Most-Favoured-Nation Clauses and pre-conditions for ISDS: the Argentinian Experience
Cláusula da Nação-Mais-Favorecida e pré-condições para a solução de controvérsias investidor-estado: a experiência argentina

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Abstract: In recent years, the negotiation and conclusion of international investment agreements (IIAs) in Latin America has been signalling to a change in dispute settlement clauses, favouring alternative dispute settlement mechanisms prior to investor-state arbitration, when the latter are present at all in those agreements. This trend is illustrated, among others, in the Brazilian experience with the Cooperation and Facilitation Investment Agreements (CFIAs), the negotiations on the creation of a regional dispute settlement centre under the auspices of the Union of South American Nations (UNASUR), the Mercosur Protocol, some recently signed Bilateral Investment Agreements (BITs) in the region and amendments to national arbitration laws for disputes involving the State. The article contraposes this recent experience with another, too, common trend in recent agreements, related to the latter: the modification of the most-favoured-nation (MFN) clause, often found in BITs. Using the Argentinian experience as a guidance to arbitral tribunals' previous and present decisions regarding such a clause and highlighting the importance of alternative dispute settlement mechanisms for the development of international investment law, this article will shed light into the importance of the MFN clauses to uphold equality in investor-state disputes among countries and combat the idea that MFN clauses prevent alternative dispute settlement resolutions from being effective.

Keywords: International Investment Law. Investor-State Dispute Settlement (ISDS). Alternative Dispute Settlement Resolution (ADR). Most-favoured-nation clauses. Argentina.

Resumo: Nos últimos anos, a negociação e a conclusão de acordos internacionais de investimento (AIIs) na América Latina vêm sinalizando uma mudança nas cláusulas de solução de controvérsias, favorecendo mecanismos alternativos de solução de controvérsias ante a arbitragem entre investidores e estados, quando estes últimos estão presentes naqueles acordos. Essa tendência é ilustrada, entre outros, na experiência brasileira com os Acordos de Investimento em Cooperação e Facilitação (CFIAs), nas negociações sobre a criação de um centro regional de solução de controvérsias, sob os auspícios da União das Nações Sul-Americanas (UNASUL), no Protocolo do Mercosul, em alguns Acordos Bilaterais de Investimento (TBIs) recentemente assinados na região e em emendas às leis nacionais de arbitragem para disputas envolvendo o Estado. O presente artigo contrapõe essa experiência recente a outra tendência comum em acordos recentes, relacionados a essa: a modificação da cláusula de nação mais favorecida (MFN), frequentemente encontrada nos TBIs. Usando a experiência argentina como orientação em relação a decisões de tribunais arbitrais anteriores e recentes em relação a

essa cláusula e frisando a importância da resolução alternativa de controvérsias para a evolução do direito internacional do investimento, este artigo esclarecerá a importância das cláusulas da MFN para manter a igualdade nas disputas entre investidores e estados entre países e combater a ideia de que as cláusulas da MFN impedem resoluções alternativas de solução de controvérsias sejam efetivas.

Palavras-chave: Direito internacional dos investimentos. Solução de controvérsias entre investidor e estado. Vias alternativas de resolução de conflitos. Cláusula da nação mais favorecida. Argentina.

1 Introduction

The International Investment Law (IIL) regime is constantly under scrutiny. Foreign Direct Investment (FDI), the main characteristic of it, itself has at least two theories for its existence.[1] The first theory maintains that foreign investment is wholly beneficial to the host state. The second theory, on the opposite, maintains that unless a state veers away from dependence on foreign investment it cannot achieve development. Both theories focus attention on the economic development of the host state. Whether or not FDI promotes development[2] is beyond the scope of this article. The fact is that, in order to attract FDI, states afford investors with some guarantees that are present in most international investment agreements (IIAs), one of them being the Most-Favoured-Nation Clause (MFN).

Another characteristic of the regime is the Investor-State Dispute Settlement System (ISDS), an arbitration mechanism under which investors can bring claims against States. Under this mechanism, claimant's rights afforded by MFN clauses are often triggered. ISDS, as part of the international law regime is also under scrutiny, as some States perceive the mechanism as biased.[3] In this scenario, the paper will make the argument that the adoption of provisions for dispute settlement previous to ISDS, a solution encountered by states for this criticism, should coexist with MFN clauses.

To make the above argument, the essay will assess Argentina's experience with local litigation requirements and how the tribunals have been dealing with the MFN clauses vis-à-vis such a requirement in Argentinian BITs. Argentina is one of

1 M. Sornajah, The International Law on Foreign Investment 50 (2004).

2 To an in-depth discussion on this matter *see generally* J. Salacuse & N.Sullivan, Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain,46 HARv. INT'L L.J. 67,76 (2005).

