

Article

# Most-Favoured-Nation Treatment in International Investment Law: Ascertaining the Limits through Interpretative Principles

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## Abstract

Recent developments in investor-state arbitration portrays most-favoured-nation (MFN) standard as a limitless provision to attract third party treaties. There is no *jurisprudence constante* as to its nature and scope under international investment law. Textual differences of the clause in investment treaties are often used as a justification for its varied interpretation by *ad hoc* arbitral tribunals. On that account, this article identifies specific interpretative techniques—like *res inter alia acta*, *ejusdem generis*, questioning presumptive approaches, recognising relative autonomy of treaty components, and balancing conceptual evolution over textual interpretation—to ascertain the limits of MFN standard under international investment law and to regulate the interpretative discretion of investment tribunals.

## I. Introduction

In the era of growing number of bilateral investment treaties,<sup>1</sup> provisions relating to treatment standards in general and most-favoured-nation in particular are often seen as the elements that multilateralise the principles of international law on foreign investments.<sup>2</sup> Some scholars are inclined towards a view that the regular inclusion of certain treatment standards, like, national treatment, most-favoured-nation (MFN) treatment, fair and equitable treatment, full protection and security clause, and umbrella clause, are the indicators of uniformity in state practice that accelerates the development of common standards in international law for treatment of foreign investments.<sup>3</sup> The practice, however, shows just the opposite; a more

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<sup>1</sup> UNCTAD World Investment Report, *Investing in the Sustainable Development Goals: An Action Plan*, 2014, pp. xxiii-xxiv (the number of international investment agreements have reached to 3,240 by the end of 2013, and the total number of publicly known investment cases have reached to 568).

<sup>2</sup> Stephen W. Schill, 'Multilateralizing Investment Treaties Through Most-Favoured-Nation Clause', *Berkeley Journal of International Law* 2009-27, p. 501 (Further he is of opinion that "one factor in creating uniformity in international investment relations and in implementing multilateralism despite the apparent fragmentation of investment treaties into a myriad number of bilateral treaties are most-favored-nation (MFN) clause that are regularly incorporated in BITs").

<sup>3</sup> Stephen W. Schill, *The Multilateralization of International Investment Law*, Cambridge: Cambridge University Press 2009, pp. 10 & 15 (despite the bilateral nature of investment relations "what one can observe is a convergence, not a divergence, in structure, scope, and content of existing investment treaties." Further, "BITs do not stand isolated in governing the relation between the two contracting states only; they rather develop multiple overlaps and structural interconnections that ... create a uniform and treaty-overarching regime for international

fragmented and issues specific nature of their operation. Neither is the state practice in formulating the provisions uniform nor is the practice of investment tribunals in interpreting them consistent.

The reason could be twofold: on the one hand, MFN clauses are generally formulated in generic terms to attract beneficial treatment that has not been granted in the basic treaty and they are not self-defining in relation to their application. On the other, the investment tribunals are functional entities constituted to decide specific disputes before them and their awards do not become precedents. As a result, such clauses are often used in an unrestricted manner to replace the basic treaty itself with beneficial provisions of third-party treaties. The question of uniformity and consistency has become a remote possibility. In brief, inclusion of MFN clause in investment treaties seems to be all encompassing shrinking the policy-making freedom of sovereign states. In an attempt to reduce this danger the paper identifies different interpretative techniques—like *res inter alias acta*, *ejusdem generis*, questioning presumptive approaches, recognising relative autonomy of treaty components, and balancing conceptual evolution over textual interpretation—to ascertain the limits of most-favoured-nation clause in investment treaties and to regulate the interpretative discretion of investment tribunals. The present work is an attempt to develop a negative uniformity and consistency as to how an MFN clause should not operate in a treaty framework.

This article is structured as follows: section II examines the status of MFN clause under contemporary investment law, questions the relevance of the meaning of ‘treatment’ in determining the breach of the standard, and analyses its applicability towards procedural issues like dispute settlement arrangements. Section III deals with interpretative principles, where it condemns the presumptive approach of investment tribunals in determining ‘object and purpose’ of investment agreements, invokes *ejusdem generis* principle to recognise the relative autonomy of treaty components, and insists on investment tribunals to maintain a balance between textual interpretation of provisions and conceptual evolution of principles. Finally, section IV ends with concluding remarks.

## II. MFN Clause under Contemporary Investment Law

### II.1. Concept of ‘Treatment’ and Its Scope

The purpose of MFN clause in a treaty is to guarantee ‘treatment’ that an investor finds more favourable in the host state. Article 4 of the ILC Draft Articles on MFN clause states that, “[a] most-favoured-nation clause is a treaty provision whereby a State undertakes an obligation towards another State to accord most-favoured-nation *treatment* in agreed sphere of relations” (emphasis added).<sup>4</sup> If the *raison d’être* of MFN clause is to guarantee ‘treatment’ then it is essential to consider the scope and ambit of the word treatment to have a grasp over MFN clause and its applicability in a treaty framework. While considering the scope of treatment three possible questions may arise in the context of investment treaties: what constitutes ‘treatment’ and does it requires a comparison of whole third-party treaty or

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investments ... [and] function analogously to a truly multilateral system as they establish rather uniform general principles”).

<sup>4</sup> *ILC Commentaries on Draft Articles on Most-Favoured-Nation Clause*, adopted by the International Law Commission at its Thirtieth Session 1978, A/CN.4/SER.A/1978/Add.1(Part 2), p. 18.

only the clause conferring treatment or merely part of the provision conferring favourable treatment? Is a favourable treatment in a third-party treaty a ‘claim’ in itself or simply a ‘right to claim’? And, does the word ‘treatment’ refer only to rights or also to remedies for the violation of such rights?

One of the serious issues to be addressed is, when MFN clause, in the basic treaty, is invoked to claim a favourable treatment extended in a third-party treaty, does it also attract corresponding duties therein as a condition for the enjoyment of such benefits? In treaty practice, one provision negotiated in the context of the other and any advantages granted in one provision may be a trade-off for the imposed responsibilities in the other. On that account, invoking MFN clause may attract the whole third-party treaty to be applied for any claimed advantages. Such an approach, however, may render the purpose of MFN clause futile in a treaty framework. Similarly, restricting the application of the clause only to advantages may also lead to disastrous consequences enabling claimants to claim only words, sentences or merely part of the provisions conferring benefits. An intermediate position would be clause-by-clause approach in accordance with the principle of *ejusdem generis*, requiring the application of a clause as a package for any claimed advantages from a third-party treaty. For instance, if a claimant imports a favourable expropriation clause from a third party treaty then he shall import the entire clause, rather than merely the beneficial part of the clause or the entire treaty.

Some scholars may argue that the nomenclature of MFN clause itself indicates that the clause attracts only favourable treatments and not disadvantages of a third party-treaty. But this is a problematic view. For example, in an hypothetical situation, an agreement between State A and State B requires the parties to submit treaty disputes to an *ad hoc* arbitral tribunal in accordance with the Arbitration Rules of the UNCITRAL 1976; whereas a treaty between State A and State C requires that the disputes shall be referred to ICSID forum in accordance with the ICSID Convention. If an investor from State B invokes MFN clause in the basic treaty to claim a favourable dispute settlement provision from the Agreement between State A and State C i.e. ICSID forum to settle disputes but wants to retain the applicable rules i.e. UNCITRAL Arbitration Rules. Would such a partial claim be permissible under the MFN clause?

Such a situation came before the ICSID Tribunal in *Siemens v. Argentina*.<sup>5</sup> The case involved a dispute between a German investor on the one hand and the Argentine Republic on the other. Article 10 of the Argentina-Germany BIT 1991 provides that a dispute shall be settled amicably between the parties within a period of six months; and in the absence, the dispute shall be submitted to the domestic courts and tribunals of the host state for settlement over a period of eighteen months; and if the dispute continues, then to an international arbitration.<sup>6</sup>

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<sup>5</sup> *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004.

