A Further Update on Most-Favoured-Nation Treatment—In Search of a Constant Jurisprudence

Meg Kinnear*
Secretary-General, ICSID
Washington, DC

INTRODUCTION

The “most-favoured-nation” (MFN) obligation has a long pedigree. It is found in treaties concluded as early as the 12th century and was a staple of commercial treaties by the early 1900s. Modern free trade agreements (FTAs) invariably contain MFN obligations. For example, Article I:1 of the 1948 General Agreement on Tariffs and Trade (GATT) commences with a guarantee of MFN treatment for goods as they cross State borders, requiring that,

* These comments are made solely in the personal capacity of the author, and should not be attributed to her past or current employers. The author wishes to thank Ladi Jatau of the Trade Law Bureau of Canada for her tireless work on this article as well as Professor Andrea Bjorklund and Sylvie Tabet for their helpful comments on earlier drafts.

any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

FTAs have extended MFN treatment to diverse aspects of economic activity in the past 40 years. The World Trade Organization (WTO) agreements now include MFN obligations for services, intellectual property, and technical barriers to trade. Similarly, most bilateral investment agreements (BITs) and FTAs with investment disciplines grant MFN treatment to investments and/or investors in host countries.

The extension of MFN treatment to different types of economic activity has raised numerous debates about its proper purpose, scope, and application. As a border measure applicable to goods, MFN is relatively straightforward. Its purpose is to prevent nationality-based trade discrimination and preferential trading arrangements among members, and it effects a continuous upward ratchet on the overall level of trade liberalization. FTA and WTO cases addressing MFN in the goods context apply a relatively uniform interpretive approach, considering whether the goods in question are “like,” whether the challenged measure accords a competitive advantage to other foreign goods, and whether that measure discriminates de jure or de facto.

MFN analysis is more complex in the investment context. For starters, investment agreements have a twofold purpose: to promote foreign investment and to protect foreign investors. The application of MFN in investment cases requires a comparison between investors and their investments accounting for a broad range of factual or legal circumstances that might justify according dissimilar treatment to foreign and third-party investors. The effect of MFN in investment also differs from its effect in trade. There are multilateral disciplines in trade, and hence MFN is a harmonizing and

---

2 General Agreement on Trade in Services (GATS), art. II.
3 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), art. 4.
4 Agreement on Technical Barriers to Trade (TBT), art. 5.1.1.