

# APPLICABILITY TO DISPUTE SETTLEMENT OF MOST FAVOURED NATION CLAUSES IN INTERNATIONAL INVESTMENT AGREEMENTS

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## INTRODUCTION:

Most Favoured Nation (MFN) clauses in International Investment Agreements (IIAs) play an important role in promoting fairness and non-discrimination among foreign investors. MFN clauses oblige the host state to treat investors of one state no less favorably than it treats investors of any other state. These clauses are becoming increasingly common in international investment agreements and are often found in the dispute settlement provisions of such agreements. In this article, we will discuss the applicability of MFN clauses to dispute settlement in IIAs.

The purpose of MFN clauses in IIAs is to ensure that foreign investors receive the same treatment as investors from other countries. This means that if a host state provides a certain level of protection or treatment to investors from one state, it must also provide the same level of protection or treatment to investors from any other state that is a party to the IIA. This principle of non-discrimination is designed to ensure that foreign investors are not subject to arbitrary or discriminatory treatment.

In the context of dispute settlement, MFN clauses are used to extend the benefits of one IIA to another. For example, if a host state has agreed to provide a certain level of protection to investors from one state in one IIA, and then subsequently signs another IIA with a different state that offers greater protection, the MFN clause in the second IIA may be used to extend the higher level of protection to the investors of the first state.

However, the applicability of MFN clauses to dispute settlement in IIAs is not always clear. Some IIAs explicitly exclude the application of MFN clauses to dispute settlement, while others are silent on the issue. The question of whether MFN clauses can be applied to dispute settlement in IIAs has been the subject of much debate and controversy in recent years.

One view is that MFN clauses should be interpreted narrowly and should not be used to extend the dispute settlement provisions of one IIA to another. This view is based on the argument that dispute settlement is a sensitive issue that should be left to the discretion of the parties involved in each IIA. Furthermore, it is argued that extending the dispute settlement provisions of one IIA to another through an MFN clause could result in forum shopping, whereby investors choose the most favorable forum for dispute resolution.

On the other hand, some argue that MFN clauses should be interpreted broadly and should be used to extend the dispute settlement provisions of one IIA to another. This view is based on the argument that the purpose of MFN clauses is to ensure non-discriminatory treatment of foreign investors, and that extending the dispute settlement provisions of one IIA to another through an MFN clause is consistent with this principle.

In practice, the application of MFN clauses to dispute settlement in IIAs is highly dependent on the specific language of the clause and the intention of the parties involved in each IIA. As such, the interpretation of MFN clauses in IIAs will continue to be a contentious issue and will likely be the subject of future disputes.

#### **FUNCTIONS OF MFN CLAUSES:**

The most-favored nation (MFN) clause is a provision that is commonly included in International Investment Agreements (IIAs) such as Bilateral Investment Treaties (BITs) and Free Trade Agreements (FTAs). The primary function of the MFN clause is to promote non-discrimination and ensure that foreign investors are treated fairly and equally by the host state.

More specifically, the MFN clause has the following functions:

**Non-Discrimination:** The MFN clause prohibits host states from discriminating against investors from the other party to the agreement by providing less favorable treatment than that

provided to investors from other countries. In other words, the host state must provide foreign investors with treatment that is no less favorable than that given to investors from any third country.

**Treatment Extension:** The MFN clause also allows investors to benefit from more favorable treatment that the host state has given to investors from other countries. For example, if the host state has granted more favorable investment treatment to investors from a third country, the MFN clause allows investors from the other party to the agreement to also benefit from that more favorable treatment.

**Forum Shopping:** The MFN clause can also be used by investors as a form of forum shopping. If the host state provides more favorable dispute settlement provisions in another agreement with a third country, the MFN clause may allow investors to bring a claim under those provisions rather than under the provisions of the IIA in question.

The MFN clause promotes non-discrimination and equal treatment of foreign investors by host states, and allows investors to benefit from more favorable treatment that the host state has given to investors from other countries. However, the use of the MFN clause can also give rise to issues such as uncertainty, forum shopping, and potential abuse by investors.

### **CHALLENGES DURING DISPUTE SETTLEMENT:**

One of the challenges in interpreting MFN clauses in the context of dispute settlement is the potential overlap with other provisions in IIAs, such as the provisions on nationality and the definition of investment. For example, if an investor from one state uses an MFN clause to access a more favorable dispute settlement mechanism provided for in another IIA, this could raise issues about the nationality of the investor and whether the investment in question qualifies for protection under the IIA.

Another issue is the potential impact of MFN clauses on the consistency and coherence of the international investment regime. Some have argued that the use of MFN clauses to extend the dispute settlement provisions of one IIA to another could result in fragmentation and inconsistency in the interpretation and application of IIAs. This could undermine the legitimacy and effectiveness of the international investment regime as a whole.

Despite these challenges, MFN clauses continue to be a widely used and important feature of IIAs. They are seen as a means of promoting transparency, predictability and fairness in the treatment of foreign investors. At the same time, their interpretation and application in the context of dispute settlement remain a complex and evolving area of international investment law.

