APPLICATION OF MFN CLAUSES TO THE DISPUTE SETTLEMENT PROVISIONS OF BITS: AN UPDATED ASSESSMENT OF THE JURISPRUDENCE SINCE *WINTERSHALL*

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Application of MFN Clauses to the Dispute Settlement Provisions of BITs: an Updated Assessment of the Jurisprudence since *Wintershall*

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Abstract

This paper is an updated assessment of international arbitration jurisprudence considering the scope and applicability of most-favoured-nation (MFN) clauses in international investment law. A previous paper examining diverging lines of arbitral jurisprudence on this issue was published in (2009) 27(4) Journal of Energy and Natural Resources Law 527 and awarded the 2010 Marc Lalonde Prize for Excellence in International and Commercial Arbitration by the Canadian Arbitration Congress. That article examined the diverging lines of arbitral jurisprudence regarding MFN clauses up to the *Wintershall* decision and attempted to elucidate the opposing positions of a doctrinal divide regarding the scope and applicability of MFN protection. This paper examines four subsequent arbitral decisions on MFN protection (*Renta 4, Shum, Austrian Airlines* and *Impregilo*) and questions whether those arbitral decisions continue to evidence a doctrinal divide within the international community regarding the scope and applicability of MFN protection that is easily defined.

1. Introduction

Most-favoured-nation ("MFN") clauses have a long and well-documented history within the international legal order.[1] While the scope and application of MFN clauses have evolved over time in different areas of international law, they have gained particular distinction in international trade law – becoming one of the "pillars" of the current multilateral trading system.[2] More recently, however, such clauses have found notoriety within the international investment law context. Found in an overwhelming number of International Investment Agreements ("IIAs") including Bilateral Investment Treaties ("BITs"), MFN clauses within the international investment context require that a host state afford investors or investments from one foreign country treatment "no less favourable" than that provided to investors or investments from any other foreign country.[3]

Despite their ubiquitous presence in treaties governing investment flows between States, the proper scope and application of MFN clauses is a divisive issue within international investment law. A recent study by the United Nations Conference on Trade and Development ("UNCTAD") articulates a number of issues regarding the scope and application of MFN clauses in international investment law.[4] Of particular concern are questions regarding the extent to which an investor (the claimant in an investor-state dispute) can use an MFN clause to access what are

1. See e.g. Endre Ustor, "First Report on the Most-Favoured-Nation Clause", in *Yearbook of the International Law Commission* (1969) vol. II, UN Doc. A/CN.4/SER.A/1969/Add.1 (and the sources cited therein).
2. UNCTAD, *Most-Favoured-Nation Treatment*, UNCTAD Series on Issues in International Investment Agreements II, UN Doc. UNCTAD/DIAE/IA/2010/1 (United Nations: New York, 2010) at 9-11 (briefly describing the history of MFN clauses in international law and their rising prominence in international trade) [UNCTAD, *MFN* II].
3. See generally *ibid.* at 12-33 (which provides a discussion of the definition, purpose and scope of the MFN standard). See also OECD (Directorate for Financial and Enterprise Affairs), *Most-Favoured-Nation Treatment in International Investment Law*, Working Paper on International Investment No. 2004/2 (September 2004) at 2, which briefly defines the MFN standard in international investment law by referencing the International Law Commission's Draft Articles on MFN clauses.
4. See UNCTAD, MFN II, *supra* note 2 at 38-72.

perceived to be more favourable dispute-settlement provisions found in other BITs concluded between the host state (the defendant in an investor-state dispute) and a third state.

To date, numerous arbitral decisions have considered this phenomenon and thus far, two categories of cases have emerged.[5] In the first category of cases foreign investors have attempted to invoke an MFN clause in order to access an expedited arbitration process. Typically, the BITs in this line of authorities contained provisions that required a foreign investor to submit disputes to domestic courts and did not permit the investor to resort to international arbitration until after a fixed time had passed without a decision from the domestic courts.[6] In the second category of cases, foreign investors have attempted to invoke an MFN clause as a way of vesting arbitral tribunals with jurisdiction over classes of claims not contemplated or expressly excluded under a BIT. Cases falling in this category have characteristically involved either a request to bring contractual (not treaty) claims before an arbitration panel or a request to extend the jurisdiction of such panels to claims beyond those

5. Unless otherwise specified, all of the investor-state arbitral awards referred to in this Article are available at <http://italaw.com> (last accessed on July 11, 2011). See e.g. *Emilio Agustin Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction (25 January 2000)[*Maffezini*]; *Siemens AG v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (3 August 2004)[*Siemens*]; *Suez Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction (16 May 2006)[*Suez Sociedad*]; *Gas Natural v. Argentina*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions of Jurisdiction (17 June 2005)[*Gas Natural*]; *National Grid plc. v. Argentina*, UNCITRAL, Decision on Jurisdiction (20 June 2006)[*National Grid*]; *Salini Costruttori S.p.A. a; and Italstrade S.p.A. v. the Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction (9 November 2004)[*Salini*], *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (8 February 2005) [*Plama*]; *Telenor Mobile Communications AS v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award (13 September 2006)[*Telenor*]; *Vladimir Berschader and Moïse Berschader v. Russian Federation*, SCC Case No. 080/2004, Award (21 April 2006) [*Berschader*]; *RosInvestCo Uk Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction (October 2007) [*RosInvestCo*]; *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award (8 December 2008) [*Wintershall*]; *Renta 4 S.V.S.A et al. v. Russian Federation*, SCC No. 24/2007, Award Preliminary Objections (March 20, 2009) [*Renta 4*]; *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence (June 19, 2009)[*Shum*]; *Austrian Airlines v. Slovak Republic*, UNCITRAL Case No. redacted, Final Award (October 9, 2009) [*Austrian Airlines*]; *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/01/17, Award (June 21, 2011) [*Impregilo*].
6. See e.g. *Maffezini*, *ibid.*; *Siemens*, *ibid.*; *Suez*, *ibid.*; *Gas Natural*, *ibid.*; *National Grid*, *ibid.*; *Wintershall*, *ibid.*; *Impregilo*, *ibid*.

respecting the amount of compensation owed to a foreign investor subsequent to an expropriation.[7]

Despite being able to categorize the jurisprudence as falling within one of these two categories, the written reasons for such decisions are varied and difficult to reconcile.[8] Indeed, an arbitral tribunal tasked with the responsibility of deciding such a case recently commented:

> A considerable number of awards under BITs have dealt with the jurisdictional implications of MFN. Many of them have been invoked in the present arbitration. They are of uneven persuasiveness and relevance. The present Tribunal would find it jejune to declare that there is a dominant view; it is futile to make a head-count of populations of such diversity. What can be said with confidence is that a *jurisprudence constante* of general applicability is not yet firmly established.[9]

While that observation is undoubtedly true and in fact there are divergent lines of authority within each of the two categories of cases noted above, since the *Wintershall* decision it is less certain whether that diversity of arbitral decisions also evidences a 'doctrinal divide' within the international community regarding the scope and applicability of MFN protection that is easily defined.

In a previous publication I discussed this doctrinal divide with reference to the divergent lines of arbitral jurisprudence up to the *Wintershall* decision and attempted to elucidate the opposing positions of that divide.[10] I concluded that the doctrinal divide, as reflected in the arbitral jurisprudence, has less to do with whether MFN clauses have the primary objective of promoting non-discrimination and harmonization versus the economic purpose of allowing competition to proceed on the

7. See e.g. *Salini*, *supra* note 5; *Plama*, *supra* note 5; *Telenor*, *supra* note 5; *Berschader*, *supra* note 5; *RosInvest*, *supra* note 5; *Renta 4*, *supra* note 5; *Shum*, *supra* note 5; *Austrian Airlines*, *supra* note 5.
8. See e.g. the decisions in *Siemens*, *supra* note 5 and *Wintershall*, *supra* note 5 where tribunals considering whether foreign investors could access an expedited arbitration process by way of the MFN clause in the Argentina-Germany BIT came to opposite conclusions. Emphasizing the importance of arbitration as a fundamental right in the international investment law context, the tribunal in *Siemens* permitted a foreign investor to circumvent a local remedies requirement by way of the MFN clause in the Argentina-Germany BIT while the tribunal in *Wintershall* refused to do so – instead placing emphasis on the dispute settlement clause consented to by the state parties to the Argentina-Germany BIT.
9. *Renta 4*, *supra* note 5 at para. 94.
10. Elizabeth Whitsitt, "Application of Most-Favoured-Nation Clauses to the Dispute Settlement Provisions of Bilateral Investment Treaties: An Assessment of the Jurisprudence" (2009) 27(4) JENRL 527 [Whitsitt, "MFN Clauses"].

