



The Most-Favoured-Nation Clause in Investment Treaties

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1.0 Introduction

Most-favoured nation (MFN) is now a both common and controversial clause in investment treaties. It has been the object of differing and unexpected interpretations by treaty-based arbitral tribunals.

Initially, the application of MFN in investment treaties did not raise much debate. Since 2000, however, with *Maffezini v. Spain*,¹ an original interpretation of MFN led to a seismic shift in international investment law: the possibility for investors protected under a bilateral investment treaty (BIT) to import more favourable provisions from a third-party BIT made by their host state. This trend then accelerated and led to many criticisms, crystallized in one essential point: the latitude given to foreign investors to bring together elements from various treaties made by the host state and to custom tailor a treaty, ignoring the bilateral character of the commitments made by two states in the context of specific negotiations.

The controversies around MFN raise fundamental questions in the context of current changes in the international investment law and arbitration regime. They require an examination of the content and scope of this clause in order to find solutions that strike a better balance of the rights and obligations involved without compromising current reforms towards a more balanced regime that is a vector of sustainable development.

After reviewing the definition and background of the MFN clause (Section 2), this study will conduct a typology of investment treaties (Section 3) and then an analysis of the differing interpretations by the tribunals of several key issues (Section 4). The issues surrounding certain interpretations of the MFN clause (Section 5) and the reactions of states in their recent treaties (Section 6) will be reviewed in order to draw lessons for states (Section 7).

¹ Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID, ARB/97/7, Decision on Jurisdiction, January 25, 2000. Retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0479.pdf>



2.0 Definition and Background of the MFN Clause

It is impossible to analyze criticisms of current interpretations of MFN by certain investment tribunals without going into its characteristics. Including MFN in treaties is a very old practice by states. Nowadays considered the “cornerstone” of the World Trade Organization (WTO), unconditional MFN² constitutes a powerful lever for the multilateralization of the commitments of WTO member states.

It should be noted that MFN works in an integrated multilateral framework in the WTO in which member states are, in principle, subject to the same rules. Moreover, MFN is the object of numerous derogations in the WTO, including to the benefit of developing countries as part of special and differential treatment. Moreover, under the General Agreement on Trade in Services (GATS), each member state shall grant MFN treatment for every measure affecting trade in services, unless that measure is listed in Annex on Article II Exemptions.

MFN is one component of the principle of non-discrimination under international law. Indeed, non-discrimination can be appreciated in its internal aspect through the treatment accorded to nationals compared with that accorded to foreigners in national territory (national treatment). It can also be appreciated in its external aspect through the treatment accorded by the host state to foreigners of other nationalities (MFN treatment).

Schematically,³ under MFN a signatory state must extend to another party that is a beneficiary of the clause the most-favourable treatment that it would have granted to a third party. Under a BIT, this amounts to the host state extending to investors or investments from the other signatory state the most-favourable treatment that it would have granted to investors or investments from a third state to the BIT. The treaty in which an MFN clause is included is called the “basic treaty.”

Three main characteristics of MFN merit attention. First, the obligation to grant MFN treatment is strictly a treaty obligation, and it does not arise from customary international law. For this reason, a state is only obliged to grant MFN treatment if it has made commitments in a treaty and only to the extent of the commitments made therein. As clearly stated in the draft articles on MFN of the International Law Commission (ILC) in its article 7, the benefit of MFN treatment may only be claimed from a state “otherwise than on the basis of an international obligation undertaken by the latter State.”⁴ The commentary states that:

Although the grant of most-favoured-nation treatment is frequent in commercial treaties, there is no evidence that it has developed into a rule of customary international law.

Second, the MFN clause is a relative obligation. Unlike other BIT obligations, it is not possible to have an advance and absolute definition of the content of the “no less favourable” treatment to be granted by the host state. Everything will depend on what is granted to investors of other nationalities and their investments in the host state. In this, we can say that the host state may only grant to others what it was initially willing to give to some.

Third, one can only compare what arises from the same sphere of relationship. In accordance with article 10.2 of the ILC draft articles on MFN clauses, this clause can only come into effect if the persons or things benefiting under MFN:

(a) belong to the same category of persons or things as those in a determined relationship with a third

² MFN is said to be unconditional in the WTO because there is no obligation of reciprocity. In practice, when an advantage is granted by one member state, it has to be automatically and unconditionally extended to similar products of other WTO member states.

³ MFN treatment is defined in article 4.a of the Draft Articles on MFN Clauses of the International Law Commission (ILC) as “treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favourable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State.” See Draft Articles on MFN clauses with commentaries, adopted by the ILC at its third session in 1978, A/CN.4/SER.A/1978/Add.1 (Part 2), p. 18. Retrieved from http://legal.un.org/ilc/texts/instruments/english/commentaries/1_3_1978.pdf. The text was reproduced in the *Yearbook of the International Law Commission*, 1978, Vol. II, Part Two.

⁴ *Id.*, p. 25.



State which benefit from the treatment extended to them by the granting State and
(b) have the same relationship with the beneficiary State as the persons and things referred to in
subparagraph (a) have with that third State.

The arbitration commission in the famous *Ambatielos* case had ruled back in 1953 that MFN “can only attract matters belonging to the same category of subject as that to which the clause relates.”⁵

⁵ ICJ, *Ambatielos, (Merits) (Greece v. The United Kingdom)*, judgement of May 19, 1953, ICJ Report, 1953, p. 10.



3.0 MFN in Investment Treaties

The MFN clause already appeared in the “ancestors” to the investment treaties, that is, treaties of friendship, commerce and navigation concluded starting from the 18th century. Also present in the first BIT signed in 1959 between Germany and Pakistan, MFN is now included in the vast majority of BITs and investment chapters of free trade agreements (FTAs).

3.1 Typology of MFN Clauses in BITs and Investment Chapters

There are many variations on the MFN clause in investment treaties and chapters, but it is possible to classify them according to three main criteria. First, a distinction may be made on whether MFN is a stand-alone clause, attached to a national treatment clause or attached to another clause in the BIT.

For the first case, we can cite article 3.2 of the China–Benin BIT (2004):⁶

Neither Contracting Party shall subject investments and activities associated with such investments by the investors of the other Contracting Party to treatment less favorable than that accorded to the investments and associated activities by the investors of any third State.

But sometimes MFN is combined with the national treatment obligation in BITs, such as in article 3.2 of the Netherlands–Burkina Faso BIT (2001):

Each Contracting Party shall grant most particularly to these investments treatment that is not in any way less favourable than that **afforded to investments made by its own nationals or by the nationals of any third State**, in all cases the treatment that is the most favourable to the national concerned.
[Unofficial translation; emphasis added]

Second, a distinction can be made on whether the MFN clause specifies or not the type of “treatment” covered. The majority of traditional BITs do not specify the scope of application of MFN—that is, the categories of measures covered—like the examples cited above. Some BITs, however, are more precise and state, for example, that:

Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, maintenance, **use, enjoyment or disposal of their investments**, to treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State.⁷ [Emphasis added]

Conversely, other BITs refer directly to all the provisions contained in other BITs.⁸ Indeed, they state that MFN is applicable to all the provisions of the BIT from definitions through to the settlement of disputes. This type of BIT, therefore, expressly authorizes the import of any more favourable provision from other BITs corresponding to those covered by MFN. Note that although several British BITs contain this clarification, not all do, including those made after 2000.⁹ This is a very minority practice in the universe of BITs, with very important legal implications, as we shall see below.

Article 4.2 of the Colombia–Switzerland BIT (2006) refers solely to fair and equitable treatment (FET):¹⁰

⁶ All the BITs and FTAs mentioned in this article are available on the UNCTAD database (<http://investmentpolicyhub.unctad.org/IIA>).

⁷ BIT between the United Kingdom of Great Britain and Northern Ireland and Bosnia and Herzegovina (2002), article 3.2 See also United Kingdom–Egypt (1975), article 3.2; Argentina–Denmark (1992), article 3.3.

⁸ Article 3.3 of the United Kingdom–Kyrgyzstan BIT (1999) reads as follows: “For the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above **shall apply to the provisions of Articles 1 to 11 of this Agreement.**” [Emphasis added]

⁹ See, for example, the United Kingdom–Vietnam BIT (2002), article 3.

¹⁰ See also the Spain–Russia BIT (1990), article 5.1-2.



Each Party shall ensure **fair and equitable treatment within its territory of the investments of investors of the other Party. This treatment** shall not be less favourable than that granted by each Party to investments made within its territory by its own investors, or than that granted by each Party to the investments made within its territory by investors of the most favoured nation, if this latter treatment is more favourable. [Emphasis added]

Finally, one can make a distinction on whether or not the MFN clause incorporates a criterion of comparison between foreign investors. Thus, a growing number of BITs state that a comparison will be made between investors or investments located “in like circumstances or situations”:

Each Contracting Party shall in its territory accord to investors of the other Contracting Party and to their investments treatment no less favourable than the treatment it accords **in like circumstances** to investors of any third country and to their investments ... with respect to investment and business activities.¹¹[Emphasis added]

Each Party shall accord to an investor of the other Party and to a covered investment, treatment no less favourable than the treatment it accords **in like situations**, to investors of a third country and to their investments ... in its territory.¹² [Emphasis added]

The term “circumstance” is used more frequently than “situation” in investment treaties, and the legal implications of the choice of the one rather than the other are yet to be determined.

