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(translation)

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At the Sixth Committee of the 73rd Session of the UN General Assembly

On Agenda Item 82

Report of the International Law Commission on the work of its 70th session

Cluster II: Chapters VI, VII and VIII &

Cluster III: Chapters IX, X and XI

New York, 26 October 2018

Mr. Chairperson,

First of all, I would like to draw the Committee's attention to the fact that in the intervention made yesterday, the representative of an observer made several references to the so-called "Award" of the South China Sea Arbitration. China would like to register its firm objection to this.

In relation to the so-called South China Sea Arbitration, the Arbitral Tribunal manifestly has no jurisdiction. The "Award" made *ultra vires* is obviously in error in the ascertainment of facts and application of law. The said "Award" has no legality whatsoever and constitutes a reckless disruption of rule of law at the international level. Obviously it is highly inappropriate to cite such an unjust, unlawful and invalid "Award" in the serious discussions at this Committee.

Mr. Chairperson,

On the topic **"Protection of the atmosphere"**, the Chinese delegation noted that a draft preamble and 12 draft guidelines, together with commentaries thereto, had been adopted on first reading. Protecting the atmosphere, as a current and common issue faced by humankind, involves political, legal and scientific aspects and therefore, is highly complex and sensitive. China wishes to remind the Commission once again, that, in its study of the topic, it is necessary to follow the four-point Understanding reached in 2013, use general international practice and existing law as basis, and fully respect the

efforts of the international community under existing mechanisms and the outcomes of relevant political and legal negotiation processes. China supports the reaffirmation in the present draft guidelines of such basic principles of international law as those on international cooperation and the peaceful settlement of disputes. However, we beg to differ on the specific provisions proposed in the draft guidelines. For example, as regards draft guideline 3, China believes that to date, no clear and specific rules of international law have emerged in the field of the Protection of the atmosphere. In particular, explicit legal obligations placed on States to protect the atmosphere have yet to materialize, and the relevant practice and rules are still being developed. Draft guideline 4 copied the rule cited in certain treaties and cases regarding environmental impact assessment required for activities that may have significant transboundary impact, and directly applied it to the protection of the atmosphere. However, this rule has its specific context and scope of application in the relevant treaties and cases and therefore, one can hardly claim that it has become a universally agreed principle of international law for the protection of the atmosphere. Paragraph 3 of draft guideline 9, regarding special national circumstances, brought the concept of countries in special situations as defined in the context of climate change into the discourse on the protection of the atmosphere. We don't see sufficient justification for doing so.

Mr. Chairperson,

With regard to the topic **"Provisional application of treaties"**, the Chinese

delegation noted that the Commission had adopted on first reading a set of 12 draft guidelines, with commentaries thereto. We are of the view that the scope of legally binding obligations on the parties concerned created by the provisional application should be defined cautiously, with due respect for the genuine intentions of those parties. The conditions and procedures of the provisional application agreed upon by the parties should be interpreted rigorously, to avoid undue expansion of the scope of obligations placed upon the parties. China suggests that the relevant commentaries clarify this matter. Regarding draft guideline 7 "Reservations" and draft guideline 9 "Termination and suspension of provisional application", it seems no State would need such provisions in reality, therefore, we suggest that the Commission consider the practical value of drafting these two guidelines.

Mr. Chairperson,

With regard to the topic **"Peremptory norms of general international law (*jus cogens*)"**, the Chinese delegation is of the view that given the unique importance of *jus cogens* as it is different from the norms of general international law, the Commission should be extremely cautious in its consideration of this topic. The determination of the elements, criteria and consequences of *jus cogens* must be based on the relevant provisions of the Vienna Convention on the Law of Treaties, and be supported by adequate practice at the State level. The focus should be on codifying *lex lata* rather than developing new laws. Regarding the draft conclusions proposed by the Special Rapporteur in his third report, China would like to emphasize the

following two points:

First, draft conclusion 17 states that binding resolutions of the Security Council of the United Nations do not establish binding obligations if they conflict with *jus cogens*. China does not agree with this conclusion. We have noted that the Commission has not fully discussed this yet, and therefore, will follow closely its future discussions. The Security Council is at the center of the UN collective security system established after World War II. The resolutions of the Security Council are adopted in accordance with the provisions of the UN Charter and must follow strict procedural requirements and stay in line with the purposes and principles of the UN Charter. When the content and scope of *jus cogens* are still far from clear, attempts to invoke *jus cogens* to judge the validity of the Security Council resolutions will very likely result in situations where *jus cogens* is used as an excuse to evade the implementation of Security Council resolutions or as a challenge to the authority of Security Council resolutions, thus undermining the UN collective security system. Therefore, China proposes that the draft conclusions on the topic refrain from delving into this issue.

Second, regarding the categorization in draft conclusion 23 of "any offence prohibited by a peremptory norm of general international law (*jus cogens*)" as the kind to which immunity *ratione materiae* shall not apply, in the absence of any clarity on either the content and scope of *jus cogens* itself or the concept of "any offence prohibited by *jus cogens*", this provision was very controversial within the Commission. In view of this, the Special

Rapporteur proposed that draft conclusions 22 and 23 be replaced with a single clause, which would read: "[t]he present draft conclusions are without prejudice to the consequences of specific/individual/particular peremptory norms of general international law (*jus cogens*)". China supports the deletion of draft conclusion 23 on one hand and on the other, looks forward to the further clarification of the specific meaning of the new draft clause. The International Court of Justice has repeatedly emphasized in its judgements that immunities are procedural rules. In its 2006 judgement on jurisdiction concerning the case of "Armed Activities on the Territory of the Congo", the ICJ specifically pointed out that *jus cogens* and jurisdiction are two different matters. Therefore, *jus cogens* as a substantive rule should not prejudice the rule on immunity of officials.

