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STATEMENT OF THE CHAIR OF THE INTERNATIONAL LAW COMMISSION,

MR. EDUARDO VALENCIA-OSPINA

Cluster Two

Chapters VI, VII and VIII: Protection of the atmosphere; Provisional application of treaties; and Peremptory norms of general international law (*jus cogens*)

Mr. Chair,

The second cluster is constituted of three chapters of the report of the ILC: Protection of the atmosphere (chapter VI); Provisional application of treaties (chapter VII); and Peremptory norms of general international law (*jus cogens*) (chapter VIII).

Chapter VI: Protection of the atmosphere

Mr. Chair,

Chapter VI of the Commission's report concerns the topic "**Protection of the atmosphere**". This year, the Commission considered the fifth report of the Special Rapporteur, Mr. Shinya Murase, and adopted, on first reading, a draft preamble and a set of 12 draft guidelines, together with commentaries thereto, on the topic.

It is acknowledged that both the human and natural environments can be adversely affected by certain changes in the condition of the atmosphere mainly caused by the introduction of harmful substances, causing transboundary air pollution, ozone depletion, as well as changes in the atmospheric conditions leading to climate change. In this topic, the Commission is seeking to assist the international community as it addresses critical questions relating to transboundary and global protection of the atmosphere.

Let me reiterate the deep words of appreciation of the Commission to the Special Rapporteur, Mr. Shinya Murase, for his outstanding contribution, which enabled the Commission to conclude successfully the first reading of the draft guidelines.

Mr. Chair,

The Sixth Committee now has before it a set of 12 guidelines, nine of which were provisionally adopted at previous sessions, as well as a preamble, together with commentaries thereto. They can be found at paragraphs 77 and 78 of the annual report.

The draft preamble consists of eight preambular paragraphs, which remain as previously adopted. The preambular paragraphs seek to set the context in which the draft guidelines have been developed and have to be appreciated.

Draft guidelines 1 and 2 are introductory and definitional in nature. Draft guideline 1 is on the “Use of terms” and remains as previously adopted. Draft guideline 2, entitled “Scope of the guidelines”, consists of four paragraphs. Paragraph 1 provides that the draft guidelines concern the protection of the atmosphere from atmospheric pollution and atmospheric degradation. The term “concern” was adopted to replace the previous alternative formulations which were in brackets. No changes were made to paragraphs 2 to 4.

Draft guidelines 3 to 9 form the core of the text of the draft guidelines. Those draft guidelines remain substantially as previously adopted. Draft guideline 3 sets out the “Obligation to protect the atmosphere”, which is central to the draft guidelines. Draft guidelines 4, 5 and 6 address, respectively, “Environmental impact assessment”, “Sustainable utilization of the atmosphere”, and “Equitable and reasonable use of the atmosphere”, which all flow from draft guideline 3. Draft guideline 7 deals with “Intentional large-scale modification of the atmosphere”, covering activities the very purpose of which is to alter atmospheric conditions. Draft guideline 8 addresses “International cooperation”, among States as well as between States and international organizations.

Draft guideline 9, entitled “Interrelationship among relevant rules”, seeks to reflect the relationship between rules of international law relating to the protection of the atmosphere and other relevant rules of international law.

Mr. Chair,

Let me now turn to the remaining draft guidelines 10 to 12, which were adopted at the present session of the Commission. They address, respectively, questions of implementation, compliance and dispute settlement.

Draft guideline 10 deals with the implementation of obligations under international law relating to the protection of the atmosphere. The term “implementation” is used to refer to measures that States may take to make treaty provisions effective at the national level, including implementation in their national laws. Paragraph 1 of draft guideline 10 addresses, on one hand, existing obligations under international law, including those referred to in the draft guidelines – namely, the obligation to protect the atmosphere (draft guideline 3), the obligation to ensure that an environmental impact assessment is carried out (draft guideline 4) and the obligation to cooperate (draft guideline 8). Paragraph 2 of draft guideline 10 provides, on the other hand, that States should endeavour to give effect to the recommendations contained in the draft guidelines, namely, those formulated using the term “should”.

Draft guideline 11, which complements guideline 10 on national implementation, refers to “Compliance” at the international level. The term “compliance” is used to refer to mechanisms or procedures at the level of international law that verify whether States in fact adhere to the obligations under an agreement or other rules of international law. Paragraph 1 of draft guideline 11 reflects the principle *pacta sunt servanda* and is general in nature. Paragraph 2 deals with the facilitative or enforcement procedures that may be used by compliance mechanisms, as provided for under existing agreements to which States are parties, and may be used in differing circumstances and contexts as appropriate. Sub-paragraph (a) of paragraph 2 provides that, “in cases of non-compliance”, facilitative procedures may include providing “assistance” to States, since some States may be willing to comply but are unable to do so for lack of capacity. In contrast, sub-paragraph (b) refers to enforcement procedures, which aim to achieve compliance by imposing a penalty on the State concerned and should be adopted only for the purpose of leading that State to return to compliance.