<sup>6</sup> *Treaty between the Federal Republic of Germany and the Argentine Republic on the Promotion and Reciprocal Protection of Investments* (Argentina-Germany BIT), signed 09 April 1991, <<http://investmentpolicyhub.unctad.org/IIA/country/8/treaty/128>> (19 July 2014). Article 10 of the Agreement reads as follows:

1. Disputes concerning investments within the meaning of this Treaty between one of the Contracting Parties and a national or company of the other Contracting Party, shall as far as possible, be settled amicably between the parties to the dispute.
2. If a dispute within the meaning of paragraph 1 cannot be settled within six months from the date on which one of the parties concerned gave notice of the dispute, it shall, at the request of

However, the claimant invoked MFN clause in the basic treaty (Argentina-Germany BIT 1991) to circumvent the eighteen months waiting period before domestic courts by importing a more favourable dispute settlement provision from a third-party BIT (Argentina-Chile BIT 1991) which did not impose any such condition before reaching an international arbitration. But Article X of the Argentina-Chile BIT contained a fork-in-the-road provision,<sup>7</sup> which the Argentina-Germany BIT did not contain.<sup>8</sup> While considering the provisions, Argentina argued that since the claimant had already initiated a local administrative proceeding against the host state by making a choice, the claimant should not be allowed to initiate an international arbitration. However, the Tribunal rejected the argument of importing dispute settlement clause as a whole, rather than claiming only favourable provisions, in the following terms:

This understanding of the operation of the MFN clause would defeat the intended result of the clause which is to harmonise the benefits agreed with a party with those considered more favourable granted to another party. It would oblige the party claiming a benefit under a treaty to consider the advantages and disadvantages of that treaty as a whole rather than just the benefits. The Tribunal recognises that there may be merit in the proposition that, since a treaty has been negotiated as a package, for other parties to benefit from it, they also should be subjected to its disadvantages. However, this is not the meaning of an MFN clause. As its own name indicates, it relates only to more favourable treatment. There is also no correlation between the generality of the application of a particular clause and the generality of benefits and disadvantages that the treaty concerned may include. Even if the MFN clause is of a general nature, its application will be related only to the benefits that the treaty of reference may grant and to the extent that benefits are perceived to be such. As already noted, there may be public policy considerations that limit the benefits that may be claimed by the

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either party, be submitted to the competent courts of the Contracting Party in whose territory the investment was made.

3. The dispute may be submitted to an arbitral tribunal in any of the following circumstances:

- a. at the request of one of the parties to the dispute where, after a period of 18 months has elapsed from the moment when the judicial process provided for by paragraph 2 of this article was initiated, no final decision has been given or where a decision has been made but the parties to the dispute are still in dispute;
- b. where both parties to the dispute have so agreed...

<sup>7</sup> The principle of 'fork-in-the-road' is a provision that requires the parties to make an irrevocable choice between submitting a dispute to domestic courts or to international arbitration.

<sup>8</sup> *Agreement between the Argentine Republic and the Republic of Chile on the Promotion and Reciprocal Protection of Investments* (Argentina-Chile BIT), signed 02 August 1991, <<http://investmentpolicyhub.unctad.org/IIA/country/8/treaty/115>> (19 July 2014). Article X of the Agreement provides as follows:

1. Any dispute relating to investments for the purpose of this Treaty between a Contracting Party and a national or company of the other Contracting Party shall, as far as possible, be settled amicable between the two parties to the dispute.
2. If the dispute cannot be settled within six months from the time that has been raised by either party, shall at the request of the national or company,
  - be submitted to courts of the Contracting Party involved in the dispute,
  - or to international arbitration under the conditions described in paragraph 3.

Once a national or company has submitted the dispute to the courts of the Contracting Party concerned or to international arbitration, the choice of one or other of these procedures shall be final (The original Spanish version of the text is translated into English with the help of Google-Translate).

operation of an MFN clause, but these pleaded by the Respondent have not been considered by the Tribunal to be applicable in this case.<sup>9</sup>

The conclusion of the Tribunal allowing partial claim of benefits of a clause leaving aside the conditions attached therewith is against logic, justice and equity. In social practice any benefits or advantages cannot stand alone without corresponding duties or responsibilities. There is a small story in India to explain the situation. One Mr. X lived in a village, which went to shop to buy a coconut. The shopkeeper fixed the price of a coconut at Rs. 10 but Mr. X bargained for Rs. 5. The shopkeeper advised him to go to the nearby field, from where the shopkeeper gets coconut for his wholesale market. Mr. X went to the field and asked a coconut for Rs. 5 but the landlord fixed the price at Rs. 8. During negotiation one Mr. Y from the same village got a coconut for free from the landlord. Now Mr. X also wanted a coconut for free. The landlord told him to climb any of the trees in the field and if he could pluck four coconuts then he could choose one out of those for free. Mr. X climbed a tree without any previous experience and while plucking coconuts lost his balance. As a result, he was dangling in the sky with the coconut. The moral of the story was to explain where a man's greed should stop. However, the relevance of the story for the present discussion is that the benefit arising out of every stage in the story necessarily depends on the corresponding duties and conditionalities. Standing at the shop Mr. X cannot claim a coconut for free as a favourable treatment as enjoyed by Mr. Y on the ground that both belong to the same village.

Further, the purpose of MFN clause is to guarantee a favourable treatment to the nationals or companies of one contracting party into the territory of the other, if the other grants a favourable treatment to the nationals or companies of a third-country. The obligation to grant a favourable treatment laid on the host state only when it extended such a treatment to one over the other and not otherwise. Article 5 of the ILC Draft Articles on MFN Clause requires a special mention in this regard:

*Most-favoured-nation treatment is treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that third State, not less favourable than treatment extended by the granting state to a third State or to persons or things in the same relationship with that third State (emphasis added).*

It is clear that the MFN clause in a treaty facilitates the claimant to claim a favourable treatment only those that are "accorded by the granting State to the beneficiary State" and nothing more. If the host state has not granted a treatment to any third state then it will not be under an obligation to accord any 'constructed favourable treatments' that have not been enjoyed by anyone in the host state. Contrary to this, in *Siemens v. Argentina* the ICSID Tribunal forced Argentina to grant such a constructed favourable treatment to the claimant. In that case, the claimant was allowed to enjoy the combined benefits of two treaties, namely Argentina-Germany BIT 1991 and Argentina-Chile BIT 1991, ignoring the conditions mentioned under both treaties. The claimed treatment in the case had not been granted by Argentina to any third country with which it had treaty relations. These are constructed claims of commercial investors against the consented treatments of sovereign states. The tribunals should be restrictive in recognising such presumed claims that may hamper the established understanding as to international law i.e. states are bound only by those

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<sup>9</sup> *Siemens A.G. v. The Argentine Republic*, supra note 24, para. 120.

obligations to which they have voluntarily consented.

The purpose of MFN clause is to grant equality in competitive conditions and not to grant superiority or to guarantee the aggregation of advantageous rules and principles of third-party treaties.<sup>10</sup>

The next question to be answered is whether a favourable treatment in a third-party BIT is a 'claim' in itself or simply a 'right to claim'.<sup>11</sup> If it is a 'claim' then the host state will be under an obligation to extend a favourable treatment to the beneficiary of the MFN clause from the moment when it has granted such a treatment to an investor from a third-country. Such an understanding may impose heavy costs on the host state and it may require the host state to provide back date compensation for the claimants for not providing such treatment from the date of its original grant to the date of the claim. Considering the number and overlapping nature of international investment agreements it is hardly practicable for the host state to determine which treatments are more favourable for whom under what circumstances. On the other hand, the 'right to claim' approach limits the responsibility of the host state to extend a favourable treatment to the beneficiary of an MFN clause only when the claimant makes such a claim. This would maximise the predictability and transparency of MFN obligation and minimise the impact of such clauses on the policy-making freedom of the host states.<sup>12</sup> The purpose of the clause is not to restrict the host state from granting favourable treatments to any third-country in future, but to extend such treatment to the beneficiary of the clause when it is granted.

