The Most-Favoured-Nation Clause in International Investment Agreements: A tool for Treaty Shopping?

Alejandro Faya Rodriguez
The Most-Favored-Nation Clause in International Investment Agreements

A Tool for Treaty Shopping?

Alejandro Faya Rodriguez*

Until recent years, the most favored nation clause ("MFNC") in international investment agreements appeared to be a harmless rule, and for some time it had not been the subject of any serious discussion. We have now a number of awards which have raised difficult questions concerning the right application of the standard. It seems there is doubt and a lack of consensus. This article goes back to the very basic nature of the MFNC and reviews the relevant jurisprudence arising from investment treaty arbitration, as a requisite step before arriving at the proposed conclusion: the MFNC was designed and should function as a means to reduce distortions in a host country that adversely affect investors, but solely with respect to competitive conditions, and not as a treaty shopping tool that, in the context of particular claims, overrides or modifies the scope of specific negotiated arrangements related to non-competitive conditions.

I. Overview

The most-favored-nation clause ("MFNC") has traditionally been a pivotal tool in trade agreements and is the cornerstone of the WTO system. After the Havana Charter back in 1948, however, the concept was borrowed and the clause became popular in international investment agreements ("IIAs"). Nowadays, an IIA without an MFNC is considered as a half-empty treaty. The idea makes sense. The MFNC, combined with the National Treatment provision, provides for an indirect standard of protection that attempts to provide an equal playing field between investors and therefore diminishes economic distortions in a host country. However, the MFNC in commerce and investment cannot work the same way; whereas in the former case the clause provided primarily quantitative advantages, in the latter the scope remains unclear. In addition, the range of measures that can be applied by a state within its borders (mainly tariff related) cannot be compared to those applied with respect to an established investment, because the areas here are countless.

* LL.B., Magister Juris (Oxford); Professor of Foreign Investment Law and Treaty Law at the Universidad Iberoamericana Law School and the Universidad Nacional Autónoma de México Law Postgraduate Division, Mexico City. He is Deputy Director-General for International Affairs of the Directorate-General of Foreign Investment at the Ministry of Economy of Mexico; in that capacity, he has negotiated international investment agreements with countries from Europe, Asia and Latin America. This article represents exclusively the personal view of the author, and is partially based on two presentations delivered at the UNCTAD-APEC Seminars, Investor-State Dispute Settlement: Key Substantive and Procedural Issues and Impact of Recent Investor-State Disputes in the Negotiation of BITs and FTA/RTA in the APEC Region, held in Mexico City and Manila, in October 2006 and April 2007, respectively. The author may be contacted at: <afaya@economia.gob.mx> or <alejandrofaya@yahoo.com>.

1 General Agreement on Tariff and Trade (GATT), art. I; and General Agreement on Trade in Services (GATS), art. II.
Until recent years, the MFNC in IIAs had not been the subject of interpretations or discussions. At the negotiation level, nobody thought this provision could ever pose a real problem. We now have a number of arbitration cases, apparently contradictory among themselves, which have raised difficult questions concerning the application of the clause. As we shall see, and quite surprisingly in my view, all discussions have focused on treaty shopping, that is, borrowing from third treaties (the treaties from where a benefit is extended), or derogating provisions of basic treaties (the underlying treaty) by reason of third treaties. The cases have not been about the actual adverse consequences of not extending to a foreign investor a better treatment actually offered to others (the very purpose of the MFNC), such treatment normally deriving not from an IIA, which contains standards of legal protection, but from the domestic legal framework and the conduct of the host states, where the operational business environment is laid down.

In this article I will first discuss the background and nature of the MFNC in IIAs; then I will review briefly the relevant jurisprudence arising from investment treaty arbitration with the objective of establishing any applicable pattern of interpretation. The outcome will be that the apparent discrepancy in interpretation does not really exist, at least not as conventional opinion has put it. Finally, the core conclusion will be that an important line of thought headed by counsels and arbitrators on the role of the MFNC in IIAs has been erroneous, simply because such provision should not be used (at least as a general principle admitting very few exceptions) as a tool for treaty shopping.

II. The Very Basics of an MFNC

Most Favored Nation ("MFN") is defined as a "a treaty provision whereby a State undertakes an obligation towards another State to accord most-favored treatment in an agreed sphere of relationships."\(^2\) MFN treatment is such "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 widely recognized ejusdem generis\(^3\) principle indicates that the clause may only attract matters belonging to the same subject matter or the same category of subject as to which the clause relates. The subject matter is restricted in two ways: first, by the clause itself, which always refers to a certain matter, and secondly by the right conferred by the granting state to the third state. The situation is similar, although not identical, in respect of the subjects in the interests of which the beneficiary state is entitled to claim most-favoured-nation treatment.\(^4\) In the context of IIAs, the benefit is obviously accorded to investors or their investments. But to what extent? The wording of the treaty matters.

