Case Brief

ISDS OVERHAUL AND THE MFN STANDARD

END OF THE ROAD FOR MULTILATERIZATION?

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ISDS overhaul and the MFN standard: end of the road for multilateralization?

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The development of international trade law through a multilateral agreement such as the General Agreement on Tariffs and Trade (GATT) has done much in the way of creating a coherent body of jurisprudence for the discipline. However, the same success could not be replicated in the international law on the protection of foreign investment. The absence of a GATT-esque multilateral instrument in investment law has led to a fragmentation of jurisprudence. Efforts have been made to overcome this fragmentation and to harmonise standards of investment protection, one aspect of which has been the use of the most-favoured-nation (MFN) clause in investment treaties. However, the development of investment law as expressed in the form of arbitral awards by investment tribunals has generated dissatisfaction among states, who have resorted to modifying their treaties to curb this adventurism in the form of MFN.

The incorporation of an ancient mercantile principle such as MFN in investment protection may broadly be classified into two models: the "comparison model" (non-discrimination between investors of different home States), and the "importation model" (treaty-shopping), the latter of which has been the subject of widespread criticism. Recent treaty practice and rulings by domestic courts also appear to be leaning towards limiting use of MFN to import third treaty provisions. This trend (if it holds) would strike a blow at the multilateralization project, by closing the doors on harmonising protection standards through the MFN clause in investment treaties.

It has been 16 years since the publication of Stephan W. Schill's seminal treatise, *The Multilateralization of International Investment Law* in 2009.[1] As outlined in the book, the need for a common minimum programme on international investment law (IIL) predates even the General Agreement on Tariffs and Trade (GATT) of 1947. Like trade law, which developed steadily following the conclusion of the GATT, many attempts were made to create a multilateral body of rules on the protection of foreign investment, each of which ended in failure, leading to attempts to forge consensus by alternative means.[2] Schill traces the efforts made at multilateralization through (among other things) the establishment of the International Centre for the Settlement of Investment Disputes (ICSID), the development of jurisprudence by arbitral tribunals, and reliance on the most-favoured-nation (MFN) standard of treatment in bilateral investment treaties (BITs) to expand the scope of protections offered to foreign investors. The explosion of investment claims towards the end of the Cold War period pointed to the growing success of the IIL multilateralization project.[3]

[1] S. W. Schill, *The Multilateraliation of International Investment Law* (CUP 2009)
[2] Joost Pauwelyn, 'Rational Design or Accidental Evolution? The Emergence of International Investment Law', in Zachary Douglas, et al, *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014), p. 23
[3] Z Elkins, AT Guzman and B Simmons, 'Competing for Capital: The Diffusion of Bilateral Investment Treaties' (2006) 60 International Organization 811, 841

Subsequent developments marked a significant departure, starting with the gradual backlash against investor-state dispute settlement (ISDS) which hit its crescendo in the 2010s, and the growing calls for reform along the axes of both substance and procedure, with the emergence of multiple schools of thought on the best way forward.[4] Ironically, a common minimum programme did emerge on IIL—States, regardless of development, are almost unanimous now in asserting that the ISDS regime is interfering with their sovereign policy space. States are now individually reviewing substantive protections in their BITs and determining how to prevent these protections from encroaching upon their right to regulate.[5] As far as MFN is concerned, a majority of recent investment treaties lean towards restricting its scope, according to a survey by the UN Trade and Development (UNCTAD) in its recently published World Investment Report (WIR) 2025.[6]

MFN as a conduit for multilateralization

The MFN standard's purpose in a BIT, as summarised recently by Professor George Bermann, was twofold: to curb discrimination in treatment to investors from different home States, and to achieve multilateralization in international investment law by enhancing protections beyond what is negotiated in the BIT.[7] This is also partially why MFN, which has been part of mercantile discourse since at least the 12th century and is almost routine in its application in trade law today, has courted so much controversy in investment law. The application of MFN by tribunals has, in Bermann's opinion, not effectively fulfilled these objectives, leading him to conclude that States might be better off removing MFN entirely from their BITs.

This criticism of tribunals' expansive interpretation of MFN is not new, but when examined in the backdrop of the ongoing global churn in ISDS, indicates a significant shift in perspectives on the nature of protections accorded to foreign investors. Zachary Douglas, one of the early critiques of MFN interpretation by ISDS tribunals, has highlighted certain absurdities that emerge when tribunals attempt to apply the MFN clause to jurisdictional clauses in BITs. Drawing on the example of the award in *Maffezini v. Spain*,[8] he highlighted that the "error" in using MFN to modify the tribunal's jurisdictional mandate.[9] The "error" here relates to reliance on the Commission of Arbitration's award in the *Ambatielos* case (the *locus classicus* on the issue), which related to substantive protections offered to investors in the context of denial of justice before the domestic courts of the host State.[10]

