

Chapter XII

THE MOST-FAVOURLED-NATION CLAUSE

A. Introduction

345. The Commission, at its sixtieth session (2008), decided to include the topic “The most-favoured-nation clause” in its programme of work and to establish a study group on the topic at its sixty-first session.⁶⁹³

346. A Study Group, co-chaired by Mr. Donald McRae and Mr. A. Rohan Perera, was established at the sixty-first session (2009),⁶⁹⁴ and reconstituted at the sixty-second session (2010) under the same co-chairpersonship.⁶⁹⁵

B. Consideration of the topic at the present session

347. At the present session, the Commission reconstituted the Study Group on the most-favoured-nation clause, co-chaired by Mr. Donald McRae and Mr. A. Rohan Perera.

348. At its 3119th meeting, on 8 August 2011, the Commission took note of the oral report of the Co-Chairpersons of the Study Group.

1. DISCUSSIONS OF THE STUDY GROUP

349. The Study Group held 4 meetings on 1 June, 20 July and 4 August 2011.

350. In 2010 the Study Group decided, in an effort to advance its work, to try to identify further the normative content of the most-favoured-nation clauses in the field of investment and to undertake a further analysis of the case law, including the role of arbitrators, the factors that explain different approaches to interpreting most-favoured-nation provisions, and the divergences and steps taken by States in response to the case law. At the present session, the Study Group had before it an informal document, in tabular form, identifying the arbitrators and

counsel in investment cases involving most-favoured-nation clauses, together with the type of most-favoured-nation provision that was being interpreted.

351. It also had before it a working paper on the interpretation and application of most-favoured-nation clauses in investment agreements prepared by Mr. McRae. The working paper built upon the prior study by Mr. Perera on the most-favoured-nation clause and the *Maffezini* case,⁶⁹⁶ by attempting to identify the factors that had been taken into account by the tribunals in reaching their decisions in order to assess whether these threw any light on the divergences that exist in the case law, with the objective of identifying categories of factors that had been invoked throughout the cases and of assessing their relative significance in the interpretation and application of most-favoured-nation clauses. In this regard, the working paper considered the various uses for which most-favoured-nation clauses had been invoked in investment disputes, focusing primarily on the use of such clauses to obtain a substantive benefit provided for in the bilateral investment treaty between the respondent State and a third State, and the use of these clauses to obtain more favourable dispute settlement provisions than are provided for in the bilateral investment agreement under which the claim was being brought.⁶⁹⁷

352. It also looked into the considerations that had played a part in investment tribunal decisions, dwelling on the *source* of the right to most-favoured-nation treatment, as well as its *scope*. In terms of scope, it was noted that there were many ways in which investment tribunals had framed the application of the *ejusdem generis* principle, and even within some decisions different approaches had been taken. These included (a) drawing a distinction between substance and procedure (jurisdiction); (b) following a *treaty interpretation* approach, whether by interpreting most-favoured-nation provisions as a general matter of treaty interpretation or treating the matter as one of interpreting the jurisdiction of the tribunal; (c) adopting a *conflict of treaty provisions* approach, whereby tribunals take into account the fact that the matter sought to be incorporated into the treaty has already been covered, in a different way, in the basic treaty itself; and (d) considering the *practice* of the parties as a means to ascertain the intention of the parties regarding the scope of the most-favoured-nation clause. Moreover, the working paper considered the question, albeit not explicitly dealt with by the tribunals as a factor, whether the *type of claim*

⁶⁹³ At its 2997th meeting, on 8 August 2008 (see *Yearbook ... 2008*, vol. II (Part Two), p. 148, para. 354). For the syllabus of the topic, see *ibid.*, annex II. The General Assembly, in paragraph 6 of its resolution 63/123 of 11 December 2008, took note of the decision.

⁶⁹⁴ At its 3029th meeting, on 31 July 2009, the Commission took note of the oral report of the Co-Chairpersons of the Study Group on the most-favoured-nation clause (see *Yearbook ... 2009*, vol. II (Part Two), pp. 146–147, paras. 211–216). The Study Group considered, *inter alia*, a framework that would serve as a road map for future work and agreed on a work schedule involving the preparation of papers intended to shed additional light on questions concerning, in particular, the scope of most-favoured-nation clauses and their interpretation and application.

⁶⁹⁵ At its 3071st meeting, on 30 July 2010, the Commission took note of the oral report of the Co-Chairpersons of the Study Group (see *Yearbook ... 2010*, vol. II (Part Two), pp. 196–199, paras. 359–373). The Study Group considered and reviewed the various papers prepared on the basis of the 2009 framework to serve as a road map for future work and agreed upon a programme of work for 2010.