---

\(^2\) Following the 1978 Draft Articles on Most-Favoured-Nation Clauses, prepared by the International Law Commission [hereinafter "Draft Articles"].

\(^3\) This principle has long been recognized by local and international tribunals. For instance, see Anglo-Iranian Oil Company Case (1952); Ambatekos Case (1956); and Braunkohlen Briket Verkaufverein Gesellschaft v. Goffard, decision by the French Court of Cassation (1913). See also Draft Articles, supra note 2, arts. 9–10.

\(^4\) Draft Articles, supra note 2, arts. 9–10, Commentary 13.
Whereas some treaties such as NAFTA refer to a limited set of activities (“with respect to the establishment, acquisition, expansion, management, conduct, operation, sale or other disposition of investments”) the classical European model IIA contains a very general text (“neither Contracting Party shall subject investors of the other Contracting Party and their investments to treatment less favorable than it accords to investors of any third State”). For very basic operational purposes, the benefit may go only to investors or their investments, or to both, as the common practice stands; also, the provision may cover the pre-establishment phase or only post-establishment activities.

However, once we know the basic scope of the MFNC, the need arises to determine the kind of benefits extended. To do that, it is essential to be clear about the purposes of the MFNC, which can be summarized as follows:

(a) generally speaking, helping “to establish equality of competitive opportunities between foreign investors from different countries”; ⁵ and
(b) in certain cases, most notably for those IIAs with pre-establishment rights to “avoid economic distortions that would occur through more selective country-by-country liberalization.” ⁶

At the point of entry, both trade and investment-related MFNCs seek to avoid preferential access to the host state which would prove damaging to the excluded company through the denial of commercial opportunities in the host state, which may not always be easily mitigated by trading or investing elsewhere. In relation to an investment already made in a host country, discriminatory treatment may be prejudicial to existing investors, given the “sunk costs” incurred in setting up an investment, and the more beneficial situation that other competing foreign investors enjoy in the same market. The more foreign investors from various home countries play an important role in a host country, the more important the MFNC becomes. ⁷

Even though the “more-favorable-treatment” may be based upon a treaty, another agreement or a unilateral, legislative or other act or mere practice, ⁸ in the context of investment such treatment derives in most of the cases from law and practice, simply because the competitive conditions for investment are there. They refer, for instance, to matters such as taxes, real estate, intellectual property rights, ordinary administrative and commercial regulation; they refer also to the general conduct of the state when executing its regulatory power. With very few exceptions (e.g. pre-establishment rights and transfers), they do not arise from IIAs, which instead establish general legal standards of protection to investment. The former and not the latter are the kind of benefits an MFNC is looking for.

---

¹ UNCTAD, Most-Favored-Nation Treatment, in Series on Issues in International Investment Agreements 8 (1999).
³ UNCTAD, supra note 5, at 8.
⁴ Draft Articles, supra note 2, art. 8, Commentary 1.
For its material operation, the MFNC is characterized by the following features:

(a) its relative nature, because it lacks an *a priori* or material content. A comparison must be made between two foreign investors, and deriving from an objective test a discriminatory treatment must be found. So, if a very poor treatment is applied to all, there could never be a breach of the MFNC, no matter how bad the treatment was;

(b) it covers de facto or de jure discrimination by reason of nationality, that is to say, a differentiated treatment may be justified on other grounds. Following this argument, and even if the wording does not so specify, the MFNC applies in “like circumstances or conditions.” The states cannot be obliged to treat investors equally in different objective situations.9

III. The Problem at Stake

Most MFNCs are highly generic and follow the very same purpose, even though the wording may differ. Such generic wording cannot be otherwise, or cannot become too specific, given the nature of the MFNC itself. Unless there is a specific note or otherwise a clear reference to the intent of the parties, most MFNCs should be interpreted the same way (except, of course, for the very basic “operational” wording)10. UNCTAD has said that there is no evidence that, by using different wording, the parties to these various agreements (a sample of various IIAs) intended to give the MFNCs a different scope; whatever the specific terminology used, it does not change the basic thrust of MFN, namely its non-discriminating character among foreign investors investing in a particular host country.11 In order to arrive at a right interpretation, the first step is to examine the purpose and role of the MFNC, which has just been commented upon above.

