

MOST-FAVOURED-NATION CLAUSE IN CHINESE BILATERAL INVESTMENT TREATIES

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ABSTRACT: *Bilateral investment treaty (BIT) programs were a natural response of capital-exporting countries in trying to protect the investments made by their nationals and corporations in the territories of developing states. In recent decades the role of BITs has risen in global economy for promoting foreign investments by guaranteeing that the rights of foreign investors are protected in the territory of the host state. Most-Favoured-Nation (MFN) treatment is a commonly found treatment standard in investment treaties which guarantees equality of competitive conditions among foreign investors in a host country. The underlying notion behind the MFN clause is to eliminate the de facto and de jure discrimination based on the origin of foreign investment. This paper discusses the role of MFN clause in international investment law with a specific focus to Chinese BITs. Particularly, the paper examines the wording of MFN clauses in Chinese BITs, the stages of investments covered by the clause and its applicability to substantive and procedural treatment standards.*

KEYWORDS: Most-Favoured-Nation Treatment, Bilateral Investment Treaties, China

INTRODUCTION

MFN Clause in Investment Agreements

Virtually every modern bilateral investment treaty has a Most-Favoured-Nation (MFN) treatment clause¹. MFN clause ensures level playing field and equality of competitive conditions among the foreign investors originating from different countries that seek to make investments in a host state, by eliminating discrimination based on national considerations². MFN clauses guarantees that the host state provides to investors originating from a foreign country not less favourable treatment than it provided to any other third states in the specific agreed space of relation covered by the treaty³. The clause is now found in vast majority of BITs⁴, and is an important influence for multilateralization of bilateral investment relationships between the states⁵. In the overly fragmented international investment law, where most of the relations between the states are based on bilateral agreements, MFN treatment helps to create uniformity⁶.

¹ Dolzer, Rudolf, and Christoph Schreuer. *Principles of international investment law*. Oxford University Press, 2012, 206; Schwarzenberger, Georg. "The Most-Favored-Nation Standard in British State Practice." *Brit. YB Int'l L.* 22 (1945): 103.

² UNCTAD "Most-Favored-Nation Treatment" (2010) *UNCTAD Series on Issues in International Investment Agreements II*, New York and Geneva: 30.

³ Organisation for Economic Co-operation and Development. *International investment law: a changing landscape; a companion volume to international investment perspectives*. OECD, 2005: 128.

⁴ *Ibid.*, 129.

⁵ For general discussion on this influence see. Schill, Stephan W. "Multilateralizing investment treaties through most-favored-nation clauses." *Berkeley J. Int'l Law* 27 (2009): 496-569; United Nations Conference on Trade and Development (UNCTAD), "Most-Favored-Nation Treatment", *Series on Issues in International Investment Agreements*, (1999): 3.

⁶ *Ibid.*

MFN clause brings dynamics into the investment treaty that is fixed in a time, allowing the party state of basic treaty to utilize any future more-preferable de facto and de jure treatment in scope of their MFN clause that the other party grants to any third state. This dynamic effect of MFN clause eliminates the need for the countries to extensively renegotiate past BITs⁷. MFN is a relative standard, meaning that the scope of the clause is based on the host state's conduct towards any third state⁸. Thus, as soon as the state provides a more favourable treatment to one third state, the treatment is automatically extended to all the other states that it has a treaty with MFN clause.

In trade agreements, such as GATT, where MFN treatment is defined to include "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the *like product* originating in or destined for the territories of all other contracting parties"[emphasis added]⁹, the parties allow flexibility by specifying that MFN treatment shall be provided for "like products" thus allowing the signatory countries to provide different treatment for different products. In international investment agreements (IIAs) scope of MFN clause is more ambiguous, and potentially much broader including any substantive or procedural more favorable rights granted to a third state and de fact more favourable treatment¹⁰. Thus, MFN clause allows the foreign investors to receive the most advantageous treatment provided by the host country and guard against disadvantages or discrimination¹¹ based on nationality ensuring equal competitive ground for foreign investors. If the host country grants specific privileges and rights according to an investment contract between the state and a foreign investor, the state would not be obliged under MFN clause to extend the treatment to all other foreign investors¹². In relation to subject matter of MFN clause, it is governing according to *Ejusdem Generis* principle¹³, particularly on the matters that are in the scope of the particular article and requires a legitimate basis for comparing investors and investments (such as they need to be in "like circumstances", "same circumstances")¹⁴.