3 See the mandate of the UNCITRAL Working Group III. (http://www.uncitral.org/pdf/english/workinggroups/wg_3/WGIII-34thsession/930_for_the_website.pdf), last accessed (09-05-2019).

the countries that adhered the most to the practice of requiring alternative dispute settlement resolutions, (mostly in the form of local litigation), previous to ISDS, and, as such, case-law related to the Country is extensive.

To the above intent, the paper will, in the second section expose the use and the importance of MFN clauses to IIL, in opposition to the tendency of countries in reformulating them in their recent IIAs. In the third section, it will expose the importance of local litigation and alternative dispute settlement resolution. In the fourth section, the paper will assess the latest Argentinian experience in requiring solution of controversies previous to ISDS and the relevance of that practice for the country, and, in parallel, the MFN clauses present in such treaties, to assess how these two trends are arising in parallel. In the fifth section, it will delve into the Argentinian experience with the MFN clause in relation to local litigation requirements in terms of development of tribunal decisions to make the argument that an interpretation considering the intention of the States in their Treaty-drafting, and the socio-economic situation in which the claim takes place should be called for in order to establish a balance between investor's rights and State's concerns.

The conclusion will be that some tribunals, in a rightful manner, have been approaching to the local litigation requirements with caution, assessing the wording of the clause along with the whole context in which the claim takes place, rather than indiscriminately accepting investors' claims for most-favoured-nation treatment. This trend should be followed by tribunals in the future for two reasons. First, so that the application of local litigation requirements indeed serves its purpose, of allowing claimants and respondents two different and effective *fora* of adjudication. And, second, so that the MFN clauses effects don't have to be restricted to these purposes to be reached.

2 The MFN clause under international investment agreements

2.1 Overview

According to The Draft Articles on Most-Favoured-Nation Clauses prepared by the ILC, "a most-favoured-nation clause is a treaty provision whereby a State undertakes an obligation towards another State to accord most-favoured-nation treatment in an agreed sphere of relations".[4] The MFN clause is an economic law principle exported to investment law.

[4] International Law Commission (ILC), Yearbook of the International Law Commission (1978), Draft Articles on Most-Favoured-Nation Clauses with Commentaries, Article 4.

For foreign investors, the MFN clause is an anti-discrimination provision protecting them against any competitive disadvantage compared to treatment afforded to other investors from third countries. Confirming this thought the UNCTAD affirmed: "a host country treats investors from one foreign country no less favorably than investors from any other foreign country".[5] Thus, the underlying idea behind the MFN principle is to ensure equality of competitive opportunities between investors from different foreign countries. MFN clauses are mostly used to import more favourable procedural provisions from other host states' BITs.

2.2 Recent Trends in MFN drafting in treaty making

The UNCTAD also recognized the implications of the clause to States;

> [t]he MFN standard may also have implications for host countries' room for manouvre in respect of future investment agreements, because it can create a so-called "free rider" situation in that the MFN standard commits a host country to extend unilaterally to its treaty partners any additional rights that it grants to third countries in future agreements.[6]

In this regard, in what arguably amounts to a reaction of previous awards conferring most-favoured-nation treatment to investors,[7] what is mostly observed in recent agreements is an attempt of the Countries to restrict the application of MFN clauses in the BITs they sign. Accordingly, States have decided on two avenues regarding MFN treatment and dispute settlement. Some States decided to exclude the dispute settlement mechanism from the scope of the MFN[8] clauses under their agreements. Others even decided to not include MFN clauses in their contracts at all[9]. Argentina, as will be seen, opted for the first avenue.

Restrictions on MFN clauses, ultimately, undermine the purpose of the clause of affording investors similar rights under similar situations that, as will be exposed in the next subsection, plays an important role in maintaining IIL as a field in which states are conferred sovereign equality.

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5 UNCTAD, Most-Favoured-Nation Treatment, UNCTAD Series on Issues in International Investment Agreements, at 1 (1999).

6 *Id.*

7 International Institute for Sustainable Development (IISD), The Most-Favoured-Nation Clause in Investment Treaties, Best Practice Series, at 23 (2017).

8 *E.g.* Colombia-United Kingdom BIT (2010), Article 3.2; Trans-Pacific Partnership (2016), Article 9.5.3; Switzerland-Georgia BIT (2014), Article 5.4; Comprehensive Economic and Trade Agreement (2016), Article 8.7, para 4; EU-Vietnam FTA (2016), Article 4.6; Switzerland-Tunisia BIT (2012), Article 5.5; COMESA CCIA (2007), Article 19.1.

9 *E.g.* SADC Model BIT (2012); India Model BIT (2015).

2.3 The relevance of MFN clauses to IIL

The Most-favoured-nation clause is an instrument for multilateralization of investment law. The clauses break with what, in principle, would permit States to accord differential treatment to different States and their nationals and instead ensure equal treatment between the State benefiting from MFN treatment and any third State.[10] While doing so, it assures that investors are not discriminated by their nationality under IIL, assuring, in this, equality in treatment among nations and, thus, equal possibilities to any investor of any nationality to allocate their resources in the host State.