Given that most of the arbitration cases have been about whether or not provisions from third treaties not related necessarily to liberalization or competitive conditions may be imported, there is a reasonable doubt as to whether the MFNC was intended to cover such situations. The only issue at stake in the jurisprudence has been investors using more suitable provisions from third treaties, or getting rid of provisions they dislike in the context of a particular claim. Treaty shopping may not be bad in itself, but it depends on where you shop. In my view, third IIAs are not supermarkets from which you pick up groceries.

---

9 Draft Articles, *supra* note 2. As Commentary 18 on arts. 9 and 10 says: “obviously, even in the absence of such an explicit statement (like products or like articles), the beneficiary State may claim MFN treatment only for the goods specified in the clause or belonging to the same category as the goods enjoying MFN treatment by the third State.”

10 See *supra*, at section II.

IV. Importing Procedural Provisions

The first case was Maffezini, where the requirement to resort to domestic courts for a period of eighteen months before commencing arbitration contained in the applicable IIA was overridden by a third IIA. The tribunal found that “if a third-party treaty contained provisions for the settlement of disputes that are more favorable to the protection of the investor’s rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause as they are fully compatible with the ejusdem generis principle.” However, recognizing that non-controlled treaty shopping may be a bad idea, the Tribunal also expressed that “other elements of public policy limiting the operation of the clause will no doubt be identified by the parties or tribunals. It is clear, in any event, that a distinction has to be made between the legitimate extension of rights and benefits by means of the operation of the clause, on the one hand, and disruptive treaty-shopping that would play havoc with the policy objectives of underlying specific treaty provisions, on the other hand.”

In this context, it provided examples of some “public policy” provisions that could not be overridden by an MFNC, namely: (i) the agreement of a particular forum such as the ICSID; (ii) the use of a highly institutionalized system such as NAFTA; (iii) the fork in the road clause; and (iv) the rule of exhaustion of local remedies. The decision was erratic because, at the same time, it tried to broaden and limit the application of the MFNC. Of course, there was no guidance at all as to what may be qualified as a “non-public policy” or “public policy” rule. The conventional opinion at the time was that procedural rules could not be overridden by an MFNC, and many justified the decision on the grounds that the specific wording of the MFNC in question—a very sui generis and broad clause—gave opportunity to this outcome. But the journey had just begun.

In Siemens, the tribunal assessed the same procedural requirement in Maffezini, although the MFNC wording was different. However, the tribunal concluded that “the Treaty itself, together with so many other treaties of investment protection, had as a distinctive feature special dispute settlement mechanisms not normally open to investors. Access to these mechanisms is part of the protection afforded under the treaty. It is part of the treatment of foreign investors and investment and of the advantages accessible

---

12 Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Case ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, January 25, 2000.
13 Id. para. 56.
14 Id. para. 63.
15 The relevant MFNC states: “In all matters subject to this agreement, this treatment [fair and equitable treatment] shall be not less favorable than that extended by each Party to the investments made in its territory by investors of a third country.”
17 The relevant MFNC states: “(1) None of the Contracting Parties shall accord in its territory to the investments of nationals or companies of the other Contracting Party or to investments in which they hold shares, a less favorable treatment than the treatment granted to the investments of its own nationals or companies or to the investments of nationals or companies of third States. (2) None of the Contracting Parties shall accord in its territory to nationals or companies of the other Contracting Party a less favorable treatment of activities related to investments than the treatment granted to its own nationals or companies or to nationals and companies of third States . . . . (4) The nationals or companies of each Contracting Party shall enjoy in the territory of the other Contracting Party the treatment of the most favored nation in all matters covered in this Article.”
through an MFN clause.”

Although the MFNC was more precise, the tribunal considered it broad enough so as to include dispute settlement provisions. The public policy considerations remained; but again, without any specifics or explanations whatsoever.

In the *Salini* case, the tribunal was confronted with a much more serious issue. Here, the claimant attempted to bring contractual claims before an ICSID tribunal, although the applicable IIA did not provide for legal action for the claims and the underlying contract provided that all disputes should be settled before local courts. The claimant was invoking, through the MFNC, provisions contained in other IIAs signed by Jordan that entitled investors to refer to ICSID any dispute arising from their construction contracts. The tribunal shared the concerns that had been expressed with regard to the *Mafezzini* case, and stated “its fear is that the precautions taken by the authors of the award may in practice prove difficult to apply, thereby adding more uncertainties to the risk of treaty shopping.”

