on climate-related geoengineering, adopted by the Conference of the Parties to the Convention on Biological Diversity (UNEP/CBD/COP/DEC/XI/20, 5 December 2012), para. 11.

[81] Report of the Secretary-General, Gaps in international environmental law and environment-related instruments: towards a global pact for the environment (A/73/419), para. 104.

[82] Masson-Delmotte and others (eds.), *Global Warming of 1.5°C* (see footnote 18 above).

[83] "Summary for policymakers", *ibid*.

[84] *Ibid*.

[85] Para. (9) of the commentary to draft guideline 7, A/73/10, para. 78, at p. 183.

suggest that an alternative, and perhaps more relevant, point of reference would be found in the Commission's articles on the law of transboundary aquifers, in which the expression "precautionary approach" is included in article 12.[86]

Germany

Draft guideline 7 constitutes, in the view of Germany, a well-balanced approach. However, the necessity to 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.").

Netherlands

Draft guideline 7, also formulated as a "should" requirement, concerns intentional large-scale modification of the atmosphere. It applies only to "non-military" activities. The activities covered include, for instance, projects to remove carbon dioxide from the atmosphere (geo-engineering) or to lower the surface temperature of the Earth (solar radiation management). They also include activities that could prevent or limit the adverse effects on the atmosphere of disasters and hazards, including drought, hurricanes, tornadoes, as well as activities that could enhance crop production and the availability of water.[87] These activities are of course "subject to any applicable rules of international law".

Draft guideline 7 was not uncontroversial within the Commission: "A number of members remained unpersuaded that there was a need for a draft guideline on this matter, which essentially remains controversial, and the discussion on it was evolving, and is based on scant practice. Other members were of the view that the draft guideline could be enhanced during second reading".[88]

Draft guideline 7 has wrongly been formulated as a "should" requirement. Draft guideline 3 should be considered to apply also to intentional large-scale modification of the atmosphere.

Togo

[Original: French]

It would be necessary for the Commission to explain clearly what meant by "intentional large-scale modification of the atmosphere" and to provide an indication of the activities envisaged.

9. Draft guideline 8 – International cooperation

Antigua and Barbuda

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

The Paris Agreement states that "[d]eveloped country Parties shall provide financial resources to assist developing country parties" and that "[c]apacity-building under this agreement should enhance the capacity and ability of developing country parties".[89] Other examples of the obligation of developed countries to assist developing countries include, *inter alia*, the Nagoya Protocol, the Stockholm

[86] Articles on the law of transboundary aquifers (see footnote 76 above), art. 12.
[87] Paras. (3)–(7) of the commentary to draft guideline 7, A/73/10, para. 78, at p. 182.
[88] Para. (12), *ibid*., at p. 183.
[89] Paris Agreement, arts. 9, para. 1, and 11, para. 1.

Convention, the Kyoto Protocol, and the United Nations Framework Convention on Climate Change.[90] Caribbean regional instruments affirm this notion as well. The Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean notes in its article on cooperation that "[t]he Parties shall give particular consideration to least developed countries, landlocked developing countries and small island developing States".[91] The Protocol to the Treaty of Basseterre, when addressing environmental sustainability, notes the need for capacity-building to ensure member States can implement the St George's Declaration.[92]

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

Netherlands

Paragraph 1 of draft guideline 8 concerns the obligation of States to cooperate internationally and more or less speaks for itself. Paragraph 2, which is formulated as a "should" requirement, calls for cooperation "in further enhancing scientific knowledge relating to the causes and impacts of atmospheric pollution and atmospheric degradation. Cooperation could include exchange of information and joint monitoring."

United Kingdom of Great Britain and Northern Ireland

The United Kingdom supports the concept of international cooperation set out in draft guideline 8. International cooperation is an effective means of ensuring harmony and integration as between separate instruments and bodies concerned with protection of the atmosphere, and the United Kingdom recognizes that such harmony and integration is important.