Other treaties go further and provide guidelines for tribunals that must rule on whether like circumstances are present. This is the case of article 17.2 of the Investment Agreement for the COMESA Common Investment Area (CCIA):¹³

For greater certainty, references to ‘like circumstances’ in paragraph 1 of this Article requires an overall examination on a case-by-case basis of all the circumstances of an investment including, inter alia:

- (a) its effects on third persons and the local community;
 - (b) its effects on the local, regional or national environment, including the cumulative effects of all investments within a jurisdiction on the environment;
 - (c) the sector the investor is in;
 - (d) the aim of the measure concerned;
 - (e) the regulatory process generally applied in relation to the measure concerned; and
 - (f) other factors directly relating to the investment or investor in relation to the measure concerned;
- and the examination shall not be limited to or be biased towards any one factor.

But as in the examples above, most BITs do not refer to “like circumstances” and do not provide a criterion for comparisons between investments. We should note that in the WTO, MFN is only applied between “like” foreign products (GATT) or “like service providers” (GATS). The notion of likeness is fundamental and has been the subject of abundant jurisprudence by the Appellate Body, particularly as part of national treatment. Does the silence of many BITs on this point mean that the tribunals can compare any foreign investors to any other foreign investors and, if not, based on what criteria? It will be for investment tribunals to answer this question.

Some atypical formulations can also be found. Thus, some BITs grant MFN “without prejudice to the laws and regulation” of the host state¹⁴ or “subject to the exceptions established by law and to applicable legal requirements.”¹⁵ This type of provision lays down that a state may reserve the right to have discriminatory rules in national law, on condition that the laws in question are themselves applied in a non-discriminatory fashion.

¹¹ Japan–Republic of Korea BIT (2002), article 2.2.

¹² EU–Canada CETA, 2016, article 8.7.1.

¹³ COMESA is the Common Market for Eastern and Southern Africa

¹⁴ China–Latvia BIT (2006), article 3.

¹⁵ Brazil–Malawi Investment Cooperation and Facilitation Agreement (2015), article 10.2.



Moreover, although MFN clauses generally protect investors and their investments, some BITs limit the benefit of MFN treatment to “investments” without extending it to “investors.”¹⁶

Finally, regardless of the way in which the MFN clause is written, investment treaties systematically provide for exceptions.

3.2 Exceptions to the Application of MFN

Traditionally, two types of MFN-specific exceptions are systematically provided in investment treaties and chapters. First, as with the WTO, they respond to the need to take account of the existence of areas of economic integration, which are by definition incompatible with MFN. They then cover double taxation treaties.

Exceptions of this type are typically formulated as follows:¹⁷

This treatment does not extend, however, to the privileges that one Contracting Party grants to the nationals or companies of a third State, by virtue of its participation in or association with a free trade area, customs union, common market or any other form of regional economic organization.

Treatment granted under this article is not applied to taxes and fiscal deductions and exemptions granted by one of the Contracting Parties to the investors of a third State under a double taxation or other tax-related agreement. [Unofficial translation]

The result of these exceptions is that investors protected by the treaty cannot use MFN to claim treatment more favourable than that granted by the host country to investors from third countries as part of an economic integration area or on the basis of a double taxation treaty.

These two categories of exception reflect the types of risks considered by the signatory states (at the time the BIT is made) in the event of the limitless application of MFN. These include the accidental multilateralization of trade or tax preferences granted to privileged members of an economic integration area or to strategic economic partners.

Some BITs specifically exclude certain sectors from the scope of MFN, namely “aviation, fisheries, maritime matters, including salvage.”¹⁸ Other BITs add specific exceptions, such as “any arrangements for facilitating small scale frontier trade in border area,”¹⁹ or “matters related to the acquisition of land property.”²⁰ It is, therefore, quite possible for signatory countries to provide specific exceptions to meet their national investment policies.

Finally, it is interesting to note the growing inclusion in BITs, and especially investment chapters, of a general exception based on the general exception in Article XX of the WTO GATT. This type of exception is *a priori* applicable to MFN. But the scope of these clauses and their precise impact on the scope of MFN and national treatment largely depends on the way in which they are formulated, and the fact is that there are many variants.

3.3 The Temporal Scope of MFN

We should make a distinction here depending on whether MFN is limited to the post-establishment phase of the investment or whether it also covers the pre-establishment phase.

3.3.1 The Majority Approach: Post-Establishment MFN Treatment

The majority of BITs grant rights to protected foreign investors only after they have been allowed into the territorial jurisdiction of the state; and the MFN clause included in those treaties makes no exception to this rule.

¹⁶ Australia–Uruguay BIT (2002), article 4.

¹⁷ France–Libya BIT (2004), article 4.

¹⁸ See, for example, the Canada–Peru BIT (2008), annex II of the Canada list.

¹⁹ Article 3.3.c of the China–Benin BIT (2004).

²⁰ Japan–Kazakhstan BIT (2014), article 4.2.a.



When MFN is limited to the post-establishment phase, the host country retains the latitude to set specific entry requirements for foreign investors. National legislation may, thus, provide discriminatory rules, including limitations, in relation to the entry and admission of foreign investments, or certain foreign investments into the territorial jurisdiction of the state. Once they are admitted, however, foreign investments may not be subjected to discrimination, regardless of their country of origin.

In practice, BITs that limit MFN to the post-establishment phase already provide a clause on the admission of investments generally formulated, as in the following example, of article 2 of the Belgium–Côte d’Ivoire BIT (1999):

Each of the Contracting Parties shall encourage on its territory investments by investors of the other Contracting Party and **shall admit such investments in accordance with its legislation**. [Unofficial translation. Emphasis added]

Therefore, admission does not occur in accordance with the provisions of the BIT, since the BIT is only applicable in the post-establishment phase.

This can also arise from the clause on application of the treaty, when there is such provision, as with the Mexico–Australia BIT (2006), article 4:

This Agreement shall apply to investments of Investors of one Contracting Party in the territory of the other Contracting Party whenever made, to **the management, conduct, operation, sale or other disposition of such investments** (“activities associated with investments”), and to such Investors. [Emphasis added]

Other BITs go further and state that MFN is only applicable to post-establishment phase activities. An example of this can be found in article 4.2 of the United Kingdom–Mozambique BIT (2004)²¹:

Neither Contracting Party shall in its Territory subject Nationals or Companies of the other Contracting Party, **as regards their management, maintenance, use, enjoyment or disposal of their Investments**, to treatment less favourable than that which it accords to its own Nationals or Companies or to nationals or companies of any third State. [Emphasis added]

3.3.2 The Growing Minority Approach: MFN Since the Pre-Establishment Phase

3.3.2.1 Definition of Pre-Establishment MFN

Since the 1990s, with the emergence of investment chapters in FTAs, ever more investment treaties have granted rights to foreign investors since the admission phase in the liberalization of goods and capital movement. Canada and the United States were the first to follow this path, followed by the European Union and Japan. The trend was started by chapter 11 of the North American Free Trade Agreement (NAFTA), article 1103, which reads as follows:

Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party **with respect to the establishment, acquisition, expansion**, management, conduct, operation, and sale or other disposition of investments. [Emphasis added]

We note here that the agreement does not say that it is concerned with liberalizing the admission of foreign investments within the limits of MFN. It is sufficient to insert three key words in the MFN clause (or national treatment clause), namely, “**admission, acquisition and expansion**,”²² to grant rights of access to national territory.

²¹ See also the United Kingdom–Mexico BIT (2006), article 4.2.

²² The fact that the term “expansion” relates to the pre- or post-establishment phases remains controversial. It is likely that it covers both phases depending on the case at hand. See, for example, the clarifications regarding national treatment in the Canada–China BIT (2012), article 6.3: “The concept of ‘expansion’ in this Article applies only with respect to sectors not subject to a prior approval process under the relevant sectoral guidelines and applicable laws, regulations and rules in force at the time of expansion. The expansion may be subject to prescribed formalities and other information requirements.”



Article 1103 of the NAFTA inspired numerous subsequent Canadian and U.S. treaties, as well as their respective national model BITs.²³ The same applies in recent agreements made by the European Union, particularly the Comprehensive Economic and Trade Agreement (CETA).²⁴

Some treaties, like the Energy Charter Treaty, while limiting MFN to the post-establishment phase, leave the door open to an extension to the pre-establishment phase by an agreement to be negotiated later by the parties:²⁵

A supplementary treaty shall, subject to conditions to be laid down therein, oblige each party thereto to accord to investors of other parties, as regards the making of investments in its Area, the treatment described in paragraph (3) [MFN].

3.3.2.2 Exclusions from Pre-Establishment MFN Treatment

Investment treaties that grant pre-establishment rights systematically provide for restrictions. Indeed, no state could agree to flinging open the doors to the sectors of its economy to foreign investment without a minimum of safeguards. States, therefore, reserve the right to protect certain sectors or certain measures that are sensitive to the obligation of MFN treatment (and national treatment) during the pre-establishment phase.

While the principle is clear, the methods to achieve it are more complex. There are two possible options.

The first is to simply develop lists of existing non-conforming measures, called positive and negative lists. State parties can grant admission rights based on the MFN clause to every sector and for every measure except those that have been explicitly excluded in a list—that is the negative-list approach. Care must be taken to ensure that everything they want to protect is listed. This approach is often used in Canadian, U.S. and EU investment treaties.

Alternatively, state parties grant these same rights only for sectors that have been explicitly listed—the positive-list approach. Thus, anything that is not listed is excluded. This is the approach adopted by the WTO in the context of the liberalization of trade in services (GATS).

To sum up, with a positive list, everything that is not listed is covered by MFN, while in the negative list, everything that is not listed is excluded from it.

