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Held at Headquarters, New York, on Tuesday, 3 November 2015, at 10 a.m.

Chair:	Mr. Charles	(Trinidad and Tobago)
later:	Mr. Holovka (Vice-Chair)	(Serbia)
later:	Mr. Charles (Chair)	(Trinidad and Tobago)

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15-19183 (E)

The meeting was called to order at 10.10 a.m.

Agenda item 83: Report of the International Law Commission on the work of its sixty-seventh session (*continued*) (A/70/10)

1. **The Chair** invited the Committee to continue its consideration of chapters I to V and XII of the report of the International Law Commission on the work of its sixty-seventh session (A/70/10).

2. **Ms. Weiss Ma'udi** (Israel) said that the final report of the Study Group on the most-favoured-nation clause promised to be a valuable tool for guiding treaty negotiators, policymakers and practitioners in the field of investment law. Given the complexities of interpreting most-favoured-nation (MFN) clauses, her delegation wished to reiterate the importance it attached to the principle of consent between the parties negotiating an international investment agreement, including with regard to the scope of MFN clauses and the exclusion of specific treaty provisions from their application. It did not favour providing for so broad an interpretation of MFN clauses as to encompass matters beyond the parties' intentions as determined by what was set forth in the agreement.

3. Her delegation did not consider MFN clauses in international investment agreements to apply to procedural matters, including dispute settlement provisions, unless the parties to the agreement had expressly indicated as much. In its view, MFN clauses were not normally capable of producing the following effects: adding a dispute mechanism to a treaty that did not contain one; applying specific dispute settlement provisions prescribed by another international investment agreement; extending the jurisdiction of a dispute settlement tribunal over matters beyond those explicitly set out in the basic treaty; or allowing claimants to bypass procedural requirements. As to the principle *expressio unius est exclusio alterius*, her delegation held that, even if it was applicable in a particular case, it could not be used to apply an MFN clause to procedural matters unless expressly provided by the parties. Israel shared the Study Group's conclusion regarding the relevance of the 1969 Vienna Convention on the Law of Treaties and took the view that the Convention should serve as the point of departure for the interpretation of treaties, including investment treaties and the MFN clauses they contained.

4. Regarding the topic "Protection of the atmosphere", her delegation largely supported the Commission's work on the draft guidelines and commentaries thereto. The expression "common concern of humankind", which had appeared in draft guideline 3, as proposed by the Special Rapporteur in his second report, was too vague, and Israel welcomed its replacement with the more objective, factual description contained in the preamble. As to draft guideline 5 (International cooperation), her delegation wished to stress the importance of respecting and safeguarding State sovereignty in the context of global challenges that required joint action, including the protection of the atmosphere. It endorsed the use of the words "as appropriate", which were intended to provide States with flexibility in complying with that obligation; the flexibility aspect, however, should be strengthened in the text of the draft guideline itself.

5. Noting the inclusion of the topic "*Jus cogens*" in the Commission's long-term programme of work, her delegation wished to call attention to a tendency in some academic circles to rush too quickly into awarding a rule of positive law the status of *jus cogens*, even though, in practice, the rule had failed to meet established criteria or its *jus cogens* status had been contested. The identification of the content of the normative category of *jus cogens* was an intricate task that should be approached with great caution; accordingly, a rule of positive law should undergo a thorough process in order to be elevated successfully to that category. In undertaking its work on the topic, the Commission should do its utmost to avoid producing an outcome that would create an overly extensive list of *jus cogens* norms. An extensive list might eventually be counterproductive if the designation of certain rules as *jus cogens* no longer represented the general will of the international community or, in the case of emerging *jus cogens*, gave rise to controversy. A conservative list, on the other hand, would help to preserve and strengthen the binding nature of the norms it included.

6. In response to the Commission's request for information on State practice in relation to *jus cogens*, she reported that the concept of *jus cogens* had been discussed in Israeli domestic judicial proceedings, and that the existence of *jus cogens* had been recognized by the Israeli Supreme Court in 1962 during the Eichmann Trial — even before the adoption of the 1969 Vienna Convention — in relation to the prohibition of genocide and crimes against humanity. In 1999 the

Court had also recognized torture as having the character of *jus cogens*. Ultimately, her Government questioned whether the codification of rules relating to *jus cogens* was appropriate at the current juncture, reiterating its request for the Commission to proceed with caution on that topic.

7. **Mr. Macleod** (United Kingdom) expressed his Government's appreciation for the excellent work of the Codification Division of the Secretariat and for its assistance to States. In particular, the United Kingdom appreciated the recent update of the Commission's website, which facilitated States' engagement with the Commission's work and served as a general research tool.

8. Turning to the Commission's report, he noted that it was confusing when the Commission's draft output and commentaries thereto were presented in various formats and locations, notably when draft provisions were contained in a footnote, set out in a separate document or had been provisionally adopted before the corresponding commentaries to them had been prepared. It might have been helpful to indicate clearly — perhaps in chapter I of the report — where the reader could go to find the latest version of the draft provisions for each topic, including an indication as to their precise status of completion. Doing so would ensure that, during the Sixth Committee debate, all delegations were addressing the most up-to-date versions with full knowledge of their status. Although the ideal format was one in which draft provisions were presented together with their corresponding commentaries, when that was not the case they should be accompanied by a footnote indicating that the delegations' comments concerning them were provisional.

9. His delegation welcomed the inclusion of the topic of *jus cogens* in the Commission's long-term programme of work. It agreed that questions concerning sources of international law were natural topics for consideration by the Commission, as evidenced by the Commission's work on the topic "Identification of customary international law", and a study of *jus cogens* could be of considerable practical assistance, especially to domestic courts. It might be helpful if the study's object was to explain how to identify pre-existing *jus cogens* and the consequences of such identification. The Commission could make a useful contribution to the codification of international law if it confined the parameters of the topic to methodology and generally approached it with caution. On the topic "The Most-Favoured-Nation clause", his delegation welcomed the Study Group's final report and believed that it would be of practical utility, particularly to policymakers and professionals in the field of investment.

