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Report of the Study Group on the Most-Favoured-Nation clause

1. At the present session, the Commission reconstituted the Study Group on the Most-Favoured-Nation clause, under the chairmanship of Mr. Donald M. McRae. However, in his absence, Mr. Mathias Forteau served as Chairman.

1. Work of the Study Group

2. The Study Group held [3] meetings on 23 May, and on 10 and 15 July 2013.

3. It will be recalled that 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. The Study Group continues to work towards making a contribution in assuring greater certainty and stability in the field of investment law. It intends to elaborate an outcome that would be of practical use 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.

4. In seeking to throw further light on the contemporary challenges posed by the MFN clause in investment law, the Study Group had since 2010 prepared and considered several background working papers. In particular, it had examined: (a) the typology of existing MFN provisions, which is an ongoing exercise; (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) contemporary issues concerning the scope of application of the MFN clause, such as those arising in the *Maffezini* award; (f) how the MFN clause had been interpreted by investment tribunals, *Maffezini* and post-*Maffezini*; and (g) the effect of the mixed nature of investment tribunals on the application of MFN Clauses to procedural provisions.[1]

[1] 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) (this paper was further revised in 2013); MFN in the

5. The Study Group had also undertaken work identifying the arbitrators and counsel in investment cases involving MFN clauses, together with the type of MFN provision interpreted. Additionally, to identify further the normative content of the MFN clauses in the field of investment, it considered an informal 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, specifically stating that the MFN clause does apply to dispute resolution provisions, or specifically enumerating the fields to which the MFN clause applies. It has also considered an informal working paper providing an overview of MFN-type language in Headquarters Agreements, conferring on representatives of States to an 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", are still a work in progress.

6. The Study Group had 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 regional economic integration agreements (REIOs) and free trade agreements (FTAs) to assess whether any application of MFN in such areas might provide some insight for the work of the Study Group. Attention was also drawn to the need to consider the relationship between bilateral and multilateral treaties and how the MFN clause operated in a more varied and complex environment since the adoption by the Commission of the 1978 draft articles on the MFN clause; and the question of reciprocity in the application of MFN, particularly in agreements between developed and developing countries.

7. It was generally understood that the end goal would be to put together an overall report that systematically analyses the various issues identified as relevant. It was envisaged that the final report would provide a general background to the work within the broader framework of general international law, in the light of subsequent developments, including following the adoption of the 1978 Draft articles. Accordingly, the report would also seek to address contemporary issues concerning MFN clauses, analysing in that regard, such aspects 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 was discussed that the final report of the Study Group might address broadly the question of the interpretation of MFN provisions in investment agreements in respect of dispute settlement, analysing the various factors that are relevant to this process and presenting as appropriate guidelines and examples of model clauses for the negotiation of MFN provisions, based on State practice.

2. Discussions of the Study Group at the present session

8. The Study Group had before it a working paper entitled "A BIT on Mixed Tribunals: Legal Character of Investment Dispute Settlements" by Mr. S. Murase. The Study Group also continued to examine contemporary practice and jurisprudence relevant to the interpretation of MFN clauses. In this connection, it had before it recent awards and

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); Interpretation and Application of MFN Clauses in Investment Agreements (D.M. McRae); Interpretation of MFN Clauses by Investment Tribunals (D.M. McRae); and Effect of the Mixed Nature of Investment Tribunals on the Application of MFN Clauses to Procedural Provisions (Mr. M. Forteau).

dissenting and separate opinions[2] addressing the issues under consideration by the Study Group.

