EDITORIAL NOTE

APPLYING MFN CLAUSES TO DISPUTE SETTLEMENT PROVISIONS: PUTTING THE CART BEFORE THE HORSE

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I. INTRODUCTION

Bilateral Investment Treaties (hereinafter 'BIT') provide certain favourable features to qualified investors in order to secure their investment and facilitate business in the transacting countries. Some disputes primarily concern the Most Favourable Nation (hereinafter 'MFN') clause in the BITs, and the extent to which parties can enjoy the benefits of that particular clause. A MFN clause guarantees investors the right to be treated no less favourably than any other contracting third party (from within the host state or from a different jurisdiction).[1] It allows investors to argue their case based on the clauses and provisions of other BITs concluded by the host state.[2] One such provisio is the dispute resolution clause for investor-state disagreements.

A BIT may provide for a structured dispute resolution agreement with the scope to approach native courts and/or international settlement bodies. The debate whether the MFN clause is only applicable to substantive provisions such as expropriation protection, free and equal treatment or if it extends to procedural features including dispute resolution has long been a part of BIT disputes. The authors wish to analyse the debate in light of the leading case, *Hochtief* v. *Argentina* while sectionally examiningthe tribunal's analysis and Justice Christopher Thomas's dissent to comprehensively analyse the debate.

Accordingly, this note has broadly been divided into two broad section parts such that the first section concerns itself with the case of *Hochtief* v. *Argentina* with specific reference to Justice Thomas's dissent and subsequently in the second section, similar cases have been compared and contrasted to better understand the substantive and procedural aspects of a BIT and the viability of the dispute resolution clause thereunder.

Likewise, part II gives a brief background to the case and the analysis of the tribunal thereunder. Part III discusses the application an MFN clause to dispute resolution provision particular to this case. Thereafter, as we move towards the next broad section of this note, in part IV we discuss, the dissent of Justice Thomas wherein he observed that procedural rights are not analogues to substantive rights and MFN clauses apply only to substantive provisions. Hence, he refused to apply MFN clause to dispute resolution provisions. In furtherance of the same, we in part V have analysed in detail, the evolution of

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[1]OECD, 'Most-Favoured-Nation Treatment in International Investment Law' (February 2004) <https://www.oecd.org/daf/inv/investment-policy/WP-2004_2.pdf> accessed on May 2 2023.

[2]IISD, 'The Most-Favoured Nation Clause in Investment Treaties- IISD Best Practices Series' 2017 <https://www.iisd.org/system/files/publications/mfn-most-favoured-nation-clause-best-practices-en.pdf> accessed May 2 2023.

MFN clauses so as to determine whether they can be applied to dispute resolution provisions as well. Finally part VI concludes.

II. A BRIEF BACKGROUND TO THE CASE AND THE TRIBUNAL'S ANALYSIS

In this case, Hochtief and a consortium of construction companies was awarded a 25-year concession agreement to maintain, construct and operate a series of bridges and a toll road between the Argentinean cities of Rosario and Victoria.[3] In order to implement the concession agreement, Hochtief and the consortium of companies formulated a new company in Argentina called *Puentes del Litoral SA*. Hochtief owned 26% of the shares of the new company and the rest was divided between the consortium. On 5th November 2007, during the Argentine economic crises,[4] Hochtief filed a case against the country, alleging breach of several obligations under the Argentina-Germany BIT[5] and several provisions of Customary International Law.[6]The tribunal referred to various paragraphs of Article 10 of the Argentina-Germany BIT in a step-wise format.[7]

Article 10(1) of the BIT states that any dispute between the investor and the State must be settled amicably. Neither party argued a violation of Article 10(1) of the BIT; however, Article 10(2) was a point of discord for both sides.[8] Argentina submitted that Article 10(2)[9] imposes a *duty* on the parties to the BIT to pursue relief at the country's national courts before applying to international bodies.[10] However, Hochtief argued that Article 10(2) only creates a *right* for the parties to the BIT to approach national courts and does not impose a duty.[11] The ICSID tribunal agreed with the claimant's submissions. As per the tribunal, Article 10(2) of the BIT,[12] only creates a right to approach national dispute settlement bodies and courts and does not include a duty to do so. A duty to mandatorily approach domestic bodies would hamper effective and efficient access to justice for investors.

The tribunal then proceeded to examine Article 10(3) of the Argentina-Germany BIT. In analysing Article 10(3), the judges identified three primary features:[13] the Article includes a right that may be exercised unilaterally; neither party is obliged to submit to the jurisdiction of national courts for more than 18 months and the Article did not impose a

[3]*Hochtief Ag v Argentine Republic*, (2014) ICSID Case No. Arb/07/31.

[4]Reuters, 'Argentina faces a currency crisis as reserves dwindle' (October 17 2013) <https://www.reuters.com/article/us-argentina-economy-scenarios-idUSBRE99F10020131016> accessed May 2 2023.

[5]*Hochtief Ag v Argentine Republic*, (2014) ICSID Case No. Arb/07/31.

[6]Kluwer Arbitration Blog, 'Hochtief v Argentina: Obtaining a Smaller Piece of the Pie' (February 112017) <https://arbitrationblog.kluwerarbitration.com/2017/02/11/hochtief-v-argentina/> accessed May 2 2023.

[7]*Hochtief Ag v Argentine Republic*, (2014) ICSID Case No. Arb/07/31.

