

Chapter XI

THE MOST-FAVOURLED-NATION CLAUSE

A. Introduction

241. 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.³⁶³

242. A Study Group, co-chaired by Mr. Donald McRae and Mr. A. Perera, was established at the sixty-first session (2009),³⁶⁴ and reconstituted at the sixty-second (2010) and sixty-third (2011) sessions under the same co-chairpersonship.³⁶⁵

B. Consideration of the topic at the present session

243. At the present session, the Commission reconstituted the Study Group on the most-favoured-nation clause, under the chairpersonship of Mr. Donald McRae. At the first meeting of the Study Group, tribute was paid to the former Co-Chair of the Study Group, Mr. A. Rohan Perera.

244. At its 3151st meeting, on 27 July 2012, the Commission took note of the oral report of the Chairperson of the Study Group.

1. WORK OF THE STUDY GROUP

245. The Study Group held six meetings on 24 and 31 May and on 11, 12, 17 and 18 July 2012.

246. The overall objective of the Study Group is to seek to safeguard against fragmentation of international law and to stress the importance of greater coherence in the approaches taken in the arbitral decisions in the area of investment, particularly in relation to most-favoured-nation provisions. It is considered that the Study Group could make a contribution towards assuring greater certainty and stability in the field of investment law. It seeks to elaborate an outcome

³⁶³ At its 2997th meeting, on 8 August 2008 (see *Yearbook ... 2008*, vol. II (Part Two), 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.

³⁶⁴ 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), 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.

³⁶⁵ 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), 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. See also *Yearbook ... 2011*, vol. II (Part Two), paras. 347–362.

that would be of practical utility to those involved in the investment field and to policymakers. It is not the intention of the Study Group to prepare any draft articles or to revise the 1978 draft articles of the Commission on the most-favoured-nation clause.³⁶⁶ It is envisaged that a report will be prepared, providing the general background, analysing and contextualizing the case law, drawing attention to the issues that had arisen and trends in practice and, where appropriate, making recommendations, including possible guidelines and model clauses.

247. To date, the Study Group, in order to illuminate further the contemporary challenges posed by the most-favoured-nation clause, has considered several background papers. In that connection, it has examined (a) a typology of existing most-favoured-nation provisions, which is an ongoing study; (b) the 1978 draft articles adopted by the Commission and areas of their continuing relevance; (c) aspects concerning how the most-favoured-nation clause had developed and was developing in the context of the General Agreement on Tariffs and Trade (GATT) and WTO; (d) other developments in the context of the Organisation for Economic Co-operation and Development (OECD) and the United Nations Conference on Trade and Development (UNCTAD); and (e) an analysis of contemporary issues concerning the scope of application of the most-favoured-nation clause, such as those arising in the *Maffezini* award.³⁶⁷

248. Additional work had also been undertaken to identify the arbitrators and counsel in investment cases involving most-favoured-nation clauses, together with the types of most-favoured-nation provisions interpreted. Moreover, to identify further the normative content of the most-favoured-nation clauses in the field of investment, there had been an analysis of the factors taken into account by tribunals in the interpretation and application of most-favoured-nation clauses in investment agreements, building upon earlier work done on the most-favoured-nation clause and the *Maffezini* award.³⁶⁸

³⁶⁶ *Yearbook ... 1978*, vol. II (Part Two), para. 74.

³⁶⁷ Donald McRae and A. Perera, “Catalogue of MFN provisions”; Shinya Murase, “The 1978 draft articles of the International Law Commission”; Donald McRae, “MFN in the GATT and the WTO”; Mahmoud Hmoud, “The work of OECD on MFN”; Stephen Vasciannie, “The work of UNCTAD on MFN”; A. Perera, “The *Maffezini* problem under investment treaties” (see *Yearbook ... 2010*, vol. II (Part Two), paras. 360–368). Regarding *Emilio Agustín Maffezini v. Kingdom of Spain*, see International Centre for Settlement of Investment Disputes, Case No. ARB/97/7, decision of 25 January 2000, *ICSID Review: Foreign Investment Law Journal*, vol. 16, No. 1 (2001), p. 1. The text of the decision is also available online (see <https://icsid.worldbank.org/>) and in *International Law Reports*, vol. 124 (2001), p. 1.

