MFN Provisions and Related Issues in Bilateral Investment Treaties

MD ATEKUL, ISLAM NUR SHUVO*

ABSTRACT *MFN provisions have been interpreted in a broad manner allowing the stakeholders to bring in financially beneficial provisions from other BITs. Using this broad interpretation, the policy instrument gives the opportunity to the investor to shop around for suitable provisions of BITs during disputes. The orthodox application provides substantive protection under the forum of international trade law, but in the field of international investment law this provision is used for both substantive and procedural treatment in the area of the investor-state dispute-settlement mechanism. What makes it more challenging is when the investor or the state invokes the investor-state dispute-settlement procedure before a different international settlement forum. Interestingly, the investor and the state earlier agreed on dispute-settlement forums via their BITs, but there are a lot of examples where a state has tried to receive protection from their domestic court in an international matter. Besides, MFN provisions are used for bypassing various requirements for establishing formal international arbitration. So, due to lacunae in government mechanisms, political instability and the lack of knowledge on the BIT's binding nature, countries have to face legal and economic hurdles after signing it. In this article, the author has tried to discuss this broad interpretation of the MFN provisions of BITs by discussing existing cases of investor-state dispute settlement related to MFN provisions. The author has tried to focus on two basic subjects: a) MFN provisions and related issues regarding investment, and b) MFN provisions and jurisdiction.*

KEYWORDS *MFN Provision, BIT, Jurisdiction, Waiting period*

1. 1 Introduction

A Bilateral Investment Treaty (BIT) is an agreement between two countries to protect investments made by foreign investors. The first BIT was signed in 1959, since then 3271 such treaties have been signed between more than 179 countries.[1] Moreover, the commitments of states are essentially made by investment treaties, which are commonly labelled as international investment

* PhD student, University of Debrecen, Marton Géza Doctoral School of Legal Studies.

[1] "International Investment Agreements," accessed August 19, 2024, http://investmentpolicyhub.unctad.org/IIA.

agreements (IIAs), where they agree on a certain mechanism to enforce it.[2] Besides, by 2013, 568 investor-state dispute cases had been reported.[3] One of the core features of BITs is constituted by the most favored nation provisions. This provision prohibits the host states from discriminating between two foreign investors from two different states. In recent years, MFN provisions have attracted considerable attention in BIT disputes. This dissertation will focus on the interpretation of MFN provisions by arbitration tribunals. For centuries Most Favored Nation (MFN) clauses have been part of international economic treaties.[4] The obligation imposed by an MFN clause is conventional international law, whereas we can understand that international law emerged from customary laws and state practices.[5] Usually, state-to-state agreements use MFN clauses where the application of the MFN provisions is limited and allows access to the trading partners of the states.[6] Since the inception of international trade practices, MFN clauses have been there and later they have been coined within the scope of new bilateral and multilateral trade and investment treaties.[7] To be more clear, MFN treatment means that the recipient will not be treated less favorably than third parties in the same field of relations by the granting State.[8] The trade and investment benefits can be substantive or procedural. Regarding investment treaties, a few researchers have observed that access to an advantageous dispute settlement mechanism is the main bone of contention for foreign investors. Moreover, investors often invoke MFN clauses to secure procedural rights that might otherwise be denied them[9]. MFN clauses in Bilateral Investment Treaties (BITs) are there to expand the rights of investors.[10] In recent years, MFN provisions have attracted considerable

[2] Jeswald W. Salacuse, *The Law of the Investment Treaties* (Oxford: Oxford University Press, 2010), 1.

[3] "Recent Developments in Investor-State Dispute Settlement (ISDS)," accessed November 19, 2022, http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf.

[4] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press, 2012), 206.

[5] Abby Cohen Smutny and Lee A. Steven, "The MFN Clause: What Are Its Limits?" in the Arbitration under International Investment Agreements: A Guide to the Key Issues, ed. Katia Yannaca-Small (Oxford University Press, 2010), 352.

[6] Ibid.

[7] Ibid 351.

[8] Ibid.

[9] Francisco Vacuna, "Bilateral Investment Treaties and the Most-Favored-Nation Clause: Implications for Arbitration in the Light of a Recent ICSID Case," in Investment Treaties and Arbitration, ed. Swiss Arbitration Association (Basel: Swiss Arbitration Association, 2002), [specific page number]. "Under most [bilateral investment treaties] ... the key of the protection of the investors lies not so much in the substantive provisions of the treatment accorded...but in the arrangements allowing for the submission of disputes to arbitration."

[10] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law, 2nd ed.* (Oxford: Oxford University Press, 2012), 206.

attention in BIT disputes, but MFN treatment is not required under customary international law,[11] and it becomes one of the core features of BITs. MFN provisions prohibit the host states from discriminating between two foreign investors from two different states. It is also the last resort for an investor to protect its investment by invoking the MFN clause when BITs are failed.[12] In 1952, the first decision related to an MFN clause was delivered by the ICJ in the *Anglo-Iranian Oil Company*[13] *case*. In this case, the bone of contention was whether the UK could rely on a treaty between Iran and Denmark to bring in more favorable provisions for its benefit.[14] The Court did not accept this contention on the ground that the treaties whose application was sought by the United Kingdom were simply excluded from the scope of Iran's declaration of acceptance of the Court's jurisdiction pursuant to Article 36, paragraph 2, of the Court's Statute.[15] Also, it described the operation of the most favored nation provision in the following terms:

"... in order that the United Kingdom may enjoy the benefit of any treaty concluded by Iran with a third party by virtue of a most favored nation clause contained in a treaty concluded by the United Kingdom and Iran, the United Kingdom must be in a position to invoke the latter treaty.The basic treaty between Iran and the United Kingdom actually created the juridical link to invoke third-party treaty provisions which Iran granted to another country. Since a third-party treaty is unique and isolated from the basic treaty, it cannot produce any legal effect as between the United Kingdom and Iran because it is *res inter alios acta*."[16]

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[11] Dolzer, *Principles of International Investment Law*, 206.

[12] Jeswald W. Salacuse, *The Law of the Investment Treaties* (Oxford: Oxford University Press, 2010), 252, 403.

[13] Anglo-Iranian Oil Co. (United Kingdom v. Iran), http://www.icj-cij.org/docket/index.php?sum=82&p1=3&p2=3&case=16&p3=5. accessed 4 April 2022.

[14] Anglo-Iranian Oil Co. (United Kingdom v. Iran), accessed April 4, 2022, http://www.icj-cij.org/docket/index.php?sum=82&p1=3&p2=3&case=16&p3=5.

[15] The two treaties containing the most-favoured-nation clause and relied upon by the United Kingdom were the Treaty concluded between the United Kingdom and Iran on 4 March 1857 and the Commercial Convention concluded between the United Kingdom and Iran on 9 February 1903. Iran's Declaration of acceptance of the Court's compulsory jurisdiction, signed on 2 October 1930 and ratified on 19 September 1932, provided in turn that such jurisdiction covered "any disputes arising after the ratification of the present declaration with regard to situations or facts relating directly or indirectly to the application of treaties or conventions accepted by Persia and subsequent to the ratification of this declaration. Also, "If the United Kingdom is not entitled to invoke its own Treaty of 1857 or 1903 with Iran, it cannot rely upon the Iranian-Danish Treaty, irrespective of whether the facts of the dispute are directly or indirectly related to the latter treaty."

[16] Yas Banifatemi, "The Emerging Jurisprudence on the Most-Favoured-Nation Treatment in Investment Arbitration," in Investment Treaty Law: Current Issues III, ed. British Institute of International and Comparative Law (London: British Institute of International and Comparative Law, 2009), 239.