[8]*Hochtief Ag v Argentine Republic*, (2014) ICSID Case No. Arb/07/31.

[9]*Hochtief Ag v Argentine Republic*, (2014) ICSID Case No. Arb/07/31.

[10]*Hochtief Ag v Argentine Republic*, (2014) ICSID Case No. Arb/07/31.

[11]UPPSALA Universitet, 'The Distinction between Jurisdiction and Admissibility in International Investment Law', (Spring 2020) <https://www.diva-portal.org/smash/get/diva2:1436202/FULLTEXT01.pdf> accessed May 2 2023.

[12]ibid.

[13]OECD,'Investment Treaties and Shareholder Claims- Analysis of Treaty Practice', (March 2014) <https://www.oecd.org/investment/investment-policy/WP-2014-3.pdf> accessed May 2, 2023.

duty on either party to mandatorily accept the decision of a national court, the party may still choose to treat the matter as disputed. In reference to Article 10(3), the respondent argued that unless there has been an application to national courts under Article 10(2) and 18 months have passed since then, neither party can exercise their rights under the particular provision or unilaterally approach an international dispute settlement body.[14]

Alternatively, the claimant contended that the 18-month period is relevant only if a reference to national courts was made pursuant to Article 10(2), and that the clause is inapplicable in the absence of such a reference. Accordingly, the tribunal noted some merit in the respondents' arguments and observed that reference to national courts in order to exhaust local remedies was recognized in the ICSID charter.[15]

However, the tribunal did not agree with the requirement of pursuing remedies in local courts for a period of 18 months before approaching any international bodies. As per the tribunal, such a requirement was *nonsensical* since either of the two parties may preliminarily decide not to accept the local court's verdict and would then have to wait for 18 months before eventually applying for relief.[16] The tribunal was not ready to accept such a feature which would promote pointless litigation; however, instead of deciding the matter, it chose to move to the MFN issue.[17] The judges maintained that they do not have to adjudicate on whether the 18-month period is a mandatory pre-condition to approaching international bodies since the bulk of the claimant's submissions concerned the MFN clause. Hence, the tribunal moved to the MFN sub-issue without deciding whether Article 10 of the Argentina-Germany BIT[18] imposes a mandatory 18-month submission to national courts as a precondition of unilateral recourse to arbitration under the BIT.**[19]**

III. THE CONFLICTING STAKES OF MFN AND DISPUTE RESOLUTION CLAUSE

It is important to sectionally analyse the tribunal's decision on the MFN issue since the majority of the claimant's and respondent's submissions concerned the applicability of this clause.

The ICSID tribunal first assessed the viability of the MFN clause in case of dispute resolution.[20] It observed that Article 3(2) of the BIT included references to the "activities of a contracting state."[21] The Protocol at the end of the BIT defined

[14]Salles, L, 'In Forum Shopping in International Adjudication: The Role of Preliminary Objections', Cambridge Studies in International and Comparative Law 144 (2014).

[15]ICSID Convention, Regulations and Rules 2006, art 26.

[16]Oxford University Comparative Law Forum, 'The Mutable and Evolving Concept of 'Consent' in International Arbitration – Comparing rules, laws, treaties and types of arbitration for a better understanding of the concept of 'Consent''(2012) <https://ouclf.law.ox.ac.uk/the-mutable-and-evolving-concept-of-consent-in-international-arbitration-comparing-rules-laws-treaties-and-types-of-arbitration-for-a-better-understanding-of-the-concept-of/> accessed May 6 2023.

[17]Gonzalo Vial, 'Effects of Settlement between a Local Company and a Host State in a Bilateral Investment Treaty Claim of Foreign Shareholders Arising from the Same Conduct' (5 Chi.-Kent J. Int'l & Comp. L. 16 2016).

[18]*Hochtief Ag v Argentine Republic*, (2014) ICSID Case No. Arb/07/31.

[19]*Hochtief Ag v Argentine Republic*, (2014) ICSID Case No. Arb/07/31.

[20]*Hochtief Ag v Argentine Republic*, (2014) ICSID Case No. Arb/07/31.

[21]*Hochtief Ag v Argentine Republic*, (2014) ICSID Case No. Arb/07/31.

such activities and stipulated in Ad Article 3 that an activity, within the confines of the MFN clause, shall be understood to encompass "management, utilisation, use, and enjoyment of an investment".

Accordingly, the tribunal concluded that the expression "management, utilisation, use, and enjoyment of an investment" incorporates relief via dispute resolution.[22] The judges noted that recourse via dispute resolution was included within the management of an investment.[23] As per the tribunal, the procedural right to enforce a substantive right was indeed a part of the MFN provision and hence Article 3 of the BIT included litigation as well as dispute resolution.[24]

After establishing the MFN clause's applicability, the tribunal's next consideration was the connection between the MFN provision and the jurisdictional limitations under Article 10. The majority of the tribunal observed that Argentina and Germany would not have intended to create *entirely new rights* via the MFN provision.[25] The MFN provision requires investors to be given favourable treatment during an arbitration proceeding; however, this does not mean that the investor would be allowed to initiate arbitration proceedings when such a right is not guaranteed under its original BIT. Accordingly, the MFN clause cannot create rights that did not exist previously.[26]

Nevertheless, the court, upon a preliminary interpretation of Article 10 of the BIT,[27] noted that investors under the Argentina-Germany BIT have the right to initiate dispute resolution proceedings via Article 10(3). As a result, relying on the Argentina-Chile BIT's dispute resolution clause does not entitle Hochtief to a right that it could not have achieved under the Argentina-Germany BIT. Such a reference would simply allow Hochtief to claim relief in a more efficient and effective manner.[28]

However, the tribunal noted that the investor would not be allowed to individually select provisions from different BITs in furtherance of the MFN clause. It must rely on the entire scheme as outlined in either the Argentina-Chile or Argentina-Germany

[22]Megan Wells Sheffer, 'Bilateral Investment Treaties: A Friend or Foe to Human Rights'(39 Denv. J. Int'l L. & Pol'y 483 2011).

