Chapter XIII

THE MOST-FAVOURED-NATION CLAUSE

A. Introduction

249. 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.[845]

250. The Study Group, co-chaired by Mr. Donald M. McRae and Mr. A. Rohan Perera, was established at the sixty-first session (2009),[846] and was reconstituted at the sixty-second (2010) and sixty-third (2011) sessions, under the same co-chairpersonship.[847] At the sixty-fourth (2012) and sixty-fifth (2013) sessions, the Commission reconstituted the Study Group, under the chairpersonship of Mr. Donald M. McRae.[848] In the absence of Mr. McRae during the 2013 session, Mr. Mathias Forteau served as chairperson.

B. Consideration of the topic at the present session

251. At the present session, the Commission, at its 3218th meeting on 8 July 2014, reconstituted the Study Group on the most-favoured-nation clause, under the chairpersonship of Mr. Donald M. McRae. In his absence, Mr. Mathias Forteau served as chairperson.

252. The Study Group held three meetings on 9, 10 and 18 July 2014.

253. At its 3231st meeting, on 25 July 2014, the Commission took note of the oral report on the work of the Study Group.

1. Draft final report

254. The Study Group had before it a draft final report on its overall work prepared by Mr. Donald M. McRae. The draft final report, which is in the form of an informal working document of the Study Group, is based on the working papers and other informal documents that had been considered by the Study Group in the course of its work since it began deliberations in 2009.[849]

255. The draft final report is divided in three parts. Part I provides the background, including the origins and purpose of the work of the Study Group, the Commission's prior work on the 1978 draft articles on the most-favoured-nation clause,[850] and developments subsequent to the completion of the 1978 draft articles, in particular in the area of investment. The general orientation of the Study Group is not to seek a revision of those draft articles.

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[845] 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.

[846] 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.

[847] 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 of 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 (*Yearbook … 2011*, vol. II (Part Two), pp. 172–174, paras. 348–362). The Study Group considered and reviewed additional papers prepared on the basis of the 2009 framework.

[848] At its 3151st meeting, on 27 July 2012, the Commission took note of the oral report of the Chairperson of the Study Group (*Yearbook … 2012*, vol. II (Part Two), pp. 81–84, paras. 244–265). The Study Group considered and reviewed additional papers prepared on the basis of the 2009 framework. At its 3189th meeting, on 31 July 2013, the Commission took note of the report of the Study Group (*Yearbook … 2013*, vol. II (Part Two), p. 75–77, paras. 154–164). The Study Group continued to consider and review additional papers. It also examined contemporary practice and jurisprudence relevant to the interpretation of most-favoured-nation clauses.

[849] The Study Group considered working papers on the following: (*a*) the review of the 1978 draft articles of the most-favoured-nation clause (Mr. S. Murase) (for the draft articles adopted by the Commission in 1978, see *Yearbook ... 1978*, vol. II (Part Two), para. 74); (*b*) most-favoured nation in the GATT and the WTO (Mr. D. M. McRae); (*c*) the most-favoured-nation clause and the *Maffezini* case (Mr. A. R. Perera) (for the *Maffezini v. Kingdom of Spain* case, ICSID case No. ARB/97/7, available from http://icsid.worldbank.org); (*d*) the work of OECD on most-favoured nation (Mr. M.D. Hmoud); (*e*) the work of UNCTAD on most-favoured nation (Mr. S. C. Vasciannie); (*f*) the interpretation and application of most-favoured-nation clauses in investment agreements (Mr. D. M. McRae); (*g*) the interpretation of most-favoured-nation clauses by investment tribunals (Mr. D. M. McRae) (this working paper was a restructured version of the working paper "Interpretation and application of MFN clauses in investment agreements"); (*h*) the effect of the mixed nature of investment tribunals on the application of most-favoured-nation clauses to procedural provisions (Mr. M. Forteau); (*i*) a bilateral investment treaty on mixed tribunals: legal character of investment dispute settlements (Mr. S. Murase); and (*j*) survey of most-favoured-nation language and *Maffezini*-related jurisprudence (Mr. M. D. Hmoud). The Study Group also had before it: (*a*) a catalogue of most-favoured-nation provisions (prepared Mr. D. M. McRae and Mr. A. R. Perera); (*b*) 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; (*c*) an informal working paper on model most-favoured-nation clauses post-*Maffezini*, examining the various ways in which States have reacted to the *Maffezini* case; (*d*) 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; and (*e*) an informal working paper on "Bilateral taxation treaties and the most-favoured-nation clause".