And according to Nartnirun Junngam,[17] an MFN clause "should not be prohibited unless it jeopardizes the validity and enforceability of an award to be rendered."[18] Primarily, MFN clauses are widely used in international trade law as a protection for substantive rights but, in international investment law, MFN clauses are also used concerning procedural rights.[19] So, a controversy arises and it adds even more fuel to that controversy when Jurgen Kurtz[20] states that "transmutation of the MFN clause from trade into investment was made without any analysis of its implications."[21] Besides, a lot of disagreement arises when awards are granted on the basis MFN provisions, as it raises the question of applicability, while allowing substantive guarantees.[22] According to Alejandro Faya, "[a]t the negotiation level, nobody thought these provisions [an MFN clause] could ever pose a real problem but now it has become clear that MFN clauses do pose a real problem, especially related to dispute settlement provisions."[23] Day by day, using MFN clauses in dispute settlement in an international investment law context rather than in an international trade law context is becoming more and more complicated.[24] To support this, Professor Schurer stated that the applicability of MFN clauses to dispute settlement is the most contentious issue.[25] The same has been opined by several scholars like Norah Gallagher, Salacause.[26] So, it can be easily stated that the applicability of MFN clauses in BIT dispute settlement is still at a primary stage of development.[27]

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[17] Nartnirun Junngam Assistant Professor & Head of International Law Department at Faculty of Law, Thammasat University.

[18] Junngam, Principles of International Investment Law, 400. (referencing note 13)

[19] Ibid, 404.

[20] Jürgen Kurtz is Senior Lecturer and Director of the International Investment Law Research Programme of the Institute for International Law and the Humanities at the University of Melbourne, Australia.

[21] Junngam, Principles of International Investment Law, 404. (referencing note 13).

[22] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law, 2nd ed*. (Oxford: Oxford University Press, 2012), 191.

[23] Alejandro Faya Rodriguez, "The Most-Favoured-Nation Clause in International Investment Agreements: A Tool for Treaty Shopping?," *Journal of International Arbitration* 25, no. 1 (2008): 89, 90.

[24] Ibid.

[25]"Standard of Investment Protection," accessed April 19, 2022, http://www.univie.ac.at/intlaw/93.pdf.

[26] Junngam, Principles of International Investment Law, 404. (referencing note 13)

[27] To support this view we can go through some arbitral decisions of 2012. Several decisions rendered in 2012 continue to show a significant divergence between different tribunals and among arbitrators sitting on the same tribunal. 1) The majority of the tribunal in *Teinver v. Argentina* concluded that the claimant could rely on the MFN clause found in the Argentina-Spain BIT to make use of the (more favourable) dispute resolution provisions contained in Article 13 of the Argentina-Australia BIT. The tribunal noted that the broad "all matters" language of the MFN clause was unambiguously inclusive. 2) On the other hand, the tribunal in *ICS Inspection v.*

1. 2 MFN Clauses in Bilateral Investment Treaties

Basically, MFN provisions are there to introduce a liberal system for international trade law where equal treatment and non-discrimination clauses will help to lower the tariffs.[28] Actually, by inserting an MFN clause into BITs, the parties thereto intended to show their liberal ideas about the equality of States, propagating a wide scope of international trade nurtured by the States.
A typical MFN provision in investment treaties provides that:
(1) neither contracting party shall subject investments in its territory owned or controlled by nationals or companies of the other contracting party to treatment less favourable than it accords … to investments of nationals or companies of any third State; and
(2) neither contracting party shall in its territory subject nationals or companies of the other contracting party, as regards their activity in connection with investments, to treatment less favourable than it accords … to nationals or companies of any third State.[29]

Argentina found that the MFN clause in Article 3 of the Argentina-UK BIT did not apply in such a way as to permit the claimant to avail itself of the dispute resolution provisions of the Argentina- Lithuania BIT. The tribunal first of all noted that "a State's consent to arbitration shall not be presumed in the face of ambiguity [and] where a claimant fails to prove consent with sufficient certainty, jurisdiction will be declined." Secondly, according to the tribunal, the term "treatment", in the absence of any contrary stipulation in the treaty itself, was most likely meant by the two Contracting Parties to refer only to the legal regime to be respected by the host State in conformity with its international obligations, conventional or customary, while the settlement of disputes remained an entirely distinct issue, covered by a separate and specific treaty provision. Thirdly, the reference to "treatment in its territory" in the MFN clause clearly imposed a territorial limitation, which consequently excluded international arbitration proceedings from the scope of the MFN clause. Finally, on the basis of the aggregate comparison of the entire dispute settlement mechanism in the two treaties at issue (Argentina-UK and Argentina-Lithuania BITs), the tribunal concluded that Lithuanian investors were not necessarily accorded more favourable treatment by Argentina as compared to the UK investor. 3) The majority of the tribunal in *Daimler v. Argentina* denied the use of the MFN clause to circumvent the local litigation requirement in the Argentina-Germany BIT. The majority determined that the language of the Argentina-Germany BIT's MFN clause was territorially limited, that "treatment" was intended by the parties to refer only to treatment of the investment, and that the BIT did not extend MFN treatment to "all matters" subject to the BIT. 4) On the application of MFN to substantive treaty obligations, the tribunal in EDF v. Argentina concluded that the MFN clause in the applicable Argentina-France BIT permitted recourse to the "umbrella" clause found in Argentina's BITs with other countries. In the tribunal's view, to ignore the MFN clause in this case would permit more favourable treatment of investors protected under Argentina's BITs with third countries, which is exactly the result that the MFN clause is intended to prevent.

[28]Stephan W. Schill, *The Multilateralization of International Investment Law* (Cambridge: Cambridge University Press, 2009), 131.

[29]Article 2, Agreement between the Federal Republic of Germany and the People's Republic of Bangladesh Concerning the Promotion and Reciprocal Protection of

The basic objective of an MFN Clause in BITs is investment, but it looks like this provision is only there for the protection of investors.[30] In reality, this provision is there for both investors and investments, but some BITs only refer to investors.[31] If we look at the German BITs, then we can find that the MFN provisions of some treaties only cover the similar treaties.[32]

1. 3 Structure of the MFN Clauses in International Investment Treaties:

The MFN Clause of BITs is generally structured in the manner figured in the following diagram. Here, State A (granting the MFN) enters into an obligation vis-à-vis the beneficiary State B, where these two states will extend to each other the benefits of third state C's BIT to increase their rights and stakes. The diagram below shows that State B has the opportunity to claim all the benefits from State A which are granted by State A to State C because of the scope of the MFN clause included in the treaty between A and B. The treaty containing the MFN clause

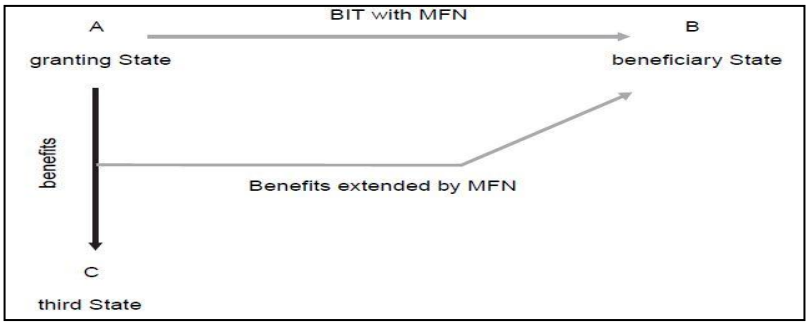

Fig: General function of MFN clause[33]
Fig: 1[34]

Investments, signed May 6, 1981, entered into force September 14, 1986, accessed April 15, 2024, http://investmentpolicyhub.unctad.org/Download/TreatyFile/264.

[30] Pia Acconci, "Most-Favoured-Nation Treatment," in *The Oxford Handbook of International Investment Law*, ed. Peter Muchlinski, Federico Ortino, and Christoph Schreuer (Oxford: Oxford University Press, 2008), 370. Article 4 of Canadian Model BIT of 2004, accessed March 13, 2024, http://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf. Article 4 of US Model BIT 2004, accessed March 13, 2024, http://www.state.gov/documents/organization/117601.pdf.

[31] Acconci, "Most-Favoured-Nation Treatment," 370.

[32] Article 2 of Germany BIT with Romania (1979), cited in Joachim Karl, "The Promotion and Protection of German Foreign Investment Abroad," *ICSID Review – Foreign Investment Law Journal* 11, no. 1 (1996): 13.

[33] Stephan W. Schill, *The Multilateralization of International Investment Law* (Cambridge: Cambridge University Press, 2009), 127. (referencing note 29)

[34] Ibid.

agreed between A and B is designated as the "basic treaty", because it contains the basis for incorporating more favorable conditions granted in a third-party treaty into the treaty relationship between A and B. The third-party treaty (between A and C) does not, however, modify the relationship between A and B, the parties to the basic treaty. Also, it does not govern the relationship between the parties of the basic treaty as the applicable international treaty; rather, here, the content of the third-party treaty becomes operative because of the basic treaty's MFN clause. For this reason, MFN clauses do not break with the *inter partes* effect of international treaties.