United States of America

Draft guideline 8, like draft guideline 3, suffers from a lack of clarity concerning its legal underpinnings. In particular, draft guideline 8, paragraph 1, provides that "States have an obligation to cooperate, as appropriate, with each other and with

[90] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (Nagoya, Japan, 29 October 2010), United Nations Environment Programme, document UNEP/CBD/COP/10/27, annex, decision X/1, annex I (Nagoya Protocol) art. 22; Stockholm Convention on Persistent Organic Pollutants, art. 12; Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto, 11 December 1997), United Nations, *Treaty Series*, vol. 2303, No. 30822, p. 162, art. 10, subpara. (e); United Nations Framework Convention on Climate Change, art. 9, para. 2 (d).

[91] Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú, 4 March 2018), text available from https://treaties.un.org (*Status of Multilateral Treaties Deposited with the Secretary-General*, chap. XXVII.18), art. 11, para. 2.

[92] Protocol of Eastern Caribbean Economic Union to the Revised Treaty of Basseterre establishing the Organisation of Eastern Caribbean States Economic Union (Gros Islet, 18 June 2010), *Statement of treaties and international agreements registered or filed and recorded with the Secretariat during the month of January 2018* (ST/LEG/SER.A/851), No. 54946, art. 24.

relevant international organizations for the protection of the atmosphere from atmospheric pollution and atmospheric degradation." Unlike draft guideline 3, however, draft guideline 8, paragraph 1, does not appear to incorporate existing applicable rules of international law to inform the purported obligation identified therein. In fact, none of the sources referenced in the corresponding commentary to this draft guideline establish the general obligation to cooperate set forth in draft guideline 8, paragraph 1. Specifically, the commentary notes two political declarations,[93] the preambles to two multilateral conventions,[94] and three sets of draft articles produced by the Commission,[95] none of which establish any legal obligation in respect of cooperation. The single example of a binding obligation to cooperate comes from the Convention on the Law of the Non-navigational Uses of International Watercourses, a treaty with only 36 parties addressing a wholly separate area of international law. The purported obligation in draft guideline 8, paragraph 1, is therefore best understood as a recommendation that States cooperate and not as encompassing a legal obligation.

The essentially recommendatory or hortatory nature of draft guideline 8, paragraph 1, is shared by draft guidelines 5, 6, and 7. Each of these draft guidelines contain assertions about what States "should be" doing with regard to distinct activities concerning the atmosphere. While the commentary to draft guidelines 5 and 7 acknowledge that their formulations are "simple and not overly legalistic" and "hortatory" respectively,[96] it bears observing that these draft guidelines are policy prescriptions based on value judgments. Inclusion of such policy preferences in Commission products is inconsistent with article 1, paragraph 1, of the Commission's statute, which unambiguously states that the Commission "shall have for its object the promotion of the progressive development of international law and its codification". Policy prescriptions for diplomatic cooperation, however well-intentioned, are not part of the Commission's mandate and therefore should not be a part of the Commission's work.

10. Draft guideline 9 – Interrelationship among relevant rules

Antigua and Barbuda

Antigua and Barbuda supports the inclusion of paragraph 3 of draft guideline 9; however, for the same reason discussed in its comments, above, on the sixth preambular paragraph, it recommends striking out the phrase "affected by sea-level rise". Again, this has the effect of limiting the "special consideration" to only the damage from sea-level rise, and not the other consequences of atmospheric degradation and pollution, which disproportionately affect small island developing States. However, the commentary can and should recognize the impacts of sea-level rise.

Belarus

Regarding the commentary to draft guideline 9, the statement to the effect that any human activities governed by international law have a bearing on the atmosphere seems somewhat excessive. Belarus is also not convinced that international atmospheric law has become a separate branch of international law, the presumption

[93] Stockholm Declaration; Rio Declaration.

[94] Vienna Convention for the Protection of the Ozone Layer; United Nations Framework Convention on Climate Change.

[95] Articles on prevention of transboundary harm from hazardous activities (see footnote 52 above); articles on the law of transboundary aquifers (see footnote 76 above); draft articles on the protection of persons in the event of disasters, A/71/10, paras. 48–49.

[96] Para. (4) of the commentary to draft guideline 5 and para. (9) of the commentary to draft guideline 7, A/73/10, para. 78, at pp. 180 and 183, respectively.

on which this draft guideline is based. Overall, the issues highlighted in the draft guideline appear to be sufficiently regulated by the applicable provisions of the Vienna Convention on the Law of Treaties of 1969 and the conclusions contained in the Commission's report on the fragmentation of international law.[97] At the same time, the formulation of rules for interpreting international treaties goes somewhat beyond the scope of the draft guidelines. 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.

