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Cover Page Footnote

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MOST-FAVOURED-NATION CLAUSE: UNLEASHING ITS LEGAL POTENTIAL IN FAVOUR OF FOREIGN INVESTORS IN THE RENEWABLE ENERGY SECTOR

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Abstract

International Investment Law and other international legal systems, such as trade law and environmental law have interactions and dynamic interrelationships in meeting global challenges including energy security, climate change, and the need for the renewable energy transition. They have a potential share in the global climate change mitigation agenda through innovative policies and regulations, inter alia, to facilitate and promote foreign investment and trade in the renewable energy sector. These systems share common principles in their respective agreements. The Most-Favoured-Nation Treatment (MFN) is among these. Hence to analyse the potential role of MFN in the context of the renewable energy transition is significant. This article sheds light on this dilemma by expounding on the concept of MFN, analyzing the MFN clauses under International Investment Agreements (IIAs), and its relevance in terms of renewable energy investment protection. It concludes that despite the extensive potential contribution of MFN to the protection of foreign investments in renewable energy, the application of this standard has been especially problematic since it is incorporated somewhat differently in international investment and trade regimes. While it is one of the basic principles of WTO, it remains among the least successful provisions in investor-State arbitration. Despite its nearly ubiquitous usage, the interpretation of the MFN clause and its scope of application has been disputable so far. IIAs contain different MFN clauses with various exemptions, and the arbitral practice has demonstrated several divergent decisions that other tribunals and legal scholars feel should be subject to a more focused review.

Keywords*: foreign investment; MFN; multilateralization; Renewable energy; like circumstances.*

I. INTRODUCTION

Although Earth's climate has changed throughout history, the current warming trend is different because it is clearly the result of human activities since the mid-1800s, and is proceeding at a rate not seen over many recent millennia. Scientists attribute global warming to the human expansion of the 'greenhouse effect'.[2] As a result, today, various regions are struggling with climate change. But some are tackling tougher challenges than others. Most notably, the Pacific island countries and Southeast Asia are especially vulnerable to the effects of climate change. Most countries in these regions are bordering the sea; therefore, they are on the front lines

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[2] Global Climate Change: Vital Signs of the Planet, "What Is Climate Change?," NASA, last modified July 26, 2022, https://climate.nasa.gov/.

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of the world's shared climate change's damaging effects, including rising sea levels, floods, droughts, and shifts in rainfall patterns.[3] Unlike fossil fuels, renewable energies have little greenhouse effect and hence contribute to climate change mitigation.[4] Therefore, developing renewable energies is considered a core component of the world's sustainable energy transition.[5] As pointed out by the Director-General of the International Renewable Energy Agency, *Francesco La Camera,* 'Today, governments are facing multiple challenges of energy security, economic recovery and the affordability of energy bills for households and businesses. Many answers lie in the accelerated transition'.[6] New laws to accelerate renewable energy transition may also help Governments to overcome a wide range of financial, economic, and energy challenges. However, renewable energy deployment costs billions of dollars which calls for the promotion of foreign investments in this sector.[7] Frustratingly, many States cannot afford the costs and technological requirements of the renewable energy transition. Against this background, various States are adopting incentive regulations to attract renewable energy investments.[8]

Similarly, International Investment Agreements (IIAs) have a significant part to play in this context.[9] Prominent scholars and recent theories confirm this proposition. Most notably is *Nadakavukaren Schefer* who has proposed the theory of 'The Strong Responsibility to Protect (R2P*)'. According to this concept, the investment law system recognizes the responsibility of States toward a goal of climate stabilization, preventing human severe suffering, and protecting against it. This theory suggests that all States are obliged to promote climate-friendly activities and pursue low-carbon economies. *Schefer* emphasizes the need for adding a normative layer to the investment law system to shift the existing obligations towards climate stabilization and full protection of investments in renewable energy or low-carbon technologies.[10]

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[3] Danielle Fallin et al., "Oceans of Opportunity: Southeast Asia's Shared Maritime Challenges," Center for Strategic and International Studies, last modified September 10, 2021, https://www.csis.org/analysis/oceans-opportunity-southeast-asias-shared-maritime-challenges#:~:text=One%20of%20the%20primary%20ways,could%20be%20underwater%20by%202050. The World Bank Group and Asian Development Bank, *Climate Risk Profile: Indonesia* (Washington, DC: World Bank Publications, 2021). Zhijun Chen, "Monitoring the Vulnerability and Adaptation Planning for Water Security," in *Climate Change in Asia and the Pacific: How Can Countries Adapt?,* eds. Venkatachalam Anbumozhi et al. (New Delhi: Sage Publications, 2012), 93.

[4] Thomas Cottier, *Renewable Energy and Process and Production Methods- E15Initiative* (Geneva: International Centre for Trade and Sustainable Development and World Economic Forum, 2015), 1.

[5] Feja Lesniewska, "Renewable Energy Waste Management and the Circular Economy in the EU: Solar PV and Wind Power," in *Research Handbook on EU Energy Law and Policy*, eds. Rafael Leal-Arcas and Jan Wouters (Cheltenham: Edward Elgar Publishing, 2017), 460-69.

[6] IRENA, "Energy Transition Holds Key to Tackle Global Energy and Climate Crisis," International Renewable Energy Agency, last modified March 29, 2022, https://irena.org/newsroom/pressreleases/2022/Mar/Energy-Transition-Holds-Key-to-Tackle-Global-Energy-and-Climate-Crisis.

[7] International Energy Agency, *Perspectives for the Energy Transition – Investment Needs for a Low Carbon Energy System* (Bonn: IEA/IRENA, 2017), 8. Stuart Bruce, "International Law and Renewable Energy: Facilitating Sustainable Energy for All?," *Melbourne Journal of International Law* 14, no. 1 (2013): 26-27.

[8] E.g. IRENA, *Renewable Energy Prospects: Indonesia, a REmap analysis* (Abu Dhabi: International Renewable Energy Agency, 2017), 22-30. OECD, *Better Policies for Development 2015: Policy Coherence and Green Growth* (Paris: OECD Publishing, 2015), 59-91.

