The Applicability to Dispute Settlement of Most Favoured Nation Clauses in International Investment Agreements

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I. Introduction

Most Favoured Nation (MFN) clauses are one of the most conventional clauses generally found in international agreements, particularly in trade and investment agreements.[1] In crude terms, the MFN clause prohibits any discrimination against the investor of the contracting state by according any more favourable treatment to the investors of another state. The scope of these clauses may well change according

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[1] Stanley K Hornbeck, 'The Most-Favoured-Nation-Clause' (1909) 3 AJIL 395; Cristopher Greenwood, 'Reflections on "Most Favoured Nation" Clauses in Bilateral Investment Treaties' in David Caron, Stephan W Shill, Abby Cohen Smutny, and Epaminontas E Triantafilou (eds), *Practicing Virtue* (OUP 2015) 557. For a comprehensive study on the MFN clauses generally, see International Law Commission (ILC), *Final Report of the Study Group on the Most-Favoured-Nation Clause* (29 May 2015) UN Doc A/45/10 <http://legal.un.org/ilc/reports/2015/english/annex.pdf> accessed 4 February 2018.

to their wording,[2] and their applicability in a particular situation depends on the treatment accorded to investors of other nationalities.

These clauses, which seem benign at first blush, have led to one of the greatest divergences in investor-state arbitration in respect of their effect on jurisdiction. The central question is whether, by virtue of the MFN clause in the underlying treaty, an investor may benefit from more favourable dispute settlement provisions found in other treaties concluded by the host state.[3] This question assumes different shapes in different contexts. The underlying treaty, the MFN clause of which the investor invokes, may contain no dispute settlement mechanism, and the investor may be trying to invoke the dispute settlement mechanism found in other treaties through the MFN clause. Alternatively, the underlying treaty may include a dispute resolution mechanism, but it may be limited in its scope and applicability. For example, other treaties may offer a menu of venues for resolving the dispute, while the underlying treaty offers only one forum that may be less favourable from the point of view of the investor. Should the investor have recourse to other venues offered in other treaties through the MFN clause in the underlying treaty? In another scenario, there may be some preliminary conditions which need to be satisfied—the observance of a cooling period or other alternative dispute resolution methods such as conciliation or the exhaustion of local remedies—before the investor is allowed to initiate proceedings before an international tribunal, whereas there are no such conditions in other treaties concluded by the host state. May the investor sidestep these conditions by invoking the MFN clause of the underlying treaty? Moreover, the underlying treaty may provide for the resolution of disputes regarding only the determination of the amount of compensation for expropriation, whereas other

[2] For example, Article 3(2) of the Model Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of X for the Promotion and Protection of Investments (1991) ("UK Model BIT") <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2847> accessed 10 January 2018 reads as follows (emphasis added):

> 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.

A broader MFN clause can be found in Article 4.2 of the Agreement between the Argentine Republic and the Kingdom of Spain on the Reciprocal Promotion and Protection of Investments (3 October 1991) ("Argentina-Spain BIT") <http://www.wipo.int/wipolex/en/other_treaties/text.jsp?file_id=247353> accessed 10 January 2018: *"[i]n all matters governed by this Agreement*, such treatment shall be no less favourable than that accorded by each Party to investments made in its territory by investors of a third country" (emphasis added).

Greenwood argues that even identically or similarly worded clauses may take different meanings in the light of their context, object, purpose and negotiating history: see Greenwood (n 1) 558.

[3] The term 'underlying treaty' is used throughout in this study to mean the treaty concluded between the host state and the home state of the investor who invokes the MFN clause of this treaty.

treaties offer the dispute settlement mechanism for a broader range of disputes. Should the investor bring its claims that do not relate to matters referred to in the dispute settlement provision of the underlying treaty, but which are covered by the relevant provisions of other treaties of the host state, by relying on the MFN clause of the underlying treaty? These various manifestations of the central problem can be reduced to one question: whether an international tribunal can claim jurisdiction by reference to dispute settlement provisions of another treaty by virtue of the MFN clause in the underlying treaty.[4]

To answer this question thoroughly, one first needs to address the function of the MFN clause. If the function of the MFN clause is to incorporate the more favourable provisions of another treaty into the underlying treaty, then it is reasonable to conclude that more favourable dispute settlement provisions will also be incorporated into the underlying treaty ('incorporation by reference' function—a *renvoi*). An international tribunal can therefore assert jurisdiction under the incorporated provisions of the other treaty, which would not have normally existed under the underlying treaty. On the other hand, if the MFN clause only obliges the contracting state to accord to the nationals of the other contracting state any favourable treatment accorded to nationals of another state, rather than incorporating the provisions of another treaty automatically, the question becomes whether issues relating to dispute settlement—particularly the jurisdiction of tribunals—are 'treatment' in the sense that is used in the MFN clauses; and, if so, how the MFN clause may function reasonably in this case.

Before examining the function of the MFN clauses, one of the fundamental issues that should be determined by a tribunal is whether the MFN clause can be invoked in the first place[5]. This entails, *inter alia*, the *ratione materiae*, *ratione persone*, and *ratione temporis* aspects of the applicability of the treaty. In these respects, if the treaty is not applicable at all, the investor cannot invoke the MFN clause of this treaty before an international tribunal to benefit from other treaties that may be applicable to the investor in these respects. For example, if the investor's operation does not count as an 'investment' as defined under the underlying treaty, the investor cannot invoke the MFN clause of this treaty to benefit from a broader definition

[4] It is admitted that not every condition in the dispute settlement mechanism may relate to the jurisdiction of the international tribunal. For example, it is unclear whether the observance of preliminary conditions such as cooling period concerns the jurisdiction or the admissibility of the claim, or neither of them. However, in this article, for the ease of exposition, all such matters are brought under the 'umbrella' of jurisdiction. This does not affect the validity of the arguments about the applicability of the MFN clauses to the dispute settlement provisions put forward in this article (in Part IV).