1. 4 Draft Articles of the International Law Commission (ILC) on MFN Clauses

A multi-year project was initiated in 1964 to study MFN clauses, which led the ILC to adopt the culmination of that multi-year project as the Draft Articles on Most-Favored-Nation Clauses (Draft Articles).[35] Here, the ILC did not confine their work to one area, rather they explored the application of MFN clauses in as many as possible related areas.[36] But the United Nations General Assembly did not adopt it and did not take substantive action on the draft articles.[37] The main aim of the draft articles is to ensure equal treatment without any bias. On reviewing Article 31.1 of the Vienna Convention on the Law of the Treaties, we can come to a conclusion that, 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' So, a beneficiary is entitled to claim all the rights and favors (given under an MFN clause) extended by the granting state to a third state.[38] Besides, the parties can limit, in their BIT, the extent of the favors that may be claimed by the beneficiary state; therefore, if the MFN clause contains restrictions, then the beneficiary state's claim cannot go beyond that restriction.[39] The other important principle attached to the Draft Articles on MFN Clauses is the *ejusdem generis* rule. Under this rule, an MFN clause can be applied to the matters belonging to the same subject matter to which the MFN clause relates.[40] Specifically, Article 9 states that the beneficiary State can acquire "only those rights which fall within the [subject matter of the [MFN] clause", while Article 10 provides that the beneficiary Stae

[35] Jarrod Wong, "The Application of Most-Favoured-Nation Clauses to Dispute Resolution Provisions in Bilateral Investment Treaties," *Asian Journal of WTO & International Health Law and Policy* 3, no. 1 (2008): 171, 176.
[36]"Most-Favoured-Nation Treatment in International Investment Law," OECD Working Papers on International Investment 2/2004 (2004): 8, accessed May 10, 2024, https://www.oecd.org/daf/inv/investment-policy/WP-2004_2.pdf.
[37] Ibid.
[38] Ibid.
[39] Ibid.
[40] Ibid., 177.

acquires the right to MFN treatment "only if the granting State extends to a third State treatment within the limits of the subject matter of the clause."[41]

1. 5 Motivation and Reasons for choosing the topic:

Currently, an MFN clause is used by both the investor and the host state in their respective BIT's. As BITs are independent treaties, there is no scope for including any other matter after their implementation. Interestingly, MFN Clauses have been dragging along third countries' BIT provisions, especially jurisdictional provisions, increasing waiting periods for BIT claims in International Tribunals. BITs are binding international agreements where the host state gives extra privileges to particular countries' investors to invest in the host state and, because of these, investors invest mainly in those countries to develop their countries, although nowadays it happens vice-versa. And, for this reason there are many legal complications when a conflict of interest arises. Furthermore, because of these BITs, economically developing countries are getting a benefit (not true for every context) and they have a huge role to play in the developing world. Because of lacunae in expertise and experiences, both investors and the host state have to face some unwanted problems. Mainly, in the case of disputes, several unlawful ultra vires actions have taken place, primarily endangering the security of investments by investors. The latest example is ***Saipem v. Bangladesh***[42], where the Bangladesh High Court interrupted the international procedure after a mass rebellion took place as simple xenophobia against capitalism upsurged and made things difficult. Moreover, we also observe that some tribunals have come up with a new idea to resolve the problem, however, without maintaining or referencing proper international law, just coming up with new ideas like Salini Test in the ***Salini v. Morocco***[43] case. Besides, the other side of BITs is Foreign Direct Investment (FDI), directly contributing to developing countries and making them financially strong. In 2014, South Asia[44] FDI rose to 41 billion USD, with India receiving the most of it (34 billion) and the second place shared by Bangladesh, Iran and Pakistan (2 billion each).[45] The main reason is that South Asia

[41] Article 9 and Article 10, Draft Articles on Most-Favoured-Nation Clauses, 1974, accessed May 10, 2024, http://legal.un.org/ilc/texts/instruments/english/draft_articles/1_3_1978.pdf.

[42] Saipem S.p.A. v. The People's Republic of Bangladesh, Award, accessed November 19, 2022, http://www.italaw.com/cases/documents/953.

[43] Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, Decision on Jurisdiction, accessed November 19, 2022, http://www.italaw.com/cases/documents/959.

[44] UNCTAD, World Investment Report 2015. South Asia consists of eight countries: Afghanistan, Bangladesh, Bhutan, India, Iran, Nepal, Pakistan, and Sri Lanka.

[45] "India Leads FDI in South Asia with $34 Billion Investment in 2014: Report," Economic Times, accessed August 19, 2024,

(excluding Iran, but including the Maldives) has 204 BITs and 41 other Investment Agreements (IIAS).[46] Though, almost 42% of those BITs have been signed by India. Actually, this is the main reason and inspiration that motivates me to work on this topic. Now, the main question arises: do MFN Clauses have the ability to extend to procedural issues just like they are widely used for substantive issues between two countries? Also, do they have the capability to drag the third-party BIT provisions into a dispute settlement mechanism in the same way as the BIT concluded between the two parties?

2. 1 MFN and Related Issues regarding International Investment

An MFN provision is introduced to put a bar on discrimination against stakeholders from different nations and maintain equality. To ensure this, several issues arise when an MFN provision is being invoked in the process of settling the dispute related to an investment treaty. The MFN provision is related to both procedural matters and substantive treatment of BITs. In international trade law, there is no scope for traders to bring any BIT claim against the states, rather it should be solved by the states even if the stakeholders are suffering loss.[47] For that reason a controversy arises concerning whether this clause should also extend to dispute settlement procedures in international trade law. With respect to international investment law, the application scope of the clause can be divided into two categories: (1) substantive protection and (2) procedural protection (dispute settlement). But it has been universally accepted that MFN clauses only apply to the protection of substantive rights. Meanwhile, controversy arises when this clause is applied for procedural protection.[48]

There are some distinctions between substantive and procedural protection and, in the ***Renata 4 SVSA v. Russian Fedaration***[49] case, the respondent state argued that the MFN clause applies only to protection of substantive rights and not to procedural protection. And in this case, it has been found that this argument made by the respondent state is rather unpersuasive and should not be

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http://economictimes.indiatimes.com/news/economy/foreign-trade/india-leads-fdi-in-south-asia-with-34-billion-investment-in-2014-report/articleshow/47806243.cms.

[46] "International Investment Agreements Navigator," accessed May 14, 2024, http://investmentpolicyhub.unctad.org/IIA.

[47] Jeswald W. Salacuse and Nicholas P. Sullivan, "Do BEATs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain," *Harvard International Law Journal* 46, no. 1 (2005): 67, 88.

[48] Nartnirun Junngam, "An MFN Clause and BIT Dispute Settlement: A Host State's Implied Consent to Arbitration By Reference," UCLA Journal of International Law & Foreign Affairs 15 (California): 403.

[49] Renta 4 S.V.S.A., Ahorro Corporación Emergentes F.I., Ahorro Corporación Eurofondo F.I., Rovime Inversiones SICAV S.A., Quasar de Valors SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. v. The Russian Federation, SCC No. 24/2007, accessed August 12, 2024, http://www.italaw.com/cases/915.

upheld.[50] The reason provided was that there is a scope for discrimination being committed in the context of both substantive and procedural rights. If we look at the past, then we can easily see that, because of the substantive nature of issues, we looked for substantive protection, but nowadays, for the perfect application of the clause, we should allow it to function properly in accordance with the varying conditions.[51] Actually, substantive and procedural protection are very closely connected and, therefore, it is very difficult to establish the distinctive nature of both types of protection.[52] Overall, "in a positivist conception of law in which rights exist only to the extent that they are enforceable, the distinction between substantive and procedural rights may be of no practical significance and thus a reading of treatment that included one and not the other could be seen as arbitrary."[53]

2. 2 Substantive Protection

Usually, an MFN clause in an investment treaty deals with the way how a state deals with foreign goods and persons when they enter the territory of the host country.[54] Mainly in the field of foreign investors and/or investments during the post-establishment phase, the issue of MFN clauses arises when the association between the host state and foreign investors becomes inimical and a dispute takes place.[55] Mainly for this reason, the functioning of the MFN treatment is evaluated by arbitration tribunals.