basis of equal opportunity. Rather, the doctrinal divide has more to do with whether the tribunal gives primacy to the interests of the investor as the beneficiary of the BIT rather than focusing exclusively on the intentions of the state parties to the treaty text.[11]

This paper examines four recent arbitral decisions addressing the proper scope and applicability of MFN clauses in international investment law that have been publicly released since my prior publication. In Part 2 of this Article I review three arbitral decisions (*Renta 4*, *Shum* and *Austrian Airlines*) that consider the applicability of MFN provisions to confer jurisdiction. In Part 3 I review a fourth arbitral decision (*Impregilo*) that considers whether an MFN provision should be used to access an expedited arbitration process. In particular, I discuss the principle of state consent in international law and related jurisdictional implications for investor-state arbitral tribunals as raised by the dissenting arbitrator (Stern) in the fourth arbitral decision. In Part 4, I provide some comments and concluding remarks about the doctrinal divide and the various interpretative approaches taken by arbitrators since the *Wintershall* decision. I also question whether considering the principle of consent in either of the two categories of decisions could lead to a more reasoned approach to assessing the proper scope and applicability of MFN clauses, and perhaps even a *jurisprudence constante* of general applicability in international investment law.

2. Arbitral decisions that consider the applicability of MFN provisions to confer jurisdiction

The following arbitral decisions fall within the category of cases in which foreign investors have attempted to invoke an MFN clause as a way of vesting arbitral tribunals with jurisdiction over classes of claims not contemplated or expressly excluded under a BIT. While a number of arbitral tribunals considering these types of disputes have refused such an application of MFN protection, other arbitral tribunals have come to the opposite conclusion.[12] As noted below, such discrepancies continue to exist in the most recent cases addressing this issue with two of the three cases discussed generating split arbitral decisions.

Renta 4 S.V.S.A. v. The Russian Federation

In March 2007 a number of Spanish parties (comprised of investment funds and stock companies) initiated arbitral proceedings at the

11. *Ibid.* at 532, 557.
12. See e.g. the decisions in *Plama*, *supra* note 5 and *Berschader*, *supra* note 5.

Stockholm Chamber of Commerce ("SCC") against the Russian Federation ("Russia").[13] The nature of their claims related to Russia's alleged unlawful dispossession of the assets of the Yukos Oil Company ('Yukos') and the subsequent loss to Yukos shareholders. According to the claimants, Russia expropriated their property "by means of a variety of abuses of executive and judicial power."[14] The claimants grounded their case on the Agreement for Reciprocal Promotion and Protection of Investments between Spain and the USSR ("Spain-Russia BIT"), which entered into force on November 28, 1991. As owners of the Yukos American Depository Receipts, the claimants requested that Russia compensate them for their losses.

In response, Russia argued that the SCC lacked jurisdiction over the dispute because of the narrow dispute resolution clause within the Spain-Russia BIT, which limited arbitration to claims regarding the amount or method of payment of the compensation due in cases of expropriation.[15] As a result, Russia argued that the claimants' Request for Arbitration was 'misguided' as it attempted to arbitrate claims regarding whether Russia had in fact: (i) expropriated Yukos' assets, (ii) taken unjustified and discriminatory measures against the Claimants' investment, and (iii) acted unfairly and inequitably toward those investments.[16]

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13. *Renta 4*, *supra* note 5 at para. 6.
14. *Ibid*. at para. 3.
15. The English translation of Articles 6 and 10 of the Spain-Russia BIT are reproduced in *ibid*. at paras. 19 and 5, respectively and state:
    6. Any nationalization, expropriation or any other measure having similar consequences taken by the authorities of either Party against investments made within its territory by investors of the other Party, shall be taken only on the grounds of public use and in accordance with the legislation in force in the territory. Such measures should on no account be discriminatory. The Party adopting such measures shall pay the investor or his beneficiary adequate compensation, without undue delay and in freely convertible currency.
    [...]
    10(1) Any dispute between a Party and an investor of the other Party *relating to the amount or method of payment of the compensation due under article 6 of this Agreement*, shall be communicated in writing, together with a detailed report by the investor to the Party in whose territory the investment was made. The two shall, as far as possible, endeavor to settle the dispute amicably.
    2. If the dispute cannot be settled thus within six months of the date of the written notification referred to in paragraph 1 of this article, it may be referred to by [sic] either of the following, the choice being left to the investor:
    – An arbitral tribunal in accordance with the Regulations of the Institute of Arbitration of the Chamber of Commerce in Stockholm;
    – The ad hoc arbitral tribunal established in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). [*emphasis added*]
16. *Ibid*. at para. 20. See also *ibid*. at para. 21.

The claimants raised a number of arguments in response to Russia's jurisdictional objection, the most relevant one to this discussion being the scope of MFN protection in Article 5 of the Spain-Russia BIT.[17] Noting Russia's BIT with Denmark, the claimants argued that they were entitled to more favourable dispute-settlement mechanisms found in other investment agreements to which Russia was party, which permitted arbitration for a broader category of disputes.[18]

Marking the second split arbitral decision regarding the extension of MFN clauses to procedural rights under BITs (*Berschader* was the first such case[19]), the majority of the tribunal held that the MFN clause in the Spain-Russia BIT did not allow the importation of a different dispute settlement mechanism from another BIT, while the minority of the tribunal disagreed.

Majority decision in Renta 4

In coming to its conclusion, the majority of the tribunal began its analysis by rejecting the presumption articulated in *Plama* (and subsequently accepted by tribunals in *Telenor*, the majority in *Berschader* and *Wintershall*) – that an MFN provision "does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty."[20] Instead, the majority of the tribunal adopted the view that MFN

17. *Ibid*. at para. 69. Article 5 of the Spain-Russia BIT states:
    1. Each Party shall guarantee fair and equitable treatment within its territory for the investments made by investors of the other Party.
    2. The *treatment referred to in paragraph 1 above* shall be no less favourable than that accorded by either Party in respect of investments made within its territory by investors of any third State.
    3. Such treatment shall not, however, include privileges which may be granted by either Party to investors of a third State by virtue of its participation in:
    – A free trade area;
    – A customs union;
    – A common market;
    – An organization of mutual economic assistance or other agreement concluded prior to the signing of this Agreement and containing conditions comparable to those accorded by the Party to the participants in said organization.
    The treatment granted under this article shall not include tax exemptions or other comparable privileges granted by either Party to the investors of a third State by virtue of a double taxation agreement or any other agreement concerning matters of taxation.
    4. In addition to the provisions of paragraph 2 above, each Party shall, in accordance with its national legislation, accord investments made by investors of the other Party treatment no less favourable than that granted to its own investors.
18. *Ibid*. at para. 69.
19. See Whitsitt, "MFN Clauses", *supra* note 10 at 546.
20. See *Renta 4*, *supra* note 5 at para. 95 citing *Plama*, *supra* note 5 at para. 223.

treatment could apply equally to substantive and or procedural rights in a treaty.[21] Focusing on the importance of investor-state dispute settlement, the tribunal noted that, "...access to international arbitration has been a fundamental and constant desideratum for investment protection and therefore a weighty factor in considering the object and purpose of BITs."[22]

Despite its determination on those general aspects of the MFN debate, the tribunal went on to reject the claimants' attempt to expand the jurisdictional reach of the tribunal by virtue of the MFN clause in the Spain-Russia BIT.[23] In implementing a "BIT by BIT" interpretive approach to the issue, the majority determined that while there are some 'lexical difficulties' in the wording and structure of Article 5, the Spain-Russia BIT limited MFN protection to fair and equitable treatment ("FET").[24] Thus, in contrast to MFN clauses entitling investors to avail themselves of more favourable treatment found "in all matters covered" by other treaties, Article 5 of the Spain-Russia BIT only entitled investors to avail themselves of more favourable levels of FET articulated in other BITs.[25] As a result, the majority found that MFN treatment in the Spain-Russia BIT related to "normative standards and [did] not extend to either (i) the availability of international as opposed to national fora or (ii) "more" rather than "less" arbitration (as the separate opinion puts it)."[26]

Minority decision in Renta 4

In direct contradiction to the majority, the dissenting arbitrator Charles N. Brower was of the opinion that the MFN clause in the Spain-Russia BIT permitted the claimants to incorporate Russia's broader consent to arbitration under its other investment treaties.[27] Agreeing with the majority that the principle basis of the decisions in *Plama*, *Telenor*, *Berschader* and *Wintershall* has no valid support in international law, Judge Brower reasoned that there was "little merit in distinguishing between matters of substantive investment protection and the enforcement of these rights through investor-State dispute settlement" when applying MFN clauses.[28] Despite such agreement among the arbitrators, Judge Brower went on to articulate the point upon which

21. *Ibid.* at paras. 98-101.
22. *Ibid.* at para. 100.
23. *Ibid.* at paras. 102-120.
24. *Ibid.*
25. *Ibid.* at para. 95.
26. *Ibid.* at para. 119.
27. *Ibid.* (Separate Opinion of Charles N. Brower) at para. 5.
28. *Ibid.* at para. 10.

his dissent is based – namely the majority's approach to the interpretation of the MFN clause in the Spain-Russia BIT.

