ESPAÑA

INTERVENCIÓN
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DEL MINISTERIO DE ASUNTOS EXTERIORES, UNIÓN EUROPEA Y
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EN LA SEXTA COMISIÓN
DEL 73 PERÍODO DE SESIONES DE LA ASAMBLEA GENERAL
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Tema 82. Informe de la Comisión de Derecho Internacional sobre la labor realizada en su 70º período de sesiones (PARTE II)

Nueva York, 25 de octubre de 2018

(Cotejar con intervención definitiva)

STATEMENT
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AT THE SIXTH COMMITTEE
OF THE 73nd SESSION OF THE UN GENERAL ASSEMBLY

Agenda item 82. Report of the International Law Commission on the work of its 70th session (CLUSTER II)

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Mr Chairman ,

Please allow me to begin my second intervention before this Sixth Committee by once again congratulating the International Law Commission on the approval at the first reading of the draft guidelines on the issues addressed in Chapters VI and VII, on which today's address will be focused.

We shall not dwell on Chapter VIII, on the peremptory norms of general international law (*jus cogens*), which is at an earlier stage of discussion. However, we wish to point out that it is very likely that the drafting of an illustrative list of *jus cogens* norms will bring us back to the general discussion of the work of the Commission itself. Indeed, this issue was addressed this year in the framework of the celebration of its 70th anniversary.

Chapter VI (Protection of the atmosphere)

Mr Chairman,

As regards Chapter VI, on the protection of the atmosphere, the Spanish Delegation expresses its appreciation of the Fifth Report prepared by the Special Rapporteur on this issue, Mr Shinya Murase.
During its 70th session, the Commission adopted three new draft guidelines: 10, 11 and 12. We will make a series of observations about them. Let us begin with two terminological considerations.

The first observation relates to the titles of draft guidelines 10 and 11. These titles are "Implementation" and "Compliance", respectively. In the Spanish language, these two terms, depending on the context, could potentially be synonymous. In the case at hand, the content of the draft guidelines leaves no room for doubt and, therefore, there is no risk of confusion between them. However, for the sake of greater clarity, we recommend that the titles be modified. Following the indications given in the comment to draft guideline 10, the titles could be "National implementation" and "International compliance", respectively.

The second terminological observation relates to the verb used for highlighting the nature of the recommendations. The draft guidelines on the Protection of the atmosphere include obligations and recommendations: *obligations* existing by virtue of international law; and *recommendations* made in the draft. And to underline this twofold nature, the comment to draft guideline 10 highlights the appropriateness of the verb form used by the draft

guidelines containing recommendations. But in the Spanish language, the chosen verb phrase is "*deber* + infinitive" [=must + infinitive], which indicates obligation. In draft guideline 9, this imperative nature is somewhat lessened by the use of the expression "*en la medida de lo posible*" [=to the extent possible], or by using the formula "*deben procurar*" [=must endeavour to], which refers to an obligation of conduct not to an obligation of result. But in draft guidelines 5, 6, 7 and 12.2 this is not the case. In these draft guidelines, the recommendation is worded as though it were an obligation. Therefore we kindly ask the Commission to find another formula.

A different question, not involving wording but substance, relates to the scope of paragraph 1 of draft guideline 10. This paragraph refers to national implementation of obligations under international law. Such obligations are, as stated in the comment, those included in draft guidelines 3, 4 and 8. And regarding draft guideline 8, the Commission clarifies that "...even the obligation to cooperate sometimes requires national implementation". We believe that the same could apply to the facilitation procedures that may be used in the framework of a treaty to achieve compliance therewith. Such procedures are referred to in paragraph 2(a) of draft guideline 11. We suggest, therefore, that the comment on the scope of paragraph 1 of draft guideline 10 also refers to draft guideline 11. If deemed appropriate, with a clarification regarding its paragraph 2(a), similar to the clarification made with regard to draft guideline 8.