10. Regarding the topic "Protection of the atmosphere", the United Kingdom endorsed the Commission's recognition of the importance of being fully engaged with the international community's present-day needs and of not interfering with relevant political negotiations, including those on climate change, alternatives to ozone depleting substances and long-range transboundary air pollution. Given the international community's current focus on those subjects, it was important for the Commission not to depart from its 2013 decision that those subjects would remain outside the topic's scope. As to the text of the proposed draft guidelines, his delegation welcomed the removal of the reference to the concept "common concern of mankind" on the reasoning that the legal consequences of that concept remained unclear. While noting with appreciation the Commission's responsiveness to the concerns raised by his and other delegations on that issue, he observed that such difficulties could be avoided completely if no further consideration was given to the topic.

11. **Mr. Mulalap** (Federated States of Micronesia) said that, as the United Nations commemorated its seventieth anniversary, his delegation wished to acknowledge that one of the Organization's most important achievements had been the establishment of the International Law Commission. Given that States resorted less frequently to multilateral treaties to promulgate and enshrine international law, the risk of fragmentation of international law was real, making the Commission's work in identifying, developing and codifying existing and emerging rules and principles of international law as pressing as ever.

12. His delegation strongly believed that the protection of the atmosphere remained the most pressing challenge facing contemporary humankind. Storms of historic intensity, desertification, unprecedented warming and rising sea levels were among the ills afflicting the planet whose cause lay in humankind's bombardment of the planet's atmosphere with excess gases, pollutants and other harmful substances that degraded it and set off chain reactions of catastrophic consequences. In the comments that it

had submitted to the Commission in January 2015, Micronesia had asserted that "only through the establishment of a comprehensive global regime to regulate the protection of the atmosphere in a robust manner can we safeguard the livelihoods — and the lives — of present and future generations of humankind".

13. Consequently, his Government was concerned at the Commission's decision to convert draft guideline 3 (Common concern of humankind), as proposed by the Special Rapporteur in his report, into a preambular paragraph, which stripped the text of its operative essence. The inclusion in that preambular paragraph of the expression "pressing concern of the international community as a whole" reflected a subtle but profound change. Its designation in the report as a factual statement, in contradistinction to the normative statement "common concern of humankind", implied that the Commission had shied away from explicitly acknowledging that the degradation of atmospheric conditions was a common concern that all States were legally obligated to address cooperatively, comprehensively and urgently. The Commission's reluctance to make that acknowledgement, on the reasoning that the concept of common concern remained unclear, insufficiently established in international law or unsupported in State practice, and that the prevention of transboundary air pollution had not become a common concern of humankind, was not in accordance with the present state of development of international law in relation to the protection of the environment.

14. There were numerous examples of treaties — many of which the Commission itself cited in its report — that did make such an acknowledgement. Moreover, the Commission had provisionally adopted draft guideline 5, which recognized that States had the obligation to cooperate with each other and international organizations to protect the atmosphere, thus laying the groundwork for accepting the Special Rapporteur's proposed draft guideline 3 on that matter.

15. His delegation strongly believed that atmospheric degradation was a "common concern of humankind". That was a normative statement that imposed *erga omnes* obligations , with each State being obligated to the international community as a whole to take concrete, collaborative and comprehensive steps to protect the atmosphere. The fact that all States had a common interest in ensuring that the planet they inhabited could continue to host them for generations to come was a matter of simple logic, and he respectfully urged the Commission to reconsider its position.

16. One example of States' acknowledging a serious threat to the planet's atmosphere and working collaboratively to address it was the fact that Micronesia was one of 100 States parties to the Montreal Protocol on Substances that Deplete the Ozone Layer that were calling for an amendment to the Protocol in order to promote the phase-down of the production and consumption of hydrofluorocarbons.

17. **Mr. Xu** Hong (China) said that his delegation appreciated the Commission's rigorous approach to the highly technical topic of protection of the atmosphere, as evidenced by the dialogue the Special Rapporteur had organized with atmospheric scientists. With regard to the draft guidelines, his delegation took the view that the purpose and scope of the project should be clarified further. The Commission had incorporated in both the preamble and draft guideline 2 the understanding on the topic that it had reached in 2013, which would help to ease the concerns voiced by many Sixth Committee delegations about the relationship between the project and the relevant political negotiations and legal regimes. At the same time, the commentary to draft guideline 1 made reference to the issues of transboundary air pollution, ozone depletion and climate change, and noted that the draft guideline had used language based directly on the definition of pollution contained in the 1979 Convention on Long-Range Transboundary Air Pollution. That seemed to contradict the understanding set out in the preamble and draft guideline 2, which created confusion about the scope and purposes of the guidelines. His delegation hoped that the Commission would address that concern in an appropriate manner.

18. Furthermore, although China approved of substituting the expression "a pressing concern of the international community as a whole" for the words "common concern of humankind" and placing the former in the preamble, the meaning of other crucial terms and the relationship between certain terms required further clarification. For example, the distinction between the terms "atmospheric pollution" and "atmospheric degradation" remained ambiguous. Since the term "atmospheric degradation" that was referred to in the commentary denoted worldwide atmospheric problems, consideration should be given

to inserting the word "global" before "atmospheric conditions" in the definition of "atmospheric degradation" set out in draft guideline 1 (c). That would make it clear that the atmospheric degradation referred to was the alteration of atmospheric conditions to such an extent that they produced worldwide deleterious effects. A distinction should be made among the different types of atmospheric pollution and the rules corresponding to them, as some types of atmospheric pollution might have deleterious effects that were limited to certain countries or regions, while others might affect the international community as a whole. In doing so, the Commission should give consideration to the priorities of developing countries and their capacity to address atmospheric pollution; a "one-size-fits-all" approach was inadequate to meet the needs of the present-day world.

