

**REDEFINING THE SUBSTANTIVE AND PROCEDURAL PROTECTIONS OF
MOST FAVOURED NATION CLAUSES IN BILATERAL INVESTMENT TREATIES
(BITS)**

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Declaration

I, PATRICIA WANGUI NJERU, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

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This Research Proposal has been submitted for examination with my approval as University Supervisor.

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Abstract

The MFN Clause has been subject to a change in interpretation an application following a series of cases arising from the both courts and tribunals. This study evaluates the history of the MFN Clause and contrasts it to its contemporary interpretation and application. The core objective is to ascertain the role of the MFN clause with regards to BITs. This will inform the recommendations on the potential redefinition of the clause or the removal of the protection from BITs in its entirety. The scope of the study will be limited to BITs as they are the key tool utilised to further development thorough foreign direct investment in developing countries. As such it is more often than not the case that the two parties in the BIT are a developed state and a developing state. The key methods used to obtain the findings are desktop research of cases seen to provide the most cogent justification for the conditional extension of the MFN clause.

The major finding was, the large acceptance of the substantive protection of MFN clauses, may be extended to include procedural advantages. This extension is justified where it is proved to provide more favourable conditions for investment. A narrow application of the clause in such an instance would be classed as a breach of the inextricable rights owed to investors under the BIT. This study suggests that the best remedy for this potentially detrimental application of the clause would be either to adopt an expressly open or limited MFN clause. However, the best possible remedy would be to do away with the MFN Clause in the context of BITs and never have to worry about the inclusion of provisions from 3rd party BITs.

List of Abbreviations

BIT	Bilateral Investment Treaty
CETA	Canada and the European Union in their Comprehensive Economic and Trade Agreement
MIT	Multilateral Investment Treaty
MFN	Most Favoured Nation clause
ILC	International law Commission
ICSID	International Centre for Settlement of Investment Disputes
ICJ	International Court of Justice
WTO	World Trade Organization
SCC	Stockholm Chamber of Commerce
VCLT	Vienna Convention on the Law of Treaties

List of cases

ICJ Cases

Anglo-Iranian Oil Co., U.K. v. Iran, Order, 1951 I.C.J. Rep. 106

Ambatielos, Greece v. U.K., Judgment, 1953 I.C.J. Rep. 10

Rights of U.S. Nationals in Morocco Case, 1952 I.C.J. Rep. 176

ICSID Tribunal cases

Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID ARB/97/7, Award, 1999.

ADF Group Inc. v. Unites States of America, ICSID ARB (AF)/00/1, Award, 2003.

M.C.I. Power Group L.C and New Turbine, Inc v Republic of Ecuador, ICSID ARB/03/6, Decision on the Application for Annulment, 2007.

Plama Consortium v Bulgaria, ICSID, ARB/03/24, Award, 2008.

Wintershall Aktiengesellschaft v Argentine Republic, ICSID ARB/04/14, Award, 2008.

RosInvest UK v. The Russian Federation, ICSID ARB/02/13, 2004.

Impregilo S.p.A. v. Argentine Republic, ICSID ARB/07/17, 2011.

Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan, ICSID, ARB/02/13, 2004.

Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID, ARB (AF)/00/2, 2003.

Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic, ICSID ARB/03/19, Award, 2015

Siemens A.G. v. The Argentine Republic, ICSID ARB/02/8, Award, 2004

UNCITRAC Cases

National Grid plc v. The Argentine Republic, UNCITRAL Arbitration, 2006

White Industries v. India, UNCITRAL, Final Award, 2011

List of Legal Instruments

Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331

General Agreement on Tariffs & Trade 1994, 1867 U.N.T.S. 190 33 I.L.M. 1153

Agreement between Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments, 25 November 1959 of 2009, 457 U.N.T.S. 24.

Ads Draft International Convention for the Mutual Protection of Private Property Rights in Foreign Countries 1956

Abs-Shawcross Draft Convention on Foreign Investment 1959

United Nations, *Statute of the International Court of Justice*, 18 April 1946.

Agreement between the Argentine Republic and the Kingdom of Spain on the reciprocal promotion and protection of Investments, 28 September 1992, 1699, 1-29403

Comprehensive Economic and Trade Agreement, 7 May 2016, 2016/0220 (NLE).

CHAPTER ONE

History of the MFN Clause

1. Background

A bilateral investment treaty (BIT), is an international agreement between two states for the Protection and Promotion of Investments made by private individuals or private companies.¹ This is different from multilateral investment treaties (MITs) which are seen to be established for the same investment purposes but have more than two sovereigns as parties.² The term bilateral connotes that the agreement is between two countries where one state is acting as the Host State and another is acting as an Investor State.³ The key purpose of these treaties is to assist “developed, capital-exporting states to ensure that their nationals are financially and legally protected when investing in developing, capital-importing states.”⁴ This overriding objective has transcended the ages and contributed to an increase in the number of BITs signed between states.⁵

The first recording of the Most Favoured Nation Clause (MFN) as a protection, was in the ‘Ads Draft International Convention for the Mutual Protection of Private Property Rights in Foreign Countries 1956.’⁶ The MFN provision at Article 4 of the Ads Draft stated “In so far as better treatment is promised to non-nationals than to nationals either under intergovernmental or other agreements or by administrative decrees of one of the High contracting Parties, including most-favoured nation clauses, such promises shall prevail.”⁷ This provision went on to influence the Abs-Shawcross Draft Convention on Foreign Investment 1959.⁸ Article 3 of the Abs-Shawcross draft convention provided as follows “Each Party shall at all times ensure the observance of

¹ Parker, S.L., ‘A BIT at a Time: The Proper Extension of the MFN Clause to Dispute Settlement Provisions in Bilateral Investment Treaties.’ *The Arbitration Brief* 2, (2012), 31.

² <https://www.law.berkeley.edu/library/dynamic/guide.php?id=65> on 19 February 2017.

³ <https://www.law.berkeley.edu/library/dynamic/guide.php?id=65> on 19 February 2017.

⁴ <https://www.iisd.org/investment/law/treaties.aspx> accessed on 17/01/17; Juillard P, ‘Bilateral Investment Treaties In The Context Of Investment Law’9 (2001)1.

⁵ <https://www.iisd.org/investment/law/treaties.aspx> accessed on 17/01/17; Juillard P, ‘Bilateral Investment Treaties In The Context Of Investment Law’9 (2001) 2.

⁶ Katia Yannaca-Small, ‘International Investment Law: Understanding Concepts and Tracking Innovations’ (2008), 103.

⁷ Katia Yannaca-Small, ‘International Investment Law: Understanding Concepts and Tracking Innovations’ (2008), 103.

⁸ Katia Yannaca-Small, ‘International Investment Law: Understanding Concepts and Tracking Innovations’ (2008), 103.

any undertakings which it may have given in relation to investments made by nationals of any other party.

It was with this guidance that the MFN clause was incorporated into the first BIT between Germany and Pakistan in 1959.⁹ This protection still remains at Article 7 in the current Germany – Pakistan BIT of 2009.¹⁰ Due regard is given to this codification of MFN protection, as it led to the advancement of diplomatic relations between sovereigns with a shared interest to promote and protect cross-border investments.¹¹

MFN clauses in BITs have been seen to come into play in two instances. Firstly, substantive protection, where an investor seeks to ensure that their investments are protected and they receive all substantive favourable treatment accorded to other investors. Secondly, where they wish to import a procedural advantages from 3rd party BITs that their host state have signed.¹² This was first discussed in the *Anglo-Iranian Oil Company* case heard in the International Court of Justice in 1952.¹³ In this instance the United Kingdom in a dispute with Iran sought to rely on a BIT signed between Iran and Denmark.¹⁴ The dispute centred on, Most Favoured Nation Treatment being denied to the Anglo Iranian Oil Company in accordance with practice and principles of international law.¹⁵ The tribunal in this instance held that “A third-party treaty, independent of and isolated from the basic treaty, cannot produce any legal effect as between the United Kingdom and Iran.¹⁶” Thus establishing the MFN clause found in the treaty in question would not be used to borrow the procedural protections from a 3rd party treaty. It would not be extended to include the procedural advantages that the United Kingdom sought to enforce.¹⁷ Procedural protection is to be understood as borrowing a favourable dispute resolution mechanism from other BITs signed by the host state and other sovereigns. Substantive Protection is to be understood as, favourable treatment of their investments such as tariffs and tax exemptions that other investors receive. Such treatment is given to both

⁹Katia Yannaca-Small, ‘International Investment Law: Understanding Concepts and Tracking Innovations’ (2008), 104.

¹⁰<http://investmentpolicyhub.unctad.org/IIA/mappedContent/treaty/1733> on 30 January 2017.

¹¹<http://investmentpolicyhub.unctad.org/IIA/mappedContent/treaty/1733> on 21 February 2017

¹²Barber Louise: ‘Cart Before the Horse; Can MFN Clauses Expand the Key Definitions in Investment Treaties?’ *Kluwer arbitration blog*, (2014) available at <http://kluwerarbitrationblog.com/2014/09/02/cart-before-the-horse-can-mfn-clauses-expand-the-key-definitions-in-investment-treaties/> on 17 January 17.

