Provisional

For participants only

13 July 2018
Original: English

International Law Commission

Seventieth session (first part)

Provisional summary record of the 3411th meeting
Held at Headquarters, New York, on Thursday, 24 May 2018, at 10 a.m.

Contents

Protection of the atmosphere (*continued*)

18-08375 (E)

Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Argüello Gómez Mr. Cissé Ms. Escobar Hernández Ms. Galvão Teles Mr. Gómez-Robledo Mr. Grossman Guiloff Mr. Hassouna Mr. Huang Mr. Jalloh Ms. Lehto Mr. Murase Mr. Murphy 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 Mr. Wako 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 Commission to resume its consideration of the fifth report on the protection of the atmosphere (A/CN.4/711).

Mr. Rajput said that the Special Rapporteur was to be commended for his thoughtful report on a topic with implications for the long term, especially since he had introduced into it the Asian values of cooperation over confrontation and mild persuasion over loud criticism. He continued to support the topic, bearing in mind the Special Rapporteur's repeated emphasis on the non-binding nature of the outcome of the project, which should allay any concerns about its possible legal effects. Since the Special Rapporteur was presenting his last report, he was right to refer to the issues relating to implementation, compliance and dispute settlement as "intrinsic and logical consequences", in paragraph 10 of his report, although he also referred to them as "obligations and recommendations" in the same paragraph. Since the work was recommendatory in nature, it could not be treated as obligatory. Article 1 of the articles on the responsibility of States for internationally wrongful acts could therefore not form the basis of any conclusions in the project in its current state, as must be adequately reflected in all the draft guidelines: they needed to be changed where appropriate to bring the outcome into line with the objectives. The proposed distinction between implementation and compliance was perhaps not sufficiently clear but it was workable.

With regard to draft guideline 10 (Implementation), he supported the Special Rapporteur's overall approach of encouraging States to consider taking measures in their national law to protect the atmosphere. That draft guideline went far beyond persuasion, the Special Rapporteur's stated intention, however, since it used mandatory words such as "shall" and "obligations"; it should be modified to reflect the recommendatory nature of the project. With regard to the serious issue of extraterritorial application of national laws, there were good reasons why it did not commonly arise in international law: it involved the overlapping of jurisdictions and could therefore result in confrontation and conflict between States, as happened with the implementation of the Singaporean legislation referred to in paragraph 28 of the Special Rapporteur's report; that was the very opposite of his intended outcome. The Commission's work on transboundary harm could be an appropriate basis for the work on protection of the atmosphere since, as noted by Mr. Nguyen, it drew upon well-settled principles of international law, such as the no-harm rule and due diligence. While the issue of due diligence was appropriately covered in draft guideline 3, as had been noted by Ms. Oral, the cases to which she had referred in that connection had focused on its role in respect of the use of territory by a State in a manner affecting other States, but by itself that was no basis for extraterritorial application. He therefore did not support paragraph 4 of the draft guideline.

Turning to draft guideline 11, he said that, although the project did not extend to climate change, analogies could safely be drawn with the procedural aspects of related agreements, but only to suggest the available means for persuading States to take measures for compliance and without importing the binding features of such agreements. He agreed with the Special Rapporteur on the avoidance of adversarial elements, such as sanctions and naming and shaming, but found that the text of the draft guideline went beyond that objective. Again, changes should be made to the wording to reflect the recommendatory nature of the project.

Paragraph 1 of draft guideline 12 sought to persuade States to adopt one of the well-settled methods for the peaceful settlement of disputes, which was the bedrock of modern-day international relations, and did not in any way suggest that jurisdiction, whether compulsory or otherwise, might be granted to any international court or tribunal. It therefore gave no concern. However, the undeniable and complex factual nature of contemporary disputes, particularly on environmental matters, regularly required recourse to experts and that could create problems. One example was the *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* case, in which the International Court of Justice had frowned upon the use of experts as counsel, since they could not be cross-examined. The use of experts also made it difficult to distinguish between the views of an expert and those of a party, since the expert was attesting not to a fact but to an opinion. He therefore supported paragraph 2. In paragraph 3, he saw no reason not to retain the *non ultra petita* rule, which was fairly settled in the case law of the International Court of Justice, even though that rule applied to facts rather than to law. There was, however, no basis for extending the *jura novit curia* rule to facts. No court or tribunal could ever be presumed to know the facts, which needed to be proved. Any such presumption would obviate the requirement of due process and fairness in adjudication. He accordingly proposed the removal of the reference to *jura novit curia* in that paragraph.