19. With regard to the topic of *jus cogens*, he recalled that, in 1993, the Commission had rejected the proposal to include that topic in its long-term programme of work, owing in large part to a lack of relevant State practice. Given that there had not been any fundamental change in that situation, the Commission should collect information on State practice before undertaking an in-depth study on the topic. It should also adopt a cautious approach when referencing the limited practice of international bodies and institutions. Although the 1969 Vienna Convention on the Law of Treaties and the articles on responsibility of States for internationally wrongful acts mentioned the concept of *jus cogens*, they did not elaborate on its nature and could not serve as guidance for the identification of *jus cogens*.

20. The International Court of Justice had also exercised caution in the few decisions it had rendered that referred to *jus cogens*, limiting itself to explaining the relationship between *jus cogens*, the jurisdiction of the Court and the immunity of the State and State officials, without touching on the nature and identification of *jus cogens*. If it was to continue to contribute to the codification and development of international law, the Commission should, in choosing any new topic, carefully examine the practice of all States, focus on the shared needs of the international community, take into account the views expressed by Member States in the Sixth Committee and address, as a matter of priority, matters on which the international community needed the guidance of international law.

21. **Ms. Saiki** (Japan) said that, on the historic occasion of the seventieth anniversary of the founding of the United Nations, her delegation wished to recognize the Organization's many achievements in the field of public international law, including the fulfilment over the decades by the Sixth Committee and the International Law Commission of their mandates under Article 13 of the Charter of the United Nations. However, new challenges had arisen in relation to the Commission's mandate, giving rise to the view that its influence in the area of international law-making was waning and that the Sixth Committee was no longer regarded as the central forum on the establishment of international law. Among the explanations offered for that situation were that the Commission had already exhausted the major areas of international law; that multilateral forums were playing an increasingly important role in international law-making; and that judicial institutions such as the International Court of Justice were exerting a growing influence on the consolidation of international norms through the development of their case law.

22. While it was true that the Commission should review its working methods and the selection of its topics in the light of those new circumstances, it still had a unique and important role to play as an institution of prominent international legal academics and practitioners who represented the main forms of civilization and principal legal systems of the world. In order to maintain consistency within the existing international legal framework and to avoid the trend towards the almost daily establishment of rules of international law and accelerated fragmentation, the Commission should continue to identify and codify established and emerging principles of international law in order to produce overarching individual norms. In view of the importance of close cooperation between the Sixth Committee and the Commission, her delegation supported the Commission's wish to convene the first part of its seventieth session in New York, as long as the change of venue for part of its session did not generate additional costs.

23. Her delegation welcomed the Commission's decision to include the topic "*Jus cogens*" in its long-term programme of work. Despite the fact that the term "*jus cogens*" had been used in the 1969 Vienna Convention to describe peremptory norms of general international law, the actual substance of such norms remained unclear, and the identification of their nature

and scope would therefore be of benefit to all States. The Commission should formulate provisions relating to *jus cogens* on the basis of a widely shared understanding of peremptory norms by Member States and on that of the relevant case law of international courts, approaching the topic in a manner conducive to enjoying the broad support of Sixth Committee delegations.

24. Her delegation also welcomed the final report of the Study Group on the Most-Favoured-Nation clause. In the absence of a unified rule on the implementation of MFN clauses, different types of bodies with different standards of judgement had interpreted and applied MFN provisions, thus giving rise to uncertainty with regard to arbitral awards under international economic law. It was to be hoped that the final report would provide practical guidance, particularly in the negotiation of investment treaties and regional economic partnership agreements and in judicial proceedings before the World Trade Organization (WTO) and other investment arbitration bodies. Japan welcomed the Commission's review of interpretative techniques with the aim of assisting in the interpretation and application of MFN provisions; it further welcomed the conclusions that the interpretation of MFN clauses was to be undertaken on the basis of the rules set out in articles 31 and 32 of the 1969 Vienna Convention and that whether MFN clauses were to encompass dispute settlement provisions was ultimately up to the States that negotiated such clauses, taking into account the rules for the interpretation of treaties.

25. With regard to the topic "Protection of the atmosphere", her delegation considered it would be appropriate to include the concept "common concern of humankind" in the preamble, as several related legal documents, such as the United Nations Framework Convention on Climate Change, referred to the concept. It did not necessarily entail substantive legal relationships among States; rather, it attributed a certain legal value, broadly speaking, to the project's objectives. As for draft guideline 5 (International cooperation), she believed it represented one of the most important outcomes of the topic's consideration, given that, in modern industrial society, a wide range of economic and other activities could cause transboundary air pollution or global climate change, the resolution of which required inter-State cooperation. A rule stipulating a general obligation to provide such cooperation therefore reflected present-day environmental realities and should be included in the guidelines.

26. Her delegation hoped that the Commission would continue to uphold the understanding that had been established as a condition and guiding principle for its consideration of the topic. That said, it was inappropriate to include the language of that understanding in the preambular paragraph that provided a contextual framework for the draft guidelines; moreover the wording of draft guideline 2 (Scope of the guidelines) should not reproduce verbatim the language of the understanding but rather should be reformulated in order to simplify it. She welcomed the fact that a dialogue had been organized with scientific experts and hoped that a similar event would be arranged at the Commission's next session in order to stimulate further deliberation on the topic.

27. **Ms. Pathak** (India), referring to the topic "The Most-Favoured-Nation clause", said that the Study Group's final report on that topic established the contemporary relevance and importance of the MFN clause. Her delegation agreed with the Commission's conclusion that the 1969 Vienna Convention should be the basis of and point of departure for the interpretation of investment treaties, including the MFN clauses in those treaties. Acceptance of that conclusion would help to avoid the use of selective interpretative methodologies by arbitral tribunals dealing with investment disputes, which in the past had resulted in inconsistent decisions that generally operated against the interests of States.

28. Recent decisions by arbitral tribunals to apply the MFN clause to dispute settlement provisions, rather than confining the clause to the substantive obligations imposed under bilateral investment treaties, added a new dimension, thus making it appropriate to welcome the Commission's conclusion that it was for States, when negotiating bilateral investment treaties, to determine the scope of application of the MFN clause. Moreover, in view of the contemporary relevance and importance of the MFN clauses in trade and investment treaties, her delegation welcomed the Study Group's review of interpretative techniques and the Commission's summary of conclusions. They should serve as guidance to States, arbitral tribunals and other relevant actors in the field.