¹³*Anglo-Iranian Oil Company case (United Kingdom v. Iran)* Judgment, 1952 I.C.J. 93.

¹⁴Banifatemi Yas, ‘The Emerging Jurisprudence On The Most-Favoured-Nation Treatment In Investment Arbitration’, *Shearman & Sterling*, (2009), 2.

¹⁵<http://www.icj-cij.org/docket/index.php?sum=82&p1=3&p2=3&case=16&p3=5> on 14 March 2017.

¹⁶Banifatemi Yas, ‘The Emerging Jurisprudence On The Most-Favoured-Nation Treatment In Investment Arbitration’, 4.

¹⁷<http://www.icj-cij.org/docket/index.php?sum=82&p1=3&p2=3&case=16&p3=5> on 14 March 2017.

national investors and to foreign direct investors who gain protection through other BITs signed by the host state.

1.2. Statement of the problem

The application of the MFN clause in BIT's has historically only applied to the substantive treatment of the investors and their investments. However, given the difference in material construction of the MFN clauses it has led to what was purely a substantive protection, gaining a procedural element. This procedural advantage has been used to facilitate treaty and forum shopping. Essentially, going against the sentiments of the ICJ in the *Anglo-Iranian Oil Company* case. It is due to this that the exact nature and scope of both protections has since become muddled in uncertainty. Whereas initially the parties' investments were sufficiently protected by the MFN Clause, it may now facilitate greater difficulty particular in the dispute resolution mechanisms negotiated into the BIT.

1.3. Justification of the study

The import of this study is seen in the ever growing number of BITs signed by sovereigns.¹⁸ Such may be seen from the example of Kenya, which has signed seventeen BITs (as of the writing of this study).¹⁹ To continue with the example of Kenya, understanding the consequences of a poorly worded MFN clause is crucial as this may have a detrimental effect for the still developing economy.²⁰ Consequently, the effects of such clauses may lead to penalties that are felt by both developed countries if not mitigated.²¹

The inclusion of the MFN Clause has remained in effect due to its extensive substantive protection as is evidenced by its inclusion in every BIT ratified by Kenya.²² The underpinning of this being need for equality of protections for all foreign investors.²³ Due to the inconsistency in wording of the actual clause, there has been much confusion as to the proper use of MFN as a substantive and in certain circumstances procedural protection.²⁴ This has also been occasioned by the difference in decisions reached by courts and tribunals charged with

¹⁸ <http://investmentpolicyhub.unctad.org/IIA/CountryBits/108> on 08/02/17 on 8 February 17

¹⁹ <http://investmentpolicyhub.unctad.org/IIA/CountryBits/108> on 08/02/17 on 8 February 17.

²⁰ Kerner A, "why should I believe you? The costs and consequences of Bilateral Investment Treaties" International studies quarterly Emory University, (2009).

²¹ Kerner A, "why should I believe you? The costs and consequences of Bilateral Investment Treaties" International studies quarterly Emory University, (2009).

²² <http://investmentpolicyhub.unctad.org/IIA/CountryBits/108> on 08/02/17 on 8 February 17.

²³ Barclay Thomas 'Most-Favoured-Nation' Clause in Commercial Treaties'

²⁴ Barclay Thomas 'Most-Favoured-Nation' Clause in Commercial Treaties', *The Yale Law Journal*, (1967), 26-32.

determining the appropriate application of the clause.²⁵ The main peculiarity of such decisions is apparent in that they are final and binding yet the tribunal itself is only bound by the treaty.²⁶ As such the current study may be seen as doubly crucial. Firstly, in its investigation on the possible consequence of tribunal decisions like the one seen in *Maffezini*. Secondly, the effect it has on the future drafting or inclusion of MFN clauses in BITs.

1.4. Hypothesis

The hypothesis going into the study is as follows;

1. The history of the MFN clause will show its growth in use as a means to liberalize trade,
2. The continued appearance of MFN clauses in BITs' is based on the need to ensure that all investors and their investments are accorded the proper substantive protections as agreed within the BIT,
3. It is essentially irreplaceable in the grand scheme of furthering foreign direct investment and furthering the economy of the host state,
4. The removal of the MFN clause from BITs will provide the much needed clarity and uniformity in the grand scheme of international investment policy. Furthermore, given the fact that the MFN clause is not considered international customary law it will be correct to state that the parties will not be in contravention of the customary principles of international law.

1.5. Statement of objective(s)

This study has one core objective, namely to define the proper use of the substantive and procedural protection of MFN clauses. The core objective may be informed by investigating;

1. The reasons why MFN clauses are still considered an essential protection in BITs,
2. What may be the effect of the removal of the MFN clause from BITs,
3. Whether such effect will be favourable to the promotion and protection of investments,
4. The possible detriments if any to the efficacy of BITs.

1.6. Research Questions

This study will address the following interrelated research questions;

1. What is the history of the MFN Clause in international investment law?

²⁵ Barclay T 'Most-Favoured-Nation' Clause in Commercial Treaties', 26-32.

²⁶ Dixon M, 'International law' Oxford University Press, 2013,151.

2. What is the theoretical justification of the MFN clause?
3. What may acritical analysis of case law in various courts and tribunals demonstrate about the evolution of the MFN Clause?
4. What consequences have come about due to the mixed interpretation of the MFN clause?
5. Recommendations and conclusion

1.7. Literature Review

Vesel notes that from their historic origin, MFN clauses have come to be considered the “cornerstone of all modern commercial treaties.”²⁷ Where they were once seen to be applied in consular relations they have since become a core element of international investment agreements, such speaks to their continued use due to tradition.²⁸ He asserts the historical purpose of the MFN Clause, was to magnify and strengthen the European powers and further magnify the weakness of the states subject to these agreements.²⁹

European powers utilized unilateral agreements where they obtained the necessary concessions for all European investors whilst the weak party in the agreement was made to provide the concessions to all investors who came under the agreement.³⁰ This was the case till China and Belgium conflicted over the essentially one sided benefits of the agreements.³¹ China was seen to issue a public statement stating as follows, “The 'unequal treaties' which were exacted from China nearly a century ago have established between Chinese and foreigners discriminations that are now sources of endless discontent and friction with foreign powers.³² Such a state of affairs is not as it should be, since intercourse between nations, as between individuals, finds its rational motif in the exchange of mutual benefits which will endure and lead to lasting friendship.³³ In an age which has witnessed the coming into existence of the League of Nations

²⁷ Scott Vesel, ‘Clearing a Path through a Tangled Jurisprudence: Most-Favoured-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties’, *Yale Journal of International Law*, 2007, 10.

²⁸ Vesel, ‘Clearing a Path Through a Tangled Jurisprudence: Most-Favoured-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties’, 10.

²⁹ Vesel, ‘Clearing a Path through a Tangled Jurisprudence: Most-Favoured-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties’, 12.

³⁰ Vesel, ‘Clearing a Path through a Tangled Jurisprudence: Most-Favoured-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties’, 12.

³¹ Vesel, ‘Clearing a Path through a Tangled Jurisprudence: Most-Favoured-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties’, 12.

³² *Statement of the Chinese Government*, 1929 P.C.I.J., No. 16-I, at 271 (Nov. 6), 167.

³³ Ustor E, ‘First report on the most-favoured-nation clause’, *International Law Commission Yearbook*, Vol. II (1969)

... there does not seem to be any valid reason to justify international relations which are not founded on equality and mutuality.³⁴”

Such is the background of the first dispute focussing on MFN clauses, namely the *Anglo Iranian Oil Case*.³⁵ The pertinence of this study to the present study is its chronology on the pre-codification of the MFN clause. This provides both history and insight on the jurisprudence of the clause from its original understanding to its current understanding.³⁶

Thulasidhass discusses the possibility of attaining uniformity and consistency through the use of interpretive rules such as *ejusdem generis* (words of the same kind), questioning presumptive approaches, recognising relative autonomy of treaty components, and balancing conceptual evolution over textual interpretation.³⁷ In his analysis on the effects of the *ejusdem generis* rule, Thulasidhass posits that this rule of interpretation shall lead to a limited understanding and application of the MFN clause. He cites *The Ambatielos Claim* where the ICJ was seen to state that the MFN clause can only “attract matters belonging to the same category of subject as that to which the clause itself relates.”³⁸ Such understanding effectively leads to the non-expansion of the clause unless parties to the dispute otherwise opt to have the clause structured in a manner that would facilitate such expansion. However, it is key to not that this means of interpretation may be seen as too restrictive by some but in effect provides for the absolute certainty on the function of such protections in treaties.

Thulasidhass concludes by suggesting that the “interpretative discretion of investment tribunals” is key in understanding how the MFN clause ought not to be interpreted.³⁹ He also calls for caution going forward, that tribunals seek not to add on to the negative uniformity in their interpretation of principles of international investment.⁴⁰ There appears to be a move towards conservatism within the ICJ whilst other tribunals are seen to construe the MFN clauses with less restraint. This study proposes to advance the views of the ICJ as they may be seen to

³⁴ *Statement of the Chinese Government*, 167.

³⁵ Vesel, ‘Clearing a Path through a Tangled Jurisprudence: Most-Favoured-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties’, 13.