[5] See, for example, the *Preliminary Objection in Anglo-Iranian Oil Company Case (United Kingdom v Iran)* [1952] ICJ Rep 93, 109.

of investment found in other bilateral investment treaties (BITs) concluded by the host state which also covers its operation, the reason being that the underlying treaty does not apply to the investor in the first place. It may be asked whether, in the case of jurisdiction, the same reasoning applies. The answer seems to be in the negative.[6] When the MFN clause is resorted to invoke the jurisdiction of a tribunal which would not have existed under the underlying treaty, it cannot be said that the underlying treaty is not applicable at all in the first place. It is applicable; the question is whether the tribunal which purports to apply it can have the jurisdiction to do so through the MFN clause of this treaty. To address this question, the true function of the MFN clauses must first be discussed.

II. The Function Of Most Favoured Nation Clauses

The means to deduce the true function of MFN clauses can be found in an early case in another context: the *Case concerning Rights of Nationals of the United States of America in Morocco*.[7] The dispute related to the consular jurisdiction of the United States in the French Zone of Morocco, which was held to be acquired through the MFN clause of the Treaty between the United States and the Shereefian Empire by relying on the provisions of the Treaties concluded by Morocco with Great Britain and Spain.[8] The International Court of Justice (ICJ) provided the following explanation of how an MFN clause works:

> When the most extensive privileges as regards consular jurisdiction were granted by Morocco to Great Britain in 1856 and to Spain in 1861, these *enured automatically and immediately to the benefit of the other Powers by virtue of the operation of the most-favoured-nation clauses*.[9]

The ICJ has also ruled that these benefits to the United States were terminated by the surrender by Great Britain in 1937 of its rights of jurisdiction in the French Zone, elaborating further on the function of the MFN clause:

> *The… consideration [of the US] was based on the view that the most-favoured-nation clauses in treaties made with countries like Morocco should be regarded as a form of drafting by reference rather than as a method for the establishment and maintenance of equality of treatment without discrimination amongst the various*

[6] *cf. Daimler AG v Argentine Republic*, ICSID Case No. ARB/05/1, Award (22 August 2012) [199]–[204] <https://www.italaw.com/sites/default/files/case-documents/ita1082.pdf> accessed 30 August 2018.

[7] *Case concerning Rights of Nationals of the United States of America in Morocco (France v United States of America)* [1952] ICJ Rep 176.

[8] ibid 190.

[9] ibid 187 (emphasis added).

> *countries concerned*. According to this view, rights or privileges which a country was entitled to invoke by virtue of a most-favoured-nation clause, and which were in existence at the date of its coming into force, would be incorporated permanently by reference and enjoyed and exercised even after the abrogation of the treaty provisions from which they had been derived.… *[T]his contention is inconsistent* with the intentions of the parties to the treaties now in question. This is shown both by the wording of the particular treaties, and by the general pattern which emerges from an examination of the treaties made by Morocco…. These treaties show that *the intention of the most-favoured-nation clauses was to establish and to maintain at all times fundamental equality without discrimination among all of the countries concerned*.[10]

This clearly indicates that the MFN clause does not serve the purpose of incorporating the more favourable provisions of other treaties concluded by the host country into the underlying treaty.[11] If it did, the further existence and validity of the other treaty would be irrelevant for the investor to obtain more favourable treatment contained in that treaty. When the more favourable treatment comes to an end for other investors of different nationality, however, the investor can no longer rely on the MFN clause.[12] Rather than incorporate the more favourable provisions, the MFN clause—in the words of the ICJ—establishes and maintains equality of treatment. It "operates to secure more favourable treatment for the claiming party".[13] The ICJ, similarly, expresses this effect as benefits "enur[ing] automatically and immediately" to the other party.[14] In other words, when the host state has granted a more favourable treatment to the investors of other states whether it is through a BIT, domestic legislation, or *de facto* practice, the investor of

[10] ibid 191–192 (emphasis added).

[11] Although, in its judgment, the ICJ was prudent enough to confine its comment on the function of the relevant MFN clause to the wording of the particular treaties and general pattern of the treaties made by the host state (which in turn demonstrate the intentions of the contracting parties), there is no reason why the current wording of the MFN clauses in BITs and general pattern of the investment treaties should indicate a difference as regards the function of the MFN clauses. There may, however, be exceptions as indicated below (in Part III).

[12] This point is also emphasised in Article 21 of Final Draft Articles on Most Favoured Nation Clauses by the ILC. See ILC, 'Final Draft Articles on Most Favoured Nation Clauses' (1978) 2 Yearbook of ILC 55.

[13] Zachary Douglas, 'The MFN Clause in Investment Arbitration: Treaty Arbitration Off the Rails' (2001) 2 JIDS 97, 105. *cf.* Stephan W Schill, 'Allocating Adjudicatory Authority: Most-Favoured-Nation Clauses as a Basis of Jurisdiction—A Reply to Zachary Douglas' (2011) 2 JIDS 353.