29. Turning to the topic "Protection of the atmosphere", she endorsed the Commission's decision to address in the preamble the subject matter of draft guideline 3 (Common concern of humankind), together with the reasons given for that decision in the general commentary thereto. The general obligation of all States to protect the atmosphere, which was the subject matter of draft guideline 4, as proposed by the Special Rapporteur in his report, required further study and analysis. Her delegation therefore endorsed the Special Rapporteur's request to the Drafting Committee to defer consideration of that draft article, since it would allow more time for an in-depth study and analysis of its subject matter. She noted with appreciation the future plan of work on the topic that had been presented by the Special Rapporteur; in that context, she urged the Commission to continue to strengthen its research on relevant theories and practices and to gradually clarify the corresponding draft guidelines.

30. Regarding chapter XII of the Commission's report, her delegation welcomed the Commission's decision to include in its long-term programme of work the topic "*Jus cogens*". Its study would be of interest to all States.

31. In conclusion, she congratulated the Commission and others for successfully holding the fifty-first session of the International Law Seminar, pursuant to General Assembly resolution 69/118. She noted that India was one of the voluntary contributors to the United Nations Trust Fund for the International Law Seminar, which allowed successive generations of young international lawyers to familiarize themselves with the Commission's work.

32. **Mr. Dehghani** (Islamic Republic of Iran), referring to the topic "Protection of the atmosphere", said that the objective of the Commission's work was to eliminate loopholes in the legal regime applicable to the protection of the atmosphere. His delegation urged the Commission to undertake a study of all sources of pollutants and substances that were detrimental to the atmosphere, in particular radioactive and nuclear emissions, due to the potentially long-term transboundary risks that they posed. Although draft guideline 2, paragraph 3, had excluded the specific substances of black carbon, tropospheric ozone and other dual-impact substances from the scope of the draft guidelines so as not to interfere with the results of ongoing negotiations among Member States, his delegation believed that a "without prejudice clause" would be more helpful and appropriate than the exclusion of specific substances from the project's scope.

33. His delegation considered it appropriate that the Commission had decided to replace the expression "common concern of mankind" — which appeared in draft guideline 3, as proposed by the Special Rapporteur in his second report — with the phrase "pressing concern of the international community as a whole" and to include the latter in the preamble. Since the atmosphere was the Earth's largest single resource and one of its most important, that expression was the more relevant of the two and properly referred to the atmosphere in legal terms.

34. An example taken from the case law of the International Tribunal for the Law of the Sea illustrated a mechanism that might be replicated for the purposes of the protection of the atmosphere. Article 136 of the United Nations Convention on the Law of the Sea qualified "the Area", which was the seabed and ocean floor that lay beyond the limits of national jurisdiction, as "the common heritage of mankind". Article 137, paragraph 2, of the same Convention stipulated that "[a]ll rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act". In paragraph 180 of its advisory opinion of 1 February 2011 *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, the International Tribunal for the Law of the Sea referred to article 137, arguing that, besides the Authority, "[e]ach State Party may also be entitled to claim compensation in light of the *erga omnes* character of the obligations relating to preservation of the environment of the high seas and in the Area". In support of that view, the Tribunal referred to article 48 of the articles on State responsibility, which concerned the invocation of the responsibility of a State other than an injured State for the violation of an obligation *erga omnes partes*.

35. On the subject of inter-State cooperation, which the Special Rapporteur had described as one of the principles of modern international law that was applicable to the protection of the atmosphere, his delegation noted that the obligation to cooperate was a vague and undefined legal concept in international law; it was therefore imperative to carry out an in-depth study of the technical aspects of such cooperation and agree on its various elements before proposing to include that obligation in the legal regime applicable to

the protection of the atmosphere. His delegation had the same concern in relation to the principles of international environmental law — for example, sustainable development — and their applicability to the topic.

36. The Special Rapporteur's second report merely made reference to those principles without providing any further elaboration or analysis of them in the context of the topic. The relationship of the principles of international environmental law to the protection of the atmosphere deserved serious consideration in the Commission's future work. Ultimately, the development of an international legal regime on the protection of the atmosphere in the light of those principles was feasible only if due consideration was given to the well-established concepts in the field, such as intra- and inter-generational equity and the special needs and priorities of developing countries.

37. **Mr. Perera** (Sri Lanka) said that the MFN clause had recently assumed particular relevance as a core principle of bilateral investment treaties. His delegation wished to draw particular attention to the question of the scope of treatment to be provided under an MFN provision, and in particular whether an MFN clause in a basic treaty could be invoked in order to expand the scope of that treaty's dispute settlement provisions — commonly called the "Maffezini problem". In view of the uncertainties that had arisen as a result of inconsistent arbitral awards, his delegation welcomed the guidance provided in the Study Group's final report on the interpretation of the MFN clause, in particular its comprehensive review of the factors that could potentially influence tribunals in interpreting MFN provisions and its enumeration of the consequences that could arise from particular wording in MFN clauses, including how such wording might be treated by investment tribunals. Those contributions would undoubtedly be of great value to States in considering how their investment agreements might be interpreted and what factors they could take into account in negotiating new bilateral investment treaties.

38. Regarding the summary of conclusions contained in Part V of the Study Group's report, his delegation agreed that the 1978 draft articles on the most-favoured-nation clause remained the basis for the interpretation and application of MFN clauses; however, they did not provide answers to all the interpretative issues that could arise in relation to MFN clauses in present-day circumstances. That was particularly true in relation to the developments that had taken place following the elaboration of the 1978 draft articles, namely, the emergence of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes and the analysis of MFN provisions by other bodies, such as the United Nations Conference on Trade and Development (UNCTAD) and the Organisation for Economic Co-operation and Development (OECD). His delegation endorsed the conclusion that the interpretation of MFN clauses was to be undertaken on the basis of the rules for the interpretation of treaties as set out in the 1969 Vienna Convention. Notwithstanding the "mixed" nature of investor-State arbitration, an investment agreement was clearly a treaty, and as such it must be interpreted in accordance with the accepted rules of international law governing treaty interpretation.