It also stated:

> The Tribunal observes that the circumstances of this case are different. Indeed, Article 3 of the BIT between Italy and Jordan does not include any provision extending its scope of application to dispute settlement. It does not envisage “all rights or all matters covered by the agreement.” Furthermore, the claimants have submitted nothing from which it might be established that the common intention of the Parties was to have the MFN clause apply to dispute settlement.

A later case followed a similar approach, when the *Plama* tribunal concluded that “an 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.”

In this case, another serious issue was at stake, because the claimant was trying to overcome an ad hoc UNCITRAL arbitration for disputes relating to amounts of compensation; instead, the claimant was asking for ICSID jurisdiction by importing provisions from another IIA. Although the tribunal sympathized with the *Mafezzini* tribunal which attempted to neutralize a provision that was nonsensical from a practical point of view, it stated that “such exceptional circumstances should not be treated as a statement of general principle.”

---

18 *Siemens*, supra note 16, para. 102.
19 *Salini Costruttori* S.p.A. & *Italstrade* S.p.A. v. Hashemite Kingdom of Jordan, ICSID Case ARB/02/13, Decision on Jurisdiction, November 29, 2004. The MFNC reads: “Both Contracting Parties, within the bounds of their own territory, shall grant investments effected by, and the income accruing to, investors of the Contracting Party no less favorable treatment than that accorded to investments effected by, and income accruing to, its own nationals or investors of third States.”
20 Id. para. 115.
21 Id. para. 118.
22 *Plama Consortium Ltd et al.* v. Republic of Bulgaria, ICSID Case ARB/03/04, Decision on Jurisdiction, February 8, 2005. The MFNC reads: “Each Contracting Party shall apply to the investments in its territory by investors of the other Contracting Party a treatment which is not less favorable than that accorded to investments by investors of third States.”
23 Id. para. 223.
24 Id. para. 224.
A turnaround came with *Gas Natural*, where the tribunal focused on the importance to be attached to the assurance of independent international arbitration and concluded that, “unless it appears clearly that the state parties to a BIT or the parties to a particular investment agreement settled on a different method for resolution of disputes that may arise most-favored-nation provisions in BITs should be understood to be applicable to dispute settlement.” The issue was the recurrent one: whether or not to bypass the requirement of resorting to domestic courts for at least eighteen months before submitting a claim to arbitration. A similar approach was taken afterwards in the *Suez* case.

By contrast, in the latest case at the time of writing, *Telenor Mobile*, the tribunal “wholeheartedly” endorsed the statement of principle furnished in *Plama*. In this case the investor had invoked the MFNC to expand the scope of disputes that were subject to investor-state dispute settlement under the underlying IIA, which only allowed investors to submit claims related to expropriation. In the words of the tribunal:

> It is one thing to stipulate that the investor is to have the benefit of MFN investment treatment but quite another to use an MFN clause in a BIT to bypass a limitation in the very same BIT when the parties have not chosen language in the MFN clause showing an intention to do this, as has been done in some BITs.

The tribunal recognized that:

> [t]he importance to investors of independent international arbitration cannot be denied, but in the view of this Tribunal its task is to interpret the BIT and for that purpose to apply ordinary canons of interpretation, not to displace, by reference to general policy considerations concerning investor protection, the dispute resolution mechanism specifically negotiated by the parties.

Summing up, while *Maffezini*, *Siemens*, *Gas Natural* and *Suez* interpreted silence or ambiguity as indicative that the MFNC included, with certain limits, procedural provisions, *Salini*, *Plama* and *Telenor* concluded just the opposite.

In the light of the foregoing, there seems to be a great inconsistency with respect to MFNC jurisprudence. If we were to draw a graph of the decisions over time, illustrating whether an MFNC may or may not provide procedural rules, the lines would be going up and down constantly.

However, that view is simplistic, as we have to take into account the following:

(a) the cases did result in different decisions, but the issues at stake were also different;

---

25 *Gas Natural SDG, S.A. v. Argentine Republic*, ICSID Case ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, June 17, 2005. As the underlying IIA was Spain-Argentina, the MFNC is the same as in *Mafezzini*, *supra* note 12.

26 *Id.* para. 49.


28 *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case ARB/04/15, Award, September 13, 2006. The MFNC reads: “Investments made by Investors of one Contracting Party in the territory of the other Contracting Party, as also the returns therefrom, shall be accorded treatment no less favourable than that accorded to investments made by Investors of any third State.”

29 *Id.* para. 92.