Interpretation of MFN clause

In 1970s the International Court of Justice has been surprised that notwithstanding with the history of investment protection provisions, there is no generally acceptable rules developed around most of its concepts, which creates practical difficulty for tribunals¹⁵. For interpretation of the scope MFN clause it is assumed that during disputes the investors strive for the most expansive interpretation and the countries strive for most limited interpretation of the

⁷ Chukwumerije, Okezie. "Interpreting Most-Favoured-Nation Clauses in Investment Treaty Arbitrations." *Journal of World Investment & Trade* 8.5 (2007): 611.

⁸ Dolzer, Rudolf, and Christoph Schreuer. *Principles of international investment law*. Oxford University Press, 2012, 206.

⁹ General Agreement on Tariffs and Trade 1994, Article 1(i).

¹⁰ Kurtz, Jurgen. "The MFN Standard and Foreign Investment: An Uneasy Fit." *Journal of World Investment & Trade* 5.6 (2004): 865-868.

¹¹ Chukwumerije, Okezie. "Interpreting Most-Favoured-Nation Clauses in Investment Treaty Arbitrations." *Journal of World Investment & Trade* 8.5 (2007): 610.

¹² UNCTAD, "Most-Favoured-Nation Treatment", *Series on Issues in International Investment Agreements*, (1999): 3.6.

¹³ Yearbook of the International Law Commission, 1978, vol. II, Part Two, Art.9 "Under a most-favoured-nation clause the beneficiary State acquires, for itself or for the benefit of persons or things in a determined relationship with it, only those rights which fall within the limits of the subject-matter of the clause."

¹⁴ UNCTAD, "Most-Favoured-Nation Treatment", *Series on Issues in International Investment Agreements*, (1999): 24-27

¹⁵ Salacuse, Jeswald W., and Nicholas P. Sullivan. "Do BITs really work: An evaluation of bilateral investment treaties and their grand bargain." *Harv. Int'l LJ* 46 (2005): 68, referring to Barcelona Traction, Light and Power Co., Ltd. (Belg. V. Spain), 1970 I.C.J. 3, 46-47, Awards Feb 5.

provision¹⁶. It has been discussed in the literature that potentially before being transplanted into IIAs, the MFN clause did not pass through detailed evaluation and countries did not understand the full extent of its possible implications¹⁷. While MFN provision in the context of trade might mean similar tariffs for the like products, in the context of IIAs its implication would encompass both at treatment of foreign investments in the border and the substantive and procedural, de fact and de jure, treatment of the investment after it enters into the State¹⁸.

For understanding the general notion of MFN interpretation, we can refer to ICL "Draft Articles" which provides that "[t]he present articles are without prejudice to any provision on which the granting State and the beneficiary State may otherwise agree"¹⁹ meaning that the scope of MFN clause is defined by the contracting states under a specific agreement. Thus, the notion proposed by Judge Anzilotti and Sir Arnold McNair that "speaking strictly, there is no such thing as the most-favoured nation clause: every treaty requires independent examination"²⁰ is still precisely right about MFN clause in current BIT context.

For interpreting specific MFN clauses in different investment treaties, the tribunals and scholars refer to well established standards set forth in Vienna Convention on Law of Treaties Article 31 (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"²¹. ILC further clarified this rule that the wording of Article 31 shall not be interpreted as "laying down a hierarchical order for the application of the various elements of interpretation in the article" and instead, "[a]ll the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation."²² However, as demonstrated by the inconsistent case law on interpretation of different MFN clause based on Vienna Convention Article 31(1) and Article 32 has proven to be controversial in the context of MFN clause and procedural matters under a treaty (ISDS), but have been relatively straight forward when concerning to substantive standards of treatment.

