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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 on the topic at its sixty-first session.[1]

2. A Study Group, co-chaired by Mr. Donald M. McRae and Mr. A. Rohan Perera, was established at the sixty-first session (2009),[2] and reconstituted at the sixty-second (2010) and sixty-third (2011) sessions, under the same co-chairmanship.[3]

B. Consideration of the topic at the present session

3. At the present session, the Commission reconstituted the Study Group on The Most-Favoured-Nation clause, under the chairmanship of Mr. Donald M. McRae. At the first meeting of the Study Group, tribute was paid to the former Co-chair of the Study Group, Mr. A. Rohan Perera.

4. At its … meeting, on … July 2012, the Commission took note of the oral report of the Chairman of the Study Group.

1. Work of the Study Group

5. The Study Group held 6 meetings on 24 and 31 May and on 11, 12, 17 and 18 July 2012.

6. The overall objective of the Study Group is to seek to safeguard against fragmentation 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 MFN provisions. It is considered that the Study Group could make a contribution towards assuring greater certainty and stability in the field of investment law. It seeks to elaborate an outcome that would be of practical utility 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 1978 draft articles of the Commission on the Most-favoured-Nation clause. It is envisaged that a report will be prepared, providing the general background,

[1] At its 2997th meeting, on 8 August 2008. (*Official Records of the General Assembly, Sixty-third Session, Supplement No. 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.

[2] At its 3029th meeting, on 31 July 2009, the Commission took note of the oral report of the Co-Chairmen of the Study Group on The Most-Favoured-Nation clause (*ibid., Sixty-fourth Session, Supplement No. 10* (A/64/10), 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.

[3] At its 3071st meeting, on 30 July 2010, the Commission took note of the oral report of the Co-Chairmen of the Study Group (*ibid., Sixty-fifth Session, Supplement No. 10* (A/65/10), 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.

analysing and contextualizing the case law, drawing attention to the issues that had arisen and trends in the practice and where appropriate make recommendations, including possible guidelines and model clauses.

7. To date, the Study Group, in order to illuminate further the contemporary challenges posed by the MFN clause, has had the occasion to consider several background papers. In this connection, it had given consideration to (a) a typology of existing MFN provisions, which is an on-going study; (b) the 1978 Draft articles adopted by the Commission and areas of their continuing relevance; (c) aspects concerning how the MFN clause had developed and was developing in the context of the GATT and the WTO; (d) other developments in the context of the OECD and UNCTAD; (e) an analysis of contemporary issues concerning the scope of application of the MFN clause, such as those arising in the *Maffezini* award.[4]

8. Additional work had also been undertaken to identify the arbitrators and counsel in investment cases involving MFN clauses, together with the type of MFN provision interpreted. Moreover, to identify further the normative content of the MFN clauses in the field of investment, there had been an analysis of factors taken into account by tribunals in the interpretation and application of MFN clauses in investment agreements, building upon earlier work done on the MFN clause and the *Maffezini* award.[5]

9. The Study Group has previously identified the need to study further the question of MFN in relation to trade in services under GATS and investment agreements, the relationship between MFN, fair and equitable treatment, and national treatment standards, as well as other areas of international law to assess whether any application of MFN in such areas might provide some insight for the work of the Study Group.

2. Discussions of the Study Group at the present session

10. At the present session of the Commission, the Study Group had before it a working paper on the "Interpretation of MFN Clauses by Investment Tribunals", prepared by Donald McRae. It also had before it a working paper on the "Effect of the Mixed Nature of Investment Tribunals on the Application of MFN Clauses to Procedural Provisions", prepared by Mathias Forteau.

11. The working paper by Mr. McRae was a restructured version of the 2011 working paper, "Interpretation and Application of MFN Clauses in Investment Agreements", taking into account recent developments and discussions of the Study Group in 2011. It contained an analysis of recent decisions and further factors, which had been taken into account in the case law. It also provided an assessment of the different interpretative approaches utilized by tribunals.

12. In course of the discussion of the working paper by Mr. McRae, there was an exchange of views on whether the nature of the tribunal had a bearing on how it goes about treaty interpretation, in particular whether the mixed nature of arbitration constituted a relevant factor in the interpretative process. The working paper by Mr. Forteau was prepared as a consequence of that discussion.

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[4] *Catalogue of MFN provisions* (Mr. D.M. McRae and Mr. A.R. Perera); *The 1978 draft articles of the International Law Commission* (Mr. S. Murase); *MFN in the GATT and the WTO* (Mr. D.M. McRae); *The Work of OECD on MFN* (Mr. M. Hmoud); *The Work of UNCTAD on MFN* (Mr. S.C. Vasciannie); *The* Maffezini *problem under investment treaties* (Mr. A.R. Perera).

[5] Interpretation and Application of MFN Clauses in Investment Agreements (D.M. McRae). See also *Official Records of the General Assembly, Sixty six session, Supplement 10* (A/66/10), paras. 351–353.

13. The two working papers constitute preparatory documents to form part of the overall report to be submitted by the Study Group.