[9] OECD, *Better Policies for Development 2015,* 73. Edna Sussman, "The Energy Charter Treaty's Investor Protection Provisions: Potential to Foster Solutions to Global Warming and Promote Sustainable Development," *ILSA Journal of International & Comparative Law* 14, no. 2 (2008): 400-404.

[10] Krista Nadakavukaren Schefer, "Climate Change, Trade, and Investment Law: What Difference Would a Real Responsibility to Protect Make?," in *Emerging Issues in Sustainable Development: International Trade Law and Policy Relating to Natural Resources, Energy, and the Environment,* eds. Mitsuo Matsushita and Thomas J. Schoenbaum (Tokyo: Springer, 2016), 383-394.

Prima facie, this theory appears to be interesting. But it is not clear how such a normative layer may be added to the system of international investment law. International investment law, in contrast to international trade law, is characterized by decentralization, and rather than constituting a consistent and coherent system of law, it comprises a network of bilateral and multilateral investment agreements which consist of a mixture of binding and non-binding obligations with direct and indirect effects.[11] The Standard of Most-Favoured-Nation Treatment (MFN) is among these provisions that can have a potential direct effect in this context. For decades, MFN has been a central pillar of international trade policy and among the top basic principles of the WTO.[12] However, compared with trade law, international investment law has always prioritized the establishment of absolute rather than relative standards of protection.[13] This makes the analysis of the potential role of MFN more difficult since it is classified as a relative standard of investment protection.[14] This difficulty is exacerbated by the fact that IIAs are not always the products of reasonable negotiation and drafting. So far, many governments have proved to pay significantly less attention to the terms of agreements.[15]

Although most IIAs contain similar MFN clauses, the precise wording of these provisions may vary from one agreement to another. Moreover, these clauses are often subject to divergent and sometimes contradictory interpretations, and there is no centralized coordination or dispute settlement system which could avoid the conflicting outcomes.[16] States and investors increasingly demonstrate less tolerance towards inconsistency and incoherency among arbitral awards, since this undermines their confidence in the available investor-State arbitration mechanisms.[17] Although the host States and investors can negotiate *ex-ante* for the making of investments and balancing their rights, to the extent they are unaware of such inconsistencies, it may lead to *ex-post* unfair and unjustifiable outcomes.[18] To avoid such dangers, a few agreements tend not to include the MFN clause whatsoever, while others have dramatically limited its scope of application.[19] Hence, it is important to come up with a proper understanding of the prevailing boundaries of MFN and its limitations in IIAs.

Moreover, analyzing the MFN clauses in light of the features of the renewable energy sector is significant since international investment law has so far received little

[11] Laurence Boisson de Chazournes, "International economic law and the quest for universality," *Leiden Journal of International Law* 32, no. 3 (2019): 401–414. Stephan W. Schill, "Multilateralizing Investment Treaties Through Most-Favoured-Nation Clauses," *Berkeley Journal of International Law* 27, no. 2 (2009): 499.

[12] Mitsuo Matsushita, "Basic Principles of the WTO and the Role of Competition Policy," *The Journal of World Investment & Trade* 3, no. 4 (2002): 567-584.

[13] Jurgen Kurtz, "Science as a Common Proxy for Rational Regulation across International Trade and Investment Law," in *Science and Technology in International Economic Law: Balancing Competing Interests*, eds. Bryan Mercurio and Kuei-Jung Ni (New York: Routledge, 2014), 136.

[14] Jonathan Bonnitcha, Lauge N. Skovgaard Poulsen and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford: Oxford University Press, 2018) pt 4.

[15] Lauge N. Skovgaard Poulsen and Emma Aisbett, "When the claim hits: bilateral investment treaties and bounded rational learning," *World Politics* 65, no. 2 (2013): 279-281.

[16] Boisson de Chazournes, "International economic law and the quest for universality," 410.

[17] Sungjoon Cho and Jurgen Kurtz, "Convergence and Divergence in International Economic Law and Politics," *The European Journal of International Law* 29, no. 1 (2018): 197.

[18] Chester Brown, Federico Ortino and Julian Arato, "Lack of Consistency and Coherence in the Interpretation of Legal Issues," EJIL: Talk!, last modified April 5, 2019, https://www.ejiltalk.org/lack-of-consistency-and-coherence-in-the-interpretation-of-legal-issues/.

[19] M. Sornarajah, *The International Law on Foreign Investment* (Cambridge: Cambridge University Press, 2021) 104.

attention from sector-specific points of view compared to international trade law.[20] Generally, renewable energy investments follow the same economic determinants as other types of foreign investments.[21] However, these projects have particular features that make them relatively vulnerable to various physical and economic threats. Often, renewable energy investments are carried out in long-term capital-intensive projects. This is a unique feature of renewable energy projects and throughout their life span, they also need to be protected against government and third-party interferences in form of physical or cyber aggression.[22] Similarly, the economic and regulatory stability of the investment environment is a crucial concern before the investors, and therefore they insist on stabilization clauses or similar contractual mechanisms that would protect their investments and guarantee them a fair return.[23] Often, companies and prospective investors analyze these factors, as they have a strong interest in the stability of the regulatory regime, the continuity of any incentive schemes for renewable energy during the expected period of recovery, and the protection from unwarranted policy changes that may overshadow their benefits.[24] The European Parliament, for instance, has rightly observed the significance of the stability of renewable energy investments by asking the Member States to ensure that 'the level of, and the conditions attached to, the support granted to renewable energy projects are not revised in a way that negatively affects the rights conferred thereunder and undermines the economic viability of projects that already benefit from support'.[25]

Against this background, the purpose of this article is to examine the potential legal contribution of MFN clauses in protecting foreign investments in renewable energy. The key question would be what features should MFN clauses incorporate to adequately protect foreign investments in the renewable energy sector?