The ***AAPL v. Sri Lanka***[56] is the first case where MFN clauses have been discussed in the ICSID tribunal and the tribunal has considered an MFN clause in relation to liability standards. The tribunal considered the case based on the UK-Sri Lanka BIT. The case took place because of the claim for damages filed by the investor against the respondent State Sri Lanka, where there were civil conflicts going on. The claimant invoked the MFN clauses of the BIT and stated that the Sri Lanka – Switzerland BIT provides for a more favorable standard of liability than the UK – Sri Lanka BIT. Also, they sought the protection granted in the Sri Lanka – Switzerland BIT. Nevertheless, the arbitral tribunal rejected

[50] Ibid., paras. 98–101.
[51] Junngam, Principles of International Investment Law, 509. (referencing note 2).
[52] Yannick Radi, "The Application of the Most-Favoured-Nation Clause to the Dispute Settlement Provisions of Bilateral Investment Treaties: Domesticating the 'Trojan Horse'," *European Journal of International Law* 18, no. 4 (2007): 757, 762, fn. 474.
[53] Kenneth J. Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* (Oxford: Oxford University Press, 2015), 359.
[54] Pia Acconci, "Most-Favoured-Nation Treatment," in *Oxford Handbook of International Investment Law*, ed. Peter Muchlinski, Federico Ortino, and Christoph Schreuer (Oxford: Oxford University Press, 2008), 381.
[55] Ibid.
[56] AAPL v. Sri Lanka, ICSID Case No. Arb/87/3, Award of June 27, 1990, ICSID Reports 4 (1990): 246 ff., accessed August 25, 2024, http://www.italaw.com/sites/default/files/case-documents/ita1034.pdf.

the claim. It stated that '....it is not proven that the Sri Lanka/Switzerland Treaty contains rules more favorable than this provided for under the Sri Lanka/UK Treaty, and hence, Article 3 of the latter Treaty cannot be justifiably invoked in the present case.' On the other hand, in the case of ***CMS v. Argentina***,[57] the claimant relied upon the MFN treatment included in the USA – Argentina BIT to maintain that the liability standards incorporated in other Argentinean BITs could apply, as they were more favorable than those contained in the US-Argentina BIT. The main reason behind this claim was that all other BITs concluded between Argentina and other countries did not include exception clauses to MFN treatment but such a clause is included in USA-Argentina BIT. On the other hand, the tribunal rejected the assertion and stated that it is 'not convinced that the clause [had] any role to play in this case.'[58] The tribunal also established that such an assertion 'would in any event fail under the *ejusdem generis*[59] rule, as rightly argued by the Respondent.'[60] Here the tribunal did not explain the reasoning behind its conclusion about the *ejusdem generis* rule. Besides, the tribunal also did not deal in more depth with the issue of the *ejusdem generis* rule.

Furthermore, by analyzing case-law, it is easily found that the standard of fair and equitable treatment is also connected with the standard of MFN treatment.[61] Actually, the relation between the standards of fair and equitable treatment and that of MFN treatment are parallel in nature and there is absolutely no hierarchy.[62] So, fair and equitable treatment should not be looked on as an outsmart standard where there may be a scope for the inclusion of other protective standards.[63] For the last few decades, the approach has shifted toward including MFN treatment instead of fair and equitable treatment. Therefore, it can be easily said that a modern-day typical standard of international trade is now common in international investment law. This is occurring mainly because

[57] CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award of April 20, 2005, accessed August 22, 2024, http://www.italaw.com/cases/288#sthash.jxGNIXAe.dpuf.

[58] Ibid., para 377.

[59] "Ejusdem generis" refers to a principle of legal interpretation used to limit the scope of general terms in legislation or legal documents by constraining them to the same class or category as the specific terms mentioned. For example, if a law refers to "cars, trucks, and other vehicles," the general term "vehicles" would be interpreted to include only those types of vehicles similar to cars and trucks, not, for instance, airplanes or boats.

[60] CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, para. 377.

[61] Pia Acconci, "Most-Favoured-Nation Treatment," in *Oxford Handbook of International Investment Law,* ed. Peter Muchlinski, Federico Ortino, and Christoph Schreuer (Oxford: Oxford University Press, 2008), 382.

[62] Ibid.

[63] Stephen Vasciannie, "The Fair and Equitable Treatment Standard in International Investment Law and Practice," *British Yearbook of International Law* 70 (1999): 99–149.

of the increasing significance of foreign investments in the process of global economic integration. Also, the growing complementarity between trade and investments is creating continuous competition between states to attract investors and there is a sign of transparency in the international legal framework in the area of foreign investment.[64] Remarkably, MFN treatment has become quite relevant due to the rapid changes which have taken place in many developing countries and due to the progressive liberalization which those countries have been undergoing, even through concluding investment treaties *inter se*.[65] For that, the issue of applying the MFN standard to substantive matters of treatment in connection with the fair and equitable treatment standard can arise.[66] In 1995, the BIT treaty between Pakistan and Turkey did not expressly include fair and equitable treatment, but in the case of **Bayindir v. Pakistan**[67] there was a successful attempt to link the fair and equitable treatment standard with the most favored nation treatment provided in the BIT of the respective countries. The claimant argued that it was entitled to get fair and equitable treatment through the Most Favored Nation treatment which is included in the BIT between Pakistan and Tukey. Later, the ICSID[68] tribunal accepted that argument and upheld its jurisdiction although Pakistan vehemently objected to it. Also, the tribunal concluded that Pakistan has an explicit fair and equitable principle clause in other BITs signed by the government of Pakistan.[69] In considering the claim that a selected tendering process was held to favor the locals to replace *Bayindir* in the completion of the investment[70], the court found that there was a direct violation of the Most Favored Nation treatment and the court also upheld its jurisdiction.[71] There was an allegation of violation of the MFN clause and it had to be dealt with by the tribunal. In this regard, the tribunal noted that the MFN clause was not limited

[64] Pia Acconci, "Most-Favoured-Nation Treatment." In *Oxford Handbook of International Investment Law*, edited by Peter Muchlinski, Federico Ortino, and Christoph Schreuer (Oxford: Oxford University Press, 2008), 383.
[65] Ibid., 81.
[66] Stephen Vasciannie, "The Fair and Equitable Treatment Standard in International Investment Law and Practice," *British Yearbook of International Law* 70 (1999): 106. Vasciannie emphasizes that "one effect of the growing network of bilateral investment treaties incorporating the most-favorable-nation standard has been to generalize the applicability of the fair and equitable standard among States."
[67] Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, Award, accessed August 29, 2024, http://www.italaw.com/cases/documents/133#sthash.Sk1JTTNm.dpuf.
[68] International Centre for Settlement of Investment Disputes (ICSID), "Home," accessed August 22, 2024, https://icsid.worldbank.org/apps/ICSIDWEB/Pages/default.aspx.
[69] Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, Award, paras 230-31, accessed August 29, 2024, http://www.italaw.com/cases/documents/133#sthash.Sk1JTTNm.dpuf.
[70] Ibid., paragraph 208–210.
[71] Ibid., paragraph 219–2221, 223–224.

to regulatory treatment, but also applied "to the manner in which a state concludes an investment contract and/or exercises its rights thereunder".[72] On the contrary, in the case of ***Telenor v. Hungary,***[73] the claimant failed to achieve a similar conclusion. Although an MFN clause was included in the basic treaty of 1991 between Hungary and Norway, the claimant failed to achieve its goals. Also, an expropriation claim arose and both parties had to agree to submit to ICSID arbitration. There was an allegation that the host state had breached the fair and equitable treatment afforded by the BIT and, in support of this, Telenor pointed out the procedural link by referring to the MFN clause. For this reason, a very broad dispute resolution clause emerged.[74] Hungary objected to this claim by contending that the 'most favoured nation clause [was] limited to substantive rights and could not be invoked to extend the jurisdiction of the tribunal beyond that conferred by…. the Hungary-Norway BIT.'[75] The *Maffezini,*[76] *Siemens,*[77] *Gas Naturals*[78] *and Suez*[79] cases were also mentioned by the ICSID tribunal as examples where a broad construction of the most-favored-nation provision was given.[80] There arose also situations where the tribunal took a narrower approach to deal with the MFN clause, for example, in the cases of *Salini*[81] and *Palma.*[82] Because of ambiguity in the language of the BITs of the respective parties concerning 'the intention of the parties', the tribunal adopted the same approach as the *Palma* tribunal and attributed absolute relevance to the intention being clearly expressed by the contracting states.[83] Here, in this