Focusing on the original Spanish and Russian texts of the Spain-Russia BIT, Judge Brower concluded that the MFN clause (Article 5(2)) was not limited to FET but rather referred to any treatment contemplated in the Spain-Russia BIT. As a result, Judge Brower would have enabled the claimants in this case to avail themselves of more favourable dispute settlement provisions found in third-party BITs to which Russia was a party.[29] Moreover, even if the majority was correct in its interpretation of the MFN clause, Judge Brower was of the opinion that investor-state arbitration is an aspect of the FET standard – a finding that should have resulted in the claimants having access to more favourable dispute settlement clauses found in other investment treaties concluded by Russia.[30]

Unlike the debates between arbitrators and arbitration panels in previous cases where doctrinal divisions about the scope and application of the MFN principle depended on the emphasis such arbitrators and arbitration panels placed on investors' interests versus states' interests,[31] the argument among the *Renta 4* arbitrators centres on the rather unique language of the MFN clause at issue in the case. As mentioned above, both the majority and the dissenting arbitrator agreed that MFN clauses should, *in principle*, apply to dispute settlement provisions and thereby permit foreign investors access to more favourable dispute settlement fora where possible.

After *Renta 4*, a panel of ICSID arbitrators addressed the scope and applicability of MFN protection where the MFN clause at issue was similarly worded to the MFN clause that divided *Renta 4* arbitrators. That case, *Tza Yap Shum v. The Republic of Peru*,[32] has generated a lot of

29. *Ibid*. at paras. 11-18.
30. *Ibid*. at paras. 19-23.
31. See e.g. Whitsitt, "MFN Clauses", *supra* note 10 at 557 (concluding that arbitral tribunals that extend MFN protection to procedural rights address the debate from the perspective of an investor focusing on the importance of arbitration as a fundamental protection to foreign investors and their investments, while tribunals that do not extend MFN protection to procedural rights tend to focus on the importance of state consent as the fundamental principle underpinning the settlement of disputes in international law).
32. *Shum*, *supra* note 5. Because a previously posted unofficial English translation of this decision was taken offline due to inaccuracies in that translation, all references herein are based on secondary sources commenting on and citing portions of that removed English translation. See e.g. Wei Shen, "The Good, the Bad or the Ugly? A Critique of the Decision on Jurisdiction and Competence in Tza Yap Shum v. the Republic

attention in the investment treaty arbitration community as it is the first investor-state arbitration decided that involved a Chinese investor seeking to by-pass a restrictive dispute settlement clause in a Chinese BIT.[33]

Tza Yap Shum v. The Republic of Peru

On September 29, 2006 Mr. Tza Yap Shum, a Chinese national, filed a claim with the International Centre for the Settlement of Investment Disputes ("ICSID") under the Peru-China BIT. Mr. Tza Yap Shum was the majority shareholder of TSG Peru S.A.C., a Peruvian company engaged in the manufacturing, import, export and distribution of fish-based food products. In his Request for Arbitration Mr. Tza Yap Shum alleged that numerous actions of Peru's national tax authority breached provisions of the Peru-China BIT.[34]

In response, Peru objected to the jurisdiction of the tribunal on numerous grounds. Most relevant to this discussion are those objections related to the narrow dispute settlement clause in the Peru-China BIT. Similar to "old-generation" BITs China signed prior to 1998, the dispute settlement provision in the Peru-China BIT permitted investors to seek arbitration only for claims "involving the amount of compensation for expropriation".[35] Article 8(3) of the Peru-China BIT also provided that: "[a]ny disputes concerning other matters between an investor of either Contracting Party and the other Contracting Party may be submitted to the Centre if the parties to the dispute so agree."[36]

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of Peru" (2011) 10(1) Chinese JIL 55 [Shen, "Good, Bad or Ugly?"]; Andrew Newcombe, "Another misapplication of MFN? Tza Yap Shum v. the Republic of Peru", *Kluwer Arbitration Blog* (21 October 2009), online at: <http://kluwerarbitration blog.com/blog/2009/10/21/another-misapplication-of-mfn-tza-yap-shum-v-the-republic-of-peru/> [Newcombe, "Another misapplication of MFN?"].

33. See e.g. Shen, "Good, Bad or Ugly?", *ibid.*; Newcombe, "Another misapplication of MFN?", *ibid.*; An Chen, "Queries to the Recent ICSID Decision on Jurisdiction upon the Case of Tza Yap Shum v. Republic of Peru: Should China-Peru BIT 1994 be Applied to Hong Kong SAR under the "One Country Two Systems' Policy" (2009) 10(6) Journal of World Investment and Trade 829 [Chen, "Queries upon the Case of Tza Yap Shum v. Republic of Peru"]; Fernando Cabrera Diaz, "Chinese Investor Launches BIT Claim against Peru at ICSID", *Investment Treaty News* (2 March 2007), online at: <http://www.iisd.org/pdf/2007/itn_mar2_2007.pdf>.
34. Shen, "Good, Bad or Ugly?", *ibid.* at para. 3; Newcombe, "Another misapplication of MFN?", *ibid.*
35. See Shen, "Good, Bad or Ugly?", *ibid.* at para. 31 referencing Article 8(3) of the Peru-China BIT, which provides that "a dispute involving the amount of compensation for expropriation may be submitted at the request of either party to the international arbitration of the ICSID."
36. See Newcombe, "Another Misapplication of MFN?", *supra* note 32.

On this basis, Peru argued that the tribunal lacked jurisdiction to hear Mr. Tza Yap Shum's claims. For his part, Mr. Tza Yap Shum argued that the MFN provision in the Peru-China BIT could be used to confer the tribunal with jurisdiction over his claims, as Peru had ratified other BITs that contained broader dispute settlement clauses.[37] Similar to the MFN clause at issue in *Renta 4*, the MFN clause in the Peru-China BIT provided: "The treatment and protection referred to in [Article 3(1) regarding fair and equitable treatment] shall not be less favourable than that accorded to investments and activities associated with such investments of investors of a third State."[38]

In considering the above, the tribunal in this case first considered whether it had jurisdiction over Mr. Tza Yap Shum's expropriation claim. In so doing, the tribunal determined that it did have jurisdiction over that claim. Specifically, the tribunal considered that the words "...involving the amount of compensation for expropriation..." should be interpreted broadly to permit arbitration of claims concerning a number of aspects related to an expropriation, including whether an instance of expropriation, nationalization, or similar measure has taken place.[39]

With respect to Mr. Tza Yap Shum's other claims, the tribunal determined that it did not have jurisdiction to hear the dispute and that the MFN clause in the Peru-China BIT could not be used as a means through which to confer the tribunal with jurisdiction over those claims. In particular, the tribunal found that the narrow dispute settlement clause [Article 8(3)] in the Peru-China BIT reflected the parties' agreement to limit ICSID arbitration to: (i) expropriation disputes and (ii) those disputes over which the parties specifically agreed could be submitted to such a procedure. Given the specificity of language in Article 8(3), the tribunal reasoned that it should override the more general application of the MFN clause in Article 3 of the Peru-China BIT.[40]

As of the time of writing this paper, the unofficial English translation of this decision has been removed from internet databases due to inaccuracies. As a result, it goes without saying that caution must be taken when commenting on the particularities of the arbitral tribunal's reasoning in *Shum*. Relying on the now unavailable English translation of this

37. See Shen, "Good, Bad or Ugly?", *supra* note 32 at paras. 32, 55. See also Newcombe, "Another Misapplication of MFN?", *ibid*.
38. Shen, "Good, Bad or Ugly?", *ibid*. at para. 55, fn. 170 citing Article 3(2), the MFN clause, of the Peru-China BIT.
39. *Ibid*. at paras. 33-35.
40. See *ibid*. at paras. 56-59 and footnotes therein citing paras. 189-217 of the once public unofficial English translation of the decision in *Shum*.

decision, some authors have been critical of the tribunal's reasoning in *Shum*.[41] For the purpose of this paper, all that can be done is to note the apparent divergent approaches used by the tribunals in *Renta 4* and *Shum* when considering the scope and applicability of, what appear to be, similar MFN clauses (i.e. clauses that tie MFN protection to FET).

