THE APPLICATION OF MOST-FAVORED-NATION CLAUSES TO DISPUTE RESOLUTION PROVISIONS IN BILATERAL INVESTMENT TREATIES

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ABSTRACT

Many BITs contain the so-called MFN clause, under which a host State may not treat the relevant investment less favorably than the investment of an investor from any other country. Much confusion, however, has arisen on the question of whether an investor may rely on an MFN clause to invoke the dispute resolution provisions of a third party BIT that are comparatively more favorable to the investor. While some ICSID arbitral decisions, including Maffezini v. Spain *and* Siemens v. Argentina*, determined that MFN clauses apply to BIT dispute resolution provisions, other decisions like* Salini v. Jordan *and* Plama v. Bulgaria *concluded that they do not.*

This Article argues that these decisions can in fact be reconciled by analyzing their differences under Article 31 of the Vienna Convention on the Law of Treaties, which in turn requires a determination of whether the particular use sought of the MFN clause falls within its "ordinary meaning." The former category of decisions involved reliance on broadly-rendered MFN clauses to

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avoid a procedural requirement that delayed, but did not ultimately preclude, ICSID arbitration, and which reliance is as such arguably within the reasonable contemplation of State parties as judged by its "ordinary meaning." The latter category of decisions, however, involved reliance on MFN clauses in BITs that strongly suggested an intent on the part of the parties to exclude from their scope dispute resolution in general, and/or to effect the substitution of an entirely different dispute resolution system, and thereby implicates an aggressive use of the MFN clause that does not sit well with its "ordinary meaning." Thus, the approach advocated in this Article seeks to provide a more comprehensive and coherent framework in which to analyze the relationship between the MFN clause and BIT dispute resolution provisions, anchored by fundamental interpretive principles of customary international law articulated in Article 31 of the Vienna Convention.

KEYWORDS: *Most-Favored-Nation, Most-Favoured-Nation, bilateral investment treaties, dispute resolution, dispute settlement provisions*

I. INTRODUCTION

One of the principal substantive rights afforded investors under many bilateral investment treaties (BITs)[1] is the protection of their investments under the so-called Most-Favored-Nation (MFN) treatment standard. Pursuant to this MFN standard, the host State may not treat the relevant investment less favorably than it does the investment of an investor from any other country.

In the last few years, the scope of the treaty provision guaranteeing such non-discriminatory treatment, the MFN clause, has come into question with respect to dispute resolution under BITs. Specifically, the issue is

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[1] A BIT is an agreement between two countries that governs the treatment of investments made in their respective territories by individuals and corporations from the other country. *See generally* RUDOLF DOLZER & MARGARET STEVENS, BILATERAL INVESTMENT TREATIES (1995); U.N. Conf. Int'l Trade & Dev. (UNCTAD), *Bilateral Investment Treaties 1959-1999*, U.N. Doc. UNCTAD/ITE/IIA/2 (Dec. 15, 2000), http://www.unctad.org/en/docs/poiteiiad2.en.pdf (last visited Mar. 10, 2008) (*prepared by* Abraham Negash); UNCTAD, BILATERAL INVESTMENT TREATIES IN THE MID-1990S, U.N. Doc. UNCTAD/ITE/IIT/7, U.N. Sales No. E.98.II.D.8 (1998).