9. The working paper by Mr. Murase addressed an aspect of prior discussion of the Study Group in 2012 in relation to a working paper by Mr. M. Forteau on the "Effect of the Mixed Nature of Investment Tribunals on the Application of MFN Clauses to Procedural Provisions", which had analysed the phenomenon of mixed tribunals by offering an explanation of the mixed nature of arbitration in relation to investment; assessing the peculiarities of the application of the MFN clause in mixed arbitration; studying the impact of such arbitration on the application of the MFN clause to procedural provisions; considering that the mixed nature of investment arbitration operated at two levels, because the parties to the proceedings, being a private claimant and a respondent State, were not of the same nature; and arguing that the tribunal in such instance was a functional substitute for an otherwise competent domestic court of the host State. Accordingly, a mixed arbitration was situated between the domestic plane and international plane, with affinities in relation to investment to both international commercial arbitration and public international arbitration; having both a private and a public element to it. The working paper by Mr. Murase sought to bring a historical perspective to development of the law in this area. It recalled that the process of "internationalization" of "concession agreements" concluded between an investor company and the host State emerged in the 19th and early 20th century. These agreements were considered to be "private law contracts" or "public law (or administrative) contracts" regulated by the domestic law of either the investor's home State or the host State. After the Second World War, the exclusion of domestic law and domestic jurisdiction became an evident trend in such agreement, giving rise, in the doctrine, to considerations that such agreements were regulated by "the general principles recognized by civilized nations" rather than domestic law of either State and that such agreements were "economic development agreements" governed neither by domestic law nor by international law but by the *lex contractus*, even though case law rejected such characterizations.[3] It was asserted that these concession agreements or economic development agreements were a precursor leading to the subsequent conclusion of numerous bilateral investments agreements (BITs), which are inter-State agreements, whose substantive rules are governed by international law. However, procedurally, it was argued that no matter the extent to which mixed tribunals may resemble inter-State tribunals, the Study Group ought to treat them with care, and differently from, for instance, WTO dispute cases.

10. With regard to the *Daimler* and the *Kılıç* awards before the Study Group, it noted that they dealt with similar issues of contention as the *Maffezini* case and that the various elements raised in the awards could be of relevance to its work, as the Study Group in 2012 had addressed the various factors that tribunals take into account in the interpretation of MFN clauses. In particular, the Study Group recognized that the arbitral tribunals' interpretative approaches to the MFN clause and the relevance of the Vienna Convention on the Law of Treaties for this purpose were of particular interest. The awards highlighted

[2] *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1 dispatched to the parties on 22 August 2012 and dissenting opinion of Judge Charles N. Brower and opinion of Professor Domingo Bello Janeiro and *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1 dispatched to the parties on 2 July 2013 and separate opinion of Professor William W. Park.

[3] Cf. The International Court of Justice in the *Anglo-Iranian Oil Co. case (Jurisdiction), Judgment of 22 July 1952, I.C.J. Reports 1952*, p. 93 at 112 stated that: "The Court cannot accept the view that the contract signed between the Iranian Government and the Anglo-Persian Oil Company has a double character. It is nothing more than a concessionary contract between a government and a foreign corporation."

several important aspects of treaty interpretation, such as the textual relevance and contextual framework of the treaty, including the conventional practice of the States concerned, the object and purpose of the treaty, as well as notions of consent and contemporaneity. The Study Group also took note of the fact the arbitral tribunal in the *Daimler* case examined the meaning of the concept "more" or "less" favourable treatment as related to the various dispute settlement procedures available to the parties under a treaty. It further considered that the overview in the *Kılıç* award of relevant jurisprudence might be useful in the development of its final report.

11. It had been anticipated that at the current session the Study Group would begin the consideration of the draft final report, which was to be prepared by the Chairman, taking into account the various working papers that had been presented to the Study Group. In the absence of the Chairman, it nevertheless exchanged further views on the broad outlines of its final report, recognizing once more that while the focus of its work was in the area of investment, the issues under discussion would best be located within a broader normative framework, namely against the background of general international law and prior work of the Commission. The report would address such issues as origins and purpose of the work of the Study Group; the 1978 draft articles and their relevance; subsequent developments since 1978; the contemporary relevance of MFN provisions, including of the 1978 draft articles; the consideration of MFN provisions in other bodies such as UNCTAD and the OECD; contextual considerations, such as the phenomenon of mixed arbitrations as highlighted, for example, in the paper by Mr. Murase; and conflicting approaches to the interpretation of the MFN provisions in the case law.

12. In further addressing the interpretation of MFN provisions in investment agreements, with the Vienna Convention of the Law of Treaties serving as a point of departure, the Study Group noted the possibility of developing for the final report guidelines and model clauses. It nevertheless recognized the risks of any outcome being overly prescriptive. Instead, it was noted that it might be useful to catalogue the examples that have arisen in the practice relating to treaties and drawing the attention of States to the interpretation that various awards have given to a variety of provisions. The Study Group once more 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. All these aspects will continue to be monitored by the Study Group as its work progresses. The Study Group was at the same time mindful that it should not overly broaden the scope of its work.