While the majority in *Renta 4* and the *Shum* tribunal agree in result (i.e. that the MFN clauses at issue in those cases cannot be used to confer the respective tribunals with jurisdiction over a class of claims not contemplated in the subject-matter BIT), their rationales for coming to that conclusion are drastically different. Implementing a "BIT by BIT" treaty interpretive approach, the majority in *Renta 4* focused on the precise language of the MFN clause in the Spain-Russia BIT to conclude that MFN protection is restricted to the realm of FET. In contrast, the *Shum* tribunal appears to ignore the particular language of the MFN clause at issue in the case and rather emphasizes a different treaty interpretive rule – that of *lex specialis derogat legi generali* – to conclude that the specific wording of the dispute settlement clause should prevail over the general wording of the MFN clause in the Peru-China BIT.

Austrian Airlines v. Slovak Republic

The most recent case to consider whether an MFN clause can be used to vest an arbitral tribunal with jurisdiction over a class of claims for which such jurisdiction is specifically excluded under the subject BIT is *Austrian Airlines v. Slovak Republic*.[42] In this case the claimant commenced arbitral proceedings against the Slovak Republic ("Slovakia") under the auspices of the Arbitration Rules of the United Nations Commission on International Trade Law of 1976 (the "UNCITRAL Rules"). While factual details regarding the arbitration are sparse given redactions within the Award, it appears that the dispute arose in connection with a tri-lateral agreement executed by two unknown parties and the claimant.[43]

41. See e.g. *ibid*. (criticizing the tribunal for using conflicting treaty interpretive methodologies to interpret different phrases, terms and treaty clauses in the Peru-China BIT); Newcombe, "Another Misapplication of MFN?", *supra* note 32 (pointing out three errors of reasoning in *Shum*. Specifically, that the tribunal (i) lacked jurisdiction to even consider whether the MFN clause in the Peru-China BIT could be applied to expand its subject-matter jurisdiction, (ii) failed to distinguish whether the MFN clause applied to investments and/or investors, and (iii) failed to consider that the MFN clause at issue in the case only applied to FET); Chen, "Queries upon the Case of Tza Yap Shum v. Republic of Peru", *supra* note 33 (criticizing the Shum tribunal's reasoning on nationality).
42. *Austrian Airlines*, *supra* note 5.
43. *Ibid*. at para. 14.

Presumably, through actions or omissions related to that tri-lateral agreement, the claimant alleged that the Slovak Republic had breached certain provisions of an investment treaty concluded between the Republic of Austria and the Slovak Republic that entered into force on 1 January 1995 (the Austria-Slovakia BIT).[44] Specifically, the claimant contended that Slovakia had: (i) unlawfully expropriated its investment, (ii) violated its full protection and security obligation, and (iii) breached the umbrella clause of the Austria-Slovakia BIT.[45]

In response, Slovakia launched a number of challenges to the jurisdiction of the tribunal. Specifically, the Slovak Republic argued that Austrian Airlines' claims were not covered by the dispute resolution provision in the Austria-Slovakia BIT, which limited arbitration to disputes regarding the amount or the conditions of payment of compensation for expropriation.[46] In support of this position, Slovakia pointed to the ordinary meaning and negotiating history of the dispute resolution clause (Article 8) in the Austria-Slovakia BIT to show that the wording of that provision had been purposefully confined to disputes regarding the amount or the conditions of payment of compensation as contemplated in the treaty's Article 4. Additionally, the Slovak Republic cited a number of cases, including *EMV v. Czech Republic*[47], *Berschader v.*

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44. For a brief explanation of the history of the Austria-Slovakia BIT in the context of the dissolution of the Czech and Slovak Republic see *ibid*. at paras. 7-8.
45. See *ibid*. at paras. 26 & 85.
46. See *ibid*. at paras. 86-88. See also *ibid*. at paras. 92-93 reproducing the relevant portions of Articles 4 and 8 of the Austria-Slovakia BIT, which state respectively:
    4(4) The investor shall have the right to have the legitimacy of the expropriation reviewed by the competent authorities of the Contracting Party which prompted the expropriation.
    4(5) The investor shall have the right to have the amount of compensation and the conditions of payment reviewed either by the competent authorities of the Contracting Party which prompted the expropriation or by an arbitral tribunal according to Article 8 of this Agreement.
    [...]
    8(1) Any disputes arising out of an investment, between a Contracting Party and an investor of the other Contracting Party, *concerning the amount or the conditions of payment of a compensation pursuant to Article 4 of this Agreement*, or the transfer obligations pursuant to Article 5 of this Agreement, shall as far as possible, be settled amicably between the parties to the disputes.
    8(2) *If a dispute pursuant to para. 1 above cannot be amicably settled* within six months as from the date of a written notice containing sufficiently specified claims, *the dispute shall unless otherwise agreed, be decided* upon the request of the Contracting Party or the Investor of the other Contracting Party *by way of arbitral proceedings in accordance with the UNCITRAL-Arbitration Rules*, as effective at the date of the motion for the institution of the arbitration proceeding. (*emphasis added*)
47. *European Media Ventures S.A. v. Czech Republic*, (2007) EWHC 2851 (Comm), Judgment on Jurisdiction, 5 December 2007.

Russia[48], *Nagel v. Czech Republic*[49], *RosInvest v. Russia*[50] and *Telenor v. Hungary*[51], to reinforce its argument.[52]

The second, but related, objection Slovakia launched in relation to the tribunal's jurisdiction contended that the claimant could not rely on the MFN clause (Article 3) in the Austria-Slovakia BIT to access less restrictive dispute settlement clauses found in other investment treaties entered into by the Slovak Republic.[53] Attempting to by-pass this issue altogether, Slovakia first argued that the tribunal did not have the power to decide this issue given its limited scope of jurisdiction under Article 8.[54] Alternatively, Slovakia asserted: (i) that the wording, context and negotiating history of the Austria-Slovakia BIT precluded the extension of the MFN clause to dispute settlement, (ii) that extending the MFN clause to dispute settlement was contrary to the *ejusdem generis* principle, (iii) that interpretation on the basis of the object and purpose of the Austria-Slovakia BIT should not be used to reach exaggerated results, and (iv) that Slovakia's practice regarding dispute settlement clauses in other investment treaties did not support the assertion that it consented to a policy of broadening dispute resolution mechanisms.[55]

In response, the claimant argued that the tribunal was empowered to determine the effects of the MFN clause by virtue of the principle of *compétence-compétence*. Additionally, the claimant contended that the MFN clause in the Austria-Slovakia BIT applied to dispute settlement as the wording of the clause was 'unrestricted' and failed to explicitly exclude the treaty's dispute resolution provisions.[56]

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48. *Berschader*, *supra* note 5.
49. *Nagel v. Czech Republic*, SCC Case No. 49/2002, Award, 9 September 2003.
50. *RosInvest, supra* note 5.
51. *Telenor*, *supra* note 5.
52. *Austrian Airlines*, *supra* note 5, at paras. 87-88.
53. See *ibid*. at paras. 109-113. See also *ibid*. at para. 122 reproducing the relevant portions of Article 3 of the Austria-Slovakia BIT, which states:
    3(1) Each Contracting Party shall accord to investors of the other Contracting Party and to their investments treatment that is no less favorable than that which it accords to its own investors or to investors of any third states and their investments.
    3(2) The provisions of para. 1 above, however, shall not apply to present or future benefits and privileges granted by one Contracting Party to investors of a third state or their investments in connection with
    (a) any membership in an economic or customs union, a common market, a free trade zone or an economic community;
    (b) an international agreement or a bilateral arrangement or national laws and regulations concerning matters of taxation;
    (c) a regulation to facilitate border traffic.
54. *Ibid*. at para. 110.
55. *Ibid*. at para. 111.
56. *Ibid*. at paras. 114-115.

In what appears to be a growing trend, the issues raised in this case regarding the scope and applicability of MFN protection divided the arbitral tribunal. Moreover, similar to *Renta 4*, the split decisions in *Austrian Airlines* do not expressly depend on the emphasis such arbitrators and arbitration panels placed on investors' interests versus states' interests with the majority refusing to extend MFN protection to procedural matters while the dissenting arbitrator (Charles Brower) came to a different conclusion.

