The Application of the Most-Favoured-Nation Clause to the Dispute Settlement Provisions of Bilateral Investment Treaties: Domesticating the 'Trojan Horse'

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Abstract

Contracting states bring a 'Trojan Horse' into the city when providing for most-favoured-nation clauses (MFN clause) in bilateral investment treaties (BIT). This affects the general equilibrium of the treaties, as recent case law from investment arbitration tribunals illustrates. In these cases the controversial issue is the applicability of the MFN clause to the dispute settlement provisions of the BITs. Arbitration practice and mainstream literature so far have focussed on the specific nature of the dispute settlement mechanism, asking whether the MFN clause should cover it or not. This article analyses the arguments put forward so far on this issue, and argues that by reason of the 'effet utile' the MFN clause always covers the dispute settlement mechanism, unless the opposite intention of the Contracting states can be demonstrated. Furthermore, this article considers that the prevailing focus on the entire mechanism is misleading. The main issue is in fact the scope of application of the MFN clause to the individual provisions on dispute settlement. Underlying this issue there is the tension between the MFN clause and the other provisions of BITs, whatever their procedural or substantive nature. This tension puts into question the rationality of providing for MFN clauses in bilateral investment treaties. But once such a clause is already adopted, this article suggests that the way to domesticate this 'Trojan Horse' is to substitute conditional MFN clauses for the unconditional MFN clauses presently provided for in BITs.

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1 Introduction

The most-favoured-nation clause (hereinafter MFN clause) has been included in international agreements since the twelfth century. Originally it was used mainly with the aim of preventing discrimination in international trade. It was then extended to the area of international investments, first of all through the friendship, commerce and navigation treaties, and later, with their successors, the bilateral investment treaties (hereinafter BIT), which aim at the promotion and protection of investments. The MFN clause has become such a typical clause in treaties that the International Law Commission (hereinafter ILC) has drawn up Draft Articles on Most-Favoured-Nation clauses (hereinafter the ILC's Draft Articles).[1]

Even though the ILC's Draft Articles did not become a treaty and are thus non-binding, they did codify the definition and the rules governing the operation of the MFN clause.

The definition is provided for in Article 4. Under its terms, '[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 an agreed sphere of relations'.[2] The most-favoured-nation treatment is defined under Article 5 as the 'treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that 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'.[3]

The ILC's Draft Articles then describe the basic structure in the functioning of the MFN clause, with respect to the source of the right to most-favoured-nation treatment, as well as the scope of the latter. Concerning the source of this right, Article 8 provides that it stems from the treaty containing the MFN clause, entitled the basic treaty.[4] The clause also determines the scope of the right as provided for by Article 9.[5] Thus, the beneficiary of most-favoured-nation treatment can only demand the application of the

[1] International Law Commission, Draft Arts. on Most-Favoured-Nation Clauses (hereinafter ILC Draft Arts.), text adopted by the International Law Commission at its 30th session (1978), available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1_3_1978.pdf. For commentaries on the ILC's Draft Arts., see *Report of the International Law Commission on the Work of its Thirtieth session*, 8 May– 28 July 1978, Official Records of the General Assembly, Thirty-third session, Supplement No. 10, Doc. A/33/10 (hereinafter ILC Report), 2 *Yearbook of the International Law Commission* (1978) 8, available at: http://untreaty.un.org/ilc/documentation/english/A_33_10.pdf.

[2] *Ibid.*

[3] *Ibid.*

[4] Art. 8 states: '[t]he source and scope of most-favoured-nation treatment : 1. The right of the beneficiary State to most-favoured-nation treatment arises only from the most-favoured-nation clause referred to in article 4, or from the clause on most-favoured-nation treatment referred to in article 6, in force between the granting State and the beneficiary State. 2. The most-favoured-nation treatment to which the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, is entitled under a clause referred to in paragraph 1 is determined by the treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State.': *ibid.*

[5] Art. 9 states: '[s]cope of rights under a most-favoured-nation clause: 1. Under a most-favoured-nation clause the beneficiary States 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.': *ibid.*

more favourable treatment accorded to a third state when it falls within the limits of the subject matter of the clause. Article 9 thus reinforces the *ejusdem generis* principle, generally recognized and affirmed in the case law of international judicial bodies.[6]

If the MFN clause of the basic treaty constitutes the source of the right to most-favoured-nation treatment as well as determining its scope, the concrete treatment that the beneficiary state can demand depends, on a factual basis, on the more favourable treatment accorded to a third state. Moreover, this treatment constitutes the condition *sine qua non* in the operation of the MFN clause. Its functioning indeed requires that more favourable treatment is provided to a third state. It follows that the source of the right to most-favoured-nation treatment has to be distinguished from the basis of the actual treatment that is granted.

Neglecting this distinction sometimes leads to the assertion that, in practice, the right of the beneficiary state to most-favoured-nation treatment derives from the treaty concluded by the granting state with a third state, which contains more favourable treatment. Besides the inconsistency of such a viewpoint as regards Article 8 of the ILC's Draft Articles, this viewpoint contradicts the principle of the relative effect of treaties. Indeed, the third-party treaty does not have any effect on the relations between the granting state and the beneficiary state. Furthermore, such an opinion cannot be justified in light of Article 36 of the Vienna Convention on the Law of Treaties which deals with rights emerging from a treaty for third states. According to this Article, such a benefit granted to a third state can only derive from a clear intention expressed by the parties to the treaty.[7] And yet, as explained by the ILC in its commentary on Article 8 of the Draft Articles on Most-Favoured-Nation Clauses, the parties to a third-party treaty may be aware of the fact that their agreement may have an indirect effect due to the most-favoured-nation clause.[8] This indirect effect, however, is unintentional. As considered in 1952 by the International Court of Justice in the *Anglo-Iranian Oil Company* case 'the treaty containing the most-favoured-nation clause is the basic treaty. . . . A third-party treaty, independent of and isolated from the basic treaty, cannot produce any legal effect as between the United Kingdom [the beneficiary state] and Iran [the granting state]: it is *res inter alios acta*'.[9]

All these rules governing the functioning of the MFN clause apply in the field of international investment law.[10] One of them, the *ejusdem generis* principle, is at the core of

[6] *Anglo-Iranian Oil Co. Case (United Kingdom v. Iran) (Preliminary objection)* [1952] ICJ Rep 93, at 110; *The Ambatielos claim (United Kingdom v. Greece)* (1956), Reports of International Arbitral Awards (vol. XII) 83, at 106.