To answer this question, this article begins in Part II by providing an overview of the concept of MFN. Part III then analyses the MFN clause and the relevant trends under IIAs. Part IV expounds on the focal points between the MFN clauses and renewable energy investments at the application stage. Finally, it concludes that most MFN clauses are not adequately tailored to protect renewable energy investments, and hence drafting of new MFN clauses is recommended. This creates a potential level playing field for this standard to help overcome the substantive or procedural shortcomings of IIAs, in general, and to protect the foreign investments in this sector by undertaking a relatively active role in this context. Hence, it provides a few recommendations for conceivable treaty law reforms.

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[20] Jan Peter Sasse, *An Economic Analysis of Bilateral Investment Treaties* (The Netherlands: Gabler Verlag, 2011).

[21] World Investment Report, *Investing in a Low Carbon Economy* (Geneva: United Nations Publication, 2010), 117, 136.

[22] International Energy Agency, "*Perspectives for the Energy Transition,*" 8. Bruce, "International Law and Renewable Energy," 26-27. Anu Narayanan et al., *Deterring Attacks against the Power Grid: Two Approaches for the US Department of Defence* (Santa Monica: RAND Corporation, 2020), 3.

[23] Abdullah Faruque, "Validity and Efficacy of Stabilisation Clauses: Legal Protection vs. Functional Value," *Journal of International Arbitration* 23, no. 4 (2006): 321-23.

[24] Nadejda Komendantova, Thomas Schinkoa, and Anthony Patt, "De-risking Policies as a Substantial Determinant of Climate Change Mitigation Costs in Developing Countries: Case study of the Middle East and North African Region," *Energy Policy* 127, (2019): 404-411.

[25] European Parliament, *Directive EU2018/2001 of 11 December 2018 on the Promotion of the Use of Energy from Renewable Sources (recast),* [2018] OJ L328/82, 11/12/2018, art 6(1).

II. AN OVERVIEW OF THE CONCEPT OF MFN

MFN has been a part of international economic treaties for centuries. It is among the disciplines of international investment law that refer to the manners in which the host State and those entities for which it must assume responsibility should deal with foreign investments.[26] MFN is a relative standard of treatment, and according to it, a host State must extend to the investors from one foreign country treatment no less favorable than it accords to investors from any other foreign country in 'like circumstances' (*ejusdem generis*). In other words, MFN seeks to prevent nationality-based discrimination against foreign investors.[27] This concept initially arose out of the field of international trade.[28] The first example of an MFN clause was when England signed a treaty with the Duchy of Burgundy,[29] according to which English vessels were granted the right to use the harbors of Flanders 'in the same way as French, Dutch, Sealanders, and Scots'.[30]

However, the MFN clause, in its modern scope that is no longer referring to a limited number of States, first appeared at the end of the 17th century, in bilateral treaties, such as treaties of peace and commerce that granted foreign nationals the right of equal access to domestic courts and provided MFN provisions covering other activities related to investment.[31] The first Treaty of Amity and Commerce, concluded by the United States and France in 1778, established bilateral trade on an MFN basis and provided for the protection of vessels, crews, passengers, and cargoes.[32]

The use of the MFN clauses was taken over into later Bilateral Investment Treaties (BITs).[33] Today, MFN applies both to the trade and investment fields. Indeed, MFN along with National Treatment forms a cornerstone of the General Agreement on Tariffs and Trade (GATT) and the World Trade Organisation (WTO) agreements as well as of IIAs.[34] However, applying MFN to foreign investments is a far more difficult task than is the case with the international trade in fungible goods, since, contrary to trade, where the MFN standard only applies to measures at the border, there are more possibilities to discriminate against foreign investments.[35]

The incorporation of MFN clauses in IIAs can equip the commitments made in these instruments with a multilateral effect. This effect is sometimes called 'upward harmonisation'.[36] It imposes greater coherency across the fragmented network of IIAs

[26] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press, 2008), 186. Elizabeth Whitsitt, Nigel Bankes, "The Evolution of International Investment Law and Its Application to the Energy Sector," Alberta Law Review 51, no. 2 (2013): 214.

[27] UNCTAD, *Most-Favoured-Nation Treatment: UNCTAD Series on issues in international investment agreements* (Geneva: United Nations Publication, 1999), 3.

[28] Jeswald W. Salacuse, *The Law of Investment Treaties* (Oxford: Oxford University Press, 2021), 101-104.

[29] Treaty for Mercantile Intercourse with Flanders (signed 17 August 1417).

[30] UNCTAD, *Most-Favoured-Nation Treatment,* 12.

[31] Pavel Šturma, "Goodbye, Maffezini? On the Recent Developments of Most-Favoured-Nation Clause Interpretation in International Investment Law," *The Law and Practice of International Courts and Tribunals* 15, no. 1 (2016): 83.

[32] Salacuse, *The Law of Investment Treaties,* 101-104.

[33] Sornarajah, *The International Law on Foreign Investment,* 221.

[34] Matthias Herdegen, *Principles of International Economic Law* (Oxford: Oxford University Press, 2013), 55-7.

[35] UNCTAD, *Most-Favoured-Nation Treatment,* 3. Salacuse, *The Law of Investment Treaties*, 101-104. Sornarajah, *The International Law on Foreign Investment,* 249-50.

