The Most-Favored-Nation Treatment Standard

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Abstract: In this article, we will analyze the importance of the Most Favored Nation (MFN) treatment standard in the context of international investment law as an instrument to create equal competition between foreign investors. We will investigate the history of this standard, and the changes it underwent during different moments of history. Our aim, through this article, is to understand how this standard has supported the liberalization of world trade. In furtherance of the aim, we will analyze the connection between the two relative standards, the National Treatment Standard and the Most-Favored-Nation Treatment Standard, as they are both used to create an equal playing field among foreign investors, and between foreign and national investors. We will examine the most important MFN clauses in different investment law agreements and analyze their main components and differences, together with the exceptions and limits of some MFN clauses. We will then focus on some of the most important decisions regarding the possibility of extending a Tribunal's jurisdiction through an MFN clause and shortening the waiting periods. Our aim through this article is to understand how this standard has supported the liberalization of world trade.

Key words: International Investment Law; International Commercial Law; BIT; Treaties; Most Favored Nation Treatment Standard.

1. *Introduction*

The international investment law system is a multilateral system based on a series of Bilateral Investment Treaties (BITs) between two countries that contain different rules and standards of treatment regarding foreign investments. These standards are necessary for the protection of foreign investment. They are the Fair and Equitable Treatment standard (FET), the Full Protection and Security standard (FPS), the National Treatment standard (NT) and the Most-Favored-Nation treatment standard (MFN).

These may be divided between relative standards and absolute standards. The FET and the FPS standards are considered absolute, because there is no special condition for their implementation by the host State. The Most-Favored-Nation treatment standard and the National Treatment standard are relative standards. In the case of relative standards, the conduct of the State regarding foreign

investors of a certain nationality is compared with the conduct that that same State has towards investors of a different nationality.[1]

The wording of the clauses that enshrine these standards in these legal documents may differ from one treaty to another. However, unless the contracting parties have made it clear that they intend to give a particular meaning to the clause, the slight differences between the clauses in different treaties, that refer to the same standard, do not change its function.[2]

The focus of this essay will be the MFN treatment standard, whose importance has been recognized for centuries.[3] The MFN treatment requires the favorable treatment applied towards one country to be applied to all. The use and the scope of the MFN treatment has varied over time,[4] but one element always remained constant: the MFN treatment has always helped lock States into a multilateral framework, preventing them from making exclusive promises to achieve a specific concession from another State. MFN clauses harmonize the level of investment protection given to any foreign investor in a particular State, transforming the BITs from instruments of bilateralism into instruments of multilateralism.[5]

The MFN principle also helps to increase efficiency in the world economy by ensuring that member countries that want to levy their

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[1] Ansari Mahyari, A. & Raisi, L.; *International standards of investment in international arbitration procedure and investment treaties*; 15 (2), Revista Jurídicas, at 13 (2018).

[2] Stephan W. Schill, *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses*, Berkeley Journal Of International Law, Vol. 27:2, at 503 (2009).

[3] In fact, MFN clauses were present in the international treaties concerning trade of the eleventh and twelfth century.

[4] See paragraph 4, on the history of the Most-Favored-Nation standard.

[5] Schill, *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses* at 504 (cited in note 2).

tariffs levy it on all member countries.[6] This in turn makes it possible for countries to import from the best supplier, securing the most efficient result.

Another effect of the MFN treatment is the stabilization of the multilateral trading system[7] through its extension to trade restrictions[8].

The MFN treatment also helps in reducing the cost of maintaining a multilateral trade system: countries will not have to re-negotiate a new BIT in order to obtain the most favorable conditions that are now given to other countries, because those conditions will be applied immediately by virtue of the MFN clause in the previous BIT. This raises the issue of free riders States, which are States that get an advantage by the application of the MFN clause, without participating in the negotiations. The free rider problem is the main critique against the MFN treatment. For example, under the GATT, whenever a few WTO members mutually exchange trade-barrier reductions, they must extend those reductions to all other WTO members under MFN, even if the latter do not reciprocate.[9]

For all of these reasons, the importance of the MFN treatment standard cannot be understated.

2. *History of the Most-Favored-Nation Standard*

[6] METI Japan Ministry of Economy, Trade and Industry, *Most-Favored-Nation Treatment Principle* Chapter 1 Part II (date missing), available at https://dl.ndl.go.jp/view/prepareDownload?itemId=info%3Andljp%2Fpid%2F1286059&contentNo=16 (last visited May 2, 2024) at 312.

[7] Ibid.

[8] See Article 13, GATT (Non-discriminatory Administration of Quantitative Restrictions).

[9] Donald McRae, *MFN in the GATT and the WTO*, Vol. 7, Asian J. WTO & Int'l Health L & Pol'y 1, at 5 (2012).

MFN clauses have been used in bilateral investment treaties since the eleventh and twelfth century[10], but their scope has varied over time. The prototype of the modern MFN clause was very broad. It was used by medieval trading cities when they were not able to achieve a monopoly in a foreign market. The clause then became widespread in trade treaties in the fifteenth and sixteenth centuries.

The phrase "Most-Favored-Nation" made its first appearance in a 1692 treaty between Denmark and the Hanseatic cities.[11] In that same century, the function of MFN clauses started to change because of the influence of mercantilist ideology.[12] During that period, the function of MFN clauses was significantly different from that of modern MFN clauses, even though they were similarly formulated. They were not considered as "instruments of multilateralism"[13], but rather as an instrument to advance a protectionist view on international trade relations.

Up until the Treaty of Amity and Commerce of 1778, only unconditional MFN clauses existed. They did not require the beneficiary State to make the same concessions to the granting State for the clause to have its beneficial effect.[14] Conditional MFN clauses were only introduced in the late 18th century. They were based on the concept of reciprocity: the privileges would be extended to the beneficiary State only if the beneficiary State made the same

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[10] Scott Vesel, *Clearing a Path Through a Tangled Jurisprudence: Most-Favored-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties,* Vol. 32:125; The Yale Journal of International Law, at 129.

[11] Ibid.

[12] Mercantilists thought that the wealth of a nation depended on its supply of capital and that the volume of trade could never be changed. They believed that the wealth of a nation could only increase in case the positive external trade balance widened. Because of this, protectionist measures and high tariffs that discouraged imports were among the instruments of choice.

[13] Schill, *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses* at 510 (cited in note 2).

[14] Id at 512.

concessions in return.[15] This type of MFN clause was well suited to a protectionist view of international trade relations. Its purpose was to lower tariffs overall and to reach a system of international trade based on non-discrimination and equality.

Conditional MFN clauses were later abandoned because the system they created was too complex,[16] but they were still preferred by the United States up until the 1920s.

The forsaking of the conditional clause can be linked to the Free Trade movement of the 19th and 20th century. The key event in the abandoning of conditional MFN clauses was the 1860 Cobden Treaty, under which the two leading powers of the world at the time, France and Great Britain, lowered tariffs and granted one another unconditional Most-Favored-Nation status.[17] After this treaty, Europe as a whole abandoned its protectionist views of the economy, as well as the use of the conditional form of the MFN clause.

Even when Europe reconnected with a protectionist view in the 19th century, the unconditional clause was not abandoned.[18] However, the USA continued to use the conditional MFN clause until the end of the Great War.[19] During the Great War there was a resurgence of mercantilism, which led many States to renounce all the treaties containing MFN clauses.

