中国关于联大“迈向《世界环境公约》”特设工作组的评论意见

（2019 年 2 月 19 日，北京）

一、对工作组进程的总体评论

中国将建设清洁美丽世界作为构建人类命运共同体的重要方面，坚定支持加强全球环境治理，并认为本特设工作组工作是加强全球环境治理的重要环节。中方认为，加强国际环境治理，包括推进本工作组进程应统筹各方利益，做到“四个坚持”：一是要坚持在可持续发展框架下讨论解决环境问题，实现经济社会发展与环境保护相协调；二是要坚持“共同但有区别的责任”原则，切实帮助发展中国家稳步提高环境治理水平和可持续发展能力；三是要坚持环境资源国家主权原则；四是要坚持发展中国家的充分参与。

关于推进工作组工作的程序要求，中方认为应坚持科学民主决策、凝聚共识动力、协同增效。同时在具体工作中坚持以下几点：**首先，不与既有国际公约或机制的工作重复。**工作组工作的主旨在于加强现有法律和文书执行，联大授权决议明确要求工作组不损害现有相关文书和框架以及相关的全球、区域和部门机构，不重复是应有之义。**其次，应坚持渐进发展。**根

据国际法委员会，渐进发展意味着稳定与变化的适度平衡。为完善国际环境治理，国际环境法既不能停滞不前，也不能搞修正（revision），应寻求稳定与变化的平衡，通过国际环境法持续的渐进发展不断提升国际环境治理。**第三，应聚焦全球性问题、避免介入双边及地区性问题。**工作组要严格按照授权，将有限时间和资源聚焦全球性和普遍性问题，避免过多讨论应在双边及地区层面解决的问题，影响实现工作组宗旨和目标。**第四，要坚持国际法原则和方法。**要尊重国家意愿和实际情况，坚持国家同意原则，立足国家实践，避免超越实际强行推进。

中方对联合国秘书长起草《国际环境治理不足报告》的努力表示赞赏，同时认为，工作组进程是成员国驱动的进程，各国可不受《报告》局限。如成员国在报告之外提出关于国际环境治理的不足，工作组亦应予以重视。

二、对国际环境法现状的总体评论

（一）**关于方法论。**国际环境法是国际公法的一部分，植根于一般国际公法的原则和规则。我们应运用国际公法的规则和工具来识别国际环境法的可能不足及提出解决方案。习惯国际法规则的存在需证实相应的公认国家实践和法律确信。讨论国际环境法原则时应遵循这一规则。此外，条约解释规则与处理国际环境法碎片化所带来的困难密切相关，应予重视。

（二）**关于国际环境法现状。** 1972年斯德哥尔摩人类环境会议以来，全球环境治理取得长足进展，环境问题在国际议程中的位置不断前移。对秘书长报告提出的国际环境法碎片化、国

际环境法原则状态不明及各部门国际环境法之间及与其他领域国际法缺乏协调等问题，中方初步看法如下：

1、关于碎片化。由于环境问题性质、特点各不相同，需要针对具体问题订制解决方案，碎片化有其合理性。另一方面，碎片化确实产生互相冲突和不相容的规则、原则、规则体系及体制惯例的危险。对于碎片化可能引起的规则、原则冲突，可通过关于条约冲突的成熟国际法工具协助解决。例如，特别法优先于普通法（lex specialis derogat legi generali）和后法优先于先法（lex posterior derogat legi priori）、不得与强行法抵触（norms of jus cogens tolerate no derogation）等，对解决碎片化问题很有裨益。这些条约法规则对于解决国际环境法碎片化问题也是有效的手段。中方愿本着开放态度结合碎片化具体个案展开研讨，寻求务实解决之道。

从长远来说，国际环境法的碎片化发展趋势确实会导致各国履约负担日益繁重、相关权利义务清晰度可能下降等问题，需要通过加强国际环境条约、机制之间的协调予以解决。相关机制已就此展开诸多统筹协调工作。如化学品领域的巴塞尔、鹿特丹和斯德哥尔摩三公约缔约国大会2008年发起的“协同增效进程”（synergies process）、联合国环境规划署（UNEP）2017年发起的“环境条约项目—实现生物多样性的协同增效”倡议等。相关努力应在现有框架内继续推进。此外，环境法以外其他领域为应对碎片化加强机制、规则间协调的做法也值得借鉴。如在国际贸易法领域，联合国国际贸易法委员会（UNCITRAL）