Regarding paragraphs (13) and (15) of the commentary to the draft guideline,[98] extreme caution should be exercised in formulating conclusions as to the existence of rules and principles of customary international law in order not to raise false expectations among the persons and groups concerned.

At the same time, Belarus supports that the provision requiring considerations relating to the protection of the atmosphere (and, presumably, other elements of the environment) be taken into account when developing rules of international law.

Belgium

Belgium recognizes the importance of paying attention to particularly vulnerable people and groups, as provided for in draft guideline 9, paragraph 3. Although the list of these vulnerable groups is not exhaustive, Belgium believes 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 this context, Belgium proposes to take into account the concept of protection of health, which now governs European and international work on air and which affects all groups of individuals, whether from developed or less developed countries.

Czech Republic

It is not clear whether the reference to "rules of international law" in paragraph 1 is supposed to cover only rules of customary international law or also obligations under treaties. Possible conflicts between treaty obligations relating to the protection of the atmosphere and other treaty obligations could hardly be resolved in a manner suggested in the first sentence of paragraph 1. The rules of the Vienna Convention on the Law of Treaties concerning the interpretation apply to treaties individually. They do not aim at reconciling, by means of interpretation, conflicting obligations deriving from various treaty instruments that may also be binding on different groups of treaty parties. If the legal instruments are substantively contradictory, the problem cannot be resolved by means of their "conciliatory" interpretation.

The problem is primarily a problem of harmonization, in the phase of "treaty-making", of the substantive obligations under various international legal instruments to which a State is a party. Such harmonization should, first of all, be preceded by identification of appropriate material and technical solutions for interconnected problems, which may subsequently require the adoption of new legal obligations or

[97] Report of the Study Group of the Commission on fragmentation of international law (A/CN.4/L.682 and Corr.1 and Add.1) (mimeographed; available from the Commission's website, documents of the fifty-eighth session; the final text is to be published as an annex to *Yearbook of the International Law Commission 2006*, vol. II (Part One), paras. 328–340).

[98] A/73/10, para. 78, at pp. 192–193.

modification of existing ones. Paragraph 2 addresses the problem of harmonization of legal instruments in a more realistic manner.

Germany

Furthermore, Germany would suggest adding a new paragraph in draft guideline 9 which encourages States to join, ratify and implement relevant multilateral environmental agreements.

Netherlands

Draft guideline 9 concerns the interrelationship between the rules of international law relating to the protection of the atmosphere and other relevant rules of international law, such as the rules of international trade and investment law, of the law of the sea and of international human rights law, recommending that these rules, to the extent possible, should "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."

When developing new rules of international law relating to the protection of the atmosphere and other relevant rules of international law, States should also, "to the extent possible … endeavour to do so in a harmonious manner". When applying these recommendations, special consideration should be given to persons and groups particularly vulnerable to atmospheric pollution and atmospheric degradation, such as indigenous peoples, people of the least developed countries and people of low-lying coastal areas and small island developing States affected by sea-level rise.

It should be noted that the issue of the interrelationship among relevant rules of international law is of a general nature and is not unique to the rules concerning the protection of the atmosphere. It is therefore questionable whether there is any great need for a draft guideline with such a general scope given that none is included in other draft articles or principles drawn up by the Commission. Should this draft guideline be maintained, however, the words "involving relevant scientists and legal experts at an early stage of the development of such rules" could be added at the end of paragraph 2.

Portugal

One of the greatest endeavours of the Commission on this topic should be to clarify the interrelationship between rules of different areas of international law. Therefore, Portugal welcomes the emphasis on the need for interpreting international law in accordance with the relevant principles of international law concerning interpretation and application, as read in draft guideline 9.

Moreover, Portugal praises the very clear reference made in paragraph 3 of draft guideline 9 – in line with the text in the fifth and sixth preambular paragraphs – to persons and groups particularly vulnerable to atmospheric pollution.