Majority decision in Austria Airlines Award

In coming to its conclusion, the majority of the tribunal began its analysis by referring to the treaty interpretive principles outlined in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* ("VCLT"). In accordance with those principles, the tribunal looked to the ordinary meaning of Article 8 of the Austria-Slovakia BIT and noted that the words in that provision clearly limited the types of disputes that could be submitted to arbitration.[57] More specifically, the majority of the tribunal held that "The scope of Article 8 [was] limited to disputes about the amount of ... compensation and [did] not extend to the review of the principle of expropriation."[58]

That interpretation was, in the majority's view, confirmed by the context of Article 8, which included Articles 4(4) and 4(5) of the Austria-Slovakia BIT. In particular, the majority of the tribunal noted the difference in language between Articles 4(4) and 4(5). Under Article 4(4), an Austrian investor could only challenge the legitimacy of an expropriation before a Slovakian court, while Article 4(5) provided an Austrian investor the choice to refer challenges regarding the amount of compensation either to a Slovakian court or to an arbitral tribunal as contemplated in Article 8 of the Austrian-Slovakian BIT. Because Article 4(4) did not refer to arbitration or Article 8, the majority of the tribunal concluded that it had no jurisdiction to hear Austrian Airlines' claim about whether an expropriation had occurred and whether such action(s) were lawful.[59]

Finally, the majority of the tribunal considered arguments regarding the object and purpose of the Austria-Slovakia BIT and the intent of the state parties as reflected in that BIT's negotiating history. With respect to the object and purpose of the Austria-Slovakia BIT, the majority distinguished this case from the decisions reached in *EMV v. Czech Republic*

57. *Ibid.* at paras. 95-96.
58. *Ibid.* at para. 96.
59. *Ibid.* at para. 97.

and *Renta 4*.[60] Unlike the investment treaties at issue in those two cases, the majority of the tribunal observed that Article 4(4) of Austria-Slovakia BIT expressly provided a forum for disputes regarding the principle of expropriation and that there was "...no reason to believe that the review of the legality of the expropriation by the host state's authorities, be they Slovak or Austrian, would be ineffective ... [or] not support the Treaty's object and purpose of protecting foreign investors."[61] The majority found further support for its conclusion in the travaux préparatoires of the Austria-Slovakia BIT. Those materials revealed that the language of Article 8 deliberately restricted the availability of arbitration to disputes concerning the amount or conditions of payment of compensation in cases of expropriation because an earlier draft of Article 8 would have provided for arbitration in any dispute "regarding an investment."[62]

Having so found, the majority of the tribunal then went on to address arguments made by both parties regarding the scope of the MFN clause in the Austria-Slovakia BIT. Determining that it had jurisdiction to review the application of the MFN clause by virtue of the principle of *compétence-compétence* as articulated in the UNCITRAL Arbitration Rules, the majority of the tribunal rejected the claimant's attempt to import more favourable dispute resolution provisions from other investment treaties entered into by Slovakia by virtue of the MFN clause in the Austria-Slovakia BIT.[63] In so finding, the tribunal commenced its analysis by stating that there was no rule of international law under which it was obliged to adopt a restrictive or expansive interpretation of an agreement to arbitrate.[64] As a result, the tribunal reasoned (in direct contrast to propositions adopted by tribunals in *Plama*, *Telenor*, *Berschader* and *Wintershall*) that it had to interpret the MFN clause (Article 3) in the Austria-Slovakia BIT "neither restrictively or expansively but ... objectively and in good faith" and in accordance with Articles 31 and 32 of the VCLT.[65]

Examining the language of Article 3(1) of the Austria-Slovakia BIT, the majority in this case determined that the language of that MFN provision was ambiguous as it used the term "treatment" without distinguishing between substantive and procedural matters.[66] Consequently, the majority of the tribunal looked to the context of the MFN clause together

60. *Ibid.* at paras. 100-103.
61. *Ibid.* at para. 104.
62. *Ibid.* at paras. 105-107.
63. *Ibid.* at paras. 117-118, 135.
64. *Ibid.* at paras. 119-121.
65. *Ibid.* at para. 121.
66. *Ibid.* at para. 126.

with the dispute settlement provisions (i.e. Articles 4(4), 4(5) and 8) in the Austria-Slovakia BIT) to interpret the MFN clause in this case. In so doing, the majority of the tribunal first addressed arguments raised by the claimant regarding the exceptions (i.e. regional economic integration treaties) to the MFN clause in Article 3(2) of the Austria-Slovakia BIT.[67] On this issue, the majority rejected the claimant's arguments that the exceptions identified in Article 3(2) must be read to imply that all other matters not specifically excluded fall under the auspices of the MFN clause by virtue of the *expressio unius est exclusio alterius* principle.[68] Characterizing the *expression unius* principle as a "...supplementary means of [treaty] interpretation that [could] not alone determine the outcome [of the case]..."[69], the majority of the tribunal found it necessary to consider the MFN clause in light of the provisions governing access to arbitration under the Austria-Slovakia BIT. Specifically, the tribunal stated:

> Faced with a manifest, specific intent to restrict arbitration to disputes over the amount of compensation for expropriation to the exclusion of disputes over the principle of expropriation, it would be paradoxical to invalidate that specific intent by virtue of the general, unspecific intent expressed in the MFN clause. As a result...the specific intent expressed in Articles 8, 4(4) and 4(5) informs the scope of the general intent expressed in Article 3(1), with the result that the former prevails over the latter. In other words, the restrictive dispute settlement mechanism for expropriation claims set out in Articles 8, 4(4) and 4(5) constitutes an exception to the scope of Article 3(1). Hence, the MFN clause does not apply to the settlement of disputes over the legality of expropriations.[70]

This finding, as confirmed by reference to the negotiating history of the Austria-Slovakia BIT, led the majority of the tribunal to conclude that dispute settlement did not fall within the scope of the MFN clause and that it lacked jurisdiction over the claimant's claims.[71] As noted by Professor Reinisch, the above finding 'effectively neutralized' the MFN clause, as any reliance on such a 'general' and 'unspecific' provision would invalidate more 'specific' provisions agreed upon within the Austria-Slovakia BIT.[72] It is therefore not surprising that the majority's reasoning was scrutinized in a dissenting opinion written by Judge Charles Brower.

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67. See MFN clause referenced above at *supra* note 53.
68. *Ibid.* at paras. 127-131.
69. *Ibid.* at para. 131.
70. *Ibid.* at para. 135.
71. *Ibid.* at paras. 137-140.
72. August Reinisch, "How Narrow are Narrow Dispute Settlement Clauses in Investment Treaties?" (2011) 2(1) Journal of International Dispute Settlement 115, at 151.

Dissenting decision in Austrian Airlines v. Slovakia

In direct contradiction to the majority's approach, Judge Brower would have broadened the tribunal's jurisdiction by virtue of the MFN clause in the Austria-Slovakia BIT and thereby permitted the claimant access to arbitration for all of its claims. Specifically, Judge Brower would have ended the interpretive analysis in this case after applying the *expressio unius* principle in considering the exceptions to the MFN clause articulated in Article 3(2) of Austria-Slovakia BIT. According to Judge Brower, "...the presence of such express exceptions to MFN treatment normally should preclude the implication of further exceptions from other provisions of the Treaty, as the Final Award has done by reading Articles 8, 4(4) and 4(5) as implicit exceptions to the operation of [the MFN clause]."[73]

Taking issue with a number of points in the majority's analysis regarding the MFN clause, Judge Brower goes on to express concern about the majority's reliance on Articles 8, 4(4) and 4(5) as 'relevant context' for interpreting the MFN clause in the Austria-Slovakia BIT. Specifically, he notes:

> ...[I]t is not appropriate to consider provisions as "context" for interpreting an MFN clause that are less favorable than provisions in third-state treaties to which Claimant claims access. *If every time an MFN clause were invoked it were read together with the treaty provision which the MFN clause is alleged to circumvent, such a clause might never be given any effect*; it would be largely vitiated by that which it seeks to void, modify or expand by importing more favorable treatment from Respondent's third-state treaties. The treatment under a BIT that is possibly less favorable than that provided in third-State treaties is simply not the relevant "context" for interpreting the subject-matter of the MFN clause.[74] [emphasis added]

In Judge Brower's view, the more appropriate result in this case would have been to invoke the MFN clause in Article 3(1) of the Austria-Slovakia BIT as a means through which to vest the arbitral tribunal with jurisdiction to hear all of the claimant's claims. In Judge Brower's opinion, the broad language of Article 3(1) along with the explicitly listed exceptions to that clause in Article 3(2) of the Austria-Slovakia BIT supported such a result.