[14] *Case concerning Rights of Nationals of the United States of America in Morocco (France v United States of America)* (n 7) 187.

the home state is automatically and immediately entitled to these benefits as well. This does not mean that they are automatically and immediately incorporated into the underlying treaty. Rather, without any intermediary act, the host state becomes obliged to accord these benefits to the investors of home state under the MFN clause of the underlying treaty; a failure to do so will result in the breach of the MFN clause, hence the underlying treaty. What the MFN clause does not do, however, is to "rewrite the terms of a treaty".[15]

In summary, the MFN provision is a substantive obligation, which is to be invoked by the investor claiming that there has been a breach of the MFN clause. To be able to succeed in its claim, the investor has to show that the host state has granted more favourable treatment to other investors of a different nationality. If this is shown, it means that the host state also has an obligation to extend the benefits to the investors of the home state under the MFN clause. Failure to do so will result in a breach of the MFN clause.[16] In these cases, an international tribunal may: (a) grant declaratory relief, declaring that the investor is entitled to these benefits, or reversely, that the host state is under an obligation to extend these benefits to the investor; (b) award damages to the investor to compensate for the harm that it has suffered as a result of the deprivation of the benefits to which it is entitled under the MFN clause; or (c) order specific performance if it is possible and proper in the circumstances of the case (although this is rare in the investment context, and sometimes not allowed).[17] This last remedy essentially compels the host state to provide relevant benefits to the investor.

[15] Douglas (n 13) 105; Greenwood (n 1) 560–561.

[16] The MFN clauses can be deemed to contain an ancillary obligation. That is, once the contracting state grants a more favourable treatment to investors of different nationality, it becomes obliged to extend the benefits to the investor of other contracting state. So long as it does so, there is no breach of the MFN clause; however, it is still obliged under it because if it stops doing so, it will breach the MFN clause.

[17] It should be noted that ultimately what remedies are available depends on the relevant BIT. However, most investment treaties do not specifically state the consequences of a failure by the contracting state to comply with its treaty obligations. They, however, usually provide that tribunals are to decide disputes also in accordance with 'international law' (or some variation of that formulation). Consequently, tribunals look to customary international law for remedies for internationally wrongful acts in investment treaty sphere. An authoritative statement of customary international law on this matter can be found in International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, in particular Articles 28–39. See ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) 2 Yearbook of ILC 31. For more detailed information on the remedies in investor-state arbitration, see Borzu Sabahi, *Compensation and Restitution in Investor-State Arbitration* (OUP 2011) 43–133; Eric De Brabandere, Investment Treaty Arbitration as Public International Law Procedural Aspects and Implications (CUP 2014) 175–201; Jeswald W. Salacuse, *The Law of Investment Treaties* (2nd edn, OUP 2015) 436–452.

III. The Jurisprudence Of Investment Tribunals

Having addressed the proper function of the MFN clause as established by early authorities, the relevant jurisprudence of investment tribunals will be briefly examined. The first case that addressed the issue of applicability of MFN clauses to dispute settlement was *Maffezini v Spain*.[18] The dispute settlement provision of the Argentina-Spain BIT provided for a six-month negotiation period, and the submission of the dispute to the competent courts of the host state for its resolution, failing which, in eighteen months, the dispute could be brought before an international tribunal constituted under the BIT.[19] The claimant sought to benefit from the dispute settlement provision of the Chile-Spain BIT by invoking the MFN clause of the Argentina-Spain BIT, according to which "in all matters governed by this Agreement, such treatment shall be no less favourable than that accorded by each Party to investments made in its territory by investors of a third country".[20] The Chile-Spain BIT did not require the submission of the dispute to the competent courts for a period of eighteen months.[21]

The *Maffezini* tribunal held that dispute settlement mechanisms form a part of the treatment-protection accorded to investors:

> Notwithstanding the fact that the basic treaty containing the clause does not refer expressly to dispute settlement as covered by the most favoured nation clause,… there are good reasons to conclude that 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… It follows that such arrangements, even if not strictly a part of the material aspect of the trade and investment policy pursued by treaties of commerce and navigation, were essential for the adequate protection of the rights they sought to guarantee.[22]

The tribunal, however, excluded the application of the MFN clause to the dispute settlement mechanism when "public policy considerations" are in play.[23]

[18] *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (25 January 2000) 5 ICSID Rep 387.

[19] Argentina-Spain BIT (n 2) Article X.

[20] ibid Article IV(2).

[21] Acuerdo Entre La Republica De Chile Y El Reino De España Para La Proteccion Y Fomento Reciprocos De Inversiones (signed 2 October 1991, entered into force 28 March 1994) ("Chile-Spain BIT")
<http://investmentpolicyhub.unctad.org/Download/TreatyFile/708> accessed 11 January 2018.

[22] *Maffezini v Spain* (n 18) [54].

[23] ibid [62]. The tribunal defines "public policy considerations" as fundamental conditions that contracting parties might have envisaged for their acceptance of the agreement in question.