United Kingdom of Great Britain and Northern Ireland

Draft guideline 9, like draft guideline 8, is also aimed at achieving harmony and integration – but does so by constraining interpretation, and development, of rules of international law. Draft guideline 9 seems 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 is a sufficient and effective means of attaining this end.

United States of America

Like draft guideline 12, below, draft guideline 9 gives the appearance that issues concerning fragmentation of international law are to be treated in a special way in the context of protection of the atmosphere. The Commission released in 2006 a lengthy report by a Study Group addressing exactly this topic, including in particular the relationship between trade and environmental regimes referenced in draft guideline 9, paragraph 1.[99] The report included extended considerations of international environmental law, but reached no definitive normative conclusion about the interaction between international environmental law and other international legal regimes. Notably, the Study Group's report cast doubt about the viability of harmonizing interpretation in precisely this context.[100] The report did not directly address protection of the atmosphere. However, despite the topic of fragmentation having been the subject of exhaustive study by the Commission's Study Group, draft guideline 9 purports to identify specific norms of harmonization and systemic integration that should apply in the context of protection of the atmosphere. The United States sees no basis for establishing specific norms in this context and cautions the Commission against establishing a practice whereby previous Commission products and efforts intended to address broad topics are undermined by new projects with a narrow focus.

11. Draft guideline 10 – Implementation

Antigua and Barbuda

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

Belgium

Concerning draft guideline 10, Belgium considers that it is obvious that the obligations incumbent on States under international law must be implemented in domestic law. 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.

Czech Republic

The fact that national implementation of an international obligation may take the form of legislative, administrative, judicial or other action is a simple statement of a well-known fact. This guideline would be more practical if formulated as a guideline for negotiation of future instruments – e.g., it could include an opening sentence advising that future instruments should also envisage provisions concerning appropriate means of national implementation.

Paragraph 2 aims at implementation of "recommendations" contained in the present draft guidelines. The effective implementation of some guidelines, such as

[99] Report of the Study Group of the International Law Commission on fragmentation of international law (see footnote 97 above).

[100] *Ibid*., para. 277.

draft guideline 5 on sustainable utilization or draft guideline 6 on equitable and reasonable utilization of the atmosphere requires a concerted action of the international community. The most effective way in which States "should endeavour to give effect" to these recommendations is through a collective effort based on multilateral treaty arrangements. This aspect should be included.

Estonia

Estonia would like to reiterate its comments presented in 2018 on paragraph 2 of the draft guideline that it considers the cooperation of all States of utmost importance in this matter and supports the idea that States could endeavour to give effect to the recommendations, for example through political declarations.

Netherlands

Draft guidelines 10 and 11 concern implementation of and compliance with the obligations to protect the atmosphere. Draft guideline 10 relates to implementation and draft guideline 11 to compliance. The distinction between the two draft guidelines – which, both relate to implementation of and compliance with the obligations to protect the atmosphere – is somewhat artificial.

According to the Commission, draft guideline 10 deals with *national* implementation and compliance with obligations under international law. Implementation and compliance at the *international* level is the subject of draft guideline 11.[101]

Strictly speaking, paragraph 1 of draft guideline 10 is not formulated as an obligation, although it should have been. As it stands, this paragraph is nothing special and actually amounts to little more than an observation. Paragraph 2 concerns the recommendations contained the draft guidelines, by which is meant all draft guidelines that are formulated as "should" requirements.

United States of America

Draft guideline 10 addresses "implementation". As a general matter the means by which a State chooses to "implement" domestically international legal obligations is left for States to decide and are not prescribed in advance by general public international law. While such issues could be addressed in a treaty, the United States does not see the utility in addressing these topics in the abstract in non-binding draft guidelines.

12. Draft guideline 11 – Compliance

Antigua and Barbuda

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

[101] Para. (1) of the commentary to draft guideline 10 and para. (1) of draft guideline 11, A/73/10, para. 78, at pp. 194 and 196, respectively.

Czech Republic

Paragraph 1 of guideline 11, which recalls the duty of States to "abide with their obligations under international law relating to the protection of the atmosphere … in good faith" does not add to what is already universally accepted for *all* international legal obligations. This provision would therefore better serve as a paragraph of the preamble. There is also no reason for mentioning explicitly "rules and procedures in the relevant instruments" as there are no different standards for compliance in *good faith* with international obligations depending on their content.

