Provisional

For participants only

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International Law Commission

Seventy-second session (first part)

Provisional summary record of the 3512th meeting

Held at the Palais des Nations, Geneva, on Friday, 30 April 2021, at 11 a.m.

Contents

Present:

Chair:	Mr. Hmoud
Members:	Ms. Escobar Hernández
	Mr. Forteau
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Hassouna
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Nguyen
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	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 11.05 a.m.

Protection of the atmosphere (agenda item 5) (*continued*) (A/CN.4/735 and A/CN.4/736)

The Chair invited the Commission to resume its consideration of the sixth report of the Special Rapporteur on the protection of the atmosphere (A/CN.4/736).

Mr. Rajput said that the Special Rapporteur was to be commended for maintaining a balanced approach to his work on the topic "The protection of the atmosphere", including in his sixth report. Although he himself had not been a member of the Commission when the 2013 understanding had been adopted, he could only express regret that, as a result of that understanding, the most critical principles of environmental law, including the polluter-pays principle, the precautionary principle and – perhaps most importantly for developing countries – common but differentiated responsibilities, had been excluded from the Commission's consideration of the topic. He agreed in that regard with Ms. Oral's comment that, in narrowing the scope of the topic, the Commission had missed an opportunity to address the problem of fragmentation of international law and to further consolidate a set of well-accepted principles of environmental law. While he could appreciate the Special Rapporteur's concerns at the constraints placed on his work on the topic, he did not believe the reference to the 2013 understanding should be removed from the draft guidelines, as it served to explain why the scope of the Commission's outcome on the topic was so narrow. The absence of such a reference might imply that the scope of the topic was naturally narrow and that the aforementioned critical principles of environmental law simply were not applicable. The deletion of draft guideline 2 (2), moreover, would be counterproductive and might stifle future development of the topic. He would prefer to retain an explicit mention of the 2013 understanding both in the preamble and in draft guideline 2, rather than relegating a mention of it to the commentary or a footnote.

He supported the proposal to insert, in the first preambular paragraph, the phrase "a limited natural resource" between the words "is" and "essential". On the other hand, he did not support the deletion of the second preambular paragraph, which presented factual information on the consequences of the transport and dispersion of certain substances on the atmosphere and the grounds for the Commission's undertaking consideration of the topic. It was erroneous to interpret the paragraph as an encouragement to pollute. As for the phrase "pressing concern of the international community as a whole", he was not convinced that replacing it with "common concern of humankind" was necessary or even desirable. The literature showed that there remained some confusion around the exact meaning of the latter phrase; moreover, the phrase "pressing concern …" was a factual assertion, not a legal claim. Therefore, and despite the use of "common concern of humankind" in instruments such as the Paris Agreement and the Convention on Biological Diversity, it would be judicious to retain the phrase in the preamble as adopted on first reading. He supported all other changes to the preamble as suggested by the Special Rapporteur in his report.

He shared the concerns expressed with regard to the proposed incorporation of the second preambular paragraph in draft guideline 1 (a); the definition of the term "atmosphere" adopted on first reading was sufficiently broad to address States' concerns. He was also not convinced of the need to insert, in draft guideline 1 (b), the words "or energy" after the word "substances". The decision not to include a reference to "energy" on first reading was the outcome of a compromise reached by the Drafting Committee; it would therefore be inappropriate, at the current stage, to reintroduce a previously controversial reference, and such an important change, without submitting it for comments from States.

In draft guideline 7, he was not convinced of the need for the additional phrase proposed by the Special Rapporteur. Indeed, singling out environmental impact assessments could create the impression that other rules and principles of international law did not apply in similar situations. In any event, by virtue of draft guideline 4, an environmental impact assessment was already required for any activities likely to have a significant adverse effect on the atmosphere, and other rules of general international law would also continue to be applicable.

In draft guideline 8, although the full implications were not yet clear, he would not object to the proposed insertion of the words "and technical" after the word "scientific", a proposal which had received considerable support from developing countries.