This is so, according to the tribunal, in cases where the exhaustion of local remedies is required; a fork-in-the-road clause is stipulated; a particular forum is specified; or the parties have submitted to a highly institutionalised system of arbitration (such as under the North American Free Trade Agreement (NAFTA)).[24]

It is understandable that the tribunal held in *Maffezini* that the dispute settlement mechanism offered to investors of different nationalities constituted different treatment, given the role that venue plays in such disputes and the burdens that investors have to go through before initiating proceedings in investment arbitration. However, what the tribunal meant by "public policy considerations", and how it differentiated those that are not included in this category, is not clear. Firstly, the tribunal defined "public policy considerations" as "fundamental conditions that contracting parties might have envisaged for their acceptance of the agreement in question",[25] but this definition instead connotes specifically agreed conditions in the sense of holding parties to their bargain and not allowing the investor to override these specifically agreed conditions. Secondly, the tribunal did not consider the prior resort to domestic courts (for a period of eighteen months), which was included in the Argentina-Spain BIT but not in the Chile-Spain BIT, as reflecting a public policy consideration.[26] It is doubtful that this requirement is so different in terms of public policy considerations from a heavier requirement of exhaustion of local remedies, which was accepted by the tribunal to be included in these considerations. Put it differently, it is not clear why it was not a fundamental condition for the acceptance of the agreement. Furthermore, the tribunal itself did not devise a test, but rather enumerated a few circumstances that it deemed in connection with public policy, leaving it to other tribunals to identify further similar situations.[27]

In *Plama v Bulgaria*,[28] the claimant sought to rely on the dispute settlement provision of the Bulgaria-Finland BIT, which provided for arbitration by the International Centre for Settlement of Investment Disputes (ICSID) in respect of any dispute.[29] It invoked the MFN clause of the Bulgaria-Cyprus BIT, which, in turn, offered *ad hoc* arbitration only for disputes regarding the amount of

[24] ibid [63].
[25] ibid [62].
[26] ibid [64].
[27] ibid [63].
[28] *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (8 February 2005) 13 ICSID Rep 268.
[29] Article 8 of the Agreement between the Government of The Republic of Finland and the Government of the Republic of Bulgaria on the Promotion and Protection of Investments (signed 3 October 1997, entered into force 16 April 1999) ("Bulgaria-Finland BIT") <http://investmentpolicyhub.unctad.org/Download/TreatyFile/527> accessed 10 January 2018.

compensation for expropriation.[30] The *Plama* tribunal, unlike the *Maffezini* tribunal, held that it was not clear whether the term "treatment" in the MFN clause includes dispute settlement provisions found in other BITs (although it was considered to be irrelevant to address).[31] The *Plama* tribunal further considered, in relation to incorporation by reference by the MFN clause, that:

> …[A] reference may in and of itself not be sufficient; the reference is required to be such as to make the arbitration clause part of the contract (*i.e.*, in this case, the Bulgaria-Cyprus BIT). The reference must be such that the parties' intention to import the arbitration provision of the other agreement is clear and unambiguous. A clause reading "a treatment which is not less favourable than that accorded to investments by investors of third states"… cannot be said to be a typical incorporation by reference clause as appearing in ordinary [commercial] contracts. It creates doubt whether the reference to the other document (in this case the other BITs concluded by Bulgaria) clearly and unambiguously includes a reference to the dispute settlement provisions contained in those BITs. [32]

The tribunal seems to accept the incorporation by reference function attributed to the MFN clauses; however, it does not accept that the MFN clause is sufficient to incorporate the dispute settlement provisions of other BITs given that, usually, any reference to arbitration clauses contained in other documents must be clear and unambiguous. Even if the incorporation by reference function of the MFN clause is to be accepted, it is difficult to understand why a reference to other BITs by the MFN clause is not a clear and unambiguous reference to the dispute settlement provisions contained within those BITs, as was asserted by the *Plama* tribunal. This contention is equivalent to requiring the parties to refer to each and every provision of another BIT separately while they can refer to other BITs as a whole to indicate the provisions of those BITs.[33]

[30] Article 4 of the Agreement between the Government of The People's Republic of Bulgaria and the Government of the Republic of Cyprus on Mutual Encouragement and Protection of Investments (signed 12 November 1987, entered into force 18 May 1988) ("Bulgaria-Cyprus BIT") <http://investmentpolicyhub.unctad.org/Download/TreatyFile/522> accessed 10 January 2018.

[31] *Plama v Bulgaria* (n 28) [189].

[32] ibid [200].

[33] This reasoning is aptly expressed in legal maxims in Latin: *in toto et pars continetur* or *in eo quod plus sit semper inest et*, which respectively mean that 'the part is also included in the whole' or 'in the greater is always included the lesser'.

A more important reason that led the *Plama* tribunal to reject the applicability of the MFN clause to dispute settlement provisions seems to be the idea that such provisions are "specifically negotiated" by the parties:

> It is also not evident that when parties have agreed in a particular BIT on a specific dispute resolution mechanism, as is the case with the Bulgaria-Cyprus BIT (*ad hoc* arbitration), their agreement to most-favored nation treatment means that they intended that, by operation of the MFN clause, their specific agreement on such a dispute settlement mechanism could be replaced by a totally different dispute resolution mechanism (ICSID arbitration). It is one thing to add to the treatment provided in one treaty more favorable treatment provided elsewhere. It is quite another thing to replace a procedure specifically negotiated by parties with an entirely different mechanism.[34]

> Based on this proposition, it is rather more plausible to suggest that, when there is a specifically agreed dispute settlement mechanism, a general reference to more favourable treatment found in other BITs by the MFN clause does not suffice to replace it. As the *Plama* tribunal put it elsewhere:

> [A]n MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.[35]

As a result, the tribunal concluded that the MFN clause of the Bulgaria-Cyprus BIT cannot be construed as giving consent to submit a dispute under the Bulgaria-Cyprus BIT to ICSID arbitration.[36]

Nevertheless, it is submitted that the idea of dispute settlement provisions in a BIT being 'specifically agreed' does not provide much help. It is hard to contemplate that other provisions of the BIT are not 'specifically agreed'.[37] There is no spectrum of value attached to the consent of the state to the provisions of a