Paragraph 2 of this guideline concerns facilitative and enforcement procedures. It could be formulated as an *encouragement* to States to include this type of provisions in future agreements, while seeking, at the same time, their coherence with procedures already available under existing agreements to which they are parties. The element of periodic review and improvement of these procedures, keeping with scientific and technological progress, could also be included in such guideline.

Estonia

Estonia reiterates its strong support for the inclusion of subparagraph 2 (a) to draft guideline 11, which concerns the compliance with international obligations and missing capabilities of some States. Estonia welcomes the assistance to States in case of non-compliance and recognition of specific challenges the States could have. 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.

Netherlands

Paragraph 1 of draft guideline 11 reflects the *pacta sunt servanda* principle as regards existing obligations under international law. Paragraph 2 concerns the use of possible existing facilitative or enforcement procedures, in accordance with the relevant international agreements.

United Kingdom of Great Britain and Northern Ireland

Draft guideline 11 relates to "compliance with the rules and procedures [of] relevant agreements". Yet such "relevant agreements" are the subject of ongoing political negotiation (since concluded agreements are reviewed and evolve in response to new challenges and understandings). As mentioned above in commentary to draft guideline 2, the Commission adopted this topic on the understanding that: "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." A guideline on "compliance with the rules and procedures [of] relevant agreements" goes beyond this limitation.

United States of America

Draft guideline 11 addresses "compliance". As a general matter, the means by which a State and/or States may agree to achieve "compliance" with international legal obligations are left for States to decide and are not prescribed in advance by general public international law. While such issues could be addressed in a treaty, the United States does not see the utility in addressing these topics in the abstract in non-binding draft guidelines.

13. Draft guideline 12 – Dispute settlement

Antigua and Barbuda

As a general matter, Antigua and Barbuda underscores the importance of the pacific settlement of disputes. It welcomes the role that "technical and scientific experts" can play in resolving disputes peacefully, particularly as it relates to protection of the atmosphere. The Commission should examine, for example, the role of *amici curiae* and expert witnesses before international courts and tribunals, and how consideration of such evidence could facilitate protection of the atmosphere, with due respect for the principle of *non ultra petita*. However, the appropriate role of such evidence must reflect the special needs and specific circumstances of developing States, particularly their lack of capacity to provide technical and scientific experts. Opening the door to *amici* and expert witnesses should ensure the equality of States before the law. Developed States should not be able to overwhelm the proceeding with experts and supportive *amici* not available to developing States due to resource constraints. Affirmative measures should be considered to establish equality, like a trust fund for developing States to call expert witnesses.

Czech Republic

The need for the involvement of scientists or technical experts should be recognized and underscored in all stages of policy- and decision-making, as well as in the process of elaborating international legal instruments aimed at protection of atmosphere, i.e. not only in connection with dispute settlement. Whether technical or scientific experts have a role to play in settlement of legal disputes depends on the content of the dispute. If the dispute concerns questions such as the validity of a treaty, effects of a reservation etc., there is no need for such experts. In contrast, the involvement of experts in solution of emerging scientific and technical problems in the process of implementation of existing treaty instruments should be envisaged as an important means of dispute prevention. This aspect should be underscored either in this guideline or in the guideline concerning the compliance.

Estonia

Estonia supports the reaffirmation of the peaceful settlement of disputes as expressed in draft guideline 12. It welcomes that the importance of scientific knowledge has been emphasized throughout the commentaries of the draft guidelines and considered the key by the Commission when it comes to the protecting of the atmosphere (scientific knowledge relating to the causes and impacts of atmospheric pollution and atmospheric degradation in paragraph (13) of the commentary to draft guideline 8; the need to use technical and scientific experts in paragraph (2) of the commentary to draft guideline 12 [102]). Estonia would therefore request the Commission to consider adding an autonomous guideline stating *expressis verbis* the importance of underlying scientific knowledge for actions relating to the protection of the atmosphere.

Netherlands

Draft guideline 12 concerns dispute settlement. Paragraph 1 describes the general obligation of States to settle their disputes by peaceful means. Paragraph 2 (which unlike paragraph 1 is only a "should" requirement) calls to mind that disputes relating to the protection of the atmosphere from atmospheric pollution and

[102] A/73/10, para. 78, at p. 187 and pp. 198–199, respectively.

atmospheric degradation may be of a “fact-intensive” and “science-dependent” character.

