MOST FAVORED NATION TREATMENT CLAUSE IN BILATERAL INVESTMENT AGREEMENTS

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Annotation
The Investment activities is the area of law most commonly relating to the relationship between states and investment-actors. Unlike international trade law, investment law does not have a large number of multilateral and universal agreements that could serve as a basis for international investment relations. In this regard Bilateral Investment Agreements (BIT) along with its specific provisions are regarded as a commonly shared mechanism of investment protection.
Key words: the most-favored-nation provision, fair and equal treatment, bilateral investment treaties, International Center for the Settlement of Investment Disputes.

Introduction

In the context of a globalized system of international investment relations, the issue of regulation of rule-making activities deserves special attention. The modern system of investment relations is based on very specific bilateral investment agreements, which contain the basic principles of cooperation for certain categories of legal entities, that include states as parties to the agreement and investors (Odio, 2020).

The fact that countries have chosen a special method of investment relations regulation, by concluding separate agreements between two countries, suggests that there is no complete system of international investment law. However, this assumption is extremely erroneous, because in such agreements there is a provision that turns individual acts into a single system, and this is really about provision on the most-favored-nation treatment (MFN). The peculiarity of this provision is to ensure equal legal treatment for all participants in investment relations and to accord participants of such relations with the right to import, any provision of investment agreements concluded with third countries.

The relevance of the study: The provisions on MFN, by their significance, play the role of a guarantee for ensuring the principle of equality in international investment relations and have very specific features in the context of application. Particularly acute is the issue of international investment disputes, in which arbitrations create decisions that give rise to contradictory approaches to the interpretation of the provisions on MFNs, which in the future directly flow to international investment relations. This topic is especially relevant for Ukraine, given the investment arbitrations against the aggressor country of the Russian Federation.

The purpose and objectives of the article: The purpose of article is to study the legal framework, approaches to the interpretation and application of the provisions on MFN. To achieve this goal, the following tasks are expected to be achieved:

- Study of the legal nature and purpose of such a provision; and
- Study of problematic aspects of the provisions on MFN in the context of investment disputes.

Research methods: The following basic methods were used in solving the tasks:

1. Analysis of legal documents (study and processing of the content of bilateral and model investment agreements).
2. Analysis of arbitration decisions (study and processing of the content of investment arbitration decisions).
3. Systematic-legal method (determination of regularities and connections between the essence of the provisions on MFN and the purposes of their application in practice); and
4. Generalization method (formulation of own conclusions on the basis of the processed sources).

Purpose of application of the most-favored-nation provisions

In the context of international investment activities, MFN is an important to ensure equal level of treatment between all partners and it is a central pillar of the international investment system. The MFN aims to ensure an equality between investors in different countries and provides strong guarantees to avoid any discrimination that could potentially lead to unfavorable competition. Thus, MFN standards help to establish equal competitive

opportunities between investors from different countries. Such guarantees provide investors with the opportunity, in case of violation of the principle of equality, to import more favorable provisions of agreements concluded with third parties (Sauvant, Sachs, 2009).

The MFN clause is essential and key contractual instrument that very clearly follows the purpose of the Investment Agreement itself, ensures equality of treatment, conditions between foreign entities and offers protection for investments, providing less limited opportunities for investment activities. In practice, the MFN provisions are part of about 2,600 agreements, the subject of which is regarded as protection of foreign investment (Stanivuković, 2012).

Of course, given the large array of bilateral investment protection agreements, a number of issues inevitably arise regarding the heterogeneity of the wording of the provisions on MFN. However, despite the different scope and exceptions provided for in the separate agreements, the purpose of the MFN remains the same and is to ensure equal protection of all partners and / or their investments. The issue of „multilateralization" of rights and freedoms, which arises in the case of the application of the provisions on the MFN, is more acute now, as the parties to international investment relations are essentially creating a mechanism for directly borrowing provisions that may seem more favorable to them.

Problematic issues of MFN application

The most common category of investment disputes is a contradiction over the granting of a regime that is less favorable than that granted to third parties. In other words, this is a violation of the provisions on MFN.

In practice, the most common solution to such investment disputes is to apply the so-called "import provisions", which are based on the existence of the same MFN provisions. The essence of such a mechanism is interpretated as follows: in case of proving the existence of a regime that is less favorable than that provided to third countries based on the provisions on MFN, it is allowed to import entire provisions of bilateral investment agreements with third countries.