Last but not least, China wishes to raise a procedural issue regarding the consideration of this topic. The current practice of the Commission is that the draft conclusions on this topic would not be submitted to the plenary for review after their adoption by the Drafting Committee, nor would they be included in the Commission' s annual report on its work. Rather, all the draft conclusions, with commentaries thereto, would be submitted in one go to the Sixth Committee of the UN General Assembly following first reading. This arrangement is different from the procedure the Commission follows in its consideration of most of the other topics. For a topic as important as *jus cogens* in particular, this practice makes it difficult for Member States to fully express their views. We suggest that the Commission pay attention to this issue and find a proper solution.

Mr. Chairperson,

Since I will not be here to participate in the discussions next week, I'd like to present China's views on Cluster III as well.

On the topic of **"Protection of the environment in relation to armed conflicts"**, the Chinese delegation has taken note of the Commission's provisional adoption, at its 70th session, of nine draft principles, with commentaries thereto. It is our long-standing position that international and non-international armed conflicts are different in nature and that rules of international law that apply to international armed conflicts, unless supported by State practice, cannot be copy-pasted to non-international armed conflicts. But the inclination to do just that remains present in the draft principles and commentaries thereto that are before us. We propose that the Commission look deeper into this matter.

Mr Chairperson,

On the topic of **"Succession of States in respect of State responsibilities"**, China believes that the second report submitted by the Special Rapporteur goes some way towards facilitating the understanding of this matter among States. Having studied the content of the report and in light of the dynamics of the Commission's discussions, we wish to repeat what we have stated in the past, that is, there is a paucity of State practice on State succession in

respect of State responsibilities and what little State practice that is available is specific to complex political and historical contexts that vary from State to State, all of which poses a real challenge to any attempt to codify a general rule. We encourage the Commission to consider whether it is necessary to continue the work on this topic or it is more advisable to formulate some essential draft guidelines and leave it at that.

Mr Chairperson,

On the topic of **"Immunity of State officials from foreign criminal immunity"**, we wish to remind the Commission that during last year's session of the Sixth Committee, many Member States voiced their objections to the provision on the non-applicability of immunity *ratione materiae* under draft article 7. We encourage the Commission to take these views seriously and re-examine draft article 7 and the commentary thereto. At this year's session, the Commission held a preliminary discussion on the Special Rapporteur's sixth report, which is devoted to addressing procedural aspects of immunity. On that report, we would like to make the following comments:

On the question of at what point the forum State should start considering the immunity of foreign officials, the report seems to favour the view that if the forum State simply initiates an investigation without taking binding measures against a foreign official, imposing obligations on him or her or impeding the proper performance of his or her functions, it would have no

immunity implications and the issue of immunity does not come into the equation at this stage. China is of the view that immunity of State officials is not only required to safeguard the performance of their functions, but also arises from the principle of "*par in parem non habet imperium*" ("*an equal has no power over an equal*"), which is a basic principle of international law, and as such, is a mark of respect for State sovereignty. In light of this, as and when the forum State initiates legal proceedings against an act of a foreign official in performance of his or her functions, even if these proceedings have no binding force, impose no obligations or have no impact on the performance of his or her functions, they still have the potential to violate the immunity of the official and, by extension, to infringe on the sovereignty of the State of the official. Therefore, in situations like this, the issue of immunity should rightfully be taken into account.

As to which authority in the forum State has the right to decide to either grant or reject immunity, China is of the view that for cases that have entered into the judicial process, the court does play an important part in the final decision of granting or rejecting immunity. However, given the diversity of the political and legal systems of different States and, in particular, the fact that immunity concerns State-to-State relations and foreign affairs, the executive branch of a fair number of States tends to have a considerable voice, sometimes a decisive one, in determining whether to grant immunity. That is why China is not in favour of establishing a set of uniform criteria in this regard. More importantly, whether a State respects the immunity of foreign officials reflects the way that State approaches its

international rights and obligations as a whole. As for which authority in the State has the competence to make a final decision on immunity, this is an internal matter of the State, outside the purview of international law. For these reasons, China believes the Commission should refrain from setting any rules for this matter.

On the question of procedural safeguards in respect of immunity of officials, we have been informed that it will be treated by the Special Rapporteur in the seventh report. We think procedural safeguards are vital for protecting the immunity of officials from infringement. In our view, procedural safeguards in this context refer to those that are directly linked with immunity, the purpose of which is to prevent abuse of litigation against officials by putting adequate, effective procedural safeguards in place. The procedural safeguards that aim to protect the suspects or the legitimate rights of the accused in criminal cases are of no direct relevance to this topic. It is also worth stressing that no procedural safeguards, however perfect they are, can make up for the flaw in the provision under draft article 7 on exceptions to immunity *ratione materiae*. The only way to redress this flaw is to reexamine this draft article and come up with the right conclusion supported by general State practice and *opinio juris*.

Thank you, Mr. Chairperson.