30 *Id.* para. 95.
(b) Mafezzini, Siemens, Gas Natural and Suez were about a less fundamental procedural requirement: a mere preliminary step for accessing arbitration;
(c) by contrast, Salini, Plama and Telenor Mobile dealt with core matters (basically an extension of jurisdiction), which could easily have been categorized as “public policy provisions” following Mafezzini. In all these cases a radical effect was intended by the claimant: in the words of Plama, to replace the dispute resolution clause in the basic treaty in toto by a dispute resolution mechanism from a third treaty.

V. Importing Substantive Provisions

Some assume that an MFNC may be invoked to attract substantive rights of a third treaty without a problem, and that the discussion should stay only with respect to procedural matters. I do not agree, as both issues are part of the same conceptual discussion. And the jurisprudence, which is less, but not of lesser importance, evidences such difficulty.

In ADF,31 the MFNC was invoked in order to mitigate the effects of the NAFTA Free Trade Interpretation on Article 1105 (Minimum Standard of Treatment). 32 The claimant wanted what in his view was a broader fair and equitable provision from two other IIAs. The argument was rejected because, in the words of the tribunal:

The Investor’s theory assumes the validity of its own reading of the relevant clauses of the treaties with Albania and Estonia. That reading, as observed in some detail earlier, is that the “fair and equitable treatment” and “full protection and security” clauses of the two treaties establish broad, normative standards of treatment distinct and separate from the specific requirements of the customary international law minimum standard of treatment.33

The main point is that the claimant did not furnish any piece of evidence in support of such an argument. In any case, at the end the tribunal did not find it necessary to resolve the issue because the investor was not entitled to the MFNC, as it was inapplicable by virtue of another article of NAFTA’s Chapter XI that excluded procurement by a party.

In Tecmed,34 the tribunal was called upon to decide if the MFNC entitled the claimant to a retroactive application of its claim. The tribunal concluded that:

---

31 ADF Group Inc. v. United States, ICSID Case ARB/00/1, Award of the Tribunal, January 9, 2003. The MFNC reads: “1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. 2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”
32 Interpretation by the Joint Commission dated July 31, 2001, by which NAFTA’s art. 1105 was tied to the customary international law minimum standard of treatment of aliens.
33 ADF, supra note 31, para. 194.
34 Tecnicas Medioambientales Tecmed, S.A. v. United Mexican States, ICSID Case ARB(AF)/00/02, Award, May 29, 2003. The MFNC reads: “(1) Cada Parte Contratante garantizará en su territorio un tratamiento justo y equitativo, conforme al Derecho Internacional, a las inversiones realizadas por inversores de la otra Parte Contratante. (2) Este tratamiento no será menos favorable que el otorgado en circunstancias similares por cada Parte Contratante a las inversiones realizadas en su territorio por inversores de un tercer Estado.” (“(1) Each Contracting Party shall guarantee in its territory a fair and equitable treatment in accordance with International Law to investments made by investors of the other Contracting Party. (2) This treatment shall not be less favourable that that accorded in like circumstances by each Contracting Party to investments made in its territory by investors of a third State.”)
matters relating to the application over time of the Agreement, which involved more the time
dimension of application of its substantive provisions rather than matters of procedure or jurisdiction,
due to their significance and importance, go to the core of matters that must be deemed to
be specifically negotiated by the Contracting Parties. Their application cannot therefore be
impaired by the principle contained in the MFN clause.35

I must say that at the least tribunals have to give negotiators the benefit of the doubt
that every single clause is “specifically negotiated.”

By contrast, in MTD Equity,36 the claimants successfully invoked the MFNC and
claimed the benefit of a clause regarding the granting of permits contained in two other
IIAs. The dispute involved a Malaysian construction company which did not get its con-
struction project approved because of zoning requirements. Without any serious analysis,
the tribunal decided that to include as part of the protections of the basic treaty those
included in the third treaties was “in the manner most conducive to fulfill the objective
of the BIT to protect investments and create conditions favorable to investments.”37 In
this case, however, the defendant did not challenge the argument advanced by the claim-
ant; rather, it stated that even if the third clauses applied, the facts were such that the
defendant’s acts did not amount to any breach (of the basic or third treaties). At the end
of the day the claimant was found to be in breach of the fair and equitable treatment
obligation.

