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STATEMENT BY
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DELEGATE OF MALAYSIA TO THE UNITED NATIONS
ON AGENDA ITEM 83:
REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS
SIXTY-SEVENTH SESSION

THE MOST-FAVOURED-NATION (MFN) CLAUSE (CHAPTER IV)
AND
PROTECTION OF THE ATMOSPHERE (CHAPTER V)

AT THE SIXTH COMMITTEE OF THE
70TH SESSION OF THE GENERAL ASSEMBLY

NEW YORK, 2 NOVEMBER 2015

CHAPTER IV : THE MOST-FAVOURED-NATION (MFN) CLAUSE

Mr Chairman,

1. Malaysia is pleased to congratulate the ILC Study Group on Most-Favoured-Nation (“MFN”) Clause for producing a comprehensive Final Report on the topic. Malaysia would also like to record our earnest appreciation to the Special Rapporteurs, distinguished scholars and contributors for their outstanding works in studying, deliberating and clarifying the genesis and background of the MFN Clause, up to the contemporary practices and interpretation of the said Clause in mixed nature of investment arbitrations, which are often faced with the question of application of MFN Clause to dispute settlement procedure provisions.

2. The task of clarifying the scope of application of MFN Clause is indeed challenging. It requires conscientious efforts to assess the peculiarities of the



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application of the MFN Clause and factors that are relevant in the interpretative process in determining whether an MFN Clause applies to the conditions for invoking investor-State dispute settlement (“ISDS”). In this regard, Malaysia takes note that the Final Report had managed to draw, in great and considerable detail, a distinction between *substance and procedure*, by inquiring into the basic question of whether, in principle, MFN Clause could relate to both the procedural, as well as the substantive provisions of a treaty. Further, as noted in the Final Report, following decision in the case of *Maffezini v. Spain*, there is now a growing propensity to state expressly that the MFN Clause applies or not applies to ISDS. Albeit the stark contrast of decision in the case of *Plama v. Bulgaria* that had distinguished the *Maffezini case*, the jurisprudence remains inconsistent rather than promoting a more constant and uniform approach of interpretation. In this vein, Malaysia views that the Final Report has addressed various interpretative tools and gathered jurisprudence of the contemporary relevance of the MFN Clause, and how the said Clause is applied in treaties.

3. Taking a leaf from the 66th UNGA Session, Malaysia reiterates its view that the general point of departure in interpreting the MFN Clause would be the Vienna Convention of the Law of Treaties (“VCLT”), by referring to Articles 31 - 32. The Final Report has also stated that the basis of the rules for the interpretation for MFN Clause should first refer to Articles 31 - 32 of the VCLT. Whilst the VCLT may be the point of reference, Malaysia shares the same view as expounded by the Study Group in its Final Report that it is ultimately up to the States that negotiate the MFN Clause to determine whether the MFN Clause encompasses dispute settlement provisions. Following that, Malaysia appreciates the observation that an explicit language can resolve on the issue of the applicability of MFN Clause to dispute settlement provisions. However, should that not be the case, the matter would then be left at the hands of the dispute settlement tribunals in interpreting the MFN Clause. In that sense,



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Malaysia opines that an expansive interpretation of the MFN Clause should as far as possible be evaded. Consistent practices by a State *vis-à-vis* the MFN Clause, its negotiating background and drafting intention should play a pivotal role in contextualising the proper interpretation and application of the MFN Clause. In this connection, Malaysia notes that the ILC Study Group had made substantive elaborations on the interpretation of MFN Clause particularly in elucidating the principle and context as to when MFN Clause applies to substantive treatment obligations and not the dispute settlement provisions. Therefore, Malaysia is convinced that the various interpretative techniques reviewed by the ILC Study Group in the Final Report would be of great utility that can assist States in the negotiation, drafting, interpretation as well as the application of MFN Clause in treaties.

4. That said, Malaysia believes that the MFN Clause should be interpreted in a way that its application is limited to substantive preferential treatment provided in treaties and not the ISDS mechanism. Malaysia's experience, drawing upon the ASEAN context also heralds a conscious perspective towards this development. This is evident from most of the ASEAN Free Trade Agreements that explicitly provides that the MFN Clause shall not apply to ISDS mechanism.

5. Last but not least in relation to MFN, Malaysia notes that the 67th ILC Session has encouraged for the widest possible dissemination of the Final Report. In light of this, Malaysia is of the view that the Final Report should serve as a non-legally binding guide to assist in the interpretation and application of the MFN Clause.



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CHAPTER V: PROTECTION OF THE ATMOSPHERE

Mr. Chairman,

6. Turning now to the topic of “Protection of the Atmosphere”, Malaysia records its appreciation to the Secretariat for the Report of the Secretary-General on this topic A/70/10 which was prepared in pursuance of resolution 68/112.

7. Malaysia notes that during the Sixty-Seventh Session of the International Law Commission (ILC), the Special Rapporteur for the topic on Protection of the Atmosphere, Mr. Shinya Murase (“the Special Rapporteur”), had submitted his second report entitled “Second Report on the Protection of the Atmosphere” (“Second Report”).

