

PERMANENT MISSION OF ROMANIA  
to the United Nations



MISSION PERMANENTE DE LA ROUMANIE  
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Sixth Committee**

***Agenda item 83***

**International Law Commission  
Report on ILC's 67<sup>th</sup> Session**

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Mr. Chairman,

I would like to thank the Chair of the International Law Commission for the comprehensive presentation of the report on the last ILC session and to express the gratitude and appreciation of my delegation to all members of the International Law Commission for the work carried out during the Commission's 67th session.

As reflected in the report that is before us these days for debate, the Commission has continued its work on the topics already under its consideration, with significant progress on most of them, while it initiated, conscientiously, the consideration of other important topics for the development of international law, newly introduced on its agenda.

Romania's delegation welcomes the outcome of this work and takes this opportunity to present some of its views with regard to each of the topics. Our interventions will follow closely the cluster division and the organization of work proposed by the Chair.

We have taken note, as well, of the interest of the Commission in the comments of the States on some specific issues concerning a number of topics on its agenda as mentioned in Chapter III of the Report. We firmly intend to contribute to the research of the Commission on those particular topics by providing, in the delay specified, relevant Romanian practice and legislation, if any.

With regard to the items that make up the first cluster of our debate, my delegation underlines the following:

#### **Chapter IV Most Favoured Nation Clause**

I would like to join the other delegations and praise the valuable work carried out by the Study Group constituted for this topic. Our appreciation goes in particular with the chairs, who during several years since 2008 worked on this complex and relevant subject: Mr. Donald M. McRae, Mr. Rohan Perrera and Mr. Mathias Forteau. The draft final report that was completed and reviewed this year and was attached to the Report of the International Law Commission stands proof of this extensive and substantive endeavor. It shed light on the developments since 1978 and evaluated them having in view the draft articles adopted by then. It has reached important conclusions of practical relevance as well. Although the 1978 draft articles were not embodied in a multilateral treaty, they contain key provisions, among which the *ejusdem generis* principle, which served as a reference for the outcome of the present final report.

We took note of the conclusion of the Commission that the MFN clauses remain unchanged in character from the time the 1978 draft articles were concluded, those draft articles continuing to be the basis for its interpretation and application. As Part V of the report indicates, it is the Vienna Convention on the Law of the Treaties that should be the point of departure in the interpretation and application of the MFN clauses contained in the investment treaties as well.

The guidance given that the States should stipulate "explicit language to ensure that it does or does not apply to the settlement of disputes" is a valuable and important one, useful for policy makers and practitioners alike, for drafters of international treaties, for negotiators, for tribunals, either jurisdictional or arbitral ones, for all those who deal with investment matters.

That is why, in our view, the work of the Study Group will be of special relevance as regards investment law and investment treaties, an area that entailed specific difficulties as to the interpretation and application of the MFN clauses they contained. Hopefully the conclusions of the Commission will bring more clarity and will prevent or limit in the future the differences of interpretation as to this important issue.

However, policy guidance is to be applied for the conclusion of future treaties or amendments. As stated by the Commission, the possible application of the MFN clause to the dispute settlement is a matter of treaty interpretation. Even if articles 31 and 32 of the VCLT apply to a BIT as a whole, Romania finds that two lines of jurisprudence have developed: one led by cases like *Maffezzini* and *Siemens*, according to which, in the absence of a contrary indication and subject to specific elements, the MFN clause applies to jurisdiction, while a second line of case-law, led by cases like *Salini*, *Plama* or *ICS*, seemed to conclude that in the absence of a clear indication that the MFN does apply to jurisdiction, consent of a State to arbitration must not be presumed. In conclusion e), adopted on 23 July 2015, the Commission finds that “[in absence of explicit language], the matter will be left to dispute settlement tribunals to interpret MFN clauses on a case-by-case basis”. Indeed, having in mind the existence of two divergent lines of case-law, supplementary general indication on interpretative approaches would have been welcome.

Romania also considers that the view according to which the matter of the possible application of the MFN clause to dispute settlement is also one of “establishing jurisdiction” or “consent to arbitrate” has a lot of value. Recalling the general reasoning of the ICJ in *Oil Platforms*, according to which a substantive article “is such as to throw light on the interpretation of the other Treaty provisions [...] but cannot, taken in isolation, be a basis for the jurisdiction of the Court”, Romania considers that consent to jurisdiction or arbitration is not to be presumed, but established beyond doubt.

Moreover, we give a lot of importance to the finding of the Tribunal in the ICS case, according to which the “contemporaneity principle” applies to identifying the intention of the parties at the moment of concluding the agreement: it could not be presumed that the parties envisaged the application of the MFN clause to dispute settlement, when inserting the clause in the agreement. Romania regards with caution the application of “evolutive interpretation” in this case – as the Draft report quotes the *Dispute regarding navigational and related rights (Costa Rica/Nicaragua)*: such “evolutive” interpretation should rely only on well-established bilateral State practice, for each particular agreement.

## **Chapter V – Protection of the atmosphere**

The Romanian delegation welcomes the results achieved until now on the topic concerning the protection of the atmosphere. The Romanian delegation is aware of the difficulties in adequately responding to this topic and for this reason would like to commend the Special Rapporteur, Mr. Shinya Murase, for his second report.

We welcome the clear definition of the term “atmosphere”, which we find useful to be used also outside the purposes of the guidelines. As to the definition of “atmospheric pollution”, as Party to the 1979 Convention on Long-Range Transboundary Air Pollution (LRTAP) we would prefer listing living resources, in addition to the human life and Earth’s natural environment as endangered by atmospheric degradation.

We also welcome the clear statement of state's obligation to cooperate for the protection of the atmosphere and in further enhancing scientific knowledge relating to the causes and impacts of atmospheric pollution and atmospheric degradation. We find this as key in the global demarches to protect our atmosphere and fully agree with the Commission in this respect.