Equality in treatment among nations has an economic value. Equal competition, a cornerstone economic principle, is essential for the functioning of a market economy that allocates resources efficiently[11]. Thus, MFN treatment is an important instrument to uphold multilateralization and its effects: sustainable allocation of economic resources and sovereign equality among countries. For the host country, MFN clauses harmonize the protection of foreign investments, giving the host States' practice consistency and reliability.

2.4 MFN clauses and ISDS

In what regards Dispute Settlement provisions, one of the claims that investors make is the use of the MFN clause to bypass conditions previous to investor-state dispute settlement. The most common practice in this sense has been the attempt to bypass the requirement of resorting to local remedies prior to ISDS litigation. In this, the *Maffezini*[12] case illustrate the situation.

In the most famous and scrutinized case regarding the use of MFN clauses for the purposes of ISDS, *Maffezini v Spain*, the Tribunal accepted the use of the MFN clause to bypass the requirement of local litigation. Mr Maffezini was an Argentine investor who had a dispute with the Government of Spain arising out of an investment that he had made in the country. He submitted his dispute to ICSID arbitration under the Spain-Argentina BIT (1991), despite the fact that the treaty had a dispute settlement clause requiring prior recourse to local courts for a period of eighteen months. Mr Maffezini stressed that the MFN clause of the Spanish treaty obliged Spain to treat investors of Argentina no less favourably than third-party investors. Consequently, rather than taking his dispute to local courts, he successfully invoked the MFN clause of the Spanish treaty in order to

[10] S. Schill The Multilateralization of International Investment Law 122 (2010).
[11] *Id.*, at 123.
[12] Emílio Augustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7.

rely on the more favourable dispute settlement clause of another BIT concluded between Spain and Chile in which the requirement was of a six-month negotiation prior to dispute settlement. This case was invoked in numerous subsequent cases involving Argentina. Thus, Arbitral Tribunals have interpreted local litigation requirements and considered the possibility of using the MFN provision to bypass them. In doing so, decisions are not homogeneous. Numerous tribunals have accepted this possibility,[13] while others consider that this is not possible.[14]

As exposed in this section, there is a trend among States of restricting the procedural rights granted to investors under the MFN clause. As will be dealt with in the next section, regarding the Argentinian experience, this trend would be problematic for two reasons. First, it would be a barrier to affording protection to investors, causing an imbalance between investors' and States' rights, as explained in this section. Second, because as according to recent tribunals' decisions, restricting MFN clauses is uncalled for. To illustrate the last argument, the requirement of domestic recourse prior to ISDS under BITs undertaken by Argentina will be scrutinized.

3 The importance of prior requirements to ISDS in international investment law

According to the 2015 World Investment Report (WIR), a reform of the ISDS is called for. In this context, alternative dispute resolution mechanisms (ADR) and provisions for local remedies are two of the options suggested by the report.[15] The article will analyse the presence of such clauses in the most recent treaties signed or drafted by Argentina, underlying its importance both for the Country and for the development of the investment law regime.

Local litigation requirement, according to the 2015 WIR, is the requirement that states could add in their treaties establishing that either the investors should exhaust local remedies before accessing international arbitration or specifying that

[13] *Id.*, Maffezinin v Spain, Decision on Jurisdiction (2000); Siemens v Argentina, ICSID Case No ARB/02/8, Decision on Jurisdiction (2005); Camuzzi v Argentina (Camuzzi II), ICSID Case No ARB/03/7, Decision on Jurisdiction (2005); Gas Natural v Argentina, ICSID Case No ARB/03/10, Decision on Jurisdiction (2005); Telefónica v Argentina, ICSID Case No ARB/03/20, Decision on Jurisdiction (2006); National Grid v Argentina, UNCITRAL, Decision on Jurisdiction (2006); Suez and ors v Argentina (Suez I), ICSID Case No ARB/03/17, Decision on Jurisdiction (2006); Suez and ors v Argentina (Suez II), ICSID Case No ARB/03/19, Decision on Jurisdiction (2006); Impregilo v Argentina ICSID Case No ARB/07/17, Final Award (2011); Hochtief v Argentina, ICSID Case No ARB07/31, Decision on Jurisdiction (2011); Teinver v Argentina, ICSID Case No ARB/09/1, Decision on Jurisdiction (2012).

[14] Wintershall v Argentina, ICSID Case No ARB/04/14, Award (2008); ICS v Argentina, PCA Case No 2010-9, Award on Jurisdiction (2012); Daimler v Argentina, ICSID Case No ARB/05/1, Award (2012); Kiliç v Turkmenistan, ICSID Case No ARB/10/1, Award (2013); Dede and Elhuseyni v Romania, ICSID Case No ARB/10/22, Award (2013).

[15] UNCTAD, World Investment Report 2015: Reforming International Investment Governance 149-151 (2015).

the recourse to international investment arbitration becomes possible only after a certain period of time litigating in local courts (e.g. 18 months) has elapsed.