Variations of MFN clauses in Chinese Bilateral Investment Treaties

Bilateral investment treaty programs were a natural response of capital-exporting countries to try protecting the investment made by nationals and corporations originating from their countries, due to failure of multilateral investment protection efforts, specifically Havana Chapter of 1948, efforts of International Chamber of Commerce (ICC), private efforts of Abs-

¹⁶ Egli, Gabriel. "Don't Get Bit: Addressing ICSID's Inconsistent Application of Most-Favored-Nation Clauses to Dispute Resolution Provisions." *Pepp. L. Rev.* 34 (2006): 1062-3.

¹⁷ Chukwumerije, Okezie. "Interpreting Most-Favoured-Nation Clauses in Investment Treaty Arbitrations." *Journal of World Investment & Trade* 8.5 (2007):609.

¹⁸ Kurtz, Jurgen. "The MFN Standard and Foreign Investment: An Uneasy Fit." *Journal of World Investment & Trade* 5.6 (2004): 867-868.

¹⁹ ILC, *supra* note, Art. 29; (in the commentary section of the same article the commission goes to explain it "The Commission was unanimous in the view that the granting and beneficiary States might agree on most-favoured-nation treatment in all matters that lent themselves to such treatment: they might specify the sphere of relations in which they undertook most-favoured-nation obligations and they might restrict *ratione materiae* their respective promises".)

²⁰ Schwarzenberger, Georg. "The Most-Favored-Nation Standard in British State Practice." *Brit. YB Int'l L.* 22 (1945): 103.

²¹ Vienna Convention, Art. 32 specifies supplementary means of interpretation "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty 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."

²² Vesel, Scott. "Clearing a Path through a Tangled Jurisprudence: Most-Favored-Nation in Bilateral Investment Treaties." *Yale J. Int'l L.* 32 (2007): 138; referring to Reports of the Commission to the General Assembly, [1966] 2 *Y.B. Int'l L. Comm'n* 218, U.N. Doc. A/6309/Rev. 1/1966, reprinted in 3 United Nations Conference on the Law of Treaties 38(2001).

Shawcross Convention, and the efforts of Organization for Economic Cooperation and Development (OECD)²³. All those efforts foremost went in vain, due to unaligned interest of capital exporting (mostly developed) and importing countries (primarily developing)²⁴. BITs allowed higher bilateral flexibility, and Germany commenced the world's first BIT program with signing its agreement with Pakistan²⁵, a practice that was soon followed by its European counterparts and later by US²⁶ and China²⁷ joining the BIT negotiation efforts. Starting its BIT program with signing the first agreement with Sweden in 1982, China currently has 131 BITs that are signed (110 in force) and 22 Treaties with Investment Provisions (TIPs)²⁸. This is an impressive and robust network of BITs, which to put into perspective, makes China second most active BIT maker in the world after Germany²⁹.

While there are a number of economic, legal and political implications for BITs, looking from the developing country's perspective BITs are a concession to treat investment in an agreed manner which has the potential to promote higher investment and capital flow into the country³⁰. Chinese BIT program seems fulfilled its role of economic liberalization and capital importation, were results suggest "a significant connection exists between a BIT and increased FDI flows"³¹. While MFN clause has been included in vast majority of BITs globally, in Chinese BIT making context³², every single BIT has a variation of MFN clause among its treatment standards³³. Below is one of the most detailed MFN clauses found in a number of Chinese BITs:

Article 5(1) [Most-Favoured-Nation Treatment]: "Each Contracting Party shall accord to *investors* [subject matter] of the other Contracting Party treatment no less favourable than that it accords, *in like circumstances* [qualifier/comparator], to investors of a non-Contracting Party with respect to the *establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments* [phases of investment covered] in its territory"³⁴.

²³ Salacuse, Jeswald W., and Nicholas P. Sullivan. "Do BITs really work: An evaluation of bilateral investment treaties and their grand bargain." *Harv. Int'l LJ* 46 (2005): 72. Particularly Havana Chapter was the first effort that failed, which was intending to give the World Trade Organization the authority of promulgating investment protection rules. ICC has initiated two unsuccessful efforts: International Code of Fair Treatment of Foreign Investment (1949) and the International Convention for the Mutual Protection of Foreign Property (1967); and OECD has organized Draft Convention on the Protection of Foreign Property.