If the former approach is accepted then it amounts to automatic incorporation of third-party treaty into the basic treaty, which has been rejected by the ICJ in the *Case concerning Rights of Nationals of the United States of America in Morocco*. As rightly observed by Douglas "[t]he MFN clause does not, in truth, operate automatically to 'incorporate' provisions of a third treaty so that all that remains for a tribunal to do is to interpret the amended text of the basic treaty."<sup>13</sup>

Finally, the issue to be explored is whether treatment refers only to 'rights' or also to 'remedies' for the violation of such rights is one of the most controversial issues in the practice of investor-state arbitral tribunals. Whether an MFN clause in the basic treaty attracts, from a third-party treaty, only the substantial rights like national treatment, fair and equitable treatment, right against expropriation, etc. or also the procedural remedies like dispute settlement clause is yet to be answered with certainty and clarity. The views expressed by investment tribunals diverge.

## II.2. MFN Clause and Dispute Settlement Provisions

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<sup>10</sup> Vesel, *supra* note 21; *see also*, Alejandro Faya Rodriguez, 'The Most-Favored-Nation Clause in International Investment Agreements: A Tool for Treaty Shopping?', *Journal of Arbitration International* 2008-25, p. 89.

<sup>11</sup> For elaborate discussion on the 'claim' and 'right to claim' issues, *see generally*, Tony Cole, 'The Boundaries of Most-Favored-Nation Treatment in International Investment Law', *Michigan Journal of International Law* 2012-33, p. 537.

<sup>12</sup> Benedict Kingsbury and Stephen Schil, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law', *NYU School of Law Public Law Research Paper* 2009, pp. 09-46, <<http://ssrn.com/abstract=1466980>> (19 July 2014).

<sup>13</sup> Zachary Douglas, 'The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails', *Journal of International Dispute Settlement* 2011-2, p. 105.

The interaction between MFN clause and dispute settlement provision in investment treaties is one of the most contested issues in recent years. The approach and outcome of the investment tribunals are divided between two different groups. The tribunals in *Maffezini v. Spain*, *Siemens v. Argentina*, *RosInvest v. Russian Federation*, and *Renta 4 v. Russian Federation* ruled that MFN clause is applicable to all matters including dispute settlement provisions within a treaty framework. Whereas, the tribunals in *Salini v. Jordan*, *Plama v. Bulgaria*, *Vladimir Berschader v. Russian Federation*, and *Wintershall v. Argentina* rejected the possibility of applying MFN clause over procedural issues. However, it is proper to consider the findings of the tribunals in some of these cases to arrive at a better understanding as to the relation between MFN clause and dispute settlement provisions in the context of international investment agreements.

*Maffezini v. Spain*<sup>14</sup> was the first case to hold that an investor could import a favourable dispute settlement provisions from a third-party treaty through MFN clause in the basic treaty. The case involved a dispute between an investor from Argentina who had invested in an enterprise for the production and distribution of chemical products in the Spanish region of Galicia on the one hand and the Kingdom of Spain on the other. Spain objected to the jurisdiction of the Tribunal on the ground that the Claimant failed to fulfil the conditions provided under Article X of the Argentina-Spain BIT 1991 before reaching the Tribunal for international commercial arbitration.<sup>15</sup> Article X provides three different stages for settlement of disputes, namely, (i) to be settled amicably by the parties to the dispute within a period of six months, and in the absence (ii) to be submitted to the competent courts and tribunals of the host state for settlement over a period of eighteen months, and if the dispute continues (iii) to be submitted to the international arbitration. Since, the Claimant did not exhaust the available remedies before domestic courts under Article X (2) and X (3) (a), Spain argued that the Tribunal had no jurisdiction over the case.

On the other hand, the Claimant invoked MFN clause under Article IV (2) of the Argentina-Spain BIT 1991 to circumvent the domestic court requirement under Article X of the Agreement by importing more favourable dispute settlement provisions from a third-party treaty (i.e. Spain-Chile BIT 1991) which did not impose any such condition before reaching an international arbitration. Article IV (2) of the Argentina-Spain BIT provides as follows:

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<sup>14</sup> *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000.

<sup>15</sup> *Agreement for the Reciprocal Promotion and Protection of Investment between the Kingdom of Spain and the Argentine Republic* (Argentina-Spain BIT), signed on 03 October 1991, <<http://investmentpolicyhub.unctad.org/IIA/country/8/treaty/154>> (19 July 2014). Article X of the Agreement provides that:

1. Disputes arising between a Party and an investor of the other Party in connection with investments within the meaning of this Agreement shall, as far as possible, be settled amicably between the parties to the dispute.
2. Where a dispute within the meaning of Paragraph 1 cannot be settled within six months from the date on which one of the parties to the dispute instigated it, it shall, at the request of either party, be submitted to the competent tribunals of the party in whose territory the investment was made.
3. The dispute may be submitted to an international arbitral tribunal in any of the following circumstances: (a) At the request of either party to the dispute, when no decision has been reached on the substance 18 months after the judicial proceeding provided for in paragraph 2 of this article began or when such a decision has been reached, but the dispute between the parties persists; (b) When both parties to the dispute have so agreed.

In *all matters* subject to this Agreement, this treatment shall not be less favourable than that extended by each party to the investments made in its territory by investors of a third country (emphasis added).

The issue before the ICSID Tribunal was whether the words *all matters* in the MFN clause apply only to substantial matters or even to procedural issues like jurisdictional questions. Spain argued that in accordance with the principle of *ejusdem generis*, reference to *all matters* in Article IV (2) refers only to “substantial matters or material aspects of the treatment granted to investors and not to procedural or jurisdictional questions.”<sup>16</sup> The Tribunal, however, declined to limit the application of MFN clause to substantial matters alone following the decision of the Commission of Arbitration in *Ambatielos*. In that case, the Commission was of opinion that:

It is true that ‘the administration of justice’, when viewed in isolation, is a subject-matter other than ‘commerce and navigation’, but this is not necessarily so when it is viewed in connection with the protection of the rights of traders. Protection of the rights of traders naturally finds a place among the matters dealt with by Treaties of commerce and navigation. Therefore it cannot be said that the administration of justice, in so far as it is concerned with the protection of these rights, must necessarily be excluded from the field of application of the most-favoured-nation clause, when the latter includes ‘all matter relating to commerce and navigation’.<sup>17</sup>

Taking cue from the above consideration of *all matters* and its application to *administration of justice* the *Maffezini* Tribunal concluded that: “today dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights of traders under treaties of commerce.”<sup>18</sup> Further, “[t]hese modern developments are essential, however, to the protection of the rights envisaged under the pertinent treaties; they are also closely linked to the material aspects of the treatment accorded.”<sup>19</sup> And therefore, the Tribunal ruled that:

[I]f 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 than 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.<sup>20</sup>

Similarly, the ICSID Tribunal in *Siemens v. Argentina* recognised the applicability of MFN clause to dispute settlement provisions reinforcing the interpretative approach followed by the *Maffezini* Tribunal. In support of its findings:

[T]he Tribunal finds that the Treaty itself, together with so many other treaties of investment protection, has as a distinctive feature special dispute settlement mechanism not normally open to investors. Access to these

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<sup>16</sup> *Maffezini v. Spain*, supra note 37, para. 41.

