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Summary record of the 3214th meeting

Topic:
<multiple topics>

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also needed further examination. With those reservations, he was in favour of referring the draft guidelines to the Drafting Committee.

30. Mr. WAKO said that the Special Rapporteur, guided by his enthusiasm for the subject, had managed in his first report to make headway along the rocky path mapped out by the 2013 understanding. The Special Rapporteur had taken due account of the concerns expressed by some States in the Sixth Committee about the technical nature of the subject matter and those of the members who deemed the Commission's scientific and technical knowledge to be inadequate, and he had proposed that the Commission should consult some experts as it had done in the past. Those consultations should be held at an early stage, otherwise it would be impossible to adopt a position on the proposed definition of the atmosphere. It would be undesirable to forgo a definition of the atmosphere that would, however, have to be scientific. Although the reasons for restricting that definition to the two lower layers of the atmosphere appeared to be justified, the exclusion of the other two layers might complicate work in other bodies, such as the United Nations Committee on the Peaceful Uses of Outer Space.

31. The member States of the Asian–African Legal Consultative Organization (AALCO) had emphasized the importance of including the topic of the protection of the atmosphere in the Commission's programme of work, since that protection was rendered all the more urgent by the fact that in many respects humanity depended on the conservation of the atmosphere's quality. The understanding from 2013 had made it possible to break the deadlock, and several States that had previously had substantial reservations about the topic had revised their position, after what they considered to be a "wise precaution" had been taken. It was to be hoped that it would no longer be necessary to have recourse to that unusual procedure in the future. The Commission would currently have to make the best of it and not interpret the understanding so restrictively that constant questioning of the Special Rapporteur's faithfulness to its terms killed off the project. The flexible interpretation proposed by the Special Rapporteur was therefore appropriate.

32. Paragraphs 13 and 92 of the first report set out a programme of work on which the Special Rapporteur could base himself in the future. While Mr. Wako personally shared the reservations expressed by a number of members concerning the approach chosen, the clarity and the wording of the draft guidelines, the Special Rapporteur would undoubtedly dispel those reservations in his subsequent reports. He was therefore in favour of referring the draft guidelines to the Drafting Committee, on the understanding that draft guideline 1 might be altered in light of the opinions of the experts who would be consulted, and that the notions of a common concern or common heritage of humankind would be subject to more in-depth consideration. He would support whatever decision was taken by the Special Rapporteur on the referral of each of the draft guidelines to the Drafting Committee.

The meeting rose at 1.05 p.m.

3214th MEETING

Tuesday, 3 June 2014, at 10 a.m.

Chairperson: Ms. Concepción ESCOBAR HERNÁNDEZ (Vice-Chairperson)

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, 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. Wako, Mr. Wisnumurti.

Expression of sympathy in connection with the disappearance of Malaysia Airlines flight MH370

1. Mr. HUANG said that the loss of Malaysia Airlines flight MH370 had been an incident of virtually unprecedented gravity: 330 passengers and crew members, citizens of 13 different countries, had been on board. The Governments of China and Malaysia reiterated their will to continue the search for the aircraft and to investigate the causes for its loss. They acknowledged their responsibility to all the passengers and flight attendants and to the international community as a whole.

2. The CHAIRPERSON requested Mr. Huang, in his capacity as Chinese Ambassador to Malaysia, to convey the Commission's condolences to the Chinese authorities, the Chinese people and, in particular, to the families of the passengers and crew of the aircraft. She hoped that the investigations would soon shed light on the fate of Malaysia Airlines flight MH370.

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

[Agenda item 11]

First report of the Special Rapporteur (*concluded*)

3. Mr. HUANG said that the three draft guidelines proposed in the Special Rapporteur's first report (A/CN.4/667) touched on some fundamental issues, including the definition and legal status of the atmosphere. However, those matters required more thorough study before any guidelines could be properly formulated. Depletion of the ozone layer, long-range air pollution and protection of the atmosphere were all processes that were still imperfectly understood. He hoped that the Special Rapporteur would conduct more in-depth research and that his second report would address the concerns expressed during the current debate. For those reasons, he believed it was too early to establish a Drafting Committee to discuss the draft guidelines.

4. Mr. MURASE (Special Rapporteur), summing up the debate, said that the detailed comments made by 24 speakers—nearly the entire membership of the Commission—attested to the importance of the topic. Two

members had drawn attention to the dire consequences of atmospheric pollution, and all had acknowledged the urgent need to deal with the protection of the atmosphere. Despite the generalized interest in the project and the high expectations that surrounded it, the Commission's role, as a juridical body, must be a limited one, as one speaker had pointed out. However, he himself believed that as long as the Commission handled the issue with restraint and sensitivity, its concern over the pressing problem of atmospheric degradation would resonate worldwide.

