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Provisional summary record of the 3551st meeting

Held at the Palais des Nations, Geneva, on Wednesday, 28 July 2021, at 11 a.m.

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Present:

Chair: Mr. Hmoud

Members: Mr. Cissé

Ms. Escobar Hernández

Mr. Forteau

Ms. Galvão Teles

Mr. Grossman Guiloff

Mr. Hassouna

Mr. Huang

Mr. Jalloh

Mr. Laraba

Ms. Lehto

Mr. Murase

Mr. Murphy

Mr. Nguyen

Ms. Oral

Mr. Ouazzani Chahdi

Mr. Park

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 11.05 a.m.

Draft report of the Commission on the work of its seventy-second session (*continued*)

Chapter IV. Protection of the atmosphere (continued) (A/CN.4/L.944 and A/CN.4/L.944/Add.1)

The Chair invited the Commission to resume its consideration of the portion of chapter IV of the draft report contained in document A/CN.4/L.944/Add.1, beginning with paragraph (10) of the commentary to the draft preamble, which had been left in abeyance at the previous meeting.

Commentary to the draft preamble

Paragraph (10) (continued)

Mr. Murase (Special Rapporteur) said that the words “and intergenerational equity” should be inserted after the phrase “including with a view to human rights protection” in the first sentence. That proposal was similar to the one made by Sir Michael Wood. Although some members had been concerned that the inclusion of the term “intergenerational equity” would weaken the reference to human rights protection, he was of the view that the term reinforced the notion of human rights for present and future generations.

Mr. Grossman Guiloff said that he supported the Special Rapporteur’s proposal and his reasoning. The point he had tried to make earlier in the discussion was that the Commission should be careful about reopening, on second reading, matters other than those raised by States.

Paragraph (10), as amended, was adopted.

Paragraph (11)

Mr. Murase (Special Rapporteur) said that, since it was not the Commission’s practice to describe the drafting history of a second-reading text within that text, the second, third and fourth sentences of the paragraph should be deleted.

Mr. Forteau said that the fourth sentence of the paragraph, which began “This preambular paragraph”, should be retained, after deleting the words “significant” and “of the Special Rapporteur and”.

Mr. Jalloh said he agreed with Mr. Forteau that the fourth sentence should be retained, but it should be retained in its entirety so that the commentary fully reflected the context in which the Commission had addressed the topic.

Ms. Lehto said she too thought that the fourth sentence should be retained in its entirety. It was especially important to retain the adjective “significant”.

Mr. Park said that he supported the Special Rapporteur’s proposal to delete the fourth sentence. If, however, that sentence was retained, the word “imposed” should be replaced, as the 2013 understanding had in fact represented a consensus among members; it was not something that had been imposed on the Commission. He suggested that the second half of the sentence should read: “as the latter provides the limited scope of discussion on the topic and the outcome intended by the Special Rapporteur and the Commission.”

Mr. Tladi said he agreed that the fourth sentence should be kept and that it was important to keep the word “significant”. The reference to the Special Rapporteur, however, should be deleted, as it did not seem to be the Commission’s practice to refer in commentaries to the work of special rapporteurs. He supported Mr. Park’s reasoning for replacing the word “imposed” but not the wording that he had proposed. The word “imposed” could perhaps simply be replaced with “created”.

The Chair, speaking as a member of the Commission, said that the word “imposed” could also be replaced with words such as “introduced” or “led to”.

Mr. Grossman Guiloff said it was certainly “significant” that the 2013 understanding had prevented the Commission from considering many issues, including those relating to

oceans, forests and the situation of indigenous peoples. It was therefore essential to keep the word “significant”. The use of the word would also show that the fact that an issue had not been addressed did not mean that it had been deemed unimportant. He agreed that the word “imposed” should be replaced, perhaps with “resulted in”.

Mr. Murphy said that the words “has been added” should be deleted from the fourth sentence, since there had been an earlier version of the preambular paragraph in question in the first-reading draft. The phrase “for the reader” served no clear purpose and should be deleted. Moreover, since the preambular paragraph reflected only a portion of the 2013 understanding, the words “certain elements of” should be inserted between “to reflect” and “the 2013 understanding”.