<sup>17</sup> *The Ambatielos Claim*, supra note 16, p. 107.

<sup>18</sup> *Maffezini v. Spain*, supra note 37, para. 54.

<sup>19</sup> *Idem*, para. 55.

<sup>20</sup> *Idem*, para. 56.

mechanisms is part of the protection offered under the Treaty. It is part of the treatment of foreign investors and investments and of the advantages accessible through a MFN clause.<sup>21</sup>

However, both *Maffezini* and *Siemens* Tribunals appear to have misread the opinion of the Commission of Arbitration in *Ambatielos*. The Commission extended the application of MFN Clause to the *administration of justice* as a substantial protection available to foreign national in the host state but not to dispute settlement provisions in the basic treaty. There is a fundamental difference between *administration of justice* and access to courts as substantive protection on the one hand, and interpretation of treaty provisions and settlement of treaty disputes as procedural mechanisms on the other. The ICSID Tribunal in *Salini v. Jordan*<sup>22</sup> has explained the situation in the following words:

The Tribunal will observe that in [*Ambatielos*] case, Greece invoked the most-favoured-nation clause with a view to securing, for one of its nationals, not the application of a dispute settlement clause, but the application of substantive provisions in treaties between the United Kingdom and several other countries under which their nationals were to be treated ‘in accordance with “justice”, “right” and “equity”’. The solution adopted by the Arbitration Commission, cannot there be directly transposed in this specific instance.<sup>23</sup>

This understanding as to the opinion of the Commission has also been reiterated by the ICSID Tribunal in *Plama v. Bulgaria* where it held that “[the *Ambatielos*] ruling relates to provisions concerning substantive protection in the sense of denial of justice in the domestic courts. It does not relate to the import of dispute resolution provisions of another treaty into the basic treaty.”<sup>24</sup>

Recognising the application of MFN clause to dispute settlement provisions may lead to greater anomaly against the established principles of general international law. The anomalies may include, ignoring or rejecting the courts and tribunals of the host states as not reliable institutions for settlement of disputes;<sup>25</sup> replacing the jurisdiction of one tribunal with that of the other or replacing the intended applicable rules; or constituting an international tribunal in the absence of any such mechanism provided under the basic treaty.<sup>26</sup> In brief, the consent of the contracting parties will be replaced at the instance of the interests of private commercial investors.

In certain cases countries do not recognise the jurisdiction of international courts and tribunal to settle disputes with certain countries for different reasons. India’s reservation to the jurisdiction of the International Court of Justice to settle dispute with Commonwealth-

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<sup>21</sup> *Siemens v. Argentina*, supra note 24, para. 102.

<sup>22</sup> *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 29 November 2004.

<sup>23</sup> *Idem*, para. 112.

<sup>24</sup> *Plama v. Bulgaria*, supra note 33, para. 215.

<sup>25</sup> This was the case in both *Maffezini v. Spain*, and *Siemens v. Argentina*, where the Tribunals ignored the mandatory requirement of settling disputes before domestic courts and tribunals over a period of eighteen months before reaching an international arbitration to allow direct access to investment tribunals.

<sup>26</sup> This was the case in *Salini v. Jordan*, where contractual dispute was brought before international arbitral tribunal as treaty dispute, which was not recognised under the basic treaty.

Countries and subsequent reference by Pakistan *The Aerial Incident of 10 August 1999*<sup>27</sup> before the ICJ soon after Kargil War is one example to show why countries withheld consent regarding certain issues. In a hypothetical situation, if India-Pakistan BIT provides dispute settlement mechanism for any contractual disputes only before the domestic courts of the host state, then it is meant to prevent the investors of each other from being used as a means to humiliate one another in international forums. Such provisions cannot be circumvented through MFN clause to reach an international arbitration by reference to third-party treaties. It would have never been acceptable for any of the contracting parties at the stage of negotiation.

Further, it is an established principle in international law that consent to jurisdiction of both parties to the dispute is a prerequisite for any court or tribunal to intervene in disputes between the parties. In *Plama v. Bulgaria* the ICSID Tribunal followed such an approach and declared that:

Nowadays, arbitration is the generally accepted avenue for resolving disputes between investors and states. Yet, that phenomenon does not take away the basic prerequisite for arbitration: an agreement of the parties to arbitrate. It is well established principle, both in domestic and international law, that such an agreement should be clear and unambiguous. In the framework of a BIT, the agreement to arbitrate is arrived at by the consent to arbitration that a state gives in advance in respect of investment disputes falling under the BIT, and the acceptance thereof by an investor if the later so desires.

Doubts as to the parties' clear and unambiguous intention can arise if the agreement to arbitrate is to be reached by incorporation by reference [through MFN clause].<sup>28</sup>

Further,

[D]ispute resolution provisions in a specific treaty have been negotiated with a view to resolving disputes under that treaty. Contracting States cannot be presumed to have agreed that those provisions can be enlarged by incorporating dispute resolution provisions from other treaties negotiated in an entirely different context.<sup>29</sup>

Another interesting factor in the debate is about the customary principle of exhaustion of local remedies and domestic court requirements before reaching an international arbitration. The ICSID Tribunal in *Maffezini v. Spain* came across such an issue, where Article X of the basic treaty required that the dispute should be submitted to the domestic courts for settlement over a period of eighteen months before reaching an international arbitration. The Claimant argued that the provision provides an unnecessary waiting period and is a hurdle to reach an international arbitration. On other hand, Spain argued that it is the requirement of customary principle of exhaustion of local remedies. However, the Tribunal concluded that the provision “does not require the exhaustion of domestic remedies as that concept

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<sup>27</sup> *Case Concerning the Aerial Incident of 10 August 1999 (Pakistan v. India)*, Jurisdiction of the Court, Judgment of 21 June 2000, [2000] ICJ Reports, p. 12.

<sup>28</sup> *Plama v. Bulgaria*, supra note 33, paras. 198-99.

<sup>29</sup> *Idem*, para. 207.

understood under international law” nor Spain made the exhaustion of domestic remedies as a condition for its consent to arbitration under Article 26 of the ICSID convention.<sup>30</sup> Further, the Tribunal held that the provision simply provides an opportunity to the domestic courts and tribunals and it will not prevent the case from going to international arbitration at the expiration of eighteen months.<sup>31</sup> Similarly, in relation to the principle of exhaustion of local remedies the ICSID Tribunal in *Siemens v. Argentina* ruled as follows:

The Tribunal concurs with the Respondent...that the Contracting Parties had intended through [Article] 10 (2) to give the local tribunals an opportunity to decide a dispute first before it would be submitted to an international arbitration. However, this does not mean that this provision requires the exhaustion of local remedies as this rule has understood under international law. Article 10 (2) does not require a prior final decision of the courts of the Respondent. It does not even require a prior decision of a court at any level. It simply requires the passing of time or the persistence of the dispute after a decision by a court (footnote omitted).<sup>32</sup>

In accordance with the principle of *pacta sunt servanda* under Article 26 of the Vienna Convention on the Law of Treaties, “[e]very treaty in force is binding upon *the parties* to it and must be performed by them *in good faith*” (emphasis added). In the context of international investment agreements, considering its uniqueness, along with the Contracting Parties the investors shall also be considered as *parties* to carry out the obligations under the treaty *in good faith*. While applying the principle for the cases under consideration, the Claimants are under an obligation to approach the domestic courts of the host state, in good faith, to settle disputes rather than considering the provision as a hurdle or a waiting period to reach international arbitration. In legal philosophy, the purpose of dispute settlement mechanisms is to contribute to the smooth functioning of a legal system by resolving disputes at an earliest possible stage. That is the reason why *negotiation* is always *the* primary method of resolving dispute between parties under international law. It is not a mere formality or waiting period to reach any other means of settling disputes.

