Stern dissent renews debate on whether MFN clauses extend to dispute resolution provisions

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In *Impregilo SpA v Argentina Republic (ICSID Case No ARB/07/17)*, an ICSID tribunal considered whether the claimant could rely on the "most favoured nation" clause in the Argentina-Italy bilateral investment treaty to import a more favourable dispute resolution provision from the Argentina-US bilateral investment treaty.

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An ICSID tribunal has held that it had jurisdiction to hear a claim brought by an Italian investor on the basis that the "most favoured nation" (MFN) clause in the Argentina-Italy BIT extended to dispute resolution provisions so as to enable investors to "import" arbitration clauses from other Argentina BITs. As to the merits, the underlying claim related to water and sewage concessions in Buenos Aires and the tribunal found Argentina liable for breach of the fair and equitable treatment standard in the Argentina-Italy BIT in relation to its treatment of Impregilo's investment.

The decision is particularly noteworthy for the fact that Professor Brigitte Stern disagreed with the majority decision on jurisdiction and used a dissenting opinion to warn of the "great dangers" of allowing claimants to bypass a treaty's jurisdictional requirements by invoking MFN clauses. The dissent concludes that a conditional right to ICSID cannot "magically" be transformed into an unconditional right by the grace of the MFN clause. The decision (and the dissent) adds to the ongoing debate about the interrelationship between MFN and dispute resolution clauses. In particular, Professor Stern's dissent is one of the most detailed opinions to date articulating the case against extending MFN treatment to matters of dispute resolution. (*Impregilo SpA v Argentine Republic (ICSID Case No ARB/07/17) (21 June 2011).*)

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Background

A ***bilateral investment treaty (www.practicallaw.com/4-502-2491)*** (BIT) provides qualifying investors with certain minimum protections in respect of their investments in a state with which the investors' home state has concluded a BIT. Argentina and Italy signed a BIT on 22 May 1990, which came into force on 14 October 1993.

Many BITs contain a "most favoured nation" (MFN) clause. An MFN clause ensures that state parties to a treaty provide treatment no less favourable than the treatment they provide investors from any third state. In practice, their effect is to allow investors to rely on more favourable provisions found in other treaties concluded by the host state. The MFN in the Argentina-Italy BIT (Article 3) provides:

"Each Contracting Party shall, within its own territory, accord to investments made by investors of the other Contracting Party, to the income and activities related to such investments and to all other matters regulated by this Agreement, a treatment that is no less favourable than that accorded to its own investors or investors from third-party countries."

MFN clauses, like Article 3 of the Argentina-Italy BIT, are usually general in their wording and leave considerable scope to argue competing interpretations. In particular, most BITs are silent on whether MFN "treatment" includes only substantive rules for the protection of investments (for example, fair treatment or protection from expropriation) or if it also extends to procedural protections, like dispute resolution. The question of whether an MFN clause can permit investors to rely on the arbitration provisions of other treaties is the subject of extensive debate, with decisions going both ways.

For detailed discussion on MFN clauses, see *Practice note, How most favoured nation clauses in bilateral investment treaties affect arbitration (www.practicallaw.com/0-381-7466)*.

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Facts

In 1996, the Province of Buenos Aires (the Province) privatised all water and sewage services within its region. In 1999, an Italian company, Impregilo, together with a group of international investors, formed a local operating company, AGBA, with the intention of bidding for water and sewage concessions in Buenos Aires. On 7 December 1999, the Province entered into a concession contract for a term of 30 years with AGBA, which provided that in addition to supplying drinking water and the sewerage services to a specific region, AGBA was to undertake a detailed Service Expansion and Optimization Program (POES) under a series of five-year plans that were to be presented by AGBA and agreed by the Province (the concession contract).

The first five-year plan was approved on 31 January 2001. However, AGBA was experiencing difficulties collecting money from customers who were affected by the Argentine financial crisis. Accordingly, on 17 May 2001, AGBA wrote to the Minister of Public Works and Services and stated that the difficulties collecting money from customers meant that it was impossible for AGBA to achieve the goals of the first five-

year plan. Furthermore, AGBA sought permission to raise tariffs so that it could raise funds to comply with its obligations under the POES. The Province refused AGBA's requests.

On 6 January 2002, the Federal Argentine Government enacted a law which froze all utility contracts. However, on 26 April 2002, the Province awarded additional subsidised water and sewage concessions to another service provider and allowed that service provider to increase tariffs. AGBA subsequently made requests to increase tariffs, but these were rejected. In addition, on 27 August 2002, the national Argentine regulator suspended AGBA's right to interrupt water services to customers who had not paid their bills.

In April 2006, a report commissioned by the Ministry of Public Services concluded that AGBA had violated several of its obligations under the Concession Contract and the POES. AGBA was subsequently fined and its concessions transferred to an alternate national supplier.

Impregilo commenced ICSID arbitration proceedings and sought a declaration that Argentina had violated the Argentina-Italy BIT and international law by:

- Failing to afford it fair and equitable treatment in accordance with the provisions of the BIT.
- Expropriating its assets.

Argentina denied the claims and also alleged that the tribunal lacked jurisdiction. Argentina's primary challenge to the tribunal's jurisdiction was that Impregilo failed to observe a requirement in the BIT that it submit its dispute to the Argentine courts for 18 months before pursuing arbitration. In response, Impregilo asserted that it did not need to submit the dispute to the Argentine courts as it could import a more favourable dispute resolution clause from the Argentina-US BIT, by virtue of the MFN clause in the Argentina-Italy BIT. Article VII of the Argentina-US BIT provides that the investor may choose to submit the dispute for resolution to the domestic courts or administrative tribunals, or deal with it in accordance with previously agreed dispute settlement procedures, or, after six months from the date on which the dispute arose, to submit it to international arbitration.