United States of America

The United States sees 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, which is not mentioned in the commentary, requires that international disputes be settled by peaceful means, and this applies as well in the context of disputes relating to protection of the atmosphere. Nevertheless, the reference to peaceful settlement of disputes in draft guideline 12, paragraph 1, gives the appearance that disputes concerning protection of the atmosphere enjoy a special status as compared with other types of disputes; in so doing, it weakens the general rule set forth in Article 2, paragraph 3, of the Charter of the United Nations.

III. Comments and observations received from international organizations

A. General comments and observations

United Nations Environment Programme

UNEP is committed to supporting the present process, and is pleased to see that the development of the draft guidelines builds on its earlier engagement in supporting the Commission and the Special Rapporteur. This includes the engagement in 2016 when UNEP participated in a meeting related to the preparation of the draft guidelines that was convened by the Commission. At that meeting, UNEP shared information on developments in the field of international environmental law, especially in relation to the Fourth Montevideo Programme for the Development and Periodic Review of Environmental Law.

In a similar context, UNEP notes that in January 2020 the Fifth Montevideo Programme for the Development and Periodic Review of Environmental Law (Montevideo Programme V) will commence. The Montevideo Programme V is an intergovernmental programme on environmental law adopted by resolution 4/20 of the United Nations Environment Assembly (UNEP/EA.4/Res.20). The 10-year programme is designed to promote the development and implementation of environmental rule of law, strengthen the related capacity in countries, and contribute to the environmental dimension of the 2030 Agenda for Sustainable Development. UNEP would welcome the opportunity to discuss with the Commission how the Montevideo Programme V could support the work of the Commission regarding the draft guidelines.

In the view of UNEP, there is a need to identify in paragraph (2) of the general commentary the gaps that exist under the current treaty regimes. Once identified, there would be more clarity on what gaps the draft guidelines seek to fill.

B. Specific comments on the draft preamble and guidelines

1. Draft preamble

European Union

[Original: English]

The European Union notes with regret that the suggestion made by the European Union in 2017 to include in the preamble references to specific agreements, such as the Montreal Protocol,[103] the Convention on Long-Range Transboundary Air Pollution (including the Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-level Ozone) and the importance of their ratification, and 2017 United Nations Environmental Assembly resolution 3/8 on preventing and reducing air pollution to improve air quality globally, was not taken on board. The Convention on Long-Range Transboundary Air Pollution and resolution 3/8 provide best practices, main principles and core policy for work on air quality linked to pollutant emissions from land-based sources. In addition, the European Union would like to draw the attention to MARPOL Annex VI on the prevention of Air Pollution from Ships,[104] which is instrumental in delivering very positive effects on reducing air pollution from ships on a global scale. All these instruments were developed based on the best available science over as long as the last forty years and it is important to build on this existing framework and the lessons learned from it. The European Union would like to stress that these instruments are reflected in the European Union *acquis*, notably in the Directive (EU) 2016/2284[105] on the reduction of national emissions of certain atmospheric pollutants, but also in the Non-road Mobile Machinery Regulation (EU) 2016/1628[106] or in the Sulphur in Fuels Directive (EU) 2016/802.[107] In that respect, the European Union would suggest that the Commission consider drafting guideline 3 in a way to encourage States to join, ratify or implement relevant multilateral environmental agreements. This would be in line with the broad scope of the guidelines as set out in guideline 2.

This expression “pressing concern of the international community” in the preamble deviates from the more established “common concern of humankind” often used in international environmental law. The European Union would therefore suggest that the Commission uses the wording “common concern of humankind”.

[103] Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal, 16 September 1987), United Nations, *Treaty Series*, vol. 1522, No. 26369, p. 28.

[104] International Convention for the Prevention of Pollution from Ships, 1973 (“MARPOL Convention”) (London, 2 November 1973), *ibid*., vol. 1340, No. 22484, p. 184.