³⁶⁸ Donald McRae, “Interpretation and application of MFN clauses in investment agreements”. See also *Yearbook ... 2011*, vol. II (Part Two), paras. 351–353.

249. The Study Group has previously identified the need to study further the question of most-favoured-nation clauses in relation to trade in services under the General Agreement on Trade in Services (GATS) and investment agreements, the relationship between most-favoured-nation, fair and equitable treatment, and national treatment standards, as well as other areas of international law to assess whether any application of most-favoured-nation clauses in such areas might provide some insight for the work of the Study Group.

2. DISCUSSIONS OF THE STUDY GROUP AT THE PRESENT SESSION

250. At the present session of the Commission, the Study Group had before it a working paper on the “Interpretation of MFN clauses by investment tribunals”, prepared by Mr. Donald McRae. It also had before it a working paper on the “Effect of the mixed nature of investment tribunals on the application of MFN clauses to procedural provisions”, prepared by Mr. Mathias Forteau.

251. The working paper by Mr. Donald McRae was a restructured version of the 2011 working paper, “Interpretation and application of MFN clauses in investment agreements”, taking into account recent developments and discussions of the Study Group in 2011. It contained an analysis of recent decisions and further factors, which had been taken into account in the case law. It also provided an assessment of the different interpretative approaches utilized by tribunals.

252. In course of the discussion of the working paper by Mr. Donald McRae, there was an exchange of views on whether the nature of the tribunal had a bearing on how it went about treaty interpretation, in particular whether the mixed nature of arbitration (including both a State and a private party) constituted a relevant factor in the interpretative process. The working paper by Mr. Mathias Forteau was prepared as a consequence of that discussion.

253. The two working papers constitute preparatory documents to form part of the overall report to be submitted by the Study Group.

254. The Study Group also had before it an informal working paper on model most-favoured-nation clauses post *Maffezini*, examining the various ways in which States have reacted to the *Maffezini* decision, including by specifically stating that the most-favoured-nation clause does not apply to dispute resolution provisions; or specifically stating that the most-favoured-nation clause does apply to dispute resolution provisions; or specifically enumerating the fields to which the most-favoured-nation clause applies. It also had before it an informal working paper providing an overview of most-favoured-nation-type language in headquarters agreements conferring on representatives of States to the organization the same privileges and immunities granted to diplomats in the host State. Those informal working papers, together with an informal working paper on bilateral taxation treaties and the most-favoured-nation clause that was not discussed by the Study Group, are still a work in progress and will continue to be updated to ensure completeness.

(a) *Effect of the mixed nature of investment tribunals on the application of MFN clauses to procedural provisions (Mr. Mathias Forteau)*

255. The working paper offered an explanation of the mixed nature of arbitration in relation to investment; an assessment of the peculiarities of the application of the most-favoured-nation clause in mixed arbitration; and a study of the impact of such arbitration on the application of the most-favoured-nation clause to procedural provisions. It was considered that the mixed nature of investment arbitration operated on two levels, because the parties to the proceedings, being a private claimant and a respondent State, were not of the same nature. Moreover, it was argued that the tribunal in such instance was a functional substitute for an otherwise competent domestic court of the host State.³⁶⁹ Mixed arbitration was thus situated between the domestic plane and international plane, with affinities in relation to investment to both international commercial arbitration and public international arbitration.³⁷⁰ It had a private and a public element to it.

256. Assessing the peculiarities of the application of the most-favoured-nation clause in mixed arbitration, it was pointed out that while, *ratione materiae*, the 1978 draft articles cover all types of areas, including the establishment of foreign physical and juridical persons and their personal rights and obligations, *ratione personae*, their general scope did not include obligations or rights to be performed or enjoyed by individuals. In the classical sense, an individual was not considered, as an international subject, in the application of the most-favoured-nation clause. The effect of a mixed tribunal was that an individual, like the State, was also a beneficiary of the most-favoured-nation clause in the international order; the individual, without being a party to a treaty, can invoke jurisdictional clauses of a treaty against a respondent State party; since the treaty offers both the treatment and is the basis of the right of recourse to arbitration, it becomes difficult to distinguish what falls under the settlement of disputes related to the treaty from what falls under the treatment offered by the treaty. The effect of the latter aspect is that there are two interpretative trends: one insists on the “treatment” aspect (two States grant to their respective nationals preferential treatment) in order to justify more easily the application of the most-favoured-nation clause to the dispute settlement clause; the other insists on the “dispute settlement” aspect (the dispute settlement clause is the basis of the consent of the State to arbitration) by emphasizing the need to respect the principle of State consent to arbitration.

