

## Chapter XI

### THE MOST-FAVOURLED-NATION CLAUSE

#### A. Introduction

150. 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, at its sixty-first session, a study group on the topic.<sup>396</sup>

151. The Study Group, co-chaired by Mr. Donald McRae and Mr. A. Rohan Perera, was established at the sixty-first session (2009),<sup>397</sup> and reconstituted at the sixty-second (2010) and sixty-third (2011) sessions, under the same co-chairpersonship.<sup>398</sup> At the sixty-fourth session (2012), the Commission reconstituted the Study Group on the most-favoured-nation clause, under the chairpersonship of Mr. Donald McRae.<sup>399</sup>

#### B. Consideration of the topic at the present session

152. At the present session, the Commission reconstituted the Study Group on the most-favoured-nation clause under the chairpersonship of Mr. Donald McRae. In his absence, Mr. Mathias Forteau served as Chairperson. The Study Group held four meetings, on 23 May and 10, 15 and 30 July 2013.

153. At its 3189th meeting, on 31 July 2013, the Commission took note of the report of the Study Group.

##### 1. WORK OF THE STUDY GROUP

154. It should be recalled that the overall objective of the Study Group is to seek to safeguard against fragmentation

<sup>396</sup> 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.

<sup>397</sup> 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.

<sup>398</sup> 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. At its 3119th meeting, on 8 August 2011, the Commission took note of the oral report of the Co-Chairpersons of the Study Group (see *Yearbook ... 2011*, vol. II (Part Two), paras. 348–362). The Study Group considered and reviewed additional papers prepared on the basis of the 2009 framework.

<sup>399</sup> At its 3151st meeting, on 27 July 2012, the Commission took note of the oral report of the Chairperson of the Study Group (see *Yearbook ... 2012*, vol. II (Part Two), paras. 244–265). The Study Group considered and reviewed additional papers prepared on the basis of the 2009 framework.

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. The Study Group continues to work towards making a contribution to assuring greater certainty and stability in the field of investment law. It intends to formulate an outcome that would be of practical use 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 Commission’s 1978 draft articles on most-favoured-nation clauses.<sup>400</sup>

155. In seeking to throw further light on the contemporary challenges posed by the most-favoured-nation clause in investment law, the Study Group had prepared and considered several background working papers since 2010. In particular, it had examined (a) a typology of existing most-favoured-nation provisions, which is an ongoing exercise; (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); (e) contemporary issues concerning the scope of application of the most-favoured-nation clause, such as those arising in the *Maffezini* award;<sup>401</sup> (f) how the most-favoured-nation clause had been interpreted by investment tribunals, *Maffezini* and post-*Maffezini*; and (g) the effect of the mixed nature of investment tribunals on the application of most-favoured-nation clauses to procedural provisions.<sup>402</sup>

156. The Study Group had also undertaken work to identify the arbitrators and counsel in investment cases involving most-favoured-nation clauses, together with the types of most-favoured-nation provisions interpreted. Additionally, to identify further the normative content of most-favoured-nation clauses in the field of investment,

<sup>400</sup> *Yearbook ... 1978*, vol. II (Part Two), para. 74.

<sup>401</sup> *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the tribunal on objections to jurisdiction, 25 January 2000 (available from <https://icsid.worldbank.org/>).

<sup>402</sup> “Catalogue of MFN provisions” (Donald McRae and A. Rohan Perera); “The 1978 draft articles of the International Law Commission” (Shinya Murase) (this paper was further revised in 2013); “MFN in the GATT and the WTO” (Donald McRae); “The work of OECD on MFN” (Mahmoud Hmoud); “The work of UNCTAD on MFN” (Stephen Vasciannie); “The *Maffezini* problem under investment treaties” (A. Rohan Perera); “Interpretation and application of MFN clauses in investment agreements” (Donald McRae); “Interpretation of MFN clauses by investment tribunals” (Donald McRae); and “Effect of the mixed nature of investment tribunals on the application of MFN clauses to procedural provisions” (Mathias Forteau).

it considered an informal 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 by specifically enumerating the fields to which the most-favoured-nation clause applies. It had also considered an informal working paper providing an overview of most-favoured-nation-type language in headquarters agreements, conferring on representatives of States to an organization the same privileges and immunities as those 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, are still a work in progress.

