

Most-Favoured-Nation clause

Summary Conclusions on the Most-Favoured-Nation clause 2015

Adopted by the International Law Commission at its sixty-seventh session, in 2015, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (at para. 42). The report will appear in *Yearbook of the International Law Commission, 2015*, vol. II (Part Two).



Summary Conclusions on Most-Favoured-Nation clause

At its 3277th meeting, on 23 July 2015, 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 Vienna Convention of the Law of Treaties (VCLT), 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 as set out in the VCLT;

(c) The central interpretative issue in respect of the 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 the matter will be left to dispute settlement tribunals to interpret MFN clauses on a case-by-case basis.

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.