³⁶Thulasidhass, ‘Most-Favoured-Nation Treatment in International Investment Law: Ascertain the Limits through Interpretative Principles’ 17.

³⁷Thulasidhass, ‘Most-Favoured-Nation Treatment in International Investment Law: Ascertain the Limits through Interpretative Principles’, 17.

³⁸ *Ambatielos, Greece v. U.K.*, Judgment, (1953) ICJ 10, May 19.

³⁹ Thulasidhass, “Most-Favoured-Nation Treatment in International Investment Law: Ascertain the Limits through Interpretative Principles”, *Amsterdam Law Forum*, (2015), 1.

⁴⁰Thulasidhass, “Most-Favoured-Nation Treatment in International Investment Law: Ascertain the Limits through Interpretative Principles”, *Amsterdam Law Forum*, (2015), 1.

be promoting certainty in the use of the clause rather than providing awards/decisions based on the exercise of discretion.

1.8. Theoretical Framework

The effectiveness of the MFN clause may rightly be discussed within the economic theory of comparative advantage school.⁴¹ Raz rightly observed “every law necessarily belongs to a legal system” and as a protection seen in treaties it is safe to say that the MFN clause belongs within the international law system.⁴² Comparative advantage theory has its roots in absolute advantage as espoused by Adam Smith.⁴³ Absolute advantage instructs countries to specialize in production of what they are most efficient at making and exchange that product or service with other countries.⁴⁴ Comparative advantage adds on to this by instructing countries to not only produce that which they have an absolute advantage over but even goods that they may have a comparative advantage over.⁴⁵ This is best understood through an illustration, “Country *A* is more efficient than Country *B* at producing *both* commodities *X* and *Y*, it will pay the citizens of Country *A* to specialize in producing *X*, which it is *most* best at producing, and buy all of commodity *Y* from Country *B*, which it is better at producing but does not have as great a comparative advantage as in making commodity *X*.”⁴⁶ The key difference between the two is that “comparative advantage implies an opportunity cost associated with the production of one good compared to another.”⁴⁷ This theory explains the division of labour through specialist production.⁴⁸ With regard to BITs, this theory lends itself as a justification of what why extension of the MFN clause may indeed be permitted. Simply, there is a comparatively better procedural protection in a 3rd party BIT as opposed to the basic BIT.

⁴¹ Priel Dan, ‘Toward Classical Legal Positivism, Australian Society of Legal Philosophy’ Australian Society of Legal Philosophy, (2012), 13.

⁴² Raz Joseph, ‘*The Concept of a Legal System: An Introduction to the Theory of Legal System*’, Oxford University Press, London, 1980, 1.

⁴³ <https://mises.org/library/ricardian-law-comparative-advantage> on 19 December 2017.

⁴⁴ <https://mises.org/library/ricardian-law-comparative-advantage> on 19 December 2017.

⁴⁵ <https://mises.org/library/ricardian-law-comparative-advantage> on 19 December 2017.

⁴⁶ Rehim Kılıç, ‘Absolute and Comparative Advantage: Ricardian Model’ Michigan State University, June 2002, 5.

⁴⁷ Rehim Kılıç, ‘Absolute and Comparative Advantage: Ricardian Model’ Michigan State University, June 2002, 10.

⁴⁸ <https://mises.org/library/ricardian-law-comparative-advantage> on 19 December 2017.

CHAPTER TWO

Theoretical Framework of the MFN Clause

2. Introduction

This chapter shall explore the appropriate understanding of the MFN clause through the theory of Comparative advantage. This discussion will begin with a detailing of the trends that pushed liberalization of trade. It is from this liberalization that the growth in the use of the MFN clause was seen. The objective being to ascertain the proper object and purpose of the MFN clause. As the world moved away from the colonial period and anti-colonial rhetoric began to grow.⁴⁹ The need for a concretized legal framework for protection of foreign investors became more pronounced as newly established independent states began to nationalise foreign property so as to recoup their forcefully expropriated wealth.⁵⁰ Following the destruction that was seen through the world after World War II, liberalization of trade was seen as a means to return the countries most affected to their original place, prevent nationalism and hostile retribution.⁵¹ The two main principles that were seen to further the efforts and have contributed significantly to their success include,⁵²

1. The non-discrimination principle – This stipulates that both trade restrictions and proposals to reduce trade restrictions should apply to all of a country’s trading partners equally, and that imported goods and services will not be treated differently than domestic ones. Which can be seen through the national treatment clause and fair and equitable treatment clause.⁵³
2. The principle of reciprocity - all participating countries offer to reduce some of their own import barriers or export subsidies in exchange for comparable steps by their negotiating partners. Which is best seen in the use of most favoured nation clauses.⁵⁴

The above trends in the use of MFN clauses and other investment treaty protections provides a historic context that informs the following theoretical discussion on the MFN clause. This

⁴⁹ <http://www.globalization101.org/liberalization-of-international-trade/> on 25 September 2017.

⁵⁰ <https://hbswk.hbs.edu/item/restoring-a-global-economy-19501980> on 26 September 2017.

⁵¹ <https://hbswk.hbs.edu/item/restoring-a-global-economy-19501980> on 26 September 2017.

⁵² <http://www.globalization101.org/liberalization-of-international-trade/> on 25 September 2017.

⁵³ <http://www.globalization101.org/liberalization-of-international-trade/> on 25 September 2017.

⁵⁴ <http://www.globalization101.org/liberalization-of-international-trade/> on 25 September 2017.

has resulted in an increase in competition between developed countries and developing countries to attain some of the benefits brought about through investment treaties.⁵⁵

2.1. Comparative Advantage

The comparative advantage theory as espoused by Ricardo in his 1817 book “On the Principles of Political Economy and Taxation”, provides a theoretical framework on international trade.⁵⁶ Comparative advantage occurs when one country can produce a good or service at both a lower opportunity cost and in a more efficient manner than another.⁵⁷ This will ensure that both the labourer and the material that they are producing are of high quality and produced in an efficient manner.⁵⁸ An example of this may be seen in cases of oil rich countries which may be said to have a comparative advantage in chemical production.⁵⁹ Oil provides a cheap source of material for the chemicals when compared to countries without it.⁶⁰ Thus, Saudi Arabia, Kuwait and Mexico compete well with U.S. chemical production firms.⁶¹

Despite the above efficiency in production and formation of pertinent BITs in trade, this theory demonstrates the significance of the MFN Clause in various ways.⁶² This theory assumes a homogenous level of output and the unquestioned willingness of the labourers to switch from one form of production to another.⁶³ This may be remedied by the MFN clause as the BIT ensures that both efficient production and willingness of the labourers is present.⁶⁴ In addition the political considerations between the two states may be stabilized by the inclusion of the MFN clause as negotiated by the countries.⁶⁵ It also assumes two products when in reality it is numerous products between two countries or more.⁶⁶ The MFN clause is an umbrella clause that covers all that may be termed as investment. Thus, it covers all possible product or services

⁵⁵ Busse M, Königer J and Nunnenkamp P, ‘FDI promotion through bilateral investment treaties: more than a bit?’ *Review of World Economics / Weltwirtschaftliches Archiv*, vol. 146, no. 1 (2010), 149.

⁵⁶ <http://policonomics.com/ricardian-trade-theory/> on 11 September 2017.

⁵⁷ <https://www.economicshelp.org/blog/glossary/comparative-advantage/> on 11 September 2017.

⁵⁸ <http://www.econlib.org/library/Ricardo/ricP2a.html> on 11 September 2017.

⁵⁹ <http://www.econlib.org/library/Ricardo/ricP2a.html> on 11 September 2017.

⁶⁰ <https://www.thebalance.com/comparative-advantage-3305915> on 11 September 2017..

⁶¹ <https://www.thebalance.com/comparative-advantage-3305915> on 11 September 2017..

⁶² Lowenfeld .F.A, ‘International Economic Law’ 2nd Edn Oxford University Press 2011, 4 - 7

⁶³ Lowenfeld .F.A, ‘International Economic Law’ 2nd Edn Oxford University Press 2011.

⁶⁴ Parker S.L. ‘A BIT at a Time: The Proper Extension of the MFN Clause to Dispute Settlement Provisions in Bilateral Investment Treaties’, *The Arbitration Brief* 2, no. 1 (2012), 64.

⁶⁵ Bernard A.B, Redding S. J. and. Schott P.K, ‘Comparative Advantage and Heterogeneous Firms’ *The Review of Economic Studies*, Oxford University Press vol. 74, no. 1 (2007), 39.

⁶⁶ Heckscher .E, ‘The Effects of Foreign Trade on the Distribution of Income’ English translation 1949, in Lowenfeld .F.A, ‘International Economic Law’ 2nd Edn Oxford University Press 2011.

being provided and protected through the BIT, including dispute resolution provisions. Furthermore, it assumes the prices of the production and the products will remain constant over time.⁶⁷ The MFN accounts for price fluctuation by ensuring fair trade practices.⁶⁸ Some host states have increased the number of BITs they sign as a means of increasing flow of foreign direct investment monies within their industries as evidenced in Mexico.⁶⁹ Such increase whilst being seen through and increase in BITs, is also evident of the apparent security that host courtiers may be seen as receiving through the various umbrella clauses, particularly the MFN clause.⁷⁰

The main shortcoming of this theory is the risk of Dutch disease.⁷¹ This refers to the singularity where countries specialise in producing primary products and doing so they harm the long-term performance of the economy.⁷² Such was the case in the Netherlands where in the 1970s, the country specialised in producing natural gas, and neglected manufacturing and when the gas industry declined, the economy was left behind its near neighbours.⁷³ However, whilst this may be possible, the numerous investments that may be covered under a BIT allows for the diversity necessary to keep the economy of both countries growing.

