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**Report of the ILC:
Cluster I, Chapters IV and V:
Most Favored Nation Clause
Protection of the Atmosphere**

Statement by

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Mr. Chairman,

In the present statement the delegation of the Czech Republic will focus on Chapters IV and V of this year's report of the International Law Commission. In order to save time, I will read only key parts of our statement; its complete text will be available in writing.

We welcome successful completion of the work on the topic "Most favored nation clause" and congratulate the Study Group under the chairmanship of Professor Donald McRae for its final report.

For seven years the Study Group focused on questions relating to application of MFN clauses which emerged in the practice during more than two decades following the adoption by the Commission, in 1978, of the Draft articles on MFN clauses. As noted by the Study Group, the core provisions of 1978 Draft articles continue to be the basis for the interpretation and application of MFN clauses and are frequently referred to by arbitral tribunals, however, they do not provide guidance on specific questions of interpretation that can arise under the terms actually used in a particular treaty.¹

The work accomplished by the Study Group is particularly valuable in view of the fact that Group's efforts did not overlap with the work of other international instances on MFN clauses issues, such as WTO or UNCTAD, and focused on matters of Commission's uncontested competence - interpretation of treaties.

We appreciate, that from the very beginning the Study Group perceived realistically the role that the Commission may play concerning interpretation issues arising in connection with application of MFN clauses to dispute settlement provisions of investment treaties.

While the Group was able to identify tendencies in arbitral practice towards consolidation of such interpretation, it was also able to realize the limits of its own role in this process. In view of the fact that "the Commission does not have an authoritative role in relation to the decisions of investment tribunals", the Group was right "not to attempt to decide between conflicting views of [tribunals]"² and to focus on exposition of emerging tendencies in the interpretation of various elements of the MFN clauses instead.

We note with particular interest analysis of issues concerning invocation of MFN clauses in bilateral investment treaties for the purpose of importing other treaty procedural provisions with the goal (a) to invoke a dispute settlement process not available under the basic treaty; (b) to broaden the jurisdictional scope where the basic treaty restricted the ambit of the dispute settlement clause to a specific category of disputes, and (c) to override the applicability of a provision requiring the submission of a dispute to a domestic court for a period of 18 months, prior to submission to international arbitration. We also note the guidance for interpretative techniques contained in Part IV which will be appreciated by practitioners who have to deal with these complex matters.

We concur with main conclusions concerning interpretation of MFN clauses, namely that:

Interpretation must be done in accordance with articles 31 and 32 of the Vienna Convention on the law of treaties and that provisions of each treaty have to be interpreted independently – or, to use the language of the Final report - "while guidance can be sought from the meaning of MFN treatment in other agreements, each MFN provision must be

¹ Final report, paras 158-160.

² Final report, para 2:

interpreted on the basis of its own wording and the surrounding context of the agreement it is found in.

The Final report of the Study group represents a significant contribution to already monumental work on MFN clauses accomplished in other international fora.

Mr. Chairman,

We followed attentively the Commission's work on the topic "Protection of the Atmosphere" done on the basis of the 2nd report of the Special Rapporteur Mr. Shinay Murase, which resulted in the adoption of three guidelines and four preambular paragraphs. We appreciate the fact that they are presented together with commentaries.

Protection of the atmosphere is undoubtedly in the vital interest of the mankind and, at the same time represents one of serious challenges that international community is facing. Measures to be undertaken, in addition to those already in place, will have to be robust, will require immense resources, political will and resolute committment to follow scientific advice.

At all stages of this complex effort there has been and will be a role for legal experts to play in providing adequat legal framework for arrangements that will be agreed. The Commission, however should ask itself, whether the exercise in which it opted to be involved can effectively contribute to this global effort. We are far from being convinced that it is the case.

The Commission, as we know, is not working on a draft legal instrument and it would be inappropriate to request it to do so. Also any attempt to identify possible customary rules of international law proper to the protection of atmosphere would be premature. The Commission opted for elaboration of a set of guidelines. It is not the first time that the Commission resorted to a form of guidelines. Unlike in the past cases, however, it is not clear to whom these guidelines should be addressed and mainly which legal problems – *and we believe that the Commission's competence does not extend beyond legal issues in this field* – these guidelines should help to overcome. Are these problems connected with the phase of negotiation of legal instruments dealing with various aspects of the protection of the atmosphere, are they related to the application or interpretation of these instruments, or are they somewhere else? We are still looking for answers to these questions.

The guidelines on reservations to treaties as well as the Final report of the Study group on most-favoured-nation clauses are excellent examples of situations in which the Commission both succeeded to clearly identify existing legal problems and to indicate legal techniques the use of which can help to overcome these problems. In dealing with the current topic on Protection of the Atmosphere, however, we lack the clarity in this respect. Instead, it seems that the Commission is heading towards recalling or restating various general principles already contained in a number of international instruments, binding or not binding, without proper explanation what the purpose of this repetitive exercise truely is.

Concerning some of the draft guidelines adopted by the Commission:

Draft guideline 2 (Scope of application) contains only one paragraph drafted in positive terms, namely paragraph 1. While it is very clear form paragraphs 2 – 4 which issues are outside the scope of the guidelines, it is not clear from paragraph 1 what the scope of the exercise really is. This problem, however cannot be resolved without giving thoughts to the issues we mentioned earlier, namely what kind of legal problems in connection with the protection of atmosphere the Commission intends to address and which legal techniques might be appropriate for solving or overcomming these problems.

*The guideline 5 deals with **Cooperation**. The sub-paragraph a) is drafted as a re-statement of an obligation which States already have, in much more specific terms, under number of treaties. Sub-paragraph b) provides that „States should cooperate in further enhancing scientific knowledge relating to the causes and impacts of atmospheric pollution and atmospheric degradation. Cooperation could include exchange of information and joint monitoring“.*

Enhancing scientific knowledge about the cause and impacts of atmospheric pollution and degradation is undoubtedly an important task. We believe, however, that the guidance in this respect would be better provided by bodies with strong scientific and technical expertise.

We reserve the right to revert to these guidelines once we see the content of other guidelines dealing with the substantive issues concerning the protection of the atmosphere. This will allow us to understand what the obligation to cooperate would in real terms encompass.

Thank you, Mr. Chairman.