

Statement by H.E. Dr. Rohan Perera,
Permanent Representative of Sri Lanka to the United Nations

Sixth Committee of the United Nations General Assembly 70th Session

Agenda item 83: Report of the International Law Commission on the work of its sixty-seventh session (Cluster 1 – Chapters I-III, XII, IV & V)

2-4 November 2015

Mr. Chairman,

At the outset, I join all other delegations who have spoken before me in extending, on behalf of the delegation of Sri Lanka, our warm congratulations to the Chairman of the ILC, Mr. Narinder Singh, for his comprehensive introduction of the first cluster of items covering Chapters I-III, XII, IV & V.

My intervention today is limited to Chapter IV, “The Most-Favoured-Nation Clause”, and Chapter V, “Protection of the Atmosphere”.

The Most-Favoured-Nation Clause (MFN)

Let me at the outset express our deep appreciation and warm congratulations to the Chairman of the Study Group on the MFN clause, Mr. Donald McRae, for the outstanding contribution he has made to the work of the Study Group on the MFN clause and for the results achieved by the Study Group. If I may strike a personal note, it was indeed a privilege for me to be associated with Mr. McRae as a co-Chairman of the Study Group from 2009 to 2011. At the initial stages of this study, there were some doubts expressed within the Commission, whether the ILC should engage itself in the area of law relating to foreign investment, considered to be a distinct and highly specialized branch of law. It is gratifying that the report that has been presented, vindicates the decision that was taken to constitute a Study Group on this topic.

The MFN clause has assumed particular relevance in contemporary times as a core principle of bilateral investment treaties (BITs). We wish to draw particular attention to the question of the scope of treatment to be provided under an MFN provision. As the report of the Study Group indicates, this has become one of the most vexed interpretative issues under BITs and remains at the heart of current controversies in the field. The problem arises in respect of whether an MFN clause in the basic treaty is such that it can be invoked to expand the scope of the basic treaty’s dispute settlement provisions – commonly called “the *Maffezini* problem” – dealt with comprehensively in the report.

The core of the report is contained in Part IV, which seeks to provide guidance on the interpretation of MFN clauses, setting out a framework for the proper application of the principles of treaty interpretation to MFN clauses.

In the light of prevailing uncertainties brought about by inconsistent arbitral awards, the delegation of Sri Lanka welcomes the guidance provided by the Study Group on the interpretation of MFN clauses, and in particular its comprehensive review of the factors that may influence tribunals in interpreting MFN provisions. We also welcome the report's guidance in regard to the consequences that may arise from particular wording in MFN clauses, including how this wording might be treated by investment tribunals. These contributions will undoubtedly be of great value to States in considering how their investment agreements might be interpreted and what they might take into account in negotiating new BITs.

The delegation of Sri Lanka has carefully noted the summary of conclusions contained in Part V of the report. We agree that the 1978 Draft Articles continue to be the basis for the interpretation and application of MFN clauses today. However, they do not provide answers to all the interpretative issues that can arise in the current context with MFN clauses. This is particularly so in the context of developments subsequent to the 1978 Draft Articles, namely, the emergence of the World Trade Organization's Dispute Settlement Understanding (DSU), as well as the analysis of MFN provisions in other bodies, such as the United Nations Conference on Trade and Development (UNCTAD) and the Organisation for Economic Co-operation and Development (OECD).

We agree with the important conclusion that the interpretation of MFN clauses is to be undertaken on the basis of the rules for the interpretation of treaties as set out in Articles 31-33 of the Vienna Convention on the Law of Treaties (VCLT). This point is of particular importance in the light of recent practice of some tribunals, as pointed out in the report, to invoke, without an explicit legal basis, interpretative techniques that seemingly go beyond Articles 31-33. Notwithstanding the "mixed" nature of investor-state arbitration, we agree that an investment agreement is clearly a treaty, and as such it must be interpreted in accordance with the accepted rules of international law governing treaty interpretation.

We also note that the Study Group has concluded that the application of MFN clauses to dispute settlement provisions in investment treaty arbitration, rather than limiting them to substantive obligations, has brought about a new dimension to thinking about MFN provisions and perhaps consequences that had not been foreseen by parties when they negotiated their investment agreements. While this is true, Sri Lanka takes the view that unless clearly worded, or there are particular contextual circumstances, an MFN provision cannot alter the conditions of access to dispute settlement. However, we welcome the conclusion of the Study Group that the question whether MFN clauses are to encompass dispute settlement provisions, is ultimately up to the States that negotiate such clauses. Explicit language can ensure that an MFN provision does or does not apply to dispute settlement provisions. Unless the clear intentions of the parties are made explicit, the matter will be left to dispute settlement tribunals to interpret MFN clauses on an ad-hoc and case-by-case basis, resulting in the unsettled jurisprudence on the scope of the MFN clause, that has consequently arisen.

In conclusion, Mr. Chairman, the Study Group is to be congratulated for producing guidance that is of practical utility to Members States and investment tribunals alike. We firmly believe that this contribution will go a long way towards ensuring greater certainty and stability in the field of foreign investment law.

Protection of the atmosphere

Turning now to the topic “Protection of the atmosphere”, let me first congratulate the Special Rapporteur, Mr. Shinya Murase, for the work so far accomplished on this topic. We welcome the new draft guidelines and commentaries adopted at this year’s session of the Commission. This topic presents issues and complexities of both science and law, and we are pleased to observe that it is moving forward in the right direction.

The delegation of Sri Lanka firmly believes that this topic cannot properly be discussed or developed in isolation from the scientific community. We therefore wish to compliment the Special Rapporteur on his initiative to organize a dialogue with six of the world’s foremost atmospheric scientists. We are pleased to note that this had been held with a view to increasing ILC Members’ familiarity with the relevant scientific concepts and encouraging broader dialogue between expert scientific and legal bodies in the international community. We are pleased to note that the Members of the Commission found the exercise useful and look forward to more such dialogues as work on this topic continues to develop.

The atmosphere is vital to the existence of life on Earth. As Member States, we cannot turn a blind eye to the fact that it is being depleted; slowly, it is true, but surely nonetheless. We therefore approve of the newly adopted third paragraph of the preamble to the draft guidelines, which recognizes that the protection of the atmosphere from transboundary atmospheric pollution and atmospheric degradation is a “pressing concern of the international community as a whole”. We also welcome the Commission’s emphasis on international cooperation under Guideline 5, and note in particular the importance of information exchange with a view to further enhancing scientific knowledge in this area.

In closing, my delegation wishes to acknowledge the positive step taken by the Special Rapporteur in providing a detailed future plan of work for this topic. There is a long road ahead. We look forward to further progress during the term of the next Commission.

Thank you Mr. Chairman.