The above highlights the vulnerability of international trade and the ability of the MFN clause to provide security against these limitations. The efficiency of the MFN clause is thus hampered by the lack of a fixed form and narrow application. However, even in the narrow interpretation it is still susceptible to manipulation as seen in *Emilio Augustin Maffezini v. The Kingdom of Spain*.⁷⁴ Uniformity, if applied, may ensure the different investments are governed in a manner that removes risk by ensuring parties may determine their disputes based not on the direction but on the pertinent BIT.

⁶⁷ Lowenfeild .F.A, 'International Economic Law' 2nd Edn Oxford University Press 2011.

⁶⁸ Lowenfeild .F.A, 'International Economic Law' 2nd Edn Oxford University Press 2011.

⁶⁹ Waldkirch A, 'Comparative advantage FDI? A host country perspective', *Review of World Economics / Weltwirtschaftliches Archiv*, Vol. 147, No. 3 (2011), 485.

⁷⁰ Waldkirch A, 'Comparative advantage FDI? A host country perspective,' 489.

⁷¹ <https://www.economicshelp.org/blog/glossary/comparative-advantage/> on 11 September 2017.

⁷² <https://www.economicshelp.org/blog/glossary/comparative-advantage/> on 11 September 2017.

⁷³ <https://www.economicshelp.org/blog/glossary/comparative-advantage/> on 11 September 2017.

⁷⁴ *Emilio Augustin Maffezini v. The Kingdom of Spain*, ICSID, ARB/97/7 Award of 13 November 2001.

2.3. Conclusion

Evidence of a comparative advantage in certain BITs has been stated by some tribunals as justification for the redefined application of MFN clauses where they are vague or deemed to be too limited in the basic BIT.⁷⁵ However, given the inherent limit of two parties in a BIT undermines the purpose of the MFN Clause. This is due to the fact that in a BIT the parties have already consented to grant each other's investments favourable treatment, and possibility of a 3rd party gaining more favourable treatment from the basic BIT is not seen.

⁷⁵ *Emilio Augustin Maffezini v. The Kingdom of Spain*, Award 39.

CHAPTER THREE

Evolution of MFN Clause through Case Law

3. Introduction

Thus far the MFN clause appears to be applicable primarily to the substance of a BIT, that is, everything that is considered to be part of the investment. Such primary application may however, be extended where parties agree. Essentially, it is a provision in a treaty under which a State agrees to accord to the other contracting partner treatment to its investments in the host state, that is no less favourable than that which it accords to other or third states.⁷⁶ Thus, for the clause to function it requires that more favourable treatment is provided to a third state.⁷⁷ The MFN clause would only be applicable to dispute resolution procedure where the parties expressly include it as part of what they both view as ‘treatment.’⁷⁸ In order to ascertain whether the above separation between substance and procedure is valid we must first concretize what is viewed as ‘treatment’ under the MFN clause.

The scope of what may be termed as treatment has been defined in two cases, namely in *Siemens AG v. The Argentine Republic*, where the tribunal stated that treatment in its ordinary meaning refers to behaviour in respect of an entity or a person.⁷⁹ This was further elaborated in *Suez, Sociedad General de Aguas de Barcelona SA v. The Argentine Republic*, where the ICSID tribunal stated the following, “the ordinary meaning of that term within the context of investment includes the rights and privileges granted and the obligations and burdens imposed by a Contracting State on investments made by investors covered by the treaty.”⁸⁰ The tribunal concluded that the term treatment does not exclude the dispute settlement provisions from the scope of the MFN clause.⁸¹ Despite this open-ended interpretation, in order to be certain of the inclusion of dispute resolution under the MFN clause it must be clear from the parties’ intention.

Consequently, in some cases the parties’ intention has been clear from the wording of the MFN clause itself, as seen in the Spain-Argentina BIT. At Article 4 (3) of the Spain-Argentina BIT

⁷⁶ Radi Y, ‘Application of the MFN Clause to Dispute Settlement Provisions of BITs’, *The European Journal of International Law* Vol. 18, (2007), 759.

⁷⁷ Radi Y, ‘Application of the MFN Clause to Dispute Settlement Provisions of BITs’, 758.

⁷⁸ Radi Y, ‘Application of the MFN Clause to Dispute Settlement Provisions of BITs’, 759.

⁷⁹ *Siemens A.G. v. The Argentine Republic*, ICSID ARB/02/8, 2004, 85.

⁸⁰ *S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID ARB/03/19, 2015, 189.

⁸¹ Radi Y, ‘Application of the MFN Clause to Dispute Settlement Provisions of BITs’, 769.

MFN treatment was excluded from applying to the following “privileges which either Party may grant to investors of a third State by virtue of its participation in a free trade area; a customs union; a common market; a regional integration agreement; or an organization of mutual economic assistance by virtue of an agreement concluded prior to the entry into force of this Agreement, containing terms similar to those accorded by that Party to participants of said organization.” The *Suez* Tribunal in interpreting this provision stated that the “parties failure to refer among these excluded items to any matter remotely connected to dispute settlement reinforces the interpretation that the most-favoured-nation clause includes dispute settlement.”⁸² Similarly in the UK-Argentina BIT the tribunal in *National Grid plc v. The Argentine Republic*, stated the following, as a “matter of interpretation, specific mention of an item excludes others: *expressio unius est exclusio alterius* (one or more things of a class are expressly mentioned others of the same class are excluded).⁸³”

This chapter shall explore the evolution of the protection provided by the MFN clause that has resulted from the mixed understanding and application of various tribunals. The first part shall discuss the parameters of what may be classed as ‘treatment’ under the MFN clause. The second part shall explore the metamorphosis of the MFN clause through an analysis of several cases. Beginning with the ICJ decision in the Anglo Iranian Oil Company case, this marked the first discussion of the potential expansion of the MFN clause as a means of obtaining procedural protections. From this discussion we shall gain an understanding of what exactly treatment is and whether or not such extension of the clause may be seen as remaining within the parameters of what the MFN clause ought to do. The key objective will be to establish whether or not the change in the construction and thereby effect of the MFN clause will indeed provide investors the protections they seek. This analysis will be broken up into three thematic areas namely,

1. Emphasis on investor protection
2. Emphasis on state consent
3. Emphasis on MFN treatment

⁸² *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, 58.

⁸³ *National Grid plc v. The Argentine Republic*, UNCITRAL Arbitration, (2006), 82.

3.1. Part I: What 'treatment' falls under the MFN Clause?

As has been previously stated the exact parameters of what ought to be viewed as treatment under the MFN clause was defined by the *Suez tribunal* as “the ordinary meaning of that term within the context of investment includes the rights and privileges granted and the obligations and burdens imposed by a Contracting State on investments made by investors covered by the treaty.”⁸⁴ From this statement it may be correct to state that dispute resolution provisions do form an important part of the protection accorded to investors, however, they are not substantive protection unless otherwise provided by the parties (emphasis added).⁸⁵ Professor Sornarajah, states that the purpose of the dispute resolution clause in a BIT is indeed a “major step that has been taken to ensure the protection of the foreign investor by enabling him to have direct access to a neutral forum for the disputes that could arise between him and the host state.”⁸⁶ However, due regard must be given to the parties intention in order to be certain of such an inclusion of procedural protection. In some instances the *travaux préparatoires* and subsequent negotiations have been used to ascertain the parties’ intentions to include or exclude the procedural protection. This was seen after the *Siemens Case*, Argentina and Panama exchange diplomatic notes concerning an ‘interpretative declaration’ of the MFN clause contained in their 1996 investment treaty.⁸⁷ It aimed at making it clear that the clause does not extend to dispute settlement provisions in the basic BIT.⁸⁸

It is necessary at this stage to detail a clear definition for due to the apparent separation between what may be termed as ‘substantive’ and ‘procedural’ protection under the MFN clause. Regarding the substantive protection, the General Agreement on Tariffs and Trade, here GATT, provides the best non-exhaustive list of what may be seen as substance covered by the MFN clause. GATT article 1:1 states, “World Trade Organization, here WTO, Members to extend MFN treatment to like products of other WTO Members regarding tariffs, regulations on exports and imports, internal taxes and charges, and internal regulations.”⁸⁹ This was reiterated in the case of *Vladimir Berschader and Moïse Berschader v. Russian Federation*, where the tribunal stated, “it is universally agreed that the very essence of an MFN provision in a BIT is to afford to investors all material protection provided by subsequent treaties.”⁹⁰

⁸⁴ *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, 189.

⁸⁵ Radi Y, ‘Application of the MFN Clause to Dispute Settlement Provisions of BITs’, 769.

⁸⁶ Sornarajah M, ‘*The International Law on Foreign Investment*’, Cambridge University Press (2004), 250.

⁸⁷ *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, 89.

