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Summary record of the 3210th meeting

Topic:
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"common concern of humankind" seemed more likely to promote mechanisms for cooperation among States to solve a problem of common concern, on the basis of the draft guidelines.

The meeting rose at 11.45 a.m.

3210th MEETING

Friday, 23 May 2014, at 10 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Protection of the atmosphere (*continued*) (A/CN.4/666, Part II, sect. I, A/CN.4/667)

[Agenda item 11]

First report of the Special Rapporteur (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the first report of the Special Rapporteur on the protection of the atmosphere (A/CN.4/667).

2. Mr. KITTICHAISAREE said that the first report by the Special Rapporteur was a strong step forward as the Commission began its work on a pressing contemporary issue.

3. To supplement the detailed overview of relevant case law provided in paragraphs 42 to 50 of the report, the Special Rapporteur might also consider looking at the award rendered in 2013, by the Permanent Court of Arbitration, in the *Indus Waters Kishenganga Arbitration (Pakistan* v. *India)*, which had concerned a dispute over the construction of a hydroelectric project by India on a river shared by India and Pakistan. The case was significant because the Court had recognized that the *Trail Smelter* arbitration had enunciated a foundational principle of customary international environmental law: that of *sic utere tuo ut alienum non laedas* (use your own property so as not to injure that of another). That finding supported the Special Rapporteur's conclusion in paragraph 51 of his report that the *sic utere* principle was generally recognized as customary international law concerning transboundary air pollution between adjacent States. The Permanent Court of Arbitration had also strongly affirmed the status of the principle of sustainable development as part of contemporary customary international law.

4. With regard to draft guideline 1 and the proposed definition of the term "atmosphere", he agreed with the Special Rapporteur on the need for a legal definition that corresponded reasonably well to the scientific definition. For the purposes of the guidelines, the Special Rapporteur had excluded the upper atmosphere, of which the mesosphere and the thermosphere formed part, from the definition of "atmosphere". He wished to caution against that exclusion for three reasons.

5. First, changes in the mesosphere might serve as the first indicators of greenhouse effects. An increase in the concentration of greenhouse gases was generally understood to result in the warming of the troposphere; however, it could also produce a cooling of the stratosphere and the mesosphere, as had been observed in recent studies on climate change, including the Antarctic Program implemented by the Government of Australia.[115]

6. Second, although figure I of the first report showed that there were low orbital satellites in the upper atmosphere, the environmental consequences of the launch and presence of low orbital satellites was beyond the present scope of the guidelines.

7. Third, the limited attention currently being paid to the upper atmosphere for the purpose of the protection of the atmosphere was likely due to a lack of scientific knowledge, as had initially been the case with the ozone layer.

8. With regard to draft guideline 2, he noted that the draft guidelines were limited in scope to those adverse effects on the environment that were "significant" enough to warrant international regulation, yet no definition of the term "significant" appeared in the first report. Since, according to the report, the atmosphere was "a fluid, single and non-partitionable unit" (para. 81), it was worth considering whether the effect of the introduction of substances and energy into the atmosphere or the alteration of its composition would be considered "significant" if it had potentially widespread or long-term consequences. Given that the cumulative effect was the most ruinous one, even minor damage might, by accumulating, lead to significant damage for which no particular State was responsible, thereby undermining the "common concern" approach to the protection of the atmosphere.

9. With regard to draft guideline 3 (*a*), he said that, in reaching the conclusion that the protection of the atmosphere was a "common concern of humankind", the Special Rapporteur had helpfully analysed various concepts that could be applied to the legal status of the atmosphere. Two aspects of his analysis raised difficult questions that merited further discussion.

10. First, he fully agreed with the Special Rapporteur that the notion of "airspace" differed significantly from that of the "atmosphere": the former was an area-based concept, whereas the latter was a functional concept. The existing regime for the protection of the marine

[115] See the information on climate change in the mesosphere on the website of the Antarctic Program of the Government of Australia: www.antarctica.gov.au/about-antarctica/environment/atmosphere/studying-the-atmosphere/hydroxyl-airglow-temperature-observations/climate-change-in-the-mesosphere.

environment was based on the allocation of jurisdiction over various maritime zones to States. It would be neither appropriate nor practical to try to import such a framework into the protection of the atmosphere by allocating the atmosphere to the jurisdiction of States. However, he wondered whether treating the protection of the atmosphere as the "common concern of humankind" would mean skirting the questions of territory or jurisdiction. Would that diminish the relevance of the *sic utere* principle, which was the main principle governing cases of transboundary air pollution? If not, then how could the concept of the "common concern of humankind" be reconciled with the *sic utere* principle?