39. His delegation took the view that unless a most-favoured-nation clause was clearly worded or there were particular contextual circumstances, an MFN provision could not alter the conditions of access to dispute settlement. It welcomed the Study Group's conclusion that the question of whether MFN clauses encompassed dispute settlement provisions was ultimately up to the States that negotiated such clauses. They could use explicit provisions to clarify whether an MFN clause did or did not apply to such provisions. Failure to do so meant leaving it up to dispute settlement tribunals to interpret MFN clauses on an ad-hoc and case-by-case basis, which was what had given rise to the current lack of settled jurisprudence on the scope of the MFN clause. He congratulated the Study Group for producing guidance that was of practical utility to Member States and investment tribunals alike; it would go a long way towards ensuring greater certainty and stability in the field of foreign investment law.

40. Turning to the topic "Protection of the atmosphere", he said that the topic presented issues and complexities of both science and law, and his delegation was gratified to observe that the Commission's work on the project was advancing in the right direction. His delegation firmly believed that the topic could not properly be discussed or developed in isolation from the scientific community. It therefore noted with appreciation that the Special Rapporteur had organized a dialogue with six of the world's foremost atmospheric scientists in order to increase the

familiarity of Commission members with the relevant scientific concepts and to encourage broader dialogue among expert scientific and legal bodies in the international community. His delegation looked forward to the organization of more such dialogues as work on the topic progressed.

41. The atmosphere was vital to the existence of life on Earth. Member States could not tum a blind eye to the fact that it was being degraded, albeit slowly. For that reason, his delegation approved of the newly adopted third paragraph of the preamble to the draft guidelines, which recognized that the protection of the atmosphere from transboundary atmospheric pollution and atmospheric degradation was a "pressing concern of the international community as a whole". He welcomed the Commission's emphasis on international cooperation under draft guideline 5, noting in particular the importance of exchanging information with a view to further enhancing scientific knowledge in that area.

42. In closing, his delegation acknowledged the positive step taken by the Special Rapporteur in providing a detailed future plan of work for the topic. There was, no doubt, a long road ahead and a number of pitfalls to be avoided. His delegation was confident that the Special Rapporteur would take into account the need to avoid an overlap or duplication with ongoing political processes in other forums and looked forward to further progress on the topic at the Commission's next session.

43. **Mr. Crosbie** (Canada) said that his delegation welcomed the final report of the Study Group on the most-favoured-nation clause (MFN), which provided useful background and an analytical framework for the interpretation of that clause, drawing on the Commission's earlier work on the 1978 draft articles on the same topic. Recent developments highlighted the inconsistent interpretative approach and contradictory decisions of certain investment tribunals in dealing with MFN clauses. The Study Group's report usefully confirmed that there were certain limits to the application of the MFN clause, for instance, that it could not be used to expand a tribunal's jurisdiction. It also reminded tribunals of the importance of an interpretative approach on the basis of articles 31 and 32 of the Vienna Convention on the Law of Treaties and cautioned against excessive reliance on the *expressio unius* principle and the subsequent practice of one treaty party.

44. While the Study Group's recommendation to use explicit language regarding the application of MFN clauses in dispute settlement provided a practical solution to avoid future uncertainty regarding tribunal interpretations, a different solution for existing treaties that did not clearly address the issue still needed to be found. Greater involvement by States in the interpretation of their treaties might be useful in that regard.

45. **Ms. Escobar** (El Salvador) said that her delegation was concerned at the lack of uniform criteria in the application of MFN clauses and their relation to dispute settlement provisions accorded in other treaties; it therefore shared the Study Group's view that the general norms for interpreting treaties should apply, taking into account the circumstances of each case. In particular, arbitration was by its very nature a means of dispute settlement founded on free will; therefore, it would be highly questionable to afford all MFN clauses a single meaning or a scope not agreed upon by the parties to a treaty on the basis of mere assumptions. Doing so would undermine the principle of *pacta sunt servanda* at the international level.

46. Likewise, it was important to highlight the asymmetry in the negotiation of treaties and the problems that might result from changing hundreds of instruments for which the parties could not, in any case, have foreseen a broader scope in terms of dispute settlement. The Study Group's final report therefore provided a useful basis for the discussion of new, relevant issues. Its dissemination would ultimately lead to a better understanding of the scope of MFN clauses, a sounder basis for decision-making in real cases, and increased interest in formulating more explicitly worded MFN clauses, with a view to avoiding problems of interpretation.

47. With regard to the topic of protection of the atmosphere, her delegation noted with satisfaction the definitions contained in draft guideline 1, which served to clarify a number of technical concepts. Nevertheless, it would be premature to consider that guideline as approved, since additional terms that also required clarification might emerge subsequently. The proposed definitions should focus on atmospheric pollution and atmospheric degradation as anthropogenic processes, since human activity, whether directly or indirectly, was primarily responsible for those and other serious consequences, such as climate

change. In the same guideline, she furthermore proposed that the phrase in Spanish "por el hombre" should be replaced with the words "por los seres humanos" in order to better reflect the English phrase "by humans".

48. Draft guideline 5 was crucial in that the obligation to cooperate was an essential principle already established in international law. As highlighted in the Rio Declaration on Environment and Development, there was a duty to cooperate in good faith and in a spirit of partnership for the protection of the environment; the same should be expected for the protection of the atmosphere. That being said, her delegation considered the content of draft guideline 5 to be very limited in respect of the subjective and material scope of international cooperation. With regard to the former, other entities besides international organizations, including non-governmental organizations and civil society, were also actively tackling the issue of atmospheric degradation and pollution. As for the latter, the draft guideline should set out specific forms of cooperation, as the Commission had done previously when considering other topics. That would expand practical protection measures beyond those of a purely diagnostic nature and would present an opportunity to establish an express link between the duty to cooperate and the duty to prevent.

