Provisional

For participants only

23 July 2018
Original: English

International Law Commission

Seventieth session (first part)

Provisional summary record of the 3413th meeting
Held at Headquarters, New York, on Tuesday, 29 May 2018, at 10 a.m.

Contents

Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Huang
	Mr. Jalloh
	Ms. Lehto
	Mr. Murase
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.05 a.m.

Protection of the atmosphere (agenda item 8) (*continued*) (A/CN.4/711)

The Chair invited the Special Rapporteur to sum up the debate on his fifth report on the protection of the atmosphere (A/CN.4/711).

Mr. Murase (Special Rapporteur), expressing his deep appreciation to those Commission members who had taken part in the debate for the dedication they had shown in preparing their thoughtful statements, and for their many helpful comments, suggestions and constructive criticism, said that he would begin by touching on a few general issues, before responding to comments on specific draft guidelines. Ms. Oral had criticized his report for its imbalance. Conscious of the length of the report, he had chosen to be selective, focusing on controversial issues such as extraterritorial jurisdiction and the rules on evidence, at the expense of some other issues that had been explained in detail in his articles and books. That was also why he had referred in the report to his own previous works.

With regard to the 2013 understanding, in respect of which several members of the Commission had expressed a range of opinions, he could only reiterate that he had complied with it and remained faithful to it. The 2013 understanding had not been imposed by the Sixth Committee, which had approved the topic in 2011 without any conditions. Several members of the Commission had expressed sympathy with him for having to work under the restrictions imposed by the understanding. Mr. Tladi had suggested that the Commission could be asked to reconsider the understanding, so that the Special Rapporteur could propose draft guidelines on issues whose consideration was prohibited thereunder. If the Commission had followed the syllabus originally submitted to the Sixth Committee in 2011, its work on the topic would have been much more meaningful. However, as the Commission had worked on the basis of the understanding for the last five years, it was obviously too late to revisit it. Regardless of the constraints imposed on him, he would not have agreed to address the topic unless he had been sure that he could do so successfully and comprehensively. His conviction in that regard had not changed, and he thanked the members of the Commission for their continued support. That said, restrictions had never before been placed on a Special Rapporteur in the form of an understanding in the long history of the Commission, and there should be no repeat of the situation. As stated by a former member of the Commission, the understanding was "disgraceful", not to mention "humiliating" for the Special Rapporteur.

He would proceed to summarize the debate on each draft guideline proposed. As in the past, he had prepared his revised proposals for the draft guidelines on the basis of members' comments made in the plenary.

With regard to draft guideline 10, paragraph 1, he said that the Commission was working on a set of non-binding draft guidelines and, on that basis, had ascertained as a matter of factual description that there were certain obligations of States under international law to protect the atmosphere. If such obligations existed, it was a logical and intrinsic consequence that they were required to be implemented in good faith. Taking into account members' comments, he proposed that the phrase in the first sentence of the draft guideline, "the obligations affirmed by the present draft guidelines", should be replaced with "the obligations under international law which are affirmed by the present draft guidelines". The change was intended to avoid creating the impression that the draft guidelines prescribed new mandatory obligations, which had been a concern of several members. With regard to the second sentence, he accepted Mr. Jalloh's suggestion to replace the word "administrative" with "executive", and to include the words "and other" before "actions", and he agreed with Mr. Šturma to insert the word "may". The new text would therefore read:

> States are required to implement in their national law, the obligations under international law which are affirmed by the present draft guidelines, relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation. National implementation may take the form of legislative, executive, judicial and other actions.

Turning to draft guideline 10, paragraph 2, he said that the issue of State responsibility should be taken on squarely, as some States had stressed in the Sixth Committee; therefore, he believed that the paragraph should not be formulated as a "without prejudice" clause. As confirmed in the commentary to the articles on responsibility of States for internationally wrongful acts, the element of "damage" had not been incorporated into the secondary rules of State responsibility under those articles, but had been considered as a matter determined by the primary rules. The Commission had also separated "responsibility for risk" from the main study of State responsibility owing to the different nature of the rules governing it. However, the Commission had acknowledged the existence of *lex specialis* in article 55 of the articles on State responsibility, according to which the articles did not apply where the international responsibility of States was governed by special rules of international law.

