COURTESY TRANSLATION

UNITED NATIONS GENERAL ASSEMBLY 70th SESSION

SIXTH COMMISSION

INTERNATIONAL LAW COMMISSION REPORT

PART I: CHAPTERS I-III, IV (Most-Favoured-Nation clause), V (Protection of the atmosphere) y XII (Other decisions).

Statement by the Legal Expert of the Permanent Mission of Spain

on behalf of Professor José Martín y Pérez de Nanclares

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New York, 2nd November 2015

(Provisional version, subject to modifications during the presentation)

Mr. President,

Allow me to start by expressing how truly honoured I am to take the floor before this Sixth Commission one more year. Allow me also to express my appreciation of the outstanding work that you and the members of the Bureau have done and of your efforts to make this session a success.

My delegation wishes as well to congratulate the International Law Commission for its major efforts during this 67th session to move forward in the various and difficult issues included in its agenda.

Chapters I to III and XII.

Mr. President,

The Spanish delegation would like to welcome and congratulate Mr. Roman Kolodkin for his appointment as new member of the Commission.

We equally welcome the decision to include in its programme of work the issue concerning '*Ius cogens*', which undeniably constitutes one of the great categories of International Law. Although of enormous relevance, the task does not seem easy; we thus wish success to the Special Rapporteur, Mr. Dire Tladi. At the same time we would like to reiterate what was pointed out by my delegation last year in this same forum: the need to preserve the open and flexible character of the *ius cogens* rules' making process, which could be questioned if a list of those rules was drawn.

In 2014 this delegation showed its concern upon a second aspect we do not want to leave unmentioned today. This relates to the Commission's work and the excessive number of topics it is currently addressing. The difficulty of a great number of those topics certainly does not ease the situation.

Addressing another issue, we are convinced that the Commission's decision to not hold part of its 68th period of sessions in New York is correct.

Furthermore, we would like to publicly recognize the work of Mr. George Korontzis, the International Law Commission's Secretary until mid-2015.We would also like to show our gratitude to the Secretariat of the Commission for the substantial improvement of the webpage, easier to manage and duly updated. This being said, we insist that the principle of equality of official languages must be guaranteed.

Chapter IV: Most-Favoured-Nation Clause.

Mr. President,

Regarding chapter IV, and the Most-Favoured-Nation clause, the delegation of Spain would firstly like to congratulate the members of the Study Group (constituted in 2009) for addressing the topic, and especially the Sirs Donald McRae, Rohan Perera and Mathias Forteau, who have presided over it, for the Final Report submitted to the Commission.

The Report is undoubtedly great work and it is destined to be a reference for all those who, either from the Academia or the judicial and arbitral practice, will approach the question of the scope of the Most-Favoured-Nation Clause within bilateral investment treaties. Indeed, the Report presents and analyses with rigour and thoroughness the judicial and arbitral practices concerning the subject.

We are not sure, however, whether its conclusions are a great progress to the state of the matter. Allow me to say, with all due respect, that recognizing that the Report does not influence the Draft Articles adopted by International Law Commission in 1978, or that the Most-Favoured-Nation clauses are to be interpreted according to the rules on interpretation of treaties codified by the Vienna Convention on the Law of Treaties, goes without saying. The same applies to the statement that the variety of formulations for this type of clause and for the treaties it is inserted in, do not permit a single interpretation. In the same vein, the considerations regarding the principle of contemporaneity of treaties or the principle of *inclusio unius* or even the light cast by the preparatory works do not show any singularity that would lead to consider them as a contribution or that justifies their inclusion in the Report.

The Report will be of use to the future negotiators of this type of clause, since it unveils the problems its interpretation is causing and allows for measures to be taken to prevent them. It will be of use to arbitral tribunals too, given that they will be able to rely on a document that shows how other arbitral tribunals have dealt with the issue. But this kind of Report does not seem to fit within the functions of the International Law Commission, namely to contribute to the progressive development of international law and to the codification of international law, in the terms set forth in article 15 of its Statute.

Chapter V: Protection of the atmosphere.

Mr. President,

In what concerns chapter V, on the protection of the atmosphere, the Spanish delegation would like, firstly, to congratulate Mr. Shinya Murase, for the presentation of the second report on the subject, where he has revised some of the draft guidelines of his 2014 Report, while addressing as well new topics.

Up to this time, the International Law Commission has provisionally adopted three draft guidelines (1, 2 and 5), four preamble paragraphs and its corresponding commentaries.

From the number and object of the texts provisionally adopted, we can conclude that the International Law Commission's works are still at a primary level. However, this delegation would like to point to certain issues.

Regarding the *preamble*, my delegation, which expressed last year some doubts towards the expression "common concern of humankind", welcomes the use of the expression "concern of the International community as a whole", clearly more sound in International Law.

My delegation currently does not have significant objections to any of the four paragraphs of the preamble provisionally adopted by the Commission, although the wording of paragraphs 2 and 4 is improvable. Concerning paragraph 2 ("Bearing in mind that the transport and dispersion of polluting and degrading substances occur within the atmosphere") and stating the obvious, that transport and dispersion of polluting and degrading substances do not only occur within the atmosphere, it would be advisable to think of an alternative wording that reflects clearly what is meant, that is: that in the atmosphere these phenomena occur as well. Regarding paragraph 4, which *in fine* states that it "does not seek to [...] impose on current treaty regimes legal rules or legal principles not already contained therein", we wonder whether replacing "to impose" with "to complete" is more suitable.

Turning to *draft guideline 1*, concerning definitions, the approach adopted for the definitions "air pollution" and "atmospheric degradation" (paragraphs b) and c)), focusing on human activities, is to be welcomed, since it is in accordance with the purpose of this initiative.

We question however the existence of the transboundary element in the concept of "air pollution" (paragraph b)); this transboundary element does not show in the concept of "atmospheric degradation" (paragraph c)). Given the indivisible nature of the atmosphere, this approach seems, in principle, more suitable. Likewise, it cannot be taken for granted that reference to "substances" includes energy, as the International Law Commission does. Both the 1979 Convention on Long-Range Transboundary Air Pollution, and the 1982 United Nations Convention on the Law of the Sea, have included both the introduction of substances and the introduction of energy in the atmosphere as part of the definition of pollution, leading us to think that excluding "energy" from the definition of the Draft guidelines we are now considering is intentional.

Paragraphs 2 and 3 of the *draft guideline 2* reflect the agreement reached by the Commission when it decided to include this topic in its programme of work. The commentary to paragraph 4 distinguishes between atmosphere and air space (epigraph 7); this delegation suggests to include that air space is a legal term, while air space is a purely physical notion.

Thank you very much, Mr. President.