Further, the judicial institutions while engaging in the process of interpretation should not render any provision of a legal instrument meaningless. Every provision in a treaty is included after a careful negotiation between the parties and with purpose. However, the Tribunals in *Maffezini v. Spain* and *Siemens v. Argentina* treated the mandatory provision of ‘domestic court requirements’ as recommendatory and thereby rendered the presence of such provisions meaningless in the context of access to international arbitration, which is unacceptable in judicial practice.

### III. Interpretative Principles and Investment Tribunals

As rightly observed by Joseph Raz, “every law necessarily belongs to a legal system” and the branch of foreign investment law essentially stands within the framework of international legal system.<sup>33</sup> The bilateral investment treaties and other international investment

<sup>30</sup> *Maffezini v. Spain*, supra note 37, paras. 28 and 23.

<sup>31</sup> *Idem*, paras. 33-35.

<sup>32</sup> *Siemens v. Argentina*, supra note 24 para. 104.

<sup>33</sup> Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System*, London: Oxford University Press 1980, p. 1.

agreements, like any other treaties of general international law, are subject to the rules of treaty interpretation along with the application of Article 31 and 32 of the Vienna Convention on the Law of Treaties 1969. Article 31 of the Convention reads as follows:

General Rule of Treaty Interpretation:

1. 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.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relation between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Though the article sets out four elements to interpret treaty provisions in different paragraphs, all these are treated as components of a single interpretative task and there is no hierarchy among them. The International Law Commission in its commentaries to Article 31 made it clear that “the article, when read as a whole, cannot properly be regarded as laying down a legal hierarchy of norms for the interpretation of treaties”.<sup>34</sup> While applying these techniques in the interpretation of MFN clause in the context of international investment agreements, the tribunals often face problems (or their findings become problematic) in relation to the following, namely, (i) determination of object and purpose, (ii) application of *ejusdem generis* principle, and (iii) balancing textual interpretation over conceptual evolution of principles.

### III.1. Questioning the Presumptive Approach of Investment Tribunals

International investment agreements (IIAs) are often considered as the instrument of investment protection and scholars tend to refer the preamble of investment treaties to declare that the *raison d'être* of IIAs are majorly to protect and promote foreign investment. For instance, the preamble of the United States Model BIT 2012 declares that the parties “[h]aving resolved to conclude a treaty concerning the encouragement and reciprocal protection of investment”. Similarly, the Government of India has entered into bilateral investment treaties with more than seventy-five countries and in all most all treaties the preamble declares that the Contracting Parties are “[r]ecognising that the encouragement and reciprocal protection under international agreement of such investment will be conducive to the stimulation of individual business initiative and will increase prosperity in both

<sup>34</sup> ILC Commentaries on Draft Articles on the Law of Treaties, adopted by the International Law Commission at its Eighteenth Session 1971, A/CONF.39/11/Add.2, p. 40.

states.”<sup>35</sup> And most of these investment agreements are typically titled as ‘Agreement between [...] for the Promotion and Reciprocal Protection of Investments’.

As a result, there is a presumption in general that the object and purpose of investment treaties are to protect foreign investments. These presumptive approaches are not only deep rooted in scholarly debates but also have influenced the practice of investment tribunals and their outcomes. For instance, Dolzer and Stevens are of opinion that “since most of the substantive provisions of the BIT concern the promotion and protection of foreign investment, it could be argued that any ambiguity should be interpreted in a way that would favour the rights granted to foreign investor.”<sup>36</sup> Even most of the investment tribunals while addressing MFN or other treatment standards follow such a presumptive approach in the name of referring preamble to interpret the provisions in light of the object and purpose of a treaty i.e. ‘promotion and protection of foreign investments’. For example, in *Siemens v. Argentina* the ICSID Tribunal put forth its analysis as:

The Tribunal considers that the Treaty has to be interpreted neither liberally nor restrictively, as neither of these adverbs is part of Article 31 (1) of the Vienna Convention. The Tribunal shall be guided by the purpose of the Treaty as expressed in its title and preamble. It is a treaty “to protect” and “to promote” investments. The preamble provides that the parties have agreed to the provisions of the Treaty for the purpose of creating favorable conditions for the investments of nations or companies of one of the two States in the territory of the other State. Both parties recognise that the promotion and protection of these investments by a treaty may stimulate private economic initiative and increase the well-being of the peoples of both countries. The intention of the parties is clear. It is to create favorable conditions for investments and to stimulate private initiative (footnote omitted).<sup>37</sup>

The tribunal expressly based the findings on its understanding that the purpose of the treaty as a whole is to protect and promote investments and thereby reflected a corporate world view. “[O]ne must be wary of placing too much weight on such statements of purpose in BITs, for doing so could lead tribunals to resolve all doubtful questions in favour of investors on the theory that better protection for investors always be more in keeping with the ‘purpose’ of the treaty.”<sup>38</sup> Often these presumptive approaches of investment tribunals favouring corporate interests lead to rendering of awards necessarily against the interests of sovereign states. A cursory look at the practice of states and their negotiating history along with the historical past of the states concerned will deny the possibility of any such presumptions.

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<sup>35</sup> Preamble of the *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India for the Promotion and Protection of Investments*, signed on 14 March 1994, <<http://investmentpolicyhub.unctad.org/IIA/country/96/treaty/1968>> (19 July 2014).

<sup>36</sup> Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties*, London: Kluwer Law International 1995, p. 17.

<sup>37</sup> *Siemens v. Argentina*, supra note 24, para. 81.

<sup>38</sup> Vesel, supra note 21, p. 165. See also, *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004, para. 116 (the Tribunal arrived at such a conclusion that, “[t]he BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble it is intended ‘to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other.’ It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments”).

History shows that the Friendship, Commerce and Navigation (FCN) treaties, the Bilateral Investment Treaties and Free Trade Agreements (FTAs) are politico-economic arrangements between sovereign states. The primary focus of such treaties are for promoting economic cooperation between the contracting parties and incidental to this, States agree to guarantee each other's citizens legal protection within their territory. Logically, two states cannot be expected to enter into a treaty solely for the protection of someone who is not a party to the treaty at all. It is inappropriate to consider such treaties as simply an instrument to protect the commercial interest of corporate investors.

The object and purpose mentioned under the preamble of a treaty need not necessarily reflect the intention of the parties in every other provision. For instance, the provisions relating to public order, public health, internal security, emergency measures, etc. are inserted as exceptions to the application of a treaty rather than to promote the 'object and purpose' for which the treaty came into force. The presumptive approaches should not be used to circumvent the intention of the parties in such provisions. Overemphasis on any particular interpretative technique will be incorrect. The ICSID Tribunal in *Plama v. Bulgaria* explained the problem in following words:

[T]he tribunal is mindful of Sir Ian Sinclair's warning of the '*risk that the placing of undue emphasis on the "object and purpose" of a treaty will encourage teleological methods of interpretation [which], in some of its more extreme forms, will even deny the relevance of the intention of the parties*' (emphasis original).<sup>39</sup>

Sometimes it is argued that historically the system of bilateral investment treaties and each of its substantive provisions have evolved as a response to the nationalisation trends in post-colonial era to protect foreign investments in the developing and transitional economies, in the absence of any institutional structure in place in such countries. On this account, the promotion and protection of foreign investments is the object behind the evolution of bilateral investment treaties. However, such arguments are untenable. If IIAs are considered as an alternative for domestic institutional structure in developing countries, then IIA shall not be reciprocal on the ground that it is always presumed that the developed countries have every institutional structure in place.

