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Chair: Ms. Al-Thani (Qatar)

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The meeting was called to order at 10 a.m.

Agenda item 82: Report of the International Law Commission on the work of its seventy-second session (continued) (A/76/10)

1. **The Chair** invited the Committee to continue its consideration of chapters I to V and X of the report of the International Law Commission on the work of its seventy-second session (A/76/10).

2. **Mr. Hawke** (New Zealand) said that his Government was proud to have nominated, jointly with the Governments of Australia, Canada and Sierra Leone, Penelope Ridings for election to the Commission for the quinquennium beginning in 2023.

3. Referring to the topic “Protection of the atmosphere”, he said that the rules of international law relating to the issue and other relevant rules of international law should be identified, interpreted and applied in a coherent manner, to the extent possible. His delegation welcomed the Commission’s recommendation that the General Assembly take note in a draft resolution of the draft guidelines on the topic and ensure their widest possible dissemination. It appreciated the emphasis on the fact that atmospheric pollution and atmospheric degradation were a common concern of humankind and that the utilization of the atmosphere should be undertaken in a sustainable manner, given that it was a natural resource with a limited assimilation capacity. His delegation also agreed that special consideration should be given to persons and groups particularly vulnerable to atmospheric pollution and atmospheric degradation, including 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. The emphasis in draft guideline 3 (Obligation to protect the atmosphere) on the importance of exercising due diligence in taking appropriate measures to prevent, reduce or control atmospheric pollution and atmospheric degradation was also helpful.

4. With regard to the topic “Provisional application of treaties”, his delegation welcomed the finalization of the draft Guide to Provisional Application of Treaties, which, together with the commentaries thereto, would be a valuable practical tool for States and would support the development of consistent practice. It also welcomed the detailed analysis in the sixth report of the Special Rapporteur (A/CN.4/738) of the crucial question of which rights and obligations arising from the entry into force of a treaty were triggered in the event of provisional application. In his delegation’s view, provisional application was not and could not be used as

a means of bypassing parliamentary procedures. Retaining the flexibility of provisional application was key to managing the tension between bringing a treaty into force at the international level and ensuring that relevant domestic constitutional procedures were completed.

5. **Ms. Falconi** (Peru), referring to the topic “Protection of the atmosphere”, said that her delegation supported the Commission’s recommendation that the General Assembly take note in a resolution of the draft preamble and guidelines and commend them to the attention of States and all who might be called upon to deal with the subject. Her delegation wished to highlight the references in the draft guidelines to the utilization of the atmosphere, which should be sustainable, equitable and reasonable, and the fact that special consideration should be given to persons and groups particularly vulnerable to atmospheric pollution and atmospheric degradation, including 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.

6. With regard to the topic “Provisional application of treaties”, her delegation supported the Commission’s recommendation that the General Assembly take note of the draft Guide to Provisional Application of Treaties and that it commend the Guide, and the commentaries thereto, to the attention of States and international organizations. The text would be a useful tool for States and international organizations.

7. With regard to chapter X of the Commission’s report, on other decisions and conclusions of the Commission, her delegation was pleased to note that the Commission had decided to include in its long-term programme of work the topic “Subsidiary means for the determination of rules of international law”. Conducting an analysis of judicial decisions and the teachings of publicists would allow the Commission to complete its important systematic study of the sources of international law listed in Article 38, paragraph 1, of the Statute of the International Court of Justice. In addition, the re-establishment of the Working Group on methods of work of the Commission was particularly pertinent, given that, as noted in the report, useful lessons might be learned from the seventy-second session, which had been held successfully despite the challenges presented by the pandemic. Lastly, her delegation was concerned that budgetary constraints in recent years had reduced resources to an amount below the level needed to ensure the Commission’s effective functioning. It therefore supported the proposal to establish a trust fund to address those difficulties.

8. **Mr. Pieris** (Sri Lanka) said that the Commission's work on the topic "Succession of States in respect of State responsibility" was timely. His delegation welcomed the special attention given to the topic of sea-level rise in relation to international law through the reconstitution at the seventy-second session of the Study Group on the topic. With regard to chapter X of the Commission's report, his delegation welcomed the re-establishment of the Planning Group to consider the Commission's programme, procedures and working methods. In connection with the inclusion of the topic "Subsidiary means for the determination of rules of international law" in the Commission's long-term programme of work, he noted that the Commission's focus on the elucidation of the sources of international law appeared to have been well received by States and the international legal community.