Draft guideline 12 concerns “Dispute settlement” between States. Paragraph 1 describes the general obligation of States to settle their disputes by peaceful means. Paragraph 2 recognizes that disputes relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation may be “fact-intensive” and “science-dependent”. It therefore emphasizes the use of technical and scientific experts in the settlement of inter-State disputes, whether by judicial or other means.

The Commission decided to transmit the draft guidelines, through the Secretary-General, to Governments and international organizations for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by **15 December 2019**.

Let me now turn to Chapter VII of the annual report.

Chapter VII: Provisional application of treaties

Mr. Chair,

Chapter VII of the Commission's report concerns the topic "**Provisional application of treaties**". This year, the Commission considered the fifth report of the Special Rapporteur, Mr. Juan Manuel Gómez Robledo, as well as a memorandum by the Secretariat reviewing State practice in respect of treaties (bilateral and multilateral), deposited or registered in the last 20 years with the Secretary-General, that provide for provisional application, including treaty actions related thereto.

The fifth report of the Special Rapporteur continued the analysis of views expressed by Member States, provided additional information on the practice of international organizations, and addressed the topics of termination or suspension of the provisional application of a treaty as a consequence of its breach, and formulation of reservations and amendments. In his fifth report, the Special Rapporteur also proposed eight draft model clauses covering different aspects of provisional application. Those model clauses were drawn from identified State practice. In addition, the fifth report provided a bibliography on the topic.

At this session, the Commission finalized the first reading and adopted a complete set of 12 draft guidelines, with commentaries thereto, entitled the "Guide to Provisional Application of Treaties", which can be found at paragraphs 89 and 90 of the annual report. I would like to reiterate words of deep appreciation of the Commission to the Special Rapporteur, Mr. Juan Manuel Gómez Robledo, for his outstanding contribution, which had enabled the Commission to bring to a successful conclusion its first reading of the draft Guide to Provisional Application of Treaties

As indicated in the general commentary, the purpose of the Guide to Provisional Application of Treaties is to provide assistance to States, international organizations and other users concerning the law and practice on the provisional application of treaties. The objective of the Guide is to direct States, international organizations and other users to answers that are consistent with existing rules and most appropriate for contemporary practice

As you may recall, draft guidelines 1 to 11 had been provisionally adopted by the Commission last year. Those draft guidelines were renumbered as a result of the adoption of further provisions this year. Based on the Special Rapporteur's proposals, the Commission adopted new draft guideline 7 on reservations, and new draft guideline 9 on termination and suspension of provisional application, which incorporates the former draft guideline 8 on termination. The Commission also made substantive changes to draft guideline 6 on the legal effect of provisional application.

Mr. Chair,

No changes were made to draft guidelines 1 to 5, as provisionally adopted last year. Draft guidelines 1 and 2 are concerned, respectively, with the scope of application and purpose of the draft guidelines. In particular, draft guideline 2 reiterates that the guidelines are based on the 1969 Vienna Convention and other rules of international law, including the 1986 Vienna Convention.

The general rule on the provisional application of treaties is stated in draft guideline 3. That is: "A treaty or a part of a treaty may be provisionally applied, pending its entry into force between the States or international organizations concerned, if the treaty itself so provides, or if in some other manner it has been so agreed."

Draft guideline 4 deals with forms of agreement, on the basis of which a treaty, or a part of a treaty, may be provisionally applied, in addition to when the treaty itself so provides. The structure of the provision follows the sequence of article 25 of the 1969 and 1986 Vienna Conventions. Draft guideline 5 deals with the commencement of provisional application. The draft guideline is modelled on article 24, paragraph 1, of the 1969 and 1986 Vienna Conventions, on entry into force.

Draft guidelines 6 dealing with the legal effects of provisional application was modified to address comments made by Member States and members of the Commission. Two types of "legal effect" might be envisaged: the legal effect of the agreement to provisionally apply the treaty or a part of it, and the legal effect of the treaty or a part of it that is being provisionally applied. According to draft guideline 6: "[t]he provisional application of a treaty or a part of a treaty produces a legally binding obligation to apply the treaty or a part thereof as if the treaty were in force between the States or international organizations concerned, unless the treaty provides otherwise or it is otherwise agreed." The reference to "a legally binding obligation to apply the treaty or a part thereof" is designed to add more precision in the depiction of the legal effect of provisional application.

Let me now turn to draft guideline 7. This draft guideline, which was provisionally adopted this year, deals with the formulation of reservations, by a State or an international organization, purporting to exclude or modify the legal effect produced by the provisional application of certain provisions of a treaty. As indicated in the commentary, in view of the relative lack of practice on the matter, the Commission is only at the initial stage of considering the question. According to paragraph 1: “In accordance with the relevant rules of the Vienna Convention on the Law of Treaties, applied *mutatis mutandis*, a State may, when agreeing to the provisional application of a treaty or a part of a treaty, formulate a reservation purporting to exclude or modify the legal effect produced by the provisional application of certain provisions of that treaty.” Some rules of the 1969 Vienna Convention applicable to reservations are indeed relevant in case of provisional application. The formulation of this paragraph is neutral on the question as to whether reservations exclude or modify the legal effect arising from the provisional application of the treaty, or that of the agreement between the parties to provisionally apply the treaty as such. Paragraph 2 provides for the formulation of reservations by international organizations to parallel the situation of States envisaged in paragraph 1.