The draft guidelines dealt with the primary rules concerning the protection of the atmosphere, in which the obligation to "prevent, reduce or control atmospheric pollution and atmospheric degradation" was of the essence, as affirmed in draft guideline 3. In his amended proposal, he had tried to clarify the relationship between the general secondary rules regarding how State responsibility was entailed in accordance with the articles on State responsibility, and the special primary rules of international law relating to the protection of the atmosphere. The proposal did not establish "damage or risk" as a requirement but rather as an element to be taken into account by an injured State in invoking the international responsibility of States, as it was necessary to establish standing and a claim for reparation.

The terms "damage" and "risk" and the expression "clear and convincing evidence" had been explained in detail in his previous reports, in particular in the context of the 1941 *Trail Smelter* arbitration, so he had not felt it necessary to reiterate those explanations in his fifth report. The concept of "risk" in the current context came within the scope of the traditional preventive principle, not the precautionary principle or the liability principle.

Nevertheless, some members had been troubled by the terms "damage" and "risk". It might be preferable to use the term "harm" to capture the sense of both "damage", which occurred in the present, and "risk", which might occur in the future. In any event, for an injured State to invoke the international responsibility of another State, it was necessary to confirm the existence of harm, in accordance with article 42 of the articles on State responsibility. He agreed with the members who had pointed out that a reference to those articles was needed in the draft guideline. Furthermore, as suggested by Mr. Reinisch, the term "observe" might be more appropriate than "implement". The revised draft guideline 10, paragraph 2, would thus read:

> Failure to observe the obligations amounting to breach thereof entails the international responsibility of States in accordance with the articles on responsibility of States for internationally wrongful acts. In invoking the responsibility of another State as an injured State, it is necessary that the alleged harm be proven by clear and convincing evidence.

There would be no major amendments to draft guideline 10, paragraph 3. Mr. Reinisch had suggested replacing the word "implement" with "observe"; Mr. Grossman Guiloff had suggested replacing it with "consider", which Mr. Jalloh had supported; and the word "also" should be removed. The new text would thus read:

> States should consider in good faith the recommendations contained in the present draft guidelines.

Mr. Grossman Guiloff had also proposed the inclusion of a new sentence or paragraph, which would state: "States should give serious consideration to the agreed recommendations contained in the present draft guidelines, with special consideration to persons and groups particularly vulnerable to atmospheric pollution and atmospheric degradation". He was not certain that such an addition was necessary in view of the similar statement contained in draft guideline 9, paragraph 3, although draft guideline 9 addressed only the interpretation and application of the relevant rules. However, he would not oppose the inclusion of Mr. Grossman Guiloff's proposal if the Drafting Committee considered it necessary.

With regard to draft guideline 10, paragraph 4, on the extraterritorial application of national law, he said that the advisory opinion of the Inter-American Court of Human Rights of 15 November 2017, referred to by Ms. Oral, was totally irrelevant: the case had not related to the extraterritorial application of domestic law, but to the extra-jurisdictional application of a human rights convention. He had addressed that topic in 2017, in his fourth report, where he had proposed to employ the expression "extra-jurisdictional" application in relation to human rights treaties in order to clearly differentiate such application from the "extraterritorial" application of domestic law.

As he had mentioned in his oral introduction, one of the reasons he had referred to the legislation of Singapore was that Singapore had provided substantive information. Only a few States had responded to the Commission's request, and the information received had been very limited in content; he had therefore considered it important to show the Commission's appreciation to Singapore by referring to its legislation in his fifth report. His discussion with Singaporean officials had been very useful, but, of course, they had not written any part of his report. He had simply wanted to ensure that the report did not contain any errors, and believed that his interaction with the Government of Singapore was a model case of cooperation with Member States with regard to the supply of information.