[36] James M. Claxton, "The Standard of Most-Favoured-Nation Treatment in Investor-State Dispute Settlement Practice," in *Handbook of International Investment Law and Policy*, eds. Julien Chaisse, Leila Choukroune, and Sufian Jusoh (Singapore: Springer, 2021), 276.

and can aid in investment planning and risk assessment. MFN clauses enable investors to handpick the preferable treatment standards from other treaties and therefore serve as a basis for 'Multilateralising' investment relations.[37] Interestingly, an investor benefitting from MFN treatment will not normally be burdened by jurisdictional requirements, performance obligations, or inferior standards of protection in third-party treaties. Maybe for the same reasons MFN is generally known as a tool for investment liberalization.[38]

However, the standard of MFN is not a principle of customary international law; therefore, to further protect foreign investments, it is crucial for IIAs to address this concept.[39]

III. ANALYZING MFN CLAUSES UNDER IIAS

Today most IIAs contain an MFN clause. According to UNCTAD, around 99% of IIAs provide MFN.[40] Such clauses vary in wording. They typically require the parties not subject investors and their investments to treatment less favorable than that which they accord to the investors or investments of other States.[41] Generally, the wording of a clause and its express or implied exceptions will affect its interpretation and application. Thus, to conceive the potential effect of MFN clauses, it is necessary to analyze different types of MFN clauses.[42]

MFN has a unique feature in the sense that the scope of MFN could be very broad, and it may potentially cover all industries and other covered investment activities; thus, it may apply to a vast spectrum of social, labor, taxation, and environmental issues, etc. As a result, it is not possible to provide an unqualified commitment to MFN in IIAs, and the MFN clauses are not without exceptions either. However, the degree and the extent of these exceptions vary considerably in individual agreements.[43]

Some MFN clauses have a broader scope and multilateralize a wide range of matters. For instance, Article 3 of the UK-Albania BIT provides that

(2) Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards the management, maintenance, use, enjoyment, or disposal of their investments, to treatment less favorable than that which it accords to its own nationals or companies or to nationals or companies of any third State.

(3) For the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (I) and (2) above shall apply to the provisions of Articles I to II of this

[37] Paul James Cardwell and Duncan French, "The European Union as a global investment partner: Law, policy and rhetoric in the attainment of development assistance and market liberalisation?," in *Evolution in Investment Treaty Law and Arbitration*, eds. Chester Brown and Kate Miles (Cambridge: Cambridge University Press, 2011), 216-17. W. Schill, "Multilateralizing Investment Treaties," 504.

[38] Cardwell and French, "The European Union," 216-17.

[39] Herdegen, *Principles of International Economic Law*, 391-400.

[40] Federico Ortino, *The Origin and Evolution of Investment Treaty Standards: Stability, Value, and Reasonableness* (Oxford: Oxford University Press, 2019), 2. UNCTAD database, "Mapping of IIA Content," accessed May 20, 2019, https://investmentpolicy.unctad.org/international-investment-agreements. See also Model Text for Indian Bilateral Investment Treaty (2015). It is an example of an agreement that has no MFN clause.

[41] E.g. Agreement between the Argentine Republic and Spain on the Reciprocal Promotion and Protection of Investments (signed 3 October 1991, entered into force 28 September 1992) art IV (2).

[42] *Krederi Ltd v Ukraine (Award)* (ICSID Arbitral Tribunal, Case No ARB/14/17, 2 July 2018) para 289.

[43] UNCTAD, *Most-Favoured-Nation Treatment*, 7-8.

Agreement. [44]

This is generally considered a broadly drafted MFN clause.[45] However, this clause does not extend the MFN to the pre-establishment stage. In contrast, Article 14.5 of the *United States-Mexico-Canada Agreement* (*USMCA*), for instance, delineates a relatively broad MFN provision that includes the pre-establishment stage. It reads as follows:

Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.[46]

Although USMCA contains a broad MFN clause as such, it is limited by various 'non-conforming measures' regarding its application. These include a range of issues from the existing non-conforming measures that are maintained by a Party, to government procurements, subsidies, and grants provided by a Party, etc.[47]

It is important to note that, extending MFN to the pre-establishment stage can bring potential contribution to investment liberalization and promotion of foreign investments, *inter alia*, in the energy sector.[48] The Energy Charter Treaty (ECT) has endorsed this approach by stating that:

(2) Each Contracting Party shall endeavor to accord to Investors of other Contracting Parties, as regards the Making of Investments in its Area, the Treatment described in paragraph (3) [MFN] …

(4) A supplementary treaty shall, subject to conditions to be laid down therein, oblige each party thereto to accord to Investors of other parties, as regards the Making of Investments in its Area, the Treatment described in paragraph (3).[49]

Although the 'supplementary treaty' has not still come into force, this provision and its adoption reflect the parties' support in this direction.[50] Particularly, in the context of energy investment, this would be a precious achievement, since ECT provides a multilateral framework for energy cooperation and investment which is unique in international law.[51]

However, the restrictive approach to MFN is not limited to the establishment stage; in fact, IIAs may incorporate MFN clauses that multilateralize only particular types of treatments, or treaty provisions.[52] Similarly, some recent IIAs restrict the ambit of

[44] Agreement between the UK and Albania for the Promotion and Protection of Investments (signed 30 March 1994, entered into force 30 August 1995). See also Agreement between Argentine and Spain on the Reciprocal Promotion and Protection of Investments, art IV (2).

[45] *Emilio Agustín Maffezini v The Kingdom of Spain (Decision of the Tribunal on Objections to Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/97/7, 25 January 2000) para 52.

[46] Agreement between the United States of America, the United Mexican States, and Canada (opened for signature 30 November 2018, entered into force 1 July 2020) (USMCA) art 14.5(1)-(3). See also Agreement between Jordan and Italy on the Promotion and Protection of Investments (signed 21 July 1996, entered into force 17 January 2000) art 2(2).

[47] USMCA, art 14.12.

[48] Supplementary Treaty to the Energy Charter Treaty (adopted 25 June 1998) preamble.

[49] *The Energy Charter Treaty*, 2080 UNTS 100 (adopted 17 December 1994, entered into force 16 April 1998) art 10(2)-(4).

[50] See also Decision of the Energy Charter Conference, "Modernisation of the Energy Charter Treaty," Document No CCDEC 2017 23 STR, adopted November 28, 2017, https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2017/CCDEC201723.pdf.

[51] Ortino, *The Origin and Evolution of Investment Treaty Standards,* 2.