As argued by the WIR, introducing local litigation requirements as a precondition for ISDS would, contrary to what the common sense might think, put foreign investors on an equal footing with domestic investors as well as with foreign investors from States which do not have an International Investment Agreement with the host country. Another advantage of the requirement would be that this mechanism would be more readily accessible to medium and small sized investors, as the financial costs associated with international investment arbitration may preclude them from using the system. Finally, national jurisdictions usually include a right to appeal first-instance decisions and are well-suited to interpret and apply the domestic laws of the host State.

Support for local litigation requirements is also observed in arbitral tribunals. Many tribunals recognised that this pre-condition was included in BITs to give the local tribunals "an opportunity" to decide a dispute before it would be submitted to international arbitration.[16] Arbitrator Christopher Thomas considered that prior recourse to local courts can contribute to a resolution of a dispute, or at least to a narrowing of the issues in dispute,[17] which would certainly save costs and time from a posterior investor-state arbitration.

The same report also argued for effective alternative dispute resolution. Accordingly, this approach promotes the use of ADR mechanisms as a step before the commencement of international investment arbitration. The Report recognizes that ADR cannot in itself solve key ISDS-related challenges, but that it can be used as an instrument to reduce the number of disputes resulting in full-scale arbitration. The advantage of ADR in these cases is that small controversies can be solved in an early stage, preventing investor-state dispute settlement from arising and also fostering a good relationship between the investor and the host state.

The advantage of establishing such a clause, as envisioned by the WIR is that ADR mechanism, as opposed to arbitration, ultimately requires acceptance by both parties. Therefore, it helping resolving disputes at an early stage, consequently fostering good relations between the parties to the controversy. Thus, if successful, ADR would, too, save time and money to the parties.

In conclusion, for states to establish mechanisms previous to ISDS in their IIAs would be an advantage, saving costs and sometimes time in arbitration, further fostering a good relationship between the parties involved in the arbitration.

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[16] *E.g. supra*, note 13, Maffezini v Spain, at para 35; Siemens AG v Argentina, at para 104; TSA v Argentina, at para 110; Wintershall v Argentina, at para 110; Impregilo v Argentina, at para 71; Ablacat v Argentina, at para 581; Hochtief v Argentina, at para 88; Daimler v Argentina, at para 191; Teinver v Argentina, at para 137.

[17] *Supra*, note 14, Hochtief v Argentina, Dissenting Opinion by Christopher Thomas, at para 8.

For investors to think that these requirements would be less favourable for them is misleading. In the following section, the Argentinian experience with such requirements will be assessed to make that argument, inaugurated in this present section.

4 Alternative dispute settlement mechanisms and MFN clauses: the Argentinian experience

In recent years, the negotiation and conclusion of IIAs in Argentina in particular and in Latin America in general, has gone in a way of addressing the complaints of the countries of the region against the so-called over-protectionist investment law regime.[18] Although reforms were implemented in various aspects of the investor-state relation established under IIAs, for the scope of this article, the reform that is going to be scrutinized in this paper is concerning previous mechanisms to the solution of controversies between investors and states as a requirement to engage in ISDS. This trend will be analysed vis-à-vis the Argentinian treaty-drafting relating to MFN clauses in an attempt to trace the relationship between these two. For such an assessment, the most recent international treaties signed by the country will be exposed.

4.1 The UNASUR Centre for the Settlement of Investment Disputes

The proposed Centre for the Settlement of Investment Disputes, to be established under the auspices of the Union of South-American Nations (UNASUR), is an initiative to create a regional dispute settlement institution endowed with procedural rules that differ significantly from the currently mainstream ISDS system.[19] Among other features, under the UNASUR, in investor-States disputes the State may require the exhaustion of local administrative or judicial remedies as a precondition to submitting a dispute to conciliation or arbitration to the UNASUR Centre.[20]

Relative to MFN clauses, Article 12 of the UNASUR Constitutive Treaty requires consensus among the States in order for any UNASUR legislative measure

[18] F. Aznar, Local Litigation Requirements in International Investment Agreements: Their Characteristics and Potential in Times of Reform in Latin America, Journal of World Investment & Trade 17 (2016) 536-561, at 539.

[19] M. Linares, The Union of South American Nations: An Emerging Regional Organization in Marco Odello and Francesco Seatzu (eds), Latin American and Caribbean International Institutional Law 43 (2015).

[20] M. Sarmiento, The Centre for the Settlement of Investment Disputes of UNASUR. (http://papers .ssrn. com/sol3/papers.cfm?abstract_id=2703587), last accessed (08-05-2019).

to be approved.[21] To this respect, a consensus regarding the appropriateness of using the most-favourable-nation clause regarding the State's consent to the Centre's jurisdiction has not yet been reached.[22] The possibility, drawing on Brazil's experience and influence in the treaty-drafting of the document,[23] is the absence of an MFN clause in such a Treaty.