[23]*Hochtief Ag v Argentine Republic*, (2014) ICSID Case No. Arb/07/31.

[24]IA Reporter, 'Hochtief v. Argentina Case Likely to See Clash Over Whether German Investors Can Use MFN Clause To Skip Waiting Period'(May 11 2009) <https://www.iareporter.com/articles/hochtief-v-argentina-case-likely-to-see-clash-over-whether-german-investors-can-use-mfn-clause-to-skip-waiting-period/> accessed May 6 2023.

[25]Thomson Rueters-Practical Law, 'MFN clauses extending to dispute resolution - putting the cart before the horse' (November 2011) <https://uk.practicallaw.thomsonreuters.com/9-511-1017?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed May 6 2023.

[26]Thomson Rueters-Practical Law, 'ICSID tribunal considers minority shareholders rights to pursue treaty claim and fair and equitable treatment' (February 4 2015) <https://content.next.westlaw.com/practical-law/document/I45beac0dabc811e498db8b09b4f043e0/ICSID-tribunal-considers-minority-shareholders-rights-to-pursue-treaty-claim-and-fair-and-equitable-treatment?viewType=FullText&transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed May 6 2023.

[27]*Hochtief Ag v Argentine Republic*, (2014) ICSID Case No. Arb/07/31.

[28]Ziyodillayev, Rinat, 'Distinction between Jurisdiction and Admissibility in Investment Arbitration: How Remaining Uncertainty about the Distinction Is Reflected in Cases with Investor Corruption' (February 282017) <SSRN: https://ssrn.com/abstract=3785712> accessed May 6 2023.

BITs.[29] Accordingly, Hochtief relied on the Argentina-Chile Bilateral Investment Treaty in the dispute and elected arbitration over local courts.[30]

Moreover, the tribunal clarified that it would not decide on whether pursuing litigation in national courts is less favourable than arbitration proceedings; however, it maintained that providing a choice between the two formats is incredibly important. In order to treat an investor favourably, the choice to pursue either of the two dispute resolution mechanisms must be made available. After addressing the submission's concerning Article 10 of the BIT, the court moved to the respondent's second objection concerning Hochtief's lack of legal standing to file the present claim.

IV. JUSTICE CHRISTOPHER THOMAS'S DISSENT

Justice Thomas observed that applying the MFN clause to dispute settlement provisions in order to create jurisdiction for the ICSID was comparable to putting the cart before the horse.[31]

He first addressed arguments concerning Article 10(2) of the BIT between Argentina and Germany. He noted that there was no MFN clause in Article 10.[32] If there had been, it would have been apparent that a different BIT with more favourable access to international jurisdiction, would also benefit Hochtief; however, that was not the present case.[33] Additionally, Article 10(2) of the BIT presented a tiered process of dispute resolution that incorporated both litigation as well as arbitration. Justice Thomas interpreted Article 10(2)as mandatory obligations on parties to the BIT.[34] He emphasised on the use of the term "shall" in Article 10(2) which puts a *duty* on both parties to refer the matter to national courts; however, the option to approach international bodies was couched under the term "may" with no mandatory obligations.

As per Justice Thomas, Hochtief had to approach the Argentinean courts for relief post which it "may" approach international bodies. Moreover, Hochtief could only approach the ICSID or another dispute settlement body if the two preconditions established in Article 10(3) of the BIT were satisfied i.e., 18 months had passed since the initiation of local litigation or both parties mutually approached a settlement forum.[35]In the absence of a mutual agreement, Justice Thomas maintained that the 18-month requirement exists as a mandatory obligation on parties i.e., no claim can be raised at the ICSID unless the minimum period has passed. The ICSID tribunal will have no jurisdiction to hear the dispute unless it was mutually brought before it or local remedies have been exhausted for a year and a half.[36] Justice Thomas observed that it was not the tribunal's place to analyse the inconsistencies of

[29]UPPSALA Universitet, 'The Distinction between Jurisdiction and Admissibility in International Investment Law' (Spring2020) <https://www.diva-portal.org/smash/get/diva2:1436202/FULLTEXT01.pdf> accessed May 6 2023.

[30]ibid.

[31]*Hochtief Ag v Argentine Republic*, (2014) ICSID Case No. Arb/07/31.

[32]*Hochtief Ag v Argentine Republic*, (2014) ICSID Case No. Arb/07/31.

[33]Gáspár-Szilágyi, Szilárd, and Laura Létourneau-Tremblay, *A Question of Impartiality: Who are the Dissenting Arbitrators in Investment Treaty Arbitration*(International Courts and Tribunals Series, Oxford 2020).