11. Second, in paragraphs 86 to 90 of his first report, the Special Rapporteur explained his preference for the concept of "common concern of humankind" over the broader concepts of "common property" and "common heritage". While he agreed with the Special Rapporteur that placing the atmosphere under common ownership and management would be going one step too far, it might be helpful to emphasize that it was not the atmosphere but rather the protection of the atmosphere that was a common concern. The Special Rapporteur seemed to have overstated the existing position of international law with respect to the concept of "common concern" when he asserted, in paragraph 89, that "[i]t will certainly lead to the creation of substantive legal obligations on the part of all States to protect the global atmosphere as enforceable *erga omnes*". The issue of "common concern" and *erga omnes* obligations was, at best, unsettled in international law. The 1970 case concerning the *Barcelona Traction, Light and Power Company, Limited,* cited for support by the Special Rapporteur, only mentioned the concept of *erga omnes* obligations in *obiter dicta* and, in any event, was unrelated to environmental protection. The real question was whether substantive obligations to protect the atmosphere, which were potentially far-reaching, existed in hard law. If, as the Special Rapporteur had observed, it was too early to give all States a legal standing to enforce rules relating to a common concern, did that mean that those so-called *erga omnes* obligations were essentially unenforceable? Or were there certain fundamental duties in the protection of the atmosphere that could be enforced against a State?

12. The concept of "common concern" implied a need for international cooperation in the protection of the atmosphere. The duty to cooperate on matters of common concern had proved to be enforceable in the context of the protection of the marine environment. The provisional measures ordered by the International Tribunal for the Law of the Sea in the 2001 *MOX Plant Case* and the 2003 case concerning *Land Reclamation by Singapore in and around the Straits of Johor* made that clear. The Special Rapporteur might therefore wish to explore whether the duty to cooperate formed part of the concept of "common concern" or *erga omnes* obligations in the context of the protection of the atmosphere.

13. Determining the legal status of the atmosphere and the best approach for its protection posed formidable difficulties, and the Special Rapporteur's first report was an important and thoughtful contribution to that effort. He highly recommended referring the draft guidelines to the Drafting Committee.

14. Mr. PARK said that, in his first report, the Special Rapporteur clearly explained the historical evolution of the subject and contained references to useful source material.

15. Generally speaking, the tentative workplan contained in paragraph 92 of the first report did not offer sufficient information about the direction in which to go with the topic. It would be better to supply a road map comprising, for example, an introduction identifying the main problems; the basic principles that might apply to the protection of the atmosphere; the implementation of those basic principles; general provisions and other matters; and questions that should be discussed as a matter of priority.

16. Although the Special Rapporteur tried to circumscribe the scope of the topic according to the four-point "understanding" referred to in paragraph 5 of the first report, certain conflicts were likely to arise. Paragraph 68 of the report identified three core international issues concerning the atmosphere—air pollution, ozone depletion and climate change—but according to the "understanding", the work on the topic must not interfere with political negotiations on precisely those subjects.

17. Regarding the methodology, the Special Rapporteur's top priority seemed to be the protection of the atmosphere itself, but he personally thought the focus should be on regulating the activities of States or individuals that had a direct or indirect impact on the atmosphere. The purpose of the law of the air, like that of the law of the sea or outer space, should be protection through regulation of States' activities, and the rights and obligations of States should be clarified as a first step.

18. The Special Rapporteur's theoretical approach was reminiscent of the academic debate surrounding the legal status of air at the beginning of the twentieth century, when some international lawyers had insisted that the very nature of air, which flowed freely across national boundaries, made the exercise of power over it unacceptable and impossible. Not long afterwards, however, the principle of airspace sovereignty had become established, and the notions of "sovereign airspace" and "airspace over the high seas" had been applied to all activities in the air. The formula was analogous to that of the law of the sea, under which the sea was divided into several zones according to the degree of sovereignty or jurisdiction exercised over them by the coastal State. The protection of the atmosphere should therefore be approached by differentiating between the atmosphere which was subject to a State's sovereignty or control, and that which was not. That distinction would necessitate amendments to draft guidelines 1 (Use of terms) and 3 (Legal status of the atmosphere).