It is undeniable that the positive-list approach presents many advantages over the negative-list approach. Positive lists are simpler to create, present less risk of errors or the omission of strategic sectors to be protected, and require less time. Negative lists, on the other hand, are extremely complicated and time-consuming to prepare, even for developed countries. The fact is, negative lists require a particularly thorough analysis of the impact of liberalization on all the economic sectors affected, and a clear industrial policy. This is more difficult for countries that are engaging in this exercise for the first time. It is, therefore, important to allow the time to prepare its list, if one were to accept that the BIT covers the pre-establishment phase. This is an exercise that can easily span several years.

In any case, the establishment of a list, be it positive or negative, is a complex task that requires a synergy of action by all the ministerial departments of a country, in addition to widespread consultation with all stakeholders, including the domestic private sector.

The second option is to grandfather every measure that does not comply with MFN at the date of entry into force of the treaty and prepare a negative list of “future non-conforming measures.” This means that every state measure in force before the entry into force of the FTA or BIT can be maintained as such, even though it breaches the MFN clause. This is a very practical option that mitigates the risks of negative lists. It is adopted in some recent Canadian BITs. In this category of Canadian agreements, however, the host state does not have the right to amend these measures in any way that increases their “non-conformity.” For this reason, it could only renew them as they

²³ See article 4 of the US model BIT of 2012 (Retrieved from <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>) and article 4 of the Canadian model FIPA of 2004 (Retrieved from <http://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf>).

²⁴ See CETA, 2016, article 8.7.1.

²⁵ Energy Charter Treaty (1994), article 10.4. Retrieved from <http://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECT-fr.pdf>



stand, amend them to increase their conformity, or remove them. This is described as a “ratchet” mechanism. No turning back is possible. This also means that new measures adopted after the entry into force of the BIT or FTA by the host state must comply with the MFN clause, unless they are measures arising from the list of “future non-conforming measures.”

We note that countries like Canada are now more often combining a negative list of future non-conforming measures with the grandfathering of all existing non-conforming measures.²⁶

3.3.2.3 The Implications of MFN Treatment Since the Pre-Establishment Phase

Extending the scope of MFN to the pre-establishment phase means that the host state agrees to waive any discriminatory measure on the admission of and terms of access for foreign investment, and also waives its right to create new ones in the future. This is not an absolute right of access to the territory of the host state, but a relative right. In other words, foreign investors have the right to invest on the same terms as their foreign counterparts in the territory. In principle, it is not possible to close their access to certain sectors while opening such sectors to others or to impose conditions for establishment on them that are less favourable compared to other foreigners.

This is an important limitation of state sovereignty, especially for developing countries. It is also interesting to note that developing countries on several occasions rejected investment liberalization in the WTO Doha Round of negotiations on trade and development. In fact, investment is one of the so-called “Singapore issues” that were dropped from the Doha agenda at the 2003 Cancún Ministerial Conference, mainly due to opposition from developing countries. Even so, MFN clauses covering both pre-establishment and post-establishment phases are being accepted more and more by developing countries in their BITs and investment chapters of FTAs with developed countries.

Finally, we should recall that no state is required to grant pre-establishment rights in its territory to foreign investors in an investment treaty. This type of commitment in a BIT or FTA investment chapter is final and there is no possible turning back or adjustment, except in the unlikely event of renegotiation. On the other hand, a state may always proceed to liberalization in its national law if this is its domestic policy for attracting foreign investment. This has the advantage of it being possible to make the adjustments necessary to respond to economic changes at domestic and international levels. Thus, the host state can combine predictability and flexibility by modifying its laws and regulations to take account of the lessons of its experiences of liberalization or simply to adapt to a new economic order. This does not mean opening and closing sectors willy-nilly. Furthermore, states draw no advantage from doing so, if they wish to maintain a business climate that is attractive to investments in a competitive world.

These remarks are equally valid for national treatment, if it is granted at the pre-establishment phase. And the risks are even higher because countries provide for different treatment for nationals with regard to conditions for investment more often than they distinguish between different foreign nationalities.

Finally, the fact remains that most BITs provide no indication of what is meant by “treatment.” In principle, every form of state measure, whether of the legislative, executive or judicial branches, may be characterized as “treatment.” But that does not yet answer the question of whether every measure or action related to investments is covered ipso facto. The responses of tribunals to this issue have been contradictory.

²⁶ See, for example, the Canada–Burkina Faso BIT (2015).



4.0 The Interpretation of MFN by Investment Tribunals

The MFN clause was invoked in the first known award in a BIT-based case.²⁷ However, its interpretation by investment tribunals has been particularly controversial since the 2000s. Moreover, the fact that these discrepancies are not systematically based on different formulations of the MFN clause only serves to heighten legal uncertainty and unpredictability.

Among the many questions raised, the most important is that concerning the notion of “treatment” and the thorny debate between substantive and procedural rules attached to this notion; in addition, there is the selective import of BIT provisions and the interpretation of “like circumstances” and “no less favourable” treatment.

4.1 What is Meant by “Treatment”?

What types of measures or behaviours by the host state can be called “treatment” within the meaning of the MFN clause? In principle, the answer may seem obvious, particularly when referring to WTO law. Is it not simply the rights and advantages directly granted to investors in the host country, such as “treatment of transactions of a commercial and economic nature in relation to exploitation and management of investments” or “competitiveness of the investments”?²⁸ One then immediately thinks of tax exemptions or terms for accessing public procurement, for example.

In reality, the question that now arises before tribunals is whether the rights and guarantees granted in host state BITs with third countries also constitute “treatment.” In other words, can an investor protected by a BIT between states A and B use MFN to demand the benefit of a more favourable provision included in a BIT with a third country, between states A and C? If so, can investors only invoke the substantive rights of the BIT with the third country (such as the obligations of FET or free transfer of capital), or will they also have access to procedural rights—that is, the dispute settlement mechanism?

These issues have been the subjects of differing interpretations by arbitration tribunals that have applied the MFN clause.

4.2 Importing Substantive Rules of Protection from a Third-Party Treaty

The response of investment tribunals varies, depending on the specific way in which MFN has been invoked by the foreign investors to import substantive rules. Thus, the tribunals have been asked: to replace one BIT provision by another that is less restrictive; to import a provision that does not exist in the basic BIT, or conversely, to remove one; and finally, to extend the scope of a BIT.

4.2.1 Replacing One Provision With Another That Is Less Restrictive?

MFN has been invoked by investors to import into the basic treaty clauses whose formulation seems to them to be “more favourable” than that in their own treaty. This particularly applies to the FET clause, the content and scope of which, regardless of the formulas used, are particularly controversial.

Several tribunals have had to rule on this issue in the NAFTA context. Indeed, further to an interpretative note of the NAFTA Free Trade Commission in 2001, the scope of article 1105 on FET was restricted to a minimum standard of treatment in customary international law, in order to put a stop to tribunal interpretations ruled to be too extensive.²⁹ Canada and the United States reflect this interpretation in their post-2001 BIT models, BITs and investment chapters.

²⁷ Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka, ICSID, ARB/87/3, Final Award, (June 27, 1990). Retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita1034.pdf>

²⁸ As used by Argentina in its defence in *Siemens v. Argentina*. See below.

²⁹ Note retrieved from http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp



Thus, in *ADF v. United States*,³⁰ the investor invoked the benefit of FET clauses in old BITs between the United States and Albania and Estonia, in which so-called “free-standing” clauses made no reference to customary international law. The tribunal rejected the investor’s claim, ruling that the investor had not proved that the FET clauses under the treaties with Albania and Estonia were less favourable than those in chapter 11 of NAFTA.³¹ However, despite having rejected the investor’s claim, the tribunal did accept in principle the possibility of import.

MFN was also invoked, this time successfully, to replace the criterion of “just compensation ... represent[ing] the genuine value of the investments” in the case of expropriation in the Czech Republic–Netherlands BIT by “fair market value” and in the Czech Republic–United States BIT in *CME v. Czech Republic*.³²

The tribunal also said that:³³

the determination of compensation under the Treaty between the Netherlands and the Czech Republic on basis of the “fair market value” finds support in the most-favored-nation provision of Art. 3(5) of the Treaty.

Ultimately, case law gives a generally positive response to the possibility of invoking MFN to replace one provision of a BIT by another that is less restrictive.

4.2.2 Importing a Provision Where None Exists?

Among the many ways of invoking MFN is that of importing a new rule of protection into the basic treaty. In other words, investors ask the tribunal to add a new provision to their own BIT that they can invoke as having been breached by the host state. This has happened with several cases, including *Bayindir v. Pakistan*,³⁴ *MTD Equity v. Chile*³⁵ and *White Industries v. India*.³⁶

In *Bayindir v. Pakistan*, a tribunal of the International Centre for Settlement of Investment Disputes (ICSID) authorized, through invocation of MFN, the import of the FET clause in the Pakistan–Switzerland BIT (1995) into the Pakistan–Turkey BIT (1995). The tribunal arrived at this conclusion based on two main arguments: first, the preamble to the basic BIT referred to the notion of FET and second, the MFN clause was written in a sufficiently vague manner as to authorize this interpretation.³⁷

In *MTD Equity v. Chile*, the investor claimed the benefit of an obligation to grant the “necessary permits” provided for in the Chile–Denmark (1993) and Chile–Croatia (1994) BITs. This provision was missing from the Chile–Malaysia BIT (1992) in dispute. The ICSID tribunal accepted the investor’s claim on the grounds that this interpretation was in line with the object and purpose in the preamble of the basic BIT, to “protect and create a climate that is more favourable to investment.” It also concluded that exceptions to MFN in favour of regional integration organizations and fiscal arrangements in the Chile–Malaysia BIT meant, conversely, that all other matters were covered.³⁸

More recently, in *White Industries v. India*, an arbitral tribunal established in accordance with United Nations Commission on International Trade Law (UNCITRAL) rules accepted the import from the India–Kuwait BIT of an obligation to “provide effective means of asserting claims and enforcing rights”³⁹ into the India–Australia

³⁰ *ADF Group Inc. v. United States of America*, ICSID, ARB (AF)/00/1, award of January 9, 2003. Retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0009.pdf>

³¹ *Id.*, para. 193–198.