通过与相关国际组织磋商确定拟审议的新专题，编写各组织与国际贸易法相关的立法和技术援助活动概览、报告，联合研究研讨等方式加强协调，取得了良好效果。可以参考相关做法，推进加强环境条约、环境机构之间的协调，进一步加强UNEP相关协调职能。

2、关于国际环境法原则状态不明。中方认为，有些国际环境法原则更加接近于“习惯国际法”，有些则仍是“软法”。有些原则更多体现在国际法文书中，有些则主要来自各国国内法。对于同一原则的地位、内容和适用范围，不同国家、不同学者存在不同看法。进一步澄清相关原则的地位、内容和适用范围，有助于发挥这些原则的作用。

就此，中方有三点基本看法：**一、国际环境法原则并不自动构成国际法渊源意义上的一般法律原则。二、关于一项国际环境法原则是否构成习惯国际法，应坚持识别习惯国际法的惯常做法。**有观点认为，应对全球环境问题的迫切性，使得国际环境法领域习惯国际法的形成比较快。但国际法委员会2018年关于国际习惯法识别的结论草案，重申应综合考虑法律确信和国家实践两要素来识别国际习惯法。根据两要素进行衡量，会发现国际环境法原则是否已形成习惯法，在何种内涵上形成了习惯法，事实上是需要严谨讨论的。**三、即使作为软法，国际环境法的原则也是有其意义的。**软法能更好更快适应环境问题的紧迫性，软法义务具有很大包容性和灵活性甚至可执行性，对习惯法的形成有潜在影响。

对于国际环境法原则状态不明问题，中方认为关键在于加强研究和编纂。相关专家组织在此方面已开展了不少工作，但政府参与不足限制了相关工作的认知度和影响力。未来加强国际环境法的研究和编纂，应努力探讨各国政府和专家互动的方式。理论上，加强国际环境法的研究和编纂可有多种选项：一是可通过本特设工作组加强相关研究和讨论，工作组的任务是识别国际环境法的不足并研讨应对方案，加强研究是题中之义。二是可建议联大成立专家组，就特定国际环境法问题加强研究和编纂。三是可借鉴海牙国际私法会议、联合国国际贸易法委员会，探讨作出机制安排，加强UNEP关于国际环境法研究、编纂、渐进发展以及传播、协调的职能。四是可进一步发挥国际法委员会在国际环境法的编纂和渐进发展方面的作用。国际法委员会在2001年和2006年分别就预防危险活动的跨界损害及损失分配原则提出草案。相关工作较好实现国际法稳定性和渐进发展的统一，有助于进一步澄清有关原则的法律地位。虽然国际法委员会目前工作繁重，但联大有权要求委员会就国际环境法具体原则开展编纂工作，委员会应将联大授权事宜做为优先事项处理。五是如各方认为制定新的国际法文书确有必要而且可行，新文书也可作为选项之一。此外，不采取任何行动也是一种选项。即维持国际环境法原则和规则的现状不变，由各方根据各自理解予以解释、适用。

目前阶段，中方没有倾向性意见，也不排除任何可能的解决办法。如工作组认为确实存在国际环境法原则不明的问题，

需要认真评估各种选项的附加值、可行性，探讨、确定最为有效的解决办法。

三、对有关具体问题的评论

（一）关于国际环境法原则

1、环境资源国家主权原则、合作原则、共同但有区别的责任原则、可持续发展、发展权等重要原则，构成各国合作应对环境问题的基础；不论采取何种方式加强国际环境治理，均不应偏离这些原则。

2、对预防原则(prevention)、风险防范(precaution)、污染者付费（polluter pays）、环境权(right to a clean and healthy environment)、环境民主(environmental democracy)、不倒退和进步原则(non-regression and progression)等问题，中方已在第一次实质会议发言中发表了具体意见，并认为国际社会应认真研究，进一步明确其地位、内涵和适用范围。