[34] *Plama v Bulgaria* (n 28) [209].
[35] ibid [223].
[36] ibid [227].
[37] Yas Banifatemi, 'Most Favoured Nation Treatment in Investment Arbitration' in Andrea Bjorklund, Ian Laird, and Sergey Ripinsky (eds), *Investment Treaty Law: Current Issues III* (BIICL 2009). See also the Concurring and Dissenting Opinion of Professor Brigitte Stern in *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, 21 June 2011 [21]–[24] <https://www.italaw.com/sites/default/files/case-documents/ita0420.pdf> accessed 30 August 2018.

treaty in the law of treaties. Even if it is accepted that other provisions are not as 'specifically agreed' as dispute resolution clauses, it is not difficult to find specifically agreed aspects of other provisions (as some include specific exceptions or each clause may have different elements of applicability that may render them specific to each other).[38] In such a case, it is doubtful whether the *Plama* tribunal would find the MFN clause inapplicable because to follow such an approach would be self-defeating, and contrary to the very purpose of the MFN clause.

Since the *Maffezini* and *Plama* cases, tribunals have been divided in terms of the precedent that they follow. In line with the *Maffezini* precedent, various tribunals have held that the respective claimants did not need to have recourse first to the local courts of the host country for a period of eighteen months, considering that dispute settlement mechanisms are a part of protection of investment and the treatment accorded to investors.[39] Likewise, the tribunal in *RosInvestCo v Russia* allowed the claimant to rely upon the MFN clause to benefit from a broader dispute resolution provision instead of a limited procedure concerning the amount or payment of compensation in case of expropriation.[40] Taking the opposite line, following

[38] For example, in *CME v Czech Republic*, the relevant BIT provided for "just compensation" representing the "genuine value of the investment affected" in expropriation cases. The tribunal also relied on the MFN clause of this BIT to determine the compensation on the basis of the "fair market value" as provided for in some other BITs concluded by the respondent (should it is accepted that "just compensation" representing the "genuine value" is less than "fair market value"), see *CME v Czech Republic*, UNCITRAL, Final Award (14 March 2003) 9 ICSID Rep 264 [500]. See further *MTD Equity Sdn Bhd* and *MTD Chile SA v Chile*, ICSID Case No. ARB/01/7, Award (21 May 2004) 12 ICSID Rep 6 [100]–[104] and [197] ff, where the tribunal expanded the application of the fair and equitable treatment obligation in the Chile-Malaysia BIT, referring to the corresponding provisions in Chile-Croatia and Denmark-Chile BITs through the MFN clause.

[39] *Siemens A.G. v The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (3 August 2004) 12 ICSID Rep 171 [102]–[103]; *Gas Natural SDG, S.A. v The Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction (17 June 2005) 14 ICSID Rep 282 [31]; *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction (16 May 2006) [55]–[57] <https://www.italaw.com/sites/default/files/case-documents/ita0807.pdf> accessed 10 January 2018; *National Grid plc v The Argentine Republic*, UNCITRAL, Decision on Jurisdiction (20 June 2006) [92]–[93] <https://www.italaw.com/sites/default/files/case-documents/ita0553.pdf> accessed 10 January 2018 (the tribunal, however, here seems to approve the Plama tribunal in that the claimant cannot create consent to ICSID arbitration through the MFN clause when there was none before); *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Jurisdiction (3 August 2006) [55]–[59] < https://www.italaw.com/sites/default/files/case-documents/ita0819.pdf> accessed 4 February 2018.

[40] *RosInvestCo UK Ltd v The Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction (1 October 2007) <https://www.italaw.com/sites/default/files/case-documents/ita0719.pdf> [130]–[132] accessed 10 January 2008.

the *Plama* precedent,[41] various tribunals have differentiated between substantive protections afforded to investors and dispute settlement provisions, concluding that the MFN clause does not extend to the latter unless clearly expressed.[42]

It is submitted that the practice of distinguishing between substantive protections and procedural matters (*i.e.* dispute settlement provisions) in the application of the MFN clauses is not warranted, given that there is no indication to this effect in the wording of the MFN clauses.[43] The key term here is 'treatment'. States are under an obligation not to accord more favourable treatment to other investors of different nationalities. It cannot be denied that the state treats investors differently when it offers the opportunity of international arbitration to one right away but none of such opportunity for the other, or not unless some preliminary conditions are fulfilled.[44] The answer to the question of whether the latter is less

[41] The first case that refused to follow the *Maffezini v Spain* (n 18) decision was *Salini Costruttori S.p.A. and Italstrade S.p.A. v The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction (29 November 2004) 14 ICSID Rep 303. The subsequent cases, however, refer to *Maffezini* (n 18) and *Plama* (n 28) when following either of the lines.

[42] *Vladimir Berschader and Moïse Berschader v The Russian Federation*, SCC Case No. 080/2004, Award (21 April 2006) [179]–[181] <https://www.italaw.com/sites/default/files/case-documents/ita0079_0.pdf> accessed 10 January 2018; *Telenor Mobile Communications A.S. v The Republic of Hungary*, ICSID Case No. ARB/04/15, Award (13 September 2006) 17 ICSID Rep 170 [92].

[43] Banifatemi (n 37) 269; Schill (n 13) 370. It is also argued that "by reason of the *'effet utile'* the MFN clause always covers the dispute settlement mechanism, unless the opposite intention of the Contracting states can be demonstrated": see Yannick Radi, 'The Application of the Most-Favoured-Nation clause to the Dispute Settlement Provisions of Bilateral Investment Treaties: Domesticating the 'Trojan Horse' (2007) 18 EJIL 757, 757.