³² *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, final award, March 14, 2003. Retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0180.pdf>

³³ *Id.*, para. 500.

³⁴ *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v. Islamic Republic of Pakistan*, ICSID, ARB/03/29, Decision on Jurisdiction of November 14, 2005. Retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0074.pdf>

³⁵ *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID, ARB/01/7. Retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0544.pdf>

³⁶ *White Industries Australia Limited v. Republic of India*, UNCITRAL, award of November 30, 2011. Retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0906.pdf>

³⁷ *Bayindir v. Pakistan*, *op. cit.*, respectively para. 228–230 and para. 207, 231–232.

³⁸ *MTD v. Chile*, *op. cit.*, para. 104.

³⁹ *White Industry v. India*, *op. cit.*



BIT, as claimed by the investor. Indeed, to the question of whether article 4.2 (MFN) of the India–Australia BIT permitted the incorporation of article 4.5 of the India–Kuwait BIT, the tribunal responded affirmatively, ruling that:⁴⁰

This does not “subvert” the negotiated balance of the BIT. Instead, it achieves exactly the result which the parties intended by the incorporation in the BIT of an MFN clause.

Ultimately, the response of investment tribunals to the possibility of invoking MFN to import provisions that were previously not included in the basic treaty is mostly positive.

4.2.3 Removing an Existing Provision?

It has happened that MFN has been invoked to remove a clause from a basic BIT interpreted as “less favourable” on account of its mere existence.

This was the case with the necessity clause in the Argentina–United States BIT in *CMS v. Argentina*.⁴¹ The investor, through MFN, invoked other Argentinian BITs in which such a clause was not present. Here, however, the ICSID tribunal upheld the Argentinian position: “the mere absence of such provision in other treaties does not lend support to this argument, which would in any event fail under the *eiusdem generis* rule.”⁴²

It should be noted here, however, that the tribunal did not definitively reject the possibility in principle of such an importation. Indeed, it ruled that MFN could play a role if the third-country BITs contained more favourable necessity clauses.

To our knowledge, no tribunal has yet accepted that MFN could be used to purely and simply delete a clause in a basic BIT.

4.2.4 Extending the Scope of the Treaty?

MFN has also been invoked in some cases to extend the scope of the basic BIT, be this its temporal scope (*ratione temporis*) or material scope (*ratione materiae*).

With regard to application *ratione temporis*, the plaintiffs in *Tecmed v. Argentina*⁴³ and *MCI v. Ecuador*⁴⁴ unsuccessfully tried to secure the retroactive application of their basic BITs in order to cover events that occurred before they entered into force. This was a case of using MFN to import more favourable temporal application clauses from the Mexico–Australia BIT to replace those in the Mexico–United States BIT; and from the Ecuador–Argentina BIT to replace those in the Ecuador–United States BIT.

In both cases, the tribunals refused to recognize such effect of MFN. In *CMS v. Argentina*, the tribunal particularly considered that the temporal scope of BIT formed part of its “core of matters” whose “application cannot therefore be impaired by the principle contained in the most favored nation clause.”⁴⁵

With respect to application *ratione materiae*, MFN has been invoked to import a more favourable definition of investment, making it possible to include the investor’s type of economic activity. Thus, in *Société Générale v. Dominican Republic*,⁴⁶ the tribunal rejected the position of the investor, even though in this case it considered that the investor had made an investment within the meaning of the basic treaty between the Dominican Republic and

⁴⁰ *Id.*, section 11.2.4

⁴¹ *CMS Gas Transmission Company v. The Argentine Republic*, ICSID, ARB/01/8, award of May 12, 2005. Retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0184.pdf>

⁴² *CMS v. Argentina*, *op. cit.*, para. 377.

⁴³ *Tecnicas Mediambientales Tecmed S.A. v. United Mexican States*, ICSID, ARB (AF)/00/02, sentence, (May 29, 2003). Retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0854.pdf>

⁴⁴ *M.C.I. Power Group L.C. and New Urbine, Inc. v. Republic of Ecuador*, ICSID, ARB/03/6, award of July 31, 2007. Retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0500.pdf>

⁴⁵ *CMS v. Argentina*, *op. cit.*, para. 69. Emphasis added.

⁴⁶ *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. Dominican Republic*, UNCITRAL, LCIA Case No. UN 7927, Award on preliminary objections to jurisdiction, (September 19, 2008). Retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0798.pdf>



France (1999).⁴⁷ It thus decided that MFN “applies only to the treatment accorded to [...] defined investment, but not to the definition of ‘investment’ itself.”⁴⁸

For this tribunal, MFN is not, therefore, applicable to provisions on the scope and definitions of BITs. Its reasoning is very illuminating: before invoking MFN in the basic BIT, it has to be possible to invoke this treaty itself, which includes having made an investment as defined. It is only afterwards that the investor could use MFN to import more favourable substantive rights.

The position of the tribunals is easily justified. How could an arbitration tribunal rely on application of a treaty’s MFN clause to extend its scope and declare that it had jurisdiction, even though to access the MFN it would first be necessary for the basic treaty to give it jurisdiction? The same question could arise for the investor’s definition of the spatial application of the treaty or the exclusion of certain matters from the scope of the BIT.

In short, most tribunals oppose extending the scope of BITs through MFN.

4.3 Importing Procedural Rules from a Third-Party Treaty

This is probably the most controversial effect of MFN before the tribunals. As with substantive protection rules, the question is whether the mechanisms for settling disputes form part of “treatment.” Can an arbitration tribunal base its ruling on the application of a treaty’s MFN clause to declare that it had jurisdiction, when the procedural rules of the treaty do not give it jurisdiction to hear the case and, therefore, interpret the MFN clause itself? Indeed, without the MFN clause and the interpretation made of it, the tribunal would not be able to declare that it had jurisdiction. How, then, can there be justification for accessing a substantive obligation, the MFN clause, and interpreting it in order to declare that it had jurisdiction? This particularly circular question has given rise to divergent answers from tribunals.

4.3.1 Circumventing Eligibility Rules

In the great majority of cases where investors have invoked MFN, they were asking for its application since the jurisdictional phase to overcome obstacles in the basic treaty to the jurisdiction of the tribunal. In other words, the investor uses application of MFN to import the consent of the host state, consent that is paramount in consensual means of dispute settlement such as arbitration.

If some tribunals saw no difficulty in recognizing MFN as having such effect; others were vigorously opposed.

4.3.2 Favourable Positions

In some cases, MFN was invoked to circumvent the requirement to bring the dispute before domestic tribunals for a certain period before being able to bring a claim to arbitration.⁴⁹

The first case to hear such a claim was *Maffezini v. Spain*. This ICSID tribunal was the first to decide that MFN made it possible to import more favourable provisions from the dispute settlement mechanism of a third-party treaty into the basic treaty of the protected investor. In this case, the investor wanted to remove the requirement of the Spain–Argentina BIT to first bring the dispute before Spanish courts for 18 months before resorting to international arbitration. It therefore invoked the more favourable provisions of the Spain–Chile BIT that allowed it to go straight to arbitration. The tribunal upheld the position of the investor and explained that:

⁴⁷ The French investor wanted to import the definition of investment from the CAFTA-DR of 2004.

⁴⁸ *Société Générale v. Dominican Republic*, *op. cit.*, para. 41.

⁴⁹ For more detail on this issue, see: Brauch, M. D. (2017). *Exhaustion of local remedies in international investment law*, IISD Best Practice Series. Retrieved from <http://www.iisd.org/library/iisd-best-practices-series-exhaustion-local-remedies-international-investment-law>.



Today dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights of traders under treaties of commerce. ... [I]f a third-party treaty contains provisions for the settlement of disputes that are more favourable to the protection of the investor's rights and interests than those in the basic treaty, **such provisions may be extended to the beneficiary of the most favoured nation clause as they are fully compatible with the ejusdem generis principle.**⁵⁰ [Emphasis added]

In this case, the MFN clause in the Spain–Argentina BIT referred to “all matters subject to this agreement,” terms that are sufficiently vague to encompass procedural rules, according to the tribunal.