In draft guideline 10, he did not support the Special Rapporteur's proposal to introduce a new paragraph 2, which, besides the fact that the reference to the responsibility of States had been rejected on first reading and had received insufficient support from States, was problematic in itself. If the reason for including such language was to make clear that a breach entailed State responsibility, then the issue was already an established rule of customary international law, codified in the articles on responsibility of States for internationally wrongful acts; furthermore, draft guideline 10 was not the appropriate place to raise such issues. Finally, the beginning of the proposed paragraph – "Failure to implement the obligations" – suggested that failure to implement any part of draft guideline 10 might entail State responsibility, which was not the idea behind draft guideline 10. Moreover, the second reading was not the appropriate stage for opening a discussion on that point. The draft guidelines did not mark the end of the development of international law on the protection of the atmosphere, but only the first step; for that, the Special Rapporteur deserved congratulations. In conclusion, he agreed that the proposed draft guidelines should be referred to the Drafting Committee.

Mr. Šturma, speaking via video link, said that he wished to thank the Special Rapporteur for his concise, well-structured report. While only a few amendments were proposed in the report, it was worth noting that some of them were not merely superficial and, in fact, threatened to undo the delicate compromise that the Commission had reached on its first reading of the draft guidelines.

Regarding the preamble, he would not object strongly to replacing the phrase "pressing concern of the international community as a whole" with "common concern of humankind", in view of the comments received from some Governments and international organizations. Nevertheless, such a change did not seem necessary; moreover, he still had doubts about the meaning of the phrase, which should, at the very least, be clarified in the commentary. The proposal to delete the eighth preambular paragraph, concerning the 2013 understanding, required more serious consideration; after all, it was thanks to the understanding that the Commission was now close to adopting draft guidelines on the topic. Nevertheless, in the spirit of compromise, he would be willing to accept the deletion of the eighth preambular paragraph, on the understanding that its content would remain duly reflected in draft guideline 2 and in the commentary.

Draft guideline 2 was a key provision in explaining the scope of the guidelines. He strongly disagreed with the proposal that paragraph 2 of that draft guideline should be deleted. The "double negative" formula in the phrase "The present draft guidelines do not deal with, but are without prejudice to," was logical: first, it made clear that the draft guidelines did not deal with certain issues; and secondly, it set out that the draft guidelines were without prejudice to such issues – a point that was equally important, as it referred to issues governed by other rules and principles of international law. He supported the comments made by Mr. Tladi in that regard. Paragraph 3 of draft guideline 2 should also be retained, as it clarified that the draft guidelines did not deal with and, indeed, could not deal with, a number of specific substances. If that paragraph were to be deleted, its contents should be included in the commentary.

He strongly opposed the Special Rapporteur's proposal to insert a new paragraph 2 in draft guideline 10, not only – or even primarily – because of the 2013 understanding, but rather for substantive reasons. Like Mr. Reinisch, he was of the view that national implementation into domestic law was not usually an obligation under international law; it all depended on the content of a given primary rule. From that point of view, even paragraph 1 of draft guideline 10 raised questions: was the sentence "National implementation … may take the form of legislative, administrative, judicial and other actions" merely a descriptive statement, or was it an attempt to prescribe conduct? The word "may" suggested that States would be given a wide margin of appreciation regarding the measures they adopted. That was appropriate in some cases but not in all, particularly where a specific obligation provided for specific means.

Although such ambiguity in paragraph 1 of draft guideline 10 was not cause for serious concern, its juxtaposition with the notion of State responsibility in the proposed new paragraph 2 was problematic. Indeed, the idea that a breach of international obligations entailed the responsibility of States under international law was obvious and need not be spelled out in the draft guidelines. The establishment of State responsibility depended on secondary rules of general international law, the applicability of which need not be mentioned. The wording of paragraph 2 was unclear and risked blurring the difference between primary and secondary rules. Specifically, it was unclear whether it was the failure to implement international obligations domestically or the breach of such obligations that entailed State responsibility. The breach of an obligation, and the moment at which it occurred, depended on the content, or formulation, of the obligation in question. There were obligations of conduct, obligations of result and obligations of prevention, which, in environmental law, were often obligations of due diligence. Such details were clearly stated in the judgments of the International Court of Justice in the cases concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay), 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)*, as well as in the advisory opinion on *Responsibilities and obligations of States with respect to activities in the Area* of the International Tribunal for the Law of the Sea. Due diligence required only that a State should make "best possible efforts"; if it could show that it had made such efforts, it would not incur international responsibility, even in the event of environmental harm. The inclusion of the proposed new paragraph 2 in draft guideline 10 was inappropriate, as it might give rise to erroneous interpretations of the underlying primary and secondary rules of international law. Moreover, such a provision in the guidelines could not impose State responsibility in situations where such responsibility was not already established under international law.

The meeting rose at 11.35 a.m.