⁸⁸ *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, 89.

⁸⁹ Article 1:1, ‘*General Agreement on Tariffs & Trade 1994*’, 1867 U.N.T.S. 190 33 I.L.M. 1153.

⁹⁰ *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, SCC, 080/2004, 2006, 179.

The procedural advantages sought through the use of the MFN clause is the circumvention of the pre-arbitration steps provided in the basic BIT. The tribunal in the *Siemens case* stated that such “cherry picking” was a valid use of the MFN cause.⁹¹ It may be correct to state that due to the bulk of cases arising from the BITs signed by Argentina, they may be the main agitators for the redefinition of the MFN clause. This is buttressed by the pro-extension jurisprudence provided by cases where Argentina is a party. In the case of *Camuzzi International v. Argentina*, where Argentina did not bother to argue that the claimant could not use the MFN clause to invoke more favourable dispute settlement provisions.⁹² This appropriation of the core purpose of the MFN clause was affirmed by the tribunal in *Gas Natural v. Argentina*, case where the tribunal stated its use to access dispute resolution procedures was “essential to the regime of protection of foreign direct investment.”⁹³ The tribunal in the *National Grid v. Argentina*⁹⁴ case went as far as expressly rejecting the narrow application of the MFN clause as stated in the *Plama’s case*.⁹⁵ From these cases we see a clear delineation of what is indeed substance and procedure. Simply put ‘substance’ is all the activities made possible by way of the BIT, i.e. the activities the investor is investing in. Whereas ‘procedure’ is that which may be relied on to protect such substance by ensuring disputes are determined in accordance with parties’ intention under the basic BIT. The fact of trying to read the procedural advantages into the treatment accorded to the investors serves as evidence of the inherent difference of both protections.

3.2.Part II: Evolution of the narrow application of the MFN clause

Anglo-Iranian Oil Co., U.K. v. Iran, Judgment, 1952 I.C.J. 93 (July 22). The Anglo-Persian Oil Company, here APOC, was a British company founded in 1908 following the discovery of a large oil field in Masjid-e Solaymān near the Persian Gulf.⁹⁶ It was the first company to extract petroleum from Iran when granted concessions to by Nāṣer-al-dīn Shah Qājār.⁹⁷ Facts of the case are as follows, the Imperial Government of Iran signed a concessions convention with the Anglo – Iranian Oil Company dated 29th April 1933. This agreement was ratified by

⁹¹ *Siemens A.G. v. The Argentine Republic*, ICSID, ARB/02/8 (2004), 109.

⁹² *Camuzzi International S.A. v. República Argentina*, ICSID, ARB/03/7 (2005), 17.

⁹³ *Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID, ARB/03/10 (2005), 29.

⁹⁴ *National Grid plc v. The Argentine Republic*, 84.

⁹⁵ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID, ARB/03/24, (2008).

⁹⁶ <http://www.iranicaonline.org/articles/anglo-persian-oil-company> on 8 December 2017.

⁹⁷ <http://www.iranicaonline.org/articles/anglo-persian-oil-company> on 8 December 2017.

the Iranian Majlis on 28th May 1933, and came into force on the following day after having received formal Imperial assent. On 15th and 20th March 1951, the Iranian Majlis and Senate, respectively, passed a law enunciating the principle of nationalization of the oil industry in Iran.⁹⁸ On 28th and 30th, April 1951, they passed another law "concerning the procedure for enforcement of the law concerning the nationalization of the oil industry throughout the country".⁹⁹ These two laws received the Imperial assent on 1st May 1951. As a consequence of these laws, a dispute arose between the Government of Iran and the Anglo-Iranian Oil Company, Limited. The Government of the United Kingdom adopted the cause of the British Company.¹⁰⁰ It submitted, in virtue of the right of diplomatic protection, an application to the International Court of Justice, here ICJ, on 26th May 1951.¹⁰¹ Such application instituted proceedings in the name of the Government of the United Kingdom of Great Britain and Northern Ireland against the Imperial Government of Iran. Article 22 of the concessions convention provided that any disputes arising from it between the parties would be submitted to arbitration.¹⁰² The Imperial Government of Iran ignored this and instead sought to have the company nationalised. This was to occur through the implementation of the Iranian National Oil Act 1951.¹⁰³ This would result in a unilateral termination of the articles of the convention signed between Imperial Government of Persia and the Anglo-Persian Oil Company.¹⁰⁴

In response, the Imperial Government of Iran submitted that the claims were inadmissible and the court lacked jurisdiction to determine the substantive merits of the claim. The court's jurisdiction fell short as the Imperial Government of Iran had denounced its declaration to adhere to Article 36 of the ICJ statute.¹⁰⁵ The Imperial Government submitted that the court ought to declare that it lacks jurisdiction *ex officio* by applying "Article 2, paragraph 7, of the Charter of the United Nations. The matters dealt with by the Nationalization Laws of 20th March and May 1951, were essentially within the domestic jurisdiction of Iran and incapable of being the subject of an intervention by any organ of the United Nations. The United Kingdom Government sought to base its claim on other agreements signed between Iran and other Sovereign nations. Such would only be possible through, the benefit of which can only

⁹⁸ <http://www.iranicaonline.org/articles/anglo-persian-oil-compan> on 2 April 2018.

⁹⁹ <http://www.iranicaonline.org/articles/anglo-persian-oil-compan> on 2 April 2018.

¹⁰⁰ *Anglo Iranian Oil Company*, Preliminary Objection, 95.

¹⁰¹ <http://www.iranicaonline.org/articles/anglo-persian-oil-compan> on 2 April 2018.

¹⁰² Article 22, *D'Arcy oil concession*, 1901.

¹⁰³ Iranian National Oil Act 1951.

¹⁰⁴ *Anglo Iranian Oil Company*, Preliminary Objection, 95.

¹⁰⁵ *Anglo Iranian Oil Company*, Preliminary Objection, 96.

be invoked by the United Kingdom by applying the most-favoured-nation clause. Effectively, the UK sought to use of the MFN Clause to borrow more favourable dispute settlement provisions from 3rd part treaties signed by Iran. This clause appears only in the treaties concluded between Iran and the United Kingdom in 1857 and 1903. Both occurring prior to the ratification of the Iranian Declaration, thus falling outside of the court's jurisdiction [Emphasis added].¹⁰⁶ It was on this key point that the ICJ first pronounced the narrow application of the MFN clause to only substance and effectively barred resort to other 3rd party treaties that had no legal obligation under the basic BIT.

The court took the above into consideration as well as the statute of the Court in finding that its jurisdiction was based solely on Article 36 (2) of the ICJ statute, on condition of reciprocity.¹⁰⁷ In this case the UK had signed on 28th February 1940, Iran signed on 2nd October 1930, and ratified on 19th September 1932.¹⁰⁸ As such the jurisdiction of the court would be limited to the extent in which the declarations coincided in conferring it.¹⁰⁹ The Iranian Declaration was found to be much more limited in scope than that of the UK. The Court was of the opinion that the provision ought to be interpreted as it stands, with regard of the words actually used. This went against the UK Government assertions that the legal text ought to be interpreted in a manner that would attribute meaning to every word [emphasis added].¹¹⁰ The Court thus decided that its jurisdiction was only applicable to the conventions accepted by Iran after the ratification of the Declaration.

The UK Government argued that by means of the protection granted by the MFN clause in the their material treaty, the international law obligations that Iran had agreed not to breach in its treaty with Denmark would also apply to the UK.¹¹¹ The Court stated without hesitation that it would not accept such contentions.¹¹² Furthermore, it elaborated that in order for the UK to benefit from third party treaties it had to be in a position to invoke the third party treaty. The court placed further emphasis on the requisite *locus standi* by stating, "A third-party treaty, independent of and isolated from the basic treaty, cannot produce any legal effect as between

¹⁰⁶ *Anglo Iranian Oil Company*, Preliminary Objection, 98.

¹⁰⁷ *Anglo Iranian Oil Company*, Preliminary Objection, 98.

¹⁰⁸ *Anglo Iranian Oil Company*, Preliminary Objection, 98.

¹⁰⁹ *Anglo Iranian Oil Company*, Preliminary Objection, 98.

¹¹⁰ *Anglo Iranian Oil Company*, Preliminary Objection, 99.

¹¹¹ *Anglo Iranian Oil Company*, Preliminary Objection, 99.

¹¹² *Anglo Iranian Oil Company*, Preliminary Objection, 99.

the United Kingdom and Iran: it is *res inter alios acta*,” a thing done between others does not harm or benefit others.¹¹³ Essentially, if the court had allowed the UK to benefit from the Iran – Denmark treaty, it would have amounted to benefiting from others. Thus the court in concluding stated that “no treaty concluded by Iran with any third party can be relied upon by the United Kingdom in the present case.”¹¹⁴ The court’s decision to accept the Imperial Government of Iran’s arguments led to the court lacking requisite jurisdiction to determine the substantive issue. Essentially, the courts sentiments may be understood as requiring evidence of a legal tie to the 3rd party treaty and such must result in a substantive advantage in order for the MFN clause to be validly extended.