9. Given the importance of justice and the rule of law at the international level, the work of the Commission was more valuable than ever before. His delegation urged Member States to provide the Commission with the necessary support. It also hoped for the eventual establishment of a central enforcement mechanism that would ensure the effectiveness of the system of legal rules that constituted public international law.

10. **Ms. O'Sullivan** (Ireland), referring to the topic of provisional application of treaties, said that the draft Guide to Provisional Application of Treaties was a valuable practical tool for States and international organizations; her delegation supported the Commission's recommendation to the General Assembly concerning the text. Her delegation welcomed the clear indication in the general commentary to the draft Guide that its objective was to direct users to answers that were consistent with existing rules or that seemed most appropriate for contemporary practice and to describe and clarify existing rules of international law in the light of contemporary practice; it thus generally reflected *lex lata*, although some aspects of it were more recommendatory in nature. Her delegation also noted with satisfaction that the legal effect of provisionally applying a treaty, or a part of a treaty, was unequivocally affirmed in draft guideline 6. Given that article 25 of the 1969 Vienna Convention on the Law of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations was silent on the legal effect of provisional application, the draft guideline was an important confirmation of the legal obligation on States and international organizations to apply in good faith those provisions that were subject to provisional application. Her delegation welcomed the more detailed explanation in the commentaries of the two types of

legal effect of provisional application. However, as acknowledged in the general commentary, provisional application of a treaty was not an alternative to full application but was a complementary and temporary regime; moreover, it was a practical tool whose flexible nature made it attractive to States and international organizations. Her delegation was pleased to see that appropriate emphasis was placed in the draft guidelines and accompanying commentaries on that inherent flexibility.

11. The annex to the draft Guide provided a sufficiently large number of examples of existing treaty provisions to assist States and international organizations in dealing with the most common issues that they faced in considering the provisional application of treaties. It was clear, especially from paragraph (3) of the general commentary, that the draft Guide was not intended to be a comprehensive or exhaustive account of all issues concerning the provisional application of treaties. That was understandable in the light of the lack of State practice on many aspects of the topic, such as the effect of reservations, as mentioned in draft guideline 7. There were also other important aspects of the provisional application of treaties that were beyond the scope of the draft Guide, such as the impact of the provisional application of provisions establishing institutional mechanisms. Further research on those issues might be warranted as State practice developed in the future.

12. **Mr. Berman** (United Kingdom) said that, at the seventy-fourth session, his delegation had emphasized two key points: the need for the Commission to make clear in its products when it was codifying existing law and when it was suggesting the progressive development of the law, or new law; and the need for greater engagement with States. His delegation welcomed the Commission's recognition of those issues and looked forward to further steps in that regard.

13. With regard to chapter X of the report (Other decisions and conclusions of the Commission), his delegation noted the Commission's decision to include the topic "Subsidiary means for the determination of rules of international law" in its long-term programme of work and welcomed the preparation of the syllabus for the topic. It also welcomed the Commission's decision not to move any topics to its current programme of work. His delegation had previously expressed its concern about the speed at which important topics had been dealt with by the Commission. Particular account needed to be taken of the resources of States to engage with the Commission's work. When the Commission considered at its next session which topics to move to its current programme

of work, it should proceed with caution and rigour both with regard to the choice of topics and with regard to ensuring that its products took into account the views and practice of States. In that context, work on the topic “Settlement of international disputes to which international organizations are parties” might serve to address an ongoing problem.

14. Regarding the topic “Protection of the atmosphere”, the Commission’s work had been sensitive to the concerns of States, and the draft guidelines were a potentially useful contribution to international law on the protection of the atmosphere. However, his delegation continued to emphasize the significance of existing international obligations concerning the protection of the environment that already addressed many of the issues concerning protection of the atmosphere.

15. With regard to the topic “Provisional application of treaties”, the Commission was to be commended for giving due weight to the comments of States. Some important clarifications had been introduced in the draft Guide to Provisional Application of Treaties adopted on second reading, both in the draft guidelines themselves and in the commentaries. Above all, in draft guideline 6, the legal effect of provisional application was made clear. The draft Guide seemed likely to become a useful tool for all those who had to address questions of provisional application. His delegation strongly supported the Commission’s recommendation to the General Assembly, in particular with regard to ensuring the widest possible dissemination of the draft Guide. A consistent approach by all countries and jurisdictions to provisional application would aid the negotiation and drafting of treaties. However, his delegation remained of the view that provisional application should not become a routine occurrence and should remain a tool used in a specific context.

16. His Government, alongside those of Nigeria, Japan, Kenya and Slovenia, was pleased to have nominated Dapo Akande as a candidate for election to the Commission for the quinquennium 2023–2027.