[7] Art. 36 states: '[t]reaties providing for rights for third States: 1. A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assents shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides. 2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty': Vienna Convention on the Law of Treaties (1969) (VCLT), 1155 UNTS (1980) 331, at 341, available at: http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

[8] ILC Report, *supra* note 1, at 26.

[9] *Anglo-Iranian Oil Co. Case*, *supra* note 6, at 109.

[10] It can be noted that in the context of international investment law, the beneficiary of the most-favoured-nation clause is the investor. Indeed BITs provide for rights in favour of investors.

the debate which has arisen in this field of law concerning the incorporation of dispute settlement provisions of third-party BITs which investors consider more favourable than those contained in the basic BIT. Six years after the *Maffezini* case,[11] which marked the starting point of this controversy, four decisions on jurisdiction have recently dealt again with this issue.[12] They constitute a good opportunity to re-examine the arguments put forward by arbitration tribunals and commentators and to contribute to this impassioned debate.

The issue considered here is whether the MFN clause can allow for the incorporation of dispute settlement provisions contained in third-party BITs. To put it in different terms, the question is whether these dispute settlement provisions fall within the scope of the provisions which can be incorporated through the MFN clause. This question arises when the wording of the MFN clause does not mention in explicit terms whether the clause covers dispute settlement provisions or not.[13] This article focuses only on the analysis of this type of MFN clause. It must be noted that most MFN clauses remain silent on this issue. Therefore, in order to determine the scope of the MFN clause with regard to dispute settlement provisions, it is necessary to interpret the intention of the contracting states in conformity with Articles 31 and 32 of the Vienna Convention on the Law of Treaties.[14]

[11] *Emilio Agustin Maffezini v. Kingdom of Spain*, decision of the tribunal on objections to jurisdiction, 25 Jan. 2000, ICSID Case No. ARB/97/7, available at: http://ita.law.uvic.ca/chronological_list.htm.

[12] *Suez, Sociedad General de Aguas de Barcelona SA and InterAguas Servicios Integrales del Agua SA v. The Argentine Republic*, decision on jurisdiction, 16 May 2006, ICSID Case No. ARB/03/17; *National Grid PLC v. The Argentine Republic*, decision on jurisdiction, 20 June 2006, UNCITRAL Arbitration; *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v. The Argentine Republic*, ICSID Case No. ARB/03/19 and *AWG Group Ltd. v. The Argentine Republic*, UNCITRAL Arbitration, decision on jurisdiction, 3 Aug. 2006; *Telenor Mobile Communications AS v. The Republic of Hungary*, award, 2 Oct. 2006, ICSID Case No. ARB/04/15. The decisions and award are available at: http://ita.law.uvic.ca/chronological_list.htm. This article is up to date with arbitration practice until 6 Dec. 2006.

[13] An example of an explicit clause is given by the UK model investment treaty. Art. 3(3) of which, providing for most favoured-nation treatment, mentions that 'for avoidance of doubts it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of articles 1 to 11 of this agreement'. Arts. 8 and 9 provide for dispute settlement. For an example see the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Armenia for the promotion and protection of investments (1997), 1967 UNTS (1997) 86, at 88.

[14] Art. 31 states: 'General rule of 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 relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended.'Art. 32 states: 'Supplementary means of interpretation: Recourse may be had to supplementary means of interpretation, including the preparatory work and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable': Vienna Convention on the Law of Treaty, *supra* note 7, at 340.

Dealing with this interpretation issue, mainstream arbitration practice, as well as legal scholars, has considered the application of the MFN clause to the dispute settlement mechanism itself. So far, the focus has been on the procedural dimension of the dispute settlement mechanism in relation to substantive provisions included in BITs.

This article argues that such a focus on the nature of the dispute settlement mechanism is inappropriate in the process of interpreting the scope of the MFN clause. Two arguments support this viewpoint. First, the starting point of the interpretation process has to be the MFN clause. On the purpose and effectiveness of the MFN clause, this article argues that it should be presumed that the clause allows in principle for the incorporation of the provisions of the dispute settlement mechanism included in third-party BITs. Nevertheless the contracting states may have intended the MFN clause not to incorporate the dispute settlement provisions. The interpretation of the clause may therefore lead to a reversal of the rebuttable presumption of application.

Secondly, this paper argues that the interpretation issue concerns the dispute settlement provisions themselves, and not the dispute settlement mechanism as a whole. There is no reason to exclude the mechanism from the scope of the MFN clause. The difficulty arises from the determination of the scope of the clause in relation to dispute settlement provisions. This question highlights the tension between the MFN clause and the other provisions of the basic BIT. By allowing the substitution of the provisions of the basic BIT with those of a third-party BIT, this 'Trojan Horse' introduced by the contracting states within BITs may undermine the general equilibrium of the treaty. One way to domesticate this 'Trojan Horse' would be to substitute the conditional MFN clause for an unconditional one.

The second part of this article will aim at demonstrating that the procedural nature of the dispute settlement mechanism does not justify its exclusion from the scope of the MFN clause. The third part purports to show that only a systematic interpretation can rebut the presumption that the MFN clause applies to the dispute settlement mechanism. The fourth part raises the question of the application of the MFN clause to dispute settlement provisions. In conclusion, the article looks at the respective roles of contracting states and arbitrators in the 'domestication' of the MFN clause.