The significance of the Anglo Iranian Oil Case lies in the fact that it essentially opened the floor to discussion on how far the protections of the MFN clause may legally be extended. Despite the conclusively strict application of the court, a number of tribunals have deviated from the courts sentiments and decided that the MFN clause will in fact apply to both substance and procedure. This may be seen as a drastic deviation from the widely accepted purely substantive protection unless otherwise stated.¹¹⁵ The metamorphosis of the MFN clause can be seen in three distinct manners, they include;

1. Emphasis on Investor protection
2. Emphasis on State consent
3. Emphasis on MFN treatment

3.2.2. Asian Agricultural Product Limited v. Republic of Sri Lanka, ICSID Case No ARB/87/3

This is the first instance where the MFN clause may be varied with an emphasis being placed on investor protection.¹¹⁶ The effect of this is that all investors covered under one BIT are all entitled to the same rights and benefits.¹¹⁷ Thus, if there is both procedural and substantive protection covered under the MFN clause then it will be applied to all investors.¹¹⁸ This was explored in the case of *Asian Agricultural Product v. Republic of Sri Lanka*, which went a step

¹¹³ <https://legal-dictionary.thefreedictionary.com/Res+inter+alios+acta> on 15 January 018.

¹¹⁴ *Anglo Iranian Oil Company*, Preliminary Objection 99.

¹¹⁵ Parker S.L, ‘A BIT at a Time: The Proper Extension of the MFN Clause to Dispute Settlement Provisions in Bilateral Investment Treaties’, 35.

¹¹⁶ MFN Study group, ‘Part III: Considerations in Interpreting MFN Clause’, A/70/10, 32.

¹¹⁷ MFN Study group, ‘Part III: Considerations in Interpreting MFN Clause’, A/70/10, 32.

¹¹⁸ MFN Study group, ‘Part III: Considerations in Interpreting MFN Clause’, A/70/10, 32.

further and added a provision, that there must be a substantive benefit to be gained in a 3rd party BIT for it to be relied on by parties who have no legal ties to the 3rd BIT.¹¹⁹ The case involved, a Hong Kong corporation AAPL, which owned 48.2% of Serendib, a Sri Lankan joint venture company that was formed to cultivate and export shrimp to Japan. Serendib made only two shipments of shrimp when its principal facility, a shrimp farm, was destroyed as a result of counter-insurgency operation of the Sri-Lankan Security Forces. This resulted, in Serendib going out of business and thus AAPL's investment was lost. The Claimant, sought to rely on the Sri Lanka-Switzerland BIT which according to the claimant, contained procedural rules more favourable than those provided under the Sri Lanka-UK BIT. The tribunal rejected this and found that there was no substantial benefit to be gained in the 3rd BIT, namely the Sri Lanka-Switzerland BIT. For this reason the tribunal dismissed the Claimant claim under Article 2 on "Full protection and security".

This tribunal can be said to be interpreting the protection accorded to investors by the MFN Clause as purely substantive. As such it would only be valid to extend such substance to procedure only where there is a substantial benefit to be gained from the 3rd party treaty. It would be correct to state that the tribunal is in fact applying the comparative advantage theory in its analysis of the instances where reliance on a 3rd party BIT outside of the pertinent BIT may be acceptable. This is especially seen in the stress on the need for there to be a "substantive advantage" to be gained from the other BIT. The comparative advantage is seen in the fact that a 3rd party BIT permits a leapfrog approach to dispute resolution which the availability of better tribunals or simply provided for more expansive protections to investors and their investment. This may also be said to reinforce the original purely substantive nature of the MFN clause in that the tribunal will only allow for such expansion where it is seeking to incorporate not the dispute resolution procedure but the substantive protections in a 3rd party BIT.

3.2.3. Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2.

The second condition placed on the expansion of the MFN clause places an emphasis on State consent. This concept provides that the MFN clause can be seen as state consent to arbitrate, absence of the clause would be seen as a lack of consent to arbitrate.¹²⁰ This was traversed in,

¹¹⁹MFN Study group, 'Part III: Considerations in Interpreting MFN Clause', A/70/10, 32.

¹²⁰MFN Study group, Part III: Considerations in Interpreting MFN Clause, A/70/10, 32.

*Técnicas Medioambientales Tecmed S.A. (“Tecmed”) v. Mexico.*¹²¹ The facts were, a Spanish company, Cytrar, S.A. de C.V, was expropriated by Mexico by refusing to renew Cytrar’s annual license to run a hazardous industrial waste landfill. The investor, a Spanish company, in this case relied on the rules in the BIT between Spain and Mexico. The claimant, attempted to expand the jurisdiction of the Tribunal to settle a dispute before the pertinent BIT came into force.¹²² This attempt was rejected by the tribunal as only the pertinent BIT could provide the state consent to the tribunal’s jurisdiction over the material aspects of the claim to be determined.¹²³ Thus, in this instance the court stated that the dispute was governed by national law of Mexico and not international law principles such as the MFN clause.

The above position was revisited in the case of, *Salini Costruttori SpA and Italstrade SpA v. Jordan.*¹²⁴ In this instance the tribunal attempted to limit the possibility of forum shopping through the use of MFN clauses. The dispute concerned the construction of a dam in Jordan and was submitted to the ISCID tribunal by the Italian Claimant. The dispute settlement provision in the basic BIT provided first of amicable resolution then where the dispute is not determined, resort to national courts and then ICSID Arbitration. However, Article 9(2) of the basic BIT provided that “in case the investor and an entity of the Contracting Parties have stipulated an investment Agreement, the procedure foreseen in such investment agreement shall apply.”¹²⁵ The investment contract provided for the same progress through the negotiation then national courts but provided that the arbitration would be instituted once both parties had consented to such.¹²⁶ The Claimants sought to rely on the MFN clause of the basic treaty in order to invoke the comparatively more advantageous dispute settlement provisions of the Jordan-United States BIT. This 3rd party BIT provided investors with leave to approach an ICSID tribunal “regardless of any clause in the investment agreement providing for a different dispute settlement mechanism.”¹²⁷ If accepted, this would not only provide the Claimant the dispute settlement procedures they preferred, but would also grant the tribunal jurisdiction over claims it had no jurisdiction over under the basic BIT. Tribunal held, that generally MFN clauses should not be read to apply to dispute resolution clause, unless the parties had consented to such inclusion. In the present case “The Claimants have submitted nothing from which it

¹²¹ *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID, ARB (AF)/00/2, 2003.

¹²² *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, 64.

¹²³ *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, 64.

¹²⁴ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID, ARB/02/13, 2004.

¹²⁵ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, 70.

¹²⁶ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, 71.

¹²⁷ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, 23-36.

might be established that the common intention of the Parties was to have the most-favoured-nation clause apply to dispute settlement.”¹²⁸ Thus there would be no extension of the MFN clause the dispute resolution procedure in the Jordan-USA BIT.

It is interesting to see the tribunal did not consider the potential advantages accorded to either the state of the investor but rather based its decision on what is considered to be the cornerstone of arbitration, consent. This may be evidenced in the nature of arbitration which thrives because of the party autonomy in the dispute and for such to exist there must be consent of both parties in order for the proceedings to carry on. The tribunal stressed that the circumstances in this case were different in that “the common intention of the Parties’ Article 9(2) of the Italy-Jordan BIT could not be extended as the text of the MFN clause which did not refer to ‘all matters’.”¹²⁹ Whilst it may not have been expressly stated it may be inferred from the tribunals sentiments that such expansion would not be permitted as the MFN Clause in the basic BIT was a narrow clause.¹³⁰ This is so due to the fact that the MFN clause in the 3rd party treaty namely, Jordan-United State BIT, did not cover “all matters” arising from the BIT and the investment contract.

3.3.Emphasis on MFN treatment

The finding that international investment arbitration is indeed parts of the rights and protections given to the investors.¹³¹ This may have nothing to do with the MFN clause but has more to do with the primary investment regime of the states involved. Simply put in some areas the investment regime requires a different understanding and application of the MFN clause e.g. Argentina with its expansive understanding and construction of the MFN clause. However, from the case law above it may be correct to state that the elements of clear substantive advantage, party consent and considerations of the subject matter of the dispute, provide valid grounds for expansion of the MFN Clause to benefit both substantively and procedurally from a 3rd party BIT.

¹²⁸ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, 119.

¹²⁹ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, 114.

¹³⁰ Parker S.L, ‘A BIT at a Time: The Proper Extension of the MFN Clause to Dispute Settlement Provisions in Bilateral Investment Treaties’, 35.

¹³¹ Nguyễn T.T, ‘Most Favoured Nation Clause in Investment Treaties’, 22.