157. The Study Group had 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 regional economic integration agreements and free trade agreements, to assess whether any application of most-favoured-nation clauses in such areas might provide some insight for the work of the Study Group. Attention was also drawn to the need to consider the relationship between bilateral and multilateral treaties and how the most-favoured-nation clause had operated in a more varied and complex environment since the adoption by the Commission of the 1978 draft articles on most-favoured-nation clauses, and the question of reciprocity in the application of most-favoured-nation clauses, particularly in agreements between developed and developing countries.

158. It was generally understood that the end goal would be to put together an overall report that systematically analysed the various issues identified as relevant. It was envisaged that the final report would provide a general background to the work within the broader framework of general international law, in the light of subsequent developments, including following the adoption of the 1978 draft articles. Accordingly, the report would also seek to address contemporary issues concerning most-favoured-nation clauses, analysing in that regard such aspects 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 was considered that the final report of the Study Group might broadly address 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, as appropriate, guidelines and examples of model clauses for the negotiation of most-favoured-nation provisions, based on State practice.

## 2. DISCUSSIONS OF THE STUDY GROUP AT THE PRESENT SESSION

159. The Study Group had before it a working paper entitled “A BIT on mixed tribunals: legal character of investment dispute settlements”, by Mr. Shinya Murase,

together with a working paper entitled “Survey of MFN language and *Maffezini*-related jurisprudence”, by Mr. Mahmoud Hmoud. The Study Group also continued to examine contemporary practice and jurisprudence relevant to the interpretation of most-favoured-nation clauses. In that connection, it had before it recent awards and dissenting and separate opinions<sup>403</sup> addressing the issues under consideration by the Study Group.

160. The working paper by Mr. Shinya Murase addressed an aspect previously discussed by the Study Group in 2012 in relation to a working paper by Mr. Mathias Forteau on the “Effect of the mixed nature of investment tribunals on the application of MFN clauses to procedural provisions”, which analysed the phenomenon of mixed tribunals by offering an explanation of the mixed nature of arbitration in relation to investment; assessing the peculiarities of the application of the most-favoured-nation clause in mixed arbitration; studying the impact of such arbitration on the application of the most-favoured-nation clause to procedural provisions; considering 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; and arguing that the tribunal in such instances was a functional substitute for an otherwise competent domestic court of the host State. Accordingly, a mixed arbitration was situated between the domestic plane and the international plane, with affinities in relation to investment to both international commercial arbitration and public international arbitration, having both a private and a public element to it. The working paper by Mr. Shinya Murase sought to bring a historical perspective to the development of law in this area. It recalled that the process of “internationalization” of “concession agreements” concluded between an investor company and the host State had emerged in the nineteenth and early twentieth centuries. Those agreements were considered to be “private law contracts” or “public law (or administrative) contracts” regulated by the domestic law of either the investor’s home State or the host State. After the Second World War, the exclusion of domestic law and domestic jurisdiction became an evident trend in such agreements, giving rise, in the doctrine, to considerations that such agreements were regulated by “the general principles recognized by civilized nations” rather than the domestic law of either State and that such agreements were “economic development agreements” governed neither by domestic law nor by international law but by the *lex contractus*, even though case law rejected such characterizations.<sup>404</sup> It was asserted that these concession agreements or economic development

<sup>403</sup> *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award dispatched to the parties on 22 August 2012, and dissenting opinion of Judge Charles N. Brower and opinion of Professor Domingo Bello Janeiro; *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award dispatched to the parties on 2 July 2013, and separate opinion of Professor William W. Park. See also ICSID decision on the objection to jurisdiction for lack of consent in *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, 3 July 2013 (available from <https://icsid.worldbank.org/>).