In CMS38 the claimant tried to override a general emergency exception clause on
the basis that other IIAS did not contain such a clause. The tribunal was not convinced
that the clause had any role to play in the case. It concluded that:

Thus had other Article XI type clauses (the emergency clause) envisioned in those treaties a treat-
ment more favorable to the investor, the argument about the operation of the MFN might have
been made. However, the mere absence of such provision in other treaties did not lend support
to this argument, which would in any event fail under the ejusdem generis rule, as rightly argued by
the Respondent.39

VI. INTERPRETING AN MFNC

If there is specific guidance in the text regarding whether or not the MFNC applies
to procedural or substantive provisions, of course the arbitrators have to abide by that as
the parties left no doubt on their intent. But the reality is that in most of the cases arbi-
trators are confronted with a very abstract and general clause. Therefore, such clause has

35 Id. para. 69.
36 MTD Equity Sdn. Bhd. et al. v. Republic of Chile, ICSID Case ARB/01/07, Award, May 25, 2004. The
MFNC reads: “Investments made by investors of either Contracting Party in the territory of the other Contracting
Party shall receive treatment which is fair and equitable, and not less favourable than that accorded to investments
made by investors of any third State.”
37 Id. para. 104.
38 CMS Gas Transmission Co. v. Argentine Republic, ICSID Case ARB/01/08, Award, May 12, 2005. The
MFNC reads: “Investments made by investors of either Contracting Party in the territory of the other Contracting
Party shall receive treatment which is fair and equitable, and not less favorable than that accorded to investments made
by investors of any third State.”
39 Id. at para. 377.
to be interpreted, not just read. Article 31(1) of the Vienna Convention on the Law of Treaties mandates that a treaty shall be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Two methods have to be combined in order to fulfill the rule: the grammatical, that is to say, the literal wording of the clauses within the particular context of the treaty, and the teleological, meaning that the object and purpose of the treaty have to be taken into account. There is no hierarchy between both steps; instead, they have to be applied simultaneously and harmoniously. It requires from the interpreter a sensitive mental exercise that obliges establishment of a balance between the text and its purpose. This interpretation rule makes sense, as it avoids absurd outcomes arising from mere plain readings.

In my view, in some of the cases mentioned above, the arbitrators have just read the clause in its plain meaning, and simpliciter concluded that if by importing more favorable provisions from third treaties (or “preferred” provisions, because it is not always clear if the third provisions are indeed more favorable) the level of protection is heightened, then the MFNC has to be given its full effect. In other cases, while not ruling out the treaty shopping possibility, arbitrators have seen in some way a danger in giving such full effect. The critical issue is not to determine whether procedural issues are part of the protection to investment, or if substantive provisions of third treaties may heighten the level of protection of the basic treaty; they may, of course. What matters is the intent of the parties and a reasonable and correct interpretation.

We have to bear in mind that:

(a) the text of most MFNCs requires looking at the treatment granted to an investor of one nationality vis-à-vis an investor of another nationality;
(b) the purpose is to diminish economic distortions and to establish an equal “level playing field”;
(c) it is difficult for “treaty shopping” to contribute to the latter purpose;
(d) the ejusdem generis principle requires finding an identity in the subject (investors) and the “subject matter” (competitive conditions);
(e) competitive conditions that underpin the “level playing field” are not usually covered by IIAs;
(f) it does not make sense that the parties negotiate a particular clause if such clause would be immediately derogated by another agreement. This situation is exacerbated when a present agreement (the basic treaty) is changed by reason of a past agreement (the third treaty);
(g) we cannot come to the conclusion that investors are really covered by a super-IIA, that is to say, an IIA made up by the broader and apparently more favorable provisions from all the IIAs a country has in force; and
(h) a specific and clear arrangement cannot be overridden by a generic clause subject to interpretation.

40 The Vienna Convention’s position also reflects customary international law on treaties.
The tribunal's role is to examine a breach and, if found, award damages, not to grant or guarantee *ex ante* a right to the investor; when the tribunal is importing provisions related to legal standards or procedure from third treaties, what it is actually doing is making the state fulfill an obligation (that does not really exist) before it is allegedly breached. As an investment tribunal is always a compensation tribunal (as opposed to a WTO panel, for instance), it does not make sense to do something like that. This illustrates the conceptual difficulty when an MFNC serves to attract provisions from third treaties, when these provisions are related to legal standards and not to competitive conditions. It is definitely not the same thing to use a MFNC once the claim is submitted, and just for the purposes of strengthening a claim (which is really based on alleged breaches to provisions other than the MFNC), rather than first having a particular breach of an MFNC for an illegal discrimination that caused a damage to the investment and later a claim in order to assess the corresponding damages.