Although there were a number of adequate substitutes for the word “imposed”, he supported the one proposed by Mr. Grossman Guiloff, “resulted in”. He agreed with Mr. Tladi that the reference to the Special Rapporteur should be omitted. The sentence in its entirety should read: “This preambular paragraph was considered important to reflect certain elements of the 2013 understanding, as the latter resulted in a significant limitation on both the scope of the topic and the outcome of the work of the Commission.”

The Chair said he took it that the Commission wished to delete the second and third sentences and use Mr. Murphy’s wording for the fourth sentence.

It was so decided.

Paragraph (11), as amended, was adopted.

Commentary to draft guideline 1 (Use of terms)

Paragraph (1)

Mr. Murase (Special Rapporteur) said that, in the first sentence, the phrase “As a matter of practical necessity” should be deleted.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

Mr. Forteau said that the Commission had not discussed much of the scientific information contained in paragraph (3) because it lacked the expertise to do so. The passage that began with the words “The temperature of the atmosphere” and ended with the words “ultraviolet radiation from the sun” should be deleted, as it contained information that was not essential and about which the Commission was not in a position to express an opinion. All of footnote 43 should be deleted except for the last sentence.

Mr. Jalloh said that he did not support Mr. Forteau’s proposal to delete a whole passage of the paragraph. In his view, paragraph (3) followed logically from paragraph (2). Paragraph (2) stated that the Commission had provided a working definition of “atmosphere”, and paragraph (3) described how that definition was consistent with the atmospheric science. The purpose of the paragraph, as he understood it, was not to go into the science itself.

Mr. Murase (Special Rapporteur) said that the information given was prefaced, in the second sentence of the paragraph, with the phrase “According to scientists”. As the paragraph had been reviewed by Mr. Grennfelt and Mr. Hov, who had taken part in the Commission’s dialogue with scientists on the protection of the atmosphere, he was confident in the description provided. He favoured retaining the whole paragraph, which provided important background information relating to the definition of “atmosphere”.

Mr. Murphy said that he was generally in favour of Mr. Forteau’s proposal. The commentary should be focused on the content of the draft guideline, which the use of too much scientific language could obscure. It was not clear to him, for example, how the

temperature changes discussed in the passage that Mr. Forteau proposed deleting related to the draft guideline or helped illuminate the meaning of the word “atmosphere”.

Mr. Forteau said that he had not meant to suggest that the content of the paragraph was not scientifically accurate. Rather, as Mr. Murphy had explained, the sentences in question had no connection to the draft guideline. The Commission’s goal was to define “atmosphere” for the purposes of the draft guideline in question and not to define “atmosphere” as such.

Mr. Šturma said that he supported Mr. Forteau’s proposal, for the reasons given by Mr. Forteau and Mr. Murphy.

Mr. Cissé said that he too shared the views expressed by Mr. Forteau and Mr. Murphy. One solution would be to place paragraph (3) in its entirety in a footnote to draft guideline 1 (a).

Mr. Jalloh said that he did not agree with the way in which Mr. Murphy and Mr. Forteau had characterized the passage in question. In it, the Commission justified, in the context of a complex scientific debate, an element of the definition that it had chosen for the purposes of that particular guideline. He wished to note that the text had already been sent to States.

Mr. Murase (Special Rapporteur) said that he could agree to moving the passage referred to by Mr. Forteau to a footnote.

Mr. Forteau said that he had not yet understood how the temperature of the atmosphere related to the definition of “atmosphere” as an “envelope of gases surrounding the Earth” and contributed to a legal understanding of the draft guidelines.

Mr. Murase (Special Rapporteur) said that the issue had been discussed at length at a previous session. The draft guidelines were concerned only with the lower atmosphere, which comprised the troposphere and the stratosphere. Paragraph (3) explained the distinction between the lower and upper atmosphere, providing valuable background information that would help readers understand the structure of the atmosphere.