[72] Ibid., paragraph 222.
[73] Telenor Mobile Communications A.S. v. The Republic of Hungary, Award http://www.italaw.com/cases/documents/1094 accessed 02 October 2024.
[74] Ibid., paras 20, 41 and 52.
[75] Telenor Mobile Communications A.S. v. The Republic of Hungary, Award http://www.italaw.com/cases/documents/1094. accessed 02 October 2024.
[76] Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, accessed August 13, 2024, http://www.italaw.com/documents/Maffezini-Jurisdiction-English_001.pdf.
[77] Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, accessed August 13, 2024, http://www.italaw.com/cases/1026#sthash.09l2l69d.dpuf.
[78] Gas Natural SDG, S.A. v. The Argentine Republic, ICSID Case No. ARB/03/10, accessed August 13, 2024, http://www.italaw.com/cases/476#sthash.1LHRvHb0.dpuf.
[79] Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic, ICSID Case No. ARB/03/17, accessed August 13, 2024, http://www.italaw.com/cases/1048#sthash.T3NHRUIt.dpuf.
[80] Telenor Mobile Communication AS v. Hungary, ICSID Case No. ARB/04/15, Award of June 22, 2006, paras. 85-88. In this case, the claimant particularly referred to the Maffezini and Siemens cases in support of the proposition.
[81] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, accessed August 14, 2024, http://www.italaw.com/cases/954#sthash.b0xqkXIA.dpuf.
[82] Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, accessed August 14, 2024, http://www.italaw.com/cases/documents/858#sthash.7Rks3DId.dpuf.
[83] Ibid., paras 90–91.

situation, the tribunal also referred to Article 31 of the *Vienna Convention of the Law of Treaties of 1969,*[84] stating that, as already underlined by the *Palma* tribunal, '….the effect of the wide interpretation of the MFN clause is to expose the host state to treaty shopping by the investors…..'[85] and that '….the wide interpretation of the MFN clause generates both uncertainty and instability….,'[86] and that '… what has to be applied is not some abstract principle of investment protection in favor of a putative investor who is not a party to the BIT…., but the intention if the States who are the contracting parties,' as the tribunal's '…. task is to interpret the BIT….'[87] Where the basic treaty clearly limis arbitration to expropriation claims, then it is inevitable that the tribunal will have jurisdiction over it.[88] The same things happened in the *Telenor* case where there was an alleged breach of the treaty obligation to provide fair and equitable treatment.[89]

2. 3 Procedural Protection

After going through the decision of several tribunals regarding MFN clauses, it is accepted that there are no constant rules for dealing with MFN treatment, rather all the decisions are separate from each other. Also, these decisions have received different justifications from the judges of the respective tribunals as to why they are relying on the MFN provisions. Like in the case of tribunals, scholars' views on these issues are also different and not unanimous. Besides, some of the scholars who served as judges used several academic forums for further development of their views on these issues.[90] If we go through the general meaning of arbitral jurisprudence, we will find that there is room for including more favorable treatment by using an MFN clause, but when the investors try to establish or to expand the jurisdictional basis to cover 'Investor - State' arbitration based on a broader consent to arbitration in third-party BITs, it does not allow to do so.[91] Additionally, present BIT practices of parties (especially the United States) partly disapprove the application of MFN clauses

[84] Ibid., para 92.
[85] Ibid., para 93.
[86] Ibid., para 94, https://unctad.org/system/files/official-document/unctaddiaeia2011d6_en.pdf.
[87] Ibid, para 95
[88] Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, accessed October 02, 2024, http://www.italaw.com/cases/documents/858#sthash.7Rks3DId.dpuf.
[89] Ibid., 102.
[90] Junngam, Principles of International Investment Law, 480. (referencing note 2)
[91] Dana H. Freyer and David Herlihy, "Most-Favored-Nation Treatment and Dispute Settlement in Investment Arbitration: Just How 'Favored' is 'Most-Favored'?" *ICSID Review* 20, no. 1 (2005): 58.

to dispute settlements.[92] Several authors both approve and disapprove the applicability of an MFN clause to dispute settlements.[93] Many writers pointed out this issue and remind participants in international law to recognize it.[94] Applying the clause in dispute settlement provisions will extend the globalization and harmonization of dispute settlement provisions. The president of *Maffezini* argued in that manner.[95] Also, allowing a dispute to come before an international tribunal is more important than a set of substantive protections. Moreover, he believed the exclusion of dispute settlement from the operation of the MFN clause seemed unreasonable in the absence of the parties' intention.[96] Another scholar named Jurgen Kurtz argued that, unless otherwise stated, the operation of the clause should cover procedural matters.[97] In addition, this clause should be applied to dispute settlement to the extent it does not contravene other fundamental policies in the same BIT.[98] The MFN clause has been termed as a *Trojan Horse* by Yannick Radi,[99] who believes that by reason

[92] Stephan W. Schill, The Multilateralization of International Investment Law (Cambridge: Cambridge University Press, 2009): 151. Recent US and Canadian BIT practice concerning MFN treatment in BITs and Free Trade Agreements (FTAs) now includes attempts to deliberately limit MFN treatment to substantive investment protection. Thus, the United States introduced a clause in some subsequent negotiations that specifically intended to exclude the application of MFN clauses to investor-State dispute settlement. See Article 10.4(2), footnote 1, Draft of the Central America–United States Free Trade Agreement, January 28, 2004 (stating that the parties agree that the MFN clause they include in their treaty "does not encompass international dispute resolution mechanisms such as those contained in Section C of this Chapter and, therefore, could not reasonably lead to a conclusion similar to that of the Maffezini case").

[93] Junngam, *Principles of International Investment Law*, 480.

[94] Ibid.

[95] Ibid 481., Francisco Orrego Vicuna, F*oreign Investment Law: How Customary is Custom?* (American Society of International Law, 2005): 97, 100.

[96] Francisco Vacuna, "Bilateral Investment Treaties and the Most-Favored-Nation Clause: Implications for Arbitration in the Light of a Recent ICSID Case," in Investment Treaties and Arbitration, ed. (Basel: Swiss Arbitration Association, 2002): 142.

[97] Jurgen Kurtz, "The Delicate Extension of Most-Favoured-Nation Treatment to Foreign Investors: Maffezini v. Kingdom of Spain," in *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties, and Customary International Law,* ed. Todd Weiler (London: Cameron May, 2005): 523, 530.

[98] Jarrod Wong, "The Application of Most-Favored-Nation Clauses to Dispute Resolution Provisions in Bilateral Investment Treaties," AJWTO & IHLP 171 (2008): 177-79.

[99] Yannick Radi, "The Application of the Most-Favored-Nation Clause to the Dispute Settlement Provisions of Bilateral Investment Treaties: Domesticating the 'Trojan Horse,'" *EJIL* 18, no. 4 (2007): 761. Dr Yannick Radi is an Assistant Professor in International Law at the Grotius Centre for International Legal Studies of Leiden University and a Guest Professor at the University of Lille where he lectures on the philosophy of International Law.

of the *effet utile*,[100] the MFN clause always applies to the dispute settlement mechanism unless it can be demonstrated through a systemic interpretation that the parties have intended otherwise.[101] Besides, some scholars have the view that the application of the MFN clause in dispute settlement should be more limited, for instance, it should be discussed when there is a need for it.[102]

However, some scholars are against permitting MFN clauses to be used for more favorable procedural protection. They believe that it does not seem correct to extend the MFN clause to arbitration because there is no government action involved in the dispute settlement.[103] According to these scholars,

'...Treaties specify procedures. Consequently, an MFN does not control, absent ambiguities. They further argue that arbitration is consent-based between national parties; therefore, the operation of the MFN clause should not challenge or revise procedures that govern arbitration. If the MFN clause did challenge the original procedures, the new arbitration procedures would no longer reflect the government's consent, and would become contrary to the intent of the parties.'[104]

Also, there are opinions according to which when states are including the MFN provision to attract foreign investment, it may be politically motivated, so, it does not actually show the true consent of states.[105] The fear behind this opinion is that if an investor is allowed to draw more favorable treatment from other BITs rather than the host state's BITs then they may cherry-pick from all the

[100] *effet utile* or the effectiveness of European law. The development of *effet utile* is usually studied as a concept of EU law within the framework of the interpretative methods and legal principles developed by the Court. "The Role of Effet Utile in Preserving the Continuity and Authority of European Union Law: Evidence from the Citation Web of the Pre-accession Case Law of the Court of Justice of the EU", https://www.ejls.eu/18/209UKhtm. accessed 18 August 2024.