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73. *Austrian Airlines*, *supra* note 5 (Separate Opinion of Charles N. Brower) at para. 3.
74. *Ibid*. at para. 7.

3. Arbitral Decisions in which an MFN provision is used to access an expedited arbitration process

In contrast to the above arbitral decisions, the case discussed in this section assesses whether an MFN clause can be used to expedite access to arbitration. Following in the footsteps of many of its predecessors (*Maffezini*, *Siemens*, *Suez Sociedad*, *Gas Natural* and *National Grid*), the majority of the tribunal in this case extends MFN protection to procedural rights. That decision however generates a strong dissent from Professor Stern who, for the first time, clearly articulates and expounds upon the principle of consent in international law, which has largely gone unaddressed in the MFN jurisprudence and related commentaries to date.[75]

Impreglio S.p.A. v. Argentine Republic

In the most recent addition to the jurisprudence on the proper scope and application of MFN clauses the claimant, an Italian company, alleged that the Argentine Government took measures during its 2001-2002 economic crisis that had a negative impact on the claimant's water and sewage services business.[76] Notwithstanding a provision in the Argentina-Italy BIT that requires such disputes first be brought to the Argentine courts, the claimant in this case submitted its claims directly to arbitration.[77] Invoking the MFN clause in the Argentina-Italy BIT, the

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75. See Whitsitt, "MFN Clauses", *supra* note 10 at 536 (noting that the Maffezini tribunal failed to address the principle of consent in determining whether to extend MFN protection to the dispute resolution provisions of the Argentina-Spain BIT).
76. *Impregilo*, *supra* note 5 at paras. 13-48.
77. *Ibid*. at paras. 75-76. The relevant provisions of Article 8 of the Argentina-Italy BIT state:

    (1) Any dispute regarding an investment between an investor of one of the Contracting Parties and the other Party, arising out of or relating to this Agreement, shall, to the extent possible, be settled through friendly consultation between the parties to the dispute.

    (2) If the dispute cannot be settled amicably, *it may be submitted to the competent judicial or administrative courts of the Party in whose territory the investment is made.*

    (3) Where, after eighteen months from the date of notice of commencement of proceedings before the courts mentioned in paragraph 2 above, the dispute between an investor and one of the Contracting Parties has not been resolved, it may be referred to international arbitration.

    [...]

    (5) Where the dispute is submitted to international arbitration, the investor may choose to refer the dispute either to:

    a. The International Centre for the Settlement of Disputes (ICSID) established under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature in Washington on March 18, 1985,

claimant in this case argued that it was entitled to utilize more favourable dispute settlement procedures in the Argentina-US BIT, which did not require investors to submit disputes to local courts prior to initiating arbitration but rather only provides for a six-month period of consultations to try to amicably resolve the dispute.[78] Not unlike the arguments seen in many of the cases addressing MFN clauses as a basis for jurisdiction in investment arbitration, the claimant and the respondent in this dispute made a number of assertions respecting the proper scope and application of the MFN clause in the Argentina-Italy BIT.[79]

Majority decision in Impregilo

Like previous arbitral jurisprudence addressing the scope and application of MFN protection in similar circumstances (i.e. where an MFN clause was used to expedite the arbitral process), the majority of the tribunal in this case focused on interpretative rules (as opposed to placing emphasis on investors' interests versus states' interests) and found that it did have jurisdiction to hear the claim.[80] In so finding, the majority of the tribunal acknowledged that the Argentina-Italy BIT provides for a mandatory (although time limited) jurisdictional requirement

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provided that each Party to this Agreement is a signatory State to such Convention. Where such condition is not met, each Contracting Party hereby consents to submit the dispute to arbitration in accordance with the ICSID Additional Facility Rules regarding conciliation and arbitration, or

b. An ad hoc arbitration tribunal is established for each particular case. The arbitration shall be conducted in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) contained in Resolution No. 31/98 adopted by the United Nations General Assembly on December 15, 1976. The panel shall consist of three arbitrators. If the arbitrators are not nationals of the Contracting Parties, they shall be nationals of States having diplomatic relations with them. (emphasis added)

78. *Ibid*. at para. 76. The MFN clause (Article 3) in the Argentina-Italy BIT provides:

1. *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*.

2. The provisions set forth in paragraph 1 of this Article shall not apply to advantages and privileges accorded by either Contracting Party to any third country by virtue of that Party's binding obligations that derive from its membership in a customs or economic union, common market, or free trade area, or as a result of regional or subregional agreements, multilateral international agreements or double taxation agreements, or any other tax-related arrangements or agreements to facilitate cross border trade. (emphasis added)

79. *Ibid*. at paras. 51-78.

80. *Ibid*. at para. 108.

before a right to bring a case to ICSID can be exercised.[81] It then went on, however, to find that the claimant could rely on the MFN clause in Article 3 of the Argentina-Italy BIT to avoid compliance with those requirements.[82] In making this determination, the majority of the tribunal made a number of findings.[83] Most important to the majority's decision is its interpretation of the language in Article 3 of the Argentina-Italy BIT. Attaching 'special weight' to the wording of that clause, the majority of the tribunal found that the language of the MFN clause is broad enough to incorporate dispute settlement provisions.[84] To that end the majority states:

> The Arbitral Tribunal is of the opinion that the term "treatment" [in Article 3(1) of the Argentina-Italy BIT] is in itself wide enough to be applicable also to procedural matters such as dispute settlement. Moreover, the wording "all other matters regulated by this Agreement" is certainly also wide enough to cover the dispute settlement rules. The argument that the *ejusdem generis* principle would limit [the MFN clause's] application to matters similar to "investments" and "income and activities related to such investments" is not convincing, since the wording does not allow "all other matters" to be read as "all similar matters" or "all other matters of the same kind". Nor is the argument that an all-embracing concept like "all other matters" would make the previously mentioned terms "investments" and "income and activities related to such investments" superfluous, since it is indeed not unusual in legal drafting to indicate typical examples even in provisions which are intended to be of general application.[85]

In support of this finding, the majority of the tribunal went on to discuss a number of cases that have addressed the scope and applicability of MFN clauses in the international investment law context.[86] While the majority noted that there is not complete consistency within the jurisprudence on this topic, it appears to satisfy itself that "...in cases where the MFN clause has referred to "all matters" or "any matter" regulated in the BIT, there has been *near-unanimity* in finding that the clause covered the dispute settlement rules."[87] On that basis and in an apparent attempt to contribute to what it perceived to be a discernably clear jurisprudence, the majority reached the conclusion that it had jurisdiction to hear the claimant's case.

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81. *Ibid.* at paras. 70-94.
82. *Ibid.* at para. 108.
83. *Ibid.* at paras. 95-108.
84. *Ibid.* at para. 103.
85. *Ibid.* at para. 99.
86. *Ibid.* at paras. 104-108.
87. *Ibid.* at para. 108.

Minority decision in Impregilo

In contrast to the majority's final remarks, arbitrator Stern begins her dissenting opinion with the following observation:

> In fact, it might be emphasized that, concerning all the cases dealing with MFN clauses and dispute settlement, it becomes apparent, if one looks at the number of arbitrators that are in favour of applying the MFN clause to dispute settlement rather than at the number of awards, that the picture looks almost balanced, because of the repeated involvement of some of the arbitrators. In any case, it does not appear to me to be a legally convincing argument to rely on former cases as if they were binding precedents.[88]

After criticizing different aspects of the majority's reasoning, arbitrator Stern then goes on to state her opinion with respect to the scope and applicability of MFN clauses and in no uncertain terms indicates that she is "very strongly convinced that MFN clauses should not apply to dispute settlement mechanisms."[89] Having so stated, arbitrator Stern is clear that while she agrees with the results reached in *Plama* and its subsequent followers, she has concerns about the analyses used in those cases[90] and proceeds to explain that "...the core reason why an MFN clause cannot apply to dispute settlement is ultimately linked with the essence of international law."[91] The "essence of international law" referred to by arbitrator Stern, which forms the premise of her dissent and which is discussed below is the principle of consent.

Distinguishing between substantial and jurisdictional treatment in international law, arbitrator Stern commences her proposed analysis of MFN clauses by observing that national and international legal orders consider substantial and jurisdictional rights differently.