2 The Presumptive Application of the MFN Clause to the Dispute Settlement Mechanism

The main reason given by the arbitral tribunal in the *Plama* case concerning why the parties to a BIT may be presumed to have excluded the dispute settlement mechanism from the scope of the MFN clause rested in the distinction it drew between substantive and procedural provisions.[15] It considered that '[t]his matter can also be viewed as forming part of the nowadays generally accepted principle of the separability

[15] *Plama Consortium Ltd v. Republic of Bulgaria*, decision on jurisdiction, 8 Feb. 2005, ICSID Case No. ARB/03/24, available at: http://ita.law.uvic.ca/chronological_list.htm.

(autonomy) of the arbitration clause. Dispute resolution provisions constitute an agreement on their own, usually with interrelated provisions.'[16]

First, I contend in section (A) that the dispute settlement mechanism cannot be considered as an agreement in itself, and that the principle of severability cannot be used in the case of the application of the MFN clause to this mechanism. Secondly, in section (B) I will argue that the protective dimension of the dispute settlement mechanism in international investment law further blurs the distinction between procedural and substantial provisions.

A *The Non-severability of the Dispute Settlement Mechanism*

Judge Schwebel considers that 'the parties to an agreement containing an arbitration clause conclude not one agreement but two: first, the substantive or principal agreement which provides for a certain course of action; second, an additional, separable agreement which provides for arbitration of disputes arising out of the principal agreement'.[17] This opinion is shared by part of the literature. However, agreeing with Professor Mayer, I argue here that the arbitration clause cannot be understood as constituting an autonomous agreement in itself.[18]

According to the formal unity reasoning, in order to distinguish between two agreements, the formal unity would have to be contradicted by the express mention by the parties of such an intention. However, this intention cannot be presumed. From a substantive point of view, an arbitration clause is also not autonomous. Its aim is to be applied to disputes arising out of the other clauses of the agreement.

If this particular purpose justifies the arbitration clause's lack of autonomy, it underlines at the same time the necessity to separate this clause from the rest of the agreement in order to ensure its application. It 'must be severed precisely because it contributes to defining the process by which the fate of the contract will be decided'.[19] Without this fiction of severability, an arbitration clause could not have such a function in the event of an allegation of the initial or continuing invalidity of the agreement. Indeed, an arbitral tribunal would not have the competence to settle disputes arising out of the agreement which is the immediate source of the tribunal's creation.[20] Such a consequence would not accord with the intention of the parties. An allegation of nullity is one of the difficulties arising out of the agreement for which the arbitration clause is provided. Otherwise, in this hypothesis, a respondent intending to paralyse the arbitrators' competence would only have to argue that the agreement was void. Such a manoeuvre would undermine the viability of the arbitration process.

In the light of these considerations, international and national courts have referred to the severability of the arbitration clause to find that this clause is not affected by

[16] *Ibid.*, at para. 212.

[17] Schwebel, 'The Severability of the Arbitration Agreement', in S. M. Schwebel, *International Arbitration: Three Salient Problems* (1987), at 5.

[18] Mayer, 'Les limites de la séparabilité de la clause compromissoire', 2 *Revue de l'arbitrage* (1998) 359.

[19] *Ibid.*, at 362 (my translation).

[20] For a discussion concerning the '*Kompetenz-Kompetenz*' doctrine, see Sanders, 'L'autonomie de la clause compromissoire', in F. Eisemann and Y. Derains, *Hommage à Frédéric Eisemann, Liber Amicorum* (1978), at 32.

the alleged invalidity of the agreement.[21] This functional severability is reinforced by several arbitration rules. For instance, Article 45 of the Arbitration (Additional Facility) Rules of the International Centre for Settlement of Investment Disputes (ICSID), entitled 'Preliminary Objections', provides in its first paragraph that 'the Tribunal shall have the power to rule on its competence. *For the purposes of this Article,*[22] an agreement providing for arbitration under the Additional Facility shall be separable from the other terms of the contract in which it may have been included'.[23]

With regard to the functional dimension of the principle of severability, it cannot be considered that the question of the application of the MFN clause to the dispute settlement mechanism 'can also be viewed as forming part of the nowadays generally accepted principle of the separability (autonomy) of the arbitral clause'.[24] Moreover, the intellectual distinction between procedural and substantive provisions, which is at the basis of the severability concept, is rendered moot by the protective dimension of the dispute settlement mechanism in international investment law.

B *The Protective Dimension of the Dispute Settlement Mechanism*

How can the protection of rights be effective if the beneficiary of those rights does not have access to a neutral forum in which to press a claim? Foreign investors have been facing this paradox for a long time. The emergence and development of the arbitration clause, first in state contracts, then within BITs, put an end to this situation.

Although the first transnational arbitration probably dates back to 1864,[25] the significant development of this mode of dispute settlement by way of arbitration clauses did not become widespread until the twentieth century. Previously, disputes arising between states and foreign investors were most often resolved either at inter-state or national level, both solutions providing unsatisfactory protection to investors. Indeed, at the inter-state level, the features of diplomatic protection do not put the individual or the private entity at the core of the litigation. Indeed, the discretionary exercise of diplomatic protection leads to a dispute between the host

[21] As examples of national case law, see for France, Cass. 1ère civ. 7 May 1963; for the USA, *Prima Paint v. Flood & Conklin Mfg. Co,* 388 US 395, 402 (1967). As an example of international case law see *Fisheries Jurisdiction Case (United Kingdom v. Iceland) (Jurisdiction of the Court) (1973)* [1973] ICJ Rep 3.

[22] Emphasis added.

[23] ICSID Additional Facility Rules, Sched. C—Arbitration (Additional Facility) Rules, available at: http://www.worldbank.org/icsid/facility/facility.htm. Similarly, Art. 16, para. 1 of the UNCITRAL Model Law on International Commercial Arbitration provides: '[t]he arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. *For that purpose*, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause' (emphasis added): UN Commission on International Trade Law Model Law on International Commercial Arbitration, available at: http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf.