[101] Junngam, *Principles of International Investment Law*, 481.

[102] Ibid, 482. "[T]treaty was, after all, drafted precisely in order to give expression to the intentions of the parties, and must be presumed to do so. Accordingly, this intention is, *prima facie*, to be found in the text itself, and therefore the primary question is not what the parties intended by the text, but what the text itself means: whatever it clearly means on an ordinary and natural construction of its terms, such will be deemed to be what the parties intended. It may be quite true, as Judge Anzilotti said in the *Night Work* case, that 'the words have no value except as an expression of the intention of the parties'; but it is no less true that it was precisely in order to express that intention that the words were chosen, and for this reason, and in that sense, they have value and significance in themselves, without reference to anything extraneous."

[103] Junngam, *Principles of International Investment Law*, 482.

[104] Ibid.

[105] Brigitte Stem, "ICSID Arbitration and the State's Increasingly Remote Consent: Apropos the Maffezini Case," in *Law in the Service of Human Dignity: Essays in Honor of Florentino Felciano*, ed. Steve Charnovitz, Debra P. Steger, and Peter Van den Bossche (Cambridge: Cambridge University Press, 2005): 246.

BITs of the respondent's parties. Therefore, Professor Sonarajah[106] was very cautious in his article regarding the application of MFN provisions so that it does not lead to an unplanned result and that reasonable care must be taken while applying the provision.[107] So, some scholars like professor McLachlan and others also disagree with applying an MFN clause to dispute settlement; they rather prefer the *Palma* approach over *Maffezini*[108] and they also urge that, when the MFN clause is being applied in a dispute settlement process, it must be made sure it will not have any effect of fundamentally subverting the carefully negotiated balance of the BIT in question.[109]

Besides, some scholars, giving their views on the application of the MFN clause in dispute settlement, disapprovingly stated:

The lack of evidence of an intention that the MFN would apply to dispute settlement; that the application of an MFN would disrupt the balance achieved in the treaty and lead to treaty shopping; the need for clear and unambiguous consent; and the practice of states such as the UK that have expressly provided for MFN treatment to cover dispute resolution.[110]

Finally, use of MFN provisions in international investment law is totally different from international trade law. In international trade law, the MFN provisions are only used for substantive matters, on the other hand, in the area of international investment law, the MFN provisions can be used for both substantive and procedural issues. For this, using MFN provisions in the international investment law arena is controversial because it does not have any limitations like where to stop or start. To remove this confusion, several scholars and judges of independent arbitral tribunals have made comments on and delivered judgments for and against such use of MFN provisions in both substantial and procedural circumstances in investor - state dispute settlement provisions, but still there is no standard or set of rules to interpret existing MFN provisions.

3. 1 MFN Provisions and Jurisdiction

Over the past years, the interpretation and application of MFN provisions has been discussed by the International Court of Justice and several international tribunals. Primarily, these tribunal and court decisions have a deep relevance to understanding the application of MFN provisions in specific circumstances. Besides, the MFN clause is depended on to bring out a benefit which is not

[106] M. Sornarajah, The International Law on Foreign Investment, 2nd ed. (Cambridge: Cambridge University Press, 2010): 308.
[107] Ibid, 236.
[108] Junngam, Principles of International Investment Law 483.
[109] Campbell McLachlan QC, Laurence Shore, and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford: Oxford University Press, 2008): 254.
[110] Andrew Newcombe and Lluis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment, "Historical Development of Investment Treaty Law"* (Kluwer Law International, 2009): 205, 218.

usually available in general circumstances.[111] Some cases had a huge impact when a BIT dispute arose.

The case of the *Anglo-Iranian Oil Company* is a common case which has been cited in several investment treaty dispute settlements and arbitration in recent times.[112] Next, in the case of ***Rights of US Nationals in Morocco (France v. United States of America),***[113] it was decided that the application of MFN treatment depends primarily on two sets of treaties, namely, the basic treaty and the third-party treaty, if one is to establish the content of the treatment allowed under the MFN clause.[114] In this case it is explained by the ICJ that, in order to invoke the rights under MFN treatment given in the basic treaty and the third-party treaty, both treaties must be valid and in force.[115] In the *Rights of US Nationals in Morocco (France v. United States of America)* case, the question was raised as to whether the United States would get the 'privileges with regard to consular jurisdiction' that Morocco had granted to Spain and the United Kingdom in other BITs. The United States further reasoned and claimed that they were entitled to a decision on jurisdiction on the basis of a treaty concluded with Morocco in 1936, where Morocco agreed that 'whatever indulgence, in trade or otherwise, shall be granted to any of the Christian Powers, the citizens of the United States shall be equally entitled to them.'[116] The ICJ rejected this claim of the United States. The Court, further examining the treaties of Morocco with Spain and the United Kingdom, found that the 'intent of the parties was to treat each other with equality at all times, and therefore the Court held that once Spain and the United Kingdom had renounced the privileges at issue, the basis of those privileges ceased to exist, and the United States accordingly could not invoke the MFN clause to continue the claim.'[117] Furthermore, another widely cited case in investment treaty arbitration is the ***Ambatielos***[118] case. This case was decided by an *ad hoc* Arbitration Commission in 1956. Greece invoked the MFN clause of 1886 Anglo-Greek Treaty of Commerce and Navigation, because Greece believed that Mr. Ambatielos, a Greek citizen had suffered a denial of justice in respect of a

[111] Abby Cohen Smutny and Lee A. Steven, "The MFN Clause: What Are Its Limits?" in *Arbitration under International Investment Agreements: A Guide to the Key Issues*, ed. Katia Yannaca-Small (Oxford: Oxford University Press, 2010): 352.

[112] This case is discussed in the introductory part of this article.

[113] *Rights of US Nationals in Morocco (France vs United States of America)* http://www.icj-cij.org/docket/files/11/1927.pdf accessed 20 August 2024.

[114] Smutny and Steven, "MFN Clause," 360.

[115] Ibid.

[116] Ibid.

[117] Ibid 361.

[118] The Ambatielos Claim (Greece v. United Kingdom), International Court of Justice, http://www.icj-cij.org/docket/index.php?sum=81&p1=3&p2=3&case=15&p3=5. (accessed August 27, 2024).

dispute brought before the English courts.[119] On the other hand, the United Kingdom argued that Greece did not bring a valid claim because the MFN clause related to commerce and navigation and did not relate to the administration of justice.[120] The court rejected the claim and stated that "the effects of the most favored nation clause contained in Article X of the said Treaty of 1886 can be extended to the system of the rights of persons engaged in trade and navigation."[121] To resolve the case the arbitration commission used the *ejusdem generis* principle and stated that the 'clause can only attract matters belonging to the same category of subject as that to which the clause itself relates.'[122] 'Moreover, the commission found that this 1886 Anglo-Greek Treaty encompassed the administration of justice, at least in respect of the intended beneficiaries under the treaty.[123] The commission also found that the administration of justice was included in the scope of the 1886 Anglo-Greek Treaty, because the clause broadly referred to "all matters relating to commerce and navigation."[124] Nevetheless, the Arbitration Commission reached the verdict that Mr. Ambatielos had not suffered a denial of justice and rejected the claim of Greece. However, this proposition of the Arbitration Commission is not universally accepted.[125]

The following discussions will focus on later cases related to jurisdictional issues regarding an MFN clause.