Even so, no doubt aware of the revolutionary nature of its decision, the tribunal set limits on the application of MFN. Thus, MFN (a) should not allow the beneficiary to “override public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in question,” and (b) should not be a means of “treaty-shopping that would play havoc with the policy objectives of underlying specific treaty provisions.”⁵¹

One might wonder how such limitations play out in practice, particularly how to distinguish between the “legitimate extension of the rights of investors” and “treaty-shopping.” For the tribunal in *Salini v. Jordan*, the tribunal’s reasoning in the *Maffezini* case added, on the contrary, more uncertainties to the risk of “treaty shopping.”⁵² The tribunal in *Plama v. Bulgaria* was also concerned about the risk of treaty shopping arising from *Maffezini* case law, recalling that “such a chaotic situation—actually counterproductive to harmonization—cannot be the presumed intent of Contracting Parties.”⁵³ The same risk of uncertainty and instability was raised by other cases, such as *Telenor v. Hungary*.⁵⁴

Despite the impact of this award, the numerous criticisms it received and the fears that it raised, several tribunals have gone in the same direction as *Maffezini v. Spain*, almost all with regard to the 18-month waiting period before national courts in cases against Argentina. These cases particularly include *Siemens v. Argentina*,⁵⁵ *Gaz Natural v. Argentina*,⁵⁶ *Hochtief AG v. Argentina*,⁵⁷ *Suez v. Argentina*,⁵⁸ *National Grid v. Argentina*,⁵⁹ *AWG v. Argentina*⁶⁰ and *Impregilo v. Argentina*.⁶¹ At least two cases against Russia could be added: *RosInvest v. Russia*⁶² and *Renta 4 v. Russia* (statement of principle).⁶³ Note that many BITs concluded by Argentina do require investors to take disputes before the national courts for a period of 18 months before they can bring them to an arbitration tribunal.

⁵⁰ *Maffezini v. Spain*, *op. cit.*, para. 54-55.

⁵¹ *Id.*, para. 62 and 63.

⁵² *Salini Costruttori S.p.A. and Italstrade S.p.A. v. the Hashemite Kingdom of Jordan*, ICSID, ARB/02/13, Decision on Jurisdiction, (November 29, 2004). para. 115. Retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0735.pdf>

⁵³ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID ARB/03/24, Decision on Jurisdiction of February 8, 2005, para. 212. Retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0669.pdf>

⁵⁴ *Telenor Mobile Communications Hungary*, ICSID, ARB/04/15, award of September 13, 2006, para. 94-96. Retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0858.pdf>

⁵⁵ *Siemens A.G. v. The Argentine Republic*, ICSID, ARB/02/8, Decision on Jurisdiction of August 3, 2004. See para. 102. Retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0788.pdf>

⁵⁶ *Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID, ARB/03/10, Decision on preliminary questions on jurisdiction of June 27, 2005, para. 49. Retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0354.pdf>

⁵⁷ *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction of October 24, 2011, para. 73. Retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0405.pdf>

⁵⁸ *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua, S.A. v. The Argentine Republic*, ICSID, ARB/03/17, Decision on Jurisdiction of May 16, 2006, para. 57. Retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0807.pdf>

⁵⁹ *National Grid PLC v. The Argentine Republic*, UNCITRAL, Decision on Jurisdiction of June 20, 2006, para. 93. Retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0553.pdf>

⁶⁰ *AWG Group Ltd v. The Argentine Republic*, UNCITRAL, Decision on Jurisdiction of August 3, 2006, para. 68. Retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0049.pdf>

⁶¹ *Impregilo v. Argentina*, *op. cit.* The award was the subject of a dissenting opinion by one member of the tribunal, Professor Brigitte Stern, on the MFN clause, *op. cit.*

⁶² *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction of October 1, 2007, para. 155-156. Retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0719.pdf>

⁶³ *Renta 4 S.V.S.A. (...) v. The Russian Federation*, SCC No. 24/2007, Award on Preliminary Objections of March 20, 2009, para. 119. Retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0714.pdf>



The tribunal in *Hochtief AG v. Argentina* ruled that “there can be no doubt that the settlement of disputes is an activity in connection with investments.”⁶⁴

The tribunal in *Siemens v. Argentina* justified its position by the fact that the dispute settlement mechanism: “is part of the treatment of foreign investors and investments and of the advantages accessible through a MFN clause.”⁶⁵ It added that, in application of the principle of *expressio unius est exclusio alterius*, which could translate as “the express mention of one thing is to exclude all others,” “the purpose of the MFN clause is to eliminate the effect of specially negotiated provisions unless they have been excepted.”⁶⁶

Other arguments arise from the analysis of these arbitration awards, including the object and purpose of the BIT, which is to create a favourable investment climate; the vagueness of the MFN clause that does not specify its scope; and the practice of the host state in its previous BITs.

More recently, in *Venezuela US v. Venezuela*,⁶⁷ the majority of a UNCITRAL arbitral tribunal⁶⁸ declared that it had jurisdiction by importing the consent of Venezuela to ICSID arbitration, after Venezuela had withdrawn from the ICSID Convention in 2012. Indeed, in the Venezuela–Barbados BIT at issue, UNCITRAL arbitration rules were only available if Venezuela became a party to the ICSID Convention. The majority of the tribunal was able to import the dispute resolution clause from the Venezuela–Ecuador BIT, which contains no such restriction, after finding that both countries:

have agreed *expressis verbis* that the MFN treatment clause shall apply to Article 8, i.e., to dispute settlement provisions and conditions for resorting to international arbitration thereunder.⁶⁹

Previously, the majority of the tribunal in *Garanti Koza v. Turkmenistan* had already reached the same conclusion, as follows:

the BIT provides that the MFN clause “shall apply” to the investor-state arbitration article. The majority of the Tribunal therefore concludes that nothing in the BIT prevents an investor from simultaneously invoking the right to international arbitration provided by the BIT and invoking the MFN clause to obtain the benefit of a more favorable arbitration process provided by another treaty to nationals or companies of a third country.⁷⁰

We note here that both BITs at issue (article 3.3) expressly included the dispute settlement mechanism within the scope of MFN, in line with the practice of some British BITs. This practice remains a minority in the universe of BITs.

⁶⁴ *Hochtief AG v. Argentina*, *op. cit.*, para. 73.

⁶⁵ *Siemens v. Argentina*, *op. cit.*, para. 102.

⁶⁶ *Id.*, para. 106.

⁶⁷ *Venezuela US, S.R.L. (Barbados) v. Bolivarian Republic of Venezuela*, PCA Case No. 2013-34, Interim Award on Jurisdiction of July 26, 2016. Retrieved from http://www.italaw.com/sites/default/files/case-documents/italaw7494_1.pdf

⁶⁸ Professor Marcelo Kohen issued a dissenting opinion on interpretation of the MFN clause and the dispute resolution clause, arguing that the tribunal had no jurisdiction due to lack of consent to ICSID arbitration. Dissenting opinion retrieved from http://www.italaw.com/sites/default/files/case-documents/italaw7495_0.pdf

⁶⁹ *Venezuela US v. Venezuela*, *op. cit.*, para. 102.

⁷⁰ *Garanti Koza LLP v. Turkmenistan*, ICSID ARB/11/20, Decision on Objection to Jurisdiction for Lack of Consent of July 3, 2013, article 62. Retrieved from <http://www.italaw.com/sites/default/files/case-documents/italaw1540.pdf>. Professor Laurence Boisson de Chazournes issued a dissenting opinion, arguing that the tribunal did not have jurisdiction due to an absence of consent to ICSID arbitration. Dissenting opinion retrieved from <http://www.italaw.com/sites/default/files/case-documents/italaw1541.pdf>



4.3.3 Unfavourable Positions

Several other tribunals have not followed *Maffezini* case law, and have decided, on the contrary, that MFN could not be used to import procedural rules, unless clearly and expressly indicated to the contrary. Among these, we might mention *Salini v. Jordan*,⁷¹ *Plama v. Bulgaria*,⁷² *Vladimir Berschader v. Russian Federation*,⁷³ *Wintershall v. Argentina*,⁷⁴ *ICS Inspection v. Argentina*,⁷⁵ *Daimler v. Argentina*⁷⁶ and *Kilic v. Turkmenistan*.⁷⁷

In *Daimler v. Argentina*, the majority of the tribunal took into consideration the absence of clear evidence that the signatory countries to the basic BIT had wanted MFN to apply to procedural provisions. In this case, the MFN clause did not specify its scope. We can see here that the tribunal is applying a presumption in favour of the non-application of MFN to procedural questions and, therefore, rejects the principle of *expressio unius est exclusio alterius*. In other words, there is no inclusion unless expressly formulated otherwise. The tribunal particularly held that:

it seems more likely that the Contracting State Parties, acting as they were prior to *Maffezini*, did not explicitly exclude international investor-State dispute resolution provisions from the scope of the MFN clauses **simply because they never considered such an invocation of the clause to be possible**. [Emphasis added]⁷⁸

A similar position was adopted in *Wintershall v. Argentina* when the tribunal said MFN did not apply to the resolution of disputes, “unless of course the MFN clause in the basic treaty clearly and unambiguously indicates that it should be so interpreted.”⁷⁹

It may be noted here that, as seen above, the tribunal in *Siemens v. Argentina* based its reasoning, on the contrary, on the vagueness of the MFN clause in order to conclude that procedural rules are included unless expressly excluded.⁸⁰

The tribunal in *Daimler v. Argentina* also challenged other arguments from the *Maffezini* jurisprudence, including the content of the term “treatment” (by treatment, the parties were referring, at the time the BIT was concluded, to the direct treatment of the investor and not to any international arbitration that might result from this treatment); the reference to “all matters” in the formulation of the MFN clause (not all the provisions of the BIT can be encompassed by these words, such as those on the territorial scope of the BIT); the analysis of no less favourable treatment (different treatment is not necessarily less favourable); and the role of the object and purpose of the treaty (the BIT should be understood as a whole and not all its provisions may be perfectly compatible with its preamble).⁸¹ The tribunal particularly concluded that:

The most-favored-nation clauses ... of the BIT ... do not authorize the Claimant to circumvent the conditions precedent to arbitration laid down in Article 10 of the BIT. The Treaty’s MFN guarantees do not presently apply in any event, as the Claimant has not shown that the dispute resolution process prescribed by Article 10 of the German-Argentine BIT is objectively less favorable to the Claimant than that of any comparator treaty.⁸²

⁷¹ *Salini v. Argentina*, *op. cit.*, para. 112.

