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PROTECTION OF THE ATMOSPHERE

Statement of the Chairman of the Drafting Committee,

Mr. Aniruddha Rajput

2 June 2017

Mr. Chair,

I am pleased today to present the third report of the Drafting Committee for the sixty-ninth session of the Commission, this time, on the topic “Protection of the atmosphere”. The report is contained in document A/CN.4/L 894. It contains three preambular paragraphs and one draft guideline.

At the current session, the Drafting Committee devoted 4 meetings – the 12th, 13th, 14th, 17th meetings, some of them brief, – on 18, 19, 22 and 29 May 2017, for the consideration of the draft guidelines referred to it by the Commission on 17 May 2017.

Before I address the details of the draft guidelines provisionally adopted, I would like to pay tribute to the Special Rapporteur, Mr. Shinya Murase, whose mastery of the

subject, constructive spirit and cooperation greatly facilitated the work of the Drafting Committee and made my task, as Chair, considerably easier. I am also most grateful to the members of the Drafting Committee for their active participation and valuable contributions to the successful outcome. I would also wish to thank the Secretariat for its invaluable assistance. And, as always, the interpreters have continued to perform, behind the scenes, a challenging task for the Drafting Committee, and I am grateful to them.

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Mr. Chair,

At its 3359th meeting, on 17 May 2017, the Commission, upon the completion of its debate on the topic at the present session, decided to refer draft guidelines 9, 10, 11 and 12, as contained in the Special Rapporteur's fourth report (A/CN.4/705) to the Drafting Committee, taking into account the debate in the Commission. The Special Rapporteur, when summing up the debate, suggested reformulations of the proposed draft guidelines, taking into account the various comments and observations made in the plenary, in particular to streamline the draft guidelines into a single guideline.

To this end, the Drafting Committee had before it a working paper containing the proposals made by the Special Rapporteur in his summation. After an initial round of comments concerning the structure of the draft guidelines, the Special Rapporteur prepared a revised working paper, which constituted the basis of discussions in the Drafting Committee. This proposal sought to restructure the draft guidelines further, by presenting, in one paragraph, aspects of the interrelationship between the rules of international law relating to protection of the atmosphere and other relevant rules of international law, particularly the rules of international trade and investment law, of the law of the sea, and of international human rights law. It grounded the interrelationship in the Vienna Convention on the Law of Treaties, and in customary international law. The proposal contained a separate paragraph relating to the interpretation and application of relevant rules of international human rights law with respect to persons belonging to vulnerable groups. Additionally, the proposal reflected, in three separate preambular paragraphs, other elements concerning the close interaction between the atmosphere and

the oceans, the situation of small-island and low-lying States, as well as the interests of future generations of humankind in the long-term conservation of the quality of the atmosphere.

Following discussions, the Drafting Committee decided to split the first paragraph proposed by the Special Rapporteur in his revised working paper into two separate paragraphs, one dealing with existing rules and one dealing with the development of new rules. It also revised the language of the second paragraph proposed by the Special Rapporteur, which became the third paragraph of draft guideline 9.

You now have before you a report containing one draft guideline and three new preambular paragraphs. In my introduction of the report of the Drafting Committee, I will begin with draft guideline 9.

Draft guideline 9:

The draft guideline contains three paragraphs which seek to reflect the relationship between rules of international law concerning the atmosphere and other relevant rules of international law. **Paragraphs 1 and 2** are general in nature, while **paragraph 3** emphasizes the protection of groups particularly vulnerable to atmospheric pollution and atmospheric degradation. As will be recalled, the current topic deals with atmospheric pollution and atmospheric degradation caused “by humans”. Activities in other fields of the law thus have a bearing on the atmosphere and its protection. Draft guideline 9 highlights the various techniques in international law for addressing tensions between legal rules and principles, whether they relate to a matter of interpretation or a matter of conflict. In preparing the formulation the Drafting Committee drew from the Commission’s study on Fragmentation of international law: difficulties arising from the diversification and expansion of international law.

Paragraph 1 of draft guideline 9 provides that “[t]he rules of international law relating to the protection of the atmosphere and other relevant rules of international law,

including *inter alia* the rules of international trade and investment law, of the law of the sea, and of international human rights law, should, to the extent possible, be identified, interpreted and applied in order to give rise to a single set of compatible obligations, in line with the principles of harmonization and systemic integration, and with a view to avoiding conflicts.” The paragraph deals with identification of the relevant rules, as well as their interpretation and application.

The paragraph is formulated in the passive voice, in recognition of the fact that the process of identification, interpretation and application involves not only States but also international organizations, as appropriate.

The reference to “including *inter alia* the rules of international trade and investment law, of the law of the sea, and of international human rights law” reflects the concern within the Drafting Committee to capture, on the one hand, the practical importance of these three areas to the atmosphere, and, on the other, the risk of overlooking other fields of law, which might be equally relevant. The phrase “including *inter alia*” represents the agreement in the Drafting Committee that reflects this “without prejudice” categorization; and indicates that the list of relevant fields of law is not exhaustive.

The phrase “should, to the extent possible, be identified, interpreted and applied in order to give rise to a single set of compatible obligations” draws upon the Commission’s conclusions on the Fragmentation study. The paragraph applies to rules arising from treaty obligations and other sources of international law. This is indicated by the term “identified”, even though some members of the Drafting Committee doubted the need for such a specification.