After the World Economic Crisis of 1929, many States abandoned the MFN standards; bilateral trade relations and discriminatory trade surged.[20] The MFN treatment standard only regained its relevance in international trade relations after the 2nd World War, when it was included, in its unconditional form, in

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[15] Id at 130.

[16] For example, these clauses required trades to record the country of origin of every product, in order to classify it properly under the country-specific tariff.

[17] See Vesel, *Clearing a Path Through a Tangled Jurisprudence* at 131 (cited in note 10).

[18] See Ibid.

[19] See Schill, *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses* at 512 (cited in note 2).

[20] See Id at 513.

Article 1:1 of the GATT, becoming the "cornerstone" of international investment law.[21] The principle was considered an instrument to prevent further wars by "prohibiting bilateral alliances and block building in an economic context prone to spill over into military conflicts"[22].

After the 2nd World War there was a renewed interest in codifying the use of the MFN treatment standard.[23] In 1978, the International Law Commission (ILC) submitted the *Draft Articles on Most-Favored-Nation Clauses* to the U.N. General Assembly, in which MFN clauses are defined as "treaty provision[s] whereby a State undertakes an obligation towards another State to accord most-favored-nation treatment in an agreed sphere of relations". The most favored nation treatment is defined in Article 5 of the Draft Articles to mean "treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favorable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State".

The U.N. General Assembly adopted a decision on December 9, 1991, through which it brought the *Draft Articles* "to the attention of Member States and of intergovernmental organizations for their consideration in such cases and to such extent as they deem appropriate." However, the U.N. General Assembly did not make the *Draft Articles* binding.[24] Nonetheless, they are still considered valuable instruments to interpret the different MFN clauses.[25]

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[21] See Vesel, *Clearing a Path Through a Tangled Jurisprudence*,at 134 (cited in note 10).
[22] See Schill, *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses* at 514 (cited in note 2).
[23] See Ibid.
[24] See Vesel, Clearing a Path Through a Tangled Jurisprudence,at 136 (cited in note 10).
[25] See Schill, Vol. 27:2, *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses* at 516 (cited in note 2).

3. *Rules on non-discrimination*

The standard of most favored nation treatment, set out in Article 5 of the *Draft Articles on Most-Favored-Nation Clauses* creates a level playing field, in which States cannot discriminate against foreign investors, treating them differently from other investors of different nationalities.

The MFN treatment standard is intimately connected with the National Treatment standard (NT), which can be found in GATT Article 3 Paragraph 2. The NT standard requires that imported products shall not be subject "directly or indirectly to internal taxes or other internal charges of any kind in excess of those applied directly or indirectly to like domestic products"; and that imported products "shall be accorded treatment no less favorable than that accorded to like products of domestic origin".

Along with the National Treatment standard, the MFN standard creates a system of rules of non-discrimination in the investment law context:[26] The most favored nation standard forbids discrimination between foreign "like-products", whereas the national treatment standard forbids discrimination between foreign (and imported) products and domestic products.[27] The MFN treatment applies to both internal and external measures, while the NT standard only applies to internal measures. Thus, we can argue that the MFN treatment has a wider range of applicability than the NT standard. However, the MFN standard has stricter requirements of applicability, as it only refers to "like products", whereas NT applies also in the case of "directly competitive or substitutable goods".[28]

[26] Peter Van Den Bossche, Denise Prévost; *Essential of WTO Law,* Cambridge University Press, 2nd edition, 2021 [2016].

[27] Henrik Horn, Petros C. Mavroidis, Vol. 17, *Economic and legal aspects of the Most-Favored-Nation clause,* European Journal of Political Economy, at 238, 2001; MCRAE, *MFN IN THE GATT AND THE WTO* at p.6 (cited in note 9)

[28] See Ibid.

Both the MFN treatment and the NT standard have the objective of enabling equal competition between investors, which is essential to allocate resources efficiently in the market.[29]

4. *The Most-Favored-Nation Clauses*

MFN treatment is a treaty-based obligation that must be contained in specific provisions of a treaty. In the absence of a treaty-based obligation, nations retain the possibility of discriminating between foreign nations in their economic affairs.

An MFN clause is a relative standard as it requires a comparison between the treatments afforded to two foreign investors in the same circumstance.[30].

MFN clauses require at least three States: a granting State, a beneficiary State and a third State. The MFN operation entails that a granting State enters into an obligation with a beneficiary State to extend a more favorable treatment granted in a specific context, to any third State.[31]

The MFN clause between the granting State and the beneficiary State is enclosed in a treaty designated as the "basic treaty", as it contains the basis to incorporate the benefits granted in another treaty to investors of a different State into the relationship between granting State and beneficiary State. MFN clauses have been characterized as "drafting by reference",[32] because this automatic operation does not change the terms of the relationship between the contracting parties to the basic treaty.

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[29] See Schill, *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses* at 503 (cited in note 2).

[30] See Ansari, Raisi; *International standards of investment in international arbitration procedure and investment treaties*; pp. 27-30 (cited in note 1).

[31] See chill, *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses* at 506 (cited in note 2)

[32] Id. at 507.

MFN clauses are subjected to the *ejusdem generis* principle. Thus, they may only apply to issues belonging to the same subject matter or the same category of subject as to which the clause relates.[33]

Depending on the wording, we can distinguish between four different types of MFN clauses: broad MFN clauses; general MFN clauses; MFN clauses tied to fair and equitable treatment; narrow MFN clauses.

Broad MFN clauses contain terms and phrases that indicate that the MFN clause of the treaty will apply to "all matters" covered by the treaty.[34]

General MFN clauses differ from Broad MFN clauses, as they are contained in treaties that do not explicitly state the range and scope of their application. In these treaties both states are explicitly prohibited from according a "less favorable treatment" than that accorded to other foreign and national investors to the other contracting State's investors. The treaty, however, fails to define what constitutes a "less favorable treatment". Further, these treaties do not specify in what fields the no "less favorable treatment" has to be accorded, nor do they say whether the MFN clause extends to dispute resolution provisions as well.[35]

Another category of MFN clauses concerns those linked to the fair and equitable treatment standard (FET). This category creates confusion among many, because it ties the MFN treatment standard, which is a relative standard, to the FET standard, an absolute one. The BITs containing this type of clause normally have a first paragraph that states that the contracting parties have to "extend fair and

[33] See Ansari, Raisi, *International standards of investment in international arbitration procedure and investment treaties* at 28 (cited in note 1).

[34] See Julie A. Maupin, *MFN-Based Jurisdiction in Investor-State Arbitration: Is There Any Hope for a Consistent Approach?'*, 14 J Int'l Econ L 157; at 163, (2011).

[35] Id at 165.

equitable treatment[36] to one another's investors"[37], and a second paragraph, that explains that the treatment required shall never be less favorable than that accorded by the contracting States to their own investors or to other foreign investors.

The final category of MFN clauses consists of the narrow clauses. These are found in BITs that explicitly limit the scope and range of the MFN clause, excluding that the clause can be applied to dispute settlement provisions.[38]

5. *Most-favored-nation Clause in the General Agreement on Tariffs and Trade (GATT)*

5.1. *GATT Article 1:1*

The MFN standard is considered a "cornerstone" of the General Agreement on Tariffs and Trade (GATT[39])[40]. It has been included in Article 1:1, as well as in several other provisions of the treaty.

Article 1:1 GATT states that, "With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with

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[36] In some treaties the phrase "just and equitable" treatment is used instead.

[37] Maupin, *MFN-Based Jurisdiction in Investor-State Arbitration* at 166 (cited in note 35).