4.2 Recent BITs

To draw on a possible position of Argentina regarding BITs-drafting, this study will rely on the clauses relating to dispute settlement and MFN in the most recent BITs signed by the Country.[24] To that effect, the Argentina-Qatar BIT (2016), the Argentina-Japan BIT (2018) and the Argentina-United Arab Emirates BIT (2018) will be analysed. In the three agreements the scope of the MFN and the dispute settlement provisions are similar in wording, in what might indicate a trend of the Country towards this possibility of treaty-drafting.

In relation to the MFN clause, the three BITs mentioned indicate a tendency on restricting its use on dispute settlement clauses. Under Article 3.3 of the Argentina-Japan BIT (2018), the most-favoured-nation treatment does not encompass international dispute settlement procedures or mechanisms under any international agreement.[25] Under Article 4.4 of the Argentina-Qatar BIT (2016), the MFN treatment shall not apply to invoke dispute settlement provisions accorded to investors of any Third State under treaties signed by one of the Contracting Parties prior to the entry into force of the treaty.[26] Under Article 4.5 of the Argentina-UAE BIT (2018), the most-favoured-nation treatment does not apply to procedural or jurisdictional matters.[27]

[21] South American Union of Nations Constitutive Treaty (2011).

[22] K. Gómez & C. Titi, International Investment Law and ISDS: Mapping Contemporary Latin America, Journal of World Investment & Trade (2016) 515-535, at 521.

[23] Scholars have appointed that the drafting of the UNASUR Treaty drwas extensively in the Brazilian Model CFIA. *See generally*, C. Titi, International Investment Law and the Protection of Foreign Investment in Brazil, TDM (2016); M. Valenti, New Trends in International Investment Law Treaty Practice: where does Latin America stand?, 79, Sequencia 9-26 (2018).

[24] In 2016 Argentina signed its first BIT in 15 years. (https://investmentpolicyhubold.unctad.org/IIA/CountryBits/8#iiaInnerMenu), last accessed (10-05-2019).

[25] Agreement Between the Argentine Republic and Japan for the Promotion and Protection of Investment (2018), Article 3.3.

[26] The Reciprocal Promotion and Protection of Investments Between the Argentine Republic and the State of Qatar (2016), Article 4.4.

[27] Agreement for the Reciprocal Promotion and Protection of Investments Between the Argentine Republic and the United Arab Emirates (2018), Article 4.6.

In what regards dispute settlement, the three agreements provide for an amicable resolution of conflicts[28] in at least six months prior to ISDS,[29] in what illustrates an attempt to resolve disputes before resorting to arbitration. A restriction of the scope of the MFN clauses under such an agreement, as defended by this article, might have been designed to protect the state's option for that kind of conflict resolution.

The following section will make an assessment of whether or not such a restriction is called for in light of recent tribunal interpretations of MFN clauses in the Argentinian experience. Importantly, this assessment will be made bearing in consideration the importance of MFN clauses in IIAs, as stated in section 2 of the article.

5 Interpretation of MFN Clauses: the Argentinian Experience

As stated in the previous section, Argentina seems to be signalling to a path of requiring ADR previous to ISDS in its investment treaties. Because of preceding BITs undertaken by Argentina affording for such a clause, Tribunals have extensively dealt with domestic litigation prior to ISDS – a form of dispute settlement prior to investor-state arbitration analogue to ADR, as shown in section 3 of the article.

This section will assess the interaction between MFN clauses and local litigation requirements *vis-à-vis* the Argentinian experience to foresee what might happen in future cases of investors claiming for the use of MFN clauses to surpass alternative dispute resolutions to illustrate that a reform of MFN clauses in what regards its relationship with ADR requirements is uncalled for.

5.1 Local Litigation Requirements in Argentinian IIAs

In what could be an influence of the Calvo Doctrine,[30] ten out of the 58 BITs first signed by Argentina included a prior litigation requirement.[31] The most common Argentinian practice is that the IIAs contain an 18-month provision. This was envisioned as a middle-ground solution between the investor's obligation to

[28] At the same occasion that it defended the importance of local litigation requirements, The 2018 World Investment Report recognized that alternative resolution of conflicts prior to ISDS is beneficial for both Parties to the agreement. *Supra*, note 15, World Investment Report, at 151-154.

[29] *Supra*, note 25, Argentina-Japan BIT, at Article 25.1; *supra*, note 26, Argentina-Qatar BIT, at Article 15.1; *supra*, note 27, Argentina-UAE BIT, at Article 20.1.

[30] C. Calvo, Derecho Internacional teorico y practica de Europa y America.

