

Research on the Applicability of the MFN Clause in BITs in the Dispute Settlement Procedure

Yunbing Li¹

¹ Henan University of Technology, Zhengzhou, China

Correspondence: Yunbing Li, Henan University of Technology, No. 100, Lianhua Street, High Tech Zone, Zhengzhou, Henan, China.

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Abstract

There is no doubt that the MFN clause in BITs applies to substantive matters, but there are great differences on the application of procedural matters. This paper first expounds the MFN clause in BITs, then discusses the dispute over the application of the MFN clause in dispute settlement, and finally makes an evaluation on the dispute.

Keywords: MFN clause, BITs, dispute settlement procedure

1. Overview of MFN Clause

1.1 Concept of MFN Clause

As one of the most important clauses in the field of international law, the MFN clause has been extended and radiated to many fields of international law. Therefore, a simple and clear definition of the MFN clause is not easy. The United Nations International Law Commission defined it in the provisions on the 1978 draft articles, that is, "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." This definition has been criticized as ambiguous, but it does contain key elements of the MFN clause.

In short, countries can enjoy the treatment given by the beneficiary country to the third country by agreeing on the MFN clause. If the essence of the MFN clause is expressed in one sentence, as the famous WTO expert John Jackson said, the MFN "essentially refers to an obligation of a country to treat a specific foreign country and its citizens in a preferential way to any other country."

1.2 MFN Clause in BITs

BITs also include MFN treatment as a basic obligation. Although the MFN treatment clauses in various investment agreements reflect the essential content of most favored nation treatment, that is, "treatment is not less than", there are still subtle differences. There is no doubt that the MFN clause in BITs applies to substantive matters, but there are great differences on the application of procedural matters. According to whether it can be applied to the dispute settlement mechanism, the MFN clauses in BITs can be roughly divided into two types, that is, the scope of application of the MFN clauses clearly defined and the MFN clauses with vague wording.

There are two types of BITs that clearly specify the scope of application of MFN terms: clearly specify that MFN terms can be applied in dispute settlement and explicitly prohibit the application of MFN terms in dispute settlement. The vaguely worded MFN clause can also be divided into two types. First, the broadly worded MFN clause, which is mostly expressed as "all matters", "treatment" and so on, does not clearly indicate whether it can be applied to dispute settlement matters. Second, enumerated MFN terms. This type of BITs lists the relevant matters to which the MFN clause can be applied, and does not clearly indicate whether the MFN clause can be extended to the dispute settlement procedure.

1.3 Research Significance of MFN Clause in BITs

With the rapid development of China's economy and the continuous improvement of the degree of opening to the outside world, China has become one of the countries that have signed the most bilateral investment treaties with other countries in the world. At present, 145 BITs have been signed. Under the background of the Belt and

Road, we will surely accelerate cooperation with the countries along the route and sign more BITs. According to statistics, the Belt and Road, in 2021, the Chinese enterprises invested 130.97 billion yuan in non-financial sector in 57 countries, an increase of 6.7% over the same period last year. "Going out" by signing BITs has become an important way for China's foreign economic development and plays an increasingly important role in stimulating China's economic growth. Therefore, the research on the MFN clause in BITs is of great significance not only for Chinese enterprises to go global, but also for the development of China's economy.

2. Argument on the Application of MFN Clause in BITs to Dispute Settlement Procedure

2.1 Positive Theory

The application of MFN treatment to procedural matters dates back to the arbitral award of *Ambatielos* claim in 1956, which ruled that "administration of justice" is an important part of traders' rights. Therefore, through the MFN clause, it should be treated as "all matters relating to commerce and navigation".

About 45 years later, this issue again attracted attention in *Maffezini v. The Kingdom of Spain*. One party in this case is the Argentine investor in Spain, Maffezini, and the other party is the Spanish government. The applicant Maffezini cited the MFN clause in the investment agreement between the two parties and advocated that the more preferential procedural treatment in the third-party treaty should be directly followed, to avoid the 18 months local relief period and directly submit the dispute to the ICSID arbitration tribunal. MFN only applies to the matters of the government, but not to the matters of procedure. In this case, the arbitral tribunal supported the claim of the applicant Maffezini and held that the MFN clause is broadly applicable to "all matters bound by this Agreement" and can be extended to procedural matters.

