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STATEMENT OF THE CHAIRMAN OF THE INTERNATIONAL LAW COMMISSION, MR. NARINDER SINGH

Part One

Chapters I-III, XII, IV and V: Introductory Chapters; Other decisions and conclusions of the Commission; The Most-Favoured-Nation clause; Protection of the atmosphere.

Mr. Chairman,

Thank you very much for the kind words addressed to the International Law Commission. The United Nations is this year commemorating its seventieth anniversary. It is time for reflection and renewal. On behalf of the Commission, I congratulate you and the other members of the Bureau on your election and wish you every success as you grapple with the challenges posed in paving, anew, the way for the future of the United Nations. Despite the tragedies that surround us in the world, the pain and anguish that are so vivid in the daily lives of so many, international law is endowed with what my erstwhile predecessor, the first Chairman of the Commission, Mr. Manley O. Hudson, speaking in the aftermath of two tragic wars, which wrought great suffering, referred to as the "moral appeal"; and it is perhaps that which ineluctably links us to international law's continuing influence as the language of international relations. Out of the phoenix of those two wars emerged our international organization, the United Nations. Many of us in this room today find it axiomatic that respect for international law is one of the foundations for a peaceful, just, secure and prosperous world for us all. The Commission which I represent today will continue, as it has assiduously done in the past, to assist the General Assembly in its noble task of carrying out studies in the progressive development of international law and its codification, one of the signature achievements of the United Nations in these seventy years.

Mr. Chairman,

I was greatly honoured to chair the recently ended sixty-seventh session of the Commission, whose report is now before you in document **A/70/10.** To facilitate the debate, I intend to follow the tested practice of making several interventions to introduce the respective chapters of the report. Accordingly, I will make three interventions in the course of the debate of the Committee on the report of the Commission.

My statement today will deal with the first cluster of issues, namely the Introductory **Chapters I** to **III** and **Chapter XII "Other decisions and conclusions of the Commission",** as well as the first two substantive chapters, namely **Chapter IV** concerning the **"The Most-Favoured-Nation clause"** and **Chapter V** on the **"Protection of the atmosphere."**

The second statement will deal with **Chapters VI to VIII,** which respectively relate to the topics, **"Identification of customary international law"; "Crimes against humanity"** and **"Subsequent agreements and subsequent practice in relation to the interpretation of treaties".**

The final statement will address the remaining substantive **Chapters IX to XI** covering respectively, the "**Protection of the environment in relation to armed conflicts"; "Immunity of State officials from foreign criminal jurisdiction";** and **"Provisional application of treaties."**

Mr. Chairman,

Chapters I-III and XIV: Introductory Chapters and Other decisions and conclusions of the Commission

This year's session was the penultimate of the present quinquennium. As evident in Chapter II, containing the Summary of work this year, the Commission completed its work on **"The Most-Favoured-Nation clause".** The Commission also made substantive

progress on the topics **"Identification of customary international law**" and "**Subsequent agreements and subsequent practice in relation to the interpretation of treaties"**, such that the completion of the topic as a whole is within the horizon. It also continued its substantive consideration of the topics the **"Protection of the atmosphere;" Protection of the environment in relation to armed conflicts"; "Immunity of State officials from foreign criminal jurisdiction";** and **"Provisional application of treaties.** Moreover, it began and has already made some progress on **"Crimes against humanity**", a topic included in the programme of work last year. It has in turn included the topic, ***"Jus cogens***" in its programme of work, and appointed Mr. Dire Tladi, as Special Rapporteur.

As can be imagined these topics are currently in various stages of development. Accordingly, **Chapter III** of the report draws the attention of governments to specific issues on which their comments would be of particular interest to the Commission. These relate in particular to the requests for information on practice made last year with respect to the topics **"Protection of the atmosphere", "Identification of customary international law"** and **"Crimes against humanity**", as well as this year in respect of "**Subsequent agreements and subsequent practice in relation to the interpretation of treaties"**, "**Protection of the environment in relation to armed conflicts"; "Immunity of State officials from foreign criminal jurisdiction"; "Provisional application of treaties** and ***"Jus cogens".*** I will in due course refer to the specific questions when dealing with the relevant chapters of the report. At this juncture, 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. Let me also recall by way of reminder that last year, the Commission completed the first reading of the draft articles on the **"Protection of Persons in the event of Disasters".** It invited comments and observations of Governments, competent international organizations, as well as the International Committee of the Red Cross and the International Federation of

Red Cross and Red Crescent Societies to be submitted through the Secretary-General by 1 January 2016. The Commission intends to commence the second reading of work on this topic next year.

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Mr. Chairman,

The composition of the Commission changed this year further to the election of Mr. Roman A. Kolodkin to fill the casual vacancy occasioned by the resignation of Mr. Kirill Gevorgian who is now serving on the Bench of the International Court of Justice.