3. 2 The Applicability of MFN Clauses in Matters of Jurisdiction

RosInvest v. Russia[126]

For the first time the jurisdictional issues were discussed in this case and the court ruled that the 'clause could entitle an investor to ignore a dispute settlement mechanism in its BIT and enjoy one drawn from another BIT'.[127] Also, in this case, the MFN clause invoked articles from the UK-Soviet BIT and the Denmark-Russia BIT, to establish the jurisdiction of the tribunal. The aggrieved party claimed that they can bring the MFN clause from the Denmark-Russia BIT. On the other hand, the defendant stated that the aggrieved party cannot cherry-pick from the other BIT's clauses as this BIT was carefully

[119] Abby Cohen Smutny and Lee A. Steven, "The MFN Clause: What Are Its Limits?" in Arbitration under International Investment Agreements: A Guide to the Key Issues, ed. Katia Yannaca-Small (Oxford: Oxford University Press, 2010): 361.
[120] Ibid.
[121] Ibid.
[122] Ibid.
[123] Ibid, 362.
[124] Ibid, 362.
[125] Ibid., 362.
[126] RosInvest v. Russia, SCC Case No. Arbitration V. 079/2005, Award on Jurisdiction (October 2007), http://ita.law.uvic.ca/documents/Roslnvestjurisdiction-decision_2007-10_00 I.pdf. (accessed August 3, 2024).
[127] Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Cambridge: Cambridge University Press, 1986): 439.

negotiated and had a narrow scope. Furthermore, the defendant submitted that the narrow and broad clause from the Denmark-Russia BIT was in no position to relocate the original grant of jurisdiction. In addition, the respondent also argued that the MFN clause of the United Kingdom - Russia BIT was only concerned with substantive standards.[128] Later the tribunal found regarding the occurrence or validity of an expropriation that, under Article 8 of the United Kingdom and Soviet BIT, it had no jurisdiction. The jurisdiction under Article 8 of United Kingdom and Soviet BIT was limited only to disputes concerning amounts or payment of compensation or any other matters consequential to an expropriation.[129] The facts of the case are as follows:
Russia challenged the jurisdiction of the Tribunal because Rosinvest claimed that the Russian Federation had taken discriminatory and expropriatory decisions against them after they had bought 7 million shares in Yukos during November and December 2004.

The Tribunal's reasoning regarding jurisdiction
Here the tribunal took the wider definition from the Denmark-Russia BIT and did not take into account Article 8 of the UK-Soviet BIT by stating that this article did not grant jurisdiction to the tribunal regarding expropriation. Also, Article 8(1), is not sufficient to resolve the issues related to expropriation and determining compensation. So, there should be a separate basis for jurisdiction.
However, the proposition was rejected by Russia as they stated that only substantive and not procedural protection was granted by the MFN clause.

In the case of ***Renta 4 SVSA v. Russian Federation,***[130] where interestingly it was accepted by the tribunal that MFN clauses may extend to the tribunals' jurisdiction and jurisdiction based on the treaty may be disregarded,[131] a majority of the *Renta 4* tribunal ultimately decided that the specific MFN clause in the Spain–Union of Soviet Socialist Republics BIT (as it is linked to FET) could not be read as to expand the competence of the tribunal. In this case, under Article 10 of the Spain - USSR BIT, disputes may be arbitrated if they are related to the amount or method of payment of the compensation following nationalization and expropriation.[132] Here, in this case, the tribunal heavily

[128] RosInvest v. Russia, SCC Case No. Arbitration V. 079/2005, Award on Jurisdiction, 87-88, 99 (October 2007), http://ita.law.uvic.ca/documents/Roslnvestjurisdiction-decision_2007-10_00 I.pdf.
[129] Ibid.
[130] Renta 4 SVSA v. Russian Federation, SCC Case No. 24/2007, Award on Preliminary Objections, March 20, 2009, http://www.italaw.com/cases/915. (accessed August 25, 2024).
[131] Ibid, paras. 80–101.
[132] Ibid, paras 19–76.

relied on the *Ambatielos*[133] award, where it was unanimously forwarded as a general proposition that the MFN clause might be construed to encompass dispute settlements.[134] The Tribunal did not believe in the idea that access to different types of dispute settlements mechanisms should not be considered subject to MFN treatment because it would lead to forum shopping:

The use of the expression "forum shopping" in a derogatory sense is but the assertion of an opinion. It does not deal with the countervailing consideration to the effect that dispute resolution mechanisms accepted by a State in various international instruments are all legitimate in the eyes of that State. Some may be inherently more efficient. Others may be more reliable in a particular context. Having options may be thought to be more "favoured" for MFN purposes than not having them. It is not convincing for a State to argue in general terms that it accepted a particular "system of arbitration" with respect to nationals of one country but did not so consent with respect to nationals of another. The extension of commitments is in the very nature of MFN clauses.[135]

The tribunal of this case also stated that it was the duty of the tribunal to determine whether arbitration clauses in third-party treaties contained more favorable treatment or not; and the tribunal should determine it when there was no explicit provision regarding the extension of the MFN clause or the exception was absent in the treaty.[136]

3. 3 The Inapplicability of MFN Clauses in Matters of Jurisdiction

On the other hand, there are cases where an MFN clause was invoked in terms of jurisdictional issues but it was not accepted by the tribunal. Such are:

Salini v. Jordan[137]**,** in which case the claimant tried to broaden the respondent's consent which was present in the dispute settlement clause of the Italy - Jordan BIT of 1996. To show that the respondent consented, the claimant sought an umbrella clause from a third-party BIT to include in this BIT. Here the ICSID tribunal rejected the argument made by the claimant. The ICSID tribunal simply stated that the MFN clause stated in the BIT of Jordan and Italy did not have reference to 'all matters governed by the agreement', rather, the scope of the

[133] The Ambatielos Claim (Greece v. United Kingdom), International Court of Justice, http://www.icj-cij.org/docket/index.php?sum=81&p1=3&p2=3&case=15&p3=5. (accessed August 27, 2024).

[134] Nartnirun Junngam, "An MFN Clause and BIT Dispute Settlement: A Host State's Implied Consent to Arbitration By Reference," *UCLA Journal of International Law & Foreign Affairs* 15 (2009): 452.

[135] Renta 4 SVSA v. Russian Federation, SCC Case No. 24/2007, Award on Preliminary Objections, March 20, 2009, http://www.italaw.com/cases/915. (accessed August 25, 2024) para 92.

[136] Ibid.

[137] Salini Costruttori S.p.A. v. Jordan, ICSID Case No. ARB/02/13, Decision on Jurisdiction (November 15, 2004), http://ita.law.uvic.ca/documents/salini-decisionO000.pdf. (accessed August 25, 2024).

provision was more limited and narrower compared to the MFN clause allowed in the *Maffezini* case.[138]

The final conclusion in this case was that '[t]he outcome in Salini is justified not on the basis of the Tribunal's presumption that MFN clauses do not apply to dispute settlement mechanisms, but rather because of the fundamental rule of international law, that the jurisdiction of an international tribunal is based on consent.'[139]

In the case of ***Berschader v. Russia***,[140] "each Contracting Party guarantees that the most favored nation clause shall be applied to investors of the other Contracting Party in all matters covered by the present Treaty, and in particular in Articles 4, 5 and 6, with the exception of benefits provided by one Contracting Party to investors of a third country on the basis of its participation in a customs union or other international economic organizations, or & of an agreement to avoid double taxation and other taxation issues."[141]

After going through this clause, actually, most of them opined that the main objective of the tribunal was to reveal the intent of the contracting parties of the BIT.[142] Whereas most of the tribunal held different views from the *Palma* Tribunal.[143] Also, it may be questionable to what extent the MFN clause should extend to invoking provisions from third-party BITs, therefore, most of them try to limit the use of an MFN clause in procedural protection unless there is clear and unambiguous evidence.[144] So, the tribunal found that it lacked competence to hear the claim either through the original arbitration clause or through the MFN clause because of the practice of the Soviet Union.[145]

In the case of ***Tza Yap Shum v. Peru,***[146] the tribunal rejected the aggrieved party's application to use the MFN clause from the China-Peru BIT as a ground

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[138] Pia Acconci, "Most-Favoured-Nation Treatment," in Oxford Handbook of International Investment Law, ed. Peter Muchlinski, Federico Ortino, and Christoph Schreuer (Oxford: Oxford University Press, 2008), 394.

