Most Favored Nation Treatment Clause

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Caution

SGS v. Philippines: “... ambiguities in investment treaty terms should be resolved in favor of foreign investors”
Three Objectives

1. Determine the extension of the MFN clause

2. MFN in the context of investment negotiations

3. Options
What’s the extension of MFN?

- Protection vis a vis Treaty Shopping
- Evaluate decisions related to the following principles or issues:
  - “Ejusdem Generis”
  - Procedural issues
  - Jurisdictional issues
Ejusdem Generis

- According to OECD, *ejusdem generis* principle is the rule according to which the MFNC can only attract matters belonging to the same subject matter or the same category of subject matter as to which the clause relates.

- Is this principle affirmed by practice and jurisprudence?
In MTD v. the Republic of Chile, the foreign investor was denied a license to operate. The “granting of a license” was not part of the Chile – Malaysia BIT.

The claimant invoked the Chile – Denmark and Chile – Croatia BITs, where there was an obligation to grant the “necessary requirements” subsequent to the approval of contractual obligations.

The Tribunal upheld the claimants arguments.
In Bayindir (Turkish) against Pakistan, the tribunal concluded that the investor could benefit from fair and equitable treatment even though the basic treaty did not include this substantive commitment.

The tribunal considered that the investor could take advantage of the third Party treatment awarded in the Pakistan – Switzerland BIT, on the grounds that this was a treaty that was concluded afterwards.
Procedural

- Cases where the claimants wish is to override requirements that constitute a condition for the submission of a claim:
  - In favour: Mafezzini (vs Argentina); Gas Natura (vs Argentina); Suez (vs Argentina); Cammuzzi (vs Argentina); National Grid (vs Argentina); AWG (vs Argentina); Siemens (vs Argentina)
  - Against: Wintershall (vs Argentina)
Jurisdictional

• Cases where the claimants wish is to extend the jurisdictional threshold:
  
  • Against: Salini (v. Jordan); Plama (v. Bulgaria); Telenor (v. Hungary); Berschader (v. Russian Federation)
  
  • In favour: RosInvest (v. Russian Federation)
What is the extension of MFN?

- Uncertain...
MFN: modifies the outcomes of the investment negotiations

- Negotiation is a process whereby two or more countries accommodate each other's interest and proposals.
- A text which contains ALL of a country's specific proposal doesn't exist.
- Negotiations imply flexibility.
- Negotiations reflect a balance.
Balance of the negotiations

- When Investment Agreements are part of a broader agreement, such as an FTA, the negotiation is more complex and therefore the balance is also harder to reach.

- Every negotiation is different, and States obtain different results, since there are different interests.

But ... MFN may permit Treaty Shopping, and alter the balance of negotiations.
For Chile, and a wide range of countries, a broad interpretation of MFN is inconvenient, and strikes at the intention of the Parties.

Since intention is difficult to determine, it is the Parties responsibility to clarify the extension of the commitment.

There’s been different approaches, but many have limited the scope of MFN not to include procedural issues.
POTENTIAL SOLUTIONS

- For greater certainty, the Parties agree that Article xx.x does not apply to procedural or jurisdictional issues, such as those included in Section B of this Chapter. Likewise, the Parties agree that Article xx shall be interpreted and applied in accordance with the *ejusdem generis* principle.

- Limiting MFN to the future
Thank you for your attention

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