[105] Directive (EU) 2016/2284 of the European Parliament and of the Council of 14 December 2016 on the reduction of national emissions of certain atmospheric pollutants, amending Directive 2003/35/EC and repealing Directive 2001/81/EC (Text with EEA relevance), *Official Journal of the European Union*, L 344, 17 December 2016, pp. 1–31.

[106] Regulation (EU) 2016/1628 of the European Parliament and of the Council of 14 September 2016 on requirements relating to gaseous and particulate pollutant emission limits and type-approval for internal combustion engines for non-road mobile machinery, amending Regulations (EU) No. 1024/2012 and (EU) No. 167/2013, and amending and repealing Directive 97/68/EC (Text with EEA relevance), *Official Journal of the European Union*, L 252, 16 September 2016, pp. 53–117.

[107] Directive (EU) 2016/802 of the European Parliament and of the Council of 11 May 2016 relating to a reduction in the sulphur content of certain liquid fuels, *Official Journal of the European Union*, L 132, 21 May 2016, pp. 58–78.

United Nations Environment Programme

As regards the second preambular paragraph, draft guideline 1 on the use of terms notes that "atmospheric pollution" requires a substance, but there is no mention of substances as a cause of "atmospheric degradation", particularly given the definition of "atmospheric degradation". Furthermore, UNEP notes that there is no further mention of "degrading substances" in the draft guidelines apart from this one preambular paragraph. As a result, in the view of UNEP, it is not clear whether there is a distinction between a "polluting substance" and a "degrading substance".

From the UNEP perspective, the third preambular paragraph is closely related to the eighth. It is therefore suggested to have them next to each other.

Concerning the sixth preambular paragraph, in the view of UNEP, the draft guidelines should reflect the logical continuum that exists between pollution, degradation of the atmosphere, climate change, sea-level rise and its effect on the low-lying coastal areas and small island developing States. Given the focus on air quality rather than sea-level rise, UNEP suggests mentioning developing States that are inordinately affected by poor air quality. The link between "atmospheric degradation" and sea-level rise is not apparent in the language of the draft guidelines. Thus, in the view of UNEP, the purpose of singling out States susceptible to sea-level rise is unclear.

Concerning the eighth preambular paragraph, if the guidelines do not address what is already in treaty regimes, and they do not address what is not accounted for in treaty regimes (by filling gaps), the scope of the draft guidelines is unclear.

As regards paragraph (2) of the commentary to the preamble, in the view of UNEP, it is unclear whether it can be argued that the atmosphere is an exhaustible natural resource. The only reference made in the draft guidelines is a 1996 report of the World Trade Organization Appellate Body.[108] UNEP is also unsure whether water can easily be compared with air/atmosphere.

2. Draft guideline 1 – Use of terms

United Nations Environment Programme

Concerning paragraph (11) of the commentary to draft guideline 1, it is unclear to UNEP to what extent can the definition applies to ozone depletion and climate change.[109] This, considering that the definition of "atmospheric degradation" is meant to include "ozone depletion and climate change", but the preamble states that "the present draft guidelines are not to interfere with relevant political negotiations, including those on climate change, ozone depletion, and transboundary air pollution", and also not fill gaps in treaty regimes.

3. Draft guideline 2 – Scope of the guidelines

United Nations Environment Programme

Despite, the commentary provided by the Commission, the scope of the draft guidelines remains unclear. Moreover, UNEP notes that most of it is defined in the negative but remains unclear what is the gap that needs regulation.

Concerning paragraph (2) of the commentary to the draft guideline,[110] it is the view of UNEP that this paragraph elaborating on the distinction (anthropogenic and

[108] A/73/10, para. 78, at p. 162.
[109] *Ibid*., at p. 172.
[110] *Ibid*., at p. 173.

natural origins) is more appropriate in the commentary section for draft guideline 1 (Use of terms) with respect to subparagraphs (b) and (c).

4. Draft guideline 3 – Obligation to protect the atmosphere

United Nations Environment Programme

It is unclear to UNEP how the obligation imposed on States to undertake "due diligence in taking appropriate measures" ensures compliance.

As regards paragraph (2) of the commentary to the draft guideline,[111] for consistency purposes with the rest of the text, UNEP suggests changing the word "and" in "atmosphere to preventing reducing and controlling atmospheric pollution and atmospheric degradation" to "or".