Another substantive question is related to international organizations. They are explicitly mentioned in the framework of international cooperation, and implicitly mentioned with regard to the process of identification, interpretation and application of the relevant rules of international law. But unlike the Guide regarding the provisional application of treaties, which refers jointly to States and organizations, the draft guidelines on the protection of the atmosphere focus on States. However, in the comment to draft guideline 10, it is noted that "The term 'national implementation' also applies to obligations of regional organizations such as the European Union". We consider that the wording of this sentence is not clear. Regional organizations such as the European Union may assume obligations under international law. And the national implementation of such obligations may be materialized through measures adopted by the organization itself (i.e. European Union Regulations) or adopted by its Member States (i.e. national rules transposing European Union Directives). But we do not know what the Commission is referring to in this case when mentioning these organizations. Hence we ask the Commission to rephrase the abovementioned sentence in the comment.

Lastly, I wish to highlight two considerations on draft guideline 12: one on its appropriateness, and another concerning its wording.

First, we agree with the inclusion of this draft guideline. Its paragraph 1, which is the basis for paragraph 2, reaffirms the principle of peaceful settlement of disputes. Paragraph 2, which is the important one, stresses the use of technical and scientific experts for the settlement of disputes between States by judicial or other means. A debate arose in the Drafting Committee regarding the appropriateness of including a guideline on dispute settlement. The solution to this debate can be found in paragraph 2, since it makes a recommendation: the use of technical and scientific experts.

Second, we also consider appropriate the wording of this recommendation. The draft guideline simply states that "due consideration should be given". And the comment to this draft is limited to mentioning that the principles *iura novit curia* (the court knows the law) and *non ultra petita* (not beyond the parties' request) may be relevant in the context of judicial or arbitral proceedings in the scope of the protection of the atmosphere. Due to the progressive scientific and technical complexity of this area, the line between "law" and "fact" is often imprecise. In his fifth report, the Special Rapporteur addresses the issue and states that "*iura novit curia*" puts a limit on the restriction imposed by *non ultra petita*". But the Special Rapporteur's Reports and the Commission's Draft Guidelines serve different functions. The Commission has decided not to go further; and given the importance, the complexity and the topicality of this issue, we believe this is the right decision at this moment. In the framework of the second reading, this issue could be further developed; maybe not in the draft guideline, but in its comment.

Chapter VII: Provisional application of treaties

Mr Chairman,

With regard to Chapter VII, on the provisional application of treaties, the Spanish Delegation expresses its appreciation of the Fifth Report submitted to the Commission by the Special Rapporteur on this issue, Mr Juan Manuel Gómez Robledo.

The Special Rapporteur's hope, as expressed in his latest report, was that the Commission would complete its first reading of the draft guidelines and draft model clauses at its 70th session. In the end, the Commission did not have enough time to discuss the model

clauses, and has expressed its intention of doing so at its next session. For this reason, we will focus on the two new draft guidelines :7 and 9.

Draft guideline 7 concerns reservations. On the basis of this draft guideline, and taking into consideration draft guideline 6, it could be concluded that reservations that take effect in provisional applications could be formulated at two different moments, that could take place, or not, at the same time:

- One possible moment occurs when the State or international organization expresses their consent to be bound by the treaty. A reservation formulated at this moment shall take effect when the treaty enters into force for the author of the reservation; but we believe that the reservation shall also take effect for the author during the provisional application. And this is because according to draft guideline 6, provisional application produces the obligation to apply the treaty or a part thereof "as if the treaty were in force". It is true that the comment to draft guideline 6 points out that the "Provisional application of treaties remains different from their entry into force, insofar as it is not subject to all rules of the law of treaties". But it is possible to formulate reservations to provisional application, and said reservations shall be governed by the rules of the law of treaties relating to the formulation of reservations. Therefore, there seems to be no reason to rule out that reservations taking effect when the treaty enters into force may also take effect during provisional application.

  The above notwithstanding, this is a possibility, not an imposition. Draft guideline 6 sets forth that provisional application produces the obligation to implement the treaty or a part thereof as if the treaty were in force, "unless the treaty provides otherwise or it is otherwise agreed". This latter caveat is the framework for draft guideline 7, but its scope is, nonetheless, broader.