49. Lastly, her delegation recommended removing the reference to relevant political negotiations in the fourth preambular paragraph of the draft guidelines, and in the general commentary as a whole. The understanding that the Commission's work on the topic was not to interfere with relevant political negotiations was already reflected in the Commission's report on its sixty-fifth session (A/68/10); moreover, given that the guidelines would be used in the long term, they should not be understood per se as an obstacle, but rather as a complement, to future progress on the topic.

50. Her delegation welcomed the Commission's decision to include the topic "*Jus cogens*" in its programme of work.

51. *Mr. Holovka (Serbia), Vice-Chair, took the Chair*.

52. **Mr. Saeed** (Sudan) said that regular communication between the Commission and the Sixth Committee should remain a priority. He supported the proposal to hold part of the Commission's future sessions in New York, as it would allow Member States, within the framework of the Sixth Committee, to follow the Commission's deliberations more closely. He therefore proposed that the Commission's related request to the Secretariat, contained in paragraph 298 of the Commission's report (A/70/10), should be reflected in the draft resolution on the current agenda item, and that it should specifically refer to holding at least part of the Commission's seventieth session in New York. His delegation expressed appreciation to the Secretariat for rolling out the Commission's new website, which contributed meaningfully to the dissemination of international law and was an important resource for developing countries that wished to follow the Commission's progress.

53. International law essentially had been established as a result of the efforts of developed countries. The Commission's interaction with other entities, including organizations that represented developing countries, was therefore all the more crucial as it allowed the Commission to take into consideration the views of those countries on topics concerning international law. In that connection, his delegation lauded the efforts that had led to the consultation of the Asian-African Legal Consultative Organization and the African Union Commission on International Law: such initiatives should take place on a regular basis.

54. In its future consideration of the topic of *jus cogens*, the Commission should examine the conditions in which relevant norms and rules on *jus cogens* were established, as adopted in communiqués and in the decisions of tribunals, international organizations and quasi-judicial bodies. He encouraged all special rapporteurs to communicate regularly with Sixth Committee members on the topics which they had been appointed to cover, including those recently added to the Commission's programme of work. Such interaction could take place both at the main part of the annual session of the General Assembly and during the intersessional periods.

55. He expressed appreciation to the successive chairs of the Study Group on the most-favoured-nation clause since 2009 and noted that the Study Group's final report stressed the importance of the Vienna Convention on the Law of Treaties as a reference in the interpretation of treaties.

56. It was important that the Commission's work on the topic of protection of the atmosphere should not interfere with other political processes on climate change and related topics currently under way.

International cooperation between States and organizations for the protection of the atmosphere should be strengthened and the Special Rapporteur, in drafting the draft guidelines on the topic, should strive to avoid vague or ambiguous concepts.

57. **Mr. Misztal** (Poland) said that his delegation would like to reiterate its proposal that the Commission's programme of work should include a topic entitled "Duty of non-recognition as lawful of situations created by a serious breach by a State of an obligation arising under a peremptory norm of general international law". Consideration of such a topic could quickly result in practical guidelines for States. In that connection, his delegation welcomed the working paper submitted by the Working Group on the Long-term Programme of Work reviewing the list of topics for consideration, and hoped that such review would ensure that the Commission's work would be of both theoretical and practical importance. His delegation furthermore welcomed the Commission's new website, as well as the new practice of publishing an unedited version of its report, which gave States more time to review the Commission's work in preparation for the meetings of the Sixth Committee.

58. His delegation agreed that the interpretative techniques reviewed in the final report of the Study Group on the most-favoured-nation clause could significantly assist in the interpretation and application of such clauses. In particular, it supported the assertion that the application of the *ejusdem generis* principle should be determined on a case-by-case basis. Consequently, there could be no single interpretation of an MFN provision applicable to all investment agreements. Regarding the Commission's general statements on international investment law, he noted the danger of adopting interpretations of one investment agreement as automatically applicable to all other agreements.

59. On the topic of protection of the atmosphere, his delegation regretted the lack of a guideline on the general obligation of States to protect the atmosphere from pollution. The obligation of international cooperation, referred to in draft guideline 5, was in fact the natural consequence of such a general obligation.

60. **Ms. Palacios Palacios** (Spain) said that her delegation, while welcoming the Commission's decision to include in its programme of work the challenging topic of *jus cogens*, wished to highlight the need to preserve the open, flexible character of the formation of *jus cogens*; drawing up a list of such norms might call into question the openness of that process. In addition, her delegation continued to have concerns about the excessive number of topics, many of them complex, being considered by the Commission.

61. Her delegation supported the Commission's decision not to hold part of its sixty-eighth session in New York. It furthermore welcomed the substantially improved website of the Commission, but stressed that the parity of the official languages of the United Nations must continue to be ensured.

62. The final report of the Study Group on the most-favoured-nation clause would likely be useful to academics and practitioners alike, in that it shed light on problems involved in the interpretation of such clauses and the measures that might be taken to prevent them. Nevertheless, it was not clear that the report's conclusions, which tended to state the obvious, represented great progress on the topic. The topic as a whole did not seem to fall within the Commission's mandate to promote the progressive development of international law and its codification.

63. On the topic of protection of the atmosphere, her delegation welcomed the revised phrase in the third preambular paragraph, "concern of the international community as a whole", as clearly better established in international law than the previous formulation. The second and fourth preambular paragraphs could be improved, however. Specifically, she proposed that the second preambular paragraph should make clear that the transport and dispersion of polluting and degrading substances occurred also in the atmosphere, rather than implying that such processes occurred only within the atmosphere. In addition, she proposed replacing the word "imponer" with "completar", together with making the necessary grammatical changes, in the fourth preambular paragraph.