[34]*Ambiente Ufficio S.P.A. and Others v. The Argentine Republic,* (2013) ICSID Case No. ARB/08/9.

[35]*Ambiente Ufficio S.P.A. and Others v. The Argentine Republic,* (2013) ICSID Case No. ARB/08/9.

[36]Karen Halverson Cross, 'Introductory Note to The International Centre for Settlement of Investment Disputes: Daimler Financial Services Ag v. Argentine Republic'(6 International Legal Materials 51 2012).

a treaty even if its application may lead to inefficiency and additional costs for the involved parties.[37]

Further, Justice Thomas also analysed Article 3(2) of the BIT that included the MFN provision. He noted that the MFN provision in the Argentina-Germany BIT did not expressly include dispute resolution unlike the United Kingdom's BIT.[38] Moreover, he differed from the majority in interpreting "activity" under Ad Article 3[39] as inclusive of dispute resolution.

As per Justice Thomas, the Protocol's elaboration of what sorts of treatment were "less favourable"[40] addressed state conduct and activity that was entirely different in nature from the conditions governing access to international jurisdiction.[41] He agreed that there was no exhaustive list of less favourable activities; however, the features included by the ICSID must have some logical relation with the listed activities.[42] The right to access foreign jurisdiction under Article 10 was simply not analogous to restrictions on the availability of natural resources or the sale of goods both within and outside the country.[43] It was provisionally different, and so could not be classified as an "activity" under Article 3.

Additionally, Justice Thomas made a distinction between substantive and procedural rights guaranteed by a treaty and the extent to which a party may enjoy these rights.[44] He cited a number of decisions by the International Court of Justice that establish a clear line between a treaty's substantive provisions and its grant of adjudicative authority.[45]As a result, the majority's treatment of the BIT's dispute settlement provisions as identical to substantive rights appeared to be at odds with how general international law and practice had separated the two.[46] Consequently, Justice Thomas presented his dissenting opinion for the record, dismissing the ICSID's jurisdiction to adjudicate upon the dispute.

The contrasting opinions of the different judges of the tribunal, in addition to various other contradictory verdicts, has added to a lengthy debate around the applicability of the MFN provision. The following section compares and contrasts the discussion around MFN provisions in various other investor-state disputes.

[37]ibid.

[38]*Hochtief Ag v Argentine Republic*, (2014) ICSID Case No. Arb/07/31.

[39]*Hochtief Ag v Argentine Republic*, (2014) ICSID Case No. Arb/07/31.

[40]*Hochtief Ag v Argentine Republic*, (2014) ICSID Case No. Arb/07/31.

[41]*Abaclat and Others v. Argentine Republic,* (2012) ICSID Case No. ARB/07/5.

[42]*Abaclat and Others v. Argentine Republic,* (2012) ICSID Case No. ARB/07/5.

[43]*Abaclat and Others v. Argentine Republic,* (2012) ICSID Case No. ARB/07/5.

[44]Martin J. Valasek, Éric-Antoine Ménard, *Impregilo SpA v Argentine Republic and Hochtief AG v The Argentine Republic: Making Sense of Dissents: The Jurisprudence Inconstante of the MFN Clause*, 1 ICSID Review - Foreign Investment Law Journal 27 (2012).

[45]*Hochtief Ag v Argentine Republic*, (2014) ICSID Case No. Arb/07/31.

[46]*Hochtief Ag v Argentine Republic*, (2014) ICSID Case No. Arb/07/31.

V. THE EVOLUTION OF MFN CLAUSE- SUBSTANTIVE AND PROCEDURAL CONTRADICTIONS

MFN provisions have been a pillar of trade law for centuries and have helped develop international principles of trade for decades.[47] The first few MFN provisions can be traced back to the twelfth century; however, the clause became commonplace in the seventeenth and eighteenth century, alongside the growth of a global trading apparatus.[48] The MFN clause was widely incorporated in numerous treaties in the 1800s and 1900s, particularly in treaties of friendship, commerce, and navigation.[49]

In 1778, the United States of America incorporated an MFN clause in its first ever treaty, with France.[50] Similarly, the Havana Charter of 1948[51] made MFN treatment one of the key obligations of commercial policy, with members agreeing to "give due consideration to the desirability of avoiding discrimination between foreign investors".[52] MFN treatment became so commonplace that international regulatory bodies made attempts at introducing principles for enforcement and regulation of MFN clauses. The International Law Commission (ILC)[53] started working on a set of proposed articles on the MFN clause in 1964.[54] The proposed articles were never adopted; however, the ILC clarified the idea that an MFN clause (in furtherance of the ejusdem generis principle)[55] can only attract provisions belonging to the same subject-matter or a similar category of topics.[56]

Unfortunately, the lack of a set of guiding principles or rules allowed the jurisprudence around MFN provisions to present contradictory ideas. Different judgements from international investment settlement bodies including the ICSID formulated contradictory ideas concerning the scope of the provision in case of both substantive and procedural matters.

One of the most contentious substantive considerations concerned the import of liability standards and was first dealt with by the ICSID in *Asian Agricultural Products Ltd v Sri Lanka*.[57] In this case, Sri Lankan security forces destroyed the claimant's shrimp farm during a military exercise. The claimant had offered to help the Sri Lankan forces in

[47]Simon Batifort, J. Benton Heath, 'The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization'(2017) 4 The American Journal of International Law 111.