[38] An example of a narrow MFN clause is the "vanishing footnote" of CAFTA.

[39] The GATT is an international treaty signed in 1947, in Geneva, Switzerland. The signing countries now represent 4/5th of world trade. Its general objective is to establish a multilateral system of trade relations and encourage the liberalization of world trade.

[40] World Trade Organization Appellate Body, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries, (Apr. 20, 2004), available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.wto.org/english/tratop_e/dispu_e/gatt_e/80coffee.pdf (last visited May 2, 2024)

respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."

The main purpose of Art. 1:1 GATT is to ensure that all WTO members can enjoy equal opportunities to export or import to and from other WTO members[41].

The importance of the inclusion of the MFN standard in the GATT is paramount. It was only through the incorporation of an MFN clause in this treaty that the MFN standard became a multilateral obligation[42].

5.1.1. *Like Product*

A breach of Article 1:1 of the GATT can only occur if there is a discrimination between "like products"[43].

The GATT does not give a definition of the notion of "like product". As a result, the meaning of this concept is often contentious and had to be clarified through case law. In *the case of Spain – Tariff Treatment of Unroasted Coffee*[44], the Panel established that to determine the likelihood of products certain elements must be taken into consideration, such as the physical characteristics of the products, their end-users, and the tariff regimes of other Members[45]. The Panel

[41] Van Den Bossche, Prévost; *Essential of WTO Law*; at p. 14 (cited in note 27).
[42] McRae, *MFN in the GATT and the WTO* at 4 (cited in note 9).
[43] This term is also found in GATT Article 2 (Schedules of Concessions) and Article 4 (Special Provisions relating to Cinematograph Films).
[44] World Trade Organization Panel, Spain — Tariff Treatment of Unroasted Coffee 4:6, (Jan. 11, 1981), available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.wto.org/english/tratop_e/dispu_e/gatt_e/80coffee.pdf (last visited May 2, 2024)
[45] Van Den Bossche, Prévost; *Essential of WTO Law*; (cited in note 27).

stated that the different varieties of the product, which in this case was coffee beans, could be considered "like-products" and thus establishing different tariffs for different varieties of coffee could be considered a violation of the MFN clause in GATT Article 1:1[46].

In contrast, in *Japan — Tariff on Imports of Spruce*, the Panel recognized that each WTO Member has much discretion in determining the tariff classifications. The panel decided to rely on the standards used by that particular State to determine whether the products in question were "like-products".

The term "like product" also appears in GATT Article 3[47], and it has been interpreted narrowly in some cases[4849]. However, Article 3 GATT is more complex than GATT Article 1:1, as it refers not only to "like products", but also to "directly competitive or substitutable products". Because of this substantial difference, it is not clear whether the term "like products" can be interpreted in a restrictive way in the context of the MFN clause found in Article 1:1, similar to its interpretation under GATT Article 3.

5.1.2. *Immediately And Unconditionally*

The drafters of the GATT opted for an unconditional MFN standard, thus creating a clear break from the previous notion of conditional MFN, which created a reciprocal obligation of extending the favorable provisions to the other State[50].

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[46] METI Japan Ministry of Economy, *Trade and Industry, Most-Favored-Nation Treatment Principle*, at 306 (cited in note 6)

[47] Rubricated "National Treatment on Internal Taxation and Regulation".

[48] See among others World Trade Organization Appellate Body, Japan-Taxes on Alcoholic Beverages, (Jan. 12, 1998) available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/8-17A1.pdf&Open=True (last visited May 2, 2024)

[49] McRae, Donald, *MFN in the GATT and the WTO* at 14 (cited in note 9).

[50] McRae, Donald; *MFN in the GATT and the WTO* at 4 (cited in note 9).

Article 1:1 GATT states that the MFN treatment has to be given "immediately and unconditionally" to all WTO members. Thus, WTO members cannot delay the award of an advantage to other WTO members, nor can they impose conditions that will create discrimination in the import or export activity between WTO members[51].

There have been some legal cases that touched on the matter of the unconditionality of the MFN clause found in GATT Article 1:1. One of them is *Canada-Autos*, in which the Appellate Body noted that the exemption to import duty, given to just some countries, is in contrast to Article 1:1 GATT[52].

5.1.3. *De Facto Discrimination*

Art 1:1 GATT covers both *de jure* and *de facto* discrimination[53]. GATT Article 1 refers to all advantages granted by WTO member states. However, there can be cases in which the principle is explicitly waived[54]. There are also several areas of trade in which the MFN principle is disciplined by specific agreements[55].

5.2. *GATT Article 2 – Non-discrimination And Tariffs*

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[51] Van Den Bossche, Prévost; *Essential of WTO Law*; Cambridge University Press

[52]World Trade Organization Appellate Body, Canada-CERTAIN MEASURES AFFECTING THE AUTOMOTIVE INDUSTRY, (May 31, 2000), available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/142-12.pdf&Open=True (last visited May 2, 2024)

[53] A de iure discrimination occurs in the case of measures that explicitly discriminate between foreign "like products". A *de facto* discrimination, instead, occurs when we have measures that are superficially non-discriminatory, but actually impose a heavier burden on foreign goods with a particular origin. Ibid.

[54] See paragraph 8.

[55] See for example, the clauses regulated in the Anti-dumping Agreement; Safeguard Agreement; The Agreement on Subsidies and Countervailing Measures.

GATT Article 2:1 reaffirms the MFN obligation in regard to tariff bindings. Under GATT Article 2, each contracting party is required to "accord to the commerce of the other contracting parties' treatment no less favorable than that provided for" in its schedule of tariff concessions.

One of the main differences between the MFN clause in Article 1 and the clause in Article 2 is that under Article 1, any advantage must be accorded "immediately and unconditionally" to all other WTO members, whereas under Article 2 "treatment" has to be "no less favorable" than that accorded to the other WTO members.

5.3. *GATT Article 3:7 – Quantitative Restrictions on The Mixture, Processing or Use of Products*

Paragraph 7 of GATT Article 3: supplements the discipline contained in GATT Article 1:1 by providing an MFN standard to follow in the administration of quantitative restrictions relating to the mixture, processing, or use of products[56].

5.4. *GATT Article 5 - Freedom of Transit*

GATT Article 5:2 supplements the MFN clause contained in Article 1:1 by providing for freedom of transit of goods, vessels and other means of transport across the territory of WTO members via the routes most convenient for international transit.

5.5. *GATT Article 13 - Non-discriminatory Administration of Quantitative Restrictions*

[56] Article 3:7, GATT: "No internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions shall be applied in such a manner as to allocate any such amount or proportion among external sources of supply".

GATT Article 13 is a specification of the MFN clause as it states that countries, when imposing quantitative restrictions or tariffs on foreign products, should do it equally to all like-products of all countries.

The Article also asserts that the contracting parties shall "aim at a distribution of trade in such product [subject to import restrictions and tariff rate quotas], approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions". This sentence highlights the main difference between the provision in Article 1 and the provision in Article 13. The latter provision states that the application of formally equal ratios for permitted import volumes might be a violation of Article 13 GATT, even though it would be totally permissible under Article 1 GATT[57].

5.6. *GATT Article 17 – State Trading Enterprises*

State trading enterprises are defined under GATT Article 17, as state enterprises established or maintained by a WTO Member or private enterprises granted exclusive or special privileges by WTO Members that make purchases or sales involving either imports or exports.