Mr. Chairman,

8. Malaysia commends the effort of the Special Rapporteur for the submission of the Second Report and notes that the Special Rapporteur had upon further analysis of the draft guidelines submitted in his first report, revised the draft guidelines relating to the Protection of Atmosphere.

9. Malaysia observes that the Second Report lays down five draft guidelines, firstly, on “Use of Terms” (Draft Guideline 1), secondly, on “Scope of the Guidelines” (Draft Guideline 2), thirdly, on “Common Concern of Humankind” (Draft Guideline 3), fourthly on “General Obligation of States to protect the atmosphere” (Draft Guideline 4) and lastly on “International Cooperation” (Draft Guideline 5).



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10. In this regard, Malaysia notes that the Commission had decided to refer draft guidelines 1, 2, 3 and 5, as contained in the Special Rapporteur's second report to the Drafting Committee and upon consideration of the report of the Drafting Committee, the Commission provisionally adopted draft guidelines 1, 2 and 5 and four preambular paragraphs, together with commentaries thereto.

Mr. Chairman,

Use of Terms

11. With reference to the draft guidelines 1 on "Use of Terms", Malaysia observes that upon comparison with the definition proposed in the First report, the definition of "Atmosphere" has been amended and shortened. Malaysia notes that the term "Atmosphere" has now been broadly defined as "the envelope of gases surrounding the Earth." The specific reference to 2 layers of gases i.e. troposphere and stratosphere and the airborne substances have been eliminated. In this regard, Malaysia wishes to highlight that scientifically, atmosphere contains gases, clouds, particles of dust and other particles called aerosols, Malaysia, thus, seek clarification on the status of other element in the atmosphere that is not covered by the proposed definition. We are of the view that the proposed definition by the Commission should not by any means alter or narrow the existing scientific interpretation of the atmosphere.

12. With regard to paragraph (b) which defines "Atmospheric Pollution", Malaysia is of the view that the phrase "*substances contributing to deleterious effect extending beyond the State of Origin*" in the definition provide an obligation to the States to prove that substances contributing to deleterious effect extends beyond the State of Origin. In this regard, Malaysia is of the view that a more subtle formulation should be



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proposed as a definition. Whilst for the definition of “atmospheric degradation” in paragraph (c), Malaysia is not familiar with such term and of the view that there is a need to consult the technical and scientific experts in framing a clear, comprehensive and acceptable definition of “degradation”.

13. Malaysia further notes that both paragraphs (b) and (c) provide for the terms “by human” to focus on human activity, whether direct or indirect. Malaysia is of the view that addressing “by human” without specifying the act would be a broad scope. Hence, Malaysia would like to reiterate our previous intervention that Malaysia seeks clarification on the specific type of “human activities” intended to be covered under the draft guidelines, as to ensure that the activities proposed will not overlap with “human activities” covered under the existing international regime on environmental protection.

Mr. Chairman,

Scope of the Guidelines

14. In relation to the “Scope of the Guidelines”, Malaysia notes that the proposed draft guidelines by the Commission deals with the protection of the atmosphere in two (2) areas i.e atmospheric pollution and atmospheric degradation. Malaysia further notes that draft guidelines are concerned only on anthropogenic causes (originating from human activities) and not with those of natural origins such as volcanic eruptions and meteorite collisions. In this regard, Malaysia is currently studying on the draft guidelines as it is foreseen consultation with the relevant agencies and technical expertise would be crucial to the matter.



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Mr. Chairman,

International Cooperation

15. Malaysia notes that international cooperation is at the core of the whole set of draft guidelines on the protection of the atmosphere. Malaysia understand that cooperation could take a variety of forms. Paragraph (b) of the draft guidelines, stresses, in particular the importance of cooperation in enhancing scientific knowledge relating to the causes and impacts of atmospheric pollution and atmospheric degradation. Paragraph (b) also highlights the exchange of information and joint monitoring. On that note, Malaysia seeks clarification on whether it is appropriate to highlight only exchange of information and joint monitoring as there are many other forms of cooperation that could be relevant such as technology transfer and capacity building.

Mr. Chairman,

Preamble

16. In relation of Preamble Paragraphs, Malaysia wishes to highlight that the fourth preamble paragraph reflect the 2013 Understanding of the Commission when the topic was included in the programme of the Commission. On this note, Malaysia is of the view that preamble paragraph 4 touches on scope of the guidelines rather than the overall framework of the guidelines. In this regard, Malaysia prefers that the fourth preamble paragraph to be relocated in the scope of the draft guidelines.

17. Last but not least, Malaysia believes that the Topic has to be further deliberated in great detail in order to ensure the comprehensive outcome of the topic. Malaysia



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takes note the future workplan as proposed by the Special Rapporteur with regard to the detailed plan post-2016 with the hope that the work on the topic will have completed by 2020. Malaysia looks forward on the work as proposed by the Special Rapporteur.

I thank you, Mr Chairman.