5. Draft guideline 4 – Environmental impact assessment

United Nations Environment Programme

With respect to paragraph (5) of the commentary to the draft guideline,[112] it is rightly mentioned that the determination of the "significance" criterion is based on consideration of the facts. But it is not clear to UNEP what are the facts. UNEP suggests specifying what is the threshold. Otherwise, in its view there are two factors (likelihood and significance) and the assessment is subjective. A situation may be significant as a fact for one person and not so significant for another. UNEP further notes that this is why the Espoo Convention[113] includes an annex with activities which *de facto* are likely to have a significant environmental impact and thus require a transboundary environmental impact assessment procedure.

On paragraph (7) of the commentary to the draft guideline,[114] even though the procedural aspects of an environmental impact assessment are tackled in other international instruments, it is the view of UNEP that the draft guidelines should still deal with them. UNEP notes that there are many issues tackled in these draft guidelines that are already dealt with in other instruments (for instance, international cooperation, indigenous rights) but they have been still considered in the draft guidelines. UNEP considers procedural rights a key issue and suggests including them in the draft guidelines.

6. Draft guideline 5 – Sustainable utilization of the atmosphere

United Nations Environment Programme

UNEP suggests mentioning also "social development" in paragraph 2 of draft guideline 5, as it is one of the pillars of sustainable development.

Concerning paragraph (1) of the commentary to the draft guideline,[115] UNEP also expresses doubts as to whether the atmosphere could be treated analogously as transboundary watercourses or aquifers.

As regards paragraph (3) of the commentary to the draft guideline,[116] UNEP suggests providing examples of how the atmosphere has been utilized.

---

[111] *Ibid*., at p. 175.
[112] *Ibid*., at p. 178.
[113] Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991), document ECE/MP.EIA/21.
[114] A/73/10, para. 78, at p. 179.
[115] *Ibid*.
[116] *Ibid*., at p. 180.

7. Draft guideline 6 – Equitable and reasonable utilization of the atmosphere

United Nations Environment Programme

The text of draft guideline is vague, and UNEP suggests developing the commentary further to support the content of the draft guideline.

Concerning paragraph (1) of the commentary to the draft guideline,[117] in the view of UNEP, an explanation is missing on why it is important to state utilization of the atmosphere in "an equitable and reasonable manner" as an autonomous principle.

Concerning paragraph (3) of the commentary to the draft guideline,[118] UNEP notes that this sentence should read "the Commission elected to use the phrase 'taking into account the interests of present and future'".

8. Draft guideline 7 – Intentional large-scale modification of the atmosphere

European Union

The European Union welcomes 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.[119] 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 incorporates the environmental concern. 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.

9. Draft guideline 8 – International cooperation

UNEP suggests referring in paragraph 2 of draft guideline 8 to scientific and technical knowledge and referring to causes, impacts and ways to prevent.

10. Draft guideline 9 – Interrelationship among relevant rules

European Union

The European Union reiterates its prior comments in relation to vulnerable groups, namely, that paragraph 3 of draft guideline 9 should also mention the less affluent members of the national population among vulnerable groups of people. It could be noted that also in developed countries people in less affluent neighbourhoods tend to be more affected by air pollution due to their vicinity to busy roads, lifestyle or insufficient access to protection measures or health care.

---

[117] *Ibid*., at p. 181.
[118] *Ibid*.
[119] *Ibid*., at p. 183.

The European Union would also like to draw 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.[120]

11. Draft guideline 10 – Implementation

European Union

The European Union welcomes draft guideline 10 on implementation. However, the European Union points out that the Commission's recommendations contribute 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.

12. Draft guideline 11 – Dispute settlement

European Union

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.

United Nations Environment Programme

UNEP considers that referring to dispute settlement in the draft guidelines is not necessary as there are many other international venues to deal with disputes between States.

13. Additional draft guidelines

European Union

The European Union welcomes the reference to the scientific aspect of environmental issues. However, the European Union invites the Commission to consider including the science-based policy as a general principle in the draft guidelines.

[120] General Assembly resolution 73/333 of 30 August 2019 on follow-up to the report of the ad hoc open-ended working group established pursuant to General Assembly resolution 72/277.