Mr. Forteau said that, as the Special Rapporteur considered it necessary to retain the text in its entirety, he wished to withdraw both of his proposals.

Paragraph (3) was adopted.

Paragraphs (4) to (8)

Paragraphs (4) to (8) were adopted.

Paragraph (9)

Mr. Murase (Special Rapporteur) proposed that, in the eighth sentence, the word “criteria” should be replaced with “standards”.

Ms. Oral said it was in the spirit of consensus that she had reluctantly agreed to the definition of pollution as set out in draft guideline 1, in which the word “significant” had been inserted before the phrase “deleterious effects”, in a departure from the text adopted by the Commission on first reading. During the Drafting Committee’s discussion of the draft guideline, she, together with several other members, had asked the Special Rapporteur to explain the change in the commentary. Indeed, the addition of the word “significant” was also a departure from the widely accepted definition of “pollution” in several global and regional instruments. In her view, the explanations provided in paragraph (9) to support that departure did not justify the addition of the word “significant”. The references cited, including the judgments of the International Court of Justice in the case concerning *Certain activities carried out by Nicaragua in the Border area (Costa Rica v. Nicaragua)* and *Construction of a Road along the San Juan River (Nicaragua v. Costa Rica)* and in the case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, were in fact relevant to draft guideline 4, on the obligation to conduct an environmental impact assessment. Noting that paragraph (9) also referred to the Commission’s previous work, including on international watercourses, to support the addition of the word “significant”, she said that

article 7 of the Convention on the Law of the Non-navigational Uses of International Watercourses, cited by the Special Rapporteur in footnote 52, related to the obligation of States to prevent significant harm – such obligation did not constitute a definition. The definition of pollution, in article 21 of the Convention, referred not to significant harm, but rather to “detrimental alteration”, with no appearance of the word “significant”. Importantly, the commentary to draft article 21 of the draft articles on the law of the non-navigational uses of international watercourses stated that: “Paragraph 1 contains a general definition of the term ‘pollution’, as that term is used in the present draft articles ... the definition simply refers to ‘any detrimental alteration’ and thus does not prejudge the question of the threshold at which pollution becomes impermissible ... The definition is thus a purely factual one.” In the commentary currently under consideration, the Commission was therefore providing an explanation that contradicted its previous work.

Mr. Murase (Special Rapporteur) said that, during the intensive debate in the Drafting Committee during the first part of the session, he had stressed that the definitions contained in draft guideline 1 were not intended to supply a general definition of pollution for the whole of international law, but rather were meant to be used for the purposes of the present draft guidelines. The word “significant” in subparagraph (b) of the draft guideline had been added so as to align the language of subparagraphs (b) and (c). In any event, the question of what constituted “significant deleterious effects” was a factual assessment, as was clear from the Commission’s previous work.

Ms. Lehto proposed, in view of Ms. Oral’s remarks, that the fourth to the seventh sentences of paragraph (9) should be deleted.

Ms. Oral said that she would support Ms. Lehto’s proposal, so long as language was included in the paragraph to clarify that the definition of pollution was unique to the draft guidelines.

Mr. Murase (Special Rapporteur) said that the references to the court cases were necessary, as they gave definitions of the word “significant”; it was also important to include at least one sentence indicating that the Commission itself had used the word “significant” in its previous work. Even though the draft guideline on use of terms was intended for the purposes of the present draft guidelines, it was important to demonstrate that the Commission had not invented the definitions contained therein wholesale.

Mr. Murphy said it was sufficiently clear, including in paragraph (1) of the commentary to draft guideline 1, that the definitions provided were specific to the draft guidelines. Furthermore, in his view, paragraph (9) simply explained the relevance of the word “significant” and did not stake the claim that the court cases cited applied the word in the same way as it was being used in the draft guidelines. Whether or not the word “significant” was appropriate or not to include in the definitions was debatable, but he would be loath to see the references to the Commission’s work deleted.

The Chair, speaking as a member of the Commission, said that it was clear, even from the third sentence of paragraph (9), that the term “significant deleterious effects” was meant to apply only to the draft guidelines.