[52] Esmé Shirlow and Kabir Duggal, "Most Favoured Nation Treatment," Jus Mundi, last modified June 22,

the MFN clause by excluding its application to some substantive obligations under other agreements. A prominent example is the *Comprehensive Economic and Trade Agreement between Canada and the European Union* (CETA) which states:

For greater certainty … Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute 'treatment' [MFN], and thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a Party pursuant to those obligations.[53]

In addition, the parties to CETA have limited the scope of the MFN clause by imposing several reservations on various sectors of transport, business and social services, etc.[54] Most notably, employing these reservations, some Provincial Governments of Canada have restricted market access in the renewable energy sector.[55]

The substantive and sectoral exclusions to MFN are not the only limitations that may be inferred from the rhetoric of IIAs. More specifically, questions have arisen regarding the extent to which foreign investors may utilize the MFN clauses to enjoy what they perceive to be more favorable dispute-settlement provisions in other IIAs between the host State and a third State.[56] As for now, the arbitral practice, as well as treaty law, remain divergent in this regard.[57] Some agreements explicitly prevent the possibility of importing dispute settlement mechanisms from other IIAs. For instance, the Singapore-Indonesia BIT provides that:

For greater certainty, paragraphs 1 and 2 [MFN] shall not apply to options or procedures for the settlement of disputes that are available in other agreements, and shall not be construed as granting to investors options or procedures for the settlement of disputes other than those set out in Section One (Settlement of Disputes between a Party and an Investor of the Other Party) of Chapter III (Dispute Settlement).[58]

Another significant issue is the reciprocity of MFN obligations. Unlike in the WTO, where MFN is an unconditional obligation, and the advantages granted by one State will automatically and unconditionally extend to similar products of other WTO member States, the MFN clause under IIAs is not necessarily a treatment having a reciprocal application.[59] A prominent example is the CARIFORUM-EU EPA which provides asymmetrical MFN obligations.[60] Accordingly, the EU commits to provide the CARIFORUM States with the same rights and privileges as it gives to any third State with which it concludes a future economic integration agreement. On the other hand,

2022, https://jusmundi.com/en/document/wiki/en-most-favoured-nation-treatment?su=%2Fen%2Fsearch%3Fquery%3Dmost%2520favoured%2520nation%26page%3D1%26lang%3Den&contents[0]=en.

[53] Comprehensive Economic and Trade Agreement between Canada and the EU (signed 30 October 2016, entered into force 21 September 2017) (CETA) art 8.7(4).

[54] *Ibid*, annexes I-III and reservations.

[55] *Ibid*, reservations [I-PT-56]-[I-PT-134].

[56] Whitsitt and Bankes, "The Evolution of International Investment Law," 220.

[57] Shirlow and Duggal, "Most Favoured Nation Treatment." See generally Mary E. Footer, "International investment law and trade: the relationship that never went away," in *Investment Law within International Law: Integrationist Perspectives*, ed. Freya Baetens (Cambridge: Cambridge University Press, 2013), 290.

[58] Agreement between The Republic of Singapore and The Republic of Indonesia on the Promotion and Protection of Investments (signed 11 October 2018, entered into force 9 March 2021) art 5(3). CETA, art 8.7(4).

[59] Suzy H. Nikièma, *The Most-Favoured-Nation Clause in Investment Treaties: IISD Best Practices Series* (Manitoba: IISD, 2017), 2.

[60] Economic Partnership Agreement between The CARIFORUM States and The European Community and its Member States, [2008] OJ L289/I/3 (signed 15 October 2008, entered into force 1 January 2009) art 70(1).

the MFN obligation of the CARIFORUM States is significantly less extensive, as they are not obliged to provide the EU investors with MFN unless they negotiate a future economic integration agreement with a 'major trading economy' (rather than simply any other State). This provision is particularly controversial since granting of MFN to the EU members is not automatic but subject to additional 'consultations' between the EU and CARIFORUM States.[61] Moreover, when a greater regional integration amongst the CARIFORUM States may lead to an increased liberalization of trade or investment in these countries, they are not bound to grant the same MFN to the EU States.[62] Many consider this provision a 'win' for the CARIFORUM States since it provides a broad MFN treatment in favor of the investors from the CARIFORUM States.[63]

However, such detailed provisions will bring additional clarity and confidence for States, foreign investors, and tribunals regarding, *inter alia,* the interpretation of MFN. Thus, all IIAs may limit the scope of the MFN clause in different ways. This is a growing trend in IIAs as more States have adopted this approach in recent years.[64]

Pertinently, drafting parties may develop lists of existing non-conforming measures, called positive and negative lists. According to the negative list approach, States grant MFN to every sector and for every measure in any stage except those explicitly excluded in a list. On the other hand, the positive list approach ensures MFN and other preferred measures for those sectors, and in the stages that the parties consider suitable. This is the approach endorsed by the WTO in the context of the liberalization of trade in services (GATS). [65] Although positive lists have many advantages since they are simpler to create, present less risk of errors or the omission of strategic sectors to be protected, and require less time, negative lists are the common practice among developing countries, enabling the exclusion of sectors that are kept for their nationals and gradually increasing the amount of foreign participation in others.[66]

IV. THE MULTILATERALISATION OF INVESTMENT OBLIGATIONS AND THE RENEWABLE ENERGY INVESTMENT CONCERNS

Various substantive standards of investment protection, including National Treatment (NT), the duty not to expropriate, Full protection and Security (FPS), Umbrella clause, and Fair and Equitable Treatment (FET) are in charge of foreign investment protection in different sectors including the renewable energies. However, not all agreements contain the relevant standards of treatment. So far roughly 87 % of IIAs contain an NT clause, 84% with an FPS, 42% with an Umbrella clause, and 95% have a FET clause.[67] Moreover, most of these clauses have a limited scope since they are often subject to express, or implied restrictions in the wording of the IIAs. Hence, when a substantive standard of treatment is breached, the applicable MFN clauses arguably have the potential to multilateralize the relevant protections and collect the most favorable provisions available in favor of the investors.[68] This is an