⁷² *Plama v. Bulgaria*, *op. cit.* para. 215.

⁷³ *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, SCC Case No. 080/2004, award of April 21, 2006, para. 181. Retrieved from http://www.italaw.com/sites/default/files/case-documents/ita0079_0.pdf

⁷⁴ *Wintershall Aktiengesellschaft v. The Argentine Republic*, CIRDI ARB/04/14, award of December 8, 2008, para. 160–197. Retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0907.pdf>

⁷⁵ *ICS Inspection and Control Services Limited v. The Argentine Republic*, UNCITRAL, CPA No. 2010-9, Award on Jurisdiction of February 10, 2012, para. 274–318. Retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0416.pdf>

⁷⁶ *Daimler Financial Services AG v. The Argentine Republic*, ICSID, ARB/05/1, award of August 22, 2012, Retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita1082.pdf>

⁷⁷ *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, award of July 2, 2013, section 7.1.1–7.3.9. Retrieved from http://www.italaw.com/sites/default/files/case-documents/italaw1515_0.pdf

⁷⁸ *Daimler v. Argentina*, *op. cit.*, para. 239.

⁷⁹ *Wintershall v. Argentina*, *op. cit.*, para. 167. See also *Kilic v. Turkmenistan*, *op. cit.*, sections 7.1.1.–7.7.7.

⁸⁰ *Siemens v. Argentina*, *op. cit.*, para. 106.

⁸¹ *Daimler v. Argentina*, *op. cit.* See respectively para. 224; 235–236; 243–245; 258.

⁸² *Id.*, para. 280.



In *Wintershall v. Argentina*, the tribunal, in contrast with the interpretation of the *Maffezini* case, also said that: “Even words like ‘all matters relating to [...]’ in an MFN clause may not be sufficient to extend such clause to the dispute resolution provisions of the BIT.”⁸³ The same tribunal also noted that the 18-month waiting period was “part and parcel of Argentina’s integrated offer for ICSID arbitration ‘which should be’ accepted by the investor on the same terms.”⁸⁴

4.3.4 Extending the Mandate of the Arbitration Tribunal

In this category of case, the investor invoked MFN to incorporate into the arbitration tribunal’s mandate matters that are normally excluded from the scope of the basic BIT.

Thus, the tribunals were asked to declare that they had jurisdiction to hear a contractual dispute when the BIT subjects these disputes to the contractual dispute settlement mechanism (*Salini v. Jordan*); or to hear breaches of other provisions of the BIT when the BIT limits the jurisdiction of the tribunal to disputes related to compensation due to expropriation (*Plama v. Bulgaria*; *Telenor v. Hungary*). In all these cases, the arbitrators rejected *Maffezini* jurisprudence.

In *Plama v. Bulgaria*, the tribunal noted that:

When concluding a multilateral or bilateral investment treaty with specific dispute resolution provisions, States cannot be expected to leave those provisions to future (partial) replacement by different dispute resolution provisions through the operation of an MFN provision, unless the States have explicitly agreed thereto.⁸⁵

Similar positions and arguments were developed in *Telenor v. Hungary*⁸⁶ and *Berschader v. Russia*.⁸⁷

However, more recently, tribunals have agreed to extend their jurisdiction through MFN. Thus, the tribunal in *RosInvest v. Russia*⁸⁸ extended its jurisdiction to the expropriation clause, while noting that:

While indeed the application of the MFN clause of Article 3 widens the scope of Article 8 [Dispute settlement] and thus is in conflict to its limitation, this is a normal result of the application of MFN clauses.

Moreover, the same tribunal considered the distinction between substantive and procedural rules to be irrelevant. For this tribunal, MFN is applied equally to all the rules of protection of the basic BIT.⁸⁹ The tribunal in *Renta 4 v. Russia* also rejected the distinction between primary and secondary rules, concluding that MFN applied just as well to the BIT’s substantive rules as it did to its procedural ones.⁹⁰ However, in this particular case, the clause itself limited its scope to the FET obligation; a clause that did not encompass the dispute settlement mechanism, according to the majority of the tribunal.

Some tribunals have gone further than *Maffezini* jurisprudence. Indeed, in *Garanti Kosa LLP v. Turkmenistan*,⁹¹ an ICSID tribunal agreed to import the consent of Turkmenistan to ICSID arbitration from its BIT concluded with Switzerland through MFN, as such consent was not available in the basic treaty between Turkmenistan and the United Kingdom. Meanwhile, by the *Maffezini* tribunal had expressly excluded “the establishment of a particular forum such as the ICSID”⁹² from the possible effects of MFN.

⁸³ *Wintershall v. Argentina*, *op. cit.*, para. 186.

⁸⁴ *Id.*, para. 162. See also the concurring and dissenting opinion of Professor B. Stern in *Impregilo S.p.A v. The Argentine Republic*, award of June 21, 2011, ICSID, ARB/07/17, para. 105. Opinion retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0420.pdf>

⁸⁵ *Plama v. Bulgaria*, *op. cit.*, para. 212. See also para. 223.

⁸⁶ *Telenor v. Hungary*, *op. cit.*, para. 92 ff.

⁸⁷ *Berschader v. Russia*, *op. cit.*, para. 178–180.

⁸⁸ *RosInvestCo v. Russia*, *op. cit.*, para. 131.

⁸⁹ *Id.*, para. 132.

⁹⁰ *Renta 4 v. Russia*, *op. cit.*, para. 100.

⁹¹ *Kosa v. Turkmenistan*, *op. cit.* para. 79.

⁹² *Maffezini v. Spain*, *op. cit.*, para. 63. Other limitations cited as examples were the arbitration agreement on condition of exhaustion of domestic remedies, the irrevocable option clause, and the arbitration agreement by virtue of a highly institutionalized system of arbitration such as NAFTA (1992) or similar arrangements.



In short, jurisprudence on the importing of procedural clauses through MFN is, at the very least, incoherent. Divergent positions exist on the interpretation of MFN clauses, whether they are identical or not.

4.4 The Selective Import of Provisions from Treaties with Third Countries

The question that arises here is whether MFN can be used to import a provision from a treaty with a third country, be this a procedural or substantive rule, without adding any limitations or conditions attached to it. In several cases brought against Argentina in the 2000s,⁹³ Argentina often felt that, if the possibility of importing more favourable provisions from a BIT with a third country through application of MFN is to be recognized, then the disadvantageous aspects of the provision ought to be imported at the same time. In other words, BITs should be seen as a “package” where one could not enjoy the benefits of a right without the corresponding limitations.

On this point, several tribunals accepted the selective import of provisions from BITs with third countries.

In *RosInvest v. Russia*, the tribunal affirmed its jurisdiction in a 2007 award, based on a dispute settlement clause imported from a BIT with a third country (Russia–Denmark) into the basic BIT (Russia–United Kingdom). The Russia–United Kingdom BIT, however, on which the jurisdiction of the tribunal finally rested, excluded fiscal matters from the scope of the mechanism for settling disputes between investors and the state. Contrary to what Russia asked for, the tribunal, in its 2010 award on the merits, agreed to determine if the cumulative effect of tax measures had led to an expropriation of the investment. While it did not definitively settle the question of whether it was bound by the exceptions attached to the imported clause, considering this to be “irrelevant,” the tribunal did agree to selectively import a provision.⁹⁴

In *Siemens v. Argentina*, an ICSID tribunal agreed to import part of the dispute resolution clause in order to affirm its jurisdiction. Indeed, the provision imported from the Argentina–Chile BIT gave the possibility of going straight to international arbitration (which was not allowed in the Argentina–Germany BIT, which provided for an 18-month waiting period). But in return, the investor had to make a final choice between domestic courts and international arbitration with no possibility of turning the other way if one route did not give it satisfaction (a fork-in-the-road clause). Although in the case at issue the investor had already begun proceedings before the Argentine courts, the tribunal affirmed its jurisdiction:

The Tribunal recognises that there may be merit in the proposition that, since a treaty has been negotiated as a package, for other parties to benefit from it, they also should be subjected to its disadvantages. However, this is not the meaning of an MFN clause. As its own name indicates, it relates only to more favourable treatment.⁹⁵

In fact, the investor was able to combine an advantageous part of the third-country BIT with the basic BIT while ignoring the constraints and limitations in both BITs.

Here again we see that this tribunal went further than the *Maffezini* award, in which the tribunal had listed the fork-in-the-road clause as being excluded from the scope of MFN.⁹⁶

One case at least clearly rejected this position.⁹⁷ The tribunal in *Hochtief v. Argentina* decided, on the contrary, that the investor had to choose the entirety of the provision:

⁹³ See, for example, *Siemens v. Argentina*, *op. cit.*, para. 119.

⁹⁴ *RosInvest v. Russia*, *op. cit.*, para. 134–137.

⁹⁵ *Siemens v. Russia*, *op. cit.*, para. 120.

⁹⁶ See *Maffezini v. Spain*, *op. cit.*, para. 63.

⁹⁷ See also the dissenting opinion of Professor B. Stern in *Impregilo v. Argentina*, *op. cit.*, para. 107.