Yes, having a choice is better than not having one, but that is not enough. The MFNC requires an objective test, whereby economic damage is established by reason of a discriminatory treatment between two foreign investors. The fact that an investor has to exhaust local remedies and another has not; has to fulfill procedural requirements or use a particular forum not applicable to another; or may only bring international claims whereas another investor can settle contractual claims, does not fall into the discriminatory treatment envisaged by the MFNC. And neither does the following situations: when an investor has a national treatment or a fair and equitable right, apparently narrower than that of a third investor; or when an investor is covered against indirect expropriation whereas another investor is covered only against direct expropriation. Those are just different rules, arising from different treaties, and from different negotiations.

Even though the Commentaries on the Draft Articles suggest at a certain point that “the effect of the MFN process is, by means of the provision of one treaty, to attract those of another,” that statement certainly does not work for IIAs. The Draft Articles were meant for all kind of treaties. Classically, the treaties are about rights and obligations between states, so there could not be a different source for attracting a right. In IIAs, although the rights and obligations remain between states, direct benefits are granted to investors, and they find their framework for investment at the domestic level. Additionally, the Draft Articles were highly influenced by the role of the MFNC in commercial treaties;41 in this case, as opposed to investment, the operative conditions (preferential tariffs) are contained in treaties and not in internal law, making sense of the idea of attracting provisions from third treaties. The same commentary also states that: "unless this process is strictly confined to cases where there is a substantial identity between the subject-matter of the two sets of clauses concerned, the result in a number of cases may be to impose

41 Draft Articles, *infra* note 2, contain many references to the GATT (around 50 mentions), whereas there is no reference to IIAs or "investment." This is understandable, because the boom in IIAs came in the 1990s and that of investment treaty arbitration cases a decade later. However, the situation shows that some of the statements of the Draft Articles have to be seen very carefully, especially in particular contexts such as investment.
upon the granting State obligations it never contemplated.” As the subject matter of MFNC is the competitive conditions for investment, only in very limited cases may a clause from an IIA be imported into another. Doing the contrary leads to an outcome the states could not have reasonably intended when no specific and unequivocal guidance exists in the treaty.

One commentator pointed out that in “those situations where the clause is broadly phrased and the contracting parties to the treaty neither expressly made exclusions or clarifications, the intention can reasonable been interpreted to include the whole range of rights.” Another articles suggests that by applying an “object and purpose” principle, it can be argued that MFNCs “and the treaties that contain them should be construed in a way that promotes investment protection by allowing more favorable dispute settlement procedures to be incorporated into the basic treaty though the MFNC in a non-discriminatory way.” In my view, the reasonable thing to do is just the opposite. These two statements assume—quite simplistically—that everything that may effectively heighten the level of legal protection should be attracted by the MFNC.

First of all, attracting other provisions does not necessarily give more legal protection. Secondly, even if that is the case, a MFNC is supposed to guarantee equality with respect to competitive conditions, not contribute to “harmonizing” the procedural and substantial rights of IIAs, or to serve as a “pick whatever you like” tool. Last, but not least, the alleged “more favorable treatment” is in many cases futile or at least imaginary. How can an investor possibly know that using a particular mechanism of arbitration is more favorable than using that provided in the underlying IIA? For instance, UNCITRAL vs. the ICSID Additional Facility Rules, or ICC vs. AAA? The dispute has not already begun! How can the investor know in advance and for sure that by resorting first to domestic courts for a certain period of time its interests will be damaged? Maybe it will find a good solution there! We have to wait and see. How can an investor be sure that a third fair and equitable or national treatment provision is “more favorable?” It is a difficult statement, based only in theory.

---

42 Draft Articles, supra note 2, arts. 9–10, Commentary 10.
44 Dana H. Freyer & David Herlihy, Most-Favored-Nation Treatment and Dispute Settlement in Investment Arbitration: Just How “Favored” is “Most-Favored”? 20 ICSID Rev. 58 (No. 1, 2005).
45 Some argue that MFNCs contribute to the harmonization of the provisions arising from countless IIAs. The argument is false. I do not see how this could be achieved. On the contrary, if we assume that investors may choose provisions from third treaties indiscriminately, the uncertainty would grow; meaning a burden which states could not reasonably have intended. Even for investors, the rights would not be that clear, as they would have to assess and examine lots of IIAs, instead of just the applicable one. As the Plama tribunal stated: “the basket of treatment and self-adaptation of an MFN provision in relation to dispute settlement has an affect that an investor has the option to pick and choose provisions from the various BITs. If that were true, a host State which has not specifically agreed thereto can be confronted with a large number of permutations of dispute settlement provisions from the various BITs which it has concluded. Such a chaotic situation—actually counterproductive to harmonization—cannot be the presumed intent of the Contracting Parties”: Plama, supra note 22, para. 219. In my view, the same statement applies also to most of the substantive provisions of IIAs.
If an MFNC may attract third provisions, it would be in very limited circumstances, as such provisions have to relate mandatorily to competitive rules. That would be the case, for instance, where an investor, being covered by an IIA with pre-establishment rights, was hindered from entering the country whereas another investor from a third country in like circumstances was not. Or where an investor was prevented from making an overseas bank transfer in order to pay a foreign contractor whereas a similar obstacle was not imposed on another investor. A final example I give here would be a discriminatory measure related to performance requirements, another provision that may be found in an IIA. In these examples, there is a real damage related to competitive conditions, not just an attempt to attract legal standards just because it suits the legal strategy of a claim. Out of the classical provisions contained in IIAs, it is difficult to find any more examples.