（二）关于各领域规制制度

国际环境法各领域相关机制、条约针对具体环境问题进行的规制和治理，有其合理性、专业性和科学性。同时，工作组联大授权决议要求工作组进程不应损害现有相关文书和框架。因此，工作组工作不宜对各领域的规制制度和治理结构的不足和解决方案进行讨论和处理，相关工作宜由各领域的文书和机构自身进行处理。

对于森林可持续利用、海洋塑料垃圾问题、土壤保护、人权与气候变化等新兴问题，在现有机制下已开展讨论，可通过

既有机制以适当方式进行处理。如工作组发现现有机制无法处理的问题，中方愿积极讨论解决方案。

（三）关于与环境有关的文书

关于贸易文书，中方注意到，WTO争端解决机制与GATT相比，更多地考虑环境保护因素，并通过条约解释等方法考虑相关环境法原则、规则，加强环境保护；此外，地区和双边的贸易条约和立法也越来越多纳入环境保护章节。国际环境法和国际贸易法相互支持的趋势加强，联大可以鼓励继续加强上述这种相互支持。同时，需要强调的是，加强环保要避免对自由贸易构成不合理限制或贸易壁垒。

关于投资文书，中方注意到报告中引用的文献较为陈旧，未能涉及该领域新的发展。近年，越来越多的地区和双边投资条约中纳入环境保护的规则和标准，这是积极的趋势。中方认为，处理该问题要兼顾成员国对环境的保护和对投资者投资的保护之间的平衡。

关于知识产权，中方认为，该问题专业性和复杂性强，且在生物多样性公约、TRIPs等机制下已开展讨论，应继续在既有框架下推进相关讨论。

关于人权文书。中方注意到报告提及的一些国际和地区层面的发展，认为应在既有的平台和机制下开展相关的讨论。

（四）关于治理架构

1、关于加强不同机构和条约间协调。目前已开展的如化学品领域的“协同增效进程”、UNEP2017年发起的“环境条约项目

—实现生物多样性的协同增效”倡议等，可继续加强。此外，还可借鉴海牙国际私法会议、联合国国际贸易法委员会，探讨作出机制安排，加强UNEP关于国际环境法研究、编纂、渐进发展及传播、协调的职能。

2、关于非国家行为体参与。中方支持鼓励非国家利益相关方根据国内法参与环境治理，依法行使知情权、参与权和救济权，也欢迎他们在国际环境治理中发挥更大作用。同时需强调的是，环境条约的主体是国家，非国家行为体不是条约主体，其在国际环境立法、履约监督和遵约程序中的作用必须与这一地位相符合，不能冲淡甚至破坏主权国家在国际环境法中的主体地位。

遵约机制是促进履约、而非惩罚性质的机制，有关制度设计不能影响遵约机制的这一性质。虽然生物多样性公约等个别公约在惠益分享、传统知识等特殊问题上为非国家行为体一定程度上参与遵约程序提供了便利，但总体上我们仍应坚持环境条约遵约机制政府间进程的性质和促进性的特点。

（五）关于执行和有效性

1、关于履约手段（means of implementation）

中方认为，面对日益多元化、专业化、复杂化的国际环境条约体系，发展中国家履约能力和手段欠缺问题需要得到国际社会更多关注，发达国家应进一步加强对发展中国家在履行多边环境协定的资金、能力和技术等方面的支持，确保发展中国家充分和深入参与全球环境治理。

2、关于争端解决机制

现有的国际、国内司法机制和程序提供了有效处理国家之间、国家与投资者之间以及民事主体之间环境法案件的机制，建立新的司法、仲裁机制时机不成熟。

（六）关于跨界损害赔偿

1、国家责任和跨界损害损失分担属不同层面问题：

（1）预防跨界损害存在相对较多的国家实践和法律确信，但针对国家责任的损害赔偿则缺少足够的国家实践和法律确信，还远未形成习惯国际法。国际实践中存在国家参与跨界损失分担的情况，但这些国家总是强调这是一种善意补偿（ex gratia)，而非法律意义上的赔偿责任。所以并不存在关于国家赔偿责任的法律确信。