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[4] See Anthea Roberts, 'Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration, 112 American Journal of International Law (2018).
[5] See Simon Batifort, et. al., 'Reforming Substantive Investment Law: How Should We Do It?' Kluwer Arbitration Blog (16 June 2023), available at https://arbitrationblog.kluwerarbitration.com/2023/06/16/reforming-substantive-investment-law-how-should-we-do-it/
[6] UNCTAD, 'World Investment Report 2025: International Investment in the Digital Economy,' Pg. 109, available at https://unctad.org/system/files/official-document/wir2025_en.pdf
[7] Jaroslav Kudrna, 'Bermann calls on States to eliminate MFN clauses', Global Arbitration Review (19 December 2023), available at https://globalarbitrationreview-com.peacepalace.idm.oclc.org/article/bermann-calls-states-eliminate-mfn-clauses
[8] *Emilio Agustin Maffezini v Kingdom of Spain* (Decision on Objections to Jurisdiction, 25 January 2000) ICSID Case No ARB/97/7, 5 ICSID Rep 396
[9] See Zachary Douglas, 'The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails,' Journal of International Dispute Settlement, Vol. 2, No. 1 (2011), pp. 97-113
[10] *Ambatielos* (*Greece v. UK*), 12 UNRIAA 119 (1956)

In *Ambatielos*, the claimant (Greece) on behalf of one of its nationals, invoked the MFN clause in the Anglo-Greek Treaty of Commerce and Navigation (1886) to secure "treatment in accordance with 'justice,', 'right', 'equity' and the principles of international law".[11] The tribunal did allow Greece to invoke the MFN clause to secure such treatment from UK's other treaties based on the principle of *ejusdem generis*, in the context of a denial of justice claim against the English courts. The claim ultimately failed, because Greece was unable to establish more extensive "privileges, favours or immunities" in any of the UK's other treaties in comparison to the Anglo-Greek treaty. However, the MFN argument in this case had no bearing on the issue of the tribunal's jurisdiction.

In contrast, the *Maffezini* tribunal (which relied on the *ejusdem generis* argument in *Ambatielos*), effectively expanded the tribunal's jurisdiction by borrowing provisions from a third treaty: "…if a third party treaty contains provisions for the settlement of disputes that are more favourable to the protection of the investor's rights and interests that those in the basic treaty, such provisions may be extended to the beneficiary of the most favoured nation clause as they are fully compatible with the *ejusdem generis* principle."[12] Ultimately, it was the *Maffezini* decision, which allowed importation of dispute resolution clauses from other BITs through MFN, that stoked controversy and attracted the ire of States against the MFN clause.[13] A parallel series of decisions by ISDS tribunals emerged, taking the opposite view on using MFN to borrow dispute resolution provisions from other treaties.[14] Schill's treatise does acknowledge this dichotomy, but nonetheless advocates a broad reading of MFN treatment in BITs based on the ordinary meaning of MFN clauses.[15]

Bermann's criticism is based on the development of the MFN standard over time, which he believes has led to two distinct approaches—the "comparison" model and the "importation" model. The "comparison" model for MFN is based on ensuring that investors of one State may be treated no less favourably than those from another State in like circumstances. Bermann suggests that this model might be more beneficial to foreign investors because preferential treatment might be offered to investors from a third State, whether based on a BIT or not. In such cases, MFN remains the only protection against discrimination for the first set of investors.

Under the "importation" model, as the name suggests, investors routinely use the MFN clause to 'cherry-pick' clauses from other treaties signed by the host State that provide (arguably) more favourable treatment (as illustrated in the *Maffezini* case above). This

[11] The MFN clause at Article X of the Anglo-Greek Treaty of Commerce and Navigation reads as follows: "The Contracting Parties agree that, in all matters relating to commerce and navigation, any privilege, favour, or immunity whatever which either Contracting Party has actually granted or may hereafter grant to the subjects or citizens of the other Contracting Party; it being their intention that the trade and navigation of each country shall be placed, in all respects, by the other on the footing of the most-favoured nation."
[12] *Maffezini*, para 56
[13] S. Batifort, J. B. Heath, 'The New Debate on the Interpretation of MFN Clauses in Investment Treaties,' (2017) 111 AJIL 873
[14] *Salini v. Jordan*, Decision on Jurisdiction, November 15, 2004, paras. 102–19; *Plama v. Bulgaria, Decision on Jurisdiction*, February 8, 2005, paras. 183–27; *Wintershall v. Argentina*, Award, December 8, 2008, paras. 158–97
[15] Schill, 175

idea has found favour with tribunals since the first known treaty arbitration case in *AAPL v. Sri Lanka*.[16]

The use of MFN to benefit from shorter cooling-off periods in other BITs (as elaborated by Schill in his book) might have passed muster in ISDS jurisprudence, but when MFN was used to borrow more preferred treatment standards such as dispute resolution and FET, States began questioning its place in BITs. As India had argued in *White Industries* 15 years ago, the importation model would "fundamentally subvert the carefully negotiated balance of the BIT" under which the claims were filed.[17] Incidentally, it was India that had floated the idea of eliminating MFN from BITs back in 2015 when it published its model BIT, no doubt as a product of this experience.[18] India's most recent BIT with Uzbekistan also omits the MFN clause from the substantive protections offered to investors.[19] This approach likely does not resonate with Bermann's reasoning on closing the MFN route for multilateralization, but produces the same effect by ensuring that investors do not have access to any substantive protections beyond what India has offered their home jurisdiction in the BIT. The NAFTA Commission carried out a similar exercise in 2001, restricting the scope of the fair and equitable treatment standard to the minimum standard under customary international law.[20]

