



UNITED STATES MISSION TO THE UNITED NATIONS

799 UNITED NATIONS PLAZA
NEW YORK, N. Y. 10017-3505

**Statement by the United States of America
70th General Assembly Sixth Committee
Agenda Item 83 – November 2015
Report of the International Law Commission
on the Work of its 67th Session**

November 3, 2015

Summary of the Work of the Commission, Most-Favored-Nation Clause, Protection of the Atmosphere, Other Decisions and Conclusions of the Commission

Mr. Chairman, I would like to thank the chairman of the Commission, Mr. Narinder Singh, for his introduction of the Commission's report. I would also like to congratulate the Commission for a productive 67th session and for its extensive work, which has again provided this committee with valuable information and analysis on important topics of international law.

Mr. Chairman, I appreciate the opportunity to comment on the topics that are currently before the committee and will in these remarks address the topics of "the Most-Favored-Nation Clause" and "Protection of the Atmosphere," as well as provide a few comments on chapter 12 of the Commission's report regarding other decisions and conclusions.

Most-Favored-Nation Clause

With respect to the topic of the Most-Favored-Nation Clause, Mr. Chairman, we commend the Study Group, and particularly Professor Donald McRae, for completing its detailed and thorough final report on most-favored-nation clauses. We appreciate the extensive research and analysis reflected in the report, and we believe the report can serve as a useful resource for governments and practitioners who have an interest in this information.

We support the Study Group's decision not to prepare new draft articles or to revise the 1978 draft articles, and instead to include a summary of conclusions in the final report, which were adopted by the Commission. We also agree with the conclusion that the interpretation of most-favored-nation clauses is to be undertaken on the basis of the rules for the interpretation of treaties as set out in the Vienna Convention on the Law of Treaties. Each MFN clause is the product of a specific treaty negotiation and can differ considerably in its language, structure, and scope from MFN clauses that appear in other treaties. Each MFN clause is also dependent on

other provisions in the specific treaty in which it is located and thus, while there is value in generally studying such clauses, they resist a uniform meaning.

Protection of the Atmosphere

With respect to the topic of “Protection of the Atmosphere,” Mr. Chairman, we continue to be concerned about the direction it appears to be taking.

Our original concerns, which have only intensified as this topic has progressed, run along two main lines.

First, we did not believe that the topic was a useful one for the Commission to address. Various long-standing instruments already provide general guidance to States in their development, refinement, and implementation of treaty regimes, and, in many instances, very specific guidance tailored to discrete problems relating to atmospheric protection. As such, we were concerned that any exercise to extract broad legal rules from environmental agreements concluded in particularized areas would not be feasible and might potentially undermine carefully negotiated differences among regimes.

Second, we believed that such an exercise, and the topic more generally, was likely to complicate rather than facilitate ongoing and future negotiations and thus might inhibit State progress in the environmental area.

Accordingly, we opposed inclusion of this topic on the Commission’s agenda. Our concerns were somewhat allayed when the Commission adopted an understanding in 2013, which we hoped might prevent the work from straying into areas where it could do affirmative harm. But we have been disappointed. Both the first and second reports evinced a desire to recharacterize the understanding and to take an expansive view of the topic. And while we had concerns with many aspects of the draft guidelines provisionally adopted by the Commission this summer, the most serious concerns draft guideline 5, paragraph 1, which purports to describe States’ obligations to cooperate with respect to the protection of the atmosphere. We do not believe this provision reflects customary international law and we believe it should be reconsidered.

Looking forward, we are particularly concerned by the Special Rapporteur’s proposed long-term plan of work. If it were to be followed, the work would continue to stray outside the scope of the understanding and into unproductive and even counterproductive areas. For these reasons, we call upon the Commission to suspend or discontinue its work on this topic.

Other decisions and conclusions of the Commission (Jus Cogens)

With respect to other decisions and conclusions of the Commission, Mr. Chairman, we note the addition of the topic of *jus cogens* to the Commission’s active agenda. We are pleased with the selection of Dire Tladi as the Special Rapporteur for this topic, and we have high hopes that Prof. Tladi’s first report will treat the topic with the care and precision for which he is deservedly well known.

We urge the Commission, especially given the relative paucity of case law on this topic, to focus clearly and carefully on treaty practice, notably under the rules reflected in the Vienna Convention on the Law of Treaties, and on other State practice that illuminates the nature and content of *jus cogens*, the criteria for its formation, and the consequences flowing therefrom. Only research and analysis that is thoroughly grounded in the views that States have expressed about *jus cogens* is likely to add substantial value to the existing voluminous academic commentary about this topic. In that light, we appreciate the Commission's request for States to provide information on these issues, and we urge all States to respond to the Commission's request.

Thank you, Mr. Chairman.