- The other possible moment occurs when the provisional application of a treaty or a part thereof is agreed upon. According to draft guideline 7, at that moment the reservation is formulated "purporting to exclude or modify the legal effect produced by the provisional application". From this wording we understand that, unless the treaty provides otherwise or it is otherwise agreed, reservations formulated at the moment of agreeing to the provisional application shall not take effect for the author of the reservation when the treaty enters into force. This conclusion is especially relevant when the agreement to the provisional application happens in a later moment than the expression of consent to be

bound by the treaty; otherwise, reservations relating to provisional application could be used as a means of incorporating "late reservations" to the implementation of the treaty.

The new draft guideline and its comment provide a response to important questions raised in 2016 when the Special Rapporteur analysed the problems surrounding reservations. But even so, certain questions have yet to be clarified; for example: What about reservations formulated at the moment of signing a treaty and which, pursuant to Article 23.3 of the Vienna Conventions of 1969 and 1986, must be confirmed by the author at the moment of expressing its consent to be bound by the treaty? If at the moment of agreeing to the provisional application nothing is stated in this regard, and said provisional application begins after the signature but before confirmation, do those reservations take effect during the provisional application?

Another issue is the wording of draft guideline 7, in two paragraphs, one with regard to States and the other to international organizations. The only difference between the two is the legal framework of reference: "the Vienna Convention on the Law of Treaties" and "the relevant rules of international law", respectively. But the two could have been addressed jointly, as in draft guidelines 2 and 9, with the formula "Vienna Convention on the Law of Treaties and other rules of international law". In addition to being more streamlined, it seems more appropriate, bearing in mind the States that are not party to the Vienna Convention on the Law of Treaties.

We will now refer to draft guideline 9, on termination and suspension. We agree with the new version and congratulate the Commission for it, on the basis of three considerations.

First, because it modifies elements of the 2017 version with regard to which our delegation submitted observations last year. At that time, we expressed our disagreement with the reasoning that had led the Commission to rule out the explicit inclusion of termination of provisional application as a result of the entry into force of a treaty. And we also voiced our disagreement with the statement that provisional application is not subject to the rules of the law of treaties on termination and suspension.

Second, because reference to the rules of international law on the termination and suspension of treaties opens up a new possibility that could be extremely useful: termination or suspension of provisional application exclusively when it is in relation to another subject of International Law.

Third, we agree with the inclusion of the causes for termination and suspension of provisional application in a single draft guideline. It contributes to greater clarity.

Mr. Chairman,

Finally, and as we have already stated in this same forum on other occasions, we conclude our comment on provisional application by pointing out that we would like to see a mention of what are known as "mixed agreements" concluded by the European Union and its Member States, on the one hand, and one or more States or international organizations, on the other. As regards the European Union, the entry into force of a mixed agreement entails the obligation to only apply the provisions falling under its authority; and provisional application, logically, cannot go beyond that. We interpret that this possibility is included in the present guide when referring to the provisional application of only a part of a treaty, not to the treaty as a whole. And we do not consider it necessary for the Commission to address the bilateral or multilateral nature of these mixed agreements; the issue was addressed by the Secretariat in its third memorandum, and by the European Union itself in its address last year. But insofar as both the European Union and its Member States give, in the international arena, their consent to be bound by a treaty, we believe that the reference made to the rules of this particular international organization, albeit appropriate, is insufficient. A guide with the aim to offer insight into law and practice on provisional application of treaties should include in its comment the practice of mixed agreements. As we stated last year, this could be included in paragraph 4 of the comment to draft guideline 3, on the provisional application of a part of a treaty. The current wording of the mentioned paragraph seems to focus exclusively on cases in which provisional application does not include certain provisions that will be applicable upon entry into force for that same State or organization. Mixed agreements, as we have just pointed out, constitute a different case.

Thank you very much, Mr. Chairman