CHECK AGAINST DELIVERY

Statement by the Co-Chairman
of the Study Group on the Most-favoured-nation clause

8 August 2011

Thank you, Mr. Chairman.

I have the honour to present the oral report, also on behalf of the Co-Chairman, on the work of the Study Group on the Most-favoured-nation clause, which was reconstituted at the present session.

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

It will be recalled that last year the Study Group decided, in an effort to advance its work, to try to identify further the normative content of the MFN clauses in the field of investment, and to undertake a further analysis of the case law, including the role of arbitrators, factors that explain different approaches to interpreting MFN provisions, the divergences, and the steps taken by States in response to the case law.

Accordingly, 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 MFN clauses, together with the type of MFN provision that was being interpreted. It also had before it a working paper on the "Interpretation and Application of MFN Clauses in Investment Agreements" prepared by Donald McRae. The working paper built upon the prior study on the "The MFN clause and the *Maffezini* case" by Rohan Perera, 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 to assess their relative significance in the interpretation and application of MFN clauses. In this regard, the working paper considered the various *uses* for which MFN clauses had been invoked in investment disputes, focusing primarily on the use of MFN 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 MFN clauses to obtain more favourable dispute settlement provisions than are provided for in the bilateral investment agreement under which the claim was being brought.

As you are aware, an MFN clause 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), but this point was not canvassed in the working paper.

The working paper also looked into the considerations that had played a part in investment tribunal decisions, dwelling on the *source* of the right to MFN treatment, as well as its *scope*. It was noted, in terms of scope, 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 approaches included (a) drawing a distinction between substance and procedure (jurisdiction); (b) following a *treaty interpretation* approach, whether by interpreting MFN provisions as a general matter of treaty interpretation or treating the matter as one of interpreting the jurisdiction of the tribunal; (c) the adoption of the *conflict of treaty provisions* approach, whereby tribunals had taken 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; and (d) the consideration of the *practice* of the parties as a means to ascertain the intention of the parties regarding the scope of the MFN clause.

Moreover, the working paper considered, the question, albeit not explicitly dealt with by the tribunals as a factor, whether the *type of claim* being made had had an influence on the willingness of tribunals to incorporate other provisions by means of an MFN clause, as well as the *limits of the application of the MFN*, including the "public policy" exceptions set out in *Maffezini*.

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 MFN to incorporate dispute settlement provisions. There was also little consistency in the reasoning of those tribunals that had rejected the use of MFN to incorporate such provisions. There was a two-step process involved in deciding whether an MFN clause could be used to incorporate dispute settlement provisions into the basic treaty. The first was to decide, explicitly or implicitly, whether in principle MFN clauses covered dispute settlement provisions, and the second was to interpret the MFN 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.

Mr. Chairman,

The Study Group held a wide-ranging discussion on the basis of the working paper, as well as a framework of questions prepared to provide an overview of issues that may need to be considered in the context of the overall work of the Study Group. These questions ranged from strictly legal considerations to wider policy-oriented aspects, including whether a liberal interpretation of the scope of MFN 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.

The Study Group affirmed the general understanding that the source of the right to MFN treatment was the basic treaty and not the third-party treaty. MFN clauses are not an exception to the privity rule in treaty interpretation. It also recognized that the key question in the investment decisions concerning MFN seemed to be how the scope of the right to MFN treatment was to be determined, that is to say what expressly or impliedly fell "within the limits of the subject-matter of the clause".

In this connection, the Study Group 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. Obviously, where an MFN clause expressly included dispute settlement procedures or expressly excluded them, there was no need for interpretation. Such interpretation was necessary in situations where the intention of the parties in relation to the applicability or not of the MFN clause to the dispute settlement mechanism was not expressly stated or could not clearly be ascertained, and given that many BITs had the open textured provisions, there was a likelihood that the situation could not be easily ascertained.

The Study Group took into account other recent developments, including the issuance of the sequel to the UNCTAD Series on Issues in International Investment Agreements II, *Most-Favoured-Nation Treatment* which among other things reflects the reaction by States entering into investment agreements following *Maffezini,* showing a tendency to state expressly that the MFN clause applied or did not apply to dispute settlement procedures.

Likewise, it considered the recent decision in *Impregilo S.p.A. v. Argentine Republic*, in particular the concurring and dissenting opinion of Professor Brigitte Stern, Arbitrator, which *inter alia* argues that an MFN 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 qualifying conditions for access to the jurisdictional means. 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 MFN provisions as a jurisdictional matter where the intention to incorporate dispute settlement provisions must be clearly and unambiguously expressed.

It was recognized that implicit in the various decisions appeared to be a philosophical position about whether MFN clauses in principle covered dispute settlement provisions. The starting assumption in one scenario was that the MFN clause can include procedural rights, while in the other it was that the MFN 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.

In this connection, it was also noted that the concurring and dissenting opinion *Impregilo S.p.A.* 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 access – conditions *ratione personae*, *ratione materiae*, *ratione temporis* of access to the rights granted in the BIT – have been satisfied. In this regard, it was recalled that article 14 of the 1978 draft articles on the MFN Clause provided that the exercise of rights arising under a MFN 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. In other words, instead of a two-step process deciding, explicitly or implicitly, whether in principle MFN clauses covered dispute settlement provisions, and embarking on the interpretation of the MFN 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.

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* may be a misnomer since what was implicated in the process as a whole was treaty interpretation. It was confirmed that the general point of departure would be the Vienna Convention of the Law of Treaties, supplemented by any principles that may be deduced from the practice in the investment area. It was noted however that that reference to the other treaty-making practice of the parties to the BIT, in respect of which an MFN claim had been made, as a means to ascertain the intention of the parties regarding the scope of the MFN clause, did not seem to find support in the VCLT.

The Study Group also had an opportunity to consider its future work programme of work. It once more reaffirmed the need to study further the question of MFN in relation to trade in services and investment agreements, as well as the relationship between MFN, fair and equitable treatment, and national treatment standards. It was also suggested that there was need to have a further look at other areas of international law to see if any application of MFN there might provide some insight for the Study Group's work.

It is anticipated that the Study Group could be complete within two more sessions of the Commission. We are therefore looking to 2013 to possibility conclude our work. 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 policy makers. The Study Group affirmed its intention not to prepare any draft articles or to revise of the 1978 draft articles. Instead, further work will be undertaken under the overall guidance of the Co-Chairmen of the Study Group to put together a draft report providing the general background, analyzing and contextualizing the case law, drawing attention to the issues that had arisen and trends in the practice and where appropriate make recommendations, including model clauses.

This concludes my presentation of the oral report of the Study Group. It is my sincere hope that the Commission will be in a position to take note of it. All the members of the Study Group deserve appreciations for their useful contributions in the course of our work. I would also be remiss it I did not mention the valuable contribution and assistance of my co-chair.

Thank you, Mr. Chairman