



APEC-UNCTAD REGIONAL TRAINING COURSE ON THE CORE ELEMENTS OF INTERNATIONAL INVESTMENT AGREEMENTS IN THE APEC REGION

Presentations

Kuala Lumpur, Malaysia
15-19 June 2009

Produced for:
Asia Pacific Economic Cooperation Secretariat
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APEC#209-CT-01.5

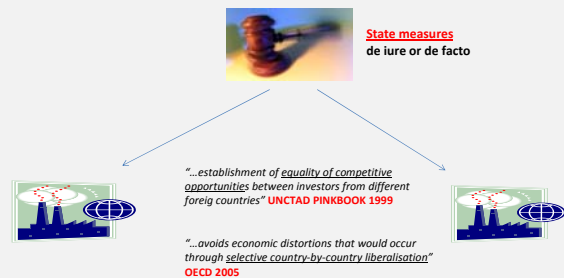


APEC-UNCTAD Regional Training Course
Most-Favored-Nation Treatment

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Kuala Lumpur, June 2009

Object and purpose



Legal qualifications

- ✓ **Relative standard:** case-by-case comparison
- ✓ **Ejusdem generis:** attracts “same category” matters
- ✓ **Similar objective situations**
- ✓ **Discrimination by reason of nationality**

International Law Commission

“...a treaty provision whereby a State undertakes an obligation towards another State to accord most-favored treatment in an agreed sphere of relationships...”

MFN treatment being such:

“...treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favorable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State”.

Negotiation approaches: “basic coverage”

Elemento	Efecto
Pre-establishment	Grants access rights. It applies to the “establishment, expansion and acquisition”.
Post-establishment	Once the investment is made “under the law”. Applies to activities such as the “administration, use, operation, administration and disposal”.
Investment	The protection is restricted (e.g. China and Australia).
Investment/investor	The protection covers both vehicles (common practice).
Like circumstances	Part of the normal functioning of the MFN clause, whether included or not.
Exceptions	They differ depending on the pre or post-establishment approach. There are general and specific exceptions.

NAFTA article 1103

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the **establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.**
2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the **establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.**

Mexico-UK BIT (2007)

ARTICLE 2 Admission of Investments

Each Contracting Party shall admit investments in accordance with its laws and regulations.
...

ARTICLE 4 National Treatment and Most-Favoured-Nation Provision

Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords, in like circumstances, to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State.

Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards the management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords, in like circumstances, to its own nationals or companies or to nationals or companies of any third State.

Exceptions

Pre-establishment

- ✓ Existing and future measures
- ✓ International agreements
- ✓ Intellectual property rights
- ✓ Government procurement
- ✓ Subsidies

Post-establishment

- ✓ Regional Economic Integration Organizations ("REIO"): e.g. free trade areas, customs or monetary unions, labor markets
- ✓ Taxation: International agreements and/or domestic law

Canada Model BIT (2004)

Article 9 Reservations and Exceptions

1. Articles 3, 4, 6 and 7 shall not apply to:
 - (a) any existing non-conforming measure that is maintained by
 - (i) a Party at the national level, as set out in its Schedule to Annex I, or
 - (ii) a sub-national government;
 - (b) ...
 - (c) ...
2. Articles 3, 4, 6 and 7 shall not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors or activities, as set out in its schedule to Annex II.
3. Article 4 shall not apply to treatment accorded by a Party pursuant to agreements, or with respect to sectors, set out in its schedule to Annex III.
4. In respect of intellectual property rights, a Party may derogate from Articles 3 and 4 in a manner that is consistent with the WTO Agreement.
5. The provisions of Articles 3, 4 and 6 of this Agreement shall not apply to:
 - (a) procurement by a Party or state enterprise;
 - (b) subsidies or grants provided by a Party or a state enterprise, including government-supported loans, guarantees and insurance.
6.
7. The provisions of Article 4 of this Agreement shall not apply to financial services.