17. **Ms. Chigiya** (Federated States of Micronesia), referring to the topic “Protection of the atmosphere”, said that the different international law regimes and processes that were of relevance to the protection of the Earth’s atmosphere from anthropogenic harms, including regimes and processes relating to climate change, the ozone layer, biological diversity and the protection and preservation of the marine environment, could operate in harmony for the overall protection of the atmosphere without their individual mandates being compromised. Her delegation therefore encouraged the

international community to break down unnecessary silos between them, in keeping with the draft guidelines.

18. Her delegation welcomed the treatment in draft guideline 9 of the interrelationship among relevant rules of international law on the protection of the atmosphere, including the rules of international human rights law and of the law of the sea, and endorsed the assertion that such rules 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. Similarly, the development of new rules of international law of relevance to the protection of the atmosphere should be done in a harmonious manner. Her delegation also welcomed the recognition of the need to afford special consideration to persons and groups particularly vulnerable to atmospheric pollution and atmospheric degradation, including indigenous peoples and people of small island developing States affected by sea-level rise. As stated in the commentary to the draft guideline, such groups often suffered the most from the adverse impacts of atmospheric pollution and degradation, including those relating to climate change and the devastation of biological diversity.

19. Her delegation also welcomed the clear recognition in draft guideline 4 that States had the obligation to ensure that an environmental impact assessment was undertaken of proposed activities under their jurisdiction or control that were likely to cause significant adverse impact on the atmosphere in terms of atmospheric pollution or atmospheric degradation. It was made clear in that draft guideline, and also in draft guideline 7 (Intentional large-scale modification of the atmosphere) and the commentaries to both provisions, that there was a need to expand international law to include rigorous environmental assessments of activities that directly and adversely impacted the atmosphere, including geoengineering and other intentional large-scale modifications of the atmosphere to counter the climate crisis.

20. On draft guideline 3 (Obligation to protect the atmosphere), her delegation reiterated its view that the obligation to protect the atmosphere was an obligation *erga omnes*, and that failure to meet that obligation triggered State responsibility. As clarified in the commentary, the current formulation of the draft guideline was without prejudice to whether such an obligation *erga omnes* existed. In her delegation’s view, given that the atmosphere benefited humankind as a whole, each State owed an obligation to the rest of the international community to take all appropriate measures to prevent, reduce or control the pollution and

degradation of the atmosphere, especially in the current era of climate and biodiversity crises.

21. **Mr. Giret Soto** (Paraguay) said that his delegation attached great importance to the dialogue between the Committee and the Commission and was in favour of holding thematic dialogues on matters of interest to Member States, facilitated by technology where possible. That was particularly important given that the Commission would likely be completing its work on a number of topics in the next few years, and in view of the large number of issues relevant to the evolution of international law.

22. With regard to the topic of protection of the atmosphere, the draft guidelines provided a practical guide for States and other international actors and were relevant to the attainment of the Sustainable Development Goals, in particular targets 3.9 and 11.6. His delegation was pleased to note the special mention of the impact of atmospheric pollution on developing countries, whose circumstances made them particularly vulnerable. It was also pleased to note that the draft guidelines were not aimed at imposing new obligations on States beyond those already established under international law, and that the Commission had taken care to ensure that its work did not interfere with relevant political negotiations. His delegation also welcomed the references in the draft guidelines to the peaceful settlement of disputes relating to atmospheric protection and the emphasis placed on the role of facts and science in such dispute settlement.

23. In Paraguay, the protection of the environment was enshrined in the Constitution, and activities likely to cause alteration of the environment were regulated under national laws, such as a 2014 law on the protection of air quality through control of emissions of chemical and physical pollutants into the atmosphere.

24. **Ms. Ruhama** (Malaysia), referring to the topic “Protection of the atmosphere”, said that the draft guidelines would serve as a framework for the harmonization of national laws and regulations with international rules, standards and recommended practices relating to the protection of the atmosphere. Her delegation noted that the draft guidelines were not aimed at imposing legal rules and legal principles on current treaty regimes. It also appreciated the fact that the comments and observations of States and international organizations had been taken into account in the sixth report of the Special Rapporteur ([A/CN.4/736](#)) and acknowledged the challenges, complexity and technical nature of matters relating to the protection of the atmosphere and contemporary practice in that regard, in particular the different levels

of development in different Member States. Her delegation hoped that the proposals made by the Special Rapporteur in his report would be taken into consideration in the draft guidelines.