14. The Study Group also had before it an informal working paper on Model MFN clauses post-*Maffezini*, examining the various ways in which States have reacted to the *Maffezini* decision, including by specifically stating that the MFN clause does not apply to dispute resolution provisions; or specifically stating that the MFN clause does apply to dispute resolution provisions; or specifically enumerating the fields to which the MFN clause applies. It also had before it an informal working paper providing an overview of MFN-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. These informal working papers, together with an informal working paper on Bilateral Taxation Treaties and the Most-Favoured-Nation Clause which was not discussed by the Study Group, are still a work in progress and will continue to be updated to ensure completeness.

(a) Effect of the Mixed Nature of Investment Tribunals on the Application of MFN Clauses to Procedural Provisions (Mr. M. Forteau)

15. The working paper offered an explanation of the mixed nature of arbitration in relation to investment; an assessment of the peculiarities of the application of the MFN clause in mixed arbitration; and studied the impact of such arbitration on the application of the MFN clause to procedural provisions. It was considered that the mixed nature of investment arbitration unfolded at two levels, namely the parties to the proceedings being a private claimant and a respondent State, were not of the same nature. Moreover, it was argued that the tribunal in such instance was a functional substitute for an otherwise competent domestic court of the host State.[6] Mixed arbitration was thus situated between the domestic plane and international plane, with affinities in relation to investment to both international commercial arbitration and public international arbitration.[7] It had a private and a public element to it.

16. Assessing the peculiarities of the application of the MFN clause in mixed arbitration, it was pointed out that while *ratione materiae* the 1978 draft articles covers all type of areas including the establishment of foreign physical and juridical persons, their personal rights and obligations, *ratione personae* their general scope did not include obligations or rights to be performed or enjoyed by individuals. In the classical sense, an individual was not considered, as an international subject, in the application of the MFN clause. The effect of a mixed tribunal was that an individual, like the State, was also a beneficiary of the MFN clause in the international order; the individual, without being a party to a treaty, can invoke jurisdictional clauses of a treaty against a respondent State party; since the treaty offers both the treatment and is the basis of the right of recourse to arbitration, it becomes difficult to distinguish what falls under the settlement of disputes related to the treaty from what falls under the treatment offered by the treaty. The effect of the latter aspect is that there are two interpretative trends: one insists on the "treatment" aspect (two States grant to their respective nationals a preferential treatment) in order to justify more easily the application of the MFN clause to the dispute settlement clause; the other insists on the "dispute

[6] Stephan W. Schill, "Allocating Adjudicatory Authority: Most-Favoured-Nation Clauses as a Basis for Jurisdiction – A Reply to Zachary Douglas", *Journal of International Dispute Settlement*, vol. 2, No. 2 (2011), p. 362, note 31. See also M. Forteau, « Le juge CIRDI envisagé du point de vue de son office : juge interne, juge international, ou l'un et l'autre *à la fois* », *Mélanges Jean-Pierre Cot*, Bruylant, Bruxelles, 2009, pp. 95–129.

[7] See on this point Franck Latty, « Arbitrage transnational et droit international général », *Annuaire français de droit international*, 2008, pp. 471–475.

settlement" aspect (the dispute settlement clause is the basis of the consent of the State to arbitration) by emphasizing the need to respect the principle of State consent to arbitration.

17. In terms of impact, it was suggested that it was not excluded that at least special interpretive guidelines, if not rules of interpretation, apply to mixed arbitration because of its unique nature. The impact was that, depending of the aspect of the mixed nature, some tribunals give more importance to the public aspect of arbitration (or to the "settlement of dispute" aspect) (public approach) than to its private aspect (or to the "treatment' aspect"), others will make the opposite choice (private approach); while in yet other cases, there is a mix of the two aspects (syncretic approach).

(b) Working paper on the "Interpretation of MFN Clauses by Investment Tribunals" (Mr. D.M. McRae)

18. It was recognized in the Working paper that notwithstanding a reliance on treaty interpretation or the invocation of the interpretative tools under the Vienna Convention on the Law Treaties there was little consistency in the way in which investment tribunals actually went about the interpretative process, or necessarily in the conclusions that they reached. Accordingly, it reviewed further the approaches taken by investment tribunals seeking to identify certain factors which appeared to influence investment tribunals in interpreting MFN clauses and to identify certain trends.

19. These factors and trends included the following: (a) drawing a distinction between *substance and procedure*, by inquiring into the basic question whether in principle an MFN provision could relate to both the procedural, as well as the substantive provisions of the treaty; (b) interpreting the MFN provision in relation to the dispute settlement provisions of the treaty as a *jurisdictional matter*, where there was an implication in some cases of an alleged higher standard for interpreting whether the scope of an MFN clause was one of agreement to arbitrate, while in some other cases a differentiation is made between *jurisdiction and admissibility*, in which case, a provision affecting a right to bring a claim, which is a jurisdictional matter, was distinguished from, a provision affecting the way in which a claim has to be brought, which has been construed as going to admissibility; (c) adopting a *conflict of treaty provisions* approach, whereby tribunals take into account the fact that the matter sought to be incorporated into the treaty had already been covered, in a different way, in the basic treaty itself; (d) considering the treaty-making *practice* of either party to the BIT, in respect of which an MFN claim had been made, as a means of ascertaining the intention of the parties regarding the scope of the MFN clause; (e) considering the *relevant time* at which the treaty was concluded (principle of contemporaneity), as well as to subsequent practice to ascertain the intention of the parties; (f) assessing the influence on the tribunal of the content of the provision sought to be ousted or added by means of an MFN clause; (g) acknowledging an implicit *doctrine of precedent*, a tendency influenced by a desire for consistency rather than any hierarchical structure; (h) assessing the content of the provision invoked to determine whether, in fact, it accorded *more/less favourable treatment*; and (i) considering the existence of *policy exceptions.*