64. Her delegation welcomed the focus on human activity in the definitions contained in draft guideline 1, subparagraphs (b) and (c), which was in line with the purpose of the Commission's consideration of the topic. She questioned, however, the reference in subparagraph (b), but not subparagraph (c), to deleterious effects extending across borders, given the indivisible nature of the atmosphere. Likewise, it could not be taken for granted that references to "substances"

included energy. The fact that the definition of pollution in the Convention on Long-range Transboundary Air Pollution and the United Nations Convention on the Law of the Sea included both terms — "substances" and "energy" — made it appear as though the word "energy" had been left out of the Commission's draft guidelines intentionally.

65. Paragraphs 2 and 3 of draft guideline 2 adequately reflected the understanding on which the Commission had decided to include the topic in its programme of work. As for the commentary to paragraph 4 of the same draft guideline, she proposed that the Commission should specify that "airspace" was a legal term, whereas "atmosphere" was a purely physical concept.

66. **Ms. Mangklatanakul** (Thailand) welcomed the final report of the Study Group on the most-favoured-nation clause, which would provide useful guidance for policymakers, negotiators and practitioners. Her delegation agreed that the Vienna Convention on the Law of Treaties was a relevant basis for the interpretation of MFN clauses and took note of the conclusion that the mixed nature of investor-State arbitration posed particular challenges in the interpretation of investment agreements. As a matter of principle, individual investors had no role in the creation of treaty obligations. To avoid the interpretation by dispute settlement tribunals of MFN clauses on a case-by-case basis, States should stipulate in treaties whether or not such clauses encompassed dispute settlement provisions. In the absence of such clear language, the customary rules of interpretation as codified in the Vienna Convention on the Law of Treaties provided guidance that helped to ensure the stability and predictability of the international investment regime. In addition, she noted that for many countries, the policy context would not favour the application of MFN clauses to dispute settlement; such clauses should be narrowly interpreted as to whether or not they should apply beyond substantive obligations.

67. Her delegation supported the Commission's work on the topic of protection of the atmosphere, which in addition to raising the visibility of the issue, sought to address the fragmentation of international regimes for protecting the atmosphere. It furthermore welcomed the Special Rapporteur's highlighting of the fact that protection of the atmosphere was not an exclusively domestic matter but required coordinated action by the international community.

68. Her delegation appreciated the Commission's role in promoting the rule of law at the international level and in contributing to Sustainable Development Goal 16, and it commended its contribution to the training of international lawyers, in particular through the Commission's annual international law seminars. Thailand, for its part, was committed to promoting capacity-building in the field of international law. It had hosted three United Nations regional courses in international law for participants from the Asia-Pacific region and planned to host an additional one in November 2016. Her delegation thanked the Office of Legal Affairs for its continued support and cooperation and hoped to receive the same from all those involved.

69. **Mr. Mminele** (South Africa) said that his delegation supported the Study Group's conclusion that the uniform interpretation and application of MFN clauses was not realistic; indeed, given the varying language used in treaties, seeking such uniformity would risk contravening the rules of interpretation set out in articles 31 to 33 of the Vienna Convention on the Law of Treaties. Therefore, rather than revise the 1978 draft articles, the Study Group had been right to emphasize consistency in the interpretation of similarly drafted MFN clauses. The Study Group's final report would prove useful for treaty negotiators, policymakers and practitioners working in investment.

70. South Africa continued to be concerned about the inconsistent interpretation of MFN clauses by investment tribunals. Owing to such concerns, South Africa had not, for some time now, considered the MFN clause as a core provision of bilateral investment treaties, even though that provision was essential to managing relations between States on a multilateral trade level, including vis-à-vis the World Trade Organization.

71. Bilateral investment treaties should be considered public international law instruments, not contractual arrangements, and States' policy choices in concluding such treaties should be respected by investment arbitration tribunals. His delegation hoped, therefore, that the Study Group's final report would foster greater consistency in the interpretation of similarly drafted MFN clauses by arbitral tribunals and thus enable States to accurately express their policy choices in treaties.

72. The international community's efforts to protect the atmosphere were crucial to the world's sustainable

development and well-being. The atmosphere was a common resource of global concern and the effects of human interference in the atmosphere had impacts beyond national borders. Protection of the atmosphere should therefore be addressed in international law to the extent possible.

73. The protection of the atmosphere under international law had evolved through treaty-making and through State practice, ultimately giving rise to customary law norms. Nevertheless, such development had not always been systematic or consistent, and specialized legal instruments had been developed to address particular aspects of human interference with the atmosphere without necessarily considering the body of international environmental law as a whole. His delegation supported the Special Rapporteur's approach, which entailed working in a way that did not interfere with the relevant political negotiations under way and without prejudice to existing international law principles, including the polluter-pays principle, the precautionary principle and the principle of common but differentiated responsibility. Despite the restricted scope of the Commission's work on the topic, the provisional adoption of draft guidelines would enhance the coherence of the legal instruments and customary law principles related to the atmosphere.

74. Given the technical complexity of the topic, it was important to ensure a coherent dialogue between lawyers and experts; his delegation welcomed draft guideline 5, paragraph 1, in that regard. Global challenges required global, multilaterally agreed solutions; it was only through international cooperation that States would be able to ensure a safe environment for current and future generations. South Africa was actively involved in the various multilateral processes aimed at protecting the atmosphere from pollution, ozone depletion and climate change. His delegation encouraged the Commission to continue distilling the existing international law principles that related to the protection of the atmosphere to lend expediency to the political processes of creating new norms. Lastly, he welcomed the Commission's decision to include in its programme of work the topic of *jus cogens*.

75. *Mr. Charles (Trinidad and Tobago) resumed the Chair*.

76. **Mr. Vu** Minh Nguyen (Viet Nam) said that Viet Nam, as a capital importing country, had concluded over 80 bilateral investment agreements and dozens of free trade agreements containing an investment chapter. Most of those agreements had an MFN clause, which was generally worded and subject to interpretation by the parties and arbitrators when disputes arose. Some interpretations by arbitral tribunals deviated from the rules of treaty interpretation embodied in the Vienna Convention on the Law of Treaties, and risked resulting in situations that the contracting parties had not intended at the time of signing. Uniformity in the interpretation or application of the MFN clause could not be expected, owing to the differences in language; moreover, there was no related doctrine of precedent in international law. It was nonetheless crucial for judges and arbitrators to maintain consistency in their reasoning, and thus boost the credibility of their decisions and the healthy development of international law.