[24] *Plama Consortium Ltd v. Republic of Bulgaria*, *supra* note 15, at para. 212.

[25] *Compagnie universelle du Canal de Suez v. Vice-Roi d'Egypte*, judgment of 21 Apr. 1864; see Leben, 'La théorie du contrat d'Etat et l'évolution du droit international des investissements', 302 *Recueil des Cours de l'Académie de Droit International* (2003) 197, at 219.

state and the national state, which is different from the dispute arising between the host state and a private person.[26] Under this mechanism, political considerations may trump the defence of investors' interests. Such considerations also apply at the national level. Indeed the impartiality of local tribunals and courts charged with settling disputes arising between the investor and the host state may sometimes be cast in doubt.

This point of view is widespread in legal literature. For example, Professor Sornarajah believes that the introduction of arbitration clauses, first in state contracts, then in BITs, is 'a major step that has been taken to ensure the protection of the foreign investor by enabling him to have direct access to a neutral forum for the disputes that could arise between him and the host state'.[27] This link between arbitration clauses and the protection of foreign investors is so widely accepted that even the *Plama* Tribunal[28] agreed with the observation of the arbitrators in the *Maffezini* case that the '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'.[29] This protective purpose accounts for the fact that international judicial bodies consider these dispute settlement arrangements not as a mere procedural mechanism but as arrangements provided better to protect the rights of traders and investors abroad.[30] They thus appear to be closely linked to the substantive dimension of the treatment granted by BITs.

About this protective dimension of the dispute settlement mechanism, the *Maffezini* Tribunal concluded that, 'if a third-party treaty contains provisions for the settlement of disputes that are more favourable to the protection of 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'.[31] Such a general statement, framed as an *obiter dictum*, appears to prejudge the intention of the contracting states. Indeed, although it seems that there is nothing in the nature of the dispute settlement mechanism that would justify its exclusion from the application of the MFN clause, this may have been the intention of the parties to the BIT. It is thus necessary to determine the intentions of the contracting states.

3 The Rebuttable Presumption of Application of the MFN Clause to the Dispute Settlement Mechanism

The *Plama* Tribunal considered that, in principle, 'an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set

[26] See *Mavrommatis Concessions in Palestine*, 1924 PCIJ, Series A, No. 2.
[27] M. Sornarajah, *The International Law on Foreign Investment* (2004), at 250.
[28] *Plama Consortium Limited v. Republic of Bulgaria*, *supra* note 15, at para. 193.
[29] *Maffezini v. Kingdom of Spain*, *supra* note 11, at para. 54.
[30] *The Ambatielos claim*, *supra* note 6, at, 107.
[31] *Maffezini v. Kingdom of Spain*, *supra* note 11, at para. 56.

forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them'.[32] It is contended here that the presumption should be the opposite. An MFN clause in a basic BIT incorporates the dispute settlement provisions of a third-party BIT unless the interpretation of the clause demonstrates that the parties had an opposite intention.

The purpose of this section is to identify the circumstances under which the intention of the contracting states could be interpreted as excluding the dispute settlement mechanism from the scope of an MFN clause. In light of Articles 31 and 32 of the Vienna Convention on the Law of Treaties,[33] it will first of all be argued that the literal interpretation of various types of MFN clauses does not allow the interpreter to reach the conclusion that the parties may have intended to exclude the dispute settlement mechanism from their scope. Secondly it will be argued that such an intension can only be identified through systematic interpretation.

A *An Inconclusive Literal Interpretation*

This section draws up a typology of the various paragraphs which can be included in an MFN clause. This study is based on the clauses which were analysed by the arbitral tribunals in all the relevant cases. The presumption is that these MFN clauses are representative of the conventional practice.

On a literal interpretation, MFN clauses can be shown to contain three components: first, the paragraphs dealing with the general scope of the MFN clause; secondly, those listing the different matters covered by the clause; and, finally, those concerning exceptions. Depending on the MFN clauses, these paragraphs can or cannot be included in the same clause.

The first category concerns the general scope of the MFN clause. Within this category, two types of wording can be distinguished: a broad one and a narrower one. An example of the broad formulation is given in Article 4 of the BIT concluded between Spain and Argentina (hereinafter the Spain–Argentina BIT). Its second paragraph provides: '[i]n all matters governed by this Agreement, such treatment shall be no less favourable than that accorded by each Party to investment made in its territory by investors of a third country'.[34] This provision was analysed by various tribunals in the *Maffezini*,[35] *Gas Natural,*[36] *Suez,*[37] and *Suez-AWG* cases.[38] As stated by the *Suez*

[32] *Plama Consortium Ltd v. Republic of Bulgaria*, *supra* note 15, at para. 223.

[33] VCLT, *supra* note 14, Arts. 31 and 32.

[34] Acuerdo para la promocion y la proteccion reciproca de inversiones entre il Reino de Espana y la Republica Argentina (1991) (Agreement between the Kingdom of Spain and the Republic of Argentina for the promotion and the reciprocal protection of investments), available at : http://www.unctad.org/sections/dite/iia/docs/bits/argentina_spain_sp.pdf, English translation in 1699 UNTS (1992) 202, at 204.

[35] *Maffezini v. Kingdom of Spain*, *supra* note 11, at paras. 38–64.

[36] *Gas Natural SDG, SA v. The Argentine Republic*, decision of the tribunal on a preliminary question on jurisdiction, 7 June 2005, ICSID Case No. ARB/03/10, available at: http://ita.law.uvic.ca/chronological_list.htm, at paras. 41–49.

[37] *Suez, Sociedad General de Aguas de Barcelona SA v .The Argentine Republic*, *supra* note 12, at paras. 52–66.

[38] *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v. The Argentine Republic*, and *AWG Group Ltd. v. The Argentine Republic*, *supra* note 12, at paras. 52–68.

