REPUBLICA BOLIVARIANA DE VENEZUELA

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Mr. Chairman,

My delegation adheres itself with the statement made by the distinguish delegate of the Republic of Ecuador on behalf of CELAC, and would like to express some views in our national capacity.

We welcome the report of the ILC, the briefing by its Chairman Mr. Narinder Singh, and the presence of members of the International Law Commission and the secretariat.

We also would like to welcome the work that has being done by the commission especially regarding the Most Favored Nation Clause and the final report of the study group on this issue.

Mr. Chairman,

My delegation expresses its concern of the States right to regulate in the public interest, which is paramount and must not be undermined by the provisions of any International Investment Agreement.

International Investment Dispute Settlement (ISDS) must not elevate trans-national capital status to that of sovereign State, or enable investors to challenge the right of governments to regulate and determine their own domestic affairs.

Over time several abuses have arisen through the use of ISDS, which my delegation proposes to be addressed by the International Law Commission.

Some of the systematic shortcomings derived from the working of ISDS have being accurately described by the European Economic and Social Committee, which include inter alia: (i) opacity; (ii) lack of clear rules; (III) the lack of right of appeal; (IV) discrimination against domestic investors who cannot use the system; (V) the fear that purely speculative investments are protected; (VI) third party funding for frivolous claims; (VII) the powers invested in a panel of three private lawyers, not career judges, to adjudicate and make binding decisions on areas of fundamental public interest, and (VII) the role swapping between arbiters and counsel is a clear conflict of interest, reaffirming the unfairness of this method for resolution of investment disputes.

Mr. Chairman,

As mentioned by the independent expert of the Human Right Council in its report presented to the General Assembly last 26th of October, All States Member of the United Nations are bound by the Charter, which is akin to a world

constitution. Article 103 of the Charter states: (That) "in the event of a conflict between the obligations of the Members of the UN under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail", this means that bilateral and multilateral free trade and investment agreements that contain provisions that conflict with the Charter must be revised or terminated, and incompatible provisions must be severed according to the doctrine of severability.

Pursuant to the cardinal norm of international law *pacta sunt servanda*, enshrined in article 26 of the Vienna Convention on the Law of Treaties, existing treaties must be implemented "in good faith". And no subsequent treaty can be considered legitimate if it hinders the performance of commitments under previous treaties. Inadvertent incompatibilities can be resolved in good faith by interpreting the subsequent treaty in a manner consistent with prior treaties, applying article 31 and 32 of the Convention. Pursuant to Article 103 of the Charter, subsequent treaties must in any case conform to the Charter and are invalid if they impede the fulfilment of its purposes and principles, including its human rights provisions, this argument has merits since must States parties to international investment agreements were already parties to United Nations human rights treaties, including International Covenants to the principle *pacta sunt servanda* requires the implementation of these United Nations treaties and the international investment agreements must be interpreted and applied in a manner that does not contravene the Charter of United Nations treaties, including inter alia the Indigenous and Tribal Peoples Convention, Convention of the International Labor Organization (ILO), the framework convention on Tobacco Control of the World Health Organization (WHO), Conventions of the Food and Agriculture Organization (FAO), and the United Nations Children's Fund (UNICEF).

According to customary international law and article 53 of the Vienna Convention, treaties or treaty provisions that violate preemptory norms of international law (*jus cogens*) are *contra bonos more* and therefore null and void.

There is a clear message emerging from developing and developed countries alike that ISDS is unacceptable mechanism.

Mr. Chairman

An alternative system must be found, like perhaps an investment court system presented by the Transatlantic Trade and Investment Partnership, which

can serve as an point of start for Permanent Regional Investment Tribunals and an International Investment Appeals Court, breaking from ISDS present mechanisms.

The original concept behind ISDS has long departed. It has now become a hugely profitable outlet for small number of specialist investment law firms and third party financial institutions who dominate the business.