In terms of the topic as a whole, the Special Rapporteur was trying to address a natural phenomenon

through legal tools and was faced with a situation where he had to develop ideas based on analogies and transplantations, rather than on actual law, in a field that had been barely touched on in the past, and then mostly indirectly. The Special Rapporteur had made it clear to the Commission that the basis of his work was not necessarily positive law; he was seeking rather to develop areas for cooperation and advancement in a field that could not be seen in a traditional legal manner. The impression created by the report was indeed that of a legal scholar seeking solutions outside his regular toolbox to some of the problems facing humanity. The tools he had found might not be perfect, but he was to be commended for taking such a complex topic to the critical juncture of first reading. He therefore supported the referral of the draft guidelines to the Drafting Committee.

Mr. Cissé said that, on the slow but sure path towards the completion of the Commission's first reading of the draft guidelines, he welcomed the Special Rapporteur's patience and spirit of compromise, but above all his unwavering determination to carry through the project on a subject of concern to the international community as a whole. His comprehensive approach to so complex and wide-ranging a field was commendable, particularly under the conditions imposed by the Commission, which had resulted in the exclusion from the scope of the study of several basic principles of international environmental law and several points of great importance for the protection of the atmosphere. The importance of the project should not be underestimated: its pressing relevance was reflected in the General Assembly's adoption earlier in the year of its resolution 72/277, entitled "Towards a Global Pact for the Environment" and aimed at setting in motion a process leading to the adoption of such a pact to address possible gaps in international environmental law. The current work was part of an effort to harmonize a rather diffuse area of international law without, however, addressing the political concerns inherent in such a subject; the aim was to focus exclusively on international positive law, and, as such, he fully supported it. The fact that the topic was complex and referred obliquely to economic and other non-legal matters, something that could be found in most if not all areas of law, did not mean that the Commission should abandon it. Nevertheless, and notwithstanding his agreement with their inclusion, the new proposed draft guidelines called for further improvement.

Overall, the Special Rapporteur's report seemed to be dealing with the environment in the broad sense and not with the protection of the atmosphere: the atmosphere was but one physical component of the global environment. A clarification was in order, given that environmental law was a multidimensional law. In his view, large parts of the Special Rapporteur's fourth report (A/CN.4/705), which had clearly identified the interactions that could contribute to the most effective possible protection of the atmosphere, could well have been reproduced in his latest report. The fifth report was surprisingly silent in that regard; that omission accounted for the discrepancy between the title of the report and its content. The starting point of the study should be a recognition of the physical interactions between the atmosphere, the sea and the land, given that the atmosphere to be protected could not be dissociated from other components of the environment. Environmental degradation could indeed result from factors directly linked to the atmosphere itself but could also have its sources in the land and the sea. For example, the ozone-depleting substances referred to in the fifth report originated in the land and then passed into the atmosphere. No convincing conclusions had been drawn from the cases cited in that report because of the lack of any clear link between them and the protection of the atmosphere. It might usefully have been concluded that the activities under investigation in each of those cases produced substances responsible for the depletion of the ozone layer and atmospheric degradation. Two of those cases, however, *Aerial Herbicide Spraying (Ecuador v. Colombia)* and *Air Transport Association*, clearly and directly illustrated the topic; several others could be relevant if it was established directly or indirectly in the report that they were linked to the protection of the atmosphere.