No change was made to draft guideline 8, which was adopted last year as draft guideline 7. This draft guideline deals with the question of responsibility for breach of an obligation arising under a treaty or a part of a treaty that is being provisionally applied.

Let me now turn to draft guideline 9, which addresses the termination and suspension of provisional application. The provision expands on that adopted last year, as then draft guideline 8, on “[t]ermination upon notification of intention not to become a party”, through the inclusion of two new paragraphs covering additional scenarios. Paragraph 1 addresses termination of provisional application upon entry into force. This is the most frequent way in which provisional application is terminated. Paragraph 2 concerns situations when the intention not to become a party to the treaty is communicated by the State or international organization provisionally applying the treaty or a part of a treaty to the other States or international organizations between which the treaty or a part of a treaty is being provisionally applied. It follows closely the formulation of paragraph 2 of article 25 of the 1969 and 1986 Vienna Conventions. Paragraph 3 confirms that draft guideline 9 is without prejudice to the application, *mutatis mutandis*, of relevant rules set forth in part V, section 3, of the 1969 Vienna Convention or other relevant rules of international law concerning termination and suspension.

Mr. Chair,

Let me conclude briefly this overview of the Guide to Provisional Application of Treaties with draft guidelines 10, 11 and 12, the text of which remained unchanged from the draft guidelines adopted last year. Only their titles were slightly modified to avoid translation issues.

Draft guideline 10 deals with the observance of provisionally applied treaties and their relation with the internal law of States and the rules of international organizations. Draft guideline 11 addresses the effects of the provisions of the internal law of States and the rules of international organizations on their competence to agree to the provisional application of treaties. Draft guideline 12 relates to the limitations on States and international organizations that could derive from their internal law and rules when agreeing to the provisional application of a treaty or a part of a treaty.

Mr. Chair,

In accordance with articles 16 to 21 of its statute, decided to transmit the draft guidelines to Governments and international organizations for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by **15 December 2019**.

Before concluding on this Chapter, I would like to stress that, because of lack of time, the Commission could not conclude its consideration of the draft model clauses proposed by the Special Rapporteur in his fifth report, the text of which is reproduced at footnote 996 of the annual report. The Commission intends to resume such consideration at its seventy-first session in 2019, to allow States and international organizations the opportunity to assess the draft model clauses before the second reading of the draft guidelines during the seventy-second session of the Commission in 2020.

Chapter VIII: Peremptory norms of general international law (*jus cogens*)

Mr. Chair,

Let me now turn to Chapter VIII of the report, which concerns the topic “**Peremptory norms of general international law (*jus cogens*)**”. The Commission considered this topic on the basis of the third report of the Special Rapporteur, Mr. Dire Tladi. In his report, the Special Rapporteur proposed 13 draft conclusions that were referred to the Drafting Committee on the understanding that draft conclusions 22 and 23 would be dealt with by means of a “without prejudice” clause. The draft conclusions are still being

considered by the Committee. Its Chair presented two interim reports to the Commission on the progress made at the present session, which can both be found on the website of the Commission.

Let me now address a few highlights of the debate within the Commission, the summary of which is reproduced in the annual report.

The Special Rapporteur introduced his third report, and his proposed draft conclusions, which dealt with the consequences and legal effects of peremptory norms of general international law (*jus cogens*).

In particular, the debate focused on the specific questions dealt with under each of the 13 draft conclusions proposed by the Special Rapporteur. A number of views were expressed, and proposals were made, regarding the question of the invalidity of a treaty in conflict with a peremptory norm of general international law (*jus cogens*); the severability of treaty provisions in conflict with peremptory norm of general international law; the elimination of consequences of acts performed in reliance of invalid treaty; and the effects of peremptory norms of general international law (*jus cogens*) on reservations to treaties. The debate also addressed the question of recommended procedure regarding settlement of disputes involving conflict between a treaty and a peremptory norm of general international law. The consequences of peremptory norms of general international law for customary international law, on unilateral acts, and for binding resolutions of international organizations were discussed. The questions of the relationship between peremptory norms of general international law and obligations as well as the effects of peremptory norms of general international law on circumstances precluding wrongfulness were also analyzed. Finally, the plenary debate turned on the duty to cooperate; the duty not to recognize or render assistance; the duty to exercise domestic jurisdiction over crimes prohibited by peremptory norms of general international law; and the irrelevance of official position and non-applicability of immunity *ratione materiae*.

Mr. Chair,

Before I conclude, let me note that the Commission would appreciate being provided by States with information, relating to their practice on the nature of *jus cogens*, the criteria for its formation and the consequences flowing therefrom as expressed in:

- (a) official statements, including official statements before legislatures, courts and international organizations; and
- (b) decisions of national and regional courts and tribunals, including quasi-judicial bodies.

This concludes my introduction of cluster II.
