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Report of the International Law Commission

on the Work of its 67th Session

Cluster 1: Chapters I-III, XII, IV & V (Introduction, Summary, Specific issues for comments; Other decisions and conclusions; The Most-Favoured-Nation clause; Protection of the atmosphere)

Statement by

Ambassador Helmut Tichy

New York, 2 November 2015

Mr. Chairman,

Austria would like to thank the International Law Commission and its Special Rapporteurs for the work undertaken this year as reflected in the Commission's report. Concerning the questions in Chapter III of the report, we intend to provide the relevant information in writing.

Mr. Chairman,

Austria would like to congratulate the Commission on finalizing its work on **"The most-favoured-nation clause"**. As already pointed out during the last years, Austria considers the Commission's clarification of the implications of most-favoured-nation clauses, in particular in international trade and investment treaties, to be a most valuable contribution to public international law. My delegation wishes to express its appreciation to Special Rapporteur Donald McRae.

My delegation has studied both the summary contained in this year's report of the Commission and the extensive final report of the Study Group in the annex to the Commission's report with great interest; we have found the final report highly enlightening.

Austria specifically welcomes the adoption of five summary conclusions reflecting the main outcome of the Study Group's work. It concurs with the Commission's view that the scope of MFN clauses is to be determined by the interpretation rules laid down in the Vienna Convention on the Law of Treaties. It further shares the Commission's view expressed in conclusion e) that the central, controversial question to what extent MFN clauses encompass dispute settlement provisions can be most appropriately solved by explicit language in the relevant treaties. However, there is a minor point concerning this conclusion which my delegation would like to raise: we are not fully convinced of the accuracy of the sentence stating that "[o]therwise the matter will be left to dispute settlement tribunals to interpret MFN clauses on a case-by-case basis." The introductory word "otherwise" suggests that only in the absence of explicit language in the relevant treaty dispute settlement tribunals have the power to interpret MFN clauses on a case-by-case basis. In fact, however, any application of a treaty requires the interpretation of this treaty, even if such interpretation appears obvious. Thus, a more nuanced formulation could have been adopted by the Study Group indicating that in the absence of explicit language dispute settlement tribunals enjoy a broader margin of interpretative freedom.

Concerning the topic of the **"Protection of the atmosphere"**, Austria is grateful to the Special Rapporteur Shuinya Murase for his very rich second report which contains five guidelines regarding definitions, scope, basic principles, the common concern of mankind and international cooperation. We also welcome the dialogue the Commission has had with scientists on the protection of the atmosphere, which certainly promoted a better understanding of the complex physical phenomena connected with this topic.

Permit me now to turn to the guidelines provisionally adopted by the Drafting Committee.
We agree that there is a pressing need to address this topic, as it is stated in the preamble of the guidelines.

As to guideline 1 on the use of terms, it is to be asked why the definition of "atmospheric pollution" limits the scope of the guidelines only to transboundary effects of atmospheric pollution. In the atmosphere, every pollution inevitably has transboundary effects. Thus, the qualification of "transboundary" is certainly redundant. It also complicates the matter since using that qualification any assertion of pollution would first require proof of its transboundary effects. For this reason, my delegation favours a deletion of this redundant qualification.

We also question whether it was appropriate to delete, in the same definition contained in guideline 1, "energy" from the factors causing pollution, in view of the fact that the United Nations Law of the Sea Convention, in its Article 1 (1)(4), explicitly refers to energy as a cause of pollution. We don't see the reason for the difference between these two definitions. Although we note that the commentary on this guideline refers to energy among the substances causing atmospheric pollution, for the sake of clarity it would be better to include energy also in the definition of "atmospheric pollution" itself.

Paragraph 4 of guideline 2 on the scope of the guidelines refers to the status of airspace under international law. However, since airspace is under the complete and exclusive sovereignty of the relevant state, its status is governed not only by international, but also by national law. Therefore, it should also be clarified in the guidelines that they do not affect the national legal regulation of the airspace. Accordingly we propose to reformulate this phrase, so that instead of saying that it does not affect the "status of airspace under international law" it would say that it does not affect "the legal status of the airspace". In connection with this paragraph 4 of guideline 2, I would also like to agree with the statement contained in the commentary that the question of the delimitation between airspace and outer space has been under discussion in the Legal Subcommittee of the Outer Space Committee for a long time, and that, therefore, there is no need to discuss it in the present context.