25. In view of the Commission’s recommendation that the General Assembly take note in a resolution of the draft preamble and guidelines and annex them to the resolution, her Government had undertaken the necessary domestic review of the text. Overall, her Government was supportive of the draft guidelines and the commentaries thereto, which provided clear guiding principles and approaches for States to follow in their efforts to protect the atmosphere. Nonetheless, a further in-depth analysis of the draft guidelines and their implementation could help to ensure that they were workable for all Member States.

26. Her delegation appreciated the reference in the fourth preambular paragraph to the special situation and needs of developing countries. The limitations faced by them in addressing the issue of the protection of the atmosphere, and specifically the scarcity of resources, should also be mentioned in the paragraph. With regard to utilization of the atmosphere, the participation of developing countries on an equitable basis should not be compromised because of their weak economic position or lack of access to technical assistance. As to the enforcement measures provided for in draft guideline 11 (Compliance), the termination of States’ rights and privileges under relevant agreements to which they were parties should be subject to the relevant provisions of such agreements. Her delegation hoped that those concerns could be deliberated further.

27. With regard to the topic “Provisional application of treaties”, her delegation was pleased to note that the comments of Malaysia and of other States had been addressed by the Special Rapporteur and the Commission. The draft Guide to Provisional Application of Treaties was important as a non-binding instrument that clarified existing rules of international law in the light of contemporary practice. Nonetheless, as provided in the general commentary, provisional application constituted a voluntary mechanism to which States and international organizations were free to resort or not. Her delegation reiterated its view that there should be a statement of unequivocal consent and explicit commitment by States and international organizations to apply a treaty provisionally and thereby agree to be bound by such provisional application. The provisional application of treaties might also be subject to limitations deriving from the internal laws of States and the rules of international organizations. States and international organizations must therefore ensure that their statements of consent to apply a treaty

provisionally were compatible with their internal laws or rules.

28. The domestic law of Malaysia did not contain any express provision either prohibiting or allowing for the provisional application of treaties. As a dualist State, Malaysia ensured that, before ratifying or acceding to any treaty, it had domestic laws in place that would enable it to fulfil its obligations under the treaty. Her delegation therefore agreed with the statement in the general commentary that the draft Guide did not create any kind of presumption in favour of provisional application of treaties and that provisional application was neither a substitute for securing the entry into force of treaties, which remained the natural vocation of treaties, nor a means of bypassing domestic procedures. The draft Guide would be a useful tool to assist States and international organizations with regard to the law and practice on the provisional application of treaties. Her delegation supported the Commission's recommendation that the General Assembly request the Secretary-General to prepare a volume of the *United Nations Legislative Series* compiling the practice of States and international organizations in the provisional application of treaties, together with other materials relevant to the topic.

29. **Ms. Hanlomyuang** (Thailand), referring to the topic "Protection of the atmosphere", said that the Commission's work on such technical issues could enrich the discussion in other forums. The draft guidelines offered a good example of in-depth analysis of key principles of international law, such as due diligence, the obligation to cooperate and the peaceful settlement of disputes, that applied to complex and cross-cutting issues. Such analysis could be useful in addressing the fragmentation of international law.

30. Turning to the topic "Provisional application of treaties", she said that the draft Guide to Provisional Application of Treaties would promote mutual understanding and uniformity of State practice with regard to provisional application. Her delegation endorsed the rationale of draft guideline 12 (Agreement to provisional application with limitations deriving from internal law of States or rules of international organizations) and the commentary thereto. Given that the provisional application of treaties might not be possible at all under the internal law of States, it was essential that the draft Guide unambiguously reflect the consensual basis of the provisional application of treaties. Moreover, provisional application should not undermine or delay procedures whereby the negotiating parties consented to be bound by a treaty. Her delegation shared the view that the provisional application of treaties should be subject to a fixed time period. The

negotiating parties should resort to provisional application only when there was a real necessity to begin the implementation of a treaty before its entry into force, such as in a situation of urgency or to avoid gaps between successive treaty regimes. Given that treaties remained one of the major sources of international law, her delegation encouraged the Commission to continue its work on various aspects of treaty law so as to assist States in the treaty-making process.

31. Regarding the inclusion of the topic "Subsidiary means for the determination of rules of international law" in the Commission's long-term programme of work, the Commission's contribution with regard to the sources of international law was unique and valuable, but the limited use of subsidiary means for the determination of rules of international law might make it challenging to gain interest and input from Member States.