[139] Scott Vesel, "Clearing a Path Through a Tangled Jurisprudence: Most-Favored-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties," Yale Journal of International Law 32, no. 1 (2007): 125, 184-85.

[140] Bersehader v. Russia, SCC Case No. Arbitration V. 080/2004, Award (April 21, 2006), http://www.italaw.com/sites/default/files/case-documents/ita0079_0.pdf (accessed August 26, 2024).

[141] Ibid para 47.

[142] Abby Cohen Smutny and Lee A. Steven, "The MFN Clause: What Are Its Limits?" in *Arbitration under International Investment Agreements: A Guide to the Key Issues*, ed. Katia Yannaca-Small (Oxford: Oxford University Press, 2010), 351, 377.

[143] Ibid.

[144] Bersehader v. Russia, SCC Case No. Arbitration V. 080/2004, Award (April 21, 2006), paras. 180-81, http://www.italaw.com/sites/default/files/case-documents/ita0079_0.pdf (accessed August 26, 2024).

[145] Ibid., para 208.

[146] Tza Yap Shum v. Peru, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence (June 19, 2009), http://italaw.com/documents/TzaYapShum-DecisiononJurisdiction_002.pdf (accessed August 27, 2024).

to establish jurisdiction to resolve the dispute. The tribunal stated that the specific wording "should prevail over the general wording of the MFN clause". In the case of ***Palma Consortium v. Bulgaria,***[147] the tribunal also did not allow the claimants to import dispute resolution provisions from third-party treaties[148] and the reasoning was also the same, namely, that the MFN clauses in the latter case were much narrower in scope than the MFN clause in the former case.[149] Actually in this case, the claimant tried to submit its dispute to the forum which was not specified in the agreed BIT between Cyprus and Bulgaria. The claimant tried to put the case to the ICSID forum that arbitration was agreed in the Cyprus and Bulgaria BIT. Here the claimant gave two separate grounds as an indication for the respondent's consent to ICSID arbitration, namely: a) Respondent's consent to ICSID arbitration and Respondent consent to Energy Treaty Charter (ETC) and b) the MFN clause of the respective BIT signed between Cyprus and Bulgaria. Also, the claimant argued that the MFN clause must be construed as importing any more generous dispute settlement contained in the other BITs like the Bulgaria - Finland BIT. The claimant also argued that the respondent had given the positive nod to submit to ICSID arbitration by providing an MFN Clause in the BIT.[150] But the respondent rejected the argument forwarded by the claimant. The tribunal stated in an *obiter dictum* that the MFN clause could not be used to replace the agreed arbitral proceedings with ICSID arbitration although under Article 26 of the Energy Charter Treaty, the tribunal established its jurisdiction.[151] The Tribunal also rejected the idea that the clause may be construed as the respondent's consent to arbitrate, here the tribunal followed the rules which were established in the *Salini* case. Mainly, tribunal argued and tried to distinguish substantive rights from those of

[147] Plama Consortium v. Bulgaria, ICSID Case No.ARB/03/24, Decision on Jurisdiction (Feb 8, 2005), http://ita.law.uvic.ca/documents/plamavbulgaria.pdf. Accessed 28 March 2023. Global Arbitration Review reported that the August 27, 2008 Award in Plama Consortium Limited v. Republic of Bulgaria (ICSID Case No. ARB/03/24) was selected as the Best Award and the Most Surprising Award of 2008 in a survey of participants in the international arbitration on-line discussion forum OGEMID. The Award is the first ICSID award on the merits under the ECT from among more than 10 ECT cases registered with ICSID to date, and it reaches many interesting conclusions. It was issued by a tribunal composed of Carl F. Salans (President – appointed by ICSID), Albert Jan van den Berg (claimant's appointee) and V.V. Veeder (Bulgaria's appointee). https://kluwerarbitrationblog.com/2009/02/11/plama-consortium-limited-v-republic-of-bulgaria-the-best-and-most-surprising-award-of-2008/ .

[148] Jeswald W. Salacuse, The Law of Investment Treaties (Oxford: Oxford University Press, 2010), 254.

[149] Ibid.

[150] Nartnirun Junngam, "An MFN Clause and BIT Dispute Settlement: A Host State's Implied Consent to Arbitration By Reference," *UCLA Journal of International Law & Foreign Affairs* 15 (2009): 459.

[151] Ibid., 459.

a procedural nature.[152] In paragraph 209 of the *Palma Consortium v. Bulgaria* decision on jurisdiction, the tribunal stated that:
"It is one thing to add to the treatment provided in one treaty more favorable treatment provided elsewhere. It is quite another thing to replace a procedure specifically negotiated by the parties with an entirely different mechanism."
In ***Telenor v. Hungary,***[153] the Suez case was not followed. Also, the BIT between Norway-Hungary was extraordinarily precise as this BIT had limited their consent regarding specific categories of dispute but there was a scope for widening the jurisdiction.[154]
In 2013, there were decisions continuing to give different propositions regarding the widening of jurisdiction using the MFN clause. The bone of contention was whether dispute settlement clauses could be rectified by using an MFN clause or not. In the case of ***Garanti Koza v. Turkmenistan,***[155] it was agreed by the majority of the judges that the MFN clause can be applied to all dispute settlement scenarios. But there was a twist where one arbitrator did not agree with the majority and stated that the foreign investor "*must first be in a* dispute settlement relationship *with the host state*. In the light of the dissenting arbitrator from the ***Garanti Koza v. Turkmenistan*** case, we can come to the conclusion that the ICSID tribunal did not have jurisdiction over that particular case and there was a scope for UNCITRAL arbitration as it was provided by the BIT.
The ***Kilic v. Turkmenistan***[156] tribunal did not allow MFN provisions to be applied to the dispute settlement process.
In ***Sanum v. Laos***[157], a narrow-worded MFN clause was not allowed to extend to the jurisdiction. The arbitrator of that tribunal stated that "to read into [the MFN] clause a dispute settlement provision to cover all protections under the Treaty when the Treaty itself provides for very limited access to international arbitration would result in a substantial re-write of the Treaty and an extension of the States Parties' consent to arbitration beyond what may be assumed to have been their intention, given the limited reach of the Treaty protection and dispute settlement clauses."

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[152] Ibid, 461.
[153] Telenor Mobile Communication AS v. Hungary, ICSID Case No. ARB/04/15, Award (September 13, 2006), http://ita.law.uvic.ca/documents/TelenorvHungaryAward_001.pdf. (accessed August 2, 2024).
[154] Ibid, para 98.
[155] Garanti Koza LLP v. Turkmenistan, ICSID Case No. ARB/11/20, http://www.italaw.com/cases/2176#sthash.YYB5PsHm.dpuf (accessed August 24, 2024).
[156] Kiliç v. Turkmenistan, ICSID Case No. ARB/10/1, http://www.italaw.com/cases/1220#sthash.j3qnTFgz.dpuf (accessed August 2, 2024).
[157] Sanum Investments Limited v. Lao People's Democratic Republic, UNCITRAL, PCA Case No. 2013-13, http://www.italaw.com/cases/2050#sthash.X5x6GU36.dpuf. (accessed August 24, 2024).

To sum up, there is no fixed set of regulations for interpreting MFN provisions. Therefore, judges in several tribunals came up with new ideas to resolve the investor-state dispute. The claimant and judges, depending on MFN provisions related to dispute settlement, invoked the procedural provisions of third-party BITs related to jurisdiction. Nevertheless, it can easily coin that there is a trend going on in the area of BIT dispute settlement where aggrieved parties are prone to create an indirect relation or consent[158] "deducing consent of a host state party to the dispute by relying on not only the BIT in question but also on the other treaties concluded by the state concerned by extending the nature, meaning and scope of the MFN principle."[159]

[158] Nartnirun Junngam, "An MFN Clause and BIT Dispute Settlement: A Host State's Implied Consent to Arbitration By Reference," *UCLA Journal of International Law & Foreign Affairs* 15 (2009): 447.

[159] Suriya P. Subedi, *International Investment Law: Reconciling Policy and Principle* (London: Hart Publishing, 2008), 176.