Mr. Grossman Guiloff said that, although the cases cited dealt with issues that were not mentioned in draft guideline 1, they were relevant in demonstrating the use of the word “significant” by the Commission and the International Court of Justice. He proposed that the fourth sentence should be moved to the end of footnote 52.

Mr. Šturma proposed that the phrase “*mutatis mutandis*” should be inserted in the fourth sentence, between the phrases “the term ‘significant’ has been used” and “in the jurisprudence of the International Court of Justice”.

Sir Michael Wood said that, while he had not examined the judgments cited in detail, the phrase “*mutatis mutandis*” did not seem appropriate in the context. He was in favour of the proposal made by Mr. Grossman Guiloff.

Mr. Forteau said that the fourth sentence of the paragraph appeared to have been lifted from the statement by the Chair of the Drafting Committee. The word “including” in

that sentence was important, as it implied that there were additional relevant judgments. He would support Mr. Grossman Guiloff's proposal to move the entire sentence to the footnotes.

Paragraph (9), as amended by the Special Rapporteur and by Mr. Grossman Guiloff, was adopted.

Paragraph (10)

Paragraph (10) was adopted.

Paragraph (11)

Mr. Murase (Special Rapporteur) proposed the deletion of the second paragraph of the block quotation in paragraph (11), which repeated some of the content of the first paragraph.

Paragraph (11), as amended, was adopted.

Paragraph (12)

Paragraph (12) was adopted with minor drafting changes.

Paragraph (13)

Mr. Murase (Special Rapporteur) proposed that the second sentence should be deleted.

Mr. Jalloh said that he would like to know the reason for the proposed amendment, as simply deleting the sentence might send a message to readers that something had changed between the first and second readings.

Mr. Murase (Special Rapporteur) said that it had proved impossible to locate the source of the phrase "often in a subtle or unexpected way" and so it had been deemed better simply to delete the entire sentence.

Sir Michael Wood said that the first part of the sentence – "The word 'deleterious' refers to something harmful" – was obvious and so did not need to be retained. He had inquired as to the source behind the second part of the sentence, because those attributes were not part of the generally accepted definition of the word "deleterious".

Mr. Jalloh said that, in the light of those explanations, he supported the deletion of the second sentence of the paragraph.

Mr. Forteau said that he too was prepared to support the proposed deletion, as the "changes in climate" referred to in the first sentence of the paragraph were anything but "unexpected", given current scientific knowledge.

Paragraph (13), as amended, was adopted.

Paragraph (14)

Mr. Murase (Special Rapporteur) proposed that, in the second sentence of the paragraph, the words "deleterious effects is case-specific and" should be inserted between the phrases "the question of what constitutes 'significant'" and "is more of a factual assessment". That being said, if members wished instead to delete paragraph (14) as a whole, he would not oppose such deletion.

Mr. Park said that he would prefer to delete the entire paragraph, as the content of the first sentence was already found at the beginning of paragraph (9) of the commentary to the same draft guideline; and the second sentence, even as amended by the Special Rapporteur, was very similar to the penultimate sentence of the same paragraph (9).

Mr. Forteau said that he was not opposed to the deletion of the paragraph; if, however, it was to be retained, he would take issue with the Special Rapporteur's proposed amendment, as the deleterious effects mentioned in draft guideline 1 (c) were not "case-specific", but global.

The Chair said he took it that the Commission wished to delete paragraph (14).

It was so decided.

Commentary to draft guideline 2 (Scope)

Paragraph (1)

Paragraph (1) was adopted with a minor drafting change.

Paragraph (2)

Mr. Murase (Special Rapporteur) proposed that, in the last sentence of the paragraph, the phrase “reflects the current realities, which is supported by science”, should be changed to “reflects current realities”.

Mr. Jalloh said that, if the phrase “which is supported by science”, which had been adopted on first reading, was to be deleted, the Commission might be sending the message that science no longer supported the first part of the sentence.

Mr. Murase (Special Rapporteur) said that the degradation of the global atmosphere caused by human activities was a concept that had already been addressed in previous paragraphs; hence his proposal for the deletion of the phrase in question.