VII. Conclusion

There is certain tendency toward “treaty-shopping”. In general, jurisprudence has been inconsistent and too focused on importing provisions from third treaties, and in that way the general consensus has been formed. However, from a closer perspective there is not such inconsistency, because:

(a) with respect to procedural matters: when the intended effects have been the waiver of mere preliminary requirements (that in theory should not bother too much the respondent states) the MFNC has been given its effect; by contrast, when the intended effects have been more ambitious (a modification on the scope of jurisdiction) the MFNC has not been applied;

(b) with respect to substantive provisions, and with the MTD Equity exception, the MFNC has not been used to alter the basic IIAs for various reasons (importance of the underlying provision, lack of evidence and failure to follow the ejusdem generis principle);

(c) even the tribunals using broad interpretations have tried to place (rather vaguely) certain limits.

The latter confirms the conceptual difficulty in using the MFNC as a tool for treaty shopping, for both procedural and substantive provisions. However, no tribunal has made a clear statement on this.

MFNC wording matters; however, in most of the cases, wording is not enough and the clause has to be interpreted. An interpretation that takes into account the IIA as a whole, the nature and purpose of the MFNC and the reasonable intent of the parties, cannot lead to an outcome where a generic clause overrides specific negotiated arrangements.

As a general rule, the MFNC should not be used for treaty shopping purposes. The only exception would be that the third provision relates to competitive conditions for investment; examples would be pre-establishment, transfers and performance requirements. Almost if not all the remaining provisions normally contained in IIAs relate to
generic legal standards of protection and procedure, which, because of their nature, should not fall into the MFNC.

I understand that there could be certain provisions which make little sense. However, if a dislike of a specific article or paragraph of an IIA exists, the correct path is to amend the treaty in the ordinary way, not artificially by means of an MFNC and, in the process, breaking a set of well-grounded principles of international law.
Kluwer Law International is a renowned publisher of books, journals, and looseleafs in areas of international legal practice.

We publish important and interesting titles in the following areas:

- Air & Space Law
- Arbitration
- Banking and Finance Law
- Business Law
- Commercial law
- Company/Corporate law
- Competition Law
- Environmental Law
- European Community Law
- Intellectual Property
- International Trade Law
- Labour Law
- Maritime Law
- Taxation

Please browse our website for information on all our books, journals, looseleafs and electronic products: www.kluwerlaw.com

**Kluwer Law Online: One of the most complete libraries on the web**

**Kluwer Law Online** is your online gateway to Kluwer Law International publications. Completely revamped, the Kluwer Law Online is packed with new functionality.

Improved functionality includes:

- inclusion of product types other than journals
- regularly updated homepage texts to keep you informed about us and our products
- a homepage for every publication
- improved Browse Topics
- suggestions for related titles
- informative and regularly updated site texts (About Us, Contact Us)

At www.kluwerlawonline.com, you will find all our journals online. Feel free to browse the site and view a sample copy of the journal of your interest.
Journal of International Arbitration

Since its 1984 launch, the Journal of International Arbitration has established itself as a thought-provoking, ground-breaking journal aimed at the specific requirements of those involved in international arbitration. The Journal now appears bimonthly (six times a year) rather than quarterly, giving it even more immediacy as a forum for original thinking, penetrating analysis, and lively discussion of international arbitration issues.

The Notes and Current Developments section contains concise and critical commentary on new developments in the world of arbitration.

As always each issue contains in-depth investigations of the most important current issues in international arbitration, focusing on business, investment, and economic disputes between private corporations, state-controlled entities, and states. The Journal's worldwide coverage ensures regular reporting on regional trends which can serve as an example for other regions and countries.

Editor-in-Chief: Michael J. Moser & Dominique Hascher

Assistant Editor: Friven Yeoh

For more information about Journal of International Arbitration, please visit: www.kluwerlawonline.com/journalofinternationalarbitration