²⁴ Egli, Gabriel. "Don't Get Bit: Addressing ICSID's Inconsistent Application of Most-Favored-Nation Clauses to Dispute Resolution Provisions." *Pepp. L. Rev.* 34 (2006): 1051.

²⁵ Germany-Pakistan BIT (1959).

²⁶ USA-Panama BIT (1982).

²⁷ China-Sweden BIT (1982).

²⁸ For further updated details to the BIT statistics of China, refer to the following website: <
<http://investmentpolicyhub.unctad.org/IIA/CountryBits/42#iiaInnerMenu>>

²⁹ Germany, according to UNCTAD website currently has 135 signed BITs (129 in force).

³⁰ See generally, Hadley, Kate. "Do China's Bits Matter-Assessing the Effect of China's Investment Agreements on Foreign Direct Investment Flows, Investors Rights, and the Rule of Law." *Geo. J. Int'l L.* 45 (2013): 255-321; Büthe, Tim, and Helen V. Milner. "The politics of foreign direct investment into developing countries: increasing FDI through international trade agreements?." *American Journal of Political Science* 52.4 (2008): 741-762.

³¹ Hadley, Kate. "Do China's Bits Matter-Assessing the Effect of China's Investment Agreements on Foreign Direct Investment Flows, Investors Rights, and the Rule of Law." *Geo. J. Int'l L.* 45 (2013): 269.

³² Dolzer, Rudolf, and Christoph Schreuer. *Principles of international investment law*. Oxford University Press, 2012, 186.

³³ Gallagher, Norah, and Wenhua Shan. *Chinese investment treaties: policies and practice*. Vol. 99. Oxford: Oxford University Press, 2009, 140.

³⁴ China-Canada BIT (2012), Art. 5(1).

Article 8 (1): *Exceptions* [list of exceptions] “Article 5 does not apply to: treatment by a Contracting Party pursuant to any existing or future bilateral or multilateral agreement:

- (i) establishing, strengthening or expanding a free trade area or customs union; or
- (ii) relating to aviation, fisheries, or maritime matters including salvage;
- (iii) treatment accorded under any bilateral or multilateral international agreement in force prior to 1 January 1994”.

In terms of subject matter, as provided above, MFN clauses in Chinese BITs vary among the following most common wordings: investments³⁵, investments or returns³⁶, investors and covered investments³⁷, and investments and activities associated with investments³⁸. The subject matter (e.g., investors or investments) of MFN clause in BITs being applicable after the investments are made to potentially an extensive list of treatment standards demonstrates the difference with MFN clause of trade agreements where it is applicable to *like products* which is applicable in the border and thus considerably narrower than the former³⁹.

An important qualification or clarification to MFN clause is the inclusion of the specifics of stages of investment that MFN clause is applicable. Chinese BITs traditionally granted MFN treatment only to post-entry stage of investments⁴⁰, thus there are a few BITs that contain pre-admission MFN clause⁴¹. The approach of including pre-establishment or admission stage under the protection of MFN clause has been a rather recent practice by China.

In the first two decades of Chinese BIT making, we can hardly find an MFN clause that expands to pre-establishment stage, and the first examples of China including this stage as well has been recorded in BIT with Finland⁴². Post-admission MFN treatment allows the host country to preserve a great deal of discretion over admission and establishment of foreign investment⁴³.

BIT with Canada as a recent example provides MFN treatment in ‘*establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments*’ [establishment, acquisition and expansion constitute a pre-entry stage]. With pre-establishment MFN treatment the host country, China, to some extent limits

³⁵ Norway - China BIT (1984) Art. 4(1); Malaysia - China BIT (1988) Art. 3(1) etc.

³⁶ Singapore - China BIT (1985) Art.4; Sri Lanka – China BIT Art. 4 (1986) etc.

³⁷ China - Canada BIT (2012), Art. 5(1).

³⁸ Bulgaria - China BIT (1989) Art. 3 (2), Ghana – China BIT (1989) Art. 3(2), Philippines – China BIT (1992) Art. 3(2) etc.

³⁹ Kurtz, Jurgen. "The MFN Standard and Foreign Investment: An Uneasy Fit." *Journal of World Investment & Trade* 5.6 (2004): 868.