32. Her delegation welcomed the new hybrid format used for the Commission's seventy-second session, which had enabled its members to participate despite travel restrictions. Webcasting, at least for the plenary session, represented a good practice because it provided wider access to the Commission's work by Member States and other interested parties. Her delegation therefore encouraged the continuation of that practice and the use of technology and electronic documents to facilitate the Commission's work.

33. Her delegation hoped that the Commission would re-engage with international and regional organizations, including the Asian-African Legal Consultative Organization, when the pandemic situation improved. Such engagement helped to create synergies between international and regional efforts to promote the wider appreciation of international law. Her delegation also hoped that it would be possible to hold the International Law Seminar in 2022, since it provided a valuable opportunity for young international lawyers, especially those from developing countries, to enhance their knowledge of the Commission's work. Her delegation thanked those Member States that continued to make voluntary contributions to the United Nations Trust Fund for the International Law Seminar.

34. The United Nations must step up its efforts to strengthen the international legal framework and advance the rule of law. Practical and adequate legal principles were required in order to cope with emerging challenges and global change. The Commission must continue its vital role in promoting the clarity, predictability and universality of positive law. Its work should also be reflective of all voices and responsive to the concerns of all States. Her delegation therefore

hoped that the Commission would become more accessible and inclusive, with increased participation in its work by all interested parties, and that its interaction with the Committee would be further enhanced through formal and informal channels.

35. **Mr. Martinsen** (Argentina), referring to the topic of protection of the atmosphere, said that his delegation welcomed the normative approach taken by the Commission in the draft guidelines and the recognition of the relationship between rules of international law relating to the protection of the atmosphere and other relevant rules of international law. The significance of the Commission's work could be undermined by the exclusion of topics that were of a normative nature and that encompassed the questions of common but differentiated responsibilities, the liability of States and their nationals, the precautionary principle and the transfer of funds and technology to developing countries, including intellectual property rights.

36. With regard to the topic "Provisional application of treaties", the draft Guide to Provisional Application of Treaties covered a fundamental aspect of the law of treaties that had particular practical relevance. His Government was among those that had submitted comments on the draft Guide and was grateful to the Commission for seeking such input from Governments and international organizations. It was essential for the Commission to collect examples of contemporary State practice so that its work reflected the formation of international custom. His delegation also welcomed the explanations in the commentaries of the reasoning behind each draft guideline and attached particular importance to the recognition that provisional application was a voluntary mechanism that could be subject to limitations deriving from the internal law of States; that was true for a number of countries, including Argentina. The draft Guide was an important tool for States which, given that it was not legally binding, allowed for flexibility with regard to provisional application.

37. **Mr. Bae Jongin** (Republic of Korea), referring to the topic of protection of the atmosphere, said that his delegation supported the Commission's recommendation that the General Assembly take note in a resolution of the draft preamble and guidelines, annex them to the resolution and ensure their widest possible dissemination. As his delegation had previously stated, the draft guidelines should not interfere with relevant political negotiations on other environmental issues or seek to fill gaps in existing treaty regimes. His delegation welcomed the Commission's decision to retain the preambular paragraph relating to that point and was also pleased to note that the nature of the

document as a set of guidelines – containing both explanations of the existing international legal framework for the protection of the atmosphere and recommendations aimed at facilitating and promoting future-oriented cooperation among States – had been preserved. In that regard, it was inappropriate and unnecessary to refer to the responsibility of States, which was beyond the scope of the topic.

38. With regard to the modifications made to the draft guidelines at the Commission's seventy-second session, his delegation supported the decision to use the phrase "common concern of humankind" to characterize the atmosphere, which was in line with existing international treaties, such as the United Nations Framework Convention on Climate Change and the Paris Agreement. As noted in the commentary to the preamble to the draft guidelines, the phrase also identified a problem that required cooperation from the entire international community. At the same time, his delegation supported the Commission's comment that its inclusion did not necessarily entail the creation of rights or of obligations *erga omnes*. His delegation also welcomed the addition of the word "significant" to the phrase "deleterious effects" in the definition of "atmospheric pollution" in draft guideline 1 (Use of terms), in particular given that relevant case law, such as the judgment of the International Court of Justice in the joined cases concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, contained references to the obligation under general international law to exercise due diligence in preventing significant transboundary harm. However, that addition should not be construed as prejudicing the meaning or scope of any of the obligations under international law explained in the draft guidelines.