Tribunal, it cannot be denied that the dispute settlement provisions provided for in Article 10 of the Spain–Argentina BIT are a 'matter' covered by that treaty.[39] Even the tribunals which adopted more restrictive reasoning concerning the application of the MFN clause to dispute settlement provisions recognized that such a formulation had contributed to explaining the decisions of the tribunals which were required to interpret these broadly worded clauses.[40]

The MFN clause provided for in Article 10 of the 1886 Treaty concluded between the United Kingdom and Greece contained a similar broadly worded formulation. It referred indeed to 'all matters relating to commerce and navigation'. Interpreting this clause, the arbitration tribunal in the *Ambatiellos* case concluded that '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 matters relating to commerce and navigation"'.[41] This statement constitutes a confirmation that this broad wording does not exclude the dispute settlement mechanism from the scope of the MFN clause. However, it also suggests that such exclusion might be inferred from a clause which does not refer to 'all matters relating to commerce and navigation'. This suggestion is confirmed in the opinion of a few arbitral tribunals which dealt with narrowly formulated MFN clauses.

It is argued here that such narrower wording also cannot be interpreted as excluding the dispute settlement mechanism from the scope of the MFN clause. An example of this kind of clause is Article 3(1) of the BIT concluded between the United Kingdom and Argentina (hereinafter the UK–Argentina BIT). Under its terms, '[n]either Contracting Party shall in its territory subject investments or returns of investors of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own investors or to investors or returns of investors of any third State'.[42]

Even the *Maffezini* Tribunal has admitted that it is a narrower formulation, in comparison with the words 'all rights' or 'all matters'. The problem lies in the lack of definition of the term 'treatment' in conventional practice. Confronted with this lack, three arbitral tribunals have provided their own definition of this term. According to the *Siemens* Tribunal, '"treatment" in its ordinary meaning refers to behaviour in respect of an entity or a person'.[43] The *Suez* and the *Suez-AWG* Tribunals adopted the same

[39] *Suez, Sociedad General de Aguas de Barcelona SA v .The Argentine Republic*, *supra* note 12, at para 55.

[40] *Salini Costruttori SpA and Italstrade SpA v. The Hashemite Kingdom of Jordan*, decision on jurisdiction, 9 Nov. 2004, ICSID Case No. ARB/ 02/13, available at: http://ita.law.uvic.ca/chronological_list.htm, at paras. 117–118.

[41] *The Ambatielos Claim*, *supra* note 6, at 107.

[42] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the promotion and the protection of investments (hereinafter UK–Argentina BIT) (1990), available at: http://www.unctad.org/sections/dite/iia/docs/bits/uk_argentina.pdf.

[43] *Siemens AG v. The Argentine Republic*, decision on jurisdiction, 3 Aug. 2004, ICSID Case No. ARB/02/8, available at: http://ita.law.uvic.ca/chronological_list.htm, at para. 85.

definition. They believed that 'the ordinary meaning of that term within the context of investment includes the rights and privileges granted and the obligations and burdens imposed by a Contracting State on investments made by investors covered by the treaty'.[44] In the light of these definitions, they considered that the term 'treatment' does not exclude the dispute settlement mechanism from the scope of the MFN clause. It should be noted that the *Plama* Tribunal did not reach a similar conclusion when it considered the question.[45] It stated indeed that '[i]t is not clear whether the ordinary meaning of the term "treatment" in the MFN provision of the BIT includes or excludes dispute settlement provisions contained in other BITs to which Bulgaria is a Contracting Party'.[46]

In drawing conclusions, it has to be borne in mind that the interpretation has to demonstrate the intention of the contracting states to exclude the dispute settlement mechanism from the scope of the MFN clause. It is argued here that the differences and hesitations in arbitration practice mentioned above do not allow one to conclude that the term 'treatment' clearly expresses the intention of the parties to do so, and thus to rebut the presumption of applicability.

Such exclusion may be deduced from a paragraph contained in some MFN clauses, which lists the various matters which they are deemed to cover. The fact that there is no mention of the dispute settlement mechanism may indeed lead one to the conclusion that it is excluded from their scope. An example of such a list is provided by Article 1103 of the North American Free Trade Agreement (NAFTA).[47] Its paragraph 1 states: '[e]ach Party shall accord to investors of another Party treatment no less favourable than it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments'. Examining this provision, the *Plama* Tribunal believed that such a provision explicitly excluded the dispute settlement provisions from the scope of the MFN clause.[48] However, in an analysis of Article 3(2) of the UK–Argentina BIT, the *Suez–AWG* Tribunal reaches a different conclusion. This Article provides that: '[n]either Contracting Party shall in its territory subject investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own investors or to investors of any third state'.[49] The Tribunal considered that '[t]he right to have recourse to international

[44] *Suez, Sociedad General de Aguas de Barcelona SA v .The Argentine Republic*, *supra* note 12, at para. 55. *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v. The Argentine Republic* and *AWG Group Ltd. v. The Argentine Republic*, *supra* note 12, at para 55.

[45] *Plama Consortium Ltd v. Republic of Bulgaria*, *supra* note 15, at para. 189.

[46] In the *Telenor* case, the arbitration tribunal considered that the MFN clause of the BIT concluded between Norway and Hungary referring to 'treatment' cannot be interpreted as allowing the importation of dispute settlement provisions: *Telenor Mobile Communications AS v. The Republic of Hungary*, *supra* note 12, at para. 92.

[47] North American Free Trade Agreement (1994) (NAFTA), available at: http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=78.

[48] *Plama Consortium Ltd v. Republic of Bulgaria*, *supra* note 15, at para. 203.

[49] UK–Argentina BIT, *supra* note 48.

arbitration is very much related to investors' "management, maintenance, use, enjoyment, or disposal of their investments." It is particularly related to the "maintenance" of an investment, a term which includes the protection of an investment.'[50]

While one may disagree with this statement, it cannot be denied that this inconsistency in arbitration practice as regards the interpretation of this component of a number of MFN clauses makes its effect ambiguous as to whether or not the dispute settlement mechanism is excluded from their scope. Taking into account that the interpretation of the parties' intention aims at rebutting the presumption of application, such an inconsistency in arbitration practice does not allow one to conclude that these paragraphs express the clear intention of the parties to exclude the dispute settlement mechanism from the scope of the MFN clause. This conclusion is valid at least as long as the clause contains one of the terms referred to in Article 3(2) of the UK–Argentina BIT.