(c) Summary of the discussions

20. While recognizing that the focus of the work of the Study Group was in the area of investment, the Study Group viewed it appropriate that the issues under discussion should be located within a broader normative framework, against the background of general international law and prior work of the Commission. The Study Group also confirmed the possibility of developing guidelines and model clauses.

21. On the basis of the Working Paper by Mr. McRae, which also offered a tentative analysis of the direction that the Study Group may wish to take, the Study Group began an exchange of views addressing three main questions namely: (a) whether in principle MFN

provisions were capable of applying to the dispute settlement provisions of BITs; (b) whether the conditions set out in BITs under which dispute settlement provisions may be invoked by investors were matters that affected the jurisdiction of a tribunal; (c) what factors were relevant in the interpretative process in determining whether an MFN provision in a BIT applied to the conditions for invoking dispute settlement.

22. The Study Group recognized that whether or not an MFN provision was capable of applying to the dispute settlement provisions was a matter of treaty interpretation to be answered depending on the circumstances of each particular case. Each treaty provision had its own specificities which had to be taken into account. It was appreciated that there was no particular problem where the parties explicitly included or excluded the conditions for access to dispute settlement within the framework of their MFN provision. The question of interpretation had arisen, as in the majority of cases, when the MFN provisions in existing BITs were not explicit as to the inclusion or exclusion of dispute settlement clauses. It was suggested that at a minimum, there was no need for tribunals when interpreting MFN provisions in BITs to inquire into whether such provisions in principle would not be capable of applying to dispute settlement provisions. Post-*Maffezini*, it would be prudent for States to give an indication of their preference.

23. It was appreciated that investment tribunals, both explicitly and implicitly, consider that the question of the scope of MFN provisions in BITs is a matter of treaty interpretation. BITs are treaties governed by international law. Accordingly, the principles of treaty interpretation as set out in articles 31 and 32 of the VCLT are applicable to their interpretation.[8] The general rule of treaty interpretation as set out in article 31 of the VCLT is that treaties "shall be interpreted in good faith in accordance with the ordinary meaning of the terms of the treaty in their context and in the light of its object and purpose."[9] In the context of its further work, the Study Group will continue to consider the various factors that have been taken into account by the tribunals in interpretation with a view to considering whether recommendations could be made in relation to: (a) the ambit of context; (b) the relevance of the content of the provision sought to be replaced; (c) the interpretation of the provision sought to be included; (d) the relevance of preparatory work; (e) the treaty practice of the parties; (g) the principle of contemporaneity. It was considered that it would be necessary to give further attention to aspects concerning interpretation of the MFN clause beyond *Maffezini*, whether additional light could be thrown on the distinction made in the case law between jurisdiction and admissibility, the question of who is entitled to invoke the MFN clause, whether a particular understanding could be given to "less favourable treatment" when such provision is invoked in the context of BITs, and whether there was any role for policy exceptions as a limitation on the application of the MFN clause.

24. The Study Group recalled that it had previously identified the need to study further the question of MFN in relation to trade in services under GATS and investment agreements, as well as the relationship between MFN, fair and equitable treatment, and national treatment standards. These will be kept in view as the Study Group progresses in its work. It was also recalled that the relationship of the MFN clause and regional trade agreements was an area that was anticipated for further study. It was also suggested that there were other areas of contemporary interest such as investment agreements and human rights considerations. However, the Study Group was mindful of the need not to broaden the scope of its work, and was therefore cautious about exploring aspects that may divert

[8] *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations *Treaty Series*, vol. 1155, p. 331.

[9] VCLT, article 31 (1).

attention from its work on areas that posed problems relating to the application of the provisions of the 1978 Draft articles.

25. The Study Group shared views on the broad outlines of its future report and generally viewed it important to provide, a general background to its work within the broader framework of general international law, in the light of subsequent developments, following the adoption of the 1978 Draft articles, to address contemporary issues concerning MFN clauses, analysing in that regard, such issues as the contemporary relevance of MFN provisions, the work on MFN provisions done by other bodies, and the different approaches taken in the interpretation of MFN provisions. It is also envisioned that the final report of the Study Group would address broadly the question of the interpretation of MFN provisions in investment agreements, analysing the various factors that are relevant to this process and presenting examples of model clauses for the negotiation of MFN provisions, based on State practice. The Study Group recognized that changes in the composition of the Commission had an impact in the progress of its work as certain aspects could not be undertaken intersessionally. It however remained optimistic that its work could be completed within the next two or three sessions of the Commission.