（2）关于跨界损害，国家承担的是适当注意的义务，即确保其管辖或控制的活动不损害其他国家或在国家管辖范围以外地区的环境，这是一种行为义务，而非结果义务。只要一国采取了适当措施，就履行了适当注意义务，不引起国家责任。

（3）跨界损害损失分配的主要责任主体是经营者（operator)。目前除核和太空等个别领域规定了国家责任外，其他领域实践主要涉及民事责任，由民事主体赔偿。相关国际法的渐进发展应继续坚持这一大的方向。

2、本进程应尽量回避跨界损害的赔偿问题，交由具体领域处理。原因如下：

一是由于环境问题性质各异，国际社会难以制订统一适用

各领域环境问题的跨界损害赔偿规则；

二是国际法委员会在2001年《关于预防危险活动的跨界损害的条款草案》（Draft Articles on Prevention of Trans-boundary Harm from Hazardous Activities）和2006年《关于危险活动造成的跨界损害案件中损失分配的原则草案》（Draft Principles on the Allocation of Loss in the Case of Trans-boundary Harm Arising out of Hazardous Activities）体现了在这一问题上最新和最大程度上的进展。其后的国家实践并没有出现重大突破。脱离具体领域，在一般意义上重复讨论跨界损害问题不会取得新的进展；

三是跨界损害主要是双边或区域问题，应主要在双边和区域层面解决。联合国进程可以不必就此花费过多时间。

3、鉴于上述，**本进程可进一步鼓励各国制定关于损害的责任和赔偿受害者的国内法，并鼓励各国发展关于跨界损害的责任和赔偿的国际法规则。但本进程本身不宜实质性讨论跨界损害赔偿问题。**

(English version)

Comments of China to the Ad Hoc Open-Ended Working Group Established Pursuant to General Assembly Resolution 72/277

(Beijing, 19 February 2019)

I. General Comments on the Ad Hoc Open-Ended Working Group

1. China holds the building of a clean and beautiful world an important aspect in its pursuing a community of shared future for mankind, and gives steadfast support to strengthening global environmental governance; it is also of the view that the work of the Open-Ended Working Group (OEWG) is an important segment in strengthening global environmental governance. **China holds that strengthening global environmental governance, including promoting the work of the OEWG shall stick to four points: first,** discuss and address environmental issues in the context of sustainable development, so as to realize harmonization between economic social development and environmental protection; **second,** adhere to the principle of common but differentiated responsibilities, and take concrete measures to help developing countries enhancing their environmental governance and sustainable development; **third,** adhere to the principle of state sovereignty over its environmental resources; **fourth,** ensure adequate participation of developing countries.

2. Procedurally, the OEWG should carry out its work through open, trasparent and scientific decision-making, building consensus and enhangcing synergy; Meanwhile conducting its substantive work in accordance with the following: **first, no duplication with existing international conventions or mechanisms.** The OEWG's work is to enhance the implementation of existing laws and instruments. The GA resolution

requires the OEWG not to undermine existing relevant legal instruments and frameworks and relevant global, regional and sectorial bodies. No duplication should be a prerequisite. **Second, adhere to progressive development.** According to the International Law Commission, progressive development means nice balance between stability and change. To improve global environmental governance, international environmental law should keep neither stagnation nor revision, but a balance between stability and change. Therefore, we should enhance the global environmental governance through continuous and progressive development of international environmental law. **Third, focus on global issues instead of intervening with bilateral or regional issues.** The OEWG should stick to its mandate, invests its limited time and resources to global and universal issues, and avoid diversion of its discussion to issues that should be solved through bilateral or regional channels, as that may undermine the OEWG's fulfillment of its mandate. **Forth, adhere to principles and methodologies of international law.** The OEWG should respect the will and practice of states, adhere to the principle of state consent and move the discussion on solid state practice.

3. China appreciates efforts of the UN Secretary-General in producing the report which identifies and assesses possible gaps in international environmental law and environment-related instruments; meanwhile, the OEWG is a party-driven process by UN member states, state parties are not restricted by the report. The OEWG should pay due attention to new gaps put forward by them.

