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**Statement of the United States of America
76th Session of the General Assembly Sixth Committee
Agenda Item 82: Report of the International Law Commission
on the Work of its Seventy-Second Session
Cluster One
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Thank you, Madam Chair.

The United States remains strongly supportive of the International Law Commission, as it flexibly and effectively conducted its seventy-second session in a new, hybrid fashion due to the COVID-19 pandemic. The United States takes the work of the ILC very seriously, as evidenced by our detailed comments on ILC work products, and we thank all of the members of the Commission for their continued dedication to that work. We especially thank Ambassador Mahmoud Hmoud, for his chairmanship of the ILC during this challenging year.

Provisional Application of Treaties

Turning to the substance of this year's ILC report, the United States welcomes the completion of the Guide to Provisional Application of Treaties. We express our appreciation to the Special Rapporteur, Ambassador Juan Manuel Gómez Robledo, and other members of the Commission, for their significant contributions to the development of this topic. Moreover, we are appreciative of the consideration given to U.S. comments on prior iterations of the Guide and the Commission's efforts to address those concerns.

The United States is generally supportive of the Guide, whose purpose, as described in Guideline 2, is "to provide assistance to States, international organizations and other users concerning the law and practice on the provisional application of treaties." In this respect, the Guide helpfully confirms the basic features of the legal regime concerning provisional application of treaties. In some areas, however, the guidelines and accompanying commentary are neither necessary nor supported by law or State practice. Those areas of concern may give rise to confusion regarding the law and practice on provisional application and in so doing undermine the Guide's purpose.

With respect to Guideline 4, we appreciate the Commission's efforts to address our concerns regarding the potential for confusion arising from statements related to the use of means other than a treaty to establish an agreement to apply a treaty on a provisional basis. In this regard, the guideline previously singled out two possibilities for specific mention: "resolutions adopted by an international organization or at an intergovernmental conference[,] or a declaration by a State or an international organization that is accepted by the other States or international organizations concerned." We were particularly concerned that the guideline appeared to place undue consideration on the venue at which an agreement is reached or the adoption of a resolution rather than on whether all States and international organizations assuming rights and obligations to provisionally apply the treaty have agreed to do so. Resolutions adopted by an international conference, or in other similar fora, that do not reflect the consent of all States assuming rights and obligations pursuant to provisional application – such as those adopted without the participation of or without the consent of all relevant States – would not establish a valid agreement for provisional application in respect of those States. The revised commentary clearly establishes that the States or international organizations "concerned must consent to provisional application."

With respect, however, to declarations by a State or an international organization that are accepted by other States or concerned international organizations, we reiterate our previous observations that the commentary to the guideline has identified little support in state practice for the use of such declarations to establish the provisional application of treaties. Moreover, the commentary fails to establish persuasively that such declarations are most appropriately understood as implicating the doctrine of provisional application of treaties rather than the law regarding unilateral declarations by States. We note that the commentary describes such declarations as an "exceptional possibility," underscoring the ambiguity of State practice on this point. In light of this concern, we continue to question the soundness of this element of the guideline.

The Guide similarly lacks support in State practice in other areas. Of particular note, the commentary accompanying Guideline 7 expressly addresses "*the possibility* of formulation of reservations ... purporting to exclude or modify the legal effect produced by certain provisions of a treaty that is subject to provisional application" while acknowledging that there is no significant State practice involving reservations in the provisional application context.

These and other previously stated concerns notwithstanding, the United States on balance believes that the Guide can serve as a useful reference source for States and international organizations in the negotiation and conclusion of provisions on provisional application.

Protection of the Atmosphere

Regarding the Draft Guidelines on Protection of the Atmosphere, the United States extends our appreciation to Special Rapporteur Shinya Murase for his work on this project.

The United States remains concerned about the Draft Guidelines and their accompanying commentaries. At a time when clarity and action in this area are vitally important, the Draft Guidelines have the potential to inhibit progress in international environmental law by creating

confusion about its content, including through statements suggestive of new and unfounded international legal obligations. In the interest of brevity, we will highlight a few of the continuing concerns about the Draft Guidelines.

Draft Guidelines 3, 4, and 8 all assert categorically that “States have the obligation” to undertake certain actions. For example, Draft Guideline 3 states that the purported “obligation to protect the atmosphere” is to be fulfilled by “exercising due diligence in taking appropriate measures, in accordance with applicable rules of international law, to prevent, reduce or control atmospheric pollution and atmospheric degradation.” While the United States appreciates the Commission’s acknowledgement that the Commission “does not desire . . . to impose on current treaty regimes rules or principles not already contained therein”, it’s not clear what Draft Guideline 3 adds beyond serving to remind States to comply with their existing legal obligations.

Additionally, Guidelines 5, 6, 7, and 8 are essentially recommendatory or hortatory in nature. For example, without authoritative legal foundation, Draft Guideline 8(1) provides that “States have an obligation to cooperate, as appropriate, with each other and with relevant international organizations for the protection of the atmosphere from atmospheric pollution and atmospheric degradation.” However, none of the sources referenced in the corresponding commentary establishes the asserted general obligation to cooperate. Therefore, the purported obligation in draft Guideline 8(1) is best understood as a recommendation that States cooperate. Similarly, each of draft Guidelines 5, 6, and 7 contains assertions about what states “should be” doing with regard to distinct activities concerning the atmosphere. Thus, the Draft Guidelines are policy recommendations and, as such, should not be a part of the Commission’s work.

Finally, the United States appreciates the Commission’s acknowledgement that the phrase “common concern of humankind,” used in the preamble of the Draft Guidelines, reflects a concern of the entire international community that stands to be affected by atmospheric pollution and degradation and that inclusion of that phrase in the preamble does not create rights and obligations and, in particular, it does not entail *erga omnes* obligations. We trust that States will keep this in mind when considering whether and how to utilize the Draft Guidelines in their international engagements.

Other topics

Regarding other topics in the ILC report, the United States supports the proposal by ILC member Charles Jalloh to add to the Commission’s long-term programme of work the subject “subsidiary means for the determination of rules of international law.” Given the ILC’s work on the other provisions of Article 38 of the ICJ Statute, it makes sense to complete the project by examining subsidiary means. We also think this topic may benefit from ILC input, as reliance on subsidiary means has been somewhat unclear and inconsistent in practice.

ILC Election

I would like to close by briefly addressing the upcoming ILC election. Simply put, the ILC historically and currently lacks anything close to gender balance. The statistics are well known – in the 72 years of its existence, the ILC has had just seven female members. In its

current composition, the ILC has just four women out of 34 members. Prior to those four, only three women had ever served on the ILC.

There is an opportunity this year to move the ILC in the right direction, so that its membership comes a little closer to reflecting the global community. There are eight women running in this year's election, all well qualified in their own right. This includes the U.S. candidate, Professor Evelyn Aswad, who, if elected, would bring to the commission a valuable combination of government, multilateral, and academic experience. Even if all eight of these candidates are elected, women would still constitute less than a quarter – 8 out of 34 seats – of the membership on the ILC. We can and must do better. In the meantime, the United States expresses its appreciation to the governments nominating or otherwise supporting female candidates for the ILC this year. We also thank and congratulate the seven women who previously served on the ILC, who helped blaze the trail.

Thank you, Madam Chair.