In the contemporary scenario, the problems of presumptive approach can better be explained by reference to arbitral awards that interpret MFN clause to invoke dispute settlement mechanism of third-party treaties into the basic treaty. The ICSID tribunal in *Maffezini v Spain* arrived at a conclusion:

Notwithstanding the fact that the basic treaty containing the clause does not refer expressly to dispute settlement as covered by most favored nation clause, the Tribunal considers that there are good reasons to conclude that today *dispute settlement arrangements are inextricably related to the protection of foreign investors*, as they are also related to the protection of rights of traders under treaties of commerce. Consular jurisdiction in the past

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<sup>39</sup> *Plama v. Bulgaria*, supra note 33, para. 193, quoting Ian Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester: Manchester University Press 1984, p. 130.

like other forms of extra-territorial jurisdiction, were considered essential for the protection of rights of traders and, hence were regarded not merely as procedural devices but as arrangements designed to better protect the rights of such persons abroad (emphasis added, footnote omitted).<sup>40</sup>

These modern developments are essential, however, to the protection of the rights envisaged under the pertinent treaties; they are also closely linked to the material aspects of the treatment accorded. Traders and investors, like their states of nationality, have traditionally felt that their rights and interests are better protected by recourse to international arbitration than by submission of disputes to domestic courts, while the host governments have traditionally felt that the protection of domestic courts is to be preferred.<sup>41</sup>

The *Maffezini* tribunal and other later tribunals that followed the same line of reasoning presume that the “dispute settlement arrangements are inextricably related to the protection of foreign investors.” But, in legal philosophy, whether domestic or international, the dispute settlement arrangements have to be considered as neutral mechanisms to settle disputes between parties and thereby contribute to the smooth functioning of a legal system. The mere expression ‘dispute settlement’ itself indicates that the mechanism is for settlement of disputes between parties and not to favour any one.

In the present case, because of the presumption of investment tribunals regarding object and purpose of the treaty—that it comes into exist merely to protect foreign investors rather than to improve economic relations between states; and the dispute settlement clause is added to enhance the protection of foreign investors rather than to settle disputes—the outcome of the arbitral tribunals tend to go against the interest of host states. The tribunals in *Maffezini* and *Siemens* reject the treaty provision requiring the investor to settle disputes before domestic courts and hijack the jurisdiction for itself on the ground that it is more favourable and safer place for the protection of the interest of corporate investors. A legal provision shall not be presumed as one sided. The purpose of courts and tribunals is merely to determine how the rule is applicable in a given situation considering the context of the rule and circumstances of the case. If courts and tribunals develop a presumptive approach in favour of a possible disputing party even before the issue arise in a real sense, the impartial nature of the judicial institutions will be under severe threat.

It is proper to end this section with the opinion of renowned scholars on the process of interpretation, where they criticise the presumptive approach of judicial institutions by observing that:

The primary aim of a process of interpretation by an authorised and controlling community decision-maker can be formulated in the following

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<sup>40</sup> *Maffezini v. Spain*, supra note 37, para. 54.

<sup>41</sup> *Idem*, para. 55. *see also*, *Siemens v. Argentina*, supra note 23, para. 102 (the tribunal held that, “[a]ccess to these [dispute settlement] mechanisms is part of the protection offered under the Treaty. It is part of the treatment of foreign investors and investments and of the advantages accessible through a MFN clause”).

*Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision on Jurisdiction, 17 June 2005, para. 29 (the tribunal held that, “the critical issues is whether or not the dispute settlement provisions of bilateral investment treaties constitute part of the bundle of protections granted to foreign investors by host states...such provisions are universally regarded – by opponents as well as by proponents – as essential to a regime of protection of foreign direct investment” (footnote omitted)).

proposition: discover the shared expectations that the parties to the relevant communication succeeded in creating in each other. It would be an act of distortion on behalf of one party against another to ascertain and to give effect to his version of a supposed agreement if investigation shows that the expectations of this party were not matched by the expectations of the other. And it would be an obvious travesty on interpretation for a community decision-maker to disregard the shared subjectivities of the parties and to substitute arbitrary assumptions of his own.<sup>42</sup>

### III.2. *Ejusdem Generis* and Relative Autonomy of Treaty Components

The principle of *ejusdem generis* is one of the most important interpretative techniques in a legal system “recognised and affirmed by the jurisprudence of international tribunals and national courts and by diplomatic practice.”<sup>43</sup> The principle simply means that, when in a provision, general words follow special words then the general words shall be understood to belong to the same category as indicated by the special words, thus “[a]lthough the meaning of the rule is clear, its application is not always simple.”<sup>44</sup> The International Law Commission introduced the principle within its Draft Articles on Most-Favoured Nation Clause as a tool to determine the scope or rights under MFN clause in treaties. Article 9 and 10 of the Draft Articles read as follows:

#### Article 9 – Scope of rights under a most-favoured-nation clause

1. Under a most-favoured-nation clause the beneficiary State acquires, for itself or for the benefit of persons or things in a determined relationship with it, only those rights which fall within the limits of the subject-matter of the clause.
2. The beneficiary State acquires the rights under paragraph 1 only in respect of persons or things which are specified in the clause or implied from its subject-matter.

#### Article 10 – Acquisition of rights under most-favoured-nation clause

1. Under a most-favoured-nation clause the beneficiary State acquires the right to most-favoured-nation treatment only if the granting State extends to a third State treatment within the limits of the subject-matter of the clause.
2. The beneficiary State acquires rights under paragraph 1 in respect of persons or things in determined relationship with it only if they:
  - a. belong to the same category of persons or things as those in a determined relationship with a third State which benefit from the treatment extended to them by the granting State and
  - b. have the same relationship with the beneficiary state as the persons and things referred to in subparagraph (a) have with that third State.

The provisions limit the applicability of MFN clause to two grounds, namely, as regards to its subject matter (*ratione materiae*) and its personal applicability (*ratione personae*). For

<sup>42</sup> Myres McDougal, Harold Lasswell & James C Miller, *The Interpretation of International Agreements and World Public Order: Principles of Content and Procedure*, Netherlands: Martinus Nijhoff Publishers 1994, pp. xvi-xvii.

<sup>43</sup> *ILC Commentaries on MFN Clause*, supra note 22, p. 27, para. 1.

<sup>44</sup> *Ibid.*

example, an MFN clause in a bilateral investment treaty will not entitle the beneficiary state to claim a favourable treatment under a treaty on extradition or diplomatic privileges and immunities (*ratione materiae*). Similarly, the clause cannot be used to alter the definitional aspects of the treaty to expand its personal applicability i.e. in the present example, to modify the definitions with respect to who is ‘investor’, what is ‘investment’, etc. (*ratione personae*). On this account, the principle of *ejusdem generis* operates to limit the scope of the clause as well as the treaty. However, in contemporary international scenario, problems arise mainly with respect to the application of MFN clause for dispute settlement provisions and more specifically in the context of international investment agreements. The question is whether the usage of third party treaty dispute settlement mechanism by invoking MFN clause in the basic treaty is in accordance with the principle of *ejusdem generis*? The Commission of Arbitration in *The Ambatielos Claim* answered the question that “the most-favoured-nation clause can only attract matters belonging to the same category of subject as that to which the clause itself relates.”<sup>45</sup>

There is a fundamental difference between substantial obligations in a treaty and procedural aspects dealing with jurisdictional issues. The substantial obligations are addressed to the parties and the provisions relating to jurisdiction are addressed to the tribunal.<sup>46</sup> Recognising this difference, recently, the International Court of Justice in the *Armed Activities on the Territory of Congo case*<sup>47</sup> made it clear that even the *jus cogens* nature of an obligation in a treaty will not necessarily make the provisions relating to dispute settlement binding on parties. Each treaty provisions deal with different things and they are not *ejusdem generis* to follow one another. On this account, the Court ruled as follows:

Rwanda’s reservation to Article IX of the Genocide Convention bears on the jurisdiction of the Court, and does not affect substantive obligations relating to acts of genocide themselves under that Convention. In the circumstances of the present case, the Court cannot conclude that the reservation of Rwanda in question, which is meant to exclude a particular method of settling a dispute relating to the interpretation, application or fulfilment of the Convention, is to be regarded as being incompatible with the object and purpose of the Convention.<sup>48</sup>

Further,

[T]he Court deems it necessary to recall that the mere fact that rights and obligations *erga omnes* or peremptory norms of general international law (*jus cogens*) are at issue in a dispute cannot in itself constitute an exception to the principle that its jurisdiction always depends on the consent of the parties.<sup>49</sup>

The court had already considered such an issue in an earlier occasion when the *East Timor*

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<sup>45</sup> *The Ambatielos Claim*, supra note 16, p. 107.

