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**Statement ILC Report 2018 (2nd Cluster)**

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**Mr. Chairman,**

I would like to thank the Chairman of the ILC for his presentation of the second part of the ILC Report.

In my intervention today, which will be my last before this Committee for this session, I will address three topics: Protection of the Atmosphere, Jus Cogens, and Immunity of State Officials from foreign criminal jurisdiction.

**Mr. Chairman,**

I will first address the topic of the “**Protection of the Atmosphere**”.

Italy wishes to congratulate the Special Rapporteur, Mr. Shinya Murase, for his Fifth Report. **The objective of a product of the Commission on the protection of the atmosphere should be attentively pursued considering the environmental risks connected to the long-range trans-**

**boundary effects of polluting and degrading substances to the detriment of present and future generations.**

The Fifth Report on the protection of atmosphere allowed the Commission to improve the previous Draft with three additional guidelines, in particular guideline n. 10 on national implementation of international obligations in the field of atmosphere's protection, guideline n. 11 on States' compliance with international law therein, and guideline n. 12 on settlement of inter-state disputes concerning atmospheric pollution and degradation.

We commend the Special Rapporteur, and the Commission as a whole, for the progress made. Italy appreciates the attention of the Special Rapporteur in avoiding interference with ongoing political negotiations on environmental protection. **At the same time, we maintain a positive assessment of the fact that the Commission tackles a fundamental problem of our times.**

**Guideline n. 10 is particularly remarkable**, since it is an essential completion of draft guideline n. 3, which limits its scope in establishing an obligation of prevention, reduction and control of atmospheric pollution and degradation without facing the issue of the means to implement these obligations.

**Italy also favorably considers the discretionary approach vis-à-vis implementation:** States are let free to choose which actions to put in place in order to achieve the protection of atmosphere within their domestic legal orders.

**My Delegation welcomes the Special Rapporteur's approach to the issue of dispute settlement in the matter at hand.** Italy favors the use of cooperative compliance mechanism over punitive or enforcement mechanisms, in accordance with the overall distributive-justice feature of the settlement of environmental-related disputes. We also acknowledge the importance of scientific knowledge in the field of the protection of the atmosphere and the need to consider, as the Special Rapporteur and the Commission have done, the "science-dependent and fact-intensive character of environmental disputes". In this sense, Italy commends initiatives fostering the dialogue with scientific experts.

**Guideline n. 11 could as well be acceptable to Italy.** We share the position expressed in Draft guideline 11 on "Compliance". In particular, Italy agrees with the language used at paragraph 2, which recalls similar language used in provisions concerning compliance and implementation review mechanisms. We welcome that paragraph 2 deals, albeit indirectly, with disparities among States, providing facilitative measures of assistance to States unable to comply with international law obligations because of a lack of capacity, but willing to do so.

We take note of the reference to the “common but differentiated responsibilities” principle, which is recurrent in international environmental instruments.

Last, **my Delegation stresses the distinction** between “enforcement procedure” under Draft guideline 11, paragraph 2, letter *b*), and the invocation of international responsibility. To that effect, Italy can accept paragraph (5) of the Commentary to Draft guideline 11.

We find preferable to include language excluding any interference with existing dispute settlement provisions in treaty regime at the beginning of paragraph 1 of Draft guideline 12 on “Dispute settlement”. My Delegation supports paragraph 2 of this Draft guideline, and deems that the role of technical and scientific expertise should be duly considered in settling atmosphere-related disputes. **We do appreciate the initiative of considering technical and scientific expertise on account of the often fact-intensive and science-dependent character of most international disputes regarding atmospheric pollution.**

#### **“Peremptory norms of general international law (Jus cogens)**

Regarding the topic “Peremptory norms of general international law (jus cogens)”, we commend the Special Rapporteur and the Commission for their work on the topic, including at this session.

We appreciate the intellectual engagement and the efforts made so far by the Special Rapporteur, as well as by the Drafting Committee and by the Commission. We welcome the attempt to find ways to strike a balance between the intricacies of the topic, including on a theoretical level, and the wish to adopt a practical approach.

We take note of the discussions regarding some draft conclusions, which seem to present elements that have been considered as not entirely persuasive, and note the provisional adoption of some of them by the Drafting Committee in an effort – we suppose – to move the topic forward.

There is no doubt that the work undertaken by the Special Rapporteur and the approach adopted may, in the future, allow the Commission to work in a direction which will constitute a reference point. Nonetheless, without prejudice to what the Commission will eventually decide as to the form of the draft conclusions in their entirety, we would underscore that **the topic itself presents a theoretical dimension that cannot be easily set aside, which makes it hard for it to become, at this stage, the object of a fruitful exercise in the form of draft conclusions.**

Perhaps, on the basis of the work already done, **it would be useful to consider either a broader “study” on the topic** (admittedly of a less practical nature) or, on the contrary, **imagine an even narrower approach**, taking into consideration, through a step-by-step drafting process to be appropriately discussed with Member States, **specific aspects of the possible application of the notion of jus cogens to treaty law.** In any event, it is worth noting that the work carried out so far by the Special Rapporteur, in relatively short time, is certainly remarkable and should be commended.

## **Immunity of State officials from foreign criminal jurisdiction**

I turn now to the topic “Immunity of State officials from foreign criminal jurisdiction”. Italy wishes to thank the Special rapporteur, Ms. Conception Escobar Hernandez, for the Sixth report on this topic, in which she summarized the debates in the Commission and in the Sixth Committee on Article 7 of the Draft Articles (dealing with exceptions to immunity *ratione materiae*), and initiated the consideration of the procedural aspects of immunity, due to be completed next year with the submission of the Seventh report. We look forward to such completion and to the relevant proposals for draft articles. Meanwhile, the content of the sixth report appears to be in general terms **quite balanced** with respect to the questions addressed so far, namely: (a) the timing of the consideration of immunity; (b) the acts of the authorities of the forum State that may be affected by immunity; and (c) the identification of the organ competent to decide whether immunity applies. With regard to the issues to be addressed in the Seventh report, we would be particularly interested in the analysis of cooperation between States and international criminal courts and related impact on immunity from foreign criminal jurisdiction.

At this stage, Italy would also like to reiterate its support for the text of draft Article 7, dealing with crimes under international law in respect of which immunity *ratione materiae* should not apply, and which was provisionally adopted by the Commission at its sixty-ninth session. Draft Article 7 provides that immunity is subject only to the exception of specific “crimes under international law”, and not also to the so-called “territorial tort” exception originally proposed by the Special Rapporteur. We believe that State practice does not offer sufficient basis for establishing the existence of this latter exception to the customary rule of immunity of State officials *ratione materiae*.

Mr. Chairman,

Before I conclude, allow me to commend you for the excellent work you have done in the past years as Special Rapporteur on the topic “**protection of persons in the event of disasters**” – an extremely sensitive and important matter, which will be now discussed by the Sixth Committee and which maintains enormous relevance.

In closing, let me recall that Italy attaches great importance to the work and the role of the International Law Commission. **We have greatly appreciated ILC work in the past 70 years and we wish the Commission renewed success for its future activities.**

Thank you, Mr. Chairman.

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