39. With regard to the topic "Provisional application of treaties", his delegation noted with appreciation that, in draft guideline 4 (Form of agreement) of the draft Guide to Provisional Application of Treaties, after the phrase "a resolution, decision or other act adopted by an international organization or at an intergovernmental conference" in subparagraph (b) (i), the phrase "in accordance with the rules of such organization or conference, reflecting the agreement of the States or international organizations concerned" had been added. That made it clear that the means of expressing agreement to the provisional application of a treaty should comply with the rules of the organization or conference concerned. Regarding draft guideline 7 (Reservations), his delegation recognized that there was insufficient practice concerning the formulation of

reservations relating to the provisional application of a treaty or a part of a treaty. However, there was no reason not to accept the reservation system for provisional application, unless otherwise provided in the treaty or agreed upon by the parties. His delegation therefore supported the cautious approach taken in the current wording, in particular the fact that the draft guideline was formulated as a “without prejudice” clause.

40. His delegation welcomed the Commission’s decision to include the topic “Subsidiary means for the determination of rules of international law” in its long-term programme of work. It hoped that the Commission’s work on the topic would serve to shed light on the important yet subtle issue of the role of judicial decisions and scholarly works in identifying international legal norms. His delegation requested that, when the Commission took up the topic, it consider the possible implications for international relations and how discussions on the topic might benefit States.

41. Lastly, he requested Member States’ support for Lee Keun-Gwan as a candidate for election to the Commission, put forward by his Government.

42. **Mr. Coore** (Jamaica), referring to the topic “Protection of the atmosphere”, said that his delegation noted with appreciation the express acknowledgement in the draft guidelines of the close link between the atmosphere and other important areas. In addition, the Commission noted in the commentaries to the text that extreme atmospheric conditions could lead to flood and drought and that the environment could be adversely affected by certain changes in the condition of the atmosphere. As a small island developing State, Jamaica welcomed the reference in the fifth preambular paragraph to the relationship between the atmosphere and the oceans and the reference in the sixth preambular paragraph to the issue of sea-level rise, with particular attention drawn to the special situation of low-lying coastal areas and small island developing States.

43. While each State must make its own contribution to protecting the atmosphere and the wider environment, his delegation welcomed the recognition in the draft guidelines that atmospheric pollution and atmospheric degradation, much like other matters that affected the environment, were a “common concern of humankind”. It also welcomed draft guideline 8, in which the importance of international cooperation was reaffirmed. In the case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, the International Court of Justice had underscored the importance of cooperation in managing the risks of damage to the environment. His delegation was therefore pleased to note that States were encouraged in the draft guideline to cooperate in

enhancing scientific and technical knowledge. While certain matters were excluded from the scope of the draft guidelines, no limits were placed on the forms of cooperation; that flexibility was important in allowing States to respond to global needs as appropriate. For example, in addition to scientific and technical exchanges, the provision of adequate and appropriate financing for risk reduction and disaster mitigation efforts was a critical area in which States and international organizations could cooperate to support the protection of the atmosphere and the wider environment.

44. Given that the number of specialized areas of international law had proliferated in recent times, his delegation welcomed draft guideline 9 (Interrelationship among relevant rules). As a small island developing State and the host country of the International Seabed Authority, Jamaica attached particular importance to the law of the sea and had played a key role in the negotiation of the United Nations Convention on the Law of the Sea. His delegation therefore noted with appreciation that the Commission acknowledged in paragraph (9) of the commentary to the draft guideline that the protection of the atmosphere was intrinsically linked to the oceans and the law of the sea, owing to the close physical interaction between the atmosphere and the oceans.

45. His delegation welcomed the Commission’s decision to include the topic “Subsidiary means for the determination of rules of international law” in its long-term programme of work and noted with appreciation the syllabus of the topic contained in the annex to the report. Given the important work that the Commission had already done in relation to other sources of international law, the topic was appropriate for consideration by the Commission. His delegation encouraged the Commission to continue its efforts to identify topics of practical importance that addressed the real-world needs of Member States.

46. **Mr. Lefeber** (Netherlands), referring to the methods of work of the Commission, said that the Commission might wish to consider limiting the number of topics on its programme of work in order to enable all Member States to consider them in greater depth and to provide comments and observations, as well as examples of State practice and *opinio juris*. Furthermore, in order to ensure meaningful input from Member States, the Commission might wish to pay greater attention to reservations expressed with regard to the desirability of taking up certain topics, even if such reservations were voiced only by a few States. His Government would also welcome more transparency with regard to the treatment by the Commission of the

comments and observations of Governments. In particular, the Commission should explain more clearly its reasons for rejecting certain comments and observations. Lastly, it would be helpful for the Commission to identify relevant State practice and *opinio juris* more rigorously. Where States did not provide the Commission with sufficient examples of State practice and *opinio juris*, or where such examples simply did not exist, the Commission should be more reluctant to conclude that a particular rule had attained the status of customary international law. When there was insufficient evidence of State practice and *opinio juris*, the Commission could, and indeed should, still develop international law, but should state more explicitly that any proposed rules constituted an exercise in progressive development. That would contribute to the transparency of the Commission's work.