<sup>46</sup> Douglas, supra note 32, p. 104.

<sup>47</sup> *Armed Activities on the Territory of Congo (New Application 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction of the Court and Admissibility of the Application, Judgement of 03 February 2006, [2006] ICJ Reports, p. 6.

<sup>48</sup> *Idem*, para. 67.

<sup>49</sup> *Idem*, para. 125.

*Case*<sup>50</sup> came before it for adjudication. In that case the Court was of opinion that:

[T]he *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgement would imply on evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*.<sup>51</sup>

The provisions dealing with substantial aspects conferring rights and obligations in a treaty shall not be confused with the provisions that deal with the procedural aspects to enforce such rights and obligations. The observations of the Court regarding these fundamental differences shall be applicable to every other treaty including IIAs.

The preamble, definitional clause, provisions relating to treatment standards, emergency exceptions, dispute settlement mechanism, duration and termination of treaty, and so on are different components of a treaty that closely relate with one another in the smooth functioning of a treaty system. Every component is relatively autonomous and designed with certain purpose and no component shall be interpreted to make the other meaningless. Invoking MFN clause to expand or restrict the meaning of other treaty components will lead to unnecessary and unacceptable complications in treaty practice. For example, Article 13 of the India-Austria BIT 2001 extends the continuous application of the treaty for existing investments for a period of ten years from the date of termination of the agreement.<sup>52</sup> On the other hand, Article 17 of the India-Australia BIT 1999 extends the continuous application for fifteen years after its termination.<sup>53</sup> In such a case, investors from Austria shall not invoke the MFN clause in the basic treaty to extend the application of the treaty (India-Austria BIT) over time for five more years—as a favourable treatment with reference to Article 17 of the India-Australia BIT.

The ICSID Tribunal in *Tecmed v. Mexico*<sup>54</sup> come across such an argument, where an investor from Spain invoked MFN clause in the basic treaty to rely on a more favourable treatment in one of Mexico's third-country BIT (Mexico-Austria BIT 1998) that allegedly protected against governmental acts before the treaty come into force. The tribunal rejected the

<sup>50</sup> *East Timor Case (Portugal v. Australia)*, Judgement of 30 June 1995, [1995] ICJ Reports, p. 90.

<sup>51</sup> *Idem*, para. 29.

<sup>52</sup> *Agreement between the Government of the Republic of Austria and the Government of the Republic of India for the Promotion and Protection of Investments (India-Austria BIT)*, signed 08 November 1999, <<http://investmentpolicyhub.unctad.org/IIA/country/96/treaty/246>> (19 July 2014). Article 13 (3) provides as follows:

In respect of investments made prior to the date of termination of the present Agreement the provisions of Article 1 to 12 of the Agreement shall continue to be effective for a further period of *ten years* from the date of termination of the Agreement (emphasis added).

<sup>53</sup> *Agreement between the Government of Australia and the Government of the Republic of India on the Promotion and Protection of Investments (India-Australia BIT)*, signed 26 February 1999, <<http://investmentpolicyhub.unctad.org/IIA/country/96/treaty/209>> (19 July 2014). Article 17 (3) provides that:

Notwithstanding termination of this agreement pursuant to paragraph 2 of this Article, the agreement shall continue to be effective for a further period of *fifteen years* from the date of its termination in respect of investments made or acquired before the date of termination of this Agreement (emphasis added).

<sup>54</sup> *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2*, Award, 29 May 2003.

argument:

because it deems that matters relating to the application over time of the Agreement, which involve 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. These are determining factors for their acceptance of the Agreement, as they are directly linked to the identification of the substantive protection regime applicable to the foreign investor and, particularly, to the general (national or international) legal context within which such regime operates, as well as to the access of the foreign investor to the substantive provisions of such regime. Their application cannot therefore be impaired by the principle contained in the most favoured nation clause (footnote omitted).<sup>55</sup>

The tribunal, however, ruled out the application of MFN clause to the *ratione temporis* of a treaty. Likewise, in *Société Générale v. Dominican Republic*<sup>56</sup> the Tribunal constituted under the LCIA ruled out the application of MFN clause to the *ratione personae* of a treaty i.e. to extend or modify the definitional aspects and personal applicability of a treaty. In that case, an investor from France invoked the MFN clause under Article 14 of the French-Dominican BIT 1999 to expand the meaning of ‘investment’ by reference to Article 10.28 of the *Central American Free Trade Agreement-Dominican Republic (CAFTA-DR)* treaty with the United States, which includes ‘expectation of gain or profit’ as investment within the meaning of covered investments.<sup>57</sup> The tribunal rejected the argument on the following grounds:

Each treaty defines what it considers a protected investment and who is entitled to that protection, and definitions can change from treaty to treaty. In this situation, resort to the specific text of the MFN Clause is unnecessary because it applies only to the treatment accorded to such defined investment, but not to the definition of the ‘investment’ itself.<sup>58</sup>

In the absence of a proper understanding as to the relative autonomy of different components of a treaty and their respective function within a treaty framework often leads to anomalies in the application of the principle of *ejusdem generis*. For instance, the ICSID Tribunal in *CMS v. Argentina*<sup>59</sup> rejected the argument of the claimant invoking MFN clause to replace emergency clause in the basic treaty with that of third-party treaty, on the ground that the emergency clause may be bypassed only when the third country BIT contained a more favourable emergency clause.<sup>60</sup> Though the Tribunal rightly rejected the claimant’s argument but on a wrong premise that the *ejusdem generis* rule require the same subject-matter as that

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<sup>55</sup> Idem, para. 69.

<sup>56</sup> *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S. A. v. The Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008.

<sup>57</sup> Article 10.28 of the CAFTA-DR Treaty provides that, “investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of the capital or other resources, *the expectation of gain or profit* or the assumption of risk” (emphasis added).

<sup>58</sup> *Société Générale v. Dominican Republic*, supra note 79, para. 41.

<sup>59</sup> *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005.

<sup>60</sup> Idem, para. 377.

of the clause itself, rather than considering the emergency clause as a limitation on the application of MFN clause in a treaty.<sup>61</sup>

Relative autonomy of different treaty components should be recognised in treaty practice, and more so with respect to IIAs in the context of recent developments in investor-state arbitration. Otherwise, there is a possibility that the MFN clause will be invoked to alter the object and purpose of a treaty with reference to more favourable preamble of a third-party treaty; or to attract pre-establishment rights to investor with reference to more favourable definitional clause; or to extend the application of a treaty over time. Problem with respect to the application of third-party dispute settlement mechanism is already taking place.

Finally, a specific clause cannot be overridden by generic clause by way of treaty interpretation. The provisions dealing with definitional aspects, dispute settlement and exception clauses (like public health and public order) are more specific and clear in relation to their application in a treaty framework. Whereas, the provisions relating to treatment standards, like, MFN treatment and national treatment, are general arrangements the application of which always depends on any other specific legal arrangements like domestic legislations or judicial pronouncements in the host state, or provisions in a third party treaty. Even on this premise the MFN clause could be disregarded as inapplicable to dispute settlement provisions.