Even domestic courts are not oblivious to investors' treaty shopping using the importation model. Recently, the Svea Court of Appeal in a summary judgment ruled that an investor could not use the MFN clause to substitute one arbitral institution with another.[21] The claim in this case was filed by a Georgian-British dual national against Georgia under the Georgia-UK BIT, which provided for ICSID arbitration. However, since ICSID prohibits claims by dual nationals against a country of their nationality, the investor attempted to use the MFN clause in the BIT to import the dispute resolution clause in the Georgia-Belgium-Luxembourg BIT to bring the claim before the Stockholm Chamber of Commerce (SCC). The Svea Court of Appeal took a narrow reading of the word "treatment", inferring that it did not cover dispute resolution, much less a choice of arbitral institution.

As trends suggest, the importation model is in trouble today, with States resorting to creative drafting to prevent investors from cherry-picking from other treaties. Consider Article 4 of the New Zealand-UAE BIT (2025), which states that substantive obligations in other treaties "do not in themselves constitute 'treatment'" and therefore cannot be the basis for breach of the MFN standard.[22] Similarly, Article 94.3 of the China-Maldives FTA

[16] *Asian Agricultural Products* v. *Sri Lanka*, Final Award (June 27, 1990), para 54
[17] *White Industries* v. *Republic of India*, Final Award (30 November 2011), para 11.2.1
[18] Model Text for the Indian Bilateral Investment Treaty (28 December 2015), available at https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf
[19] India – Uzbekistan BIT (2024). Full text available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/8596/download
[20] North American Free Trade Agreement, Notes of Interpretation of Certain Chapter Provisions, NAFTA Free Trade Commission (31 July, 2001), available at http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp
[21] *Zaza Okuashvili* v. *Georgia*, SCC Case No. EA 2019/08, Judgment of the Svea Court of Appeal, 12 November 2024. See also Alison Ross, 'Swedish court sides with Georgia on MFN clause,' Global Arbitration Review, 14 November 2024, available at https://globalarbitrationreview-com.peacepalace.idm.oclc.org/article/swedish-court-sides-georgia-mfn-clause
[22] New Zealand – United Arab Emirates BIT (2025), Article 4. Full text available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/8518/download

(2025) expressly prohibits use of the MFN clause to import provisions from any other bilateral or multilateral treaty signed by either of the Parties.[23] Treaty practice suggests that States have paid attention to the conclusion arrived at by the Study Group of the International Law Commission in its 2015 final study on the MFN clause, which recognized "[e]xplicit language could ensure that an MFN provision does or does not apply to dispute settlement provisions. Otherwise the matter would be left to dispute settlement tribunals to interpret MFN clauses on a case-by-case basis."[24]

Thus, States do recognise the role of MFN in preventing discrimination between investors from different States, but it also holds true that most States would not have signed up for a regime of obligations as expansive as the one created through the MFN importation model, particularly with respect to dispute resolution clauses.

End of MFN-led multilateralization?

In view of the excesses demonstrated by importation model, Bermann's call for axing MFN from BITs does have its merits, and (as WIR 2025 suggests) this approach does seem to be gaining traction in a few BITs. Perhaps the MFN route to multilateralization may be closed. However, omitting MFN treatment entirely leaves investors vulnerable to discrimination by the host State in comparison to investors from third States. States generally also appear to appreciate this necessary distinction, and—as Schill has pointed out—would benefit from the efficient allocation of capital in a free market environment. However, the harmonisation of treatment standards through the "importation" model of MFN would only be possible if States expressly agree on it in their BITs. Recent State practice, which objects such harmonisation of treaty clauses by reading into the MFN provision, appears to suggest otherwise.

The "comparison" model (as explained above) may well be an appropriate way of reconciling approaches on the interpretation of MFN clauses. It would ensure that investors from different jurisdictions receive the same kind of treatment and protections in like circumstances concerning their investments in the host State, whilst also ensuring that States' commitments do not exceed what they have offered investors by importing from other BITs. Regardless, with States pursuing individual approaches to substantive reform, the range of carve-outs, exceptions, and limitations that will likely be placed on MFN clauses going forward will render it effectively impossible to achieve multilateralization of investment protection standards through this route.

[23] China - Maldives FTA (2025), Article 94, paragraph 3. Full text available at https://trade.gov.mv/wp-content/uploads/01_CMFTA_Main_Text.pdf

[24] International Law Commission, 'Final Report of the Study Group on the Most-Favoured-Nation clause' (29 May 2015) UN Doc A/CN.4/L.852.