3.4. Conclusion

This growth of the MFN provision from the stance of the ICJ to the considerations of the various investment tribunals may be examined by observing the difference between the substantive and procedural elements of the provision.¹³² This was argued in the case of *RosInvest UK v. The Russian Federation*, where the Respondent stated that there was a distinction between substantive and procedural matters in international contracts.¹³³ The fact that this matter was premised on a contract rather than a treaty does not take away from the validity of the tribunals proclamations. Thus, substantive protections as provided by the MFN clause deal with the crux of the matter.¹³⁴ Where read in accordance with the *ejusdem generis* principle it ought to ensure that only substantive benefits of the same kind may in fact be borrowed from other BITs.¹³⁵ In addition to this, such benefits shall only be applied where there is, a clear benefit in the secondary BIT rather than the primary BIT.¹³⁶ Where there is clear and unequivocal state consent to the use of MFN clauses to borrow provisions from other third party BITs.¹³⁷ Lastly, access to an investment arbitration body or institute is must be covered under the understanding of treatment.¹³⁸ Only when these three elements are present will there be a valid extension of the provisions of the MFN clause to procedural protections. Furthermore such may not in these fringe occurrences be classed as an extension but rather as what the clause when practically applied, ought to do. However, where the above are not present then the *ejusdem generis* principle prevents the extension of the function of the provision.¹³⁹

¹³² 8003, 'Most Favoured Nation Treatment Application in International Investment Arbitration: A Study on Conflicting Precedence in International Dispute Settlement Procedure', Unpublished LLM thesis, University of Oslo, 12 January 2011, 50.

¹³³ Parker, S.L., 'A BIT at a Time: The Proper Extension of the MFN Clause to Dispute Settlement Provisions in Bilateral Investment Treaties', 40.

¹³⁴ *Impregilo S.p.A. v. Argentine Republic*, ICSID ARB/07/17, 2011, 41.

¹³⁵ 8003, Most Favoured Nation Treatment Application in International Investment Arbitration: A Study on Conflicting Precedence in International Dispute Settlement Procedure, Unpublished LLM thesis, University of Oslo, 12 January 2011, 54.

¹³⁶ 8003, Most Favoured Nation Treatment Application in International Investment Arbitration: A Study on Conflicting Precedence in International Dispute Settlement Procedure, Unpublished LLM thesis, University of Oslo, 12 January 2011, 54.

¹³⁷ *RosInvest UK v. The Russian Federation*, ICSID ARB/02/13, 2004.

¹³⁸ 8003, Most Favoured Nation Treatment Application in International Investment Arbitration: A Study on Conflicting Precedence in International Dispute Settlement Procedure, Unpublished LLM thesis, University of Oslo, 12 January 2011, 55

¹³⁹ 8003, Most Favoured Nation Treatment Application in International Investment Arbitration: A Study on Conflicting Precedence in International Dispute Settlement Procedure, Unpublished LLM thesis, University of Oslo, 12 January 2011, 55.

CHAPTER FOUR

Consequence of Mixed Interpretation of the MFN Clause

4. Introduction

Thus far, we have seen from a critical analysis of various tribunal decisions, the MFN clause whilst universally agreed, as a largely substantive protection, may indeed be extended to include procedural protections. Such extension may occur only in select instances, primarily where the parties consent to such and where there is a clear substantive benefit to be gained from the 3rd party BIT. The Maffezini case provided the first break in this tradition. It is important to note that the tribunal warned against the use of the MFN clause to “override public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in question, particularly if the beneficiary is a private investor, as will often be the case. The scope of the clause might thus be narrower than it appears at first sight”.¹⁴⁰ The tribunal went further and provided instances in which, extension of the MFN clause to dispute settlement procedure would be inappropriate.¹⁴¹ These instances include;

1. Where one Contracting Party has conditioned its consent to arbitration on the exhaustion of local remedies, and such is a reflection of a fundamental rule of international law,
2. Where the parties had agreed to a dispute settlement arrangement which includes “fork in the road” provision, disruption of such a provision would undermine the finality of the entire BIT,
3. Where the parties have agreed to a highly institutionalized system of arbitration that incorporates precise rules of procedure, such specificity reflects the intentions of contracting parties on the particular means of dispute settlement they wish to subject their disputes to.¹⁴²

The overriding sentiment in the above exceptions to MFN invocation according to the Maffezini tribunal is contracting parties consent and intention. In order to uphold privity of contract it is necessary for a tribunal to take into account parties intention and the actual words of the MFN clause as they determine on whether or not the MFN clause may be extended. It is

¹⁴⁰ *Emilio Augustin Maffezini v. The Kingdom of Spain*, 62.

¹⁴¹ MFN Study group, Part III: Considerations in Interpreting MFN Clause, A/70/10, 34.

¹⁴² *Emilio Augustin Maffezini v. The Kingdom of Spain*, 63.

due to the interplay between these two areas that the rules of interpretation as per the VCLT may be applied. In order to reach a correct conclusion with the above considerations it is necessary for tribunals to remember given the circumstances of each case, to deny extension may be seen as breach of the rights accorded to the investor as was stated in the case of *Wintershall Aktiengesellschaft v. Argentine Republic*.¹⁴³ With this understanding, we proceed in this chapter with a discussion on the contemporary understanding of the MFN clause in a BIT. This chapter shall detail the centrality of the clause through an examination of the different means of interpretation available to tribunals. The objective of such examination will be to ascertain whether or not more harm is done by including the MFN Clause in the basic BIT rather than excluding it all together.

4.1. Objective interpretation

Due regard must be given to the actual words of the MFN Clause in order to achieve a valid interpretation as whilst maintaining parties freedom of contract.¹⁴⁴ Consequently, the interpretation of any particular MFN provision must be in accordance with articles 31 and 32 of the VCLT. Article 31 provides for the starting point is to be the ordinary meaning of the words. This is informed by three principle elements, namely, that is wording, object and purpose, when interpreting a treaty.¹⁴⁵ Such interpretation seeks to legitimise the parties' intentions. Intentions as expressed during negotiation and concretized during drafting and signing of the final BIT and investment contract. Despite, the resulting confusion, the *Maffezini Tribunal* reached the correct determination on the extension of the MFN Clause as it was within the object and purpose of the basic BIT, namely the "intention to create favourable condition for investments."¹⁴⁶

These sentiments have not always been upheld, as seen in the case of *Plama Consortium Limited v. Bulgaria*.¹⁴⁷ The dispute involved Cypriot investors claim that the public authorities in Bulgaria deliberately caused difficulties resulting in material damage to the company that

¹⁴³ *Wintershall Aktiengesellschaft v Argentine Republic*, ICSID Case No. ARB/04/14, (2008) 61.

¹⁴⁴ 8003, Most Favoured Nation Treatment Application in International Investment Arbitration: A Study on Conflicting Precedence in International Dispute Settlement Procedure, Unpublished LLM thesis, University of Oslo, 12 January 2011, 60.

¹⁴⁵ Smiding E, 'Just how favoured is most favoured? Establishing international arbitral tribunal jurisdiction in investor state disputes through most favoured nation clauses under Bilateral investment treaties', Masters thesis, University of Lund, 29.

¹⁴⁶ Preamble, Agreement between the Argentine Republic and the Kingdom of Spain on the reciprocal promotion and protection of Investments, 28 September 1992, 1699, 1-29403

¹⁴⁷ *Plama Consortium v Bulgaria*, ICSID, ARB/03/24, (2008).

was being purchased. The claimant sought to rely on the Bulgaria-Cyprus BIT, which was limited to ad hoc ICSID tribunals. Whose jurisdiction was further limited to determination of compensation due to investor following the Bulgarian national courts determination on liability. Claimant sought to rely mainly on the Bulgaria-Finland BIT which provided the arbitration tribunal with a larger class of disputes.

The tribunal in this instance distanced itself from the tribunal's sentiments in *Maffezini* and provided the following rule, "The MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves *no doubt* that the Contracting Parties intended to incorporate them [emphasis added]."¹⁴⁸ MFN clause at issue in *Plama* did not meet such a high standard as regards parties' intent and was hence not held to be a legitimate consent to submit a dispute under the Bulgaria-Cyprus BIT to ICSID arbitration.¹⁴⁹ The tribunal riled on negotiations between the parties where they sought to amend the basic BIT. The negotiations failed but it was the contemplation of revision the dispute settlement provisions of the basic BIT that the tribunal used as a means of inferring the parties intent not expand the MFN protection to allow invocation of 3rd party BITs.¹⁵⁰ In doing so the tribunal expressed itself thus, "it can be inferred from these negotiations that the Contracting Parties to the BIT themselves did not consider that the MFN provision extends to dispute settlement provisions in other BITs."¹⁵¹ The tribunal went further than the provided boundaries of Article 31 by looking at not at the words in the basic Bit but by inferring from witness statements the parties' lack of intention. This may fall within the preview of Article 32, had the reading of the words as pert Article 31 resulted in absurdity. This cannot be said to have been the case in the present case of *Plama* as such it may be correct to state that the tribunal in this instance went too far to justify their narrow interpretation of the MFN clause in the basic BIT.

4.2. Teleological Interpretation

Tribunals may apply Article 32 of the VCLT as a means of reaching an internationalist analysis which buttresses the ordinary meaning or where such meaning would give rise to an

¹⁴⁸ *Plama Consortium v Bulgaria*, 227.

¹⁴⁹ *Plama Consortium v Bulgaria*, 227.

¹⁵⁰ *Plama Consortium v Bulgaria*, 195.