19. Turning to draft guideline 1, he said that, while it was necessary to adopt a working legal definition corresponding to the scientific definition of the atmosphere, he had doubts about arbitrarily confining it to the troposphere and the stratosphere, even though those were the layers where air pollution, ozone depletion and climate change preponderantly occurred. Restricting the definition of the atmosphere to the two bottom layers would considerably lower the altitude at which States could exercise sovereignty or control over the air situated above or flowing over its territory and maritime zones.

20. He also had doubts about the expression "layer of gases", which would entail a discussion of what was meant by "layer" and "gases", and he preferred the term "gaseous envelope". The three core international issues of air pollution, ozone depletion and climate change should also be defined in the draft guidelines, although care must be taken not to encroach upon the relevant political negotiations.

21. Concerning draft guideline 2, on the scope of the guidelines, he said the nature of air pollution merited further discussion. It should be clarified, in terms of law, that the place of origin or causation of pollution was different from the place where its effects were felt. Movement in the atmosphere quickly transported pollutants all over the globe, far from their original sources, and their accumulation had deleterious effects on the atmosphere. However, it was often impossible to identify clearly the causes and original sources of atmospheric degradation. The protection of the atmosphere should therefore be formulated in terms of restriction of hazardous substances, as was done in the existing relevant conventions.

22. He had difficulty with the statement in paragraph 76 of the first report that the subject matter of the draft guidelines would include the introduction of energy into the atmosphere. That raised the issue of radioactive pollution and limits on radioactive emissions, something already covered by national laws, international documents and eight protocols to the 1979 Convention on long-range transboundary air pollution, which was cited in the last footnote to paragraph 76 of the first report.

23. Draft guideline 3 (Legal status of the atmosphere) was difficult to accept. In his view, the legal status of the atmosphere situated even temporarily over a State's territory or territorial sea was quite different to that of the atmosphere over the high seas, or over the Antarctic zone. The latter could, perhaps, be deemed a "common concern of humankind", but that was not true of the atmosphere over a State's territory, which was under the control of that State. To follow the legal regime of the law of the sea, for the purposes of its legal status, the atmosphere should be divided into the atmosphere in a State's airspace and the atmosphere outside that airspace. Moreover, it was unclear how international legal standards could be established with respect to a "common concern of humankind"; it would certainly amount to progressive development of international law.

24. While there was undoubtedly a need for a legal framework covering the entire range of environmental problems connected with the atmosphere in a systematic manner, protection of the atmosphere clearly raised many difficult technical and political issues.

Organization of the work of the session (*continued*)[*]

[Agenda item 1]

25. Mr. SABOIA (Chairperson of the Drafting Committee) said that the Drafting Committee on subsequent agreements and subsequent practice in relation to the interpretation of treaties was composed of Mr. Hmoud, Mr. Kamto, Mr. Kittichaisaree, Mr. Murphy, Mr. Park, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood, Mr. Nolte (Special Rapporteur) and Mr. Tladi *ex officio*.

The meeting rose at 10.45 a.m.

[*] Resumed from the 3200th meeting.

3211th MEETING

Tuesday, 27 May 2014, at 10.05 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Protection of the atmosphere (*continued*) (A/CN.4/666, Part II, sect. I, A/CN.4/667)

[Agenda item 11]

First report of the Special Rapporteur (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the first report of the Special Rapporteur on the protection of the atmosphere (A/CN.4/667).

2. Mr. MURPHY said that the inclusion of the topic in the Commission's programme of work, far from having received strong, general support in the Sixth Committee, had met with mixed reactions. Certain States were resolutely opposed to its inclusion and many had stressed the importance of adhering to the conditions for considering the topic specified in the Commission's 2013 understanding. However, the first report of the Special Rapporteur seemed to depart from the letter and the spirit of that understanding, the crux of which was, not that the Commission should avoid interfering only in "*ongoing* treaty negotiations", but rather, that the analysis of certain questions was clearly precluded. Moreover, even though there was no express mention made of customary international law, the conditions set out in the understanding applied not only to treaty regimes but to all sources of international law.

3. Even though the project was *not* intended to "fill" the gaps in treaty regimes, in paragraphs 12, 13 and 15 of his first report, the Special Rapporteur tended to indicate that its goal was in fact to find and fill gaps in treaty regimes by identifying principles and rules of law.