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**DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION
ON THE WORK OF ITS SIXTY-FIRST SESSION**

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CHAPTER XI

THE MOST-FAVOURED-NATION CLAUSE

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A. Introduction

1. 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.¹

B. Consideration of the topic at the present session

2. At the present session, at its 3012th meeting, on 29 May 2009, the Commission decided to establish a Study Group on The Most-Favoured-Nation clause, co-chaired by Mr. Donald M. McRae and Mr. A. Rohan Perera.

3. At its ... meeting, on ... July 2009, the Commission took note of the oral report of the Co-Chairmen of the Study Group on The Most-Favoured-Nation clause and noted the progress made.

1. Discussions of the Study Group

4. 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 with a view to reviewing the developments that had taken place since then.

Road map of future work

5. The Study Group began with a discussion and an appreciation of the nature, origins and development of MFN clauses, the prior work of the Commission on the MFN 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 MFN clause in contemporary times, and what the Commission could possibly contribute in light of significantly changed circumstances since the 1978 draft articles. These changes include the context in which MFN 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 MFN clauses in investment

¹ At its 2997th meeting, on 8 August 2008, see *Official Records of the General Assembly, Sixty-third Session Supplement 10* (A/63/10), para. 354. For the syllabus of the topic see *ibid.*, Annex B. The General Assembly in paragraph 6 of its resolution 63/123 of 11 December 2008 took note of the decision.

agreements. 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 MFN clauses and their interpretation and application.

6. 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 MFN provisions (Mr. D.M. McRae and Mr. A.R. Perera)

This work would involve collecting MFN 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 MFN clause was interpreted in decisions of the International Court of Justice (*Anglo-Iranian Case*,² *Ambatielos Case*,³ *US Nationals in Morocco*⁴) and the arbitral decision in the *Ambatielos Case*.⁵

² *Anglo-Iranian Oil Company Case (jurisdiction) Judgment of 22 July 1952, I.C.J. Reports 1952*, p. 93.

³ *The Ambatielos Case (merits: obligation to arbitrate) Judgment of 19 May 1953, I.C.J. Reports 1953*, p. 10.

⁴ *Case concerning the rights of nationals of the United States of America in Morocco, Judgment of 27 August 1952, I.C.J. Reports 1952*, p. 176.

⁵ *U.N.R.I.A.A.*, vol. XII, p. 91.

(iii) The Relationship between MFN and National Treatment (Mr. D.M. McRae)

This paper would consider the similarities and differences between MFN 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 MFN clauses that will affect their interpretation.

(iv) MFN in the GATT and the WTO (Mr. D.M. McRae)

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

(v) The Work of UNCTAD on MFN (Mr. S.C. Vasciannie)

The purpose of this paper would be to survey what UNCTAD has done in relation to MFN and provide an assessment of the contribution that this work could make to the work of the Study Group.⁶

(vi) The Work of OECD on MFN (Mr. M. Hmoud)

The purpose of this paper would be to survey what OECD has done in relation to MFN and provide an assessment of the contribution that this work could make to the work of the Study Group.⁷

⁶ See for example, United Nations Conference on Trade and Development (UNCTAD). "Most-Favoured-Nation Treatment" (1999) UNCTAD Series on issues in international investment agreements. UN Doc. UNCTAD/ITE/IIT/10 (vol. III), at <http://www.unctad.org/en/docs/psiteiitd10v3.en.pdf>.

⁷ See for example OECD, Directorate for Financial and Enterprise Affairs, *Most-Favoured-Nation Treatment in International Investment Law*, Working Papers on International Investment, Working Paper No. 2004/2 (2004), at <http://www.oecd.org/dataoecd/21/37/33773085.pdf>.

(vii) The *Maffezini* Problem⁸ under Investment Treaties (Mr. A.R. Perera)

This paper would analyse the way the MFN clause was interpreted in *Maffezini v. Spain* and in subsequent investment cases.

(viii) Regional Economic Integration Agreements and Free Trade Agreements (TBD)

The purpose of this paper would be to survey the use of the MFN 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.

⁸ *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, ICSID Review. See also http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC565_En&caseId=C163.