[44] Banifatemi (n 37) 270; Schill (n 13) 370.

favourable than the former must not be difficult.[45] The availability of dispute settlement mechanisms is just as important for investors as their substantive rights. This can be understood perhaps if one thinks of the fact that one of the most important factors for the decision of the investor whether to vindicate its substantive rights is the path it has to walk to do so.

Undoubtedly, however, when the MFN clause itself regulates its applicability, it is to be followed. For instance, the MFN provision may limit its applicability to certain areas as seen in the Article 1103(2) of NAFTA where the MFN provision applies "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments".[46] In another instance, the MFN clause may explicitly stipulate that it is applicable with regard to dispute settlement provisions such as Article 3(3) of the Model UK BIT.[47]

Overall, it is submitted that, even if the parties did not clearly express their intention to extend the MFN clauses to dispute settlement provisions, the MFN provisions found in most treaties are capable of covering dispute settlement

[45] Douglas asserts that it amounts to a "value judgment about the relative merits of recourse to domestic courts versus recourse to international tribunals": see Douglas (n 13) 111. He also considers that holding procedural protections equivalent to substantive protections in terms of 'treatment' involves a 'value judgment': see Douglas (n 13) 112. It is true that in determining favourability, the tribunal would make a value judgment, but this concern is equally valid for the application of the MFN clause in other contexts, not just with regard to favourability of fora. The determination of the relative favourability must inevitably be made from the point of view of the investors; however, it is not a subjective assessment, but rather an objective assessment: how a reasonable investor if in the position of the investor in the present case would assess the relative favourability, not that how the investor in the present case assesses it. Another more relevant concern would be the principle of comity. As above said, the application of the MFN clauses to dispute settlement provisions inevitably includes evaluations with regard to juridical system of the states. This may harm the comity, and the respect due to the internal functioning and sovereignty of the states. Therefore, it is advisable that international tribunals refrain from making far-reaching comments on the juridical system of the host states. On the other hand, Paparinskis argues that "the ordinary meaning of 'favourable' would require the relevant matters to be sufficiently comparable to establish the relationship of lesser and greater favourability. Most procedural matters do not seem to be capable of such a relationship, reflecting either very different legal techniques without obvious benchmarks for objective comparison or self-judging ad hoc peculiar conveniences of the particular situation", see Martins Paparinskis, 'MFN Clauses and International Dispute Settlement: Moving beyond *Maffezini* and *Plama*?' (2011) 26 ICSID Review 14, 57–58.

[46] North American Free Trade Agreement (United States–Canada–Mexico) (adopted 12 December 1992, entered into force 1 January 1994) ("NAFTA") 32 ILM 289, <https://www.nafta-sec-alena.org/Home/Texts-of-the-Agreement/North-American-Free-Trade-Agreement?mvid=1&seccid=539c50ef-51c1-489b-808b-9e20c9872d25#A1103> accessed 10 January 2018.

[47] UK Model BIT (n 2) Article 3.3 "for the avoidance of doubt, it is confirmed that the treatment provided for in paragraphs (1) and (2) above [national and most favoured nation treatment] shall apply to the provisions of Articles 1 to 12 of this Agreement" and thus includes dispute settlement provision provided in Article 8.

provisions unless expressly excluded by the contracting parties.[48] In short, despite the various reasons and qualifications that have been put forward to preclude the applicability of the MFN clause to dispute settlement mechanisms, the MFN provisions seem as such to be capable of covering them under 'treatment' that must be assessed in terms of favourability to investor as well. The question then becomes how the MFN clause may function reasonably in such a case, especially when there are certain other obstacles to this applicability.

IV. Obstacles To The Applicability Of Mfn Clauses To Dispute Settlement Provisions

As noted above, the function of the MFN clause is not to incorporate more favourable terms of other BITs to which the host state of the investor is a party into the underlying BIT. Therefore, it does not also replace the existing dispute settlement mechanisms with other more favourable mechanisms found in other BITs. If it did so, there would be no room to discuss the applicability of the MFN clauses to the dispute settlement provisions. The MFN clause in a BIT obliges the host state to extend the benefits that it has granted to other investors through several means (*i.e.* treaty, legislation, regulations, *de facto* practice) to the investor of the home state; if it does not, it will have breached the MFN clause, and hence the underlying treaty. This system works relatively easily in other contexts. For example, suppose that the host state permitted the investors of other states to operate without a licence; however, it required such licence from some other investors operating in the same sector and originating from a specific state that has concluded a BIT containing the MFN clause with the host state. Those investors may request from the host state the same treatment to which they are entitled by virtue of the MFN clause, or reversely, the treatment that the host state is under an obligation to procure. If that is denied, the investors may initiate proceedings, and allege the breach of the MFN clause, a substantive obligation. The tribunal will declare that the investors are entitled to the same benefit and that the host state is obliged to extend this benefit to the claiming investors, and rule upon compensation for the harm suffered, if any. In such a case, the harm may be the cost that the investors have incurred to obtain the licence, and the loss of economic benefits that may be incurred because of any delay that obtaining licence has caused in the operation of the investors. The tribunal may be reluctant to order that the operation of the investors be allowed without any licence as it may consider such an order an undue interference with state's sovereignty or unenforceable.[49] These are, in a nutshell, remedies for the breach of the MFN clause. The important point to note is that when the investor invokes the MFN clause, it must put forward and prove its breach by the state; it is

[48] Banifatemi (n 37) 272–273.