[31] *E.g.* art 8(3) of the Argentina-Italy BIT (1990), art 12(3) of the Argentina-Belgium/ Luxemburg (BLEU) BIT (1990), art 8(2)(a) of the Argentina-United Kingdom BIT (1990), art 10(3)(a) of the Argentina-Germany BIT (1991), art 9(3) of the Argentina-Switzerland (1991), art 10(3)(a) of the Argentina-Spain BIT (1991), art X(2) of the Argentina-Canada BIT (1991), art 8(3) of the Argentina-Austria BIT (1992), art 10(3) of the Argentina-Holland BIT (1992), and art 8(3) of the Argentina-South Korea BIT (1995).

exhaust local remedies and the acceptance of direct resort to arbitration, the latter being heavy criticised in Latin America.[32] Similar clauses can also be found in BITs signed by Chile, Paraguay and Peru.[33] Case law in this regard will be assessed in the following section.

5.2 Case Law

5.2.1 The use of MFN provisions to disregard the prior local litigation requirement

The reaction of Latin American countries to MFN clauses can be justified by the fact that in many cases the clause was applied in order to disregard the prior litigation requirement.[34] In this regard, some tribunals considered the provision for international dispute settlement a protection for the investor in itself,[35] others deemed to be indisputable that it is preferable for an investor not to be obliged to submit and pursue its claims before the courts of the host State before being allowed to submit it to arbitration.[36] Underlying these decisions is the tribunals' majority view of investor-state dispute settlement clauses as, indisputably, a more favourable treatment than local litigation.

Although the tendency among treaty-drafters is to assume that this is a general perception among arbitrators – especially in view of Maffezini – this is not true. This rationale was, for instance, criticized by famous arbitrator Brigitte Stern. In *Impregilo v Argentina*, opposing to her co-arbitrators, Professor Stern alarmed for the fact that tribunals who indiscriminately accept the use of MFN clauses to bypass local litigation requirements are indirectly modifying the State's prior consent to arbitration.[37] In the same occasion, professor Brigitte Stern contested the majority's view of ISDS as more favourable than local litigation by claiming that a system that gives the cumulative possibility of two different *fora* is more favourable than a system that obliges to elect only one possibility to the detriment of the other.[38]

As will be seen in the following subsection, Brigitte Stern was not the only arbitrator to oppose to the idea consolidated in *Maffezini* that investor-state dispute

[32] *Supra*, note 18, F. Aznar, at 542.
[33] *E.g.* art 10(3) of the Switzerland-Peru BIT (1991), art 10(3) of the Germany-Chile BIT (1991), art 11(3) of the BLEU-Paraguay BIT (1992), art 10 of the Germany-Peru BIT (1995).
[34] *Supra*, note 13.
[35] *Supra*, note 13, Gas Natural SDG, S.A. and The Argentine Republic, at para 28.
[36] *Supra*, note 13, Telefónica S.A. and The Argentine Republic, at para 103.
[37] *Supra*, note 13, Impregilo S.p.A. v. Argentine Republic, Concurring and Dissenting Opinion of Professor Brigitte Stern.
[38] *Id.*, at para 11.

settlement is, in itself, a most-favoured treatment accorded to investors. More recently, tribunals have been regarding MFN clauses in a more nuanced manner, in what adds to the thesis of this paper that MFN clauses and alternative dispute settlement resolutions could and should coexist in IIAs.

5.2.2 A more careful consideration to the MFN clauses

As stated above, not every arbitral tribunal followed the *Maffezini* approach. Opposing to the idea enshrined in the Maffezini case, some tribunals[39] paid more attention to the issue of compliance with the prior litigation requirement. Accordingly, certain tribunals simply regarded the local litigation requirement as a precondition to Argentina's consent to arbitration.[40] Others, assessed evidence that Argentine tribunals were capable of resolving the dispute within the 18-month requirement present in the BIT to reach the same conclusion.[41] All in all, the local litigation requirement was respected in those cases. Nonetheless, a more careful consideration to the investor's claim for bypassing local litigation requirement using, for that, the MFN clause started to take form in the ICS case, as will be assessed next.

In *ICS Inspection and Control Services Limited v. Argentina*, the dispute arose out of Argentina's alleged non-payment of invoices to the investor under a contract in which ICS was to provide auditing services in relation to a government-sponsored scheme to inspect imports bound for the country before they were shipped. In that occasion, the investor used as a precedent the Maffezini case to circumvent the requirement contained in the Argentina-UK BIT (1990) of an 18-month period of recourse to local courts before resorting to international arbitration.

The tribunal held that the MFN clause in the Argentina-UK BIT (1990) did not apply to dispute resolution provisions and therefore did not enable investors to bypass the local courts litigation requirement. In this occasion, it considered that "the task of the Tribunal is to decide the case according to the instrument as written by the Contracting Parties".[42] In that decision, the intention of the Tribunal to regard first to the BIT's text to then resort to the MFN clause as a principle, as claimed by the investor, was a very welcome development.

In that occasion, the ICS Tribunal avoided pronouncing on whether or not it was possible to disregard the local litigation provision through the MFN clause.

[39] *E.g.*, *supra*, note 14.
[40] *Supra*, note 13, Wintershall v Argentina, at para 116.
[41] *Supra*, note 13, Daimler v Argentina, at para 183.
[42] *Id.*, at 266.