Finally, the dispute settlement mechanism may be excluded from the scope of application of a number of MFN clauses through an interpretation of a paragraph which specifically excludes some matters from their scope. An example of such paragraph is given by Article 4(3) of the Spain–Argentina BIT which provides that 'the treatment shall not extend to the privileges which either Party may grant to investors of a third State by virtue of its participation in a free trade area; a customs union; a common market; a regional integration agreement; or an organization of mutual economic assistance by virtue of an agreement concluded prior to the entry into force of this Agreement, containing terms similar to those accorded by that Party to participants of said organization'.[51] Interpreting this provision, the *Suez* Tribunal stated that '[t]he failure to refer among these excluded items to any matter remotely connected to dispute settlement reinforces the interpretation that the most-favoured-nation clause includes dispute settlement'.[52] Considering a comparable provision of the UK–Argentina BIT, the *National Grid* Tribunal recalled that, '[a]s a matter of interpretation, specific mention of an item excludes others: *expressio unius est exclusio alterius*'.[53]

As long as the dispute settlement mechanism is not expressly excluded from the scope of the MFNC, it is argued that the paragraphs on exceptions do not have the effect of excluding the dispute settlement mechanism from the scope of the MFN clause.

From the above analysis of the MFN clauses as examined by arbitration tribunals, it is contended that the literal interpretation of the various paragraphs which can be included within the MFN clause does not allow one to conclude that MFN clauses exclude dispute settlement from their scope. However, such a conclusion may be arrived at through a teleological and systematic interpretation.

[50] *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v. The Argentine Republic*, and *AWG Group Ltd. v. The Argentine Republic*, *supra* note 12, at para. 57.

[51] Spain–Argentina BIT, *supra* note 34.

[52] *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v. The Argentine Republic*, and *AWG Group Ltd. v. The Argentine Republic*, *supra* note 12, at para. 58.

[53] *National Grid PLC v. The Argentine Republic*, *supra* note 12, at para. 82.

B *A Decisive Systematic Interpretation*

As demonstrated above, the dispute settlement mechanism aims at protecting investors.[54] This objective, in conformity with the object and purpose of BITs, prohibits the conclusion that the teleological interpretation of MFN clauses leads to the exclusion of the dispute settlement mechanism from their scope.

However, this teleological interpretation cannot be considered decisive in the interpretation process. The purpose and object of all BITs do not prevent the parties to a specific BIT from excluding the dispute settlement mechanism from the scope of the MFN clause. In this perspective, Professor Sinclair highlights 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'.[55] Therefore, it is considered that only a systematic interpretation may lead to the conclusion that the MFN clause does not cover the dispute settlement mechanism. The systematic interpretation is understood here in its broader sense. Apart from the text of the BIT, it includes the consideration of texts and events outside the framework of the treaty.[56]

It is argued that only an explicit intention of the contracting states can reverse the presumption of application of the clause to the dispute settlement mechanism. Such an intention can be expressed at the time of the drafting of the treaty or at a later stage. Concerning the time of the drafting of the treaty, the *travaux préparatoires* may reveal whether the parties intended to exclude the dispute settlement mechanism from the scope of the MFN clause.[57] Thus, the *travaux préparatoires* to the Free Trade Area of the Americas agreement expressly state that the MFN clause does not encompass the international dispute resolution mechanism.[58] The explicit exclusion of the dispute settlement mechanism by the contracting states can also be expressed after the conclusion of the treaty. Thus, after the *Siemens* case, Argentina and Panama exchanged diplomatic notes concerning an 'interpretative declaration' of the MFN clause contained in their 1996 investment treaty. It aimed at making it clear that the clause does not extend to dispute settlement provisions.[59]

Arbitration tribunals have also referred to the practice of the contracting states outside their direct conventional relations, both at the time of drafting of the basic BIT and at a later stage, to determine their intention concerning the application of the MFN clause to the dispute settlement mechanism.[60] It is argued here that analysis of this

[54] See *supra* at 2.B.

[55] I. Sinclair, *The Vienna Convention on the Law of Treaties* (1984), at 130, quoted in *Plama Consortium Ltd v. Republic of Bulgaria*, *supra* note 15, para 193.

[56] R. Bernhardt (ed.), *Encyclopedia of Public International Law* (1995), at 1420.

[57] Although decisive in the context of this article, it should be recalled that *travaux préparatoires* remain a 'supplementary mean of interpretation' under Art. 32 of the VCLT, *supra* note 14.

[58] See http://www.ftaa-alca.org/alca_f.asp.

[59] *National Grid PLC v. The Argentine Republic*, *supra* note 12, at para. 85.

[60] This is not one of the means of interpretation listed in the VCLT and it should not be inferred from the present analysis.

practice cannot lead to the conclusion that the parties intended the MFN clause not to cover it. This conclusion is based on the inconsistency which very often characterizes state practice. This inconsistency can be highlighted when comparing the practice of the parties to the basic BIT. Hitherto, as pointed out by the *National Grid* Tribunal[61] in relation to the UK–Argentina BIT, the differences in state practice constitute an obstacle in the identification of a common intention. This statement is reinforced by the inconsistency which also defines the practice of each state. As an example it can be noted than the 'interpretative declaration' mentioned above between the Argentine Republic and Panama was not made by Argentina in the context of the other BITs it had concluded.[62]

Most of the time, such inconsistencies in state practice outside their conventional relations will make the identification of a clear intention to exclude the dispute settlement mechanism near to impossible.