### III.3. Balancing Conceptual Evolution over Textual Interpretation

In the absence of a multilateral framework, presently the trans-border movement of investments are majorly regulated through numerous bilateral investment treaties. Each of these established a dispute settlement mechanism of their own leading to an evolution of contradicting principles in regulating foreign investments. For instance, the outcome of investment tribunals on the applicability of MFN clause over dispute settlement provisions is equally divided into conflicting views. Often these contradicting approaches are justified on the ground that the specific wording of the clause leads to such an outcome. The Tribunal constituted under the SCC to decide the dispute between *Renta 4 v. Russian Federation*<sup>62</sup> describes the situation in the following words:

A considerable number of awards under BITs have dealt with the jurisdictional implications of MFN [...]. They are of uneven persuasiveness and relevance. The present Tribunal would find it jejune to declare that there is a dominant view; it is futile to make a head-count of population of such diversity. What can be said with confidence is that a *jurisprudence constante* of general applicability is not yet firmly established. It remains necessary to proceed BIT by BIT.<sup>63</sup>

A BIT by BIT analysis is often considered as consistent with or even mandated by Article 31 of the Vienna Convention on the Law of Treaties. Though there are numerous differences in the language of the MFN clause in investment treaties, a case-by-case approach will prevent

<sup>61</sup> Schill, *supra* note 2, p. 522.

<sup>62</sup> *Renta 4 S.V.S.A., Ahorro Corporación Emergentes F.I., Ahorro Corporación Eurofondo F.I., Rovime Inversiones SICAV S.A., Quasar de Valores SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. v. The Russian Federation*, SCC Case No. Arbitration V 024/2007, Award on Preliminary Objections, 20 March 2009.

<sup>63</sup> *Idem*, para. 94.

coherence in the evolution of international law on foreign investments. A *sui generis* approach will destroy the certainty of law in any legal system. Perhaps, investment tribunals are functional entities constituted to decide a specific case before them,<sup>64</sup> but they are not free from considering relevant rules of general international law. For instance, Article 31(1) of the Vienna Convention on the Law of Treaties requires that the treaty provisions shall be interpreted “in accordance with the ordinary meaning to be given to the terms” (i.e. literal or textual interpretation); but at the same time paragraph (3) (c) of the Article requires the interpreters to take into account, in the process of interpretation, “any relevant rules of international law applicable in the relations between the parties.”

While considering the provisions as a whole a balance needs to be maintained between the textual interpretation of treaty provisions and the conceptual evolution of those provisions as principles under international law. Sometimes, scholars and treaty interpreters, tend to give more importance to ‘the text’ over ‘the concept’ considering their place of appearance in Article 31, under a mistaken impression that the provision establishes hierarchy among interpretative techniques. Recently, the Tribunal in *RosInvest v. Russian Federation* expressed such a view that:

Since the tribunal has come to the above conclusion on the basis of the ordinary meaning of Article 8 in the context of the object and purpose of the BIT in accordance with paragraph (1) of Article 31 VCLT, there is no need to go into the additional criteria for interpretation mentioned in the further paragraphs of that Article.<sup>65</sup>

Each of the four criteria mentioned under Article 31 are expressed in mandatory terms and are to be applied within a single and integrated exercise of treaty interpretation. The title of Article 31 ‘General rule of interpretation’ rather than ‘General rules of interpretation’ also signifies an integrated approach. The International Law Commission in its commentaries to Article 31 made it clear that:

[O]bservations appeared to indicate a possible fear that the successive paragraphs of article [31] might be taken as laying down a hierarchical order for the application of the various elements of interpretation in the article. The Commission by heading the article “General rule of interpretation” in the singular and by underlining the connexion between paragraphs 1 and 2 and again between paragraph 3 and the previous two paragraphs, intended to indicate that the application of the means of interpretation in the article would be a single combined operation. All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation. Thus, article [31] is entitled “General *rule* of interpretation” in the singular, not “General *rules*” in the plural, because the Commission desired to emphasize that the process of interpretation is a unity and that the provisions of the article form a single,

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<sup>64</sup> *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. Arbitration V 079/2005, Award on Jurisdiction, October 2007, para. 137 (the Tribunal held that, “since it is the primary function of this Tribunal to decide the case before it rather than developing further the general discussion on the applicability of MFN clauses to dispute-settlement-provisions, the Tribunal notes that the combined wording in Article 3 and 7 of UK-Soviet BIT is not identical to that in any of such other treaties considered in these other decisions”).

<sup>65</sup> *Idem*, para. 119.

closely integrated rule.<sup>66</sup>

Therefore, ‘the process of interpretation is a unity’ and all elements of interpretation shall be taken into account as a single interpretative task. However, problems may arise when there is a conflict between the ordinary meaning of a provision and its established meanings as a concept. In such a case, the ordinary meaning of a provision can give way to the established meaning. It is a well-known fact that the courts and tribunals need not follow a literal interpretation when the ordinary meaning of the words may lead to absurdity. The International Court of Justice in the *Arbitral Award of 31 July 1989*<sup>67</sup> held that, “the rules of interpretation according to the natural and ordinary meaning of the words employed: ‘is not an absolute one. Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it’.”<sup>68</sup>

MFN is a term of art in international law like other terms such as ‘soft law’, ‘rule of law’, ‘hot pursuit’, ‘territorial sea’, etc. that have established meanings of their own. MFN has a long history of its usage in various treaty mechanisms under international law, including treaties on diplomatic and consular relations, FCN treaties and so on and has established a meaning of its own. As observed by Schwarzenberger “[t]hough there is no such thing as *the* m.f.n. clause, it is equally necessary to emphasize that there is such a thing as *the* m.f.n. Standard.”<sup>69</sup> In the process of interpretation dictionaries will not be used to supply ordinary meaning to the ‘terms of art’ in such a way that destroys their established meaning. In the context of MFN clause in investment agreements “Article 31 of the Vienna Convention cannot be invoked by tribunals to sever the terms of art employed in investment treaties from international law as the legal system that hitherto has sustained them.”<sup>70</sup> Treating MFN as a term of art will facilitate the evolution of *jurisprudence constante* in international law of foreign investment.

#### IV. Concluding Remarks

Investment tribunals are regime specific and often investor centric. In majority cases the MFN standard is expansively interpreted to encompass both substantive as well as procedural issues of third-party treaties. As a result, even dispute settlement provisions of third-party treaties are invoked to settle disputes arising out of the basic treaty, causing uncertainty for States and instability for the regime. There is no inbuilt mechanism within investment treaties to address such anomalies; rather, it requires the critical engagement of legal scholars to develop alternative techniques. The discussion on presumptive approaches, balancing conceptual evolution over textual interpretation, and recognising relative autonomy of treaty components, shows how limitations can be imposed on the interpretative discretion of investment tribunals. If future investment treaties expressly adopt some of these interpretative principles, it will provide a negative uniformity and consistency as to how fundamental principles of investment law should not be interpreted.

<sup>66</sup> *ILC Commentaries on Law of Treaties*, supra note 57, p. 39, para. 8.

<sup>67</sup> *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgement, 12 November 1991, ICJ Reports 1991, 53.

<sup>68</sup> *Idem*, p. 69, para. 48, quoting from *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, 21 December 1962, ICJ Reports 1962, 319, 336.

<sup>69</sup> Georg Schwarzenberger, ‘The Most-Favoured-Nation Standard in British State Practice’, *British Year Book of International Law* 1945-29, p. 104.

<sup>70</sup> Douglas, supra note 32, p. 100.