With regard to Mr. Peter's observation that the question of the extraterritorial application of domestic law was a "land mine", it should be pointed out that, while such extraterritorial application might have been a tool of powerful States 80 years earlier, at the time of the *United States v. Aluminum Co. of America* case, many States, large or small, now exercised the extraterritorial

application of their domestic laws for one reason or another. Singapore was a small country, but it had had to resort to the extraterritorial application of its domestic law in order to protect its citizens from serious haze pollution. While such unilateral measures were not desirable, States felt bound to resort to applying their domestic law extraterritorially in order to complement the efforts of other States in combating air pollution, in cases where there were no treaties between the States concerned or the treaties were not effective. In addition to the three cases mentioned in his fifth report, many other disputes relating to atmospheric pollution had involved, at least potentially, the extraterritorial application of domestic law. For example, as discussed in his first report, the *Trail Smelter* arbitration of 1938 and 1941 had been predominantly concerned with the applicability of United States law and jurisprudence — in particular the 1907 Supreme Court case concerning *State of Georgia, Complainant, v. Tennessee Copper Company and the Ducktown Sulphur, Copper and Iron Company, Limited* — to the activities of the Trail Smelter in Canada. The controversies over requirements for processes and production methods often involved questions of extraterritoriality; one such example was the dispute between Austria and Malaysia over the impact of national legislation introduced by Austria in the 1990s requiring the eco-labelling of imported tropical timber.

International law permitted, or at least did not prohibit, the assertion of extraterritorial jurisdiction in certain circumstances where there were well-founded grounds, such as when the objective territoriality principle applied. He thought that there was value in retaining draft guideline 10, paragraph 4, in a positive form, rather than formulating it as a "without prejudice" clause as suggested by Mr. Cissé. He would revise his proposal in line with the suggestion made by Mr. Reinisch.

In the first sentence, the word "permissible" had caught some members' attention; it had therefore been replaced with "not prohibited", in keeping with the traditional discourse regarding the extraterritorial application of domestic law. In the second sentence, the terms "care" and "comity" had been used because they were the terms employed in the case law of the relevant domestic courts, but Mr. Reinisch's formulation was better. In the third sentence, he believed it important to indicate that "enforcement" was prohibited unless there was prior consent to it by the affected State, the point that Mr. Aurescu had made in connection with "application". However, extraterritorial application, by definition, did not necessarily require prior consent. Mr. Aurescu's point was more pertinent in the context of extraterritorial enforcement, which was generally prohibited. He thought it proper to replace the words "in any circumstances" with "generally" and to insert the phrase "unless there is prior consent to it by the State concerned" in the last sentence. The revised draft guideline 10, paragraph 4, would thus read:

> The extraterritorial application of national law by a State is not prohibited when there is a well-founded grounding in international law. Even where permissible, it should be applied with care, taking into account the interests of the States concerned. The extraterritorial enforcement of national law by a State should not generally be exercised unless there is prior consent to it by the State concerned.

Turning to draft guideline 11 (Compliance), he said that the Manual on Compliance with and Enforcement of Multilateral Environmental Agreements prepared by the United Nations Environment Programme (UNEP), to which Ms. Oral had referred, was intended largely for government officials and the general public; the document was not a scientific paper. For instance, the definition of "compliance" therein, which Ms. Oral seemed to be recommending for the Commission's project, was simply the "fulfilment … of obligations under a multilateral environmental agreement", which was not at all useful in the context of the Commission's much deeper analysis of compliance mechanisms.

He was surprised that Ms. Oral had questioned his interpretation of Martti Koskenniemi's 1993 article; he had worked with the author for some five years in the late 1990s at the Administrative Tribunal of the Asian Development Bank, and they had discussed the article at length because he himself had been dealing with the issue of non-compliance in his lectures at The Hague Academy of International Law and the Institute of International Public Law and International Relations of Thessaloniki. He had also worked with Catherine Redgwell and Malgosia Fitzmaurice, and was confident in his interpretation of their theories. They had focused on an alternative method of securing States' compliance than that afforded by efforts to establish State responsibility; it was thus irrelevant whether their articles had been written before or after the Commission's adoption of its articles on State responsibility in 2001.