The Commission has continued its traditional exchanges with the Court, as well as its cooperation with other bodies engaged in the progressive development of international law and its codification. In addition to a visit by His Excellency Judge Ronny Abraham, President of the International Court of Justice, who addressed the Commission and briefed it on the recent judicial activities of the Court, Mr. Zeid Ra'ad Al Hussein, the United Nations High Commissioner for Human Rights, in a first visit ever, addressed the Commission on the activities of his Office and some of its concerns in the area of human rights and commented on some of the topics on the programme of work of the Commission, namely "Crimes against humanity"; and "Immunity of State officials from foreign criminal jurisdiction".

The Commission reiterates its commitment to the rule of law in all of its activities and is appreciative that this year the debate on the **rule of law at the national and international levels** has been devoted to **"The role of multilateral treaty processes in promoting and advancing the rule of law".** On this occasion, the Commission wishes in particular to draw attention to its recent body of works which has been submitted for consideration by the Sixth Committee, including: (a) the draft articles on responsibility of States for internationally wrongful acts, 2001; (b) the draft articles on prevention of transboundary harm from hazardous activities, 2001; (c) the draft articles on diplomatic protection, 2006; (d) the draft articles on the law of transboundary aquifers, 2008; (e) the

draft articles on the effects of armed conflicts on treaties, 2011; (f) the Guide to practice on reservations to treaties, 2011; (g) the draft articles on the responsibility of international organizations, 2011; and (h) the draft articles on the expulsion of aliens, last year.

The Commission also considers crucial the unique interaction that it has with the Sixth Committee and with Governments. Pursuant to paragraphs 10 to 13 of General Assembly resolution 69/118 of 10 December 2014, it exchanged views on the feasibility of holding part of its sixty-eighth session in New York based on information provided by the Secretariat regarding estimated costs and relevant administrative, organizational and other factors, including its anticipated workload in the final year of the present quinquennium and came to the conclusion that it would not be feasible for such a session to take place in New York next year. It nevertheless noted that such convening, taking into account the estimated costs and relevant administrative, organizational and other factors, could be anticipated during the first segment of a session either during the first (2017) or second (2018) year of the next quinquennium. Accordingly, it has requested the Secretariat that preparatory work and estimates proceed on the basis that the first segment of the Commission's seventieth session in 2018 would be convened at the United Nations Headquarters in New York. The Commission recommends that next year its session be held in Geneva from 2 May to 10 June and 4 July to 12 August 2016.

As in the past, the Commission is appreciative of the valuable assistance of the Codification Division of the Office of Legal Affairs for the substantive servicing of the Commission over the years and, in particular, the ongoing assistance provided to Special Rapporteurs and the preparation of in-depth research studies, as requested by the Commission, pertaining to aspects of topics presently under consideration. The Commission pays tribute to Mr. George Korontzis, who had acted with high distinction as Secretary of the Commission since 2013, and has retired from the United Nations this year.

Chapter IV: Most-favoured-nation clause

Mr. Chairman,

I shall now turn to the substantive chapters of the report, starting with **Chapter IV**, which relates to the topic the **"Most-favoured-nation clause".** I have already alluded to the fact that the Commission has completed its consideration of this topic at the current session. It will be recalled that the Commission placed it on its programme of work in 2008 and has since 2009 transacted its business in the framework of a Study Group. The Study Group completed its work by submitting at this session its final report.

The report on "The Most-favoured-nation clause", as appearing in **the annex** to the report of the Commission, is divided into five parts. Part I provides the background context, including the origins and purpose of the work of the Study Group. It also offers an analysis of the prior work of the Commission on the 1978 draft articles on the most-favoured-nation clause, and of developments subsequent to the completion of the 1978 draft articles, in particular in the area of investment. It also offers an analysis of MFN provisions in other bodies, such as UNCTAD and the OECD. From the beginning, the general orientation had been not to seek a revision of the 1978 draft articles or to prepare a new set of draft articles.

Part II of the report addresses the contemporary relevance of MFN clauses and issues concerning their interpretation, including in the context of the GATT and the WTO, other trade agreements, and in investment treaties. Further, it considers the types of MFN provisions in bilateral investment agreements (BITs) and highlights the interpretative issues that have arisen in relation to the MFN clauses in BITs. On balance, the interpretative issues have predominantly related to three aspects, namely: (a) defining the beneficiary of an MFN clause; (b) defining the necessary treatment; and (c) defining the scope of the MFN clause.

