Most-Favored-Nation Clauses as a Basis of Jurisdiction in Investment Treaty Arbitration

Arbitral Jurisprudence at a Crossroads

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I. ARBITRAL JURISPRUDENCE AT A CROSSROADS

Arbitral tribunals constituted to entertain disputes about the violation of international investment treaties struggle with the interpretation and application of most-favored-nation (MFN) clauses. While broad agreement exists that MFN clauses apply to the substantive protection granted under investment treaties1 and can be used to circumvent restrictions regarding the admissibility of investor-State disputes,2 irreconcilable differences have emerged as to whether MFN clauses can broaden the jurisdiction of arbitral tribunals.3 The

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2. See infra footnote 27 for further references.

majority of investment tribunals so far has rejected, in following the jurisdictional award in *Plama v. Bulgaria*, to accord jurisdictional effect to the MFN clauses in question. The recent award in *RosInvestCo v. Russia*, by contrast, accepted that an investor could invoke, based on an MFN clause in the applicable treaty, the host State’s broader consent to arbitration under investment treaties with third countries.

Such conflicting decisions seriously compromise the predictability and stability of international investment law and arbitration. This is particularly true as the impact of MFN clauses on arbitral jurisdiction is central to a rising number of investment treaty disputes. Thus, in two circumstances will investors attempt to use MFN clauses as a basis of jurisdiction: first, if the governing investment treaty does not contain any consent to investor-State arbitration at all, while the host State’s third-country treaties do; and second, if the governing investment treaty limits recourse to investor-State arbitration to certain causes of action or restricts the choice of the arbitral forum, while the host State’s third country treaties provide for broader consent to arbitration or offer a different range of arbitral fora. The former situation arises under some older investment treaties that did not yet include consent to investor-State arbitration, but may equally become relevant if States start stepping back from including investor-State dispute settlement into their investment treaties. The latter situation is the more common one and confronts mainly investors in formerly socialist countries whose first generation investment treaties regularly only allowed investor-State arbitration for expropriation-related disputes, not however for breaches of fair and equitable treatment, national treatment, etc. The more recent treaty generation in many of these countries, by contrast, often encompasses full-blown investor-State dispute settlement. The issue in all of these situations is, however, the same: it concerns the question of whether investors faced with limited dispute settlement choices can rely on an MFN clause in order to incorporate the host State’s broader consent to arbitration under investment treaties with third countries.

Faced with contradicting precedent, investors, States and arbitral tribunals are at a crossroads and have to decide which road to take at this important junction in the system.

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6 See, for example, the Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments, signed 25 Nov. 1959, entered into force 28 April 1962.

7 The recent Australia-US Free Trade Agreement, for example, did not include an investor-state dispute-settlement mechanism. See further on this agreement Dodge, *Investor-State Dispute Settlement between Developed Countries: Reflections on the Australia-United States Free Trade Agreement*, 39 Vand. J. Transnat’l L. 1 (2006).


9 Precedent, in this context, is used in a broad sense as embracing any prior arbitral decision that has pronounced itself on the relevant question. Precedent in the narrower sense used under the common law doctrine of *stare decisis*, thus implying a legal obligation to follow prior decisions, by contrast, has no place in investment treaty arbitration. Notwithstanding, investment treaty arbitration is a highly precedent-driven system of dispute (footnote continued on next page)