Chapter XI

THE MOST-FAVOURED-NATION CLAUSE

A. Introduction

208. 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.[882]

B. Consideration of the topic at the present session

209. At its 3012th meeting, on 29 May 2009, the Commission established a Study Group on the most-favoured-nation clause, co-chaired by Mr. Donald M. McRae and Mr. A. Rohan Perera.

210. 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.

Discussions of the Study Group

211. The Study Group held two meetings, on 3 June and on 20 July 2009. The Study Group considered a framework that would serve as a road map for future work, in the light of issues highlighted in the syllabus on the topic and made a preliminary assessment of the 1978 draft articles[883] with a view to reviewing the developments that had taken place since then.

212. The Study Group began with a discussion and an appreciation of the nature, origins and development of most-favoured-nation clauses, the prior work of the Commission on the most-favoured-nation clause, the reaction of the Sixth Committee to the draft articles adopted by the Commission in 1978, developments that had occurred since 1978 and the consequent challenges of the most-favoured-nation clause in contemporary times, and what the Commission could contribute in light of significantly changed circumstances since the 1978 draft articles. These changes include the context in which most-favoured-nation clauses have arisen, the body of practice and jurisprudence now available and the new problems that have emerged, in particular as regards the application of most-favoured-nation clauses in investment agreements.

(a) *A preliminary assessment of the 1978 draft articles*

213. In the discussion, the Co-Chairperson of the Study Group, Mr. Donald M. McRae, highlighted the specific articles of the 1978 draft articles, which remained important to the areas of relevance to the Study Group. These included article 2 (Use of terms), article 5 (Most-favoured-nation treatment), article 7 (Legal basis of most-favoured-nation treatment), article 8 (The source and scope of most-favoured-nation treatment), article 9 (Scope of rights under a most-favoured-nation clause), article 10 (Acquisition of rights under a most-favoured-nation clause), article 16 (Irrelevance of limitations agreed between the granting State and a third State), article 23 (The most-favoured-nation clause in relation to treatment under a generalized system of preferences), article 24 (The most-favoured-nation clause in relation to arrangements between developing States), article 25 (The most-favoured-nation clause in relation to treatment extended to facilitate frontier traffic), and article 26 (The most-favoured-nation clause in relation to treatment extended to a land-locked third State). In particular, it was considered that draft articles 9 and 10, which focused on the scope of most-favoured nation, were of contemporary relevance, and in the context of investment would be the basic points of departure and the primary focus of the Study Group.

214. In the ensuing discussions in the Study Group, comments were made regarding the status of the 1978 draft articles and their relationship with the current work of the Study Group. It was felt necessary to clarify in advance and reach an understanding about that earlier work and its status in order to ensure that there was a clear delineation between that work and the current exercise, without the earlier achievements being undermined or adversely affecting work and developments in other forums. It was hoped that the papers to be prepared (see below) would further reflect upon these aspects and flesh out the issues that ought to be addressed.

(b) *Road map of future work*

215. In view of the discussion, the Study Group agreed on a work schedule involving the preparation of papers which it hoped would shed additional light on questions concerning, in particular, the scope of most-favoured-nation clauses and their interpretation and application.

216. Accordingly, the following eight topics, together with the names of the members of the Study Group who would assume primary responsibility for the research and preparation of specific papers related thereto, were identified:

(i) *Catalogue of most-favoured-nation provisions* (Mr. D. M. McRae and Mr. A. R. Perera)

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[882] 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.

[883] *Yearbook ... 1978*, vol. II (Part Two), para. 74.

This work would involve collecting most-favoured-nation provisions, principally but not exclusively in the investment area, and providing a preliminary categorization of these provisions into different types of clauses. The collation of material for the catalogue will be a continuing work in progress during the duration of the work of the Study Group.