<sup>404</sup> The International Court of Justice, in the *Anglo-Iranian Oil Co. case (jurisdiction)*, *Judgment of 22 July 1952*, *I.C.J. Reports 1952*, p. 93, at p. 112, stated, “The Court cannot accept the view that the contract signed between the Iranian Government and the Anglo-Persian Oil Company has a double character. It is nothing more than a concessionary contract between a government and a foreign corporation”.

agreements were a precursor leading to the subsequent conclusion of numerous bilateral investment treaties, which are inter-State agreements, the substantive rules of which are governed by international law. Procedurally, however, it was argued that, no matter the extent to which mixed tribunals may resemble inter-State tribunals, the Study Group ought to treat them with care and differently from, for instance, WTO dispute cases.

161. The working paper by Mr. Mahmoud Hmoud provided a compilation of relevant treaty provisions that had been the subject of examination in awards and addressed the *Maffezini*-related issue of whether a most-favoured-nation clause extended to dispute settlement clauses, together with relevant excerpts from the awards in question.

162. With regard to the *Daimler* and the *Kılıç* awards before it, the Study Group noted that they dealt with similar issues of contention as the *Maffezini* case and that the various elements raised in the awards could be of relevance to its work, as in 2012 the Study Group had addressed the various factors that tribunals take into account in the interpretation of most-favoured-nation clauses. In particular, the Study Group recognized that the arbitral tribunals' interpretative approaches to the most-favoured-nation clause and the relevance of the 1969 Vienna Convention for this purpose were of particular interest. The awards highlighted several important aspects of treaty interpretation, such as the text and contextual framework of the treaty, including the treaty practice of the States concerned, the object and purpose of the treaty, and consent and contemporaneity. The Study Group also took note of the fact that the arbitral tribunal in the *Daimler* case had examined the meaning of the concept "more" or "less" favourable treatment as it related to the various dispute settlement procedures available to the parties under a treaty. It further considered that the overview of relevant jurisprudence in the *Kılıç* award could be useful in the development of its final report.

163. It had been anticipated that at the present session the Study Group would begin consideration of its draft final report, which was to be prepared by the Chairperson, taking into account the various working papers that had been presented to the Study Group. In the absence of the

Chairperson, the Study Group nevertheless exchanged further views on the broad outlines of its final report, recognizing once more that, while the focus of its work was in the area of investment, the issues under discussion would best be located within a broader framework, namely against the background of general international law and the prior work of the Commission. The report would address such issues as the origins and purpose of the work of the Study Group; the 1978 draft articles and their relevance; developments since 1978; the contemporary relevance of most-favoured-nation provisions, including the 1978 draft articles; the consideration of most-favoured-nation provisions in other bodies, such as UNCTAD and the OECD; the contextual considerations, such as the phenomenon of mixed arbitrations, as highlighted, for example, in the paper by Mr. Shinya Murase; and the conflicting approaches to the interpretation of most-favoured-nation provisions in the case law.

164. In further addressing the interpretation of most-favoured-nation provisions in investment agreements, with the 1969 Vienna Convention serving as a point of departure, the Study Group noted the possibility of developing guidelines and model clauses for its final report. It nevertheless recognized the risks of any outcome being overly prescriptive. Instead, it was noted that it might be useful to catalogue examples that had arisen in practice relating to treaties and to draw the attention of States to the interpretation that various awards had given to a variety of provisions. It was considered that the survey commenced by Mr. Mahmoud Hmoud would be helpful when the Study Group eventually addressed the question of guidelines and model clauses in relation to the issues raised in the *Maffezini* award. The Study Group once more 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. All those aspects would continue to be monitored by the Study Group as its work progressed. The Study Group was at the same time mindful that it should not overly broaden the scope of its work.