These States' trading enterprises have a monopolistic status, which they may use to discriminate against an importing country, operating against the principles of international investment law.

GATT Article 17 states that WTO Members have to act according to the MFN clause, and at the same time it provides that they must act solely in accordance with commercial considerations[58].

[57] METI Japan Ministry of Economy, Trade and Industry, Most-Favored-Nation Treatment Principle at 308 (cited in note 6)

[58] Id.

6. *Most-favored-nation Clause in the General Agreement on Trade in Services (GATS)*

An MFN clause was reproduced in the GATS[59] agreement as well. In particular, Art. 2:1 states that, "With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favorable than treatment it accords to like services or service suppliers of any other country".

The MFN principle, central to GATT, is also considered a "core obligation" under GATS. However, there is a difference in wording between GATT Article 1 and GATS Article 2: whereas GATT relates to any “advantage”, GATS only relates to “measures affecting trade in services”. As observed by the Appellate Body in *Canada - Autos*, the wording of this provision suggests that analysis of the consistency of a measure with Article 2:1 should proceed in several steps. First, a threshold determination on whether a measure is covered by the GATS, must be made under Article 1:1. This determination requires that there is a 'trade in services' in one of the four modes of supply established, including a measure which 'affects' this trade in services. If the threshold determination is that the measure is covered by the GATS, appraisal of the consistency of the measure with the requirements of Article 2:1 is the next step. The text of Article 2:1 requires, in essence, that treatment by one Member of 'services and services suppliers' of any other Member be compared with treatment of 'like' services and service suppliers of 'any other country'. Finally,

[59] The General Agreement on Trade in Services (GATS) is a World Trade Organization treaty that entered into force in 1995, which aims to create a reliable and predictable system of international rules for trade in services and to facilitate the progressive liberalization of services markets. The basic principles of GATS apply, in principle, to all service sectors. The rules and principles of GATT, instead, apply to the trade of goods in the international market. (Munin, Nellie., Legal Guide to GATS. Paesi Bassi at 11 ss, Kluwer Law International, 2010).

the Panel should have applied its interpretation of Article 2:1 to the facts as it found them.

In Article 2 GATS we can also find the words "treatment no less favorable", also found in Article 2 and 3 of GATT, but not in Article 1 of GATT. However, this does not mean that arbitral tribunals and international courts have to interpret the MFN provisions under GATT Article 1 and GATS Article 2 in a different manner. In *EC-Bananas*, the Panel noted the similarities between GATS Article 2 (Most-Favored-Nation) and GATS Article 17 (National Treatment) and concluded that these two provisions had to be interpreted in the same way. However, the Appellate Body rejected this statement and stated that the MFN obligation in GATS Article 2 had to be interpreted in line with GATT Article 1.

The MFN obligation under GATS is not as broad as it might seem at first glance, as it is possible for States to create exceptions where the MFN clause wouldn't apply[60].

6.1. *Like Services or Service Suppliers*

In *Argentina – Financial Services*, the Appellate Body tried to give an explanation of the phrase "like services and service suppliers", found in Articles 2 and Article 17 of GATS[61]. It said that "the determination of 'likeness' of services and service suppliers must focus on the competitive relationship of the services and service suppliers at issue".

The Appellate Body stated that "the word 'like' refers to something sharing a number of identical or similar characteristics or qualities". It also established what degree or extent of similarity is required for services and service suppliers to be considered "like".

[60] GATS Article 2.2:
"A Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions".
[61] WTO ANALYTICAL INDEX GATS – Article II (DS reports), at 2 ss.

In *Argentina – Financial Services*, the Appellate Body explained that what is being compared for 'likeness' is different in the context of trade in goods and trade in services. In the GATS, the likeness refers to both services and service suppliers, whereas the GATT only refers to "like products", and not to the producers[62].

The Appellate Body also spoke of the method a Panel should use to determine the "likeness", recalling four general criteria used to analyze the 'likeness' of products in the trade in goods[63]: (i) the properties, nature, and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits or consumers' perceptions and behavior in respect of the products; and (iv) the tariff classification of the products[64].

6.2. *De Facto Discrimination*

In *EC – Bananas III*, the European Communities argued that Article 2 of the GATS did not cover *de facto* discrimination, but only *de jure* discrimination, because otherwise the drafters of the GATS would have done so explicitly[65].

The Panel rejected this argument, stating that Article 17 "is meant to provide for no less favorable conditions of competition regardless of whether that is achieved through the application of formally identical or formally different measures".

The Panel also affirmed that the standard of no less favorable treatment must not be "interpreted narrowly to require only formally identical treatment", because such an interpretation could "lead in

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[62] World Trade Organization Appellate Body, Argentina – Measures Relating to Trade in Goods and Services 6.3.3-6.3.4 (Apr 14, 2016), available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/453ABR.pdf&Open=True (last visited May 2, 2024)

[63]See WTO Analytical Index GATS, Article II (DS reports).

[64] Appellate Body Report, Argentina MEASURES RELATING TO TRADE IN GOODS AND SERVICES (cited in note 63)

[65] See WTO Analytical Index GATS, Article II (DS reports), p. 7.

many situations to the frustration of the objective behind Article II which is to prohibit discrimination between like services and service suppliers of other Members".

The Appellate Body used different reasoning to confirm that GATS Article 2 could be applied to both *de facto* and *de jure* discrimination.

7. *Most-favored-nation Clause in Other Agreements*

MFN clauses are also present in other international agreements. For example, an MFN clause is also present in Article 4 of the Agreement on Trade-Related aspects of International Property Rights (TRIPS Agreement[66]), which states:

> With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.

The inclusion of an MFN clause in a treaty regarding intellectual property is quite new, but the range of the provision is limited, as it does not apply to agreements stipulated before the WTO became effective[67].

An MFN clause is also included in the Technical Barriers to Trade Agreement (TBT Agreement), in Article 2[68]. The MFN clause in the TBT Agreement is slightly different in wording from the one

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[66] The Agreement on Trade-Related Aspects of Intellectual Property Rights, commonly known as the TRIPS Agreement, is an international treaty promoted by the World Trade Organization, better known as the WTO, aimed at setting the standard for the protection of intellectual property.

[67] McRae, *MFN in the GATT and the WTO* at 18 (cited in note 9).

[68] METI Japan Ministry of Economy, Trade and Industry, Most-Favored-Nation Treatment Principle at 311 (cited in note 6)

found in the GATT. In the case of *EC-Seal Products* Appellate Body stated that these two clauses had to be interpreted in a different manner[69].

MFN provisions are also found in Article 2 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and in Article 4 of the Agreement on Government Procurement (GPA Agreement)[70].

8. *Exceptions*

The potential scope of application of the MFN clauses is broad, but in practice there are many exceptions that limit their range [71]. We will try to give a complete analysis of the most important ones.

8.1. *Preferential and Regional Trade Agreements, Free Trade Areas and Custom Unions – GATT Article 24 and GATS Article 5*

The ability of the States to stipulate Preferential Trade Agreements is the most important exception to the MFN treatment standard. GATT Article 24 and GATS Article 5 allow members to liberalize trade more rapidly among a limited group of members

[69] It was the EC-Seal Products case, in which the Appellate Body determined that a violation of the MFN treatment obligation provided for in Article 2 of the TBT Agreement could be determined only after taking into consideration the objectives of the measure accused of violating the clause, whereas in the case of a violation of the MFN treatment obligation found in Article 1 GATT was determined solely on the basis that the measure would worsen the "competitive conditions of imported like products, regardless of the legitimacy of the objectives of the measure". (World Trade Organization Appellate Body, European Communities - Measures Prohibiting the Importation and Marketing Seal Products case, (Oct. 16, 2015) available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds400_e.htm (last visited May 2, 2024).

