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BITS: AN UPDATED ASSESSMENT OF THE
JURISPRUDENCE SINCE WINTERSHALL

Elizabeth Whitsitt*

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Application of MFN Clauses to the Dispute Settlement Provisions of BITs: an Updated Assessment of the Jurisprudence since Wintershall

Elizabeth Whitsitt

Abstract

This paper is an updated assessment of international arbitration jurisprudence considering the scope and applicability of most-favoured-nation (MFN) clauses in international investment law. A previous paper examining diverging lines of arbitral jurisprudence on this issue was published in (2009) 27(4) Journal of Energy and Natural Resources Law 527 and awarded the 2010 Marc Lalonde Prize for Excellence in International and Commercial Arbitration by the Canadian Arbitration Congress. That article examined the diverging lines of arbitral jurisprudence regarding MFN clauses up to the Wintershall decision and attempted to elucidate the opposing positions of a doctrinal divide regarding the scope and applicability of MFN protection. This paper examines four subsequent arbitral decisions on MFN protection (Rent a 4, Shum, Austrian Airlines and Impregilo) and questions whether those arbitral decisions continue to evidence a doctrinal divide within the international community regarding the scope and applicability of MFN protection that is easily defined.
1. Introduction

Most-favoured-nation ("MFN") clauses have a long and well-documented history within the international legal order. While the scope and application of MFN clauses have evolved over time in different areas of international law, they have gained particular distinction in international trade law – becoming one of the “pillars” of the current multilateral trading system. More recently, however, such clauses have found notoriety within the international investment law context. Found in an overwhelming number of International Investment Agreements ("IIAs") including Bilateral Investment Treaties ("BITs"), MFN clauses within the international investment context require that a host state afford investors or investments from one foreign country treatment “no less favourable” than that provided to investors or investments from any other foreign country.

Despite their ubiquitous presence in treaties governing investment flows between States, the proper scope and application of MFN clauses is a divisive issue within international investment law. A recent study by the United Nations Conference on Trade and Development ("UNCTAD") articulates a number of issues regarding the scope and application of MFN clauses in international investment law. Of particular concern are questions regarding the extent to which an investor (the claimant in an investor-state dispute) can use an MFN clause to access what are

2. UNCTAD, Most-Favoured-Nation Treatment, UNCTAD Series on Issues in International Investment Agreements II, UN Doc. UNCTAD/DIAE/IA/2010/1 (United Nations: New York, 2010) at 9-11 (briefly describing the history of MFN clauses in international law and their rising prominence in international trade) [UNCTAD, MFN II].
3. See generally ibid. at 12-33 (which provides a discussion of the definition, purpose and scope of the MFN standard). See also OECD (Directorate for Financial and Enterprise Affairs), Most-Favoured-Nation Treatment in International Investment Law, Working Paper on International Investment No. 2004/2 (September 2004) at 2, which briefly defines the MFN standard in international investment law by referencing the International Law Commission’s Draft Articles on MFN clauses.
4. See UNCTAD, MFN II, supra note 2 at 38-72.
perceived to be more favourable dispute-settlement provisions found in other BITs concluded between the host state (the defendant in an investor-state dispute) and a third state.

To date, numerous arbitral decisions have considered this phenomenon and thus far, two categories of cases have emerged. In the first category of cases foreign investors have attempted to invoke an MFN clause in order to access an expedited arbitration process. Typically, the BITs in this line of authorities contained provisions that required a foreign investor to submit disputes to domestic courts and did not permit the investor to resort to international arbitration until after a fixed time had passed without a decision from the domestic courts. In the second category of cases, foreign investors have attempted to invoke an MFN clause as a way of vesting arbitral tribunals with jurisdiction over classes of claims not contemplated or expressly excluded under a BIT. Cases falling in this category have characteristically involved either a request to bring contractual (not treaty) claims before an arbitration panel or a request to extend the jurisdiction of such panels to claims beyond those


6. See e.g. Maffezini, ibid.; Siemens, ibid.; Suez, ibid.; Gas Natural, ibid.; National Grid, ibid.; Wintershall, ibid.; Impregilo, ibid.