Ms. Oral had referred to the 2012 Doha Amendment to the Kyoto Protocol, establishing a second commitment period from 2013 to 2020. However, since there was no chance that the Protocol would be amended following the 2015 adoption of the Paris Agreement, there was no point in considering the Doha Amendment.

With regard to draft guideline 11, paragraph 1, the word "effectively" should be removed, as a number of members had suggested. Some members, including Mr. Ruda Santolaria, Mr. Reinisch and Ms. Galvão Teles, had rightly stated that the "relevant multilateral environmental agreements" were the ones to which States were parties. Based on the drafting suggestions made by Mr. Reinisch, Mr. Ruda Santolaria and Mr. Aurescu, the revised draft guideline 11, paragraph 1, would read:

> States are required to comply with the international law norms relating to the protection of the atmosphere in accordance with the rules of the relevant environmental agreements to which the States are parties.

He did not agree with those members who had suggested that paragraphs 2 to 4 of draft guideline 11 should be moved to the commentary. As the non-compliance mechanism was the most important feature in agreements related to the protection of the atmosphere, those paragraphs should remain part of the draft guidelines.

He approved of Mr. Šturma's suggestion to add "in accordance with the relevant environmental agreements" after "as appropriate". In addition, the word "adopted" should perhaps be replaced with "used", because the non-compliance procedures would already have been adopted under the relevant environmental agreements. Thus, draft guideline 11, paragraph 2, as amended, would read:

> For non-compliance, facilitative and/or enforcement approaches may be used, as appropriate, in accordance with the relevant environmental agreements.

He believed that paragraphs 3 and 4 of draft guideline 11 should become subparagraphs (a) and (b) of paragraph 2 thereof. Although they were descriptive of facilitative and enforcement measures, they did have certain normative content, which merited their inclusion in the draft guidelines. His proposal did not involve any changes, except that the last sentence of subparagraph (b) could be deleted, and explained in the commentary, as suggested by Ms. Escobar Hernández. Subparagraphs (a) and (b) would thus read:

> (a) Facilitative measures include providing assistance to non-complying States in a transparent, non-adversarial and non-punitive manner to ensure that those States comply with their international obligations by taking into account their capabilities and special conditions.
>
> (b) Enforcement approaches include issuing a caution of non-compliance, termination of rights and privileges under the relevant multilateral environmental agreements and other forms of sanctions.

With regard to draft guideline 12, paragraph 1, Ms. Oral had pointed out the potential risk that the broad scope of the paragraph might encroach on the domain of other regimes, while Mr. Murphy and Mr. Grossman Guiloff had indicated that the inclusion of a reference to Article 33 of the Charter of the United Nations could imply that disputes concerning atmospheric pollution and atmospheric degradation endangered international peace and security. He had referenced Article 33 (1) of the Charter simply to illustrate some appropriate methods for the peaceful settlement of disputes, not to make a grand statement about the endangerment of peace and security in that context. In practice, modern multilateral treaties tended to contain specific clauses to provide parties with a range of options for settling disputes. Although there was considerable diversity among treaty regimes, the traditional methods listed in Article 33 of the Charter had to a great extent been incorporated into such clauses.

In relation to that point, Mr. Jalloh had rightly pointed out that principle 26 of the Rio Declaration on Environment and Development stated that "States shall resolve all their environmental disputes peacefully and by appropriate means in accordance with the Charter of the United Nations". Meanwhile, to address the aforementioned concerns of some members, he agreed that the sentence should refer to the Charter as a whole, thereby including the principle contained in Article 2 (3) thereof, as Mr. Grossman Guiloff had suggested. As he had mentioned in his introductory statement, and as many other members had proposed, the phrase "or other peaceful means of their own choice" should be added at the end of the paragraph. He also agreed with Mr. Aurescu's proposal to include "good offices". Mr. Nguyen had stressed the importance of dispute avoidance. However, as that question was already referred to in draft guideline 9, paragraph 1, provisionally adopted the previous year, in the phrase "… with a view to avoiding conflicts" at the end of the first sentence, perhaps a further reference was unnecessary. Thus, the amended version of draft guideline 12, paragraph 1, would read:

> Disputes relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation are to be settled by peaceful means in accordance with the Charter of the United Nations, through negotiation, enquiry, good offices, mediation, conciliation, arbitration, judicial

settlement, or resorting to regional agencies or arrangements, or other peaceful means of their own choice.