[70] METI Japan Ministry of Economy, Trade and Industry, *Most-Favored-Nation Treatment Principle* at 312 (cited in note 6)

[71] See McRae, *MFN in the GATT and the WTO* at 11 (cited in note 9).

through a regional trade agreement (RTA) or other kinds of Preferential trade agreements (PTA). Through these agreements, members grant each other a more favorable treatment in trade matters than the one granted to non-members of the agreement[72]. Even though, at first glance, this agreement would be in conflict with the MFN treatment obligation, WTO law recognizes that Preferential Trade Agreements might be a first step to pursue trade liberalization between all WTO members in the future. Thus, both the GATT and the GATS allow PTAs, RTAs, custom unions and Free Trade Areas, under certain conditions. First of all, tariffs and other barriers to trade must be eliminated with respect to substantially all trade within the region; secondly, the tariffs and other barriers to trade applied to outside countries must not be higher or more restrictive than they were prior to regional integration.

States can also form "interim agreements", that will lead, after a certain period – no longer than 10 years – to the formation of a Custom Union or a Free Trade Area[73].

Regional trade agreements regarding trade on goods are justified only when the measure was introduced upon the formation of a custom union, a free-trade area or an interim agreement that would meet all the requirements set out in WTO law, and the formation of the customs union or free-trade area would have been prevented if the introduction of the measure at issue were not allowed[74]. Thus, "not all action taken under a customs union or free trade area will escape the MFN obligation of GATT Article 1:1"[75].

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[72] See Van Den Bossche, Prévost, *Essential of WTO Law*; Cambridge University Press.

[73] Id, at 139-142

[74] World Trade Organization Appellate Body, Turkey-Restrictions on Imports of Textile and Clothing Products, P1, (Oct.22, 1999) available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/34-14.pdf&Open=True (last visited May 2, 2024).

[75] McRae, *MFN in the GATT and the WTO*, at 12 (cited in note 9).

Regional trade agreements regarding trade in services are permitted only in the case of "economic integration agreements" if the measure is introduced as part of an agreement liberalizing trade in services that meets all the requirements set out in Article 5 GATS. WTO members are prevented from signing such agreements if the measures concerned violate GATS[76]. To this end, WTO Members will also have to notify the WTO of every regional trade agreement they might have concluded.

8.2. *General Exceptions: GATT Article 20 and GATS Article 14*

GATT Article 20 and GATS Article 14 are provisions that try to find a balance between the needs of trade liberalization and societal values.[77] The exceptions found in GATT Article 20 and GATS Article 14 do not apply only to the MFN clause in the GATT or in the GATS, but to all GATT or GATS obligations. They are, in fact, general exceptions[78]

GATT Article 20 establishes that a measure that deviates from the obligations of the treaty is justified when it is: (i) necessary for the protection of public morals; (ii) necessary for the protection of the life or health of humans, animals, plants; (iii) necessary to secure compliance with national law which is in itself not GATT-inconsistent; (iv) relate to the conservation of exhaustible natural resources.

Moreover, the application of a measure that is justified under Article 20 may never constitute an "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" nor a "disguised restriction on international trade". The same rule applies to measures that are justified under Article 14 GATS.

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[76] Van Den Bossch, Prévost, *Essential of WTO Law*, Cambridge University Press.

[77] Van Den Bossche, Prévost, *Essential of WTO Law*, Cambridge University Press.

[78] METI Japan Ministry of Economy, Trade and Industry, Most-Favored-Nation Treatment Principle at 311 (cited in note 6)

In *US-Shrimp*, the Appellate Body stated, speaking especially of the exceptions found in GATT Article 20, that the obligations based on the treaty may be interpreted broadly, whereas the exceptions to those same obligations have to be interpreted restrictively.[79]

GATS Article 14 has many similarities to GATT Article 20, even though it presents some important differences. Under Article 14, a WTO Member can justify measures that contrast with GATS-based obligations if those same measures are: (i) necessary to protect public morals or to maintain public order; (ii) necessary to protect human, animal, or plant life or health; (iii) necessary to secure compliance with laws that are not inconsistent with the GATS.

Under Article 14 GATS WTO Members can also justify measures that are inconsistent with GATS Article 17[80], when the difference in treatment is aimed at the equitable and effective imposition or collection of direct taxes, or that are inconsistent with GATS Article 2, when the difference in treatment results from an international agreement on the avoidance of double taxation.

8.3. *Exceptions for National and International Security: GATT Article 21 and GATS Article 14-bis*

GATT Article 21 and GATS Article 14-bis establish that a WTO member has the possibility of not disclosing information that it would normally be required to supply when it 'considers' disclosure of that information contrary to its essential security interests. This mainly happens with information relating to fissionable materials, to trade in arms or other materials, or regarding the provision of services for military use. These exceptions apply to all obligations under the GATT or GATS.

[79] This restrictive approach to GATT exceptions can also be found in Mexico-Soft Drinks.

[80] Rubricated "National Treatment".

The security exceptions give a lot of discretionary power in the hands of WTO Members, as they are not subject to the requirements of the chapeau to avoid misuse.[81]

8.4. *Enabling Clause*

The Generalized System of Preferences (GSP) allows developed-country members to grant preferential tariff treatment to imports from developing countries, in order to promote their economic development. A WTO member can, under an enabling clause, grant additional preferential tariff treatment to some developing countries and not to others, on the condition that the WTO member involved treats all 'similarly situated' developing countries equally.[82]

Granting GSP preferences is only allowed if preferential tariffs may be applied not only to countries with special historical and political relationships but also to developing countries. More generally this is a benefit unilaterally granted by developed countries to developing countries[83].

8.5. *Other Exceptions and Limits*

An important limit of MFN clauses is that they cannot override clauses included in the basic treaty which absolve a party of the obligations under the treaty as a whole[84].Other exceptions include those found in Article 13 of the Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement") that provides

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[81] Van Den Bossche, Prévost, *Essential of WTO Law*, Cambridge University Press.

[82] See *Ibid.*

[83] METI Japan Ministry of Economy, Trade and Industry, Most-Favored-Nation Treatment Principle at 309 (cited in note 6) .

[84] Schill, *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses* at 521 (cited in note 2).

that the Agreement does not apply as between a Member and another Member, when one or more of these conditions are met: (a) at the time the WTO Agreement went into force, Article XXXV of GATT 1947 had been invoked earlier and was effective as between original Members of the WTO which were Members of GATT 1947; (b) between a Member and another Member which has newly acceded, the Member not consenting to the application has so notified the Ministerial Conference before the approval of the agreement on the terms of accession by the Ministerial Conference.

This provision deals with accession-related issues: WTO member States might not want to extend favorable treatment to another country that wants to become a WTO member. Thus, they might oppose the other country's entrance to the WTO. If the States that oppose the accession of the third State in the WTO are not enough to bar its entrance, then they will have to extend favorable treatment to the third country, without their consent.

Article 13 of the WTO Agreement gives these States the possibility not to extend a favorable treatment to another State, which may nonetheless become a WTO Member[85].

[85] METI Japan Ministry of Economy, Trade and Industry, Most-Favored-Nation Treatment Principle at 309 (cited in note 6)

It is also possible to obtain a waiver from the MFN principle. Under WTO Article 9:3[86], countries may, with the agreement of other Members, waive their obligations under the agreement[87].