> ...On the national level when there exists a substantive right, there is always automatically a means to protect such a right through the jurisdictional system. In other words, on the national level the jurisdictional treatment is inherent in substantive treatment. In contrast, on the international level most rights cannot be enforced through a jurisdictional process, *it is*

88. *Ibid*. (Concurring and Dissenting Opinion of Professor Stern) at para. 5.
89. *Ibid*. at para. 14.
90. See for example *ibid*. at paras. 21-24 (where arbitrator Stern discounts the rationale used by the *Plama* and *Shum* tribunals that dispute settlement clauses should be excluded from the operation of MFN clauses on the basis that dispute settlement arrangements are 'specifically negotiated' by parties to a treaty). See also, *ibid*. at paras. 25-38 and 39-43.
91. *Ibid*. at para. 16.

> *only when, exceptionally, the State has given its consent – consent to other states for accepting the jurisdiction of the ICJ or consent to foreign investors for accepting international arbitration* – that such a "jurisdictional treatment" complements the substantive treatment granted by the international rules... [emphasis added][92]

Further explaining her position, arbitrator Stern notes that there are rules conferring substantive and jurisdictional rights to foreign investors and their investments, and there are rules dealing with the access of the foreign investor to the substantive and jurisdictional rights granted by the basic treaty.[93] In order for a foreign investor to access substantial rights under a BIT arbitrator Stern rightly points out that certain conditions must be fulfilled, including the well known conditions *ratione personæ*, *ratione materiæ*, *ratione temporis*.[94] Additionally, she explains that to obtain the jurisdictional rights granted by an investment agreement, those same prerequisites must be fulfilled in addition to the *ratione voluntatis* condition. In other words, a state must give its consent to such a procedure, which allows a foreign investor to commence legal action against that state at the international level.[95]

A fundamental principle upon which the international legal order has operated since its inception, arbitrator Stern emphasizes that a state's consent to arbitrate is different from the consent it provides to another state when ratifying an investment treaty.[96] Observing that *no participant* in the international community has an inherent right of access to jurisdictional recourse, arbitrator Stern explains:

> Just as a State cannot sue another State, unless there is a specific consent to that effect, for example through a declaration recognizing as compulsory the jurisdiction of the International Court of Justice, in the same manner, in the framework of BITs, investors are not capable of intervening on the international level against States for the recognition of their rights, unless States grant them such a right under the conditions that they determine. An arbitral tribunal – just as the ICJ or any international court – does not have a general jurisdiction, it only has a "*compétence d'attribution*", which has to respect the limits provided for by the States.[97]

Having so stated, arbitrator Stern goes on to support her conclusion that reference in an MFN clause to "all matters" never means that

92. *Ibid.* at para. 45.
93. *Ibid.* at paras. 47-49.
94. *Ibid.* at para. 51.
95. *Ibid.* at para. 52.
96. *Ibid.* at paras. 53-56.
97. *Ibid.*

the MFN clause is literally applicable to all matters, as the conditions of access to the rights granted by an investment treaty are not contemplated by that language.[98] In particular, arbitrator Stern reasons that an MFN clause could never modify the qualifying conditions (e.g. *ratione personæ*, *ratione materiæ and ratione temporis*) necessary for an investor to access substantive rights granted within a BIT.[99] An example of such reasoning can be seen in the following statement:

> It is not contended that an MFN clause cannot change the condition *ratione personæ*, which is a condition for the enjoyment of all treaty rights, whether substantive or jurisdictional. For example, if the basic treaty applies to national companies only if there is a 70 % foreign control, an MFN clause cannot be used to introduce a provision according to which a national company can be protected as soon as there is a 20 % foreign ownership, if such a clause exists in another treaty. In the same manner, if the basic treaty excludes international arbitration for dual nationals, an MFN clause could not be used to include dual nationals. More generally, it can be said that an MFN clause cannot enlarge the scope of the basic treaty to grant the rights of the treaty to investors that are not protected under the basic treaty.[100]

Having reasoned that an MFN clause cannot change the preconditions (e.g. *ratione personæ*, *ratione materiæ*, *ratione temporis*), arbitrator Stern contends that it must be equally true that an MFN clause cannot alter the condition *ratione voluntatis*, which is the qualifying condition for the enjoyment of an investor's jurisdictional rights under a BIT.[101] To that end, arbitrator Stern remarks:

> As long as the qualifying conditions expressed by the State in order to give its consent are not fulfilled, there is no consent, in other words no access of the foreign investor to the jurisdictional treatment granted by ICSID arbitration. An MFN clause cannot enlarge the scope of the basic treaty's right to international arbitration, it cannot be used to grant access to international

98. *Ibid*. at para. 57.

99. *Ibid*. at paras. 60, 63-77. Support for this proposition can be found in a number of cases including: *Tecnicas Mediambientales Tecmed S.A. v. the United Mexican States*, ICSID Case No. ARB(AF)/00/02, Award (29 May 2003) (where an arbitral tribunal refused to permit a claimant to use an MFN clause to access a more favourable ratione temporis clause in a BIT concluded between the host state and a third party). See also *M.C.I. Power Group L.C. and New Urbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award (31 July 2006); *Société Générale v. The Dominican Republic*, LCAI Case No. UN 7927, Award on Preliminary Objections to Jurisdiction (19 September 2008).

100. *Impregilo*, *supra* note 5 (Concurring and Dissenting Opinion of Professor Stern) at para. 64.

101. *Ibid*. at paras. 61, 78-81.

> arbitration when this is not possible under the conditions provided for in the basic treaty.[102]

Citing decisions of the ICJ and its predecessor court, arbitrator Stern proceeds to emphasize the coherence of her position with the importance of consent in international law and international investment law.[103] Taking on those who have criticized the tribunal in *Plama* for adopting a restrictive interpretation of the dispute settlement clause at issue in that case and citing numerous concerns about the tribunal's reasoning in *Maffezini*, arbitrator Stern prefers to characterize the tribunal's decision in *Plama* as an example of an international arbitration that stresses the importance of consent when speaking about an investor's jurisdictional rights.[104] Apparently siding with the *Plama* tribunal's reasoning that an MFN clause can only apply to a dispute settlement mechanism if this provision "leaves no doubt" that the parties to the BIT so intended, arbitrator Stern reasons:

> ...A consent that is given by a State to a defined but undetermined category of investors, which would moreover also be undefined as far as the conditions under which it is given or its scope are concerned, and would depend on the vagaries of possible other treaties entered into by the State, would not be a clear consent at all, it would be a versatile consent, it could even be said that it would not be a consent at all.[105]

Hence, arbitrator Stern concludes that "no separate basis of jurisdiction lying in Article VII of the Argentina/US BIT can be imported through the MFN clause into the Argentina/Italy BIT"[106] and finally determines that the tribunal has no jurisdiction to hear the claims of the claimant in this case.

4. Comments and Concluding Remarks

In contrast to (and perhaps an improvement from) earlier arbitral jurisprudence considering whether to extend MFN protection to proce-

102. *Ibid*. at para. 80.
103. *Ibid*. at paras. 89-99.
104. *Ibid*. at paras. 93-95. See also *ibid*. at paras. 100-107 where arbitrator Stern discusses the potential problems that could occur should tribunals continue to adopt the *Maffezini* line of reasoning. For example, arbitrator Stern raises concerns about potential treaty shopping, whether following *Maffezini* would actually bring about the intended goal of an MFN clause (i.e. to accord the same treatment to all investors), and the potential for "pick and choose" policies in the implementation of MFN clauses.
105. *Ibid*. at para. 98. See also *ibid*. at para. 108.
106. *Ibid*. at para. 109.

dural rights, the above cases subsequent to *Wintershall* do not expressly evidence a doctrinal divide defined by the arbitrator's predisposition to the interests of the foreign investor or host state. While there is a clear divergence of opinion in the more recent decisions, it is based on the emphasis investor-state tribunals and/or arbitrators place on different rules of treaty interpretation. Further, it is not clear whether those arbitral tribunals and/or arbitrators give primacy to the interests of a foreign investor or prefer to focus on the interests of the state parties to a treaty.

While all of the cases discussed in Part 2 above reject an application of the MFN principle that would confer an arbitral tribunal with jurisdiction over a class of claims not contemplated in the subject BIT, the reasons for those decisions in each case are different with the tribunals placing different emphasis on various treaty interpretive rules and two of the three cases leading to split decisions.

Thus, in *Renta 4* the majority of the tribunal and the dissenting arbitrator (Judge Brower) disagreed on the appropriate interpretation to be given an MFN clause, which was tied to FET in the Spain-Russia BIT. The tribunal in *Shum* considering a similar MFN clause chose, however, to emphasize a different treaty interpretive rule – that of *lex specialis derogat legi generali* – to conclude that the specific wording of the dispute settlement clause should prevail over the general wording of the MFN clause in the Peru-China BIT. Emphasizing yet another treaty interpretive tool, the majority of the tribunal in *Austrian Airlines* applied a contextual interpretation of the MFN clause in the Austria-Slovakia BIT by finding that the specifically worded narrow dispute settlement clause in that BIT constituted an exception to the scope of the BITs MFN clause. The majority's contextual interpretation was, however, questioned by Judge Brower again in a dissenting opinion. In contrast to the majority's reasoning, Judge Brower would have applied the *expressio unius* principle in interpreting the MFN clause and consequently extended the tribunal's jurisdiction to a class of claims not contemplated in the Austria-Slovakia BIT.