257. In terms of impact, it was suggested that it was not excluded that at least special interpretative guidelines, if not rules of interpretation, apply to mixed arbitration because of its unique nature. The impact was that,

³⁶⁹ See Stephan W. Schill, “Allocating adjudicatory authority: most-favoured-nation clauses as a basis for jurisdiction—A reply to Zachary Douglas”, *Journal of International Dispute Settlement*, vol. 2, No. 2 (2011), pp. 353–371, at p. 362, footnote 31. See also Mathias Forteau, “Le juge CIRDI envisagé du point de vue de son office: juge interne, juge international, ou l’un et l’autre à la fois”, in *Liber amicorum Jean-Pierre Cot: Le procès international* (Brussels, Bruylant, 2009), pp. 95–129.

³⁷⁰ See, on this point, Franck Latty, “Arbitrage transnational et droit international général”, in *Annuaire français de droit international*, vol. 54 (2008), pp. 467 *et seq.*, at pp. 471–475.

depending on the aspect of the mixed nature, some tribunals gave more importance to the public aspect of arbitration (or to the “settlement of dispute” aspect) (public approach) than to its private aspect (or to the “treatment” aspect), while others made the opposite choice (private approach), while in yet other cases, there was a mix of the two aspects (syncretic approach).

(b) *Interpretation of MFN clauses by investment tribunals (Mr. Donald McRae)*

258. It was recognized in the working paper that, notwithstanding a reliance on treaty interpretation or the invocation of the interpretative tools under the 1969 Vienna Convention in the interpretation of most-favoured-nation clauses, there was little consistency in the way in which investment tribunals actually went about the interpretative process, or necessarily in the conclusions that they reached. Accordingly, the paper reviewed further the approaches taken by investment tribunals seeking to identify certain factors that appeared to influence investment tribunals in interpreting most-favoured-nation clauses and to identify certain trends.

259. These factors and trends included the following: (a) drawing a distinction between *substance and procedure*, by inquiring into the basic question whether in principle a most-favoured-nation provision could relate to both the procedural and the substantive provisions of the treaty; (b) interpreting the most-favoured-nation provision in relation to the dispute settlement provisions of the treaty as a *jurisdictional matter*, where there was an implication in some cases of an allegedly higher standard for interpreting whether the scope of a most-favoured-nation clause was one of agreement to arbitrate, while in some other cases a differentiation is made between *jurisdiction and admissibility*, in which case, a provision affecting a right to bring a claim, which is a jurisdictional matter, was distinguished from a provision affecting the way in which a claim has to be brought, which has been construed as going to admissibility; (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 had already been covered, in a different way, in the basic treaty itself; (d) considering the treaty-making *practice* of either party to the bilateral investment treaty, in respect of which a most-favoured-nation claim had been made, as a means of ascertaining the intention of the parties regarding the scope of the most-favoured-nation clause; (e) considering the *relevant time* at which the treaty was concluded (principle of contemporaneity), as well as the subsequent practice to ascertain the intention of the parties; (f) assessing the influence on the tribunal of the content of the provision sought to be ousted or added by means of a most-favoured-nation clause; (g) acknowledging an implicit *doctrine of precedent*, a tendency influenced by a desire for consistency rather than any hierarchical structure; (h) assessing the content of the provision invoked to determine whether, in fact, it accorded *more/less favourable treatment*; and (i) considering the existence of *policy exceptions*.

(c) *Summary of the discussions*

260. While recognizing that the focus of the work of the Study Group was in the area of investment, the Study

Group viewed it as appropriate that the issues under discussion should be located within a broader normative framework, against the background of general international law and prior work of the Commission. The Study Group also confirmed the possibility of developing guidelines and model clauses.