It is due to such imports that the injured party receives a favorable regime that will meet the conditions of the provisions on MFN. Such imports, as a rule, cover: a) essential provisions; b) procedural provisions; and (c) se-

lective provisions contained in agreements with third countries. The following is a more detailed disclosure of certain aspects of the import of various types of provisions.

Import of essential provisions from investment agreements with third parties

Investors apply the provisions on MFN in order to import from investment agreements with third countries essential provisions, the wording of which seems to them more "favorable" than those contained in their own agreement. Especially often such imports are carried out to replace the provision of fair and equal treatment (hereinafter - "FET"), the content and scope of which is very controversial.

The reason for such disputes is the lack of a single standard for the wording of certain provisions, as a result, party to bilateral investment agreements resort to importing significant provisions (such as the provisions on FET) from agreements with third countries. However, it should be recognized that the dynamics of such disputes are declining, especially in the Western Hemisphere. I propose to investigate this issue further on the example of the provisions on FET.

Several investment arbitrations have examined the content and scope of the FET in the context of disputes between NAFTA States. As a result, the NAFTA Free Trade Commission provided an explanatory note stating that the content and scope of the FET provisions are limited by customary international law and cannot be arbitrarily interpreted in bilateral investment treaties between NAFTA member countries (Notes on the Interpretation of Chapter 11 of the North American Free Trade Agreement..., 2021).

As a result, the largest investors, North America Canada and the United States, reflected the interpretation of the FET provisions in their model bilateral investment treaties in the same way as the explanatory note to the NAFTA Free Trade Commission (Nikièma, 2017).

This example shows that the repeated import of the same provisions encourages countries to develop unified types of provisions to ensure a more favorable field for investment activities and to avoid future disputes.

It is pertinent to note that even after the unification of the wording of the FET provisions, there have been cases of importing the FET provisions to establish a more favorable regime.

In the case between the investor ADF Group v. The United States, the investor referred to the superiority of the FET provisions of the old bilateral investment agreements between the United States and Albania; The United States and Estonia, in which the FET provisions were treated in the old way.

The arbitral tribunal rejected the investor's claim, ruling that the investor had not proved that the FET provisions contained in the agreements with Albania and Estonia were more favorable than those contained in the new model bilateral US investment agreement (Arbitration award in the case "ADF Group versus United States of America"..., 2021). However, despite the rejection of the investor's claim, the arbitration in principle allowed the possibility of importing significant provisions on the basis of the provisions on MFN.

Import of new provisions that have no analogues in a separate investment agreement

There is a special type of import under which investors ask the arbitration to add a new provision to their own investment agreement, which can give them additional protection and promote regime which is no less favorable than that granted to third countries.

There is a certain practice of such imports, for example the Bayindir v. Pakistan dispute. In this case, the International Center for the Settlement of Investment Disputes (ICSID) allowed the application of the FET provisions of the 1995 bilateral investment agreement between Pakistan and Switzerland and the 1995 similar agreement between Pakistan and Turkey through the application of the SNA Regulation. The arbitration came to this conclusion based on two main arguments: first, the preamble to Pakistan's basic investment agreement referred to the concept of FET, and second, the MFN provision was vague because Pakistan did not allow foreign investors to import provisions on FET (Arbitration award in the case of Bayindir versus Pakistan, 2003) properly.

In the case of MTD Equity v. Chile, the investor stated the need to import the "important provisions" provided for in the bilateral investment agreement between Chile and Denmark in 1993 and in a similar agreement between Chile and Croatia in 1994. These agreements contained provisions that could provide the investor with a regime no less favorable than that provided to investors from third countries. The ICSID arbitration accepted

the investor's request on the grounds that this interpretation was consistent with the object and purpose of the preamble to Chile's model bilateral investment agreement, according to which Chile "protects and creates an investment-friendly climate (Arbitration award in the case of MTD versus Chile, 2004)".

Exclusion of provisions from the investment agreement

There are also cases when, investors sought to exclude certain provisions from bilateral investment agreements in order to ensure equal treatment. For example, in CMS v. Argentina, the plaintiff sought the exclusion of a specific provision in a bilateral investment agreement between Argentina and the United States of America. With the help of the MFN provision, he referred to other investment agreements between Argentina and third countries which did not contain a provision which placed him in a less favorable position. However, the ICSID Arbitration upheld the Argentine position: "the mere absence of such a provision in other treaties does not confirm the existence of a more favorable regime (Arbitration award in the case of "CMS versus Argentina", 2005)."