5. Three members considered that his approach strayed from the understanding reached at the Commission's sixty-fifth session, which they read as prohibiting him from mentioning topics that formed the subject of certain political negotiations. Few other members interpreted the understanding so stringently, however, and while some had expressed concerns, they were much less far-reaching. He personally did not see how a discussion in the Commission on air pollution, ozone depletion and climate change could interfere with the political negotiations thereon. Paragraphs 25, 26 and 68 of his first report were intended as background information and not as substantive opinions on those three issues, let alone as interference with current political negotiations. Three members of the Commission had been highly critical of the understanding, and six had taken the view that it should be regarded as a guide and not a straitjacket. In view of those divided opinions, a middle-of-the-road approach would seem to be advisable. The understanding should not be discarded, but a flexible interpretation of its terms should be used, allowing him to mention the three issues but not to deal with them specifically in the draft guidelines.

6. Some members had contended that his first report did not provide sufficient information on where the Commission should be going with the topic, and they had requested a more detailed road map. Paragraph 92 of his first report did supply a complete workplan for the remaining two years of the current quinquennium and suggested that international cooperation, compliance, dispute settlement and interrelationships might be areas of work in the period 2017–2021. There was a consensus within the Commission on the fact that international cooperation was a key element of atmospheric protection. In his second report, he intended to identify States' substantive responsibilities for protecting the atmosphere, possibly including the performance of environmental impact assessments. With regard to compliance, the emphasis would be on a promotional and facilitative approach, rather than on establishing enforcement measures for non-compliance. Questions of evidentiary proof and the standard of review would be discussed in relation to dispute settlement mechanisms. Lastly, the interrelationships between the protection of the atmosphere and other relevant areas of international law, including the law of the sea, biodiversity, international trade law and human rights law, might be studied.

7. Turning to draft guideline 1, he explained that it contained a working definition of the atmosphere solely for the purposes of the Commission's project. Some members had questioned the desirability of a definition at all, pointing out that numerous instruments related to atmospheric protection did not actually define the atmosphere. However, any attempt to articulate guidelines could only benefit from a clear understanding of what the guidelines sought to protect. He agreed that, in framing a definition of the atmosphere, it might be advisable for the Committee to consult scientific experts. He therefore intended to explore the possibility of organizing a workshop or seminar at the following session.

8. Several members had wondered whether to include the upper atmosphere in the definition contained in draft guideline 1. The distinction between the upper and lower atmosphere was anything but arbitrary, since the upper atmosphere comprised only an insignificant portion of the atmosphere's total mass. Furthermore, there was no meaningful evidence that climate change contributed to, or was responsible for, alterations in the condition of the mesosphere or thermosphere, which made up the upper atmosphere. The Antarctic Program of the Government of Australia,[144] which Mr. Kittichaisaree had mentioned, had ascribed changes in the mesosphere to solar flux and not to climate change within the meaning of article 1, paragraph 2, of the United Nations Framework Convention on Climate Change. Since an understanding of changes in the upper atmosphere was limited by a lack of scientific data, any attempt to formulate a protective regime for that part of the atmosphere would be overly ambitious, and it would be inappropriate for the Commission to address such a highly technical and poorly understood issue. The environmental harm caused by satellites in the upper atmosphere was also a different question requiring separate treatment. The environmental protection of outer space was not part of the topic and had already been discussed by the United Nations Committee on the Peaceful Uses of Outer Space.

9. Mr. Murphy's reasoning that the exclusion of the upper atmosphere from the definition in draft guideline 1 implied that outer space began approximately 50 km above the Earth's surface, at the edge of the mesosphere, rested on the erroneous premise that the notions of the atmosphere and airspace were inseparably linked, whereas they were two entirely different concepts in international law. Defining the limits of the atmosphere had no implications for the borders of national airspace or of outer space, and the exclusion of the mesosphere and thermosphere from the definition therefore had no bearing on the delimitation of the perimeters of outer space. He also believed, unlike one speaker, that a definition of the atmosphere could be developed without strictly identifying its upper limit; if the atmosphere was understood to be the envelope of gases surrounding the Earth, then its definition should be limited to the lower atmosphere where those gases were present. He was, however, willing to defer to the Commission's judgment and to remove the reference to the troposphere and stratosphere from the definition in draft guideline 1, provided that the commentary clarified the atmosphere's relationship with outer space.

10. Turning to draft guideline 2 and to the concerns of three speakers regarding the scope of the project, he said it was limited to protection against transboundary pollution and pollution with a global impact. It did not include protection against domestic pollution or harm at the local level.

[144] See the website of the Antarctic Program of the Government of Australia: www.antarctica.gov.au.