Part III in turn analyses: (a) the policy considerations in investment relating to the interpretation of investment agreements, taking into account questions of asymmetry in BIT negotiations and the specificity of each BIT; (b) the implications of investment

dispute settlement arbitration as “mixed arbitration”; and (c) the contemporary relevance of the 1978 draft articles to the interpretation of MFN provisions.

Part IV constitutes the core of the substantive contribution undertaken on this topic. It seeks to provide some guidance on the interpretation of MFN clauses. It sets out a framework for the proper application of the principles of treaty interpretation to MFN clauses and surveys the different approaches in the case-law to the interpretation of MFN provisions in investment agreements. It addresses in particular three central questions: (a) whether MFN provisions in principle are capable of applying to the dispute settlement provisions of BITs; (b) whether the jurisdiction of a tribunal is affected by conditions in BITs regarding which dispute settlement provisions may be invoked by investors; and (c) what factors are relevant in the interpretative process in determining whether an MFN provision in a BIT applies to the conditions for invoking dispute settlement.

This Part also examines the various ways in which States have reacted in their treaty practice to the *Maffezini* decision, which was the first to address the question whether an MFN provision is capable of applying to the dispute settlement provisions of a BIT. The practice as examined shows at least three trends. There are instances in which it is now specifically stated that the MFN clause does not apply to dispute resolution provisions. Other situations specifically state that the MFN clause does apply to dispute resolution provisions. In a third scenario, there is specific enumeration of the fields to which the MFN clause applies.

The last part of the report contains a summary of general conclusions, which the Commission has adopted as its own. In the main, it is important to note that MFN clauses have remained unchanged in character from the time the 1978 draft articles were concluded. The core provisions of the 1978 draft articles continue to be the basis for the interpretation and application of MFN clauses today. However, these draft articles do not provide answers to all the interpretative issues that can arise with MFN clauses.

In this connection, the 1969 Vienna Convention of the Law of Treaties is

important and relevant, as a point of departure, in the interpretation of investment treaties. The interpretation of MFN clauses is to be undertaken on the basis of the rules for the interpretation of treaties as set out in therein. It bears noting that the central interpretative issue in respect of the MFN clauses relates to the scope of the clause and the application of the *ejusdem generis* principle. In other words, the scope and nature of the benefit that can be obtained under an MFN provision depends on the interpretation of the MFN provision itself.

The matter remains one of treaty interpretation, even though the application of MFN clauses to dispute settlement provisions in investment treaty arbitration, rather than limiting them to substantive obligations, as first decided in the *Maffezini* decision, has brought a new dimension to the thinking about MFN provisions, and perhaps consequences that had not been foreseen by parties when they negotiated their investment agreements. Indeed, whether MFN clauses are to encompass dispute settlement provisions is ultimately up to the States that negotiate such clauses. Explicit language can ensure that an MFN provision does or does not apply to dispute settlement provisions. Otherwise the matter will be left to dispute settlement tribunals to interpret MFN clauses on a case-by-case basis.

The Commission wishes to highlight that the interpretative techniques reviewed in the report are designed to assist in the interpretation and application of MFN provisions. Accordingly, the Commission commends the final report to the attention of the General Assembly, and encourages its widest possible dissemination.

This work, as reflected in the Annex, no doubt, constitutes an outstanding contribution by the Study Group. The Commission paid tribute to the Study Group and its Chairman, Mr. Donald M. McRae for the results achieved. It also recalled with gratitude, the contribution of Mr. A. Rohan Perera, who served as co-chairman of the Study Group, from 2009 to 2011, as well as of Mr. Mathias Forteau, who served as chairman, in the absence of Mr. McRae during the 2013 and 2014 sessions.

This concludes my introduction of chapter IV of the report.

Mr. Chairman,

The second and last substantive chapter that I will address today is chapter V, dealing with the topic, **"Protection of the Atmosphere".** This topic was included in the Commission's programme of work in 2013 and this year the Commission had before it the second report of the Special Rapporteur. This report provided a further analysis of the draft guidelines submitted by the Special Rapporteur in his first report last year. The Commission was consequently presented with a set of revised draft guidelines 1 to 3, respectively, relating to the (a) use of terms; (b) the scope of the draft guidelines; and (c) the common concern of humankind. Additionally, two draft guidelines, 4 and 5, were submitted on: (a) the general obligation of States to protect the atmosphere; and (b) international cooperation.

The debate in the Commission led to the referral to the Drafting Committee of draft guidelines 1, 2, 3 and 5, as contained in the Special Rapporteur's second report. The referral was made with the understanding that draft guideline 3, on the common concern of humankind, would be considered in the context of a possible preamble. At the request of the Special Rapporteur, the referral of draft guideline 4 on the general obligation of States to protect the environment was deferred until next year. It is the wish of the Special Rapporteur to undertake a further analysis of the matter in the light of the debate in plenary.