II. On Status of International Environmental Law (IEL)

4. **Methodology.** As a part of public international law, IEL is anchored in the rules and principles of general public international law. Therefore, we should apply rules and tools of public international law to identify possible gaps of IEL and consider possible solutions. The existence of a rule of customary international law requires that there be a settled practice together with opinio juris of states. We should follow this

rule when discussing the issue of principles of IEL. In addition, rules of treaty interpretation would be pertinent in addressing the difficulties raised with fragmentation.

5. Status Quo of IEL. Since the Stockholm Conference on the Human Environment in 1972, great progress has been made in global environmental governance, and environmental issues have been playing a more important role in international agenda. **China has the following preliminary comments on the fragmentation of IEL, the uncertainty of principles of IEL, and the lack of synergy among different sectorial IELs and between IEL and other fields of international law as proposed in the Secretary-General's report.**

6. Fragmentation. Due to different nature and characteristics of environmental problems, tailored solutions are needed for specific problems. Fragmentation therefore has its rationality. On the other hand, fragmentation does create risks of conflicting and incompatible rules, principles, rule systems and institutional practices. However, conflicts of rules and principles that may arise from fragmentation can be resolved through matured international law tools on treaty conflicts, such as "lex specialis derogat legi generali", "lex posterior derogat legi priori", and "norms of jus cogens tolerate no derogation". **These treaties rules are also of great help to solve the problem of fragmentation in IEL. China is willing to discuss specific cases in an open manner to seek practical solutions.**

7. In the long run, the fragmented development trend of IEL will indeed lead to the increasingly heavy burden on states to fulfill their obligations and the possible decline in the clarity of related rights and obligations. They need to be addressed by strengthening synergy among international environmental treaties and mechanisms. Relevant mechanisms have launched a number of initiatives in this regard. For example, the "synergies process" lunched by Conference of Parties to the Basel, Rotterdam and Stockholm conventions in the field of chemicals in 2008, and the "Environmental Treaty Project–Synergies for Achieving

Biodiversity" initiative launched by the UN Environment Programme (UNEP) in 2017. In addition, other areas dealing with fragmentation through enhanced synergy of mechanisms and rules are also worth learning from. For example, in field of international trade law, the UNCITRAL identifies new agenda items through consultation with relevant international organizations, and compiles summaries and reports on latter's legislative and technical assistance activities related to international trade law. We may refer to relevant practices to promote and enhance the coordination between environmental treaties and institutions, and further strengthen the coordination function of the UNEP.

8. Uncertainty of principles of IEL. Some IEL principles are more likely to be customary international law, while others are still being "soft law". Some principles are more embodied in international legal instruments while others are derived primarily from national laws. Different countries and scholars hold different views on status, content and scope of application of a same principle. Further clarification of the status, content and scope of application of relevant principles will help bring them into play.

9. **In this regard, China has three basic standings: First, the principles of IEL do not automatically constitute general legal principles in the sense of sources of international law. Second, on whether a principle of IEL constitutes customary international law, the general practice of identifying customary international law should be adhered to.** Some opinions hold that given the urgency of tackling global environmental issues, the formation of customary international law in IEL is relatively fast. However, the International Law Commission's *"Draft Conclusions on the Identification of Customary International Law"* in 2018 reaffirms that the recognition of customary international law should take into account both state practice and opinio juris. It needs to be discussed rigorously regarding whether principles of IEL have formed or in what sense they have formed customary laws. **Third, principles of IEL have their value even as being soft law.** Soft law can better and faster adapt to

urgency of environmental issues. It can be very inclusive, flexible and even enforceable, and has a potential impact on the formation of customary law.