[48]Alejandro Faya Rodriguez, 'The Most-Favored-Nation Clause in International Investment: Agreements A Tool for Treaty Shopping' (2008) 1 Journal of International Arbitration 25.

[49]Tony Cole, 'The Boundaries of Most Favored Nation Treatment in International Investment Law' (2012) 3 Michigan Journal of International Law 33.

[50]OECD, 'Most-Favoured-Nation Treatment in International Investment Law'(February 2004) <https://www.oecd.org/daf/inv/investment-policy/WP-2004_2.pdf> accessed May 2 2023.

[51]United Nations *Conference on Trade and Employment, Final Act and Related Documents* (April 1948) <https://www.wto.org/english/docs_e/legal_e/havana_e.pdf> accessed May 11 2023.

[52]OECD, 'Fair and Equitable Treatment Standard in International Investment Law' (March 2004) <https://www.oecd.org/daf/inv/investment-policy/WP-2004_3.pdf> accessed May 11 2023.

[53]United Nations, 'Draft Articles on most-favoured-nation clauses with commentaries' (1978) <https://legal.un.org/ilc/texts/instruments/english/commentaries/1_3_1978.pdf> accessed May 2 2023.

[54]ibid.

[55]OECD, 'Most-Favoured-Nation Treatment in International Investment Law' (February 2004) <https://www.oecd.org/daf/inv/investment-policy/WP-2004_2.pdf> accessed May 11 2023.

[56]OECD, 'Most-Favoured-Nation Treatment in International Investment Law' (February 2004) <https://www.oecd.org/daf/inv/investment-policy/WP-2004_2.pdf> accessed May 11 2023.

[57]*Asian Agricultural Products Ltd v Sri Lanka,* (1990) ICSID Case No ARB/87/3.

facilitating their exercise while also ensuring against any damages to the farm. However, the Sri Lankan forces did not consider the claimant's offer and during the paramilitary exercise, destroyed the production wing of the farm.

The claimant wished to use the MFN provision in the Sri Lanka-United Kingdom BIT to incorporate the liability clauses of the Sri Lanka-Switzerland BIT and create a preferential position for itself.[58] It wished to avoid the *war clause* or the *civil disturbance* exception in the Sri Lanka-United Kingdom BIT by incorporating standards from the Switzerland BIT which did not recognize such exceptions.[59]

The ICSID tribunal rejected the claimant's submissions stating that *Asian foods* was unable to establish that the Switzerland BIT had more favourable provisions. The tribunal, however, later implemented the *liability standard of due diligence* based on customary international law,[60] and held that the security forces should have reasonably considered the claimant's offer of assistance.[61]

The tribunal ruled a certain amount of compensation for the claimant. Accordingly, Asian Agricultural Products' claim to import liability provisions from one BIT to another was rejected by the ICSID in this case; however, a UNCITRAL tribunal[62] in *CME Czech Republic BV v Czech Republic*,[63] allowed the import of compensation provisions via the MFN clause.[64] The court allowed CME to import a more favourable standard of "fair compensation" from another Czech BIT using the MFN clause in the Czech Republic-Netherlands BIT.[65] The tribunal maintained that both the BITs used the market value threshold to evaluate fair compensation and in such a situation CME should be allowed to enjoy the benefits of a more favourable compensation clause.

Further, in addition to importing liability clauses and compensation provisions from different BITs, the MFN clause has often been used to ensure fair and equitable treatment for different third-party investors. In *MTD v Chile*,[66] the ICSID tribunal allowed MTD to import the fair and equitable treatment clauses from the Chile-Croatia[67] and the Chile-Denmark[68] BITs via the MFN provision in the Chile-Malaysia BIT.[69]

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[58]ibid.

[59]ibid.

[60]A. Rohan Perera and Noel Dias, 'Asian Agricultural Products Ltd. v. The Republic of Sri Lanka (1991) 2 The American Review of International Arbitration 2.

[61] (n 57).

[62]*CME Czech Republic B.V. (The Netherlands) v The Czech Republic,* (2006) 9 ICSID Rep 412.

[63]ibid.

[64]ibid.

[65]ICSID (Arbitration Tribunal), 'MTD Equity SdnBhd and MTD Chile SA v. Republic of Chile' (2004) <https://www.cambridge.org/core/journals/icsid-reports/article/mtd-equity-sdn-bhd-and-mtd-chile-sa-v-republic-of-chile/20EB6EEDCCE4DAE9FB2BB5374FED96DA> accessed May 2 2023.

[66]*MTD v Chile,* (2004) ICSID Case No ARB/01/7.

[67]ICSID (Arbitration Tribunal), 'MTD Equity SdnBhd and MTD Chile SA v. Republic of Chile' (2004) <https://www.cambridge.org/core/journals/icsid-reports/article/mtd-equity-sdn-bhd-and-mtd-chile-sa-v-republic-of-chile/20EB6EEDCCE4DAE9FB2BB5374FED96DA> accessed May 2 2023.

[68]ICSID (Arbitration Tribunal), 'MTD Equity SdnBhd and MTD Chile SA v. Republic of Chile' (2004) <https://www.cambridge.org/core/journals/icsid-reports/article/mtd-equity-sdn-bhd-and-mtd-chile-sa-v-republic-of-chile/20EB6EEDCCE4DAE9FB2BB5374FED96DA> accessed May 2 2023.