Upon consideration of the report of the Drafting Committee, the Commission provisionally adopted four preambular paragraphs, draft guideline 1, on use of terms, draft guideline 2, on scope, and draft guideline 5, on international cooperation, together with commentaries thereto. You thus have before you in the report for this year the text of these draft guidelines, together with preambular paragraphs, provisionally adopted so far by the Commission, together with their commentaries. These are reflected in **paragraphs 53 and 54** of the report.

The Commission recognised that a proper consideration of the topic requires an appreciation of the science concerning the atmosphere and its interaction with the Earth's and surrounding ecosystems. The atmosphere is the Earth's largest single and one of the most important natural resources. Accordingly, a useful dialogue with scientists was organized by the Special Rapporteur during which an informal exchange of views took place, which greatly facilitated the work of the Commission. It expected that next year, another dialogue will be organized.

It bears also recalling that in addressing this topic, the Commission seeks, through the progressive development of international law and its codification, to provide guidelines that may assist the international community as it addresses critical questions relating to transboundary and global protection of the atmosphere. In accordance with the 2013 understanding reached concerning the inclusion of the topic in the programme of work, the Commission does not desire to interfere with relevant political negotiations, including those on long-range transboundary air pollution, ozone depletion and climate change, seek to "fill" gaps in treaty regimes nor to impose on current treaty regimes legal rules or legal principles not already contained therein. The preamble reflects the objective of the understanding while recognising that the protection of the atmosphere from atmospheric pollution and atmospheric degradation is a pressing concern of the international community as a whole. In doing so, the focus is also intended to capture the relevance of the functional aspect of the atmosphere, as a medium, through which transport and dispersion of polluting and degrading substances, occurs.

The atmosphere itself is defined in **draft guideline 1,** on the **Use of terms**, which offers, for the time being, definitions of three essential terms for the purposes of the draft guidelines, the other two being **"atmospheric pollution**" and "**atmospheric degradation**". Although no definition has been given of the "atmosphere" in the relevant international instruments, the Commission considered it necessary to provide a working definition for the present draft guidelines. The definition of "atmosphere" as the envelope of gases surrounding the Earth is inspired by that offered in 2014 by Working group III of

the Intergovernmental Panel on Climate Change (IPCC) in the 5th Assessment report. The definition, which corresponds to the scientific definition, focuses on the "physical" dimensions of the atmosphere.

In providing the definitions of **"atmospheric pollution"** and **"atmospheric degradation**", an effort has been made to address transboundary air pollution, as well as global atmospheric problems. The focus in both considerations is the activities of humans, that is to say "anthropogenic" atmospheric pollution and atmospheric degradation. The draft guidelines are not concerned with causes of natural origins such as volcanic eruptions and meteorite collisions. According to the Intergovermental Panel on Climate Change, the science indicates with 95 percent certainty that human activity is the dominant cause of observed warming since the mid-20th century. The focus on human activity, whether direct or indirect, is thus a deliberate one; the present guidelines seek to provide guidance to States and the international community.

Having defined "atmospheric pollution" and "atmospheric degradation", the formulation of **draft guideline 2,** on the scope of the draft guidelines, is accordingly simplified to deal with the protection of the atmosphere from atmospheric pollution and atmospheric degradation. The alternative formulations appearing in brackets signify that there is still an open question whether the draft guidelines should be referred to as guiding principles. This matter will be subject of further consideration.

Buttressing the fourth preambular paragraph, paragraphs 2 and 3 of the draft guideline, reflect the 2013 Understanding.

Paragraph 4 is a saving clause, providing that the draft guidelines do not affect the status of airspace under international law, nor are the guidelines intended to address questions concerning outer space, including its delimitation.

Draft guideline 5 deals with international cooperation, which the Commission considers to be at the core of the whole set of draft guidelines. In the main, States have

the obligation to cooperate, as appropriate, with each other and with relevant international organizations, in the protection of the atmosphere from atmospheric pollution and atmospheric degradation. The reference to “as appropriate” is intended to denote a certain degree of flexibility and latitude for States in carrying out the obligation to cooperate depending on the nature and subject matter required for cooperation. Such cooperation may take a variety of forms, and includes the sharing of scientific knowledge, exchange of information and joint monitoring. The provision as whole seeks to accentuate the fact that when it comes to the protection of the atmosphere safeguarding of the common interests of the international community as a whole informs international cooperation.

As stated last year, the further development of this topic would require information on State practice from Governments. Accordingly, in chapter III, the Commission has reiterated its request for the provision of relevant information on domestic legislation and the judicial decisions of the domestic courts. Any additional information received would be appreciated preferably by 31 January 2016.

This concludes my introduction of chapter V of the report, as well as on the first cluster of issues.

Thank you very much for your kind attention.