The MFN provision does not permit the selective picking of components from each set of conditions, **so as to manufacture a synthetic set of conditions to which no State's nationals would be entitled.** The Claimant in this case cannot rely upon the lack of an 18-month litigation period in the Argentina-Chile BIT and ignore the fact that Article 10(2) of the Argentina-Chile BIT imposes a 'fork in the road' provision: **it must rely upon the whole scheme as set out in either Article 10 of the Argentina-Chile BIT or Article 10 of the Argentina-Germany BIT.**⁹⁸ [Emphasis added]

To sum up, whether MFN makes it possible to import provisions from BITs with third countries into the basic BIT, and particularly the dispute settlement mechanism, remains controversial. Differences also exist both among arbitration awards and among arbitrators sitting on the same case.

4.5 The Notion of “Like Circumstances/Situations”

When the MFN clause itself provides that investments or investors must be in “like” circumstances or situations, tribunals have sought to determine if such was the position in the case at hand.

Even so, when the BIT is silent on the issue, as it is in most cases, tribunals have not hesitated to resort to the notion of “likeness,” as in *Parkerings v. Lithuania*:

A comparison is necessary with an investor in like circumstances. The notion of like circumstances has been broadly analysed by Tribunals.⁹⁹

In this case, the tribunal considered the economic sector in which there were two offers in response to a public invitation to tender for construction, but also the characteristics of the two offers, concluding that they were not in like circumstances. It was the same in *Bayindir v. Pakistan*,¹⁰⁰ where the tribunal compared two investments in light of the specific circumstances and terms of their respective contracts.

Therefore, one could conclude that comparisons may only be made between operators in like circumstances, even if this is not specified in the MFN clause.

That said, if the principle of the use of criteria of comparison is not controversial, the interpretation of what is similar can vary substantially from one tribunal to another. Beyond the necessary interpretation on a case-by-case basis required by this kind of legal term, it must be recognized that the criteria or factors of interpretation vary. For example, should one go beyond simple economic considerations? Does it suffice that two investors operate in the same sector or industry or are in competition? Can aspects related to protection of the environment or health or the impact on the population be included? BITs that answer these questions have the merit of ensuring that tribunals will take into account all relevant factors.

In *Occidental v. Ecuador* (UNCITRAL award),¹⁰¹ the investor argued that the expression “like circumstances” did not imply merely comparing companies operating in the same sector, such as the oil sector, but all companies engaged in the export of all goods such as flowers, minerals or seafood. The tribunal upheld the meaning of the investor, ruling that the expression:

“in like circumstances” cannot be interpreted in the narrow sense advanced by Ecuador as the purpose of national treatment is to protect investors as compared to local producers, and this cannot be done by addressing exclusively the sector in which that particular activity is undertaken.

Although it was a question of the national treatment obligation in this case, the tribunal's statements of principle seem to indicate that this very broad interpretation could apply to MFN as well.

⁹⁸ *Hochtief v. Argentina*, *op. cit.*, para. 98. Emphasis added.

⁹⁹ *Parkerings v. Lithuania*, *op. cit.*, para. 369.

¹⁰⁰ *Bayindir v. Pakistan*, *op. cit.*, para. 399-411.

¹⁰¹ *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA case No. UN3467, award of July 1, 2004, para. 173. Retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0571.pdf>



Nonetheless, when MFN is invoked to import more favourable clauses from a third-country BIT, the interpretation of “like circumstances” do not raise much interest in tribunals. Here, being described as an “investor” under the basic treaty seems to be enough to be considered as being in like circumstances to investors in the third-country BIT invoked.¹⁰² The fact that one is in the presence of potential, therefore hypothetical, investors could explain this attitude by the tribunals.

4.6 The “No Less Favourable” Character of Treatment

Several tribunals ruling on the application of MFN have also been required to determine whether the treatment invoked by the investor to its benefit was really “more favourable” than that granted it by the host state. Indeed, tribunals consider that MFN can only come into play if evidence is provided of less favourable treatment in comparison with the more favourable treatment said to have been granted to third-country investors.

Here, the interpretation of what is “more favourable” is obviously done on a case-by-case basis. Even so, we can observe differences between tribunals in their approaches to the same type of treatment. This is the case when it is a matter of comparing the possibility offered to investors of having recourse to domestic courts or international arbitration. It is interesting to note that several tribunals have ruled that the option of international arbitration, particularly without first going before domestic courts, was “more favourable” treatment. This response seemed so evident to them that it was often not analyzed as such in arbitration awards.

In contrast, at least two arbitral awards proceeded to a detailed analysis to reach a different response. In *Daimler v. Argentina*, the majority of the tribunal was not convinced that the “obligation to bring disputes before the Courts of the State” should necessarily be less favourable than the offer of international arbitration. Indeed, the majority found that “the average time required to resolve disputes via international arbitration may equal or exceed that of domestic court processes.”¹⁰³

To evaluate whether the “more favourable” character is present, the same tribunal ruled that it had to consider both treatments as wholes, in this case the two dispute settlement clauses in their entirety. This is an important issue, because any particular “advantage” could be counterbalanced by a limit within the same treatment. In the case at hand, the majority of the tribunal noted that in one case a choice was given between domestic courts and arbitration with no possibility of a later change in direction (the fork-in-the-road clause), while in the other case the plaintiff had to submit the dispute to the domestic courts before going to arbitration.

Furthermore, the question arises of whether the “more favourable” treatment must have been granted to other foreign investors before or after that granted to the plaintiff. The upshot of some awards is that only more favourable treatment granted afterwards to third parties could be invoked. Thus, in *Bayindir v. Pakistan*, the tribunal chose to consider the treatment granted in the Pakistan–Switzerland BIT (June 1995) because it had been made some months after the Pakistan–Turkey basic treaty (March 1995).

¹⁰² UNCTAD (2010). *Most favoured nation treatment*. UNCTAD Series on Issues in International Investment Agreements II (p. 64). Retrieved from http://unctad.org/en/Docs/diaeia20101_en.pdf

¹⁰³ *Daimler v. Argentina*, *op. cit.*, para. 245.



5.0 Systemic MFN Issues in Investment Treaty Negotiations

The current interpretation of MFNC by most investment tribunals raises systemic questions. It is totally legitimate that the signatory states to an investment treaty ensure that their nationals' investments will not be subject to discrimination compared to the nationals of a third country in the territory of the other signatory. In this regard, the aim of the MFN clause is to establish the same rules of play for all foreign investors in competition in a given country and to prevent any nationality-based distortions.

Yet, as certain tribunals¹⁰⁴ and commentators¹⁰⁵ have noted, it is hard to believe that, when signing BITs before 2000, states would have envisaged MFN being used to import provisions from BITs with other countries, whether substantive or procedural rules. It is more likely that they were referring to treatment directly granted in the host country. And as one tribunal noted, they did not envisage making exceptions for provisions which, in their eyes, were evidently not included.

It seems more likely that the Contracting State Parties, acting as they were prior to *Maffezini*, did not explicitly exclude international investor-State dispute resolution provisions from the scope of the MFN clauses **simply because they never considered such an invocation of the clause to be possible**.¹⁰⁶

That said, what should we make of the fact that several countries have signed and continue to sign BITs with the same formulation, well after the controversies raised by *Maffezini*? Does this mean that they accept and endorse these new interpretations? And for those that limit the scope of MFN in their recent treaties, does this mean that they endorse current interpretations with regard to their old BITs?

Countries wishing to limit the scope of MFN in their BITs need to think about a solution for their old and new BITs. They must carefully choose appropriate language that translates in a clear and unequivocal manner their interpretation for all BITs concluded to date. In particular, they will need to take care not to explain that this is not a change of stance, but is rather a clarification. As with the FET clause, it is not easy to find the perfect solution to solve the problems posed by the MFN clause. This is reinforced by the possible understanding that there would be no more presumptions in favour of states in the case of vague clauses concluded after the divergent arbitral awards. Thus, countries that did not review their approach in their new BITs would be presumed to be satisfied with the majority interpretation of tribunals based on their old treaties. However, this argument has been rejected by some tribunals.¹⁰⁷ In every case, it is more prudent to state that the limitations or exceptions in recent treaties reflect a constant position by states parties.

Another important question linked to the unexpected effects of MFN relates to “treaty-shopping” already raised by some tribunals. We could, however, take our reflection one step further and ask ourselves whether the *Maffezini* jurisprudence does not ultimately lead to the creation of discrimination between foreign investors from the very fact of the effect of MFN. Indeed, investors could now use MFN to develop a “super-treaty” by pasting in various provisions from host country BITs, picking out solely what is favourable to the investor. Such a treaty, which does not exist in reality, also places such an investor in a more favourable position than investors protected by each of the other BITs from which provision have been imported.

Finally, the tangled networks of BITs in the world pose a systemic consistency challenge. How can consistency be ensured between the BITs of partner countries in the world and the BITs that any one country has signed over several decades? These challenges are particularly crucial in the current context of the search for global reform of the regime of investment treaties and investment arbitration. The presence of MFN and the way in which it has been interpreted in recent years constitutes a potential obstacle to the reforms proposed worldwide or within

¹⁰⁴ See, for example, *Daimler v. Argentina*, *op. cit.*, para. 224.

¹⁰⁵ See UNCTAD, *op. cit.*, p. 84.

¹⁰⁶ *Daimler v. Argentina*, *op. cit.*, para. 239. Emphasis added.