[69]ibid.

Similarly, in *Rumeli Telekom AS v Kazakhstan,*[70] the claimant used the MFN provision in the Kazakhstan-Turkey BIT to import a variety of favourable provisions from different Kazakh BITs including the state's obligation to ensure fair and equal treatment for all investors and protection from unreasonable and arbitrary impositions.[71]

Accordingly, a majority of ICSID tribunals and international investment settlement bodies have recorded favourable judgements while analysing the import of substantive provisions from one BIT to another;[72] however, these tribunals take a more contradictory stance in case of procedural features.

One of the most controversial ways in which qualified investors have tried to import procedural features is by overlooking the requirement to exhaust domestic remedies. Investors have often attempted to bypass requirements such as instituting cases at local levels, or other time bound remedies by utilising the MFN provision in their BITs. However, the ICSID and similar dispute settlement bodies have recorded differing judgements concerning such an import of procedural features.

One of the first few cases where an ICSID tribunal favourably considered a request to import procedural features from a different BIT was *Maffezini v Spain*.[73] The case was based on a disagreement between an Argentinean investor and a Spanish company over their chemical manufacturing and distribution contract.[74] The claimant wanted to avoid submitting before the Spanish local courts for 18 months before turning to international arbitration, as required under the Argentina-Spain BIT.[75]

Consequently, the claimant argued that the MFN clause in the Argentina-Spain BIT allows him to import a dispute resolution provision from the Chile-Spain BIT, and avoid exhausting local remedies.[76] Spain maintained that the MFN provision only applied to the BIT's substantive provisions and not in case of procedural features such as a dispute resolution.[77] The tribunal agreed with the claimant's submissions and held that dispute resolution provisions are introduced to ensure efficient and effective relief mechanisms for all investors. In such a situation the MFN provision should be applied to allow the claimant to enjoy a more favourable provision and bypass local remedies.

The tribunal's analysis was upheld in a variety of cases such as *Siemens v Argentine Republic*[78] and *Gas Natural SDG v Argentina*.[79] In *Siemens*,[80] the tribunal

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[70]*Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan,* (2008) ICSID Case No. ARB/05/16.

[71]IISD- Investment Treaty News, 'Ad hoc committee confirms that Kazakhstan is on the hook for US$ 125 million' (April 8 2010) <https://www.iisd.org/itn/en/2010/04/08/ad-hoc-committee-confirms-that-kazakhstan-is-on-the-hook-for-us-125-million/> accessed May 11 2023.

[72] (n 70).

[73]*Emilio Agustín Maffezini v. Kingdom of Spain, (2011) ICSID Case No. ARB/97/7.*

[74]ibid.

[75]IISD- Investment Treaty News, 'Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7 (Decision on Jurisdiction)' (October 18 2018) <https://www.iisd.org/itn/en/2018/10/18/maffezini-v-spain/> accessed May 11 2023.

[76](n 73).

[77]ibid.

[78]*Siemens v Argentine Republic,* (2004) ICSID Case No ARB/02/8*; Gas Natural SDG v Argentina,* (2005) ICSID Case No ARB/03/10.

[79]ibid.

examined the scope of the MFN clause in the Argentina-Germany BIT and the investors' attempts to get around the procedural requirement of raising an appeal for relief at local courts for 18 months before advancing to international arbitration. The tribunal held that even though the BIT was confined to matters related to investments, the dispute resolution clause was wide enough to be included within the ambit of investments.

Hence, the judges allowed Siemens to use the MFN clause and import a more favourable dispute resolution provision from a different BIT.[81] Similarly, in, *Gas Natural SDG v Argentina,*[82] a Spanish investor argued that the MFN clause in the Argentina-Spain BIT allowed it to invoke the more favourable dispute resolution provision in the Argentina-United States BIT and avoid any local litigation.

The ICSID tribunal agreed with the claimant's submissions and observed thataccess to independent international arbitration is a crucial – if not the most crucial aspect of investor protection.[83] The tribunal categorically maintained that unless the parties to a BIT have preliminary agreed otherwise, an MFN clause should always be applicable in case of dispute resolution.[84] *Siemens v. Argentina, Gas Natural SDG* and the other aforementioned cases present a sense of uniformity in the ICSID's judgements; however, the dispute settlement body and similar other institutions have recorded various contradictory case laws that allow both parties in Hochtief cite favourable precedence.

One of the first few ICSID cases which did not allow an MFN clause to bypass BIT provisions was *Wintershall Aktiengesellschaft v. Argentina.*[85] In *Wintershall,* the German claimant argued that it could use the MFN clause of the Argentina-Germany BIT[86] to avoid the country's local courts and instead use arbitration provisions in other Argentine BITs, such as the Argentina-Chile BIT,[87] which allow the unilateral submission of disputes before international courts and tribunals.[88] Contrary to the judgement in *SDG v. Argentina,*[89] the Wintershall tribunal ruled that the MFN clause in the Argentina-Germany BIT did not extend to dispute resolution provisions. As a result, the German investor was unable to take advantage of the Argentina-Chile BIT's less stringent arbitration clause.[90] Similarly in *Kilic Insaat Ithalat Ihracat Sanayi Ve Ticaret Anonim Sirketi v Turkmenistan*,[91] the ICSID tribunal reached a similar conclusion under the Turkey-Turkmenistan Bilateral Investment Treaty,

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[80]ibid.