⁶⁹⁶ For a summary, see *Yearbook ... 2010*, vol. II (Part Two), pp. 198–199, paras. 366–368. Regarding the *Maffezini* case, see *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7. Available from <https://icsid.worldbank.org/>.

⁶⁹⁷ It may also be invoked to obtain a benefit granted to the investors or the investments of a third State under the domestic law or legislation of the country against which the claim is made (respondent State).

being made had had an influence on the willingness of tribunals to incorporate other provisions by means of a most-favoured-nation clause, as well as the *limits of the application* of the most-favoured-nation clause, including the “public policy” exceptions set out in *Maffezini*.

353. In the main, the working paper concluded that an examination of the decisions of investment tribunals revealed that there was no consistent approach in the reasoning of tribunals that permitted the use of a most-favoured-nation clause to incorporate dispute settlement provisions. There was also little consistency in the reasoning of those tribunals that had rejected the use of a most-favoured-nation clause to incorporate such provisions. There was a two-step process involved in deciding whether a most-favoured-nation clause could be used to incorporate dispute settlement provisions into the basic treaty. The first was to decide, explicitly or implicitly, whether in principle most-favoured-nation clauses covered dispute settlement provisions, and the second was to interpret the most-favoured-nation provision in question to see whether it applied in fact to dispute settlement provisions. These approaches were not always explicit and, in some cases, tribunals had said that their approach was one of treaty interpretation, appearing to ignore the first step.

354. The Study Group held a wide-ranging discussion on the basis of the working paper, and a framework of questions was prepared to provide an overview of the issues that might need to be considered in the context of the overall work of the Study Group, ranging from strictly legal considerations to wider policy-oriented aspects, including whether a liberal interpretation of the scope of most-favoured-nation clauses had the potential to upset the overall equilibrium of an investment agreement between the protection of the investor and its investment and the necessary policy space of a host State.

355. The Study Group affirmed the general understanding that the source of the right to most-favoured-nation treatment was the basic treaty and not the third-party treaty;⁶⁹⁸ most-favoured-nation clauses were not exceptions to the privity rule in treaty interpretation. It also recognized that the key question in the investment decisions concerning most-favoured-nation clauses seemed to be how the scope of the right to such treatment was to be determined, that is to say what expressly or impliedly fell “within the limits of the subject-matter of the clause”.

356. It thus tracked the ways in which the *ejusdem generis* question had been framed particularly through the invocation of the distinction between substantive and procedural (jurisdictional) provisions. Where a most-favoured-nation clause expressly included dispute settlement procedures or expressly excluded them, there was no need for further interpretation. Interpretation, however, was necessary in situations where the intention of the parties in relation to the applicability or not of the most-favoured-nation clause to the dispute settlement mechanism was not expressly stated or could not clearly be ascertained, a situation common in many bilateral investment treaties, which

had open-textured provisions. The Study Group took into account other recent developments, including the issuance of the sequel to the United Nations Conference on Trade and Development (UNCTAD) Series on Issues in International Investment Agreements II entitled *Most-Favoured-Nation Treatment*⁶⁹⁹ reflecting, *inter alia*, the reaction by States entering into investment agreements following *Maffezini*, showing a tendency to state expressly that the most-favoured-nation clause applied or did not apply to dispute settlement procedures.

357. It also considered the recent decision in *Impregilo S.p.A. v. Argentine Republic*,⁷⁰⁰ in particular the concurring and dissenting opinion of Professor Brigitte Stern, Arbitrator, in which she argues *inter alia* that a most-favoured-nation clause cannot apply to dispute settlement because of a core reason intimately linked with the essence of international law itself: there is no automatic assimilation of substantive rights and the jurisdictional means to enforce them, evidencing a difference between the qualifying conditions for access to the substantive rights and the substantive rights themselves, and the qualifying conditions for access to the jurisdictional means and the exercise of jurisdiction itself.⁷⁰¹ It was also noted that there were differences of opinion in the doctrine as to the correct approach, with some commentators taking the position that there was no convincing reason for distinguishing between substantive provisions and dispute settlement, while some others viewed the interpretation of most-favoured-nation provisions as a jurisdictional matter where the intention to incorporate dispute settlement provisions must be clearly and unambiguously expressed.

