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**International Law Commission**
**Sixty-seventh session**

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**Draft report of the International Law Commission on the  
work of its sixty-seventh session**
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## Chapter...

### The Most-Favoured-Nation clause

#### 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, at its sixty-first session, a Study Group on the topic.<sup>1</sup>

2. The Study Group, co-chaired by Mr. Donald M. McRae and Mr. A. Rohan Perera, was established at the sixty-first session (2009),<sup>2</sup> and was reconstituted at the sixty-second (2010) and sixty-third (2011) sessions, under the same co-chairmanship.<sup>3</sup> At the sixty-fourth (2012), sixty-fifth (2013) and sixty-sixth sessions, the Commission reconstituted the Study Group, under the chairmanship of Mr. Donald M. McRae.<sup>4</sup> In the absence of Mr. McRae during the 2013 and 2014 sessions, Mr. Mathias Forteau served as chairman.

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

3. At the present session, the Commission, at its 3249th meeting on 12 May 2015, reconstituted the Study Group on The Most-Favoured-Nation clause, under the chairmanship of Mr. Donald M. McRae.

4. The Study Group held two meetings, on 12 May 2015 and on 16 July 2015, during which it undertook and completed a substantive and technical review of the

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<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> 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. At its 3119th meeting, on 8 August 2011, the Commission took note of the oral report of the Co-Chairmen of the Study Group (*ibid.*, *Sixty-sixth Session, Supplement No. 10 (A/66/10)*, paras. 349-363). The Study Group considered and reviewed additional papers prepared on the basis of the 2009 framework.

<sup>4</sup> At its 3151st meeting, on 27 July 2012, the Commission took note of the oral report of the Chairman of the Study Group (*ibid.*, *Sixty-seventh Session, Supplement No. 10 (A/67/10)*, paras. 245-265). 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 (*ibid.*, *Sixty-eighth Session, Supplement No. 10 (A/68/10)*, 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 (*ibid.*, *Sixty-ninth Session, Supplement No. 10 (A/69/10)*, 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.

draft final report. Overall, since it was first established in 2009, the Study Group held 24 meetings.

5. 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, an analysis of the prior work of the Commission on the 1978 draft articles on the most-favoured-nation clause, and of developments subsequent to the completion of the 1978 draft articles, in particular in the area of investment, as well as an analysis of MFN provisions in other bodies, such as UNCTAD and 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.

6. Part II of the report addresses the contemporary relevance of MFN clauses and issues concerning their interpretation, including in the context of the GATT and the WTO, other trade agreements, and investment treaties. It also considers the types of MFN provisions in BITs and highlights the interpretative issues that have arisen in relation to the 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.

7. 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.

8. 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 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>5</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.

9. Part V of the report contains the conclusions reached by the Study Group, underlining, in particular, 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.

10. 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 commends the final report to the attention of the General Assembly, and encourage its widest possible dissemination.

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<sup>5</sup> *Emilio Agustín Maffezini v. Kingdom of Spain*, Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No. ARB 97/7 (25 January 2000), *ICSID Reports*, vol. 5, p. 396.

11. 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.

12. 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.

13. 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.

14. 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.

15. 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.

16. 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 Chairman**

17. At its 3277th, 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.”*