[81]ibid.

[82]ibid.

[83]ibid.

[84]ibid.

[85]IISD- Investment Treaty News, 'German firm fails to pass jurisdictional hurdle in claim against Argentina; decision provokes questions about the scope and applicability of MFN Protection'(January 5 2009) <https://www.iisd.org/itn/en/2009/01/05/german-firm-fails-to-pass-jurisdictional-hurdle-in-claim-against-argentina-decision-provokes-questions-about-the-scope-and-applicability-of-mfn-protection/> accessed May 11 2023

[86]Sam Wordsworth, QC, Chester Brown, 'A Re-run of Siemens, Wintershall and Hochtief on Most-Favoured-Nation Clauses: Daimler Financial Services AG v Argentine Republic' (2015) 2 ICSID Review - Foreign Investment Law Journal 30.

[87]*Wintershall Aktiengesellschaft v Argentine Republic* (2008) ICSID Case No ARB 04/14.

[88]ibid.

[89]*Gas Natural SDG v Argentina,* (2005) ICSID Case No ARB/03/10.

[90]ibid.

[91]*Kiliç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v Turkmenistan* (2013) ICSID Case No ARB/10/01.

which obliged claimants to first submit claims to local courts and then advance to international arbitration only if a resolution was not achieved within a year.[92]

VI. TRACING THE APPLICABILITY OF MFN IN DISPUTE RESOLUTION CLAUSES

It is clear from the cases discussed above that it is difficult to ascertain and give a water tight definition of applicability of MFN in Dispute Resolution Clauses. On a preliminary level it seems that the previous decisions operate under conflicting arbitral awards and the tribunal has embraced a two-fold approach when it comes to applicability of MFN clauses in dispute resolution settlement. However on a more comprehensive interpretation of the aforementioned case laws which envisage mandatory domestic litigation before proceeding to arbitration. These cases are *Maffezini v Kingdom of Spain; Siemens AG v Argentina*; (which opine that MFN treatment should be extended to dispute resolution) (supra) and *Wintershall* and *Kilic Salini* (which argue against it) (supra).

However, while analyzing this case we also have to keep in mind the basic intention behind the concept of BITs. In a BIT, parties enter into such specific negotiations to cater to their specific engagements, requirements and circumstances. In such scenario generic notions of international law or dispute settlements mechanism must not be imposed and the parties must be given autonomy to choose their mode of dispute resolution mechanism unless the same was specifically agreed on the treaty.

While ensuring this, it is extremely difficult to lay out a water tight definition of applicability of MFN treatment in dispute resolution clauses. In the opinion of the author, since all BITs are at the end bilateral agreements between two consenting states, specific to their unique requirements.[93] Given the unique characteristics of these agreements and diverse requirements of different nations we must not strive for achieving uniformity. Rather, the quest must be to promote a safe and comprehensive mechanism for the investors by revisiting the evolution of MFN clauses as discussed in this chapter.

VII. CONCLUSION

In the opinion of the author the MFN clauses in different aspects must be interpreted by the application of subjectivism since, the circumstances in which different treaties operate are different. However, while ensuring subjectivity in applying MFN in dispute resolution clauses, it must be noted that the BITs do not deviate from the key intention behind MFN treatment which is to ensure fairness by referring to previous agreements between third party states.

To ensure this, the well reasoned holding of the *Hochtief* v. *Argentina*[94] read with Justice Thomas's dissent can in fact serve as a guiding light. Taking a leaf out of that holding it is submitted that when the key contention to the dispute pertains to the applicability of MFN in dispute resolution clauses then in such cases, the MFN treatment has to be

[92] ibid.
[93] Foo Kim Boon, 'The Singapore-Vietnam Bilateral Investment Agreement 1992' [1993] Singapore Journal of Legal Studies National University of Singapore (Faculty of Law) 321.
[94] *Maffezini v Kingdom of Spain* ICSID Case No. ARB/9 7/7 (January 25, 2000).

extended to dispute resolution clauses unless other BITs provide otherwise. Hence, while as a general norm we can apply and extend MFN treatment to dispute resolution clauses however, at the same time we must also exercise necessary due diligence and keep other options open in principle with the necessary application of subjectivism. This is because, as observed by Justice Thomas, a blanket application of MFN clauses to dispute settlement provisions without necessary due diligence is equivalent to putting the cart before the horse.

IN THIS ISSUE

The NUJS Journal on Dispute Resolution ('JODR') was started in the year 2020 with the initial support from the India Mediation Week. The aim of the journal is to provide comprehensive research material and help in enhancing the knowledge of Alternate Dispute Resolution framework.

Through the years, we have published various articles authored by academicians, practicing advocates, industry professionals and law students. The journal in the previous two volumes has published various articles, case comments and notes on a wide variety of subject areas of dispute resolution which includes but is not limited to International Commercial Arbitration, Internationally Mediated Settlement, International Investment Arbitration and other developments in International Investment Law, Institutional and non Institutional Arbitration and lastly, developments in the Indian Judicial Framework *vis-à-vis* Alternate Dispute Resolution framework.