[49] De Brabandere (n 17) 184–185.

a substantive obligation, and for an international tribunal to rule on any remedy, there must be a prior breach of a substantive obligation by the state.[50]

It is submitted that this relatively straightforward application of the MFN provisions is not transferable to the sphere of the dispute settlement provisions, and this must be the reason for the proposition that the MFN clauses do not apply to the dispute settlement provisions.

Let us now consider the situation where the investor tries to invoke the jurisdiction of an international tribunal, which would not have existed under the underlying treaty, through the MFN clause depending on the more favourable dispute settlement provisions of other treaties.[51]

If the tribunal does not assert jurisdiction following the objections of the host state, there will be a breach of the MFN clause, because the contracting state would have failed to accord the more favourable treatment to investors under the underlying treaty that it accords to other investors under other investment treaties.[52] The way that the state may accord the same treatment in such a case is to waive any jurisdictional objections and submit to the jurisdiction of the international tribunal. If it does not, what may the cure be for the breach of the MFN clause then? As noted above, there are a few remedies that a tribunal may grant upon a breach of the MFN clause. However, this situation—the breach of the MFN clause— arises on the assumption that the tribunal declines jurisdiction. How can it rule upon any remedy when it declines jurisdiction and this very act is the cause of the breach of the MFN clause in the first place? Might it be suggested that the investor then resorts to the international tribunal constituted as prescribed by the underlying treaty, and asserts damages for the breach of the MFN clause? It is not reasonable. The whole purpose of the applicability of the MFN clauses to the dispute settlement mechanisms for the investors is that they litigate their dispute in their preferred forum. After all, how can they prove any damages that they may have incurred for not being able to litigate in their preferred forum? Moreover, to which act of the state will the liability be attributed is it objecting to the jurisdiction

[50] Brigitte Stern, 'The Elements of an Internationally Wrongful Act' in James Crawford, Alain Pellet, Simon Olleson, Kate Parlett (Assistant) (eds), *The Law of International Responsibility* (OUP 2010) 193–218, 210; Douglas (n 13) 104.

[51] See also Greenwood (n 1) 561–563.

[52] Of course, this conclusion depends on whether the MFN clause, in particular, the 'treatment' covers dispute settlement; if it does not, the state will not be under any obligation at all, thus cannot breach the MFN clause by failing to offer more favourable dispute settlement to the investor of the home state. However, although this matter is contentious, it was argued above that they normally cover the dispute resolution as well unless clearly excluded by the parties (in Part III).

of the first tribunal in the first place?[53] However, the immediate reason that has led to the breach of the MFN clause is that the international tribunal declined jurisdiction. Objecting to the jurisdiction of the first tribunal is ancillary to it. The only conceivable remedy then seems to be that the international tribunal should assert jurisdiction in the first place. That is, by asserting jurisdiction in the first place and dismissing the objections of the respondent state, the tribunal prevents the state from breaching the MFN clause. In a sense, the award in favour of the investor for the breach of the MFN clause becomes the finding of jurisdiction by the tribunal at the preliminary stage of arbitration without any breach of the MFN provision in fact. As explained in the preceding paragraph, however, invoking the MFN clause strictly means claiming a breach of the MFN provision, a wrongful act of the state that has occurred. Without any breach occurring, the tribunal may not rule on any remedy. The finding of jurisdiction, however, removes any possibility of the MFN clause being breached. In brief, the fact that an international tribunal asserts jurisdiction based on the MFN clause, accepting the claiming investor's contentions, runs counter to how the MFN clause normally functions.

Even if one ignores this fundamental rule, the application of the MFN clause to the dispute settlement provisions is beset with further difficulties. By finding that it has jurisdiction, the tribunal effectively forces the respondent state to accord more favourable treatment to the claimant investor, through making an order of specific performance. This aspect alone already indicates the unfeasibility of the application of the MFN clause to the dispute settlement provisions. There may be instances where an effective order of specific performance is not at the disposal of the tribunal, as is the case under NAFTA.[54] In those cases, it is inevitable that the tribunal cannot find jurisdiction. Moreover, in finding that it has jurisdiction, the tribunal not only orders the specific performance in nature, but also enforces this order itself. While one may question the mischief of the tribunal being able to enforce its award itself, it is worthy of note that it is an enforcement of specific performance at the preliminary stage of very arbitration itself. These peculiarities

[53] Douglas rightly asks how the respondent state may reasonably be expected to waive the jurisdictional objections it has in the face of the cardinal principle of any adjudication, the principle of procedural equality: see Douglas (n 13) 104.

[54] In this system, the tribunal may order only monetary damages or restitution of property in which case the state retains the right to pay monetary damages instead. As can be seen, the only kind of an order similar to specific performance is the restitution of property (not applicable in this context) which is also limited as states can still rectify the breach by monetary damages, see NAFTA Article 1135. Similarly, The Energy Charter Treaty (adopted 17 December 1994) ("ECT") 2080 UNTS 95 Article 26(8) provides that "[a]n award of arbitration… shall provide that the Contracting Party may pay monetary damages in lieu of any other remedy granted", thus leaving the award of specific performance at the discretion of the contracting state. Again, this also raises the question of how the arbitral tribunal finding jurisdiction under the MFN clause, which is an award of specific performance in nature, may specify the quantum of damages that the state may pay in lieu thereof.

also demonstrate the non-applicability of the MFN clause to the dispute settlement mechanisms.

