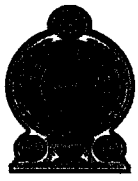

Statement by the Delegation of Sri Lanka

ILC REPORT-CH. XI-MFN CLAUSE

Mr. Chairman,

Let me at the outset, on behalf of my delegation, extend to you and to other Members of the Bureau our warmest congratulations on being elected to guide our deliberations this year.

I also wish to take this opportunity to extend our sincere appreciation to the Chairman of the ILC, Mr. Lucius Caflisch, for his comprehensive and lucid introduction of the two clusters of Chapters of the ILC Report. We also acknowledge and appreciate the presence amongst us, of the two Special Rapporteurs, Mr. Maurice Camto and Ms.Concepcion Escobar Hernandez and congratulate them on the work accomplished during the current session of the Commission, with respect to their topics, Expulsion of Aliens and Immunity of State Officials from Foreign Criminal Jurisdiction respectively. Both topics involve elements of legal complexity and political sensitivity and the approach of the Special Rapporteurs; show a clear desire to strike a delicate balance between the contending principles and considerations involved.

The work of the ILC this year in the new quinquennium show considerable progress being achieved on several topics pending on the Agenda, as well as on some new topics.

The purpose of my intervention today is to make some observations on Ch. XI of the Report on the Most- Favoured-Nations Clause and the progress that has been made in the Study Group.

My delegation attaches considerable importance to the work of the Study Group, which is intended to provide greater coherence and stability in the field of Foreign Investment Law, particularly by addressing the inconsistency that has arisen in recent Arbitral jurisprudence

with regard to the scope of application of the MFN Clause, consequent to the well-known Maffezini and the Post Maffezini Awards.

I also wish to recall here Mr. Chairman, that the first Investment Dispute to be referred to the International Center For Settlement of Investment Disputes (ICSID), under the dispute settlement provisions of a bilateral Investment Treaty was the case of AAPL vs The Government of Sri Lanka where important legal questions such as, whether the Principle of "Full Protection and Security", found in BITs required a Host State only to discharge the 'due diligence' standard under Customary International Law or whether it imposed a higher standard of strict liability came up for consideration by the Tribunal, which affirmed the 'due diligence' standard of treatment. This was in the mid 80s. Since then, with the proliferation of Investment disputes before ICSID, and with the Maffezini Award and its aftermath, the environment relating to International Arbitral jurisprudence has become shrouded in much controversy and complexity.

Sri Lanka which commenced negotiating BITs in the late 1970s with the liberalization of its economy, is now engaged in developing a new model Treaty, taking into account features in "new generation" Treaties as well as trends in recent Arbitral jurisprudence. Therefore we welcome the timely efforts being made in the Study Group under the able Chairmanship of Mr. Donal Mc Rae to provide greater clarity and certainty in the Law.

On a personal note, permit me to mention, Mr. Chairman, that it has been a privilege for me to have been closely associated with Mr. Mc Rae as a Co-Chair of the Study Group, during the previous quinquennium, when it was established in 2009.

There have been two important working papers this year, one by Mr. Mc Rae and the other by Mr. Mathias Forteau which had constituted the core of the deliberations in the Study Group, on which I wish to make some brief observations.

Mr. Mc Rae's Paper on 'Interpretation of MFN Clauses by Investment Tribunals' building on his previous papers, highlights the lack of consistency in the way Arbitral Tribunals have actually set about the interpretative process and the conclusions they have reached, notwithstanding the invocation of the interpretative tools under the Vienna Convention on the Law of Treaties. The factors identified in the Paper (Para259) as having influenced Tribunals in

interpreting the MFN Clause and also the trends identified, deserve closer analysis as they will have an important bering on the outcome of the work of the Group.

The Working Paper by Mr. Forteau on the 'Effect of the Mixed Nature of Investment Tribunals on the Application of the MFN Clause to Procedural Provisions' injects a new and important dimension to the question of the applicability of the MFN Clause to dispute settlement provisions in a BIT .It highlights the unique nature of investment arbitration, particularly under the ICSID Convention, where an individual investor has a direct right of recourse to dispute settlement provisions in an Investment Treaty and pursue a claim against a host State, in his own right. This is an important point of departure in Foreign Investment Law, from the classical position where an individual was not considered as an international subject.

As the Paper pertinently points out, the effect of a mixed Tribunal is that an individual also is a beneficiary of the MFN Clause in the international order (an aspect not covered in the 1978 Draft Articles on the MFN Clause) The resulting position is that the individual, without being Party to the Treaty, is nevertheless able to invoke the jurisdictional clauses in the Treaty against the Host State, The Paper has dealt with two interpretative trends that this unique situation has given rise to, one emphasising the 'treatment' aspect in BITs and the other, on the 'dispute settlement aspect and suggests the possibility of special Interpretative Guidelines or Rules of interpretation being applied to mixed arbitrations.

My delegation believes that the Paper has raised issues of critical importance to the scope of application of the MFN Clause and merits further analysis, as the Study Group proceeds with its work.

The Study Group had also considered an Informal Working Paper on model MFN Clauses, post-Maffezini, examining the various ways in which States have reacted to the Maffezini decision. The recent Treaty practice whereby it is explicitly stated whether the Parties intended that the MFN Clause should or should not apply to dispute settlement provisions of a Treaty, seeks to reduce or eliminate the element of Arbitral discretion that has given rise to the present uncertainty. This Paper would provide valuable guidance to States engaged in the process of negotiating new BITs.

It is also recalled that while the primary focus of the Study Group is to address the uncertainty caused by the 'Mafezini problem' in the context of BITs, it had previously identified the need to study further, inter alia, the question of MFN in relation to Trade in Services under GATS and Investment Agreements. This aspect requires particular attention, given the current growth of Free Trade Agreements and Comprehensive Economic Partnership Agreements, with Investment Chapters and consequently bringing about greater cross-linkages between Investment and Trade in Services.

It is the expectation of my delegation that the work of the Study Group will culminate with the development of Guidelines and Model Clauses, that would address the current uncertainty in the Law and provide invaluable practical guidance to both States and Tribunals.

Thank You Mr. Chairman.