The first sentence also makes specific reference to principles of “harmonization and systemic integration”, which were accorded particular attention in the conclusions of the Commission in the Fragmentation study. As noted in the conclusions, “harmonization” entails that when several norms bear on a single issue they should, to the extent possible, be interpreted so as give rise to a single set of compatible obligations. Moreover, systemic integration denotes that whatever their subject matter, treaties are a

creation of the international legal system, and should be interpreted against the background of other international rules and principles.

The phrase “and with the view to avoiding conflicts”, signals that “avoiding conflicts” is among one of the principal purposes of the paragraph. While some members had suggested to place it at the beginning, the Drafting Committee decided to retain it at the end of the sentence, as this better reflects this nuance that the guidelines has more than one purpose.

The **second sentence of paragraph 1** seeks to locate the paragraph within the relevant rules set forth in the Vienna Convention on the Law of Treaties of 1969, including articles 30 and 31(3)(c), and the principles and rules of customary international law. The phrase “principles and rules of customary international law” covers such principles and rules of customary international law as are relevant to the identification, interpretation and application of relevant rules.

In contrast to paragraph 1, **paragraph 2** deals with the situation where States wish to develop new rules. It provides that “States should, to the extent possible, when developing new rules of international law relating to the protection of the atmosphere and other relevant rules of international law, endeavour to do so in a harmonious manner.” The paragraph signals a general desire to encourage States, when engaged in negotiations for the creation of new rules, to take into account the systemic relationships that exist between rules of international law relating to the atmosphere and rules in other legal fields.

Paragraph 3 highlights the plight of those who find themselves in vulnerable situations because of atmospheric pollution and atmospheric degradation. It has been reformulated to make a direct reference to atmospheric pollution and atmospheric degradation. It provides that “when applying paragraphs 1 and 2, special consideration should be given to persons and groups particularly vulnerable to atmospheric pollution and atmospheric degradation. Such groups may include, inter alia, indigenous people, people of the least developed countries and people of small-island and low-lying States affected by sea-level rise.”

The reference to paragraphs 1 and 2 captures both the aspects of “identification, interpretation and application” on the one hand and “development” on the other. The phrase “special consideration should be given to persons and groups particularly vulnerable to atmospheric pollution and atmospheric degradation” underlines the broad scope of the consideration to be given to the situation of vulnerable groups, covering both aspects of the present topic namely “atmospheric pollution” and “atmospheric degradation”. It was considered useful to omit a reference in the text to “human rights”, or even to “rights” or “legally protected interest”. The second sentence of paragraph 3 gives examples of groups that may be found in vulnerable situations, although the phrase “may include, inter alia” indicates that these examples are not necessarily exhaustive. The commentary would further develop the examples mentioned in the sentence, as well as others, including local communities, migrants, women, children, persons with disabilities as inspired by the preamble of the Paris Agreement, and also the elderly who are often seriously affected by atmospheric pollution and atmospheric degradation.

It may be noted that some members registered their reservations not only with the various guidelines, initially proposed by the Special Rapporteur, but also with the reduction of the issues into one single guideline. It may also be noted that some members expressed their concern regarding the scope of the draft guideline, in particular the absence of reference to any purpose, for example, protecting the atmosphere or achieving sustainable development.

The title of the draft guideline is “**Interrelationship among relevant rules**” to indicate the relationship among, on the one hand, rules of international law relating to the atmosphere and the various other rules of international law, on the other hand.

Mr. Chairman,

I shall now turn to the three preambular paragraphs contained in the report.

Preambular paragraph 3bis will be placed after preambular paragraph 3 of the text of the preamble already provisionally adopted by the Commission. It acknowledges the physical relationship that exists between the atmosphere and the oceans. The Drafting

Committee did not make any changes to the text proposed by the Special Rapporteur. The relationship between the atmosphere and the oceans is cyclical and varied. To this end, the preambular paragraph simply notes as a factual matter the close interaction between the atmosphere and the oceans.

Preambular paragraph 4bis will be placed after preambular paragraph 4 of the text of the preamble already provisionally adopted by the Commission. It provides: “Also aware, in particular, of the special situation of low-lying coastal areas and small-island developing States due to sea level rise.” This preambular paragraph is linked to persons and groups in vulnerable situations referred to in paragraph 3 of draft guideline 9. The words “in particular” are intended to acknowledge specific areas without necessarily foreclosing the list of potentially affected areas. The original proposal by the Special Rapporteur had included reference to questions concerning delimitation, potential loss of Statehood and environmental migration. The Drafting Committee decided to offer a shorter and streamlined text with a reference to the phrase “due to sea level rise”. Such an approach was considered appropriate since the draft guidelines do not provide any guidance on how these three complex questions should be addressed in relation to the topic in a preambular paragraph.

The **sixth preambular paragraph** will be placed after preambular paragraph 5 of the text of the preamble already provisionally adopted by the Commission. It states: “Noting that the interests of future generations of humankind in the long-term conservation of the quality of the atmosphere should be fully taken into account.” The Drafting Committee did not make any changes to the text proposed by the Special Rapporteur. It will be recalled that the Commission has addressed considerations of intra- and inter-generational equity in draft guideline 6 on equitable and reasonable utilization of the atmosphere.

Mr. Chairman, this concludes my introduction of the third report of the Drafting Committee for the sixty-ninth session. It is my sincere hope that the Commission will be in a position to provisionally adopt the three preambular paragraphs and draft guideline 9, as presented.

I thank you for your kind attention.