Interpretation of the MFN clause through subsequent practice and the question of the common intention of the contracting states raise the question of the evolutive interpretation of treaties. This principle of interpretation was defined by the International Court of Justice in the *Namibia Advisory Opinion*.[63] It declared that 'an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation'. In a similar vein, the European Court of Human Rights considered in the *Tyrer* case that 'the Convention is a living instrument which . . . must be interpreted in the light of present-day conditions'.[64]

This evolutive interpretation raises two issues. First, a number of authors question the legitimacy of interpreting the intention of the parties at a later stage than the drafting of the treaty. Thus, in his separate opinion in the *Gabcikovo-Nagymaros* case, Judge Bedjaoui considered that the interpretation of a treaty must comply with the intentions of the contracting states expressed at the time of its conclusion.[65] Such a point of view thus denies the evolutive dimension of the interpretation. The second matter does not have the same effect. It raises the question of the relevance of the intention of the contracting states in the interpretation process. According to a number of legal scholars, the evolutive interpretation of a treaty is only viewed through the evolution of the intention of the parties. Such a focus on the intention of the parties limits the effectiveness of the principle of interpretation. It is indeed difficult to prove that the interpretation of all the parties has evolved. Such a difficulty, however, has to be put in perspective with regard to bilateral treaties. In any case, in agreement with a number of authors, I consider here that to focus on the intention of the contracting states is misleading. The evolutive interpretation does not have to be based on the intention of the parties, but rather on the 'entire legal system'.

[61] *National Grid PLC v. The Argentine Republic*, *supra* note 12, at para. 85.

[62] See *supra* note 59.

[63] *Legal consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970) [1971] ICJ Rep 31.

[64] *Tyrer v The United Kingdom*, ECHR (1978), Series A No. 26, 1 EHRR (1978) 1, at 15.

[65] *Case concerning the Gabcikovo-Nagymaros project*, ICJ Rep (1997) 118.

Under this concept of evolutive interpretation, it could be demonstrated that the dispute settlement mechanism is excluded from the scope of the MFN clause, without referring to the common intention of the parties. However, according to the arbitration and conventional practices analysed earlier, it cannot be considered that there is a consensus outside the framework of the treaty that would support such an exclusion.

The elements of interpretation outside the treaty constitute only one dimension of systematic interpretation. The other is the interpretation of the MFN clause in the context of the treaty. This confrontation of the MFN clause with the other provisions of BITs does not solve the issue of the exclusion of the dispute settlement mechanism from the scope of the MFN clause. However, it raises a more relevant and complex question, related to the scope of the clause in relation to dispute settlement provisions. The question here is whether the MFN clause can allow for the substitution of all the dispute settlement provisions of the basic treaty.

4 The Indeterminable Scope of Application of the MFN Clause to Dispute Settlement Provisions

The arbitrators in the *Maffezini* case considered that the operation of the most-favoured-nation clause has 'some important limits arising from public policy considerations'.[66] Trying to clarify these limits, they stated that 'a distinction has to be made between the legitimate extension of rights and benefits by means of the operation of the clause, on the one hand, and disruptive treaty-shopping that would play havoc with the policy objectives of underlying specific treaty provisions, on the other hand'.[67]

It is argued here that it is difficult for arbitrators to draw this distinction between legitimate extension and disruptive treaty-shopping. This section will highlight that the core of the matter is the difficulty of distinguishing the provisions of the basic treaty in light of their importance in order to determine the scope of application of the MFN clause. Doing so will show that the MFN clause threatens the general equilibrium of BITs, and this will raise the question of the rationality of providing for this clause within BITs.

A *The Threat Posed by the MFN Clause to the Conventional Equilibrium of BITs*

In order to determine the scope of the extension of rights through the MFN clause as referred to by the *Maffizini* Tribunal, it is necessary to investigate the criteria which may be used to draw the line between legitimate claims and disruptive treaty-shopping. In this perspective, it can be noted that the arbitrators in the *Maffezini* case considered that, '[a]s a matter of principle, the beneficiary of the clause should not be able to override public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in question . . .'.[68]

[66] *Maffezini v. Kingdom of Spain, supra* note 11, at para. 56.
[67] *Ibid.*, at para. 63.
[68] *Ibid.*, at para. 62.

The *Tecmed* case may be useful in order to highlight the reasoning of the *Maffezini* Tribunal.[69] It should be noted first that the *Tecmed* Tribunal did not have to examine the application of the MFN clause to the dispute settlement provisions, but had to consider the 'time dimension' of the application of substantive rights. This case shows that the issue of the scope of the MFN clause can be raised in relation to all provisions of the basic treaty, be they procedural or substantive. The following comments thus focus on the provisions of the dispute settlement provisions as well as the substantive provisions of BITs. The tribunal considered that there are matters which, due to their significance and importance, go to the core of issues that must be deemed to have been specifically negotiated by the contracting parties, and which are decisive in their acceptance of the agreement. It concludes that on these matters the MFN clause cannot allow the replacement of provisions of the basic BIT with provisions of a third-party BIT.[70]

In light of the *Maffezini* and *Tecmed* cases, two sets of criteria can be distinguished. It is argued that neither of these criteria constitutes a clear guideline to determine the provisions of the basic BIT which cannot be replaced by a provision of a third-party BIT through the MFN clause. Furthermore it is considered that these criteria do not clarify the legitimate extension of rights when the matter of the provision of the third-party treaty is not dealt with in the basic treaty. If it can be presumed that the MFN clause could not result in conferring a competence on an arbitration tribunal which was not provided for in the basic treaty, the question of the incorporation of third-party treaty provisions remains unsolved in such a context.

The first condition deals with the substance of the provisions. According to the *Maffezini* Tribunal, provisions relating to public policy considerations cannot be replaced by a provision of a third-party treaty through the MFN clause.[71] Having given four examples,[72] the Tribunal recognized that '[o]ther elements of public policy limiting the operation of the clause will no doubt be identified by the parties or tribunals'.[73] It is not surprising that the Tribunal failed to provide an exhaustive list. This is

[69] *Tecnicas Medioambientales Tecmed SA v. The United Mexican States*, Award, 19 May 2003, ICSID Case No. ARB (AF)/00/2, available at: http://ita.law.uvic.ca/chronological_list.htm.