Jurisprudence

- Not really about competitive conditions or "material treatment"
- Instead, about getting rid of provisions of the basic treaty or altering its procedural or substantive content ("treaty shopping") in the context of a particular claim

EFFECT SOUGHT	CASES
Override a procedural prerequisite for the submission of a claim to arbitration	<i>Maffezini v Spain, Siemens, Gas Natural, Suez, National Grid, Wintershall v Argentina.</i>
Alter the jurisdictional threshold	<i>Plama v Bulgaria, Salini v Jordan, Telenor Mobile v Hungary, RosInvestCo v Russia, Berschader v Russia.</i>
Benefit from "broader" or additional substantive content	<i>AAPL v Sri Lanka, ADF v United States, Bayindir v Pakistan, MTD Equity v Chile.</i>
Alter the BIT's time dimension	<i>Tecmed v Mexico, MCI v Ecuador.</i>
Override a general emergency exception clause	<i>CMS v Argentina.</i>
Change the standard of compensation for expropriation	<i>CME v Czech Republic.</i>

EFFECT SOUGHT	RESULT
Override a procedural prerequisite for the submission of a claim to arbitration	Mostly allowed (except for <i>Wintershall v Argentina</i>)
Alter the jurisdictional threshold	Mostly denied (except for <i>RosInvestCo v Russia</i>)
Benefit from additional substantive content.	Allowed when the effect is "additive". Denied when the third benefit is hypothetical
Alter the BIT's time dimension	Denied
Override a general emergency exception clause	Denied
Change the standard of compensation for expropriation	Allowed

Arguments for an expansive approach

- BIT's objective (preamble)
MTD Equity, Gas Natural, Suez
- MFN clause broad wording
Maffezini, Suez, Natural Grid
- Relation between dispute settlement and protection afforded to foreign investors
Maffezini, Siemens, Gas Natural, Suez, Natural Grid

Arguments for an expansive approach

- Principle of "*expressio unius est exclusio alterius*"
MTD Equity, Suez, Natural Grid, RosInvestCo
- Plain application
CME, Camuzzi, Bayindir, RosInvestCo
- Negotiation context
Maffezini, Natural Grid

Arguments for a restrictive approach

- Lack of evidence of a "less favorable treatment"
AAPL, ADF, Plama
- Importance of specific negotiated arrangements
Tecmed, MCI
- Risks of "treaty shopping"
Saini, Plama, Telenor, Wintershall

Arguments for a restrictive approach

- Intent of the parties as deduced from a reasonable interpretation
Salini, Plama, Berschader, Wintershall
- Necessity of an unambiguous consent to arbitration
Plama, Berschader, Telenor, Wintershall
- *Ejusdem generis* principle
CMS

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The debate - procedure

- **Positive approach:** the MFN clause does extend to procedural aspects, unless the basic treaty leaves no doubt that the Contracting Parties intended to exclude them
- **Negative approach:** the MFN clause does not extend to procedural aspects, unless the basic treaty leaves no doubt that the Contracting Parties intended to include them

The debate - substance

Yet to see how the MFN clause may modify the substantive content...

Tecmed approach

"...matters relating to the application over time of the Agreement, which involve more the time dimension of application of its substantive provisions rather than matters of procedure or jurisdiction, due to their significance and importance, go to the core of matters that must be deemed to be specifically negotiated by the Contracting Parties. These are determining factors for their acceptance of the Agreement, as they are directly linked to the identification of the substantive protection regime applicable to the foreign investor and, particularly, to the general (national or international) legal context within which such regime operates, as well as to the access of the foreign investor to the substantive provisions of such regime. Their application cannot therefore be impaired by the principle contained in the most favored nation clause."

The debate - substance

Siemens approach

"...the purpose of the MFN clause is to eliminate the effect of specially negotiated provisions unless they have been excepted..."

Is that so???

Risks-concerns

"... When concluding a multilateral or bilateral investment treaty with specific dispute resolution provisions, states cannot be expected to leave those provisions to future (partial) replacement by different dispute resolution provisions through the operation of an MFN provision, unless the States have explicitly agreed..."