11. As to the term "deleterious substances" in draft guideline 2 (*a*), criticised by some members as being too broad, he observed that the subsequent qualifying phrase, "that have or are likely to have significant adverse effects", aptly narrowed its scope. With regard to comments regarding the need to articulate more clearly the sense in which the word "significant" was used in that phrase, he pointed out that the Commission had used the word previously without providing a definition, for instance, in the draft articles on prevention of transboundary harm from hazardous activities.[145] He drew attention to the discussion of the term "significant" in paragraphs (4) and (7) of the commentary to draft article 2 of the 2001 text.[146]

12. It had been suggested that the term "energy" in draft guideline 2 (*a*) be removed or restricted so as to exclude radioactive and nuclear emissions. However, he considered that its retention was important. Its use in the context of pollution was not unprecedented in international law: for example, it appeared in the United Nations Convention on the Law of the Sea and in the Convention on long-range transboundary air pollution. Furthermore, the Fukushima nuclear disaster was a powerful reminder of the potential dangers of nuclear and radioactive pollution.

13. Responding to the argument that the inclusion of substantive concepts such as "deleterious substances" or "significant adverse effects" in a draft guideline describing a project's scope was inappropriate, he said that such a practice was consistent with the Commission's previous work. A similar approach had been adopted in the draft articles on prevention of transboundary harm, in which substantive concepts such as "risk", "harm" and "significant harm" had been incorporated into the article on scope.[147]

14. With regard to draft guideline 3, he noted that many members had voiced concerns about framing the protection of the atmosphere as a "common concern of humankind". However, as Mr. Kittichaisaree had pointed out, the term's narrow application in the draft guideline made clear that it was not the atmosphere, but rather the protection of the atmosphere, that was a common concern. The project sought to establish a cooperative framework for atmospheric protection, not common ownership or management of the atmosphere. That narrow application of the term was in line with existing applications of the concept in international environmental law. It reflected the understanding that it was not a particular resource, but rather threats to that resource, that were of common concern, since States both contributed to the problem and shared in its effects. Mr. Murphy had argued that draft guideline 3 would apply to the kind of bilateral problem of transboundary air pollution exemplified by the *Trail Smelter* arbitration. However, the concept of the "common concern of humankind" would apply to such pollution only insofar as it was a global phenomenon; it would not cover transboundary air pollution affecting specific individual States.

15. Several members of the Commission had pointed out that the legal implications of the "common concern" concept were unclear, that the concept was unsettled and that the report had overstated the link between that concept and *erga omnes* obligations. While it was true that *erga omnes* obligations had been mentioned in the *Barcelona Traction* case only in *obiter dicta*, it was his understanding that Judge Lachs, thought to have been the author of that language, had been unable to fulfil his intention of developing the concept in future judgments. In his next report, the Special Rapporteur would explore the link between "common concern" and *erga omnes* obligations when discussing the general obligation to protect the atmosphere. The report would also consider *actio popularis*, which was related to the enforcement of *erga omnes* obligations arising out of the common concern for protection of the atmosphere.

16. Objections had been raised about a lack of clarity in the substantive content of any *erga omnes* obligations arising from the concept of "common concern of humankind". It had been argued that the concept had no specific normative content and that framing the protection of the atmosphere in terms of that concept was to put the cart before the horse, to propose a legal classification before defining the actual legal obligations of States. Such reasoning assumed that law-making could and should only occur through a bottom-up approach, applying legal principles that were already well defined and understood. However, any law-making exercise required the use of both inductive and deductive approaches. A better metaphor might therefore be the relationship of children to their parents: the notion of "common concern of humankind" might still be in its infancy, but it was the responsibility of the older generation to encourage its development for the future. It could and should be the Commission's task to explore the legal obligations of the notion and to articulate them as part of the draft guidelines.

17. Although the substantive legal obligations attaching to the concept of common concern were still being developed, that did not mean that the term was devoid of normative content entirely. Two speakers had indicated that the concept implied that States had a duty to cooperate to ensure protection of the atmosphere for future generations. The duty to cooperate would be discussed at length in future reports.

18. Now that the principle of *sic utere tuo ut alienum non laedas* had been recognized in the preamble to the United Nations Framework Convention on Climate Change and in article 2, paragraph 2 (*b*), of the Vienna Convention for the Protection of the Ozone Layer, it was no longer limited to the context of bilateral transboundary harm. It applied to international environmental law in general and could therefore be transposed to the sphere of atmospheric protection.