⁴⁰ Gallagher, Norah, and Wenhua Shan. *Chinese investment treaties: policies and practice*. Vol. 99. Oxford: Oxford University Press, 2009, 146.

⁴¹ Canada - China BIT (2012); Korea- China BIT (1992), Art. 2(2); New Zealand – China FTA Art 139, para 1. In Canada - China BIT (2012) China additionally provides a qualified pre-admission national treatment along with MFN clause, which allows the better of two treatments.

⁴² Finland – China BIT (2009).

⁴³ UNCTAD, Key Terms and Concepts in IIAs: A Glossary, UNCTAD Series on Issues in International Investment Agreements,, UNCTAD/ITE/IIT/2004/2: 4.

its sovereignty to regulate foreign investment⁴⁴ while compensation for pre-establishment costs have been scarce in the international investment law (IIL) jurisprudence⁴⁵. In the context of China as a developing country, granting post-establishment MFN clause, which is found in vast majority of Chinese IIAs, is understandable, since it allows investment control and screening to its territory, protect economy from potential anti-monopolistic activities, preserve domestic production in certain sectors and preserve the right to grant certain countries potentially more preferable conditions without having to extend the same to rest that have signed a treaty with China, with post-establishment MFN clause⁴⁶.

In like circumstances comparator or qualifier is not a common practice in Chinese BIT program, and there are only handfuls of BITs⁴⁷ that do set this qualifier. *In like or same circumstances* qualifiers have not seen substantial discussion in the context of MFN clause⁴⁸ but it has been interrelated mainly in the context of national treatment clause⁴⁹. MFN clause is a relative standard of treatment and can be granted only based on being included in a particular treaty and can be utilized to gain more favourable treatment for investments that are in a similar objective situations. “Like circumstances” qualification is added to bring further clarity over potential comparators⁵⁰, it is thus a comparative test not contingent to any arbitrariness thresholds⁵¹. As mentioned, more favourable treatment granted through investment contracts does not need to be extended to other comparators that are objectively “in like circumstances”⁵².

All Chinese BITs contain some kind of exception in their respective MFN clauses⁵³. The most common kind of post-establishment exceptions provided in vast majority of global and Chinese IIAs refers to benefits and privileges granted as a virtue of economic integration (free trade agreements, customs unions, labour integration markets or any other sort of regional economic arrangements), taxation treaties and laws, frontier trade⁵⁴. The above MFN clause of Canada–China BIT, for example contains economic

⁴⁴ Joubin-Bret, Anna. "Admission and establishment in the context of investment protection." *Standards of Investment Protection*, Oxford University Press, Oxford (2008): 14.

⁴⁵ Ibid, 14.

⁴⁶ General considerations of advantages of granting post-entry MFN clause or restricted MFN clause are described in UNCTAD. *International Investment Agreements: Key issues*, Volume I, UNCTAS/ITE/IIT/2004/10, 81-85.

⁴⁷ For example, Mexico-China BIT (2008); Canada – China BIT (2012); ASEAN – China Investment Agreement (2009), New Zealand – China FTA (2008), etc.

⁴⁸ There are several cases that have dealt with appropriate comparator requirements, such as *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, para 388-420 (breach of MFN clause is ruled out due to lack of supporting data); *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, para 396, case for comparing two construction project, tribunal considered their size, objective and venue to decide whether they were *in like circumstances*; Dolzer and Stevens, *supra* note, page 207 (refers to the fact that considerations for determination of investors ‘in like circumstances’ could be borrowed from those developed for national treatment standard.

⁴⁹ While there is no extensive discussion in the case law on the implication of “in like circumstances” wording, in the context of national treatment it has been discussed widely and can guide future tribunals. For example, in *SD Myers, Inc. v. Canada*, UNCITRAL, First Partial Award, 13 November 2000, para. 251 and in *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, para 71 tribunals set economic sector and competition as prerequisite for being in “like circumstances”. In *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, para 173 case tribunal refused to confine “in like circumstances” to being in direct competition and by the sector in which the particular activity is undertaken.