77. His delegation welcomed the Study Group's final report, in particular the conclusion that the interpretation of MFN clauses should be undertaken on the basis of the rules for treaty interpretation as set out in the Vienna Convention on the Law of Treaties. The report was a valuable contribution to the consistency and predictability of international law. He encouraged policymakers, government negotiators, arbitrators, lawyers and others to rely on the report in their practice of international investment law.

78. It was widely agreed that the obligation to cooperate for the protection of the atmosphere had been established in various multilateral environmental agreements, even if the forms and nature of that cooperation might vary. While supportive of the first paragraph of draft guideline 5 on the topic, therefore, his delegation took issue with the second paragraph, which singled out one form of cooperation at the expense of others. Doing so risked undermining the discretion of States to cooperate in the most appropriate manner. In line with the Commission's 2013 understanding, his delegation supported the final form of guidelines, rather than principles or guiding principles, the last of which might connote legal obligations on States — the very thing that the Commission had sought to pre-empt.

79. His delegation praised the Commission's noteworthy contributions, particularly its promotion of the rule of law by training the future generation of international lawyers. In that connection, his Government supported the yearly International Law Seminar, which was a valuable opportunity for young

lawyers from developing countries to advance their understanding of international law and the Commission's work. His delegation would follow with interest the Commission's work on its newly included topic of *jus cogens*.

80. **Mr. Rhee** Zha-hyoung (Republic of Korea), welcoming the Commission's new website, said that the dissemination of information helped to foster the rule of law and that relevant websites, including that of the Sixth Committee, should continue to be further improved. His delegation welcomed the final report of the Study Group on the most-favoured-nation clause as a practical guide to the developments subsequent to the completion of the 1978 draft articles, particularly in the area of international investment.

81. His delegation commended the Commission for its progress on the topic of protection of the atmosphere, despite its exceedingly abstract and controversial nature. It furthermore noted, in the preamble to the draft guidelines, the overarching and comprehensive acknowledgement of the importance of the atmosphere and the fact that its protection was described as a "pressing concern of the international community as a whole". It supported the Commission's decision to include only the physical description of the atmosphere in draft guideline 1 and to refer to the functional aspect of the atmosphere in the second preambular paragraph, while omitting the more controversial language pertaining to the conceptual definition of "atmosphere".

82. The definitions contained in draft guideline 1 were necessary for the purposes of the Commission's work on the topic; in particular, his delegation welcomed the adoption of the narrow definition of "atmospheric pollution" in line with the Convention on Long-range Transboundary Air Pollution. Noting the explanation in the commentary regarding the word "substances", he said that although it remained unclear how intended releases of energy should be distinguished from unintended emissions due to natural disasters, the Commission's efforts to further clarify the word "energy" were appreciated.

83. His delegation welcomed the discussions reflecting the Commission's 2013 understanding and noted, in particular, the issues not covered by the draft guidelines, as specified in paragraphs (2) and (3) of the commentary to draft guideline 2. Furthermore, draft guideline 5, with its emphasis on international cooperation, was at the very core of the whole set of guidelines. He proposed, however, that, in draft guideline 5, paragraph 1, the phrase "States have the obligation to cooperate" should be replaced with the phrase "States shall cooperate", a wording that was more frequently employed in treaties. Moreover, while the words "as appropriate" were, according to the commentary, designed to denote flexibility and latitude, his delegation was concerned that such language might in fact make the paragraph more ambiguous.

84. The 2016-2020 long-term work plan contained in the Special Rapporteur's second report (A/CN.4/681) should not aim to be so comprehensive, lest the resulting work should override the Commission's 2013 understanding. In addition, the fifth report, on the interrelationship with relevant fields of international law, was too broad in scope. Lastly, the sixth report, on compliance and dispute settlement, was likely to trigger another round of debates. Although the development of a detailed plan might not be achievable at the present time, the Special Rapporteur would be well-advised to limit the scope of his future work to those areas prescribed in draft guideline 2.

Agenda item 143: Administration of justice at the United Nations (*continued*) (A/70/151, A/70/187, A/70/188, A/70/189)

85. **The Chair** said that informal consultations on the agenda item had involved a fruitful question-and-answer session with staff members from the Office of Legal Affairs, the Office of the Executive Director of the Office of Administration of Justice, the Office of the United Nations Ombudsman and Mediation Services and the Internal Justice Council. Owing to the success of the dialogue, it was recommended that the exercise should be repeated at the next session.

86. The informal consultations had centred on the proposals and observations contained in the report of the Secretary-General on administration of justice at the United Nations (A/70/187); the report of the Secretary-General on amendments to the rules of procedure of the United Nations Appeals Tribunal (A/70/189); the report of the Internal Justice Council on administration of justice at the United Nations (A/70/188), which included annexes containing the memorandum submitted by the judges of the United Nations Dispute Tribunal (annex III); the letter submitted by the judges of the United Nations Appeals

Tribunal (annex II); and the report of the Secretary-General on the activities of the Office of the United Nations Ombudsman and Mediation Services (A/70/151). The report of the Internal Justice Council on the appointment of judges of the United Nations Appeals Tribunal and the United Nations Dispute Tribunal (A/70/190), relating to agenda sub-items 114 (g) and (h), had also been available during the informal consultations.

87. A draft letter from the Chair of the Sixth Committee to the President of the General Assembly had been negotiated during the informal consultations. The letter drew attention to issues relating to the legal aspects of the reports discussed and contained a request that it should be brought to the attention of the Chair of the Fifth Committee. He took it that the Committee wished to authorize him to sign and send the draft letter to the President of the General Assembly.

88. *It was so decided*.

The meeting rose at 1 p.m.