19. In questioning the substantive content of the notion of common concern, Mr. Murphy had mentioned three possible interpretations of that concept, articulated by Alan E. Boyle in the work referenced in the footnote to paragraph 12 of the first report.[148] His own understanding of

[145] See the draft articles on prevention of transboundary harm from hazardous activities adopted by the Commission at its fifty-third session and the commentaries thereto in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 146 *et seq.*, paras. 97–98. The articles on prevention of transboundary harm from hazardous activities are reproduced in the annex to General Assembly resolution 62/68 of 6 December 2007.

[146] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 152–153.

[147] *Ibid.*, p. 149 (draft article 1).

[148] P. Birnie, A. Boyle and C. Redgwell, *International Law and the Environment*, 3rd ed., Oxford University Press, 2009, pp. 335–378.

"common concern" was that it created substantive obligations of environmental protection, in addition to those already recognized by customary international law. He rejected the alternative interpretations whereby the "common concern" concept gave all States a legal interest, or standing, in the enforcement of rules concerning protection of the global atmosphere or created rights for individuals and future generations. Contrary to Mr. Murphy's fears, his intention in employing the concept was not to create a legal duty for industrialized States to provide financial assistance to developing nations, or to create a liability mechanism in environmental law, but rather to provide a framework for international cooperation towards atmospheric protection.

20. Mr. Park's criticism of the use of the concept in draft guideline 3 reflected a view of the atmosphere as being divided into one part that was subject to a State's sovereignty or control and another that was not. That view was problematic, however. It was based on an approach to the protection of the marine environment, enshrined in the United Nations Convention on the Law of the Sea, that was ill adapted to the current topic, as two speakers had observed. It would be impractical, if not impossible, for a State to exercise jurisdiction and control over a portion of the air that happened to be in its territorial airspace at a particular moment but later moved to another State's airspace. The concept of jurisdiction and control was premised on an assumption that the object of control was clearly identifiable. However, the atmosphere, unlike the sea, could not be visibly divided or delineated; it was for that reason that the first report treated it as a comprehensive single unit, not subject to division along State lines.

21. He endorsed Mr. Candioti's suggestion that the title of draft guideline 3 be changed to "Protection of the atmosphere as a common concern of humankind" and that the concept of common concern form the basis of both a stand-alone guideline and a guideline articulating the basic principles relevant to atmospheric protection. In addition, he intended to move the savings clause on airspace from draft guideline 2 to draft guideline 3.

22. Two speakers considered that the concept of "common heritage of humankind" was preferable to "common concern", since the latter notion might be too weak to provide an effective legal regime for the protection of the atmosphere. However, while the instruments adopted in 1954 and 1967 on celestial bodies and cultural property used the language of common heritage, the notion had acquired a new meaning over time: it was now understood as requiring a far-reaching institutional apparatus for the implementation of protective mechanisms. It was in part for that reason that the General Assembly had designated climate change as a "common concern of [hu]mankind",[149] instead of its common heritage. However, he would have no objection if the Commission chose to use the concept of "common heritage" in relation to atmospheric pollution.

23. In sum, 10 members had expressed support for sending all three draft guidelines to the Drafting Committee, while 4 members had been in favour of sending some and deferring consideration of others until the next session. Two members had indicated that they would not oppose sending the draft guidelines to the Drafting Committee, although they would prefer to postpone doing so until the next session. Four members had opposed referral to the Drafting Committee, preferring to leave the draft guidelines in abeyance until the next session. Three members had not expressed their views on referral. Thus, the majority of the members had supported continuing the discussion of at least some of the draft guidelines in the Drafting Committee. Nonetheless, he would like to reformulate some parts of the draft guidelines, in light of the comments, suggestions and criticisms raised, before referring them to the Drafting Committee.

24. In response to a question by Mr. NOLTE, he said that the revised draft guidelines would appear in his second report and that their referral to the Drafting Committee could be decided by the plenary following the debate on the topic.

25. The CHAIRPERSON said that she took it that the Commission wished to follow the recommendation of the Special Rapporteur and defer the referral of the draft guidelines to the Drafting Committee until the following year.

It was so decided.

The meeting rose at 11.15 a.m.

3215th MEETING

Thursday, 5 June 2014, at 10.05 a.m.

Chairperson: Ms. Concepción ESCOBAR HERNÁNDEZ (Vice-Chairperson)

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

Subsequent agreements and subsequent practice in relation to the interpretation of treaties (*concluded*)* (A/CN.4/666, Part II, sect. A, A/CN.4/671, A/CN.4/L.833)

[Agenda item 6]

REPORT OF THE DRAFTING COMMITTEE

1. Mr. SABOIA (Chairperson of the Drafting Committee) presented the text and titles of draft conclusions 6 to 10, which had been provisionally adopted by the Drafting

[149] General Assembly resolution 43/53 on protection of global climate for present and future generations of mankind of 6 December 1988, para. 1.

* Resumed from the 3209th meeting.