(ii) *The 1978 draft articles of the International Law Commission* (Mr. S. Murase)

This paper would give a brief history of the 1978 draft articles and an assessment of their contemporary relevance. The paper will include an analysis of the way the most-favoured-nation clause was interpreted in decisions of the ICJ (*Anglo–Iranian Oil Co.* case,[884] *Ambatielos case*,[885] *Case concerning rights of nationals of the United States of America in Morocco*[886]) and the arbitral decision in the *Ambatielos claim*.[887]

(iii) *The relationship between most-favoured-nation and national treatment* (Mr. D. M. McRae)

This paper would consider the similarities and differences between most-favoured-nation and national treatment clauses and consider their relationship to other principles of non-discrimination. The purpose would be to determine whether there was a clear underlying objective of most-favoured-nation clauses that will affect their interpretation.

(iv) *Most-favoured nation in the General Agreement on Tariffs and Trade (GATT) and the WTO* (Mr. D. M. McRae)

This paper would consider the role of most-favoured nation under GATT, how it has been interpreted and applied and the evolution of most-favoured nation under the WTO from trade in goods to trade in services, intellectual property protection and government procurement. The objective would be to determine whether most-favoured nation under GATT and the WTO was unique to that area—form of *lex specialis*—or whether it had implications for the way most-favoured nation operates in other areas.

(v) *The work of the United Nations Conference on Trade and Development (UNCTAD) on most-favoured nation* (Mr. S. C. Vasciannie)

The purpose of this paper would be to survey what UNCTAD has done in relation to most-favoured nation and provide an assessment of the contribution that this work could make to the work of the Study Group.[888]

(vi) The work of the Organisation for Economic Co-operation and Development (OECD) on most-favoured nation (Mr. M. Hmoud)

The purpose of this paper would be to survey what OECD has done in relation to most-favoured nation and provide an assessment of the contribution that this work could make to the work of the Study Group.[889]

(vii) The *Maffezini* problem[890] under investment treaties (Mr. A. R. Perera)

This paper would analyse the way the most-favoured-nation clause was interpreted in *Maffezini* v. *Spain* and in subsequent investment cases.

(viii) Regional economic integration agreements and free trade agreements (Mr. D. M. McRae)

The purpose of this paper would be to survey the use of the most-favoured-nation clause in such agreements and to assess whether its interpretation and application in that context was consistent with or dissimilar from its interpretation and application in other areas.

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[884] *Anglo–Iranian Oil Co.* case (jurisdiction), Preliminary objection, Judgment of 22 July 1952, *I.C.J. Reports 1952*, p. 93.

[885] *Ambatielos case (Greece* v. *United Kingdom)*, Jurisdiction, Judgment of 1 July 1952, *ibid.*, p. 28.

[886] *Case concerning rights of nationals of the United States of America in Morocco*, Judgment of 27 August 1952, *ibid.*, p. 176.

[887] *Ambatielos claim (Greece, United Kingdom of Great Britain and Northern Ireland)*, UNRIAA, vol. XII (Sales No. 1963.V.3), pp. 83–153.

[888] See, for example, UNCTAD, "Most-favoured-nation treatment", UNCTAD Series on issues in international investment agreements, UNCTAD/ITE/IIT/10 (vol. III) (United Nations publication, Sales No. E.99.II.D.11) (1999). Also available from: www.unctad.org/en/docs/psiteiitd10v3.en.pdf (accessed 5 August 2015).

[889] See, for example, OECD Directorate for Financial and Enterprise Affairs, "Most-favoured-nation treatment in international investment law", *Working Papers on International Investment*, No. 2004/2 (2004). Available from: www.oecd.org/daf/inv/investment-policy/WP-2004_2.pdf (accessed 5 August 2015).

[890] *Maffezini* v. *Kingdom of Spain*, Case No. ARB/97/7, Decision of the Tribunal on objections to jurisdiction of 25 January 2000, ICSID, *ICSID Review–Foreign Investment Law Journal*, vol. 16, No. 1 (2001), p. 1; the text of the decision is also available from http://icsid.worldbank.org.