Mr. Chairman,

The ILC report provides a very good picture of the application and interpretation of the MFN clauses together with the associated problems. But, it falls short because does not go far enough to address some fundamental issues and in many places does not provide a solution to conflicting interpretations of MFN provisions by arbitral tribunals. Foreign investors in recent years have used and abused the MFN for purposes that it was arguably not designed to address particularly application to procedural matters. Ultimately, given the inconsistences in the MFN jurisprudence there is a clear need for an Appellate type mechanism for international investment treaties to address these problems.

The report notes in paras. 37-40 that the MFN originated from the "economic liberalism" ideas including "free trade" and "comparative advantage," and is a means to ensure non-discrimination. However, the report also notes that "the relevance of the economic rationale for MFN treatment beyond the field of trade in goods to . . . investment . . . is . . . a matter of controversy" and that because the MFN clauses have been inserted in many investment treaties there is no reason to consider the economic rationale for MFN provisions, effectively declining to address some of the core issues. We would of like the ILC to address these fundamental issues.

While we understand that the Study Group's main function may be providing legal analysis rather than tackling the economic rationale underlying various treaty provisions, as part of the general mission of the ILC which includes progressive development of international law, the Study Group should consider reviewing these rationales and assess whether they continue to be relevant. We all know that the pure economic liberalism ideas no longer guide the practices of the community of states. To the extent that those economic rationales and related state practices influence the creation of international law, the ILC and the

Study Group should consider studying them. Note that progressive development of international law may not always call for preparing new instruments that may serve as a blue print for future treaties; it also call for abandoning and dismantling treaty provisions and practices that have lost their currency and in fact led to fragmentation of international law. The application of MFN in the field of international investment law has undoubtedly created significant fragmentation which raises the question whether it is time to re-examine those fundamental economic rationales.

In this context, it is perhaps unfortunate that the report in para. 162 opines that there is little doubt that in principle MFN provisions are capable of applying to the dispute settlement provisions, even though it acknowledges that the premise has been based on a misreading of the decision of the tribunal in the *Ambatielos* arbitration. The Study Group perhaps should take a more objective approach to usefulness of such clauses and propose solutions accordingly.

The report notes in para. 192-193 that investment tribunals "are yet to develop any jurisprudence on the notion of likeness." That statement does not appear to be fully accurate. While the bulk of cases addressing the notion of likeness have emerged in the context of the application and interpretation of national treatment standard, that same analytical framework may be used to interpret and apply MFN provisions, particularly in matters of substance vis-à-vis procedure.

Further, treaty negotiators and drafters as well as arbitral tribunals would surely benefit from understanding the relation between the principle of *ejusdem generis* and the notion of "likeness" in some investment treaties (i.e., clauses such as "in like circumstance" or "in like situation"). If likeness is implied -- see para. 192 of the report -- then, what is the purpose of including "in like circumstances"? Providing answers to such questions would help to produce a more consistent jurisprudence in the years to come.

With all due respect, the focus of the ILC report is mainly on the applicability of MFN to dispute settlement provisions, and it takes no position other than to say it is a matter of interpretation. The MFN problem is much broader. States generally have no idea how the concept is applied, even with

respect to substantive matters. The fact is that MFN is an unworkable concept in investment treaties and should never be accepted. The basic problem is that MFN allows to pick and choose the best investor clauses from other treaties without considering the treaty as a whole. For example, one treaty may have an expansive Fair and Equitable Treatment (FET) clause but no full protection and security clause, and no dispute settlement clause. These may have been trade-offs in a negotiation. How is one to evaluate and apply MFN in that context? How can one know whether one investor is better off than the other?

Mr. Chairman,

We invite delegates of the 6 Committee to identify new topics of International Investment Dispute Settlement agreements, Bilateral Investment Treaties and Investment State Arbitration, amongst other important issues related to the progressive development of international law for the consideration of the ILC.

We also request the ILC to study further the implications of the use and abuse of the MFN clause in Investment State agreements and Bilateral Investment Treaties in the next report.

Thank you.