Turning to the text of the draft guidelines, he said that, while most of the obligations contained therein represented international customary law norms or treaty norms and were therefore to be fulfilled in good faith by States as appropriate, in draft guideline 10, the wording of paragraph 1 went too far in requiring States to fulfil the obligations affirmed in the draft guidelines. The draft guidelines were thereby assigned a misplaced normative status, since their authority derived from the force of the arguments and rules underpinning them and not from the text itself. The wording should be revised so as not to suggest that the draft guidelines possessed a legal status higher than that normally assigned to the Commission's guidelines. He suggested either: "States are required to implement in their national law, in accordance with their obligations under international law, legislative, regulatory and administrative measures for the protection of the atmosphere" [*Les États sont tenus de mettre en oeuvre dans leur droit interne, conformément aux obligations que leur impose le droit international, des mesures législatives, réglementaires et administratives en matière de protection de l'atmosphère*]; or a less

peremptory formulation similar to that used in principle 8, paragraph 1, of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities of 2006: "Each State should adopt the necessary legislative, regulatory, administrative and other measures to implement the present draft guidelines" [*Chaque État devrait adopter les mesures législatives, réglementaires, administratives et autres nécessaires pour la mise en oeuvre des présents projets de directives*]. If the latter wording were to be adopted, then paragraph 3 could be deleted as being no longer necessary.

As for paragraphs 2 and 4, in view of the lack of State practice in respect of the protection of the atmosphere regarding the issues addressed therein, the complexity of those issues and their somewhat controversial nature, as noted by several colleagues during the debates, they could be reformulated as a "without prejudice" clause, as partly proposed by Ms. Galvão Teles, and merged into a single paragraph at the end of the draft guideline. The Commission had already done extensive work on the responsibility of States, which was the subject of paragraph 2. That work and the international rules it embodied could be discussed and contextualized in the commentary, taking into account the comments thereon of Ms. Oral and Ms. Lehto. As for the sensitive and fluid question of extraterritorial application of national law addressed in paragraph 4, it would perhaps be wiser at the current stage not to include it in a draft guideline, particularly in the absence of convincing State practice in respect of protection of the atmosphere. It should simply be mentioned in the commentary that the extraterritorial application of a national law would be possible in accordance with the established rules of international law only in certain situations. He suggested the following wording for the merged new paragraph: "The present draft guidelines on the protection of the atmosphere shall be without prejudice to the rules of international law on the responsibility of States and on the extraterritorial application of national laws" [*Les présents projets de directives sur la protection de l'atmosphère sont sans préjudice aux règles de droit international portant sur la responsabilité des États et sur l'application extraterritoriale des lois nationales*].

Draft guideline 11 (Compliance) could be limited to the first paragraph, as the other paragraphs were concerned more with possible ways of monitoring compliance with the treaty obligations regarding protection of the environment. Since the draft guidelines were designed to help States find their way in such a complex area of international law, the examples should be given in the commentary, together with all the necessary detail for them to be useful to States in implementing the relevant international law. That would help to avoid the need to list the ways of monitoring compliance with treaty obligations, which were subject to change according to developments in international law in general, and international environmental law in particular. To that end, it would be prudent not to express any preference for any of the ways, so as not to limit future developments.

In draft guideline 12, it would be wise to give precedence to peaceful means of dispute settlement over judicial means, which should be used only as a last resort. Given the highly political issues that might be involved, the use of peaceful means would give States greater latitude to determine the most appropriate means of settlement according to circumstances and would not create any conflict with the mandatory dispute settlement provisions found in some multilateral treaties. In paragraph 2, the last two sentences could simply be removed, so that there would continue to be a reference to the potentially scientific and technical nature of disputes on protection of the atmosphere, and the possibility of using of experts, without any mention of how they were to be chosen. The way in which the various international tribunals had handled the issue of experts and scientific evidence would be more appropriately addressed in the commentaries.

As for paragraph 3, he concurred with several earlier speakers that it had no place in the draft guideline. He was not convinced by the Special Rapporteur's argument in his report on the extension of the *jura novit curia* principle to facts, as it would only sow confusion and doubt in the field of dispute settlement, without necessarily settling the identifiable and major problem of fact-finding by international courts and tribunals. He recalled that, in the *Pulp Mills* case, the International Court of Justice had noted that: "it is the responsibility of the Court, after having given careful consideration to all the evidence placed before it by the Parties, to determine which facts must be considered relevant, to assess their probative value and to draw conclusions from them as appropriate." Consequently, paragraph 3 served no purpose.

In closing, he commended the Special Rapporteur for his excellent work and expressed his support for the referral of all the draft guidelines to the Drafting Committee, taking into account the relevant comments made by previous speakers.

The meeting rose at 10.45 a.m. to enable the Drafting Committee on Provisional application of treaties to meet.