Likewise, other tribunals in similar situations followed this same path of avoidance.[43] However, by recognizing that prior recourse to local courts provisions included in BITs are mandatory preconditions for submitting the dispute to international arbitration and part of the offer to arbitrate contained in the ISDS provision they have, indirectly, denied the use of the MFN clause for such purposes. Although this is, already, an important development, more recently, this tendency has been translated into more robust interpretations of MFN clauses, as will be assessed in the next section of the article.

5.2.3 More recent interpretations of MFN clauses and the way forward

More recently, another approach used by tribunals to assess whether they are empowered to decide on the question of the lawfulness of bypassing local litigation requirements is on the basis that it would be futile or inefficient to resort to domestic tribunals for the period of the dispute. In this regard, tribunals have resorted to three different types of analysis in order to address this question. First, a minority of tribunals employed policy considerations to disregard the requirements.[44] Second, tribunals applied a "futility" test based on the principles applicable to the exhaustion of local remedies rule in diplomatic protection.[45] Third, some tribunals applied an "effectiveness" test, based primarily on interpretations of the text of the local litigation provision according to the rules of interpretation of treaties established by the Vienna Convention on the Law of Treaties (VCLT).[46]

In all of the three avenues of interpretation chosen by recent arbitral tribunals, despite the subsidiary reliance of the investors in the MFN clause contained in the treaties, the tribunals decided to analyse the local litigation requirement clause in itself to assess the investor's claim. This approach should lead the jurisprudence of tribunals in future, for the reasons that will be exposed in this section, as an assessment of the cases in which the approach was taken is given.

5.2.3.1 Ablacat v Argentina

Ablacat v Argentina[47] *is set in a* context of mass claims arising out of Argentina's enactment of legislation concerning the restructuring of its public debt

[43] *E.g.*, *supra*, note 13, Abaclat v Argentina, at para 589; Ambiente Ufficio v Argentina, at para 629; Urbaser v Argentina, at para 203; Philip Morris v Uruguay, at para 150 and Alemanni v Argentina, at para 317.
[44] *Supra*, note 14, Hochtief v Argentina, paras 57,87 and 88; Ablacat v Argentina para 584.
[45] *Supra*, note 14, ICS v Argentina, at para 269; Ambient Ufficio v Argentina, at para 601.
[46] *Supra*, note 14, Urbaser v Argentina, at para 107.
[47] *Supra*, note 14, Ablacat and Others v. Argentine Republic.

which led to the Government's default in sovereign bonds in 2001. In circumstances surrounding Argentina's 2005 settlement with foreign holders of its defaulted bonds, the claimant submitted that they had not complied with the local litigation requirement because conducting litigation before the Argentine courts would have been futile, but even if the Court didn't agree so, they did not have to comply with that requirement according to the MFN clause present in the BIT.[48]

In this case, the tribunal held that, based on the circumstances of the case, in which an Emergency Law and other law decrees in effect in Argentina precluded the relief sought by the claimants, coupled with the absence of any available mass claims process before the Argentine courts the opportunity to address the dispute through the domestic courts "was only theoretical and/or could not have led to an effective resolution of the dispute".[49] Accordingly, the possibility of the investor to rely on the MFN clause was deemed moot by that decision.[50]

In *Ablacat*, what can be inferred is that even in the absence of an assessment of the MFN clause in the BIT, the local litigation requirement, for more compelling reasons than a so-called most-favoured treatment, did not prevail, in light of an assessment of the socio-economic situation in which the claim was made. In this logic, even in the absence or restriction of an MFN clause, contrary to what some treaty-drafters might assume, local litigation and alternative dispute settlement requirements may also be assessed in a way of giving effect to investors' claims, so long as the context of the claim allows arbitrators to make such an assessment. This argues in favour of treaty-drafters considering the benefits of MFN clauses separately from the possibility of them being used "against" alternative dispute settlement requirements.

5.2.3.2 Hochtief v Argentina

In *Hochtief v Argentina*, the claim arose out of Argentina's enactment of a "persification" law, among other measures, also related to its 2001-2002 economic crisis. Allegedly, these measures affected the investor's interests in a consortium responsible for the construction, maintenance and operation of a toll road and several bridges between the cities of Rosario and Victoria over the Paraná river in northern Argentina.

The Tribunal in *Hochtief* stated that the arbitrary limit of 18 months and the removal of any duty to accept the judgment of the local courts rendered the rule contained in the Argentina-Germany BIT (1991) of resorting to local courts "to some

[48] *Id.*, at para 575.
[49] *Id.*, at para 582.
[50] *Id.*, at para 591.

extent perfunctory and insubstantial".[51] To this effect, the MFN clause contained in the Argentina-Germany BIT (1991) with the effect of rendering inapplicable the 18-month requirement was accepted.

