STATEMENT BY TURKEY AT THE SIXTH COMMITTEE
AGENDA ITEM 82
REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS SEVENTIETH SESSION
Cluster II
(Chapter VI, VII and VIII)

(30 OCTOBER 2018)

Mr. Chairman,

Chapter VI
Protection of atmosphere

In the matter of protection of the atmosphere, I would like to thank the Special Rapporteur Mr. Shinya Murase for his fifth report and to congratulate the Commission for its successful conclusion of its first reading of draft guidelines on the protection of the atmosphere. There are two draft guidelines of similar nature we would like to speak on.

Although alluded to in our last year's statement, we would rather reiterate our hesitations with some further comments about the consistency of draft guideline 4, with the assertion over draft guidelines' general nature. It is stated in the last preambular paragraph that *"draft guidelines neither seek to "fill" gaps in treaty regimes nor impose on current treaty regimes legal rules or legal principles not already contained therein,"* It is also confirmed in several parts of commentary such as general commentary.

In this setting, commentary to draft guideline 4 is not satisfactory so that we are still of the view draft guideline 4, whereas proclaimed to be a present obligation, is a new composition in its entirety within draft guidelines itself.

In this respect we deposit the full version of our comments to PaperSmart portal for your kind consideration.

Before I move on to the next chapter, let me turn now to draft guideline 11, paragraph 2, sub-paragraph (b) that is also questionable in terms of coherence with the purpose and nature of guidelines, with prompting some enforcement measures against non-complying state.

At this stage, we find the sub-paragraph 2(a) of draft guideline 11 sufficient and accurate in suggesting assistance to the states or apply some measures in a transparent, non-adversarial and non-punitive manner to ensure the state to conform to its obligations.

Accordingly, we would rather sub- paragraph 2 (b) with a stringent but also somewhat open-ended language, which could be therefore interpreted in a broad extent, was removed, or else more elucidation or particularization with examples was needed.

Chapter VII
Provisional application of treaties

Mr. Chairman,

Turning to the topic "provisional application of treaties", we would like to extend our appreciation to the Special Rapporteur, Mr. Juan Manuel Gómez Robledo for his fifth report on this subject, and also to thank the Secretariat for its ongoing support to the topic with a new Memorandum reviewing State practice in respect of treaties deposited or registered in the last 20 years with the Secretary-General, that provide provisional application.

In respect of the fifth report of the Special Rapporteur, it is the legal effect of the provisional application of treaties dealt with in draft guideline 6 and commentary thereto is the most tricky part to determine, which the Vienna Convention on the Law of Treaties, too is silent on. However, the Special Rapporteur in the end favors the option of legally binding obligation, in case of a silence in the treaty itself. Detailed explanation about our views in this regard you will find in PaperSmart portal too.

I just want to emphasize that we are questioning this matter, since we are hesitant over vesting a default binding force in a provisionally applied treaty, which is silent, and that is mostly the case, can make this option into a rule in fact. The situation as such could pose a threat to the exclusive power to consent to undertake an international commitment, of the legislative authority, by removing the need for taking an approval and could create as such a discouraging effect on the executive authority to initiate and complete the ratification process with the legislative body.

As well as draft guideline 6 over legal effect, we would think draft guideline 7 dealing with the formulation of reservations on that legal effect, which is directly linked to the former, would also call for further discussion and analysis of possible circumstances.

Diverse scenarios according to variable attitudes of numerous parties upon the binding force may lead to inequal consequences. In so doing it may create legal uncertainty and stability in terms of compliance with treaty norms among the parties. Besides, the differences between the parties with respect to the consent to be bound, in other words, the acceptance of a treaty provision binding for one party; whereas non-binding for the other, is likely to make the treaty questionable in terms of conformity with the general principle of contract law as the mutuality of the consent to be bound is the essential element for the formation of a contract.

Regarding the scarcity of reservation examples on provisional application, affirmed by the Special Rapporteur, we are of the view that further contemplation would be material considering the viable situations and some supplementary clarifications, as might be necessary, could be incorporated into draft guidelines itself or its commentary.

Chapter VIII

Peremptory norms of international law (jus cogens)

Mr. Chairman,

We took note of the Special Rapporteur Mr. Dire Tiladi's third report, which considers the consequences and legal effects of peremptory norms of international law.

In order to ground its preference to focus on the consequences of jus cogens norms, the Special Rapporteur refers to the inseparability of criterion and consequences. He argues for instance that non-derogability is a criteria, not a consequence. We are still of the view on the contrary that it can not be a criteria for identification, but rather may be a consequence.

We, furthermore, consider that the complexity does not solely belongs to one single example as given above with regard to "non-derogability characteristic". Conversely, it prevails over the concept of jus cogens as a whole, which emanates from the immaturity, and lack of sufficient compromise among the states with regard to the topic. That is evidently seen, too in several deeply diverse comments on the other aspects of the concept.

We view that this topic is ambiguous in its scope and content, but also very abstract in its essence, namely "the acceptance and recognition of an international community as a whole" as stated in the Vienna Convention on the Law of Treaties. Although that phrase may be accepted as a definition, it does not include any guiding substantial constituent elements to determine such norms. Besides, the definition is also questionable yet, as we witness there are very diverse opinion among states. For instance, some argue that a large majority of states is sufficient which is in clear contrast with the wording of the Vienna Convention as "international community as a whole".

We think as a result of the hardship and failure in the end to identify the universally accepted criterion during the adoption of the Vienna Convention, no further explanation could be made, nor a provision confirming a crime as an example to jus cogens illustratively could be accepted in the Vienna Convention on the Law of Treaties.

Lack of certainty in the scope and content might pave the way for the abuse of the concept. Incidentally, we met an example to such misinterpretation, which was also regrettably invoked in the first report of the Special Rapporteur. In this setting, we thank the Special Rapporteur for his response to our statement of 2016 on this matter. We would like to however reaffirm our refusal of that contention and to reiterate our objection as was grounded in our statement of 2016, to the accuracy of the reference to it under the topic.