In recent years, some countries have sought to limit the use of MFN clauses in IIAs, particularly in the context of dispute settlement. For example, the United States has included provisions in its recent trade agreements that restrict the use of MFN clauses in relation to dispute settlement, in order to protect the autonomy of the dispute settlement mechanisms provided for in each agreement.

Another issue that arises in the context of MFN clauses and dispute settlement in IIAs is the potential conflict with customary international law. Customary international law recognizes the right of states to resolve their disputes through domestic courts and tribunals. However, the use of MFN clauses to extend the dispute settlement provisions of one IIA to another could potentially limit the jurisdiction of domestic courts and tribunals, and infringe on the sovereignty of states.

Furthermore, the interpretation and application of MFN clauses in the context of dispute settlement can have significant economic implications. The availability of more favorable dispute settlement mechanisms through the use of MFN clauses can encourage foreign investment, as investors are more likely to feel secure and protected. At the same time, the use of MFN clauses can lead to increased costs for host states, as they may be required to provide the same level of protection to investors from all parties to the IIA, regardless of their economic development or level of investment.

Given these complexities and potential consequences, it is important for IIAs to provide clear and precise language regarding the use of MFN clauses in dispute settlement. This can help to minimize ambiguity and reduce the risk of conflicting interpretations by different parties to the IIA.

Finally, it is worth noting that the use of MFN clauses in IIAs is not limited to the context of dispute settlement. MFN clauses can also be used to extend other benefits, such as investment

protection or access to investment opportunities, from one IIA to another. As such, the interpretation and application of MFN clauses in IIAs is a multifaceted issue that requires careful consideration and analysis.

### **BENEFITS OF MFN CLAUSES:**

One potential benefit of MFN clauses in the context of dispute settlement is their ability to promote greater consistency and coherence in the interpretation and application of IIAs. By extending the dispute settlement mechanisms of one IIA to another, MFN clauses can help to ensure that foreign investors are treated fairly and consistently across different jurisdictions.

Furthermore, the use of MFN clauses can also help to mitigate the risk of forum shopping by foreign investors. Forum shopping refers to the practice of selecting a dispute settlement mechanism that is most favorable to the investor, rather than the mechanism provided for in the original IIA. By limiting the use of forum shopping, MFN clauses can help to promote greater predictability and stability in the international investment regime.

At the same time, however, the use of MFN clauses in dispute settlement can also give rise to a number of challenges and concerns. For example, the potential overlap with other provisions in IIAs, such as the definition of investment, can create uncertainty and ambiguity. This can make it difficult for states to determine whether a particular dispute falls within the scope of the IIA and whether an investor is entitled to invoke the MFN clause.

Another issue is the potential for abuse of MFN clauses by investors. Some investors may use MFN clauses to gain access to more favorable dispute settlement mechanisms that were not intended to be included in the original IIA. This can create a risk of excessive litigation and undermine the legitimacy of the international investment regime.

To address these challenges, some IIAs include limitations on the use of MFN clauses in dispute settlement. For example, some IIAs specify that the MFN clause cannot be used to extend the dispute settlement mechanism to a third party, or to disputes that do not relate to the investor's investment.

## CONCLUSION:

In conclusion, the use of MFN clauses in the context of dispute settlement in IIAs is a complex and multifaceted issue. While MFN clauses can help to promote non-discrimination and consistency in the treatment of foreign investors, their use can also give rise to a number of challenges and concerns. As such, it is important for IIAs to provide clear and precise language regarding the use of MFN clauses in dispute settlement, and to balance the need for fairness and predictability with respect for national sovereignty and the autonomy of domestic courts and tribunals.

One important factor to consider in the context of MFN clauses and dispute settlement in IIAs is the role of investment treaty arbitration. Investment treaty arbitration is a form of international arbitration that allows investors to bring claims against host states for alleged breaches of the IIA. The use of MFN clauses in dispute settlement can potentially expand the scope of investment treaty arbitration, by allowing investors to invoke the dispute settlement mechanism of one IIA to bring a claim under another IIA.

However, the use of investment treaty arbitration has been the subject of significant criticism in recent years. Some critics argue that investment treaty arbitration undermines the sovereignty of states and places undue burdens on host states, while others argue that the system is biased in favor of investors and lacks transparency and accountability.

In response to these concerns, some IIAs have included provisions that limit the use of investment treaty arbitration. For example, some IIAs require investors to exhaust local remedies before bringing a claim under the IIA, or restrict the types of claims that can be brought under the IIA.

Another issue to consider is the potential impact of MFN clauses and dispute settlement on developing countries. Developing countries often have limited resources and capacity to defend themselves against investment claims, and may be at a disadvantage in the context of investment treaty arbitration. The use of MFN clauses to extend more favorable dispute settlement mechanisms to investors from developed countries can exacerbate this imbalance,

and may place undue pressure on developing countries to agree to unfavorable investment terms.

To address these concerns, some developing countries have sought to limit the use of MFN clauses in IIAs. For example, some countries have included provisions that restrict the use of MFN clauses to certain types of benefits, or require the consent of the host state before an investor can invoke the MFN clause.

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