⁵⁰ UNCTAD, “Most-Favoured-Nation Treatment”, *Series on Issues in International Investment Agreements*, (1999): 21.

⁵¹ Ibid, 23.

⁵² Ibid, 29.

⁵³ Gallagher, Norah, and Wenhua Shan. *Chinese investment treaties: policies and practice*. Vol. 99. Oxford: Oxford University Press, 2009, 149.

⁵⁴ Ibid, 150-154; UNCTAD “Most-Favored-Nation Treatment” (2010): 47, Shen, Wei. "Leaning Towards a More Liberal Stance? An Evaluation of Substantive Protection Provisions under the New ASEAN–China Investment Agreement in Light

integration exception and some further exceptions based on the negotiations of parties. Some BITs provide MFN clauses with public order and security exception⁵⁵, exceptions for certain countries or sectors⁵⁶, special investor exceptions⁵⁷ and reciprocity-based exceptions⁵⁸. Some of those exceptions have a “self-judging” nature (e.g., public order and security) and allows the countries discretion to invoke the exception⁵⁹. While the reciprocal subject specific exceptions (e.g., economic integration, double taxation etc.) allow countries to grant each other rights and privileges in bilateral or reciprocal manner that would not be granted to a third state by invoking an MFN clause⁶⁰. While in one hand these exceptions push the fragmentation of IIL further and limit the multilateralizing effect of MFN clause, they allow further experimentation and liberalization of treatments that countries otherwise would not grant under the conditions it to be extendable to all the third parties.

MFN clauses of several Chinese-EU BITs have non-reciprocal *grandfather provision* in regard to China effectively excluding all existing non-conforming measures from the MFN clause, with an obligation to progressively remove those discriminatory measures⁶¹. A grandfather provision can be found in Canada-China BIT, with the following formulation “(a)(i) any existing non-conforming measures maintained within the territory of a Contracting Party; and (ii) any measure maintained or adopted after the date of entry into force of this Agreement that ... (b) the continuation or prompt renewal of any non-conforming measure referred to in sub-paragraph (a); or o (c) an amendment to any non-conforming measure referred to in sub-paragraph (a), to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 5 [MFN clause], 6 and 7”⁶². This exception allows the parties further flexibility concerning certain measures, activities and sectors⁶³ and encourages but does not oblige the parties to eliminate the non-conforming measures and in case of voluntary elimination the investors can enjoy the more favourable benefits⁶⁴. An interesting characteristic of *grandfather provision* in Chinese BITs is, unlike Canada- China BIT, in other cases the provision is non-reciprocal reason of which is hard to examine due to lack of insight.

IIL jurisprudence has proven that MFN clauses can be utilized to import more favourable substantive treatment standards such as more favourable FET, compensation for expropriation, effective means, umbrella clause, and other substantive treatment

of Chinese BIT Jurisprudence." *Arbitration International* 26.4 (2010): 566.. As an example, Indonesia–China BIT (1994) Art. IV(3) has “common market, economic multilateral or international agreement” exception, Philippines–China BIT (1992), Art. 3(3) has “regional or sub-regional arrangement exception”, Poland-China BIT (1988) Art. 3(3) has “international agreement or arrangement or arrangement relating to taxation” exception; Austria-China BIT (1985) Art.3 has “frontier trade” exception etc. This list of exceptions has a descriptive nature and does not intend to be all-exhaustive.

⁵⁵ Finland - China BIT (2004) Art. 3(5)&(6); Germany- China BIT (2003) Annex at Ad Art. 3 ect.

⁵⁶ Lebanon - China BIT (1996), Protocol, Ad Art.3; Argentina- China BIT (1992).

⁵⁷ Thailand - China BIT (1985).

⁵⁸ Netherlands - China BIT (1985) Art 3(5). For general discussion on the exceptions found in Chinese BITs see Gallagher, Norah, and Wenhua Shan. *Chinese investment treaties: policies and practice*. Vol. 99. Oxford: Oxford University Press, 2009, 150-157.

⁵⁹ UNCTAD (1999), supra note 35, p. 17.

⁶⁰ Ibid, p. 17-24

⁶¹ Grandfather clauses can be found for example in the following BITs signed by China: Netherlands (2001); Finland (2004); Czech Republic (2005); BLEU (2005), Portugal (2005); Spain (2005); Slovakia (Protocol effected in 2005) etc.