In many subsequent cases, the arbitral tribunal has made many decisions that the MFN clause can be extended. In *Siemens v. Argentina* arbitration, the tribunal noted that dispute settlement "is the protection provided by the treaty, the treatment of foreign investors and investment, and the benefits that can be obtained through the MFN clause". In the *AWG* case, the tribunal stated that it could not find "a basis for distinguishing dispute settlement matters from any other matters covered by bilateral investment treaties".

2.2 Negative Theory

In *Plama Consortium Limited v. Republic of Bulgaria*, Plama, a Cypriot investor, acquired an oil refining company in Bulgaria. Plama invoked the MFN clause in the investment agreement between the two sides to require more preferential investment dispute settlement procedures in the third-party investment agreement. The arbitral tribunal held that the application of MFN treatment to the investment dispute settlement procedures will not bring about the coordination of dispute settlement mechanisms in different international investment treaties, but will also cause foreign investors to choose favorable provisions from various international investment treaties, thus leading to the confusion of investment settlement procedures. Finally, the arbitral tribunal rejected Plama's claim, thus opposing the expansion of MFN to dispute settlement procedures.

3. The Reason Why the MFN Clause in BITs Can Be Applied in the Dispute Settlement Procedure

Whether the MFN clause can be applied in dispute settlement, there are great differences in both international arbitration practice and scholars. This paper supports that the MFN clause can be extended to dispute settlement procedures for the following reasons.

3.1 Application and Evaluation of the Principle of "Semantic Interpretation"

By comparing and analyzing the application of the MFN clause in BITs, it can be found that the differences between the arbitral tribunal mainly lie in the different understanding of "treatment". Supporters argue that unless the MFN clause explicitly excludes dispute settlement matters, the "treatment" includes dispute settlement, while the opposition believes that the "treatment" should not include dispute settlement.

According to Article 31 of the VCLT, semantic interpretation can be applied to "treatment". "Treatment" is defined as "the act or manner of treating". In BITs, treatment is a broad term, which refers to the behavior or treatment applicable to investment and accepted by both parties. In the dispute settlement mechanism, the host country's prosecution, the signing of treaties and the choice of dispute settlement methods should be regarded as its behavior towards investors. Therefore, according to the principle of "semantic interpretation", the general meaning of "treatment" does not seem to be limited to substantive rights, but can be more widely understood as involving all investment related relations between the host country and investors. If the MFN clause in BITs includes "all matters" or "all rights" of the investment or investor, the substantive and procedural rights can naturally form part of the treatment.

Therefore, according to the principle of "semantic interpretation", unless the MFN clause is explicitly excluded

from the application in dispute settlement, the MFN clause can be extended to the dispute settlement procedure.

3.2 Application and Evaluation of the Principle of “Purpose Interpretation”

Article 31 of the VCLT requires the interpreter of a treaty not only to look at the general meaning of the treaty, but also to interpret it according to the object and purpose of the treaty. Comparing with bilateral investment agreements, we can find that the object and purpose of bilateral investment agreements include the protection of investors and investment, that is, promoting and protecting investment. If the MFN clause can be extended to dispute settlement, it will give investors more options for dispute settlement, which is conducive to providing more institutional opportunities for international investment dispute settlement, so as to protect investors and realize the purpose of investment. In the context of preferential treatment, it is undoubtedly the most important way for investors to realize the purpose of dispute settlement in the current dispute settlement procedure.

3.3 Comments on Promoting Economic Globalization

Economic globalization has become an important trend of world economic development. Under this background, foreign investment plays an irreplaceable role in international economic development. Extending MFN treatment to dispute settlement procedures will ensure that foreign investors receive both substantive and procedural optimal treatment. So that investors from different countries can enjoy equal and fair treatment, ensure that investors are not discriminated against, and enhance investors' confidence in long-term investment. The development of foreign investment can promote more free flow of market resources around the world, so as to further promote economic globalization. Therefore, from the perspective of promoting economic globalization, we should extend the MFN clause to dispute settlement and increase the protection of foreign investment and investors.

4. Conclusion

Whether MFN clause can be applied in dispute settlement procedure has aroused debate in arbitration practice at home and abroad. From the perspective of semantic interpretation, purpose interpretation and promoting economic globalization, this paper tends to extend the MFN clause to the dispute settlement mechanism. This can further protect the interests of investors and promote investment. However, it is undeniable that the expansion of MFN clause will expand the consent of the host country to international arbitration, thus increasing the risk of being sued by the host country. China should face up to this risk and find a solution. We can't take a “one size fits all” approach and refuse the application of MFN clause in dispute settlement procedure.

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