

## Chapter IV

### THE MOST-FAVOURLED-NATION CLAUSE

#### A. Introduction

32. The Commission, at its sixtieth session (2008), decided to include the topic “The most-favoured-nation clause” (MFN clause) in its programme of work and to establish, at its sixty-first session, a Study Group on the topic.<sup>9</sup>

33. The Study Group, co-chaired by Mr. Donald M. McRae and Mr. A. Rohan Perera, was established at the sixty-first session (2009)<sup>10</sup> and reconstituted at the sixty-second (2010) and sixty-third (2011) sessions under the same co-chairmanship.<sup>11</sup> At the sixty-fourth (2012), sixty-fifth (2013) and sixty-sixth (2014) sessions, the Commission reconstituted the Study Group under the chairmanship of Mr. Donald M. McRae.<sup>12</sup> In the absence of Mr. McRae during the 2013 and 2014 sessions, Mr. Mathias Forteau served as Chairperson.

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

34. At the present session, the Commission, at its 3249th meeting, on 12 May 2015, reconstituted the Study

<sup>9</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>10</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 MFN clauses and their interpretation and application.

<sup>11</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 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 (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>12</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. At its 3189th meeting, on 31 July 2013, the Commission took note of the report of the Study Group (see *Yearbook ... 2013*, vol. II (Part Two), 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 MFN clauses. At its 3231st meeting, on 25 July 2014, the Commission took note of the oral report on the work of the Study Group (see *Yearbook ... 2014*, vol. II (Part Two), paras. 254–262). The Study Group undertook a substantive and technical review of the draft final report with a view to preparing a new draft to be agreed on by the Study Group.

Group on the most-favoured-nation clause, under the chairmanship of Mr. Donald M. McRae.

35. The Study Group held two meetings, on 12 May and 16 July 2015, during which it undertook and completed a substantive and technical review of the draft final report. Overall, since it was first established in 2009, the Study Group has held 24 meetings.

36. The Commission received and considered the final report of the Study Group at its 3264th and 3277th meetings, on 6 and 23 July 2015, respectively. The final report appears as an annex to the present report. The Commission notes that the final report is divided into five parts. Part I provides the background, including the origins and purpose of the work of the Study Group and an analysis of the prior work of the Commission on the 1978 draft articles on most-favoured-nation clauses<sup>13</sup> and of developments subsequent to the completion of the 1978 draft articles, in particular in the area of investment, along with an analysis of MFN provisions in other bodies, such as the United Nations Conference on Trade and Development (UNCTAD) and the Organization for Economic Cooperation and Development (OECD). The general orientation of the Study Group has been not to seek a revision of the 1978 draft articles or to prepare a new set of draft articles.

37. Part II of the report addresses the contemporary relevance of MFN clauses and issues concerning their interpretation, 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 also considers the types of MFN provisions in bilateral investment treaties (BITs) and highlights the interpretative issues that have arisen in relation to MFN clauses in BITs, namely: (a) defining the beneficiary of an MFN clause, (b) defining the necessary treatment and (c) defining the scope of the MFN clause.

38. Part III analyses: (a) the policy considerations in investment relating to the interpretation of investment agreements, taking into account questions of asymmetry in BIT negotiations and the specificity of each BIT; (b) the implications of investment dispute settlement arbitration as “mixed arbitration”; and (c) the contemporary relevance of the 1978 draft articles to the interpretation of MFN provisions.

39. Part IV seeks to provide some guidance on the interpretation of MFN clauses, setting out a framework for the proper application of the principles of treaty interpretation to MFN clauses. It surveys the different approaches in the case law to the interpretation of MFN provisions

<sup>13</sup> *Yearbook ... 1978*, vol. II (Part Two), para. 74.

in investment agreements, addressing in particular three central questions: (a) Are MFN provisions in principle capable of applying to the dispute settlement provisions of BITs? (b) Is the jurisdiction of a tribunal affected by conditions in BITs regarding which dispute settlement provisions may be invoked by investors? (c) In determining whether an MFN provision in a BIT applies to the conditions for invoking dispute settlement, what factors are relevant in the interpretative process? This part also examines the various ways in which States have reacted in their treaty practice to the *Maffezini* decision,<sup>14</sup> including by: (a) specifically stating that the MFN clause does not apply to dispute resolution provisions; (b) specifically stating that the MFN clause does apply to dispute resolution provisions; or (c) specifically enumerating the fields to which the MFN clause applies.

40. Part V of the report contains the conclusions reached by the Study Group, underlining, in particular, the importance and relevance of the 1969 Vienna Convention as a point of departure in the interpretation of investment treaties. The interpretation of MFN clauses is to be undertaken on the basis of the rules for the interpretation of treaties set out in the Vienna Convention.

41. At its 3277th meeting, on 23 July 2015, the Commission welcomed with appreciation the final report on the work of the Study Group. The Commission commended the final report to the attention of the General Assembly and encouraged its widest possible dissemination.

42. At the same meeting, the Commission adopted the following summary conclusions:

(a) The Commission notes that MFN clauses remain unchanged in character from the time the 1978 draft articles were concluded. The core provisions of the 1978 draft articles continue to be the basis for the interpretation and application of MFN clauses today. However, they do not provide answers to all the interpretative issues that can arise with MFN clauses;

(b) The Commission underlines the importance and relevance of the 1969 Vienna Convention as a point of departure in the interpretation of investment treaties. The

<sup>14</sup> *Emilio Agustín Maffezini v. Kingdom of Spain*, Decision of the Tribunal on Objections to Jurisdiction, International Centre for Settlement of Investment Disputes (ICSID), Case No. ARB 97/7 (25 January 2000), *ICSID Reports*, vol. 5, p. 396; the text of the decision is also available from <http://icsid.worldbank.org>.

interpretation of MFN clauses is to be undertaken on the basis of the rules for the interpretation of treaties set out in the 1969 Vienna Convention;

(c) The central interpretative issue in respect of MFN clauses relates to the scope of the clause and the application of the *ejusdem generis* principle. That is, the scope and nature of the benefit that can be obtained under an MFN provision depends on the interpretation of the MFN provision itself;

(d) The application of MFN clauses to dispute settlement provisions in investment treaty arbitration, rather than limiting them to substantive obligations, brought a new dimension to thinking about MFN provisions and perhaps consequences that had not been foreseen by parties when they negotiated their investment agreements. Nonetheless, the matter remains one of treaty interpretation;

(e) Whether MFN clauses are to encompass dispute settlement provisions is ultimately up to the States that negotiate such clauses. Explicit language can ensure that an MFN provision does or does not apply to dispute settlement provisions. Otherwise it will be left to dispute settlement tribunals to interpret MFN clauses on a case-by-case basis.

43. The Commission wishes to highlight that the interpretative techniques reviewed in the report of the Study Group are designed to assist in the interpretation and application of MFN provisions.

### C. Tribute to the Study Group and its Chairperson

44. At its 3277th meeting, on 23 July 2015, the Commission adopted the following resolution by acclamation:

*The International Law Commission,*

*Having welcomed with appreciation the report of the Study Group on the most-favoured nation clause,*

*Expresses to the Study Group and its Chairman, Mr. Donald M. McRae, its deep appreciation and warm congratulations for the outstanding contribution made in the preparation of the report on the most-favoured nation clause and for the results achieved by the Study Group;*

*Recalls, with gratitude, the contribution of Mr. A. Rohan Perera, who served as co-chairman of the Study Group, from 2009 to 2011, as well as of Mr. Mathias Forteau, who served as chairman, in the absence of Mr. McRae during the 2013 and 2014 sessions.*