9. *Interpreting MFN Clauses*

The MFN treatment standard is contained in many different treaty provisions. The basic rules of treaty interpretation codified in the Vienna Convention on the Law of Treaties can be used to interpret the MFN treatment clauses in different BITs and multilateral agreements[88]. In particular, Article 31 of the Vienna Convention establishes that:

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[86] WTO Article 9:3:
In exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements, provided that any such decision shall be taken by three fourths of the Members unless otherwise provided for in this paragraph.
A decision to grant a waiver in respect of any obligation subject to a transition period or a period for staged implementation that the requesting Member has not performed by the end of the relevant period shall be taken only by consensus.
(a) A request for a waiver concerning this Agreement shall be submitted to the Ministerial Conference for consideration pursuant to the practice of decision-making by consensus. The Ministerial Conference shall establish a time-period, which shall not exceed 90 days, to consider the request. If consensus is not reached during the time-period, any decision to grant a waiver shall be taken by three fourths of the Members.
(b) A request for a waiver concerning the Multilateral Trade Agreements in Annexes 1A or 1B or 1C and their annexes shall be submitted initially to the Council for Trade in Goods, the Council for Trade in Services or the Council for TRIPS, respectively, for consideration during a time-period which shall not exceed 90 days. At the end of the time-period, the relevant Council shall submit a report to the Ministerial Conference.

[87] An important example of a waiver is the Lomè waiver.

[88] Dana H. Freyer and David Herlihy, *Most-Favored-Nation Treatment and Dispute Settlement in Investment Arbitration: Just How "Favored" is "Most-Favored"?*, ICSID

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.

As explained by the International Law Commission, this rule emphasizes the primacy of the rule of literal interpretation for international treaties, while at the same time giving a certain relevance to the intentions of the contracting parties, as well as to the objects and purposes of the treaties as means of interpretation. Thus, the MFN treatment clause must be read and interpreted in light of its object and purpose[89].

It is undisputed that the purpose of an MFN treatment clause is to "attain equality of treatment irrespective of nationality"[90]. As for the object of the MFN treatment clause, most MFN clauses do not state clearly whether they may be applied to dispute settlement provisions. Thus, tribunals tend to rely on "considerations of purpose, surrounding circumstances, and pragmatic considerations, to decide individual cases"[91].

10. *Circumventing Restrictions to Arbitration through MFN Clauses*

On many occasions, MFN clauses have been used to allow access to jurisdiction on terms more favorable than those provided for in the BIT between the first state and the home state.

10.1. *Before Maffezini v. Spain*

Review—Foreign Investment Law Journal, at 62, available at www.meti.gov.jp (last visited May 2, 2024).

[89] See *Ibid.*.

[90] *Id.* at. 63.

[91] Vesel, *Clearing a Path Through a Tangled Jurisprudence* at 138 (cited in note 10).

Before Maffezini v. Spain, the Tribunals had never modified their jurisdictional mandate on the basis of an MFN clause[92].In the *Anglo-Iranian Oil Company Case*[93], the I.C.J. had actually rejected the argument that an MFN clause could extend the jurisdictional mandate of an international tribunal. This case arose from a dispute between an investor and the Persian State. In 1927, Iran had renounced to all treaties connected to the system of the capitulations[94]. It later adopted a declaration through which it accepted the jurisdiction of the Permanent Court of International Justice (P.C.I.J.). The jurisdiction was limited to disputes arising after

[92] Zachary Douglas, *The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails, Vol.2, No.1,* Journal of International Dispute Settlement, at 101 (2011).

[93] The Anglo-Iranian Oil Company case, also known as the "AIOC case," is a significant historical event that played a pivotal role in shaping the relationship between Iran and Britain. The Anglo-Iranian Oil Company (AIOC), later renamed British Petroleum (BP), was a British-owned oil company that operated in Iran. It held exclusive rights to extract and export Iranian oil under a concession granted by the Iranian government in 1901. Over time, dissatisfaction grew among Iranians regarding the terms of the concession, which they perceived as unfair and exploitative. In 1951, the Iranian Parliament voted to nationalize the country's oil industry, including the assets of the AIOC. Following the nationalization decree, the Iranian government took control of the AIOC's operations in the country. The British government strongly opposed the nationalization of the AIOC's assets. The AIOC contested the nationalization of its assets in Iran's domestic courts. However, the Iranian courts upheld the government's actions. Britain and Iran agreed to submit the dispute to the International Court of Justice (ICJ), which ruled in favor of Iran, stating that it had the sovereign right to nationalize its oil industry. (Brown, The Juridicial implications of the Anglo-Iranian Oil Company Case; Washington University Law Review Archive, at 385 ss, (1952) available at https://journals.library.wustl.edu/lawreview/article/5493/galley/22326/view/ (last visited May 2, 2024)

[94]The System of capitulations was based on treaties through which one state permitted another to exercise extraterritorial jurisdiction over its nationals within the former state's boundaries. In their later form, capitulations were imposed by European powers and came to be regarded as humiliating derogations from the sovereignty and equality of these states. (Van Den Boogert; The Capitulations And The Ottoman Legal System: Qadis, Consuls And Beraths In The 18th Century (Studies in Islamic Law & Society, 21); Brill Academic Pub (May 18, 2005))

the adoption of the declaration and on treaties that entered into force after the declaration[95]. The United Kingdom tried to use the MFN clause contained in the Treaty between the UK and Iran to extend the jurisdiction of the P.C.I.J. even to the disputes arising from that treaty. The UK stated that the more favorable treatment accorded to Danish investors through a Denmark-Iran treaty, that had entered into force after the Declaration, had to be extended also to British investors. Thus, in the UK's view, the disputes arising from the UK-Iran BIT had to be subjected to the jurisdiction of the P.C.I.J.

The Court rejected the United Kingdom's argument, as the United Kingdom did not have any right to invoke the Denmark-Iran treaty. The Tribunal is not clear in its reasoning, but the most acceptable explanation is that, since the Iranian Declaration specifically excluded consent for disputes arising out of pre-Declaration treaties such as the Anglo-Persian treaty, there could be no jurisdiction.

10.2. *Maffezini v. Spain*

The *Maffezini v. Spain* case refers to a legal dispute between a private investor, Mr. Maffezini, who invested in a Spanish company, and the Kingdom of Spain, which was brought before an international arbitration tribunal. A dispute arose between Maffezini and Spain regarding certain regulatory changes that affected his investment. Spain introduced legislative reforms that, according to Maffezini, adversely affected the value and viability of his investment. Maffezini argued that Spain's regulatory changes breached its obligations under the BIT, particularly, provisions related to fair and equitable treatment, protection against expropriation without compensation, and the free transfer of funds. Spain contested Maffezini's claims, arguing that its regulatory measures were lawful and did not violate its obligations under the

[95]See Vesel, *Clearing a Path Through a Tangled Jurisprudence* at 23 (cited in note 10).

BIT. The nation contended that the legislative changes were made for legitimate regulatory purposes and did not specifically target Maffezini's investment. The arbitration tribunal ruled in favor of Maffezini, finding that Spain's regulatory changes breached its obligations under the BIT. The tribunal awarded compensation to Maffezini for the losses suffered due to the regulatory measures.