While some members had proposed that draft guideline 12, paragraph 2, should be moved to the commentary, there had been broad support for retaining it as a draft guideline, with necessary changes. He believed that that paragraph, which highlighted the critical importance of scientific evidence in the settlement of disputes relating to the protection of the atmosphere, was one of the core provisions of the topic.

Some members, including Mr. Petrič, had expressed concern that, in paragraph 2, the Commission was telling courts what to do; however, in his own view, the use of "should" with "due consideration" already alleviated that concern. Mr. Nguyen had made an important point, suggesting the deletion of the phrase "if such disputes are to be settled by arbitration or judicial procedures". Although most of the situations involving scientific experts were arbitration or judicial settlements, it was true that conciliation, as well as fact-finding commissions and other non-arbitral and non-judicial organs, now also played an important role. He therefore proposed using the broader phrase "in the process of dispute settlement". Taking the point made by Mr. Aurescu, he had inserted the word "technical" before "experts".

Mr. Peter, supported by Mr. Jalloh, had said that rules and procedures should clearly stipulate that the tribunal, arbitrator or other facilitator should invite experts or scientists, choosing them from a pool identified by the parties, but that the parties themselves should never be directly involved in inviting the experts. Although he agreed with that point, it was, of course, up to the court or tribunal to choose its own experts. What Mr. Peter was implying, as he understood it, was the importance of the last part of the sentence, namely, that court-appointed experts should be independent and impartial. He had therefore formulated an additional phrase to stress that fact. To simplify the sentence, he had replaced the phrase "to which the dispute is submitted" with "relevant", since it was obvious which courts or tribunals were meant. The text of draft guideline 12, paragraph 2, as amended, would thus read:

> Given that such disputes may be of a fact-intensive and science-dependent character, due consideration should be given to the rules and procedures concerning, inter alia, the use of technical experts in order to ensure proper assessment of scientific evidence in the process of dispute settlement. Such experts may be appointed by each party and cross-examined by the other party. Experts may be appointed by the relevant court or tribunal to conduct assessment of scientific evidence in an independent and impartial manner.

Draft guideline 12, paragraph 3, addressed the important procedural issues relating to the treatment of evidence before the court, including the role of *jura novit curia* and its relation to fact-finding. He would follow the suggestion made by many members that those matters should be dealt with in the commentary.

Lastly, Ms. Galvão Teles had asked about the preamble. The preamble was normally prepared at the second reading. However, some of the proposed draft guidelines under the current topic had been moved to the preamble; in fact, all the preambular paragraphs provisionally adopted thus far had originally been proposed as draft guidelines. Other preambular paragraphs would be added on second reading.

The fourth preambular paragraph referred to "pressing concern of the international community as a whole", because his original proposal of "common concern of humankind" had been rejected at the Commission's sixty-seventh session in 2015 based on the assertion of a few members that the international community had abandoned the concept more than 20 years previously. However, the term "common concern" had been used in the Paris Agreement, adopted in 2015, so, in 2016, he had proposed to change "pressing concern" back to "common concern". He had been told that such a proposal should be presented at the second reading; therefore, he would again make the proposal in 2020.

Most members had supported sending all of the draft guidelines to the Drafting Committee, bearing in mind the comments made by the members in the plenary. He looked forward to the discussion in the Drafting Committee.