"... The present Tribunal fails to see how harmonization of dispute settlement provisions can be achieved by reliance on the MFN provision. Rather, the "basket of treatment" and "self-adaptation of an MFN provision" in relation to dispute settlement provisions (as alleged by the Claimant) has as effect that an investor has the option to pick and choose provisions from the various BITs. If that were true, a host state which has not specifically agreed thereto can be confronted with a large number of permutations of dispute settlement provisions from the various BITs which it has concluded. Such a chaotic situation—actually counterproductive to harmonization—cannot be the presumed intent of Contracting Parties".

Plama v Bulgaria

Risks-concerns

"...the effect of the wide interpretation of the MFN clause is to expose the host State to treaty-shopping by the investor among an indeterminate number of treaties to find a dispute resolution clause wide enough to cover a dispute that would fall outside the dispute resolution clause in the base treaty, and even then there would be questions as to whether the investor could select those elements of the wider dispute resolution that were apt for its purpose and discard those that were not".

"...the wide interpretation also generates both uncertainty and instability in that at one moment the limitation in the basic BIT is operative and at the next moment it is overridden by a wider dispute resolution clause in a new BIT entered into by the host State".

Hungary

Telenor v

Literature

"...Given the absence of a meeting of minds between investor and host State, consent has to be constructed from the standing consent given by the State by treaty, and the subsequent consent given by the investor at the time the claim is submitted to arbitration. In those circumstances, it is particularly important to construe the ambit of the State's consent strictly. As the discussion in Chapter 3 above has shown, (Dispute Resolution Provisions) the balance struck in investment treaties between the various dispute settlement options is often the subject of careful negotiation between the State Parties, selecting from a range of different techniques. It is not to be presumed that this can be disrupted by an investor selecting at will from an assorted menu of other options provided in other treaties, negotiated with other State Parties and in other circumstances. Moreover, it is in any event not possible to imply a hierarchy of favour to dispute settlement provisions. The clauses themselves do not do this, and it would be invidious for international tribunals to be finding (in the absence of specific evidence) that host State adjudication of treaty rights was necessarily inferior to international arbitration. The same point could be made with even more force in the case of a comparison between ICSID and other forms of arbitration which the State Parties may have specified in particular investment treaties. The result, will be that the Most Favoured Nation clause will not apply to investment treaties' dispute settlement provisions, save where the States expressly so provide."

Campbell, Shore & Weiniger (2007)

Literature

"...the critical issue is not to determine whether procedural issues are part of the protection to investment, or if substantive provisions of third treaties may heighten the level of protection of the basic treaty, as they may of course...what matters is the intent of the parties and a reasonable and correct interpretation."

"The fact that an investor has to exhaust local remedies and other has not to, has to fulfill procedural requirements or use a particular forum not applicable to another, or may only bring international claims whereas another investor can settle contractual claims, does not fall into the discriminatory treatment the MFNC is about. And neither does it when an investor has a national treatment or fair and equitable right, apparently narrower than that of a third investor, or when an investor is covered against indirect expropriation whereas another investor is covered only against direct expropriation. Those are just different rules, arising from different treaties, from different negotiations".

Faya-Rodríguez (2008)

To consider...

- Generally speaking, is “treaty shopping” at hand with the object and purpose of the MFN clause?
- Are equality of competitive conditions contained in other BIT’s? Or in State measures and conduct?
- *Ex ante* assessment? Objective test of damage?
- Generic clause *versus* specific arrangement? Past agreement *versus* present agreement?
- Is the MFN clause supposed to operate in the context of the remaining provisions of equal force and value?

Conclusions

- The MFN clause continues to be an essential element of BITs. Its purpose is to offer equality of competitive conditions, linked to material treatment
- Language matters! Need to refine legal technique and be precise
- Out of the “basic operational coverage”, there is no evidence that countries pursue different objectives when including an MFN clause, no matter variations in language

Conclusions

- From the jurisprudence, we could reconcile some of the decisions by an “effect test”. However, the legal reasonings are quite contradictory
- There is a fair concern as to the manner many tribunals have applied the MFN standard
- States are advised to ponder any risks and concerns and take actions, both regarding existing and future BITs

Thanks!

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