47. With regard to the topic "Protection of the atmosphere", the draft guidelines incorporated key principles of international environmental law, including customary international law, and provided useful guidance to the international community. His delegation noted with appreciation that the focus of the draft guidelines was the protection of a natural resource – the atmosphere – rather than one or more types of pollution. That was an innovative approach that represented a paradigm shift in efforts to preserve the global environment. His delegation also welcomed the adjustment of the third preambular paragraph, in which it was stated that atmospheric pollution and atmospheric degradation were a common concern of humankind, and shared the Commission's view that that concern could be adequately addressed only through cooperation across the international community as a whole. His delegation also supported the Commission's recommendation that the General Assembly take note in a resolution of the draft guidelines and ensure their widest possible dissemination. His delegation recommended that the topic be included in the Committee's agenda for the next session.

48. The comments of his Government on the protection of the atmosphere, transmitted in a diplomatic note of 9 December 2019, were not correctly referred to in the report containing comments and observations received from Governments and international organizations (A/CN.4/735). In that note, his Government had invited the Secretary-General to take note of advice provided to it by the Netherlands Advisory Committee on Issues of Public International Law, an independent body, and understood that the advice had been brought to the Commission's attention. However, it was not made clear in the report that the

advice reflected the position of the Advisory Committee and not the position of his Government.

49. With regard to the topic "Provisional application of treaties", the draft Guide to Provisional Application of Treaties would be a useful tool for States and international organizations and would contribute to the development and understanding of relevant practice in accordance with article 25 of the Vienna Convention on the Law of Treaties. His Government appreciated the fact that the comments it had submitted on the topic over the years had been taken into account. Of particular importance were its comments on the need to avoid blurring the conceptual distinction between the rules applicable to treaties that had entered into force and those applicable to treaties that were being applied on a provisional basis; the need to uphold the flexible nature of provisional application; and the need to recognize the potential consequences of termination of provisional application.

50. With regard to the Commission's decision to include the topic "Subsidiary means for the determination of rules of international law" in its long-term programme of work, his delegation understood the thought behind pursuing further work on the sources of international law mentioned in the Statute of the International Court of Justice, but would prefer the Commission to focus on issues that were more pertinent for international practice, such as the use of non-binding instruments in the identification and application of international law. His delegation invited the Commission to consider moving the topic "Settlement of international disputes to which international organizations are parties" to its current programme of work. International organizations, as well as their host States, were increasingly faced with legal action brought against them by natural and legal persons. Such disputes of a private law nature were fraught with legal complexities that impeded the sound administration of justice. His delegation would therefore welcome a study of the topic by the Commission.

51. **Mr. Tichy** (Austria), referring to the topic "Protection of the atmosphere", said that his delegation agreed with the proposition in draft guideline 9 (Interrelationship among relevant rules) of the draft guidelines on the protection of the atmosphere that the rules of international law relating to the protection of the atmosphere should, to the extent possible, be interpreted and applied in harmony with other existing rules of international law. However, that did not imply any expansion of the scope of international legal obligations beyond what had originally been accepted by States.

52. As to the topic “Provisional application of treaties”, his delegation welcomed the fact that draft guideline 3 (General rule) of the draft Guide to Provisional Application of Treaties was broader than article 25 of the Vienna Convention on the Law of Treaties in that it contained no reference to negotiating States. It thus allowed for provisional application by acceding States as well as negotiating States; as noted in the commentary, that approach reflected contemporary practice. His delegation also supported subparagraph (b) (ii) of draft guideline 4 (Form of agreement), which stated that provisional application could be agreed through a declaration by a State or an international organization that was accepted by the other States or international organizations concerned. However, his delegation did not consider it necessary for such acceptance to be “express”, as set out in paragraph (7) of the commentary to the draft guideline; implicit acceptance would be sufficient.

53. With regard to draft guideline 5 (Commencement), the current wording seemed to exclude the possibility that a State declaring its provisional application of a treaty might unilaterally determine the date on which such provisional application was to commence. His delegation proposed that a reference to the date “as notified” be included in the draft guideline, in addition to the date provided for in the treaty or otherwise agreed. That would guarantee that a State wishing to apply a treaty provisionally could announce the beginning of its provisional application unilaterally.