[61] *Ibid*, art 70(5).
[62] *Ibid*, art 70(2).
[63] James Cardwell and French, "The European Union," 219-21.
[64] Patrick Dumberry, "Has the Fair and Equitable Treatment Standard Become a Rule of Customary International Law?" *Journal of International Dispute Settlement* 8, no. 1 (2016): 159-202.
[65] Nikièma, *The Most-Favoured-Nation Clause,* 8.
[66] *Ibid*. See also Sornarajah, *The International Law on Foreign Investment,* 240.
[67] UNCTAD database, "Mapping of IIA Content." Bonnitcha, Poulsen and Waibel, *The Political Economy of the Investment Treaty Regime*, pt 4.
[68] Arnaud De Nanteuil, *International Investment Law* (Cheltenham: Edward Elgar Publishing, 2020), 283-

important option for the renewable energy sector which often witnesses apparent State involvement.[69]

To promote foreign investments in this sector, many States adopt various incentive measures such as government procurements, subsidies, and insurance policies. For instance, Feed-in Tariffs (FITs), classified as government procurements, are known as the principal driving forces in the worldwide development of Solar Photovoltaics, and, more than 110 governments have established FITs so far.[70] However, the content of such laws and policies is not necessarily always compatible with the requirements of MFN. In other words, such incentive measures may lead to the discriminatory treatment of foreign investors. For example, a State contract may contain a preferential treatment that ensures the government will privilege an investor over other foreign investors. Principally, such provisions may fall short of MFN.[71] Several investor-State awards support the proposition that unless an IIA exempts procurement measures from its coverage, established foreign investors may challenge measures that deprive them of participating in procurement or impose other discriminatory obligations upon them in the procurement process.[72] The uncertainties about the size of procurement markets, and the degree to which the host States are allowed to discriminate in their own markets, create difficulties in assessing the effectiveness of IIAs in general and the MFN clauses in particular, in protecting foreign investments against discriminatory practices in the area of government procurements.[73] Therefore more recent IIAs are beginning to include some detailed provisions on the conduct of government procurement contracts, and to prevent discrimination against covered investments in the procurement of goods by the parties and the enterprises that they are responsible for their action.[74]

In addition, most large-scale renewable energy projects have a term beyond that of one or two governments, during this period, the host State may have to revoke these incentives due to various economic or political reasons. Thus, international infrastructure providers are very attentive to these measures, since the revocation of these policies is often seen as a threat to renewable energy investments, and a breach of contractual obligations of the host State.[75]

84. Jean Ho, *State Responsibility for Breaches of Investment Contracts* (Cambridge: Cambridge University Press, 2018), 217-18.

[69] Donia El-Mazghouny, "Renewable Energy in Egypt," Lexology, last modified April 3, 2019, https://www.lexology.com/library/detail.aspx?g=799894d0-f8f5-4264-bf61-0cb4e1524b3a. For instance, Egypt has a single-buyer electricity market, with the Egyptian Electricity Transmission Company (EETC), a State-owned company that purchases electricity from all public and private generation companies and sells it to other companies.

[70] REN21, "Renewables 2017 Global Status Report," REN21 Secretariat, last modified 2017, https://www.ren21.net/wp-content/uploads/2019/05/GSR2017_Full-Report_English.pdf.

[71] UNCTAD, *State Contracts: UNCTAD Series on Issues in International Investment Agreements* (Geneva: United Nations Publication, 2004), 12.

[72] E.g. *Mercer International, Inc v Canada (Award)* (ICSID Arbitral Tribunal, Case No ARB (AF)/12/3, 6 March 2018) paras 2.19, 7.64, 7.90. *ADF Group Inc v United States of America (Award)* (ICSID Case No ARB (AF)/00/1, 9 January 2003) paras 147, 199(3). See generally Dominic Npoanlari Dagbanja, "The Intersection of Public Procurement Law and Policy, and International Investment Law," *Transnational Corporations Journal* 27, no. 2 (2020): 65-92.

[73] Julien Gourdon and James Messent, "How Government Procurement Measures Can Affect Trade," *Journal of World Trade* 53, no. 5 (2019): 679-757.

[74] UNCTAD, *State Contracts,* 12. Kenneth J. Vandevelde, *U.S. International Investment Agreements* (Oxford: Oxford University Press, 2009), 384.

[75] Thomas Dromgool and Daniel Y. Enguix, "The Fair and Equitable Treatment Standard and Revocation of Feed in Tariffs-Foreign Renewable Energy Investments in Crisis-Struck Spain," in *Legal Aspects of Sustainable Development,* ed. Volker Mauerhofer (Switzerland: Springer, 2016), 414. Marie Wilke, *Feed-in Tariffs*

Against this background, the role of the MFN clause is important, since it has the potential to import the available Umbrella clauses in other treaties into the basic treaty that lacks such an option.[76] This was the case in *Abaclat v Argentina*, where the claimant brought a claim for unpaid sovereign bonds based on the Argentina-Italy BIT which did not contain an umbrella clause. Accordingly, the tribunal held that 'By not respecting its obligations under the bonds, Argentina would have violated Article 7(2) [Umbrella clause] Argentina-Chile BIT, which in turn, constitutes a violation of Article 3(1) [MFN] Argentina-Italy BIT'.[77]

However, according to the UNCTAD database, only a few arbitral awards have found a breach of MFN.[78] Only around 18% of investment claims have relied upon an MFN clause;[79] so far these claims have experienced a success rate of less than 1%.[80] Nevertheless, there are several cases where the tribunals have, utilizing an MFN clause, found a breach of a standard of treatment under other agreements signed by the host State.[81] In addition, several investment tribunals have reaffirmed the possibility of this option.[82]

Overall, there have been divergent responses by different arbitral tribunals to different, and sometimes similar, MFN clauses which typically result in inconsistent arbitral awards.[83] Such inconsistencies run counter to the uniform application of MFN and increase the risk that States, investors, and the public may lose confidence in the efficacy of this standard and its adequate application to investor-State disputes.[84]

Generally, the discrepancies concerning the application of MFN in arbitration practice revolve around two major issues. First, is the determination of 'similarity' or 'likeness' which is often referred to as 'like circumstances', as a pre-requisite for liability under the MFN clause.[85] The application of an MFN clause depends on its scope and context, and the benefits to be claimed must come within the subject matter of the

for Renewable Energy and WTO Subsidy Rules: An Initial Legal Review (Geneva: ICTSD 2011).