Ms. Oral, thanking the Special Rapporteur for his very thoughtful and detailed response to members' comments, said she wished to clarify that her point regarding to the UNEP manual had merely been that it was the product of a very rigorous process and constituted one of the most extensive reviews of existing multilateral environmental agreements and their compliance mechanisms; she had therefore wondered why the Special Rapporteur had not included it in his citations.

As for her comment regarding the Kyoto Protocol, the Doha Amendment and the Paris Agreement, she had simply wanted to point out that the Paris Agreement had not replaced the Kyoto Protocol; rather, the Protocol had been amended by the Doha Amendment, while the Paris Agreement was a separate agreement.

With regard to the upcoming second reading in 2020, she supported the Special Rapporteur's wish to return to the language of "common concern", which was a proper reflection of international law.

The Chair said that it was not usual to intervene after the Special Rapporteur had summed up the debate to clarify comments that had been made in the plenary. He had not opposed it on the current occasion because he considered that it was in the general interest; however, he hoped that the practice would not be repeated by all members of the Commission.

Mr. Huang said that he welcomed the Special Rapporteur's willingness, as indicated during his concluding remarks, to revise draft guidelines 10 to 12, and was ready to study the redrafted texts. However, it appeared that the proposed technical revisions had not fundamentally resolved members' concerns. During the debate on the topic, the overwhelming majority of Commission members had questioned the appropriateness of the three new draft guidelines proposed by the Special Rapporteur. In particular, with regard to draft guideline 10 (Implementation), there had been concerns about new mandatory obligations imposed on States, responsibility of States and extraterritorial application of national law. In relation to draft guideline 11 (Compliance), concerns had been raised about enforcement approaches. In relation to draft guideline 12 (Dispute settlement), concerns had focused on the use of experts and the application of the principle of *jura novit curia* to facts. Most members believed that the new draft guidelines should be deleted; even most of the colleagues who had supported referring them to the Drafting Committee had seen the need for drastic modifications. There therefore seemed to be no basis for referring draft guidelines 10 to 12 to the Drafting Committee.

The Drafting Committee had, in the past, played an important role in harmonizing different points of view and working out generally acceptable solutions, and had been entrusted to deal with contentious points of substance, as well as drafting issues. However, it had also been proven that the premature referral of draft texts to the Drafting Committee was likely to result in excessive and repetitious debate, and was counterproductive.

He therefore did not support the referral of draft guidelines 10 to 12 to the Drafting Committee. However, if the Commission agreed to go through them paragraph by paragraph and to refer to the Committee only those paragraphs on which minimum consensus had been reached, he could, in a spirit of cooperation, withhold his objection.

The Chair said that he appreciated the flexibility that Mr. Huang had shown with regard to the Drafting Committee, which was in keeping with the Commission's practice. The Drafting Committee was the appropriate forum for a wide-ranging discussion of the extent to which the amendments made by the Special Rapporteur reflected the concerns of the Commission. The fact that the new draft guidelines would be referred to the Drafting Committee did not necessarily imply that the Drafting Committee must propose texts to the Commission for adoption — it could retain the texts and simply inform the Commission of its work in a report, or it could recommend that the Commission should not adopt any new text.

If there were no further objections, he took it that the Commission wished to refer draft guidelines 10 to 12 to the Drafting Committee, taking into account the comments and observations made during the debate, and the amendments made by the Special Rapporteur.

It was so decided.

Organization of the work of the session (agenda item 1) (*continued*)

Mr. Jalloh (Chair of the Drafting Committee) said that the Drafting Committee on the topic of protection of the atmosphere was composed of Mr. Aurescu, Mr. Grossman Guiloff, Mr. Huang, Ms. Lehto, Mr. Murphy, Mr. Nguyen, Mr. Nolte, Ms. Oral, Mr. Park, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Vázquez-Bermúdez and Sir Michael Wood, together with Mr. Murase (Special Rapporteur) and Ms. Galvão Teles (Rapporteur), *ex officio*.

The meeting rose at 10.55 a.m. to enable the enlarged Bureau and the Drafting Committee on Protection of the atmosphere to meet.