[70] '[I]t 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': *ibid.* (emphasis added), at para. 69.

[71] See *supra* note 68.

[72] The exhaustion of local remedies, the 'fork in the road' (the choice between submission to domestic courts or to international arbitration, where the choice, once made, becomes final and irreversible), the provision of a particular arbitration forum and an agreement on a highly institutionalized system of arbitration: see *Maffezini v. Kingdom of Spain*, *supra* note 11, at para. 63.

[73] *Ibid.*, at para. 63.

because every provision and thus the treaty as a whole relates to public policy considerations. BITs are indeed very much linked to the states' public interest.

The second criterion refers to the role of the provisions in the negotiation process. The two tribunals considered that there are provisions which play a decisive role in the acceptance of the treaty. As specified by the *Tecmed* Tribunal, those have to be deemed to have been specifically negotiated.[74] Yet again, this criterion appears to provide little guidance on the determination of the provisions of the basic BIT that cannot be replaced. Indeed the acceptance of a treaty is the result of negotiations whereby each provision is specifically negotiated in relation to the others. Thus every provision can be considered as decisive to the acceptance of the treaty. It is therefore difficult to separate the provisions of a treaty, the treaty being characterized by a general equilibrium.

Even though these criteria, established by arbitration practice, fail to provide clear indications of the scope of the MFN clause, they reveal nevertheless the impact of the MFN clause on the general equilibrium of the treaty. Of course it is not denied that, being accepted by the contracting states, the clause itself is a component of the general equilibrium. However, this equilibrium will necessarily be undermined by the substitution of provisions which are specifically negotiated and which constitute its pillars.

Considering this threat to the general equilibrium of the treaty, the question of the scope of the legitimate extension of rights through the MFN clause has to be reformulated. The question no longer concerns the modalities of application of the MFN clause, but the introduction of the MFN clause itself within BITs.

B *The Doubtful Rationality of Providing for an MFN Clause Within BITs*

In light of the effect of the MFN clause, it is sometimes alleged that it should be strictly interpreted. However, as stated by the *Suez* Tribunal, there is no rule and no reason for interpreting the MFN clause differently from the other provisions of BITs.[75]

Even if considered legitimate in relation to the purpose and effectiveness of the MFN clause, the effect of the latter raises the question of the rationality of providing for MFN clauses within BITs. The inclusion of such clauses is indeed in contradiction to the process of negotiation. As explained earlier, it allows for the substitution of provisions which were specifically negotiated, and thus undermines the general equilibrium of the treaty. This effect is reinforced by the fact that only the granting state has to accord the most favourable treatment to the beneficiary state, without any condition of reciprocity.[76]

In light of these difficulties, it has already been proposed in the literature that the MFN clause be removed from the BITs or states be encouraged to specify as far as possible the scope of application of the clause.

[74] See *supra* note 70.

[75] *Suez, Sociedad General de Aguas de Barcelona SA v. The Argentine Republic*, *supra* note 12, at para. 59.

[76] In the silence of the MFN clause, it has indeed to be presumed that the clause is unconditional, which means that the most-favoured-nation treatment is accorded without a condition awarding compensation: see International Law Commission, Draft Articles on Most-Favoured-Nation Clauses, *supra* note 1, at 37.

In order to resolve these issues, it is proposed here that contracting states replace the unconditional MFN clause provided for in BITs with a conditional MFN clause. This conditionality can take one of two forms.[77] Most-favoured-nation treatment can be granted under condition of compensation, or under condition of reciprocal treatment. In the first case, the beneficiary state has to offer concessions in order to benefit from the treatment. The second form is a category of the condition of compensation. It requires the beneficiary state to provide the granting state with the same or equivalent treatment. The conditional MFN clause in fact involves an agreement to negotiate. The automatic character of the unconditional clause is thus replaced by negotiations on the extension of the advantages.

Such negotiation in the context of the BITs would balance the granting of most-favoured-nation treatment and would contribute to re-equilibrating the treaties.

5 Conclusion

This article has aimed at showing that behind the issue of the application of the MFN clause to dispute settlement provisions lies the more fundamental question of the rationality of providing the MFN clause within BITs. This question does not arise concerning the nature of the dispute settlement mechanism. Its nature is no different from that of substantive provisions and thus requires the clause to cover that mechanism in principle. This rebuttable presumption can, however, be rebutted by the parties.

The question becomes relevant when determining which provisions of the basic BIT can be replaced through the MFN clause, in the case of the dispute settlement provisions, but also more generally for all the provisions of the BIT. Having to resolve this problem, arbitral tribunals are thus actually confronted with the fundamentally destabilising effect, for the overall equilibrium of the treaty, of the inclusion of the MFN clause within BITs. In relation to the latter, the clause can thus be viewed as a 'Trojan Horse'. The paradox of the 'Trojan Horse' is that it was brought into the city by the inhabitants themselves, just as the MFN clause is introduced by the contracting states within the BIT. How can this 'Trojan Horse' be domesticated?

The issue that is raised here is that of the rationality of the states' conventional practice and the role of arbitrators in enforcing and interpreting conventions. Can arbitrators replace contracting states, and if so, to what extent, for the purpose of solving the paradoxes of conventional practice? More specifically, one may wonder where the border lies between the interpretation and the creation of law. In other words, what is the legitimate function of judicial bodies? This is an issue of judicial policy which goes beyond the scope of this article. Similarly, here was not the place to question the political motivations of states in resorting to MFN clauses. However, states bear the responsibility of dealing with the legal consequences of the inclusion of the clause. If they are unwilling to drive away the 'Trojan Horse', it is incumbent upon them to prevent the soldiers from destroying the city, by adopting, for example, conditional MFN clauses.

[77] *Ibid.*, at 33.