10. **On uncertainty of principles of IEL, China believes that the key lies in strengthening research and codification.** Relevant expert organizations have carried out a lot of work in this aspect, but lack of government participation has limited awareness and influence of their work. **In the future, further efforts on strengthening research and codification of IEL shall explore ways to enhance interaction between governments and experts. Theoretically, there are various options for strengthening the research and codification of IEL. First,** relevant research and discussion can be strengthened through the OEWG. The task of the OEWG is to identify gaps of IEL and discuss possible options, and strengthening research is apparently in its scope. **Second,** the OEWG may suggest the UN General Assembly to establish an expert group to strengthen research and codification of specific IEL issues. **Third,** The Hague Conference on Private International Law and the United Nations Commission on International Trade Law can be used for reference to explore institutional arrangements to strengthen UNEP's functions on IEL research, codification, progressive development, communication and coordination. **Fourth,** the role of the International Law Commission in the codification and progressive development of international environmental law can be further brought into play. In 2001 and 2006, the ILC introduced *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities* and *Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities*. Relevant work is conducive to achieving the unification of stability and progressive development of international law and further clarifying the legal status of relevant principles. Despite the heavy workload of the ILC, the General Assembly has the power to request ILC to undertake the codification of specific IEL principles, and the commission should take it as a matter of priority. **Fifth,** a new international legal instrument could be

one of options if the OEWG deems it necessary and feasible. **In addition,** taking no action is also an option. That is to maintain the status quo of the principles and rules of IEL, which shall be interpreted and applied by the respective understandings of each party.

11. At this stage, China has no favored opinions, nor does it rule out any possible solutions. If the OEWG recognizes that there are indeed problems with the uncertainty of IEL principles, it is necessary to carefully evaluate the added value and feasibility of various options, and explore the most effective solutions.

III. On specific issues

A. Principles of IEL

12. Important principles such as state sovereignty over its environmental resources, cooperation, common but differentiated responsibilities, sustainable development and right to development, are fundamental for international cooperation in environmental issues. No matter what we take to enhance global environmental governance, there should not be any deviation from these principles.

13. On issues such as prevention, precaution, polluter pays, right to a clean and healthy environment, environmental democracy, non-regression and progression, China has voiced its views during the First Substantive session. China believes that the international community still need to carry out serious studies so as to clarify their statuses, contents and scopes of application.

B. Regulatory regimes in different fields

14. Regulatory regimes and governance structures of IEL treaties and mechanisms in specific fields tailored to specific environmental issues are reasonable, professional and scientific. Besides, the GA Resolution requests that the process of the OEWG should not undermine existing relevant legal instruments and frameworks. Therefore, it is inappropriate for the OEWG to discuss and address gaps and options of sectorial IEL regulatory regimes and governance structures, which should be addressed

by respective instruments and organizations themselves.

15.Emerging issues such as sustainable use of forests, marine plastics, soil protection, human rights and climate change, are being discussed under existing mechanisms, and could be addressed through those mechanisms appropriately. If the OEWG identifies issues that could not be addressed by the existing mechanisms, China would like to join discussions for solutions.

C. Environment-related instruments

16. **On trade instruments,** China notes that, compared to the GATT, the WTO dispute settlement mechanism incorperates more environmental protection elements. The mechanism takes relevant principles and norms of environmental law into its consideration and promotes environmental protection, through tools such as treaty interpretation. In addition, more and more environmental protection chapters are incorperated into regional and bilateral trade treaties. The trend of mutual reinforcement between international trade law and international environmental law is enhancing. The GA could further encourage this trend. Meanwhile, it should also be emphasized that enhancement of environmental protection should not lead to inappropriate constraints or barriers to free trade.

17. **On investment instruments,** China notes that documents cited by Secretary-General's report are fail to reflect the latest developments. In recent years, we witness a positive trend that more regional and bilateral investment treaties incorperates environmental protection rules and standards. China also holds that balance should be maintained between environment protection and investment protection in addressing this issue.

18. **On intellectual property rights,** China holds that this issue is highly professional and complicated, and relevant discussions have taken place under mechanisms such as CBD and TRIPs; discussions should be advanced under existing frameworks.

19. **On human rights instruments,** China notes in Secretary-General's report some developments at international and regional levels, and believes that discussions should be conducted under existing platforms and

mechanisms.