It is important to note that the arbitral tribunal did not definitively rule out the possibility of such an exclusion, as it noted that the provisions on the MFN could be used to remove discriminatory provisions. However, in practice such a withdrawal has no place.

Expanding the scope of the agreement

The provisions on MFN are also applied in some cases to expand the scope of a bilateral investment agreement, extend its duration or expand the material scope. With regard to the extension of the contract, the plaintiff in Tecmed v. Argentina (Arbitration award in the case of "Tecnicas Mediambientales Tecmed S.A. versus United Mexican States", 2003) tried unsuccessfully to reverse the provisions of the investment agreement in order to extend the provisions to events that occurred before the entry into force of the bilateral investment agreement.

As for the expansion of the material sphere, with the help of the provisions on MFN tried to import a more favorable definition of "investment", which allows to extend the effect of the investment agreement an additional type of economic activity of the investor. Thus, in the case of Société

Générale v. The Dominican Republic (Arbitration award in the case "Société Générale In respect of DR..., 2003)), the arbitral tribunal rejected the investor's position. Despite the fact that in attempts to extend the contract in time and expand the material part, in both cases the plaintiffs' claims were not satisfied, however, it should be recognized that in both cases, the arbitration allowed the possibility of satisfying the claims of investors.

Conclusion

Given the precedent practice, it is clear that the provisions on MFN occupy an important place in international investment law. We shall acknowledge that this provision has played a major role in the process of international trade liberalization and promotion of investment relations. In addition, the provision on the MFN at the universal level ensures compliance with one of the key principles of international law - the equality of all actors.

However, it is obvious that this provision has significant problems in the context of interpretation. The problem of the so-called "multilateralization" of rights and freedoms, which arises as a result of the use of the provisions on the MFN, is particularly acute. In other words, investors have the opportunity to use a very unstable legal mechanism to protect their interests, which in theory allows them to import favorable provisions from investment agreements with third countries. The unlimited scope of the provision in conjunction with controversial practice (when in similar investment disputes arbitrations come to different conclusions) brings the issue of MFN to a particularly complex level, and sometimes leads to the interpretation of a particular set of words from MFN.

This problem is still relevant, the uncertainty of the scope of the provision is a potentially dangerous reason to believe that in the future MFN will either be used in bad faith, or lead to a protracted investment dispute.

Bibliography

1. Odio, A.M. (2020). OECD Working Papers on International Investment. Available via internet: https://www.sipotra.it/wp-content/uploads/2020/03/The-most-favoured-nation-and-non-discrimination-provisions-in-international-trade-law-and-the-OECD-codes-of-liberalisation.pdf, [visited 2021 04 08].
2. Nikièma, S. H. (2017). The most-favoured-Nations Clause in Investment Treaties: IISD, 2017 Available via internet: https://www.iisd.org/sites/default/files/publications/mfn-most-favoured-nation-clause-best-practices-en.pdf [visited 2021 04 08].

3. Sauvant, K.P., Sachs, L.E. (2009), The Effect of Treaties on Foreign Direct Investment – Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows: Oxford University Press.
4. Stanivuković, M. (2012), On MFN clause in the Energy Charter Treaty: ECT 2012.
5. Notes on the Interpretation of Chapter 11 of the North American Free Trade Agreement. Available via internet: http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp, [visited 2021 04 08].
6. Arbitration award in the case "ADF Group versus United States of America", (2003). Available via internet: https://www.italaw.com/sites/default/files/case-documents/ita0009.pdf [visited 2021 04 08].
7. Arbitration award in the case of Bayindir versus Pakistan, (2003). Available via internet: https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/99/bayindir-v-pakistan, [visited 2021 04 08].
8. Arbitration award in the case of MTD versus Chile, (2004). Available via internet: https://www.italaw.com/sites/default/files/case-documents/ita0544.pdf, [visited 2021 04 08].
9. Arbitration award in the case of "CMS versus Argentina", (2005). Available via internet: https://www.italaw.com/sites/default/files/case-documents/ita0184.pdf, [visited 2021 04 08].
10. Arbitration award in the case of "Tecnicas Mediambientales Tecmed S.A. versus United Mexican States », (2003). Available via internet: https://www.italaw.com/sites/default/files/case-documents/ita0854.pdf, [visited 2021 04 08].
11. Arbitration award in the case "Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. versus Dominican », (2003). Available via internet: https://www.italaw.com/sites/default/files/case-documents/ita0854.pdf, [visited 2021 04 08].