[76] E.g., *Consutel Group SPA in liquidazione v People's Democratic Republic of Algeria (Final Award)* (Permanent Court of Arbitration, Case No 2017-33, 3 February 2020) para 358. *Mr Franck Charles Arif v Republic of Moldova (Award)* (ICSID Case No ARB/11/23, 8 April 2013) paras 395-96. *EDF International SA, SAUR International SA and León Participaciones Argentinas SA v Argentine Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/03/23, 11 June 2012) paras 929-937.

[77] *Abaclat and Others v Argentine Republic (Decision on Jurisdiction and Admissibility)* (ICSID Arbitral Tribunal, Case No ARB/07/5, 4 August 2011) para 312.

[78] E.g., *NJSC Naftogaz of Ukraine, PJSC State Joint Stock Company Chornomornaftogaz, PJSC Ukrgasvydobuvannya, and others v The Russian Federation (Award on Liability)* (PCA Case No 2017-16, 22 February 2019). *White Industries Australia Limited v The Republic of India (Final Award)* (Ad hoc Arbitration UNCITRAL, 30 November 2011).

[79] Ortino, *The Origin and Evolution of Investment Treaty Standards,* 1. See also UNCTAD database, "Breaches of IIAs Provisions Alleged and Fund," accessed May 20, 2022, https://investmentpolicy.unctad.org/investment-dispute-settlement.

[80] Bonnitcha, N. Skovgaard Poulsen and Waibel, *The Political Economy of the Investment Treaty Regime*, pt 4.

[81] E.g., *Hesham Talaat M Al-Warraq v The Republic of Indonesia (Final Award)* (Ad Hoc Arbitration UNCITRAL, 15 December 2014) para 683(3). *Arif v Republic of Moldova,* paras 395-96. *EDF v Argentine Republic,* paras 929-937. *RosInvestCo UK Ltd v The Russian Federation (Award)* (Stockholm Chamber of Commerce, Case No 079/2005, 12 September 2010) para 601.

[82] E.g., *SPA v Algeria,* para 358. *Abaclat v Argentina Republic,* paras 317-332.

[83] Shirlow and Duggal, "Most Favoured Nation Treatment."

[84] Sornarajah, *The International Law on Foreign Investment,* 103-5. Cho and Kurtz, "Convergence and Divergence in International Economic Law and Politics," 197.

[85] Nudrat Ejaz Piracha, *Toward Uniformly Accepted Principles for Interpreting MFN Clauses: Striking a Balance Between Sovereignty and the Protection of Investors* (The Netherlands: Kluwer Law International B.V, 2021), 1848.

MFN clause and be of the same kind (*ejusdem generis*).[86] Most agreements explicitly refer to 'like circumstances', or 'like situations', in their MFN clauses. However, even in the absence of this criterion, tribunals often conduct the 'likeness' test.[87] As rightly stated by the tribunal in *Parkerings v Lithuania*,

> The essential condition of the violation of an MFN clause is the existence of a different treatment accorded to another foreign investor in a similar situation. Therefore, a comparison is necessary with an investor in like circumstances. The notion of like circumstances has been broadly analyzed by Tribunals.[88]

Although this criterion, *per se,* is not disputable, the interpretation of 'like circumstances' may vary substantially from one tribunal to another.[89] Particularly, the difficulty arises in the renewable energy sector, since the classification of this sector, and its related services and products, has always been controversial, not only in the investment law regime but also in the context of WTO agreements. Often, the equipment manufacturers sell renewable energy goods along with services, such as construction and maintenance, etc. However, renewable energy includes various forms of energy, including hydropower, ocean, solar, wind, etc. The goods and services related to these sectors are not still definitely categorized as independent economic sectors. For instance, while ethanol is considered an 'agricultural good', biodiesel is classified as an 'industrial good'. In addition, some categories of biofuels may be deemed as 'environmental goods'.[90] As a result, the scope of protection provided by these instruments may differ. For instance, under the rules of WTO, the production of energy goods from oil, gas, and coal, comes under the scope of GATT,[91] while energy-related services fall under the scope of GATS.[92] Electric energy is qualified as a good and hence subject to GATT. However, it is not clear where different types of renewable energy fall. Indeed WTO provisions concerning renewable energies are not precisely articulated and still do not systematically address the energy sector.[93] The Doha Round, being the first round of significant negotiations on trade and the environment in the GATT/ WTO, is not far from the expectation that member States address this issue more systematically and consistently which may directly contribute to the facilitation of the establishment of 'like circumstances' in investor-State arbitration as well.[94] Because the economic concepts relating to international trade are transferable to international investment since both trade and investment are partly interchangeable

[86] International Law Commission, *Yearbook of the International Law Commission 1978-Volume II, Part Two: Report of the International Law Commission on its thirtieth session* (New York: United Nations Publication, 1979), 27.

[87] Alia Algazzar and Andrew Willcocks, "Similarity / In Like Circumstances," Jus Mundi, last modified April 22, 2022, https://jusmundi.com/en/document/wiki/en-similarity-in-like-circumstances.

[88] *Parkerings-Compagniet AS v Republic of Lithuania (Award)* (ICSID Arbitral Tribunal, Case No ARB/05/8, 11 September 2007) para 369.

[89] Nikièma, *The Most-Favoured-Nation Clause*, 19

[90] Martijn Wilder Am and Lauren Drake, "International Law and the Renewable Energy Sector," in *The Oxford Handbook of International Climate Change Law*, eds. Cinnamon P. Carlarne, Kevin R. Gray and Richard Tarasofsky (Oxford: Oxford University Press, 2016), 361-2. Thomas Cottier et al., "Energy in WTO Law and Policy," in *The Prospects of International Trade Regulation: From Fragmentation to Coherence,* eds. Thomas Cottier and Panagiotis Delimatsis (Cambridge: Cambridge University Press, 2011), 211-244.