Albeit for a different category of cases considering the proper scope and application of MFN protection, the majority of the tribunal in *Impregilo* rejected arguments that would have limited the MFN clause in the Argentina-Italy BIT to an investor's substantive rights by virtue of the *ejusdem generis* principle and instead focused on the plain and ordinary meaning of the language in the MFN clause to find that the MFN clause could be used to access expedited arbitral procedures.

Regardless of what may be said about the correctness of each of the analyses in these cases it seems clear that divisions within the jurisprudence since *Wintershall* are now largely driven by the interpretive approach adopted by each tribunal and arbitrator, making such decisions difficult (if not impossible) to reconcile. In fact, it seems unlikely that a *jurisprudence constante* could ever emerge given the nature of these discrepancies. Debates among international law jurists concerning the appropriate emphasis to be given to different rules of treaty interpretation have long been a part of international law and will not likely be resolved any time soon.[107]

Arbitrator Stern's dissenting opinion in *Impregilo*, however, stands in stark contrast to the post-*Wintershall* arbitral decisions by not applying one specific rule of treaty interpretation over another when deciding the jurisdictional question of whether to extend MFN protection to procedural rights. Instead, while other investor-state arbitral tribunals have only made passing reference to the principle of consent when considering such jurisdictional questions,[108] arbitrator Stern appears to be the first to clearly articulate and expound upon the principle of consent as a basis for jurisdiction in this context.

As a corollary to the sovereignty and equality of states,[109] the principle of consent is at the core of international dispute resolution and dates back to the commencement of modern international law.[110] With reference to arbitration, the report by Baron Descamps to the First Hague Peace Conference on Convention No. 1 of 1899 noted:

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107. See e.g. ILC Commentary on draft Article 27 of the law of treaties, Yearbook of the International Law Commission (1966) vol. II, Reports of the Commission to the General Assembly, 218.

108. See e.g. *Wintershall*, *supra* note 5 at para. 160(2) where the tribunal (in denying a claimant's request to access an expedited arbitral process by virtue of an MFN clause) states:
"[T]he eighteen-month requirement of a proceeding before local courts (stipulated in Article 10(2)) is an essential preliminary step to the institution of ICSID Arbitration, under the Argetina-Germany BIT; it constitutes an integral part of the "standing offer" ("consent") of [Argentina], which must be accepted on the same terms by every individual investor who seeks recourse (ultimately) to ICSID arbitration for resolving its dispute with the Host State under the concerned BIT."

109. See generally, Ian Brownlie, *Principles of Public International Law*, 7th ed. (Oxford: Oxford University Press, 2008) at pp. 289 – 298, 710-711; H. Kelsen, *Principles of International Law*, 2nd ed. (New York: Holt, Rinehart and Winston, Inc., 1967) at 2243-2251; *J.H.W. Verzijl, International Law in Historical Perspective*, Vol. 1 (Leyden: Sijthoff, 1976).

110. Shabtai Rosenne, *The Law and Practice of the International Court*, 2nd ed. (Dordrecht: Martinus Nijhoff Publishers, 1985) at p. 313 [*Rosenne, International Court*].

> A voluntary system of jurisdiction in origin as well as in jurisdiction, it agrees with the just demands of sovereignty, of which it is only an enlightened exercise. For, if there is not power superior to the States which can force a judge upon them, there is nothing to oppose their selection of an arbitrator by common agreement to settle their disputes, thus preferring a less imperfect means of securing justice to a method more problematical and more burdensome.[111]

Approximately 24 years later the Permanent Court of International Justice ("PCIJ") noted in its advisory opinion on the *Status of Eastern Carelia*, that the fundamental principle underpinning the settlement of disputes involving sovereign states is that "no state can, without its consent, be compelled to submit its disputes... to arbitration, or any other kind of pacific settlement."[112] That is the oft-cited enunciation of the principle of state consent, a rule so "well established in international law" that the PCIJ felt no need to provide evidence of its existence, nor to elaborate on its precise scope or content.[113]

This principle has been reaffirmed many times over the years. In fact, in the majority of cases involving jurisdictional issues at the International Court of Justice ("ICJ" or "World Court"), the ICJ has clearly stated that its jurisdiction is founded upon the principle of consent.[114] Thus, the existence of the principle as a characteristic of the law of international judicial procedure is not open to question.

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111. This text is reproduced in *Rosenne, International Court*, *ibid*.
112. *Status of Eastern Carelia* (1923), Advisory Opinion, P.C.I.J. (Ser. B) No. 5 at 19.
113. While the PCIJ affirmed its delineation of the principle of consent in subsequent cases it did not elaborate on it. See e.g. *Mavrommatis Palestine Concessions* (Great Britain v. Greece) (1924), P.C.I.J. (Ser. A) No. 2 at 10. See also *Mavrommatis Jerusalem Concessions* (Great Britain v. Greece) (1925), P.C.I.J. (Ser. A) No. 5 at 21-22.
114. See e.g. *Corfu Channel (United Kingdom v. Albania)* (1948), Preliminary Objections, I.C.J. Rep. 15 at 27 [*Corfu Channel 1948*]: "...consent of the parties confers jurisdiction on the Court."; *Anglo-Iranian Oil Company (United Kingdom v. Iran)* (1952) I.C.J. Rep. 93 at 102-103: "[T]he jurisdiction of the Court to deal with and decide a case on the merits depends on the will of the Parties. Unless the Parties have conferred jurisdiction on the Court in accordance with Article 36, the Court lacks such jurisdiction."; *Ambatielos* (1953) I.C.J. Rep. 44 at 19: "The Court is not departing from the principle, which is well-established in international law and accepted by its own jurisprudence as well as that of the Permanent Court of International Justice, to the effect that a State may not be compelled to submit its disputes to arbitration without its consent."; *Monetary Gold Removed from Rome in 1943 (Italy v. France, UK, US)* (1954) I.C.J. Rep. 19 at 32 [*Monetary Gold Case*]: "To adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle in international law embodied in the Court's statute, namely, that the Court can only exercise jurisdiction over a State with its consent."

A recent study by Professor Romano, however, notes that there is a growing divergence between "theory and practice" in relation to the compulsory versus consensual nature of international jurisdiction generally.[115] Specifically, Professor Romano observes that while international law has seen a marked increase in the proliferation of international adjudicative bodies (including investor-state arbitral tribunals) and in international adjudication generally, the "real revolution" has been a shift in the concept and practice of international adjudication from a traditional consensual paradigm (requiring explicit and specific consent) to a compulsory paradigm (in which consent is implied in the ratification of treaties or is jurisprudentially by-passed).[116] While Professor Romano's study on this topic does not directly consider the practice of investor-state arbitral tribunals, there is little doubt that both the pre- and post-*Wintershall* arbitral jurisprudence discussed above raises questions about the practical applicability of consensual versus compulsory jurisdiction under BITs.

With Professor Stern's dissenting opinion in *Impregilo*, we see the first investor-state arbitral decision to address the consensual versus compulsory jurisdiction question in any meaningful way as a basis for not extending MFN protection to procedural rights. It would be very interesting to see another international investment law arbitral panel likewise take up that question as the rationale for finding that an MFN clause can indeed extend to procedural rights to investors or ground the jurisdiction of the arbitral tribunal itself. In that case, one would expect that the panel would also implicitly or expressly find that there has been a paradigmatic shift in international law from a consensual to a compulsory basis for jurisdiction.

115. See Cesare Romano, "The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent" (2007) 39 N.Y.U.J. Int'l L. & Pol. 791 at 793 [Romano, "Theory of Consent"]. See also Yuval Shany, "Contract Claims v. Treaty Claims: Mapping Conflicts between ICSID Decisions on Multisourced Investment Claims" (2005) 99 A.J.I.L. 835; Bernard Oxman, Complementary Agreements and Compulsory Jurisdiction" (2001) 95 A.J.I.L. 277; Elihu Lauterpacht, Aspects of the Administration of International Justice, Chapter 3 (Cambridge: Grotius Publications Limited, 1991).

116. Romano, "Theory of Consent", *ibid*. at 794-795, 804-834.