Although the assessment of the case was made in a very similar manner as to in *Ablacat*, in considering the circumstances of the claim, this case was the only one thus far to consider the MFN clause when providing for a "utility" test of the local litigation requirement. This could negatively influence treaty-drafters in redacting MFN clauses to "protect" their options for alternative dispute settlement mechanisms. However, its decision will likely not be followed, as it was heavily criticized by the subsequent tribunal in *Urbaser v. Argentina*.

5.2.3.3 Urbaser v. Argentina

In *Urbaser v. Argentina*, the claim arose out of Argentina's alleged interference with the tariff regime applicable to claimant's investment and other alleged breaches of obligations under the relevant concession agreement through the enactment of emergency measures in the same context of the 2001-2002 economic crisis.

In that case, the arbitral tribunal stated that the *Hochtief v Argentina* Tribunal's reasoning is not supported by evidence relating to the possible operation of the 18 month rule before Argentina's domestic courts and while it focused on the benefit available to the investor, it did not take into account the Host State's position that the local courts would be granted the opportunity to find a suitable remedy[52] which characterized the decision as one-sided.[53]

Still regarding *Urbaser v Argentina*,[54] again, claimants submitted that they were authorized by the MFN clause present in the Argentina-Spain BIT (1991) to resort directly to ICSID arbitration[55] and stated as a subsidiary issue that it would have been impossible, in any event, to have the dispute resolved by the local courts of Argentina, given the illustrated socio-economic context of the country. In this case, the tribunal decided that none of the various possible alternative means for litigating before the domestic courts of the Argentine Republic as presented by the Respondent were suitable to meet the requirement of the BIT that a "decision on the substance" would be reached, especially in light of the fact that local courts, after 18 months, were not adjudicating on the substance of the case, but rather on procedures of "an ancillary nature", such as injunctive relief ("medidas cautelares"). This conclusion was further supported by the Republic of Argentina's

[51] *Supra*, note 14, Hoctief AG v. The Argentine Republic, at No. 88.
[52] *Supra*, note 14, Urbaser v Argentina, at para 140.
[53] *Id.*, at para141.
[54] *Supra*, note 14, Urbaser v Argentina.
[55] *Id.*, at para 39.

position under domestic law pursuant to which Claimants in any event would lack *jus standi* before the Republic's domestic courts because they were shareholders of the company claiming rights allegedly belonging exclusively to the company and not to its shareholders, as according to Argentine domestic legislation.[56]

In *Urbaser*, following the tribunal's decision in *Ablacat,* the MFN clause present in the BIT was not triggered by the tribunal when assessing the local litigation requirement. This again endorses the idea that MFN clauses should be regarded independently from local litigation requirements both from treaty-drafters' points-of-view and from investors' and tribunals'. For that to become a reality, however, more tribunals should follow this positive trend in analysing such a requirement.

5.2.3.4 The way forward

As observed in this section, the latest interpretations of local litigation requirements clauses in investment agreements have been showing a trend of analysing the context and particularities of such a requirement *vis-à-vis* the possibilities of the State to comply with it rather than applying MFN clauses indiscriminately to bypass such a requirement – as observed in previous tribunals, such as those following the Maffezini case.

This trend should be followed by tribunals facing similar situations for two reasons. First, in order to uphold the local litigation requirement as a clause that, if applied under the right condition of local courts, would positively influence or even resolve conflicts in a fast, effective and less costly manner. Second, in order to orient and inform States and investors of the application of MFN clauses. The latter reason, would, additionally, serve as a manner of preventing States from restricting or abolishing MFN clauses from future BITs, which, by turn, would negatively impact the other, positive, effects of such clauses of providing investors and states with similar rights under similar conditions.

6 Conclusion

Both most-favoured-nation clauses and local litigation requirements constitute an important feature of the international investment law regime. While MFN clauses confer investors an additional layer of protection, and, at the same time, establish a harmonized treatment between investors of any nationality, local litigation requirements, if applied properly, could play an important role in benefiting

[56] *Id.*, at para 202.

both States and foreign investors with the opportunity of litigating in two different *fora,* in addition to saving time and costs in some cases.

In order to "protect" their option for dispute settlement mechanisms prior to arbitration, some countries have decided to restrict the scope of application of MFN clauses in recent agreements. The arbitral decisions analyzed in this article show a more careful analysis towards the relation of both clauses, based on the text of the provision and on the context of its application.

However, these views are not settled. Tribunals should seek to apply this interpretation inaugurated in the cases analyzed in this article in decisions to come in order to allow investors to better understand how to comply with local litigation provisions and to encourage Countries not to restrict the scope of MFN clauses in the future, as a reaction to previous tribunals' indiscriminate interpretation of them.

The investor-state dispute settlement mechanism is already an alternative dispute settlement mechanism that could, in some cases, indeed be considered as an advantage of the investor-state relation. However, other means of dispute settlement may have their own qualities, depending on the situation of each case and therefore, should be considered as well, rather than be bypassed by the wrongful application of MFN clauses.

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