¹⁵¹ *Plama Consortium v Bulgaria*, 195.

absurdity.¹⁵² As such it provides the legislative backing for a tribunal to deny the extension of the MFN clause for reasons it finds manifestly absurd. Manifest absurdity is exemplified in the case of *M.C.I. Power Group L.C and New Turbine, Inc v. Republic of Ecuador*.¹⁵³ The Claimant sought to invoke an earlier entry into force date from the 3rd party treaty.¹⁵⁴ Whilst this may not pertain to dispute resolution procedure it does demonstrate what may be termed as a manifest absurdity.¹⁵⁵ Had such a prayer been granted the claimant would gain *locus standi* from a treaty that was yet to come into force. This would also be a breach of Article 18 of the VCLT which calls for states to “refrain from acts which would defeat the object and purpose of a treaty.”¹⁵⁶ In *White Industries v. India*.¹⁵⁷ The arbitral tribunal established in accordance with United Nations Commission on International Trade Law, here UNCITRAL rules accepted the import from the India–Kuwait BIT of an obligation to “provide effective means of asserting claims and enforcing rights” into the India–Australia BIT. ¹⁵⁸ The tribunal held, such incorporation did “not “subvert” the negotiated balance of the BIT. Instead, it achieves exactly the result which the parties intended by the inclusion of the MFN clause.”¹⁵⁹ Such result whilst relying on an inference of the parties’ intention is seen to result in an affirmation of the object and purpose interpretation provided at Article 31 VCLT.

4.3. Conclusion

From the various interpretive considerations sited above it may be correct to state that a more expansive reading of the MFN clause ought not to be limited to the instances discussed in the case law above.¹⁶⁰ Such has been the sentiment of some public policy commentators on the apparent evolution of the MFN Clause. Scholz, states that there would be little to no purpose of inclusion of the MFN Clause in a BIT where its protection is limited to only substantive protection.¹⁶¹ Scholz sites the statement of the tribunal in *ADF Group Inc. v. Unites States of*

¹⁵² Article 32, *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331

¹⁵³ *M.C.I. Power Group L.C and New Turbine, Inc v Republic of Ecuador*, ICSID ARB/03/6, Decision on the Application for Annulment, July 31, 2007.

¹⁵⁴ *M.C.I. Power Group. L.C.*, Decision on the Application for Annulment, Section B.

¹⁵⁵ *M.C.I. Power Group. L.C.* Decision on the Application for Annulment, Section B.

¹⁵⁶ *Anglo-Iranian Oil Company*, Preliminary Objection 93.

¹⁵⁷ *White Industries v India*, UNCITRAL Final Award of 30 Nov 2011.

¹⁵⁸ *White Industries v India*, Final Award 26.

¹⁵⁹ *White Industries v India*, Final Award 30.

¹⁶⁰ Scholz Katja, “Having your pie... and eating it with one chopstick – Most Favoured Nation clauses and procedural rights”, *Policy papers on Transnational Economic Law* No. 5/04, Faculty of law Martin Luther University, 2.

¹⁶¹ Scholz Katja, ‘Having your pie... and eating it with one chopstick – Most Favoured Nation clauses and procedural rights’, 2.

America, where the tribunal concluded that the previous restrictive findings of tribunals wrong and had failed to give investors sufficient guidance upon which to rely on.¹⁶² It is based on such sentiments that this study proposes a redefinition of the MFN Clause as not one narrowly understood as only substance. Rather the redefinition would affirm the sentiments of the Argentinian understanding of the MFN Clause as including both substance and procedure in order to ensure the object and purpose of every BIT is achieved. However, this should not be understood as the automatic reading of procedural advantage as being covered by the MFN clause. Such interpretation must be ascertained through an application of objective and teleological interpretation coupled with the apparent comparative advantage to be gained from the 3rd party BIT. However, with regard to BITs it may be necessary to remove the clause in its entirety as the parties have essentially agreed to confer more favourable treatment to each other's investments. Simply put the "MFN clause must be used to its proper and full potential, both by tribunals and by treaty drafters. To achieve this, MFN clauses can be invoked to import more favourable dispute settlement provisions of third party treaties under the VCLT."¹⁶³

¹⁶² *ADF Group Inc. v. Unites States of America*, ICSID ARB (AF)/00/1, Award 2003.

¹⁶³ Parker, S.L, 'A BIT at a Time: The Proper Extension of the MFN Clause to Dispute Settlement Provisions in Bilateral Investment Treaties' 62.

CHAPTER FIVE

Conclusions and Recommendations

5. Introduction

The first chapter presented the historic development of the MFN Clause as a tool to further ensure better protections were given to all investors over the obvious advantages given to more developed nations.¹⁶⁴ It stated the purpose of the present study as an examination of the MFN clause and the consequences that may arise when it is expanded to include both substantive and procedural protections. Furthermore, it provided an introductory definition of the MFN clause as contained in the 1959 Abs-Shawcross Draft Convention on Foreign Investment at Article 3. It states, “Each Party shall at all times ensure the observance of any undertakings which it may have given in relation to investments made by nationals of any other party.”¹⁶⁵

Chapter two, discussed the main theory that informs the evolution of the MFN clause. Namely, the economic theory of Comparative advantage. This theory as espoused by Ricardo provides that where “a country is relatively more efficient in the production of a good than another country then we say that it has comparative advantage in production of that good.”¹⁶⁶ Countries who have comparative advantages in production of different goods ought to enter into BITs so as to ensure efficient production of goods and services and an efficient use of resources. With regards to MFN provisions, it may be comparatively more advantageous for one state to borrow the provisions of a 3rd party BIT that does indeed provide a substantive advantage over the basic BIT. Such substantive benefit must not be alleged but proved to exist, where this does not occur there can be no extension.¹⁶⁷

Chapter three, analysed the evolution of the use of the MFN clause from the first instance it was discussed in the *Anglo Iranian Oil case*. This whilst not involving a BIT did act as a curtain raiser for the discussion on the potential expansive reading of the MFN clause. This was followed by the various areas of emphasis in which various tribunals either permitted it or

¹⁶⁴ Vesel, ‘Clearing a Path through a Tangled Jurisprudence: Most-Favoured-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties’, 12.

¹⁶⁵ Katia Yannaca-Small, ‘International Investment Law: Understanding Concepts and Tracking Innovations’ 2008, 103

¹⁶⁶ Rehim Kılıç, ‘Absolute and Comparative Advantage: Ricardian Model’ Michigan State University, June 2002, 5.

¹⁶⁷ *White Industries v India*, Final Award 39.

rejected its application for various reasons. Most notable was the requirement imposed on the necessity of a substantive advantage and party consent as regards dispute settlement provisions.

Chapter four, looked at the various means of interpretation that the tribunals use in reaching their determination on the requested expansion of the MFN clause by the claimant. The key considerations in this area are the customary international rules on interpretation of treaties as provided by the VCLT. Objective interpretation provides for a clear reading of the words in their ordinary meaning, however, such reading must give effect to the parties' intentions. Whereas teleological is to only be restored to where an ontological reading may give to an absurd result.

5.1.Recommendations

The following recommendations may be implemented:

1. Uniform MFN Clauses - This may be achieved by having model provisions that clearly delineates the matters covers under most favoured nation treatment. Countries may adopt different forms of a model law on BITs. The model MFN clauses may explicitly affirm their application to dispute resolution mechanisms.¹⁶⁸ Essentially, it should be clearly stated from the onset, either the grounds that may validate the extension or the automatic inclusion of dispute provisions under the MFN clause. This has been applied in the *UK Model BIT* which at Article 3(3) states, "For avoidance of doubt MFN treatment shall apply to certain specified provisions of the BIT including the dispute settlement provision."¹⁶⁹
2. Negotiable and non-negotiable elements of the MFN Clause - Where parties expressly include the dispute resolution mechanisms they may make certain elements negotiable. Negotiable conditions may include the waiting period between the negotiations over a dispute and the recourse to either the national court or an arbitral tribunal of the parties liking. The non-negotiable elements may be the limitation of the MFN protection only to the substantive protection. This has been adopted by Canada and the European Union in their Comprehensive Economic and Trade Agreement, here CETA where the parties provide as follows, "For greater certainty, the "treatment" ... does not include

¹⁶⁸ Parker, S.L. "A BIT at a Time: The Proper Extension of the MFN Clause to Dispute Settlement Provisions in Bilateral Investment Treaties", 35

¹⁶⁹ Nikiéma Suzy H., 'The Most-Favoured-Nation Clause in Investment Treaties IISD Best Practices Series', February 2017, International Institute for Sustainable Development, 25

procedures for the resolution of investment disputes between investors and states provided for in other international investment treaties and other trade agreements. Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute “treatment”, and thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a Party pursuant to those obligations.”¹⁷⁰

3. Removal of the MFN Clause from BITs - complete exclusion of the MFN clause would mean none of the issues currently faced pertaining to the clause ever come up for determination before any tribunals and courts.¹⁷¹
4. Interpretive declaration - where a country insists on inclusion of the MFN Clause they must also enter interpretative reservations where they take the MFN clause to be anything more than purely substantive.¹⁷² This allows the MFN principle to remain effective and provide substantive protection without limiting the potential inclusion of procedural protection.

¹⁷⁰ Article 8.7.4, *Comprehensive Economic and Trade Agreement*, 7 May 2016, 2016/0220 (NLE).

¹⁷¹ Nikièma S.H., ‘The Most-Favoured-Nation Clause in Investment Treaties’, 25

¹⁷² Nikièma S.H., ‘The Most-Favoured-Nation Clause in Investment Treaties’, 25.

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