



PERMANENT MISSION OF SOUTH AFRICA  
TO THE UNITED NATIONS  
333 EAST 38TH STREET 9TH FLOOR  
NEW YORK, NY 10016  
Tel: (212) 213-5583 Fax: (212) 692-2498  
E-mail: pmun@southafrica-newyork.net

**STATEMENT  
ON  
BEHALF OF SOUTH AFRICA  
BY  
MR MAHLATSE MMINELE,  
DEPUTY PERMANENT REPRESENTATIVE OF  
SOUTH AFRICA TO THE UNITED NATIONS**

**IN THE  
SIXTH COMMITTEE OF THE GENERAL ASSEMBLY  
ON THE REPORTS OF THE INTERNATIONAL LAW COMMISSION (ILC)  
ON THE MOST FAVOURED NATION CLAUSE AND  
PROTECTION OF THE ATMOSPHERE**

**UNITED NATIONS  
New York  
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*Check against delivery*

## **Mr Chairman**

Thank you for the opportunity to address the 6<sup>th</sup> Committee. Before turning to the substantive points on Most Favoured Nation clauses, my delegation would like to thank the Study Group of the ILC, and specifically Messrs. Donald McRae and Mathias Forteau, for their work which resulted in the Study Group's Final Report currently under discussion.

## **Mr Chairman**

My delegation supports the approach taken by the Study Group in preparing this report. We fully agree with the statement of the Study Group that, due to the fact that MFN provisions come in a variety of forms, uniformity in interpretation or application could not necessarily be expected, although we note that it is consistency and coherence in the interpretation of similarly drafted MFN provisions that should be sought rather than uniformity. In light of the divergent wording used in different treaties, seeking uniformity in interpretation of MFN clauses would, in our view, risk contravening the rules of interpretation set out by articles 31 – 33 of the Vienna Convention on the Law of Treaties. We therefore endorse the view of the Study Group that it would not have been prudent to revisit the 1978 draft articles, but that the Report should rather identify trends in the interpretation of MFN clauses to provide guidance for treaty negotiators, policy makers and practitioners in the investment area. The Final Report will indeed assist the policy makers and negotiators who have to advise States on the policy choices they choose to capture in the bilateral investment treaties that are negotiated.

The Final Report of the Study Group primarily focuses on the use of MFN clauses in international investment law. It is in this context, and specifically in relation to bilateral investment treaties, where the scope of application of MFN provisions are disputed the most. The inconsistencies in interpretation pointed out by the Study Group in the Final Report remains of concern to South Africa. As previously pointed out by my delegation on this topic, the lack of coherence in the interpretation of MFN provisions (even with regard to similarly drafted MFN provisions) by investment tribunals has lead thereto that South Africa has, for some time now, not considered the MFN provision as a core provision of Bilateral Investment Treaties, even while this provision is a necessary part of managing relations between States on a multilateral trade level, for example in the WTO.

## **Mr Chairman**

In our view, Bilateral Investment Treaties are public international law instruments, not contractual arrangements, and the policy choices of States in concluding these treaties should be respected by investment arbitration tribunals. Therefore, my delegation hopes that reports such as the one drafted by the Study Group will contribute to greater coherence and consistency in the interpretation of similarly drafted MFN clauses by arbitral tribunals. It is of great importance, as noted by the Study Group, that States should be able to understand the consequences that may attach to particular wording used in MFN clauses. It is only through the consistent interpretation of similarly worded clauses that States will be enabled to accurately express their policy choices in treaties.

## **Mr Chairman**

Now, we turn to the next topic which deals with the efforts by the international community to protect the atmosphere. The efforts by the international community to protect the atmosphere is of the crucial importance for our sustainable development and well-being. The atmosphere is common resource of global concern and the effects of human interference in the atmosphere have impacts beyond national borders. Protection of the atmosphere should therefore be address by international law as far as possible.

As with international law generally, the area of protection of the atmosphere has evolved through treaty making as well as state practice giving rise to customary law norms. Such development has not always been systematic and consistent. Specialised legal instruments have been developed to address particular aspects of human interference with the atmosphere without necessarily considering the body of international environmental law holistically.

We therefore welcome the work of the ILC on this issue and we thank the Special Rapporteur, in particular, for his second report on this issue. We fully agree with the approach of the ILC to undertake its work on this topic in a manner that will not interfere with the various political negotiations taking place on atmospheric pollution, ozone depletion and climate change on the one hand, and without prejudice to existing international law principles, including such principles as the polluter-pays principle, the precautionary principle, and the principle of common but differentiated responsibility on the other hand.

While the scope of the Commission's work is quite restricted in order not to prejudge the outcome of the difficult negotiations currently ongoing elsewhere in the UN system that will have a direct bearing on the international law norms on these issues, we do believe that the ILC makes a valuable contribution to bringing enhanced understanding and coherence to the wide array of legal instruments and customary law principles related to the atmosphere. In this regard, we believe that the provisional adoption of draft guidelines, including a preamble, on the use of terms, scope of the guidelines, and international cooperation, is a very welcome step forward.

As has been mentioned in our discussion previously, the issue of protection of the atmosphere involves a great number of technical and scientific issues. We therefore need to ensure that there is a consistent dialogue between lawyers and experts in our attempts to bring coherence in this field of international law.

It is for this reason that we are particularly pleased that the draft guidelines adopted by the Commission provides that "States have the obligation to cooperate with each other and with relevant international organisations for the protection of the atmosphere from atmospheric pollution and atmospheric degradation [and that] States should cooperate in further enhancing scientific knowledge relating to the causes and impacts of atmospheric pollution and atmospheric degradation".

As a committed member of the United Nations and a firm believer in the principle of multilateralism, South Africa fully supports the idea that global challenges require global, multilaterally agreed solutions. No one state will be able to meet the many and varied challenges we face on account of man-made changes in the atmosphere. It is only through international cooperation that we will be able to ensure a safe environment for current and future generations.

In this regard, South Africa is playing an active role in all the multilateral processes aimed at protecting the atmosphere from pollution, ozone depletion and climate change. The Paris Climate Change Conference next month is expected to adopt a legally binding agreement applicable to all under the UN Framework Convention on Climate Change, which will have a significant impact on the landscape of legal norms in this field.

We therefore encourage the ILC to continue with its task of distilling the existing international law principles that relate to the protection of the atmosphere from the wide range of sources available to serve as an accessible, understandable and coherent backdrop against which the

political processes of creating new norms can take place with greater expediency.

**Finally, Mr Chairman**

We welcome the decision of the Commission to include the topic *jus cogens* and we congratulate Mr Dire Tladi on his appointment as Special Rapporteur for this very important topic. We are confident that this very important topic will be handled with the care, sensitivity and caution it deserves.

**I thank you for your attention.**