On the whole, these considerations show that the MFN clause cannot function as it normally does when applied with regard to dispute settlement mechanisms. By invoking the MFN clause to benefit from the more favourable dispute settlement provisions, investors do not rely upon a breach of the MFN clause, and they cannot do so as shown by the preceding analyses. At most, they may try to show that the MFN clause is the evidence of the intention of the parties to incorporate dispute settlement provisions of other treaties.[55] This is simply not so, as well-established by the long history of the MFN clauses in international law. This difference was also importantly highlighted by the *Renta* tribunal which distinguished between "asserting a breach of the MFN clause and relying upon the MFN clause as evidence of conferring a more expansive jurisdictional mandate to the tribunal".[56] The tribunal held as follows:

> To be clear: the Claimants are not seeking to establish that Russia breached an obligation under the basic treaty (the Spanish BIT) by failing *explicitly* to grant to Spanish investors the same access to international arbitration as the access the Claimants say is enjoyed by Danish investors. The question is instead simply whether Article 5(2) of the Spanish BIT [the MFN provision] evidences Russia's consent that this tribunal's jurisdiction should have an ambit beyond that of Article 10 [dispute settlement provision].[57]

As explained above, however, it is normally not that parties express their intention to incorporate the more favourable provisions of other treaties into their

[55] Douglas usefully draws an analogy between this approach to the MFN clauses and the reliance on an express term in a commercial contract referring to another document which entails dispute resolution provisions: see Douglas (n 13) 106.

[56] Douglas (n 13) 105.

[57] *Renta 4 S.V.S.A, Ahorro Corporación Emergentes F.I., Ahorro Corporación Eurofondo F.I., Rovime Inversiones SICAV S.A., Quasar de Valors SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. v The Russian Federation*, SCC No. 24/2007, Award on Preliminary Objections (20 March 2009) [83] <https://www.italaw.com/sites/default/files/case-documents/ita0714.pdf> accessed 11 January 2018.

treaty through the MFN clause.[58] Rather, the MFN clause seeks to establish and maintain equality of treatment between investors.

V. Conclusion

The MFN clause is a fundamental type of clause, not just in international investment law, but also in international law more generally, and its proper function is to be understood against this background. This article has argued that these clauses ensure equality of treatment among foreign investors of different nationality, rather than rewriting the text of treaties by reference to more favourable provisions. It is this function of the MFN clauses that must be considered when one answers the question of whether they may apply with regard to dispute settlement provisions in international investment agreements.

The jurisprudence of international investment tribunals seems to be divided into two lines of cases, led by the *Maffezini* and *Plama* decisions. While some tribunals have considered the dispute settlement provisions as part of the protection and treatment accorded to the investors, applying the MFN clause in respect of them but along with some qualifications (such as "public policy considerations"), the others have differentiated the dispute settlement provisions from substantive protections and held that the MFN clause does not apply in this regard. It is submitted that both lines of case law are far from convincing. The first line of case law is not clear about, or consistent in, the qualifications that it adds to the application of the MFN clauses to the dispute settlement provisions, whereas the second line of case law fails to appreciate that dispute settlement provisions are also a part of investment protection and treatment in the sense used in the MFN clauses by maintaining an artificial division. Both, however, premise their analyses on a fundamental flaw: they seem to accept that the function of the MFN clauses is to incorporate by reference the more favourable provisions of other treaties. The central question is not whether the dispute settlement provisions are 'treatment', or 'procedural questions rather than substantive protections', or 'specifically agreed', but rather whether the MFN clauses may function properly as regards the dispute settlement provisions as they function in other contexts.

It has been shown in this article that the application of the MFN clauses with regard to dispute resolution clauses is not feasible. Invoking the MFN clause is not enabling the jurisdiction of the international tribunal; rather, it means showing a breach of the MFN clause and seeking remedies from the international tribunal. Be that as it may, when the MFN clause is invoked in this context, there is no breach

[58] Greenwood rightly argues that it "cannot be ruled out, especially where the language or drafting history of the MFN clause and the investor-state arbitration clause indicate that the parties to the BIT intended that the MFN clause apply so as to accord to investors the same access to arbitration as that offered in other BITs": see Greenwood (n 1) 563.

of the MFN clause when the investor seeks to convince the international tribunal to find jurisdiction. It is only when the international tribunal rejects jurisdiction that a breach of the MFN clause may come into existence. While how this will help the investor is very doubtful, how the state will be held liable is not clear. If the tribunal finds jurisdiction, there is no breach of the MFN clause, although the MFN clause is the provision that the investor relies on. This is no less illogical than that international tribunal declares that there is no breach of fair and equitable treatment and at the same time awards damages when the investor relies on the fair and equitable treatment standard. The MFN clause is a substantive obligation, and the investor cannot rely on substantive obligations without a breach. By finding jurisdiction, the tribunal negates in advance the breach of the MFN clause, which in fact amounts to an order of specific performance enforced by the tribunal itself at an interlocutory stage of the arbitral proceedings. How this will be possible when the order of specific performance is not allowed (if allowed, it is a rare practice anyway) is a question which can be readily answered.

Overall, the focus in the current practice of international investment arbitration is in the wrong place. Treatment, of course, covers how favourably the state chooses to solve its disputes with the investors of different nationalities. When the true function of the MFN clause is revealed, however, it is clear that their application with regard to dispute settlement provisions is not viable. This article will have achieved its purpose if it has shown that the reason why the MFN clauses will not apply to dispute settlement provisions is because they *cannot*.