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

256. The draft report also addresses, in Part II, the contemporary relevance of and issues concerning most-favoured-nation clauses, including in the context of the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO), other trade agreements, and investment treaties. It highlights the interpretative issues that have arisen in relation to the most-favoured-nation clauses in bilateral investment treaties, against the background analysis of the treatment of most-favoured-nation provisions in other bodies, such as the Organisation for Economic Co-operation and Development (OECD) and the United Nations Conference on Trade and Development (UNCTAD).

257. Part II then surveys the different approaches in the case law to the interpretation of most-favoured-nation provisions in investment agreements, addressing in particular: (*a*) the entitlement to the benefit of such a provision; (*b*) what constitutes treatment that is "no less favourable"; and (*c*) the question of the scope of the treatment to be provided under a most-favoured-nation provision, focusing on the *Maffezini* case,[851] its limitations and the post-*Maffezini* interpretation of these clauses. In this context, the draft report seeks to identify certain factors that have appeared to influence investment tribunals in interpreting most-favoured-nation clauses and to identify trends.

258. Part III analyses: (*a*) policy considerations in investment relating to the interpretation of investment agreements; (*b*) implications of investment dispute settlement arbitration as "mixed arbitration"; (*c*) the contemporary relevance of the 1978 draft articles to the interpretation of most-favoured-nation provisions; and (*d*) the interpretation of these clauses, including addressing the factors relevant in the interpretative process in determining whether a most-favoured-nation provision in a bilateral investment treaty applies to the conditions for invoking dispute settlement. This part also examines the various ways in which States have reacted in their treaty practice to the *Maffezini* case, including by: specifically stating that the most-favoured-nation clause does not apply to dispute resolution provisions; specifically stating that the clause does apply to dispute resolution provisions; or specifically enumerating the fields to which the clause applies.

2. Discussions of the Study Group

259. The Study Group undertook a substantive and technical review of the draft final report with a view to preparing a new draft for next year to be agreed on by the Study Group. The Study Group expressed its appreciation for the substantial work done by Mr. McRae in putting together the various strands of issues concerning the topic into one comprehensive draft report. The Study Group noted that the draft final report systematically analyses the various issues discussed by the Study Group since its inception, which considered the most-favoured-nation clause within the broader framework of general international law, and in the light of developments since the adoption of the 1978 draft articles.

260. The Study Group acknowledged the need, as prefaced by the author, to make attempts to shorten the report and to update certain elements of the draft report in the light of more recent cases.[852]

261. The Study Group once more underlined the importance and relevance of the 1969 Vienna Convention, as a point of departure, in the interpretation of investment treaties. Accordingly, there was emphasis placed on analyzing and contextualizing the case law and drawing attention to the issues that had arisen and trends in the practice. It also stressed the significance of taking into account the prior work of the Commission on fragmentation of international law: difficulties arising from the diversification and expansion of international law, and its current work on subsequent agreements and subsequent practice in relation to interpretation of treaties. It also highlighted the need to prepare an outcome that would be of practical utility to those involved in the investment field and to policy makers.

262. Finally, the Study Group acknowledged as feasible the timeline of seeking to present a revised draft final report for consideration at the sixty-seventh session of the Commission in 2015, taking into account comments made and amendments proposed by individual members of the Study Group during the present session.

[851] *Maffezini v. Kingdom of Spain* (see footnote 849 above).

[852] See, for example, including in particular *Daimler Financial Services AG v. Argentine Republic*, ICSID case No. ARB/05/1, dispatched to the parties on 22 August 2012 (available online from http://icsid.worldbank.org, *Cases*); *Urbaser S.A.* et al. *v. the Argentine Republic*, ICSID case No. ARB/07/26, dispatched to the parties on 19 December 2012 (*ibid.*); *Teinver S.A.* et al. *v. the Argentine Republic*, ICSID case No. ARB/09/1, dispatched to the parties on 21 December 2012 (*ibid.*); *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID case No. ARB/10/1, dispatched to the parties on 2 July 2013 (*ibid.*); and *Garanti Koza LLP v. Turkmenistan*, ICSID case No. ARB/11/20, dispatched to the parties on 3 July 2013 (*ibid.*).