[91] General Agreement on Tariffs and Trade, 1867 UNTS 187 (adopted 30 October 1947, entered into force 1 January 1948) (GATT).

[92] General Agreement on Trade in Services, 1869 UNTS 183 (adopted 15 April 1994, entered into force 1 January 1995) (GATS).

[93] Wilder Am and Drake, "International Law and the Renewable Energy Sector," 360-370.

[94] "Doha Round: what are they negotiating?" World Trade Organization, accessed August 25, 2022, https://www.wto.org/english/tratop_e/dda_e/update_e.htm.

and mutually supportive.[95] The investment arbitration arena is not free from these uncertainties about various renewable energy sectors and their boundaries. Hence, the classification of renewable energy and its related services under WTO agreements is relevant since the economic concepts relating to international trade are transferable to international investment. Particularly, the standard of MFN is a fundamental rule common in both the legal regimes of investment law and trade law, as they concur for the protection of the rights of foreigners, including foreign investors and their properties.[96] Therefore, in dealing with investment disputes, it is possible to refer to trade law regulations as the 'relevant rules of international law applicable in the relations between the parties'.[97]

However, there is no *stare decisis* in investment arbitration and investment tribunals do not necessarily adhere to such WTO classifications or similar categorizations. As for now, it is generally admitted that foreign investors not exactly operating in the same economic or business sector, are not considered in like circumstances. Many tribunals have endorsed this interpretation of the 'like circumstances'.[98] However, there are few cases where they have adopted an expansive approach.[99] Interestingly, the tribunal in *Occidental v Ecuador (I)* has rendered an ample interpretation of 'like circumstances' by extending its scope to situations where 'all exporters' have similar conditions.[100] This is a promising interpretation of 'like circumstances' since it can unprecedentedly favor the foreign investors by limiting the margin of appreciation for the host State in making policies detrimental to foreign investments as it lets the investors in different sectors argue that they have been discriminated against.[101] However, establishing this interpretation of 'like circumstances' is possible where the applicable agreement does not explicitly adopt a restrictive MFN clause. There are few IIAs that preclude this approach by stipulating that each party shall accord '… treatment no less favorable than that granted to its own investors or to investors of a third State and who are in an identical situation'.[102] This literature resembles the wording of WTO agreements that refer to 'like' products or services.[103]

Against this background, it is understandable why the interpretation of 'like circumstances' in applying MFN clauses remains disputable. It is not clear how

[95] Yamashita Tomoko, "Procedural and Normative Competition between the WTO's Dispute Settlement and the Investor-State Arbitration: Focusing on the National Treatment Principle," *Public Policy Review* 16, no. 5 (2020): 21.

[96] Andreas R. Ziegler, "Investment Law in Conflict with WTO Law?" in *International Investment Law: A Handbook,* eds. Marc Bungenberg et al. (Baden-Baden: Nomos Verlagsgesellschaft, 2015), 1795. Tomoko, "Procedural and Normative Competition," 21.

[97] Vienna Convention of the Law of Treaties, 1155 UNTS 331 (adopted 23 May 1969, entered into force 27 January 1980) (VCLT) art 31(3)(c).

[98] E.g., *Spółdzielnia Pracy Muszynianka v Slovak Republic (Award)* (Permanent Court of Arbitration, Case No 2017-08, 7 October 2020) paras 518-520. *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan (I) (Award)* (ICSID Arbitral Tribunal, Case No ARB/03/29, 27 August 2009) para 420. *Parkerings v Lithuania,* paras 371-373. *Methanex Corporation v United States of America (Final Award)* (Ad hoc Arbitration UNCITRAL, 44 ILM 1345, 3 August 2005) paras 12-19.

[99] E.g., *Cargill, Incorporated v Republic of Poland (Final Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/04/2, 29 February 2008) para 312. *Occidental Exploration and Production Company v Republic of Ecuador (I) (Award)* (London Court of International Arbitration, LCIA Case No UN3467, 1 July 2004) paras 173-176.

[100] *Ibid*, para 176.

[101] Sornarajah, *The International Law on Foreign Investment,* 425-26.

[102] Agreement on the Reciprocal Promotion and Protection of Investments between Algeria and Iran (signed 19 October 2003, entered into force 5 December 2005) art 4(1).

[103] E.g., GATS, art II. GATT, art I.

the 'likeness' test should address the foreign investments in different renewable energy projects, and perhaps the energy sector *in toto*. Thus, by their very nature, 'circumstances' are context-dependent, and the determination of 'like circumstances' is a fact-specific inquiry.[104] This leaves the tribunals with a wide margin of discretion to ascertain this issue, and may in turn create a lot of uncertainty and inconsistency in arbitral awards.

Interestingly, to ensure that tribunals do not delineate categories of investments too narrowly, IIAs may incorporate a list of all factors to be considered when determining whether investors are in 'like circumstances'. Most notably, Article 17(2) of the Investment Agreement for the COMESA Common Investment Area provides that

For greater certainty, references to 'like circumstances' […] require an overall examination on a case-by-case basis of all the circumstances of investment including, inter alia: (a) its effects on third persons and the local community; (b) its effects on the local regional or national environment, including the cumulative effects of all investments within a jurisdiction on the environment; (c) the sector the investor is in; (d) the aim of the measure concerned; (e) the regulatory process generally applied in relation to the measure concerned; and (f) other factors directly relating to the investment or investor in relation to the measure concerned; and the examination shall not be limited to or be biased towards any one factor.[105]

This trend is clearly in favor of foreign investors, *inter alia,* in the renewable energy projects since it obliges the tribunals to assess a range of criteria in the course of MFN application, instead of merely holding that the investors were participating in similar or different sectors. This provision increases the possibility that investors in different sectors benefit from the