Sir Michael Wood said that he had suggested the deletion to the Special Rapporteur primarily because it was not clear, semantically speaking, what the clause “which is supported by science” referred to in the first part of the sentence.

Paragraph (2), as amended by the Special Rapporteur, was adopted.

Paragraph (3)

Mr. Murase (Special Rapporteur) proposed that the latter half of the paragraph, starting from the words “The summary for policy makers”, should be deleted. The information cited from the 2019 special report on global warming published by the Intergovernmental Panel on Climate Change was excessively lengthy and it would be better to simply incorporate a reference to the report in footnote 62.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Mr. Forteau proposed that the words “as such” should be added at the end of the first sentence in order to indicate that the draft guidelines covered domestic and local pollution insofar as they constituted part of the global degradation of the atmosphere.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

Mr. Murase (Special Rapporteur) said that, in the third sentence, the words “avoid the ‘double negative’ formula” should be replaced with the words “provide greater clarity to the formula”. In the sixth sentence, for clarification, the words “from the scope of the topic” should be added between “understanding” and “are the questions”. The last part of the paragraph, beginning from the words “but these elements”, should be deleted.

Paragraph (6), as amended, was adopted, with a minor drafting change.

Paragraph (7)

Mr. Murase (Special Rapporteur) proposed that, in the first sentence, the word “do” should be replaced with “would”. In addition, to simplify the text, he suggested that the second and third sentences should be deleted entirely.

Mr. Jalloh said that, if the paragraph was amended as suggested by the Special Rapporteur, it would consist solely of a citation. He therefore suggested that the second sentence should be retained, but with the words “This has” replaced with “These have”.

Mr. Murase (Special Rapporteur) said that, although he was not convinced that either of the two sentences was necessary, he was happy to retain the second, which had been taken from the statement of the Chair of the Drafting Committee.

Mr. Murphy said he agreed that the second sentence should be retained, since it served to explain the purpose of the first sentence. However, he was not convinced by the suggestion to replace “This has” with “These have”; he understood “This” to be a reference to the clause cited in the first sentence. He would also like to propose that paragraph 6 should be combined with paragraph 5.

Mr. Jalloh said that he supported Mr. Murphy’s proposal.

Mr. Murase (Special Rapporteur) said he agreed that the second sentence should be retained as it stood but he was not in favour of merging the two paragraphs as they dealt with separate issues.

Paragraph (7), as amended, was adopted.

Paragraph (8)

Mr. Forteau said that the term “entirely” should be removed from the second sentence. Since, in a functional approach to the delimitation between airspace and outer space, which was mentioned in paragraph 10, one of the criteria used to distinguish between spacecraft and aircraft was the fact that aircraft used atmospheric currents, the Commission should exercise caution in any references to such distinctions.

Paragraph (8), as amended, was adopted.

Paragraph (9)

Mr. Murase (Special Rapporteur) proposed that, in the interests of style and clarity, in the last sentence, the words “territorial waters” should be replaced with “territorial sea”, and “is regarded as being outside the sovereignty” should be replaced with “is not within the sovereignty”.

Mr. Nguyen, speaking via video link, and supported by **Sir Michael Wood**, said that he supported that proposal but would suggest that the word “under” should be used instead of “within”, because, according to article 2 (2) of the United Nations Convention on the Law of the Sea, the sovereignty of a coastal State “extends to the air space over the territorial sea”. The sentence would then read “is not under the sovereignty of any State”.

Paragraph (9), as amended, was adopted.

Paragraph 10

Paragraph 10 was adopted.

Commentary to draft guideline 3 (Obligation to protect the atmosphere)

Paragraph (1)

Mr. Murase (Special Rapporteur) said that the word “contains” should be replaced with “restates”. The draft guideline referred to an already existing obligation; it did not establish that obligation.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Paragraph (2) was adopted with a minor drafting change.

