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CHECK AGAINST DELIVERY

Statement by:

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Ministry of Foreign Affairs

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Report of the International Law Commission on the Work of its Sixty-Seventh Session

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Mr. Chairman,

Israel would like to first take this opportunity to express its appreciation to the ILC and its ongoing work. We believe the dialogue between the Commission and the Sixth Committee is of great value and we once again welcome the opportunity to share our observations relating to the ILC report.

With respect to the topic of the **Most Favored Nation Clause**, Israel appreciates the comprehensive and thorough work undertaken on this issue by the study group established at the sixty first session of the Commission. In light of the complexities of the MFN clause in International Investment Agreements, the study group's final report will contribute greatly in providing guidance to treaty negotiators, policy makers and practitioners in the field of investment law.

Israel would like to reiterate the significance that it attributes to the principle of consent between parties negotiating investment agreements, including with regard to the question of the scope of MFN clauses in International Investment Agreements, as well as matters pertaining to consent to exclude certain provisions from the application of the MFN clause. In addition, Israel does not favor an overly broad interpretation of the MFN clause beyond what was intended between the parties as agreed upon in the agreement.

Israel does not consider MFN clauses in international investment agreements to apply to procedural requirements, including dispute settlement provisions and definitions, unless the parties to the agreement have explicitly agreed that they do so. Hence, we consider that MFN clauses are normally barred from adding a dispute settlement mechanism to a treaty which does not contain one, or from allowing the use of specific dispute settlement provisions from another International Investment Agreement. In our view, MFN clauses may not, as a rule, expand the jurisdiction of a dispute settlement tribunal over matters beyond those explicitly set in the basic treaty, especially where the jurisdiction has been specifically limited by means of inclusion or exclusion of specific matters covered by the basic treaty. In addition, Israel maintains that MFN articles are normally excluded from allowing claimants to bypass procedural requirements.

With regards to the *expression unius est exclusion alterius* principle, Israel holds that, even if applicable, this principle does not include the application of an MFN clause to procedural matters unless expressly provided so by the parties.

Israel shares the study group's conclusion as adopted by the Commission regarding the relevance of the 1969 Vienna Convention on the Law of Treaties, and believes it should serve as a point of departure for the interpretation of treaties in general, including in particular investment treaties and MFN clauses.

Lastly, Israel would like once again to emphasize its appreciation of the study group and its Chairman, Mr. Donald M. McRae for their substantive work. We would also like to thank Mr. A.Rohan Perera who served as co-chairman of the study group between 2009-2011, as well as Mr. Mathias Forteau, who served as chairman in the absence of Mr. McRae during the 2013 and 2014 sessions,.

Mr. Chairman,

With regards to the topic of "**Protection of the atmosphere**", Israel commends the Special Rapporteur, Mr. Shinya Murase, for his valuable work on the second report which builds on the first report; provides further analysis; and suggests both revised and new draft guidelines.

Israel believes that the protection of the atmosphere is a matter of great importance. With respect to the draft guidelines and commentary, Israel largely supports the work of the committee. We welcome the committee's replacement of the phrase "common concern of humankind" in the preamble with a factual description. This is because we believe the previous expression is vague and it would be preferable to focus on a more objective description.

Regarding guideline 5, which refers to the obligation of states to cooperate with one another and with international organizations for the protection of the atmosphere, we would like to stress the importance of respecting and safeguarding the sovereignty of states *inter alia*, in the context of global challenges that must be faced through joint efforts, such as the protection of the

atmosphere. We recognize and appreciate the term "as appropriate" that is used in guideline 5, which is intended, according to the commentary, to denote the flexibility that states enjoy with regard to this obligation. However, it is our view that the element of flexibility mentioned in the commentary could be strengthened in the text of the draft guidelines itself.

Mr. Chair,

At the outset, we would like to note the International Law Commission's decision to include the source-related topic of ***jus cogens*** in its long-term program of work and we commend the appointment of the Special Rapporteur, Mr. Dire Tladi, for this topic.

The concept of international *jus cogens* norms enjoys widespread acceptance amongst the international community and is considered a well-established doctrine in the academic world. That said, the very nature of the concept of *jus cogens*, including its very scope, remains a highly contentious issue.

While Israel shares Mr. Tladi's perspective that the 1969 Vienna Convention on the Law of Treaties conceptualized *jus cogens* as a norm of positive law "accepted and recognized by the international community of States as a whole", Israel wishes to emphasize that a norm should undergo a thorough process in order to successfully be elevated to the status of *jus cogen*s. Accordingly, identification of the content of the normative category of *jus cogens* is an intricate task that should be approached with caution.

Three core issues arise when dealing with the subject of *jus cogen*s. Firstly, the nature of the process by which it is determined that a norm has acquired *jus cogens* character; secondly, the identification of the specific norms that have reached *jus cogens* status; and thirdly, the legal consequences of *jus cogens* status.

Israel would like to call attention to a tendency that can be seen in some academic circles to rush too quickly to awarding a norm with *jus cogens* status even though it has failed to meet that standard in practice or if that status is contested. Thus the Commission should do its utmost to avoid an outcome that will create an over-extended list of *jus cogens* norms.

International commitment to the legal consequences of norms that have reached *jus cogens* status, can only be achieved if a conservative approach is adopted. If the Commission moves forward with the codification project, Israel urges the Commission to pursue any future codification effort of *jus cogens* norms, if at all, with great caution in order to preserve and strengthen the binding nature of *jus cogens* norms.

An expansive list of international law norms deemed as *jus cogens* could become counterproductive, since the concept of *jus cogens* may no longer represent the general will and vision of the international community due to the probable controversy that may arise in regard to the emerging *jus cogens* norms.

The Commission requested information relating to the use of *the principle of jus cogens* in the national level. Israel wishes to inform the Commission that the concept of *jus cogens* has been discussed in Israeli domestic judicial proceedings. The Israeli Supreme Court recognized the existence of *jus cogens* norms in 1962 during the Eichmann Trial, even before the formulation of the Vienna Convention, in relation to the prohibition of genocide and crimes against humanity. We also wish to note that in 1999 the Israeli Supreme Court recognized torture as a *jus cogens* norm.

In conclusion, the Government of the State of Israel questions whether the codification of *jus cogens* norms at this juncture is appropriate and, at the very least, would urge the Commission to proceed with great caution.

Thank you Mr. Chairman.