261. On the basis of the working paper by Mr. Donald McRae, which also offered a tentative analysis of the direction that the Study Group might wish to take, the Study Group began an exchange of views addressing three main questions, namely (a) whether in principle most-favoured-nation provisions were capable of applying to the dispute settlement provisions of bilateral investment treaties; (b) whether the conditions set out in bilateral investment treaties under which dispute settlement provisions may be invoked by investors were matters that affected the jurisdiction of a tribunal; and (c) what factors were relevant in the interpretative process in determining whether a most-favoured-nation provision in a bilateral investment treaty applied to the conditions for invoking dispute settlement.

262. The Study Group recognized that whether a most-favoured-nation provision was capable of applying to the dispute settlement provisions was a matter of treaty interpretation to be answered depending on each particular treaty, which had its own specificities to be taken into account. It was appreciated that there was no particular problem where the parties explicitly included or excluded the conditions for access to dispute settlement within the framework of their most-favoured-nation provision. The question of interpretation had arisen, as in the majority of cases, when the most-favoured-nation provisions in existing bilateral investment treaties were not explicit as to the inclusion or exclusion of dispute settlement clauses. It was suggested that, at a minimum, there was no need for tribunals, when interpreting most-favoured-nation provisions in bilateral investment treaties, to inquire into whether such provisions in principle would not be capable of applying to dispute settlement provisions. Post-*Maffezini*, it would be prudent for States to give an indication of their preference.

263. It was appreciated that investment tribunals, both explicitly and implicitly, considered that the question of the scope of most-favoured-nation provisions in bilateral investment treaties was a matter of treaty interpretation. Bilateral investment treaties are treaties governed by international law. Accordingly, the principles of treaty interpretation as set out in articles 31 to 33 of the 1969 Vienna Convention are applicable to their interpretation. The general rule of treaty interpretation as set out in article 31, paragraph 1, of the 1969 Vienna Convention is that treaties “shall be interpreted in good faith in accordance with the ordinary meaning of the terms of the treaty in their context and in the light of its object and purpose”. In the context of its further work, the Study Group will continue to consider the various factors that have been taken into account by the tribunals in interpretation with a view to considering whether recommendations could be made in relation to (a) the ambit of context; (b) the relevance of the content of the provision sought to be replaced; (c) the interpretation of the provision sought to be included; (d) the relevance of preparatory work;

(e) the treaty practice of the parties; and (f) the principle of contemporaneity. It was considered that it would be necessary to give further attention to aspects concerning the interpretation of the most-favoured-nation clause beyond *Maffezini*, whether additional light could be thrown on the distinction made in the case law between jurisdiction and admissibility, the question of who was entitled to invoke the most-favoured-nation clause, whether a particular understanding could be given to “less favourable treatment” when such provision was invoked in the context of bilateral investment treaties, and whether there was any role for policy exceptions as a limitation on the application of the most-favoured-nation clause.

264. The Study Group recalled that it had previously identified the need to study further the question of most-favoured-nation clauses in relation to trade in services under GATS and investment agreements, as well as the relationship between most-favoured-nation, fair and equitable treatment, and national treatment standards. These will be kept in view as the Study Group progresses in its work. It was also recalled that the relationship of the most-favoured-nation clause and regional trade agreements was an area that was intended for further study. It was also suggested that there were other areas of contemporary interest, such as the relationship between investment agreements and human rights. However, the Study Group was mindful of the need not to broaden

the scope of its work and was therefore cautious about exploring aspects that may divert attention from its work on areas that posed problems relating to the application of the provisions of the 1978 draft articles.

265. The Study Group shared views on the broad outlines of its future report and generally viewed it important to provide a general background to its work within the broader framework of general international law, in the light of subsequent developments, following the adoption of the 1978 draft articles, to address contemporary issues concerning most-favoured-nation clauses, analysing in that regard such issues as the contemporary relevance of most-favoured-nation provisions, the work on most-favoured-nation provisions done by other bodies and the different approaches taken in the interpretation of most-favoured-nation provisions. It is also envisioned that the final report of the Study Group would address broadly the question of the interpretation of most-favoured-nation provisions in investment agreements in respect of dispute settlement, analysing the various factors that are relevant to that process and presenting examples of model clauses for the negotiation of most-favoured-nation provisions, based on State practice. The Study Group recognized that changes in the composition of the Commission had an impact on the progress of its work, as certain aspects could not be undertaken between sessions. It remained optimistic, however, that its work could be completed within the next two or three sessions of the Commission.