54. The Commission rightly noted, in paragraph (6) of the commentary to draft guideline 6 (Legal effect), the important distinction between provisional application and entry into force of a treaty. His delegation supported the resulting view that provisional application was not subject to all rules of the law of treaties, a statement that was relevant both to States already bound by the treaty and to States applying it provisionally. It would have been useful to include in the commentary examples of rules that the Commission deemed inapplicable to provisional application.

55. With regard to draft guideline 9 (Termination), he was particularly pleased to note that the Commission had taken up his delegation’s suggestion to allow in paragraph 3 for other grounds for terminating provisional application in addition to the treaty’s entry into force or notification by a State or international organization provisionally applying a treaty of its intention not to become a party to the treaty. That possibility added to the flexibility of the system of provisional application. His delegation also agreed with the decision not to include in the draft guideline a notice period or a “reasonable period” for termination of

provisional application, as outlined in paragraph (7) of the commentary to the draft guideline. However, his delegation recognized that notice periods might be useful and welcomed the examples in the annex that served to alert treaty drafters to the benefits of clearly defined termination dates.

56. His delegation believed that the topic “Subsidiary means for the determination of rules of international law”, recently added to the Commission’s long-term programme of work, would mainly be of academic value and was not particularly pressing or practically relevant. The topic “Universal criminal jurisdiction”, however, should be taken up by the Commission. While some asserted that it was too politically sensitive for the Commission to tackle, his delegation believed that it was essentially legal in nature and should be approached in that way. His delegation trusted that the Commission would be able to dispel the existing misunderstandings and explain universal jurisdiction as a necessary element of cooperation among States in the fight against impunity for international crimes. It also hoped that the topic “Settlement of international disputes to which international organizations are parties” would receive the Commission’s attention in the near future, given that disputes between international organizations and private parties, which were governed by domestic law, had raised important questions relating to the scope of the privileges and immunities enjoyed by international organizations and the adequacy of the dispute settlement mechanisms established by such organizations.

57. **Mr. Kapucu** (Turkey), referring to the topic of protection of the atmosphere, said that his delegation welcomed the completion of the second reading of the draft guidelines but wished to note that it had previously stated its hesitation with regard to draft guideline 4 (Environmental impact assessment) and paragraph 2 (b) of draft guideline 11 (Compliance). In addition, given that many countries, including Turkey, were not parties to the Vienna Convention on the Law of Treaties, it would be preferable not to mention the Convention in draft guideline 9 (Termination). At the same time, Turkey attached great importance to environmental issues, which presented multidimensional and transboundary challenges. With regard to the protection of the atmosphere, Turkey was a party to the Vienna Convention for the Protection of the Ozone Layer and the Montreal Protocol on Substances that Deplete the Ozone Layer, which were important and universally ratified treaties, and was also committed to other international efforts to protect the ozone layer.

58. With regard to the topic of provisional application of treaties, his delegation welcomed the completion of the second reading of the draft Guide to Provisional

Application of Treaties and reiterated that, in order for Turkey to be legally bound by any international agreement, such agreement had to be approved in accordance with the relevant domestic procedures. The mere signing of the agreement did not suffice. Moreover, as previously stated, Turkey was not a party to the Vienna Convention on the Law of Treaties. It therefore maintained the view that treaties should, as a rule, be applied after their entry into force, and that provisional application before entry into force should be regarded as an exception applied at the discretion of States. In that regard, he referred to the statements made by his delegation at past sessions regarding draft guideline 6 (Legal effect). Although the wording of the draft guideline had been changed, the new wording still established a “default rule”. Since treaties were usually silent on the matter of the legal effect of provisional application, vesting the provisional application of a treaty with default binding force could turn the option of a legally binding obligation into a rule in fact. That situation could pose a threat to the exclusive power of the legislative authority to consent to international undertakings by removing the need for approval; it could also discourage the executive authority from initiating the ratification process and working with the legislature to complete it. The Commission should therefore proceed with utmost caution on the matter. Furthermore, as previously mentioned, many countries were not parties to the Vienna Convention on the Law of Treaties, and it would therefore be preferable not to refer to the Convention in draft guideline 2 (Purpose). His delegation also welcomed the decision not to include draft model clauses on provisional application in the draft Guide.

59. Lastly, his delegation welcomed the Commission’s decision to include the topic “Subsidiary means for the determination of rules of international law” in its long-term programme of work.

The meeting rose at 11.40 a.m.