358. It was recognized that implicit in the various decisions appeared to be a philosophical position about whether most-favoured-nation clauses in principle covered dispute settlement provisions. The starting assumption in one scenario was that the most-favoured-nation clause can include procedural rights, while in the other it was that the clause did not include procedural rights. It was noted that on the whole, the conundrum was in the fact that there was no systematic approach to interpretation, one that was uniform across tribunals; different factors appeared to influence different tribunals. In such circumstances, the task of drawing any general conclusions about interpretative approaches across the investment decisions was not an easy exercise. The challenge for the Study Group was in part to make an assessment that would potentially flesh out some underlying theoretical framework to explicate the reasoning in the decisions.

359. In this connection, it was also noted that the concurring and dissenting opinion in *Impregilo S.p.A. v. Argentine Republic* provided a possible framework for extrapolating ways in which the *ejusdem generis* question ought to be approached, namely by first addressing whether the fundamental preconditions for invocation of

⁶⁹⁸ *Anglo-Iranian Oil Co. case (jurisdiction)*, *Judgment of July 22nd, 1952*; *I.C.J. Reports 1952*, p. 93, at p. 109. See also draft articles 8 and 9 of the Commission’s draft articles on most-favoured-nation clauses, *Yearbook ... 1978*, vol. II (Part Two), pp. 25–33.

⁶⁹⁹ UNCTAD, *Most-Favoured-Nation Treatment*, UNCTAD Series on Issues in International Investment Agreements II (Sales No. E.10. II.D.19), pp. 84–87. Available from http://unctad.org/en/docs/diaeia20101_en.pdf.

⁷⁰⁰ ICSID Case No. ARB/07/17, Award of 21 June 2011. Available from <https://icsid.worldbank.org/>.

⁷⁰¹ Concurring and dissenting opinion by Professor Brigitte Stern, Arbitrator, paras. 16 and 45.

access—conditions *ratione personae*, *ratione materiae*, *ratione temporis* of access to the rights granted in the bilateral investment treaty—had been satisfied. In this regard, it was recalled that article 14 of the 1978 draft articles on most-favoured-nation clauses provided that the exercise of rights arising under a most-favoured-nation clause for the beneficiary State or for persons or things in a determined relationship with that State was subject to compliance with the relevant terms and conditions laid down in the treaty containing the clause or otherwise agreed between the granting State and the beneficiary State.⁷⁰² In other words, instead of a two-step process deciding, explicitly or implicitly, whether in principle most-favoured-nation clauses covered dispute settlement provisions, and embarking on the interpretation of the most-favoured-nation provision in question to see whether it applied in fact to dispute settlement provisions, there was a prior step, possibly overlooked in the case law, aimed at determining who was entitled to benefit and whether the preconditions for access had been fulfilled.

360. The Study Group viewed it advisable to review the various approaches taken, drawing attention to the strengths and weaknesses of each approach. It was noted that the *treaty interpretation* approach might be a misnomer since the whole process was about treaty interpretation. It was confirmed that the general point of departure would be the 1969 Vienna Convention, supplemented by any principles that could be deduced from practice in the investment area, although it was noted that reference to the separate treaty-making practice of each of the parties to the bilateral investment treaty, in respect of which a most-favoured-nation claim had been made, as a means to ascertain the intention of the parties regarding the scope

of the most-favoured-nation clause, did not seem to find support in the 1969 Vienna Convention.

2. FUTURE WORK

361. The Study Group once more affirmed the need to study further the question of most-favoured-nation clauses in relation to trade in services and investment agreements, as well as the relationship between most-favoured-nation, fair and equitable treatment, and national treatment standards. A further look should also be taken at other areas of international law to see if any application of most-favoured-nation clauses there might provide some insight for the Study Group's work.

362. The Study Group anticipated that its work could be completed within two more sessions of the Commission. It was underscored that the work of the Study Group should seek to safeguard against fragmentation of international law by assuring the importance of greater coherence in the approaches taken in the arbitral decisions. It was considered that the Study Group could make a contribution towards assuring greater certainty and stability in the field of investment law. It was stressed that the effort should strive at preparing an outcome that would be of practical utility to those involved in the investment field and to policymakers. The Study Group affirmed its intention not to prepare any draft articles or to revise the 1978 draft articles. Instead, further work would be undertaken under the overall guidance of the Co-Chairpersons of the Study Group to put together a draft report providing the general background, analysing and contextualizing the case law, drawing attention to the issues that had arisen and trends in the practice and, where appropriate, making recommendations, including model clauses.

⁷⁰² *Yearbook ... 1978*, vol. II (Part Two), pp. 39–40.