Paragraph (3)

Mr. Murase (Special Rapporteur) said that, for clarity, the first sentence should end after the words “atmospheric degradation”.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Mr. Forteau said that the quotation marks around the words “individually” and “jointly” should be deleted as the words were not citations.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Mr. Murase (Special Rapporteur) proposed that the second sentence beginning with the words “While there is support” should be deleted entirely, in line with the Commission’s usual practice at the second-reading stage.

Mr. Grossman Guiloff said that some Commission members had expressed the view that the due diligence standard should be without prejudice to the strictest standard of protection and should be seen as a floor and not as a ceiling. That was the approach adopted by the Inter-American Court of Human Rights and by the Human Rights Committee, among other bodies. The general standard was confirmed by national jurisprudence and treaty practice but more stringent standards were applied in specific areas of international and environmental law, and those standards should be taken into account. He would therefore have liked to see a “without prejudice” clause that was broader in the sense that it did not establish a ceiling. However, he appreciated that an amendment to that effect might not be possible at the second-reading stage and he did not wish to delay the adoption of the report.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Mr. Forteau said it was striking that all the reference sources mentioned in footnote 74 were English-language references. Since the Commission should be seeking to represent all nations in its work, he wished to suggest the addition of two French-language reference sources to help address the imbalance. Those works were, firstly, the proceedings of the 2018 seminar on the due diligence standard and international responsibility, published by the French Society of International Law, and, secondly, the 2020 course on due diligence in international law, written by Simone Besson and published by the Hague Academy of International Law.

His second observation related to the use of the term “automatically” in the sixth sentence. That term did not accurately convey the intended meaning and he suggested that it should be replaced with the words “on this ground only”. The idea to be conveyed in that sentence was that the existence of harm did not in and of itself necessarily engage a State’s responsibility. However, exclusion from responsibility was not a matter of automaticity; when it could be proven that a State had failed in its due diligence obligation, that State would be responsible.

Sir Michael Wood said that the phrase “on this ground only” could create confusion. Assuming that the ground in question was the materialization of significant adverse effects, it would be odd to suggest that it did not constitute a violation of the due diligence obligation. It would be simpler to replace “automatically” with “necessarily”, which was the word used by Mr. Forteau in his explanation.

Mr. Forteau and **Mr. Jalloh** said that they supported that suggestion.

Mr. Cissé said that, while he agreed with the point raised by Mr. Forteau, he wondered whether the issue raised by the paragraph was not one of objective responsibility. In some cases of environmental degradation, the party that caused the harm was objectively responsible even if there was no wrongdoing or fault. If the paragraph was addressing

situations of objective responsibility without fault, the Special Rapporteur was correct in his use of the term “automatically”.

Mr. Šturma, expressing support for Sir Michael Wood’s suggestion, said that the obligation set forth in draft guideline 3 was simply one of due diligence and did not entail objective responsibility.

Mr. Cissé said that he was not entirely convinced by that argument because, in some cases of environmental degradation, responsibility did not need to be proven. In the case of harm caused by satellites, for example, the party that had launched the satellite was objectively responsible, irrespective of the existence of wrongdoing or fault. However, he did not wish to impede the adoption of the report and was therefore willing to withdraw his proposal that the word “automatically” should be retained.

Mr. Forteau said that the sentence in question related solely to responsibility in the event of a violation of the due diligence obligation, as Mr. Šturma had noted.

Mr. Grossman Guiloff said that, although he shared that view, he saw problems in the fact that, as currently drafted, the paragraph first established an obligation and then proceeded immediately to set forth circumstances in which that obligation was not actually an obligation, stating that significant adverse effects did not automatically constitute a violation and that the obligation did not require the achievement of a certain result. Since a redrafting was not possible, to mitigate that concern he suggested that the term “good faith” should be incorporated into the final sentence. At present, although the sense of “good faith” was implied, the wording was too soft.

Sir Michael Wood said that the best way to incorporate Mr. Grossman Guiloff’s suggestion would be to expand the phrase “best available efforts” so that it read “best available good-faith efforts”.

Paragraph (6), as amended, was adopted.

The meeting rose at 1.05 p.m.