D. Governance structure

20. On e**nhancing coordination between organizations and treaties.** Existing initiatives such as the “synergies process” in chemical area and the “Environmental Treaty Project–Synergies for Achieving Biodiversity” launched by UNEP in 2017 could be further enhanced. In addition, the Hague Conference on Private International Law and the United Nations Commission on International Trade Law can be used for reference to explore institutional arrangements to strengthen UNEP’s functions on IEL research, codification, progressive development, communication and coordination.

21. **On participation of non-state actors.** China supports and encourages non-state stakeholders participate in environmental governance in accordance with domestic laws, including exercising their right to know, right to participate and right to legal remedy. We also welcome their more contributions to global environmental governance. It should be emphasized that state, not non-state actors, is the subject of international environmental treaties. Role of non-state actors in legislation, implementation and compliance procedures of IEL should be consistent with their legal status, and should not weaken or undermine the role of sovereign state as the subject of IEL.

22. **Compliance mechanism should be facilitative and non-punitive in nature.** Relevant institional designs should not change the nature of Compliance mechanism. Although some individual conventions such as CBD provide certain access for non-state actors on compliance process regarding benefit sharing and traditional knowledge, the inter-governmental and facilitative nature of the compliance mechanisms of international environmental conventions/treaties should be maintained in general.

E. Implementation and effectiveness

23. **On means of implementation.** China believes that in the context of increasingly diversified, specialized and complicated international

environmental convention/treaty system, lack of capacity and means of implementation by developing countries needs more attention from the international community. Developed countries should render more financial, technical and capacity support to developing countries in implementation of international environmental conventions/treaties, so as to ensure adequate and profound participation of developing countries in global environmental governance.

24. **On dispute settlement mechanism.** Existing international and domestic judicial mechanisms and procedures provide effective mechanisms for addressing environmental law cases between countries, between countries and investors, and between civil subjects. Currently it is premature to establish new judicial and arbitral mechanisms .

F. Compensation for transboundary environmental damage

25. **First, state responsibility and allocation of loss in case of transboundary environmental damage are issues of different levels:**

(1) There are relatively more “state practice ” and “opinio juris” on transboundary environmental damage prevention, but state responsibility for compensation caused by transboundary environmental damage still lacks “state practice ” and “opinio juris”, thus far from forming customary international law. In international practice, there exists cases of countries participating in allocation of transboundary environmental damage losses, but these countries always emphasize that compensation is a kind of ex gratia rather than legal liability. Therefore, there is no “opinio juris” about the state responsibility for compensation.

(2) With regard to transboundary environmental damage, a state undertakes an obligation of due diligence, that is, ensuring that the activities under its jurisdiction or control do not harm the environment of other countries or areas beyond its jurisdiction, which is an obligation of conduct, rather than an obligation of result. As long as a state takes appropriate measures, it fulfills its duty of due diligence and does not incur state responsibility.

(3) The primary liability subject in transboundary environmental

damage is operator. At present, except state responsibility in individual areas such as nuclear and outer space, practice in other fields mainly involves civil liability, which is undertakened by civil subjects. The progressive development of relevant international law should continue to adhere to this main direction.

26. The OEWG should avoid discussion issue of compensation for transboundary environmental damage and leave it to specific fora. Reasons are as follows:

(1) Due to the different nature of environmental issues, it is difficult for the international community to formulate unified rules for transboundary environmental damage compensations applicable to environmental issues in various fields;

(2) The International Law Commission's *"Draft Articles on Prevention of Trans-boundary Harm from Hazardous Activities"* in 2001 and *"Draft Principles on the Allocation of Loss in the Case of Trans-boundary Harm Arising out of Hazardous Activities"* in 2006 reflects latest progress on this issue. Subsequent state practices have not seen any major breakthrough. Repeating discussions on transboundary environmental damage in a general sense will not make new progress;

(3) Transboundary environmental damage issue is mainly of bilateral or regional nature and should be resolved mainly at the bilateral and regional levels. There is no need for the United Nations process to spend too much time on this issue.

27. In view of the above, **this process may further encourage states to develop national law regarding liability and compensation for the victims of environmental damage; and also encourage states to develop further international law rules on liability and compensation for transboundary environmental damage. However, it is inappropriate for this process itself to discuss substantively the issue of compensation for transboundary environmental damage.**