In *Maffezini v. Spain* the Tribunal declared for the first time that an MFN clause could be used to circumvent pre-arbitration restrictions.[96] In this specific case, the BIT between Spain and Argentina required the investor to wait eighteen months before accessing international arbitration. During this period of time, the foreign investor could only try to resolve the dispute before the national courts.

However, Mafezzini claimed that the MFN clause of the Spanish-Argentinian BIT[97] made it possible for him to rely on a shorter waiting period than the one dictated in the BIT. The more favorable provision in question could be found in the Spanish-Chilean BIT, which only required a six-month waiting period.

Spain tried to argue that more favorable BITs with third countries constituted *res inter alios acta* and thus could not be invoked by foreign investors.[98] It also argued that the phrase "all matters" found in Article 4 of the BIT only referred to "substantive matters or material aspects of the treatment granted to investors and not to procedural or jurisdictional questions."

Nevertheless, the Tribunal stated that the MFN treatment clause may be applied to matters connected to both procedural and substantive investment protection, therefore establishing that the

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[96] See Schill, *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses* at 531 (cited in note 2).

[97] The treaty can be found at: https://edit.wti.org/document/show/906eff11-67f0-4fed-afb9-3f6a725b5c76 (last visited May 2, 2024)

[98] SCHILL, *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses* at 531 (cited in note 2).

Claimant had the right to access international arbitration without having to wait the 18th month.

To get to this conclusion, the Tribunal quoted the decision of the Commission of Arbitration in the *Ambatielos Case*[99], making a grave mistake, later highlighted in *Plama v. Bulgaria*. In fact, the Tribunal declared that the Commission of Arbitration had supported the application of the MFN clause to the jurisdictional provisions of a third treaty, whereas in reality, the Commission had actually stated that there was no general principle that prevents an MFN clause from being applied to matters related to the "administration of justice". With such a statement, the Commission referred to the substantive obligation "to provide foreign nationals with "free access" to the national courts of each contracting state to the treaty of commerce and navigation".[100]

The tribunal also rejected the second argument of the Kingdom of Spain by stating that BITs with third countries could not be considered *res inter alios acta*, unless they had an object that differed

[99] This revolves around the legal dispute between the Greek shipowner, Nicolas Ambatielos, and the United Kingdom in the early 20th century. One of the ships of Mr. Ambatielos was confiscated by the British government, during World War II and under war powers. After the war ended, Ambatielos sought compensation for the loss of his vessel. The United Kingdom argued that the requisition was justified under international law as a wartime measure. The case was brought before the International Court of Justice (ICJ). Ultimately, the ICJ ruled in favor of Ambatielos, finding that the requisition of his ship by the United Kingdom was unlawful. The court held that the UK had failed to provide adequate justification for the seizure and ordered the British government to pay compensation to Ambatielos for the loss of his vessel. The Ambatielos Case is significant in international law as it established principles regarding the rights of individuals and states during times of war and conflict, particularly with regards to the requisition of private property by governments for wartime purposes. (Bishop, Lissitzyn; Ambatielos Case (Greece v. United Kingdom), Vol. 50,
The American Journal of International Law, at. 674-679; No. 3 (Jul., 1956))

[100] See Douglas, *The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails* at.102 (cited in note 99).

from that of the BIT in question. In this case, both BITs dealt with the matter of the promotion and protection of foreign investments.[101]

The tribunal also declared that the recipient of the clause should not be able to disregard public policy considerations that the contracting parties might have deemed essential conditions for agreeing to the said agreement. This applies especially when the recipient is a private investor, which is frequently the scenario. Consequently, the extent of the clause's applicability may be more limited than initially perceived.

The Tribunal listed some possible public policy exceptions to the application of MFN clauses and determined some access-restrictions provisions that could not be bypassed through the application of an MFN clause. For instance, the exhaustion of local remedies and "fork in the road-clauses"[102]. The main reasoning for these exceptions is the desire of the Tribunal to avoid the harmful effects of a too-broad application of MFN clauses, such as treaty shopping[103].

10.3. *Siemens v. Argentina*

[101]See Schill, *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses* at 532 (cited in note 2).

[102] Fork-in-the-road clauses prevent investors from initiating international arbitration where the same cause of action already had been advanced in domestic proceedings, or vice versa (Markus A. Petsche, The Fork in the Road Revisited: An Attempt to Overcome the Clash Between Formalistic and Pragmatic Approaches, 18 WASH. U. GLOBAL STUD. L. REV. 391 (2019));

[103] Treaty shopping refers to the practice of taking advantage of certain tax treaties between countries in order to minimize the tax liability of the company. It usually involves structuring transactions or establishing entities in a specific country solely for the purpose of accessing favorable tax benefits available under a tax treaty between that country and another jurisdiction (Valente Piergiorgio, Caraccioli Ivo, Campana Gianluca; Beneficiario effettivo e treaty shopping - Monitoraggio dei capitali, fiscalità, antiriciclaggio at 3; Ipsoa; (2016));

The tribunal in *Siemens v. Argentina*[104] stated that the investor could use the MFN clause to incorporate benefits from third-country BITs without having to be subjected to the more restrictive provisions contained in the third-country treaty.[105] The Tribunal, though, allowed the investor to "cherry-pick" more favorable provisions from third-country BITs, without being subjected to the less favorable conditions that might have been contained in those same treaties.

In *Siemens v. Argentina,* the Claimant pursued the local remedies and then decided to access arbitration before the expiration of the eighteen months period required by the German-Argentine BIT. He

[104] The Siemens v. Argentina case refers to a legal dispute between Siemens AG, a multinational conglomerate based in Germany, and the Republic of Argentina. Siemens AG was involved in a contract with Argentina for the provision of services related to the modernization of the country's national identity card system. The contract was part of Argentina's efforts to upgrade its technological infrastructure. During the late 1990s and early 2000s, Argentina experienced a severe economic crisis characterized by currency devaluation, high inflation, and financial instability. The crisis led to widespread social and political turmoil in the country. In response to the economic crisis, the Argentine government implemented various emergency measures, including regulatory changes and the restructuring of contracts with foreign companies. Siemens AG initiated legal proceedings against Argentina, alleging that the government's actions violated the terms of the contract and resulted in financial losses for the company. Siemens argued that Argentina's regulatory changes and failure to honor contractual obligations constituted breaches of international law, particularly under bilateral investment treaties (BITs) and other investment protection agreements. Siemens brought the dispute before an International Centre for Settlement of Investment Disputes, seeking compensation for the damages incurred as a result of Argentina's actions. The arbitration tribunal ruled in favor of Siemens, finding that Argentina had breached its obligations under international law by failing to honor the terms of the contract and by implementing regulatory changes that adversely affected Siemens' investment. As a result, Argentina was ordered to pay compensation to Siemens for the losses suffered. (Sam Wordsworth, Chester Brown, *A Re-run of* Siemens, Wintershall *and* Hochtief *on Most-Favoured-Nation Clauses:* Daimler Financial Services AG v Argentine Republic, Volume 30 Issue 2, *ICSID Review - Foreign Investment Law Journal*, at 365 ss, Spring 2015, at 365 ss)

[105] Schill, *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses* at 533 (cited in note 2).

was able to do so through the MFN clause found in the treaty. The clause made it possible to apply a more favorable provision, contained in a BIT stipulated between Argentina and Chile, that required only a six-months waiting period. [106]

Argentina argued that the German-Argentine BIT had a narrower wording than the BIT between Argentina and Spain, and that the dispute settlement provisions were "specifically negotiated case by case".[107] Thus, an MFN clause could not override them.

