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Having your Pie … And Eating it with One Chopstick – Most Favoured Nation Clauses and Procedural Rights

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The Recipe of Foreign Investment

Bilateral Investment Treaties (hereafter referred to as "BITs") are as much a part of foreign investment as the investment itself. The protection and certainty afforded by BITs promotes such investment, which, in turn, reaffirms and strengthens the role of these treaties. Without the basic standards guaranteed by BITs, foreign investment would not have experienced the same surge in popularity. One of the standards regularly contained in BITs is the guarantee of most favoured nation (hereafter referred to as "MFN") treatment.

Most Favoured Nation Clauses in Theory – The Spice of Bilateral Investment Treaties

MFN clauses level the playing field for all "visiting" participants. Investment often is a matter of faith or trust – rarely is it a question of science with clearly predictable outcomes. Therefore, investors seek protection from back-ally politics which might favour one at the expense of another by reason of nationality alone. MFN clauses curb this risk by allowing an investor from state X to demand the same favourable conditions as contained in the BIT between the host nation and state Y. In short, an MFN clause affords every investor the protection of any more favourable treatment negotiated in any BIT with a third nation, notwithstanding the terms of its "home" treaty.

Most Favoured Nation Clauses in Practice – A Hair in the Soup?

MFN clauses would carry little meaning if their application was easily restricted or excluded in the middle of an investment project. The factual certainty they aim to guarantee would be negated. And yet, efforts to circumvent MFN clauses are not uncommon, and the debate surrounding a possible application of MFN clauses to the jurisdictional aspects of bilateral investment treaties continues. In the recent case of *ADF Group Inc. v. United States of America* (Case No. ARB(AF)/00/1), the tribunal concluded that a previous decision on this question failed to give sufficient guidance for the investor to rely upon by way of precedent. The earlier ruling was distinguished and the decision produced no improvement.

To find out whether this conclusively settles the question, one now ought to examine this earlier decision, its roots and implications: Traditionally, MFN treatment in questions of substantive rights was sufficient for the purpose of equal treatment. But as dispute settlement takes an increasingly central role in international trade and investment – its methods and structure being

more refined and organised than ever before – so do questions relating to the administration of justice gain in significance. Considering the possible avenues for dispute settlement, different terms granted to different trading partners are liable to give rise to discrimination and unequal treatment. In the light of this development, the tribunal in *Emilio Agustín Maffezini v The Kingdom of Spain* (ICISD Case No. ARB/97/7) held that:

> " […] if a third-party treaty contains provisions for the settlement of disputes that are more favourable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause […]" (para. 56).

The reasoning of this decision was twofold: Firstly, the tribunal considered the history and nature of international arbitration, recognising its central role in the protection of traders' rights abroad. It was held that, although not a material aspect of the investment treaty itself, procedural devices are central to the protection of the rights such treaties aim to guarantee (*Maffezini*, para. 54).

Thus, if an investment treaty seeks to protect the rights of an investor from arbitrary and unfair practices of the host nation, it would be illogical to exclude from the scope of such protection the field of procedural justice – a field with ever growing significance, which has come to be so intrinsically linked to matters of trade and investment, that it plays a central role in commercial endeavour. In the light of these facts, the tribunal chose to look to intent rather than form: MFN clauses in BITs aim to protect investors from potential sources of discrimination. Rules relating to jurisdiction are a potentially significant source of such discrimination. Therefore, the aim of MFN clauses implicitly includes dispute settlement arrangements.

Second, the tribunal looked to the treaty practice followed by Spain in her BITs with other countries, finding that the overwhelming majority of these treaties provided for arbitration with more favourable conditions. Since the marginal nature of the treatment afforded to the claimant's home country indicates discriminatory intent, the case in favour of extending MFN treatment to jurisdiction is strengthened.

Notwithstanding the general applicability of MFN clauses to rules pertaining to procedure, the tribunal emphasised the limits to this approach. It was concerned that an extended application of MFN guarantees should not enable their beneficiary to override "public policy aims" considered by both parties as being essential to the treaty, without, however, developing a test (*Maffezini*,

para. 62).

Faced with a similar dispute, the tribunal in *Siemens v. The Argentine Republic* ICSID (Case No. ARB/02/8) affirmed the *Maffezini* dictum, reasoning that:

> "[This BIT], together with so many other treaties of investment protection, has as a distinctive feature special dispute settlement mechanisms not normally open to visitors. Access to these mechanisms is part of the protection offered under the [BIT]. It is part of the treatment of foreign investors and [thus also] of the advantages accessible through a MFN clause" (para. 102).

This decision signifies an important evolutionary step in the acceptance of the application of MFN clauses to questions of procedural rights. Seven years after *Maffezini*, we no longer need to emphasise how gravely matters of dispute settlement can affect investors, or how central they are to the protection of traders' rights.

The tribunal tells us that today, dispute settlement falls within the scope of MFN treatment not because it is "special", but because it is no different from any other advantage granted exclusively to commercial partners in bilateral treaties. It is a BIT advantage like any other and should be available by way of MFN treatment because of its categorisation as a BIT guarantee, not by reason of its specific content.

As in *Maffezini*, the *Siemens* tribunal pointed to the public policy exception, adding a first thin guideline to the scope of its application:

> "The Tribunal would consider an indication of a policy by the Respondent if a certain requirement has been consistently included in similar treaties […]" (para. 105).

This condition serves to filter out discrimination disguised as policy. Though not a decisive test in itself, consistent practice may serve to indicate a "sensitive" issue of economic or foreign policy essential to the BIT (*Siemens*, para. 105).

Conclusions

Bilateral Investment Treaties are concluded for the one purpose of creating conditions favourable to investment. Every clause contained in these treaties is an expression of this intent. It follows that an MFN provision cannot be stopped short of one such clause without contradicting the intention of the parties.

By analogy to the decision in *Maffezini*, one would have to say that "we must treat cats well because they are unusually graceful". The analogy of the *Siemens* judgement shows a greater level of maturity and com-

fort with the final holding, stating that "we must treat cats well because they are animals", thus acknowledging that the judicial sphere is as much a part of an economic endeavour as its substantive content.

And although *Siemens* maintains the public policy exception, it tightened the reigns by introducing the requirement of consistent practice. Thus, despite initially struggling to include procedural requirements under the umbrella of MFN clauses, judicial opinion has now reached a point where this practice has found sufficient acceptance.

It is hoped that the test for a possible public policy exception will develop beyond that of "sufficient practice" in order to promote certainty in international investment. Because to say that an investor may claim most favoured nation treatment with regard to provisions governing the "cold" phase of an investment, while not enjoying this benefit once things go wrong and he most needs it, would be like having one's pie but eating it with just one chopstick.

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