Keeping up with our aim of providing comprehensive, well-researched scholarly articles which not only deal with convoluted academic issues but also provide us a glimpse of practical modalities of the Dispute Resolution Mechanism, we hereby, proudly announce the release of Volume 3, Issue 1 of JODR ('2023'). We credit the publication of this issue to our, authors and the members of the JODR editorial board who despite some administrative hindrances worked diligently and ensured that the following scholarly articles are published by our journal -:

Adya Joshi and Adit Vikramaditya Garg in their article titled *'Heads I Win, Tails you Lose: A Critical Analysis of the Unsuccessful Party's Right to Seek Post – Award interim Measures under the Indian Arbitration Act'* navigate through the divergent stance taken by various High Courts on the question of whether post award Section 9 relief can be claimed by an unsuccessful party. The authors firstly refer to the observations of the Bombay, Delhi and Karnataka High Court, wherein, in line with the principle of what cannot be achieved directly, can also not be achieved indirectly, it was held that a losing party cannot seek recourse under Section 9.

The authors also refer to the contrary observations of the Andhra Pradesh, Gujarat and Telangana High Courts in this regard. Consequently, the authors throw light on the conundrum of a 'partially successful party' in seeking post award rights under Section 9. The authors argue that the courts need to look at such cases from a broader perspective such that the nature and type of relief sought is given due consideration. For instance, in the opinion of the authors, 'partially successful parties' should be able to bring a claim under Section 9 to the extent of the award rendered in their favour and losing parties should also be allowed to claim 'non-prejudicial interim relief' like preserving the confidentiality of certain documents.

Tushar Behl and Dhruv Srivastava in their article titled *'For Your (Attorney's) Eyes Only?: Limits to Arbitral Confidentiality in India'* analyze the relatively new

'Attorney's' Eyes Only' regime in the context of confidentiality requirements in arbitral proceedings. The authors firstly refer to the procedure of designating a document as AEO (for Attorney's Eye's Only) which can be used to protect sensitive commercial information. Consequently, the authors analyse the conflicting stakes of public and private interest and how AEO designations can be inconsistent with the established principles of natural justice. Hence, they argue that AEO designation should be done only in good faith, after undertaking considerable due diligence.

The authors then revisit the confidentially provisions under the Indian Arbitration Act, to analyse the viability of the AEO regime in the Indian judicial and legislative framework. In this reference, the authors refer to various judgments of the Indian courts and observe how Indian courts recently, seem to have deviated from their initial attempt of incorporating a confidentiality friendly regime. Likewise, the authors have opined that the AEO regime can be incorporated in the Indian judicial framework if the courts revisit the initial stance of giving due considerations to confidentiality considerations.

Mohit Mokal in his article titled *'A Critical Analysis of the Indian Mediation Bill, 2021: Offering Recommendations'* has done a comprehensive scrutiny of the India Mediation Bill 2021. The author has *inter alia* undertaken a comparative study of mandatory pre institutional mediation by referring to the legal and policy landscape of various jurisdictions; argued that certain quasi criminal cases (e.g. Section 138 NI Act cases) must also included within the ambit of matters that are suitable for mediation; analysed how sanction on parties by imposing costs who unreasonably refuse to mediate is a welcome step and has also advocated for providing some additional incentives to mediate; made a case against registration provisions since they *inter alia* can be detrimental to confidentiality aspects and discussed how there is a need for explicit provisions governing enforcement of a mediated settlement agreement.

The author also acknowledges the vital contribution technology can play viz. the online dispute resolution mechanism as entailed in the bill and has referred to the role and responsibilities various institutions the bill seeks to establish. The author has also *inter alia* revisited the landmark, Ayodhya-Babri Masjid mediation and has analysed the same through the lens of Chapter X of the bill which provides for community mediation. In this reference he has argued that community mediation is feasible in India if certain best practices of foreign jurisdictions like US, South Africa and Singapore can be incorporated in the Indian framework. Likewise, the author considers the mediation bill as a welcome step and argues that the same is a necessary tool for promoting mediation in India and in turn reducing the burden of courts.

Pitamber Yadav in his case comment title "*Case Note: Formation of Motor Accidents Mediation Cell (MAMC) in India"* has analysed in detail the judgment in the case of *MR Krishna Murthi* v. *New India Assurance Co. Ltd.* wherein the apex court has directed the central government to create a Motor Accident Mediation Cell ('MAMC') in every district in India. This came as a backdrop to the submission made by the senior council appearing on behalf of the victim who called for a creation of a Motor Accident Mediation Authority.

The court after acknowledging the huge pendency in motor accident claim disputes envisaged the creation of the MAMC and directed NALSA to take it up as a project. The author while acknowledging that the current motor accident claims dispute resolution

framework is not adequate and mediation is the need of the hour also highlighted some concerns he had with the possible functioning of the MAMC.

With the release of this issue, we continue to maintain the high scholarship standards of JODR by offering to our readers a collection of analytical articles that capture their attention and also inspire them to pursue similar areas of research. Likewise, we hope our readers like these articles and we welcome any feedback they may have for us.

There are several people who have helped us in ensuring a successful release of this issue and we would like to express our heartfelt gratitude to each of them. Above all, we would like to thank our Vice-Chancellor Prof (Dr) NK Chakrabarty, our Board of Advisors and JODR's faculty advisor Mr. Atul Alexander. Lastly, we are extremely grateful to all our authors whose intellectually stimulating articles appear in the following pages.

Sincerely,
The Editorial Board,
2022-23,
NUJS Journal on Dispute Resolution.