Argentina also challenged the arbitral tribunal's jurisdiction on the basis that Impregilo's claim was an indirect claim and that the claim referred to contractual issues on which ICSID had no jurisdiction.

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Decision

The tribunal held, by a majority, that it had jurisdiction over Impregilo's claims, due to the operation of the MFN clause. It rejected Argentina's additional jurisdictional challenges. The tribunal further found that Argentina had breached the fair and equitable treatment standard in the Argentina-Italy BIT.

Majority decision on the application of the MFN clause

The majority of the tribunal (Judge Danelius and Judge Brower) held that the MFN clause in the Argentina-Italy BIT allowed Impregilo to benefit from the more generous dispute resolution rules in the Argentina-US BIT. The basis for this reasoning was that the words "treatment" and "all other matters regulated by this Agreement" in Article 3 of the Argentina-Italy BIT were wide enough to cover the dispute settlement rules. Indeed, the majority stated that the argument that the *ejusdem generis* (that is, of the same kind) principle would limit its application to matters similar to "investments" and "income and activities related to such investments" was not convincing, since the wording did not allow "all other matters" to be read as "all similar matters" or "all other matters of the same kind".

In addition, the majority stated that there was a massive volume of case law which indicated that, at least when there is an MFN clause applying to "all matters" or "any matters" regulated by the BIT, there had been near unanimity in finding that the clause covered the dispute settlement rules. In contrast, in most cases where dispute resolution provisions in other BITs were not incorporated as a result of MFN clauses, these clauses were not applicable to "all matters", but provided for MFN treatment of "investors" or "investments".

Furthermore, the tribunal noted that while domestic courts should not, necessarily, be viewed as "unfavourable", a choice between domestic proceedings and international arbitration, as in the Argentina-US BIT, is more favourable to the investor than compulsory domestic proceedings before access is opened to arbitration.

Dissenting opinion on the application of the MFN clause

Professor Brigitte Stern dissented in relation to the application of the MFN clause. She introduced her dissent by stating that she hoped it "will contribute in a modest and constructive manner to the ongoing debate on the way MFN clauses should be applied".

Professor Stern took issue with the majority's portrayal of the case law as weighed in favour of their position. She argued that if one looked at the number of arbitrators who were in favour of applying MFN clauses to dispute resolution rather than at the number of awards, then the picture looked almost balanced. This was because many of the same arbitrators had been involved in the same cases. In any event, she stated that it was not a legally convincing argument to rely on former cases as if they were binding precedents.

Professor Stern compared the dispute resolution clauses in the Argentina-Italy BIT and the Argentina-US BIT. While the Argentina-Italy BIT requires the investor to exhaust local remedies over 18 months, the Argentina-US BIT forbids recourse to the domestic courts if the investor wishes to pursue international arbitration. Therefore, importing just a time limit from one mechanism into the other did not really make any sense, as it could not be based on a serious comparison between two clauses with completely different underlying rationales. She concluded that Impregilo had been granted an inexistent favourable treatment that did not correspond to any real situation under any treaty. Indeed, she stated that such an interpretation effectively allowed the claimant to de-structure jurisdictional requirements and pick and choose from a menu of treaty options.

Professor Stern went on to assert that applying the scope of an MFN clause to dispute resolution provisions would theoretically allow the importation of an ICSID clause into a treaty that did not provide at all for international arbitration. She argued that tribunals who applied MFN clauses in this way were failing to distinguish between two different categories of provisions in BITs: "rights" on the one hand, and "fundamental conditions for access to the rights" on the other. An MFN clause could only concern the rights that an investor can enjoy, it cannot modify the fundamental conditions for the enjoyment of such rights. A conditional right to ICSID could not magically be transformed into an unconditional right by the grace of an MFN clause.

Decision on the merits

The tribunal found that while the new regulatory framework introduced by Argentina contained elements which were unfavourable to AGBA, it was a necessary response to the financial crisis and state of emergency at the time. However, having introduced such measures, it was incumbent on Argentina to attempt to restore a reasonable equilibrium to the concession by entering into negotiations with AGBA in relation to the concession contract. By failing to do so, Argentina was in breach of its duty under the BIT to afford fair and equitable treatment to Impregilo's investment.

However, the tribunal identified a shared responsibility for the failure of the concession contract and dismissed the claims for expropriation and alleged contractual breaches (although Judge Bower dissented and stated that the gradual wearing down and eventual total devaluation of AGBA was a predetermined national political goal that amounted to no more than indirect expropriation).

The tribunal awarded Impregilo US$21 million, plus interest, a much lower figure than the US$119 million claimed.

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Comment

The issue of the application of MFN clauses to dispute resolution provisions is one of the most hotly debated topics in international investment law in recent years. While the majority of the tribunals that have grappled with the issues over the past few years have ultimately based their conclusions on the precise wording and scope of the MFN clause before them, there has nonetheless been a creep towards tribunals endorsing the majority view that MFN clauses can extend to jurisdiction. Nonetheless, as this decision highlights, the issue of the proper scope and effect of MFN clauses remains confused and inconsistent.

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Case

Impregilo SpA v Argentina Republic (ICSID Case No ARB/07/17) (21 June 2011) (www.practicallaw.com/1-506-8739).