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STATEMENT OF THE CHAIRMAN OF THE INTERNATIONAL LAW COMMISSION, MR. NARINDER SINGH

Part One

Chapters I-III, XII, IV and V: Introductory Chapters; Other decisions and conclusions of the Commission; The Most-Favoured-Nation clause; Protection of the atmosphere.

Mr. Chairman,

Thank you very much for the kind words addressed to the International Law Commission. The United Nations is this year commemorating its seventieth anniversary. It is time for reflection and renewal. On behalf of the Commission, I congratulate you and the other members of the Bureau on your election and wish you every success as you grapple with the challenges posed in paving, anew, the way for the future of the United Nations. Despite the tragedies that surround us in the world, the pain and anguish that are so vivid in the , Mr. Manley O. Hudson, speaking in the aftermath of two tragic wars, which wrought great suffering, referred to as the "moral appeal"; and it is

I was greatly honoured to chair the recently ended sixty-seventh session of the Commission, whose report is now before you in document **A/70/10.** To facilitate the debate, I intend to follow the tested practice of making several interventions to introduce the respective chapters of the report. Accordingly, I will make three interventions in the course of the debate of the Committee on the report of the Commission

My statement today will deal with the first cluster of issues, namely the Introductory **Chapters I** to **III** and **Chapter XII "Other decisions and conclusions of the Commission",** as well as the first two substantive chapters, namely **Chapter IV** concerning the **"The Most-Favoured-Nation clause"** and **Chapter V** on the **"Protection of the atmosphere."**

The second statement will deal with **Chapters VI to VIII,** which respectively relate to the topics **"Identification of customary international law"; "Crimes against humanity"** and **"Subsequent agreements and subsequent practice in relation to the interpretation of treaties".**

The final statement will address the remaining substantive **Chapters IX to XI** covering respectively the "**Protection of the environment in relation to armed conflicts"; "Immunity of State officials from foreign criminal jurisdiction";** and **"Provisional application of treaties."**

Mr. Chairman, I

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progress on the topics **“Identification of customary international law**” and “**Subsequent agreements and subsequent practice in relation to the interpretation of treaties”**, such that the completion of the topic as a whole is within the horizon. It also continued its substantive consideration of the topics the **“Protection of the atmosphere;” Protection of the environment in relation to armed conflicts”; “Immunity of State officials from foreign criminal jurisdiction”;** and **“Provisional application of treaties.** Moreover, it began and has already made some progress on **“Crimes against humanity**”, a topic included in the programme of work last year. It has

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draft articles on the effects of armed conflicts on treaties, 2011; (f) the Guide to practice on reservations to treaties, 2011; (g) the draft articles on the responsibility of international organizations, 2011; and (h) the draft articles on the expulsion of aliens, last year.

The Commission also considers crucial the unique interaction that it has with the Sixth Committee and with Governments. Pursuant to paragraphs 10 to 13 of General Assembly resolution 69/118 of 10 December 2014, it exchanged views on the feasibility of holding part of its sixty-eighth session in New York based on information provided by the Secretariat regarding estimated costs and relevant administrative, organizational and other factors, including its anticipated workload in the final year of the present quinquennium, and came to the conclusion that it would not be feasible for such sessions to take place in New York next year. It nevertheless noted that such convening, taking into account the estimated costs and relevant administrative, organizational and other factors, could be anticipated during the first segment of a session during the first (2017) or second (2018) year of the next quinquennium

Mr. Chairman,

I shall now turn to the substantive chapters of the report, starting with **Chapter IV**, which relates to the topic

dispute settlement arbitration as “mixed arbitration”; and (c) the contemporary relevance of the 1978 draft articles to the interpretation of MFN provisions.

Part IV constitutes the core of the substantive contribution undertaken on this topic. It seeks to provide some guidance on the interpretation of MFN clauses, but first sets a framework for the proper application of the principles of treaty interpretation to MFN clauses and surveys the different approaches in the case-law to the interpretation of MFN provisions in investment agreements. It addresses in particular three central questions: (a) whether MFN provisions in principle are capable of applying to the dispute settlement provisions of BITs; (b) whether the jurisdiction of a tribunal is affected by conditions in BITs regarding which dispute settlement provisions may be invoked by investors; (c) what factors are relevant in the interpretative process of determining whether an MFN provision in a BIT applies to the conditions for invoking dispute settlement.

This Part also examines the various ways in which States have reacted in their treaty practice to the *Maffezini* decision, which was the first to address the question whether an MFN provision is capable of applying to the dispute settlement provisions of a BIT. The practice as examined shows at least three trends. There are instances in which it is now specifically stated that the MFN clause does not apply to dispute resolution provisions. Other situations specifically state that the MFN clause does apply to dispute resolution provisions. In a third scenario, there is specific enumeration of the fields to which the MFN clause applies.

The last part of the report contains a summary of general conclusions, which the Commission has adopted as its own. In the main, it is important to note that MFN clauses have remained unchanged in character from the time the 1978 draft articles were concluded. The core provisions of the 1978 draft articles continue to be the basis for the interpretation and application of MFN clauses today. However, these draft articles do not provide answers to all the interpretative issues that can arise with MFN clauses.

In this connection, the 1969 Vienna Convention of the Law of Treaties is

important and relevant, as a point of departure, in the interpretation of investment treaties. The interpretation of MFN clauses is to be undertaken on the basis of the rules for the interpretation of treaties as set out in the VCLT. It bears noting that the central interpretative issue in respect of the MFN clauses relates to the scope of the clause and the application of the *ejusdem generis* principle. In other words, the scope and nature of the benefit that can be obtained under an MFN provision depends on the interpretation of the MFN provision itself.

The matter remains one of treaty interpretation, even though the application of MFN clauses to dispute settlement provisions in investment treaty arbitration, rather than limiting them to substantive obligations, as first decided in the *Maffezini* decision, has brought a new dimension to the thinking about MFN provisions, and perhaps consequences that had not been foreseen by parties when they negotiated their investment agreements. Indeed, 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. Otherwise the matter will be left to dispute settlement tribunals to interpret MFN clauses on a case-by-case basis.

The Commission wishes to highlight that the interpretative techniques reviewed in the report are designed to assist in the interpretation and application of MFN provisions. Accordingly, the Commission commends the final report to the attention of the General Assembly, and encourages its widest possible dissemination.

This work, as reflected in the Annex, no doubt, constitutes an outstanding contribution by the Study Group. The Commission paid tribute to the Study Group and its Chairman, Mr. Donald M. McRae for the results achieved. It also recalled with gratitude, the contribution of Mr. A. Rohan Perera, who served as chairman of the Study Group, from 2009 to 2011, as well as of Mr. Mathias Forteau, who served as chairman, in the absence of Mr. McRae during the 2013 and 2014 sessions.

This concludes my i

the Intergovernmental Panel on Climate Change (IPCC) in the 5th Assessment report. The definition, which corresponds to the scientific definition, focuses on the “physical” dimensions of the atmosphere.

In providing the definitions of **“atmospheric pollution”** and **“atmospheric degradation”**, an effort has been made to address transboundary air pollution, as well as global atmospheric problems.

the obligation to cooperate, as appropriate, with each other and with relevant international organizations, in the protection of the atmosphere from atmospheric pollution and atmospheric degradation. The reference to “as appropriate” is intended to denote a certain degree offlexibility and latitude for States in carrying out the obligation to cooperate