Argentina also claimed that, if the Claimant could rely on the more favorable provisions contained in the Chilean-Argentine treaty, then it also had to be subjected to other provisions of that same treaty that brought disadvantages and limits, such as the "fork in the road" clause.

The Tribunal rejected all of these arguments, stating that the purpose of the MFN clause is to eliminate the effect of specially negotiated provisions, unless the contracting parties decided differently.[108]

It allowed the Claimant to rely on the more favorable provisions of the Chilean-Argentine BIT, without having to be bound to the "fork in the road" clause. In doing so, the Tribunal went beyond *Maffezini v. Spain* by establishing that not only could the MFN clause be used to make it possible for the Claimant to rely to the more favorable provisions of the other BIT, but it also did not incorporate the limitations and unfavorable provisions of the treaty.

Many have criticized the Tribunal's "cherry-picking" approach, as it seems to defeat the objective of the MFN clause, which is to ensure that all foreign investors will be subjected to the same treatment. In this case, the Chilean investors would be ultimately subjected to a less favorable treatment than that of German investors.

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[106] *Id*., at 534.

[107] See *Ibid*.

[108] Siemens A.G. v. The Argentine Republic, ICSID, August 3, 2004, Case No. ARB/02/8, Decision on Jurisdiction at 106.

But in reality, the MFN clause works both ways. A Chilean investor in Argentina could use the MFN clause found in the Chilean-Argentine BIT in order to be subjected to the more favorable treatment given to German investors in the country. By doing so, even Chilean investors have the ability to circumvent the "fork in the road"-clause in the Argentine-Chilean BIT.[109]

10.4. *Salini v. Jordan*

The Tribunal in *Salini v. Jordan*[110] opposed the decision of *Siemens v. Argentina*, by affirming that it could not expand its jurisdiction to "purely contractual claims"[111]. In fact, the Tribunal stated that the MFN clause in the Italian-Jordanian BIT could not be used as a way to incorporate the host State's consent to arbitration from the more favorable third-country BIT. The Tribunal also

[109] Schill; *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses* at 536-537 (cited in note 2).

[110] The Salini v. Jordan case refers to a legal dispute between Salini Costruttori S.p.A., an Italian construction company, and the Kingdom of Jordan. Salini Costruttori S.p.A. was awarded a contract by the Jordanian government for the construction of a water pipeline project in Jordan. The project aimed to improve water infrastructure in the country. A dispute arose between Salini and Jordan during the course of the project. Salini claimed that Jordan had failed to fulfill its obligations under the contract, leading to delays, cost overruns, and other issues affecting the progress of the project. Salini initiated arbitration proceedings against Jordan to resolve the dispute. Salini argued that Jordan had breached its contractual obligations, including failure to provide necessary permits, delays in payments, and other actions that impeded the progress of the project. Salini sought compensation for the losses incurred as a result of Jordan's alleged breaches. The arbitration tribunal ruled in favor of Salini, finding that Jordan had indeed breached its contractual obligations under international law. Jordan was ordered to pay compensation to Salini for the losses suffered due to the delays, cost overruns, and other issues arising from the project.J.P. Gaffney; "Case Summary - Salini Costruttori S.p.A. and Italstrade S.p.A.-v- The Hashemite Kingdom of Jordan (ICSID Case No. ARB/02/13)" TDM 1 (2005), available at www.transnational-dispute-management.com)

[111] Schill; *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses* at 541 (cited in note 2)

mentioned the risk of treaty shopping and of its negative consequences as a further reason to deny the application of an MFN clause to expand the jurisdiction of the treaty-based Tribunal.

10.5. *Plama v. Bulgaria*

In *Plama v. Bulgaria*[112], the Tribunal deviated from *Maffezini v. Spain*, by refusing to expand its jurisdiction based on a BIT stipulated between Bulgaria and Cyprus, which was limited to disputes regarding the measure of compensation for expropriation. This refusal was motivated by the assumption that the intention to apply the MFN clause to issues regarding dispute settlement should have been clear in the basic treaty.

To support this argument, the Tribunal also highlighted the existing difference between substantive rights and their procedural implementation, stating that the provisions regarding arbitration could be separated by those regarding substantive rights. Thus, in the Tribunal's view, the MFN treatment clause would not apply to

[112] The *Plama Consortium Limited v. Republic of Bulgaria* case is a notable international arbitration case. Plama Consortium Limited, a Cyprus-based company, was involved in the oil refining industry. Plama had entered into various agreements with the Bulgarian government for the privatization and operation of an oil refinery in Bulgaria. A dispute arose between Plama and the Bulgarian government regarding the implementation of certain measures affecting the oil refining industry in Bulgaria. Plama alleged that the Bulgarian government had taken actions that harmed its investment in the country and violated its rights under international law. Plama argued that Bulgaria's actions constituted breaches of its obligations under the ECT (Energy Charter Treaty), including protections against expropriation without compensation, fair and equitable treatment, and the free transfer of funds related to its investment in the oil refinery. The tribunal ruled in favor of Plama, finding that Bulgaria had indeed violated its obligations under the ECT. Bulgaria was ordered to pay compensation to Plama for the losses incurred as a result of the government's actions affecting its investment in the oil refinery. ((C. Crépet Daigremont; "Plama Consortium Limited v. Republic of Bulgaria (ARB/03/24) - The most-favoured-nation clause issue", TDM 3, (2005), available at www.transnational-dispute-management.com)

dispute settlement provisions, unless this was clearly and unambiguously stated in the basic treaty.[113]

The Tribunal also stated that applying MFN clauses to matters of dispute settlement would be against the intentions of the contracting states, who would "be confronted with a large number of permutations of dispute settlement provisions from the various BITs which they had concluded"[114].

Plama's approach to interpreting MFN clauses differs from *Maffezini*'s. The tribunal stated that an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.[115]

11. *Conclusions*

As we have seen, the MFN treatment standard is of paramount importance in international investment law. MFN treatment clauses have helped to create a multilateral system of investment law, even before the institution of the World Trade Organization.

They have helped to foster equal competition and eliminate inequalities regarding the treatment of investors of different nationalities.

MFN clauses also help to lessen the cost of negotiation in the long term: even if one of the contracting States decides to stipulate a new BIT with a different contracting party, in which it grants different and more favorable conditions to the investors of such contracting State. Therefore, the first State will not have to negotiate another treaty in order to better protect its investors because the new, more

[113] Schill, *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses* at 543 (cited in note 2).
[114] *Plama Consortium Limited v. Republic of Bulgaria, ICSID,* February 8, 2005, *Case No. ARB/03/24,* Decision on Jurisdiction, at 219.
[115] See *Id*, at 223.

favorable provisions of the new BIT will automatically apply to the investors through the MFN treatment clause.

Under the MFN treatment standard, trade restrictions too must be applied equally. Although, the risk of trade restrictions becoming a political issue increase, states tend to apply less trade restrictions. The MFN treatment standard supports a more driven trade liberalization.

In this Article we have mainly focused on how the MFN clauses have been used to circumvent arbitration restrictions and to allow access to jurisdiction on more favorable terms than those provided for in the BIT between the first state and the home state. Case law have been mixed, as it is often the case in international investment law, and probably always will be. In our humble opinion, we ought to share the jurisprudential view that the MFN clause may be used to circumvent restrictions to arbitration unless, within the BIT, this possibility is explicitly excluded. This is the only interpretation that complies with the ration of the MFN treatment standard, as it is the only way to effectively protect competition.