¹⁰⁷ This is apparent, for example, in the reasoning of the tribunals in *Kilic v. Turkmenistan*, *op. cit.*, sections 7.8.1 – 7.8.10 and *ICS Inspection v. Argentina*, *op. cit.*, para. 99-101.



any one country. Indeed, what would the impact of these reforms be for a country, if the carefully and prudently negotiated more balanced provisions of its future agreements could, in the end, be nullified by the import into these new treaties of unbalanced clauses from old treaties taken from its still existing agreement network? In this sense, MFN could take away the progress and innovations made by some countries in their more recent investment treaties to move towards a better balance between the rights and obligations of investors and states. All the efforts of states to negotiate better investment treaties could be rendered virtually worthless through the effect of MFN, as now interpreted by several tribunals.



6.0 The Response of States: Limit the Scope of MFN

Analysis of MFN case law reveals the importance for signatory states to BITs of paying particular attention not only to the way in which the MFN clause and its exceptions are drafted, but also to the contents of the preamble. In other words, and for every clause of the BIT, words matter.

On this basis, several states, first the large capital-exporting countries, have reviewed their negotiation practice for BITs to counter recent MFN interpretations. As most of these recent agreements have not yet been invoked in investment arbitrations, the interpretation that will be made in future by tribunals remains to be seen, before reaching a definitive judgement of their effectiveness.

6.1 The Exclusion of Procedural Provisions from Other Agreements

As we have seen, MFN is often invoked to import more favourable procedural provisions from other host state BITs. Some states have tried, therefore, to prevent this possibility by excluding the dispute settlement mechanism from the scope of MFN.

An example of this is article 3.2 of the Colombia–United Kingdom BIT (2010):

The most favourable treatment to be granted in like circumstances referred to in this Agreement **does not encompass mechanisms for the settlement of investment disputes**, such as those contained in Articles IX and X of this Agreement, which are provided for in treaties or international investment agreements.¹⁰⁸ [Emphasis added]

One may ask here if the position of the United Kingdom has changed compared to its previous practice, which was, on the contrary, to expressly include all the provisions of its BITs in the scope of MFN. We could also cite article 9.5.3 of the Trans-Pacific Partnership (TPP) (2016):

For greater certainty, the “treatment” referred to in this Article **does not encompass international dispute resolution procedures or mechanisms**, such as those included in Section B (Investor-State Dispute Settlement). [Emphasis added]

The same can be seen in article 5.4 of the Switzerland–Georgia BIT (2014):

It is understood that the most-favoured nation treatment referred to in paragraphs (2) and (3) **does not apply to investment dispute resolution mechanisms** provided by this agreement or by other international agreements made by the Contracting Party concerned. [Emphasis added]

The presence of this type of exclusion is growing, not only in BITs, but also in the investment chapters of recent FTAs.¹⁰⁹ It is, however, partial and it leaves the possibility open of importing substantive obligations from other treaties.

6.2 The Exclusion of the Entire Contents of Past Treaties

Another approach consists of a broader exclusion of the scope of MFN—also a growing trend in recent treaties and investment chapters.

On the one hand, the entire contents of other treaties, including BITs and investment chapters, are thus excluded from the scope of MFN; in other words, both substantive and procedural rules. On the other, only agreements signed or coming into force before the BIT are excluded. The exception, therefore, does not include future treaties.

This is the case, for example, in annex III.1 of the Canada–Burkina Faso FIPA (2015):

¹⁰⁸ See also the following treaties: Chile–Colombia FTA (2006), annex 9.3; Canada–Peru FTA (2008), annex 804.1; Canada–Colombia FTA (2008), annex 804.3; Japan–Switzerland EPA (2009), article 88, and China–Canada BIT (2012), article 5.3.

¹⁰⁹ See, for example: Comprehensive Economic and Trade Agreement (CETA), 2016, article 8.7, para. 4; EU–Vietnam FTA (2016), article 4.6; Trans-Pacific Partnership (TPP), chapter 9, article 9.5, para. 3; Switzerland–Tunisia BIT (2012), article 5.5; COMESA CCA (2007), article 19.1.



Article 5 (Most-Favoured-Nation Treatment) does not apply to treatment accorded by a Party under a bilateral or multilateral international agreement in force on or signed prior to the date on which this Agreement came into effect.

This type of exclusion does not cover treaties signed after the entry into force of the BIT in question and requires the signatory states to adopt consistent practices when they conclude future investment treaties.

Initially, Canadian practice was to include an exception that only included past treaties signed before 1994. Such a clause was inserted into several FIPAs, such as that made with Benin in 2013 (Appendix III.1 - Canadian and Beninese list):

Article 6 (Most-Favoured-Nation Treatment) does not apply to treatment accorded by Canada under a bilateral or multilateral international agreement in force or signed **prior to January 1, 1994**. [Emphasis added]

This time-limited exception is of little use for most countries that have several first-generation BITs made in the late 1990s and early 2000s. It allows investors to continue to import unbalanced provisions from these treaties. This practice no longer seems to be on the agenda for BITs signed by Canada in recent years.

The CETA between Canada and the European Union is an example of a recent agreement in which the parties agreed to exclude not only procedural rules but also substantive ones from the scope of MFN.

For greater certainty, the “treatment” referred to in paragraphs 1 and 2 **does not include 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.¹¹⁰ [Emphasis added]

Note that the article begins with the wording “for greater certainty” and could indicate that the two states have always understood the MFN clause in this way in their investment treaties, including those that do not expressly provide for that exception. Similarly, states could then envisage using such terms as “the Parties confirm that,” or “it is understood that.” This could help counter the argument that, in adding this type of exception they accept, conversely, the principle of the import of substantive or procedural obligations through vague clauses in their old treaties.

This article of CETA, therefore, attempts to limit the scope of MFN. Even so, its formulation allows grey areas to continue to exist. Indeed, one may wonder in what circumstances the substantive obligations from other agreements could ultimately constitute “treatment,” since the article seems to leave such a possibility open (because of the expression “do not **in themselves** constitute treatment”). The reference to the fact that one party not “having adopted or maintained measures pursuant to these obligations” further increases the difficulty of interpretation.

6.3 The Non-Inclusion of an MFN Treatment Clause

Faced with the broad interpretations of MFN by investment tribunals and the difficulty of unequivocally limiting their scope, some countries are considering the option of simply not including this clause in their future treaties. Some also believe that MFN is not relevant in a non-multilateral context such as bilateral BITs and FTAs. Thus the 2012 SADC model BIT recommends not including a MFN clause,¹¹¹ and the Indian 2015 model BIT does not contain one.¹¹²

This apparently radical position is not contrary to international law. Let us not forget, MFN treatment is not an obligation under customary international law. A state is only bound by it if it so commits by treaty.

¹¹⁰ CETA, 2016, article 8.7.4.

¹¹¹ SADC. (2012, July). *SADC model bilateral investment treaty template with commentary*, (article 28.4). Available only in English: <http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf>.

¹¹² Government of the Republic of India. (2015, December). *Model text for the Indian bilateral investment treaty* (article 15.2). Retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3560>.



7.0 Conclusion and Recommendations

In conclusion, the extension of the scope of MFN could turn out to be endless if states and tribunals do not set limits in a uniform and definitive manner. The limits imposed by the *Maffezini* award have already been rejected by some tribunals.

It is possible to make recommendations of a general and specific nature for countries wishing to protect themselves in future from the undesired effects of MFN.

7.1 General Recommendations

Above all, there is a need in all future treaties to adopt a consistent national position on the negotiation of investment treaties in general and the MFN clause in particular. This implies, as a minimum, determining whether the country wishes to continue to sign BITs and, if so, whether MFN should be included and in what form. It is important at this level to set the non-negotiable elements in MFN, be these the extension or not of the pre-establishment phase or the content of exceptions.

In any case, it is prudent to not engage in new investment treaty negotiations or quickly finalize those that are under way at a time when discussions about a systemic reform of the universe of BITs and investment arbitration are ongoing.

7.2 Specific Recommendations

For existing treaties with vague clauses, the options are renegotiation or joint interpretation by the signatory states. Failing these, the state concerned could proceed to a unilateral interpretation of the treaty or the termination of the agreement on its expiry date.

For future treaties, there are three options available. The first is, quite simply, not to include MFN.

The second option consists of: (1) limiting MFN to the post-establishment phase; and (2) limiting the scope of the clause during the post-establishment phase. These limitations could be of three orders, cumulatively:

- (i) Exclude all previous or subsequent investment treaties (or both) from the scope of MFN, be these substantive or procedural rules, starting with the words “for greater certainty” or a similar expression.
- (ii) Include the expression “like circumstances” as a comparator and give an indicative list of factors to be taken into account to analyze “like” character.
- (iii) Make exceptions for regional integration organizations and double taxation treaties, but also exclude specific measures and sectors that are sensitive for the state.

The third option, finally, concerns the scenario whereby the country wishes, nevertheless, the MFN clause to cover the pre-establishment phase. In this case, it would be necessary (1) to apply the above recommendations for the post-establishment phase; and (2) to provide, cumulatively:

- (i) Progressive liberalization for selected sectors through a (preferably) positive list
- (ii) Grandfathering of all existing non-conforming measures in the liberalized sectors
- (iii) A list of future non-conforming measures in liberalized sectors excluded from the scope of MFN
- (iv) Exclusion of all obligations from the pre-establishment phase from investor-state arbitration to limit the risks associated with the MFN clause.

We should recall once again that no state is required to grant pre-establishment rights in their territory to foreign investors in an investment treaty. States can always liberalize sectors of their economies through domestic law.

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