⁶² China - Canada BIT (2012) Art 8.

⁶³ UNCTAD, “Most- Favoured-Nation Treatment”, *Series on Issues in International Investment Agreements*, (1999): 49.

⁶⁴ Gallagher, Norah, and Wenhua Shan. *Chinese investment treaties: policies and practice*. Vol. 99. Oxford: Oxford University Press, 2009, 154-155.

standards granted to other foreign investors. While importation of substantive standards has been relatively straight forward, until now there is no clarity whether MFN clause can invoke procedural treatment standards.

Application of MFN Clause to procedural Standards in the Context of Chinese BIT practice and BIT jurisprudence

The jurisprudence surrounding Most Favoured Nation (MFN) treatment and procedural standards or dispute settlement clause in international investment agreements (IIAs) continues to be one of *quaestiones vexatae* in investment arbitration⁶⁵. In recent BIT practice, states choose to explicitly address and clarify in their BITs whether the MFN clause is applicable to dispute settlements clauses.

Perhaps the most specific wording in Chinese BIT program can be found in a treaty concluded with Canada, which explicitly stipulates that: “For greater certainty, the ‘treatment’ referred to in paragraphs 1 and 2 [MFN treatment] of this Article does not encompass the dispute resolution mechanisms, such as those in Part C, in other international investment treaties and other trade agreements”⁶⁶. Similar formulations are also found in the most recent Chinese BITs such with Tanzania that “[p]aragraph 1 of this Article does [MFN clause] not apply in respect of dispute settlement provisions”⁶⁷, with Uzbekistan stipulating “[n]otwithstanding Paragraph 1 [MFN clause], dispute settlement mechanisms stipulated in other treaties shall not be referred to investment disputes in the framework of this Agreement”⁶⁸ and in recent TIPs such as China-Hong Kong CEPA⁶⁹, Investment Chapter of China- Australia FTA⁷⁰, China- Korea FTA⁷¹, China - Japan - Korea, Republic of Trilateral Investment Agreement (2012)⁷², China- ASEAN Investment Agreement⁷³.

First time it appeared in any Chinese investment agreements was in investment chapter of China-New Zealand FTA in 2009, stating “For greater certainty, the obligation in this Article does not encompass a requirement for a Party to extend to investors of another Party dispute resolution procedures other than those set out in this Agreement.” The importance of explicit exclusion of ISDS provisions from scope of MFN clause shall not be underestimated, a move to stop the controversy and incoherence of arbitral tribunal decisions concerning the matter.

As an over generalized summary of two most cited and discussed binary tribunal awards are a wide interpretation of MFN clause in *Maffezini v Spain* case⁷⁴ and a narrow interpretation of MFN clause with *Palma v. Bulgaria* case⁷⁵. The dichotomy of these two approaches is especially relevant in the context of Chinese BIT program which has traditionally, in vast

⁶⁵ *Tza Sum Yap v. Peru*, Decision on Jurisdiction, 19 June 2009, para 19

⁶⁶ China - Canada BIT (2012) Art 5(3).

⁶⁷ China - Tanzania BIT (2013) Art 4(3).

⁶⁸ China - Uzbekistan (2011) Art 4(3).

⁶⁹ China - Hong Kong CEPA Investment Agreement (2017) Art 6(4)

⁷⁰ China - Australia FTA (2015) Investment Chapter, Art 9.4(2), (“For greater certainty, the treatment referred to in this Article [MFN clause] does not encompass Investor-State Dispute Settlement procedures or mechanisms.”)

⁷¹ China - Korea FTA (2015) Investment Chapter, 12.4(3), (“It is understood that the treatment [...] in paragraph 1 does not include [...] provisions concerning the settlement of investment disputes between a Party and investors of any non-Party that are provided for in other international agreements”).

⁷² China - Japan - Korea, Republic of Trilateral Investment Agreement (2012) Art 4(3), similar to formulation of ISDS exception found in China-Korea FTA, *Ibid*.

⁷³ China - ASEAN Investment Agreement (2009) Art 5(4), (“For greater certainty, the obligation in this Article does not encompass a requirement for a Party to extend to investors of another Party dispute resolution procedures other than those set out in this Agreement.”)

⁷⁴ *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7.

⁷⁵ *Palma Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24.

majority of BITs signed before 1998, granted a restricted ISDS provisions with investors being able to refer their case to arbitration only for quantum of liability⁷⁶ if included into the BIT at all. China evidently has shown its categorical position during negotiations of different BITs about their restrictive approach towards ISDS provision⁷⁷ additionally it expressed its position to ICSID in 1993 by announcing that “[P]ursuant to Article 25(4) of the Convention, the Chinese Government would only consider submitting to the jurisdiction of the International Centre for Settlement of Investment Disputes over compensation resulting from expropriation and nationalization.”⁷⁸

The interrelation between MFN clause and Dispute Settlement clause has been stress tested in several Chinese BIT related investor-state disputes: *Señor Tza Yap Shum v. The Republic of Peru*⁷⁹, *Sanum Investments Limited v. Lao People’s Democratic Republic*⁸⁰, *Ansung Housing Co., Ltd. v. People's Republic of China*⁸¹, *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*⁸². In all of the above cases the tribunals have taken the approach similar to *Palma v. Bulgaria* case, the tribunals took a restrictive interpretative approach and did not allow the claimants to invoke MFN clause for importing a more favourable dispute settlement clause.

CONCLUSION

The purpose of the article was to present practice of MFN clauses in Chinese international investment treaties. There are key findings that need to be emphasised as the part of the conclusion. First of all, virtually every Chinese BIT contains Most-Favoured-Nation clause thus ensuring equality of competitive conditions among the foreign investors. The older models of Chinese BITs concluded before 2000s, provided foreign investors MFN treatment only in post-establishment stages of investment, and it is relatively recent practice for Chinese BITs to provide MFN treatment both in pre-establishment and post-establishment stages.

International investment law and jurisprudence has demonstrated that MFN clause can commonly be invoked for importing a more favourable substantive treatment standard from a third-party BIT into the basic BIT. However, the jurisprudence concerning to invoking MFN clause in reference to dispute settlement or procedural standards of treatment provides conflicting conclusions. The jurisprudence on this matter is hard to reconcile for several reasons, firstly, language of MFN and ISDS clauses vary from one agreement to another, secondly, arbitral awards don’t have precedence and are being used for reference, thirdly, in seemingly similar circumstances different tribunals have made decisions that are taking contrary sides.

⁷⁶ Shen, Wei. "The good, the bad or the ugly? A critique of the decision on jurisdiction and competence in *Tza Yap Shum v. The Republic of Peru*." *Chinese Journal of International Law* 10.1 (2011): 56. Several examples of those BITs are China - Denmark BIT (1985), China – United Kingdom BIT (1986), Philippines - China BIT (1992), Indonesia - China BIT (1994) etc.

⁷⁷ *Señor Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Award, 211-212.

⁷⁸ ICSID, “Notification Concerning Classes of Disputes Considered Suitable or Unsuitable for Submission to Center” ICSID/8-D, p. 1.

⁷⁹ *Señor Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Award; & Decision on Jurisdiction and Competence, 19 June 2009.

⁸⁰ *Sanum Investments Limited v. Lao People’s Democratic Republic*, UNCITRAL, PCA Case No. 2013-13, Award on jurisdiction, 13 Dec 2013.

⁸¹ *Ansung Housing Co., Ltd. v. People's Republic of China*, ICSID Case No. ARB/14/25, Award, 9 March 2017.,

⁸² *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30.

This divergence in jurisprudence is especially important, considering that China has traditionally taken a restrictive approach towards dispute settlement clause of BITs by limiting its scope to “disputes concerning to amount of compensation from expropriation” and if the foreign investors are able to invoke MFN clause for importing a more favourable dispute settlement clause, the traditional limitation can be overcome. In recent decade tribunals have addressed this question in the context of four Chinese BIT related cases, and in these cases the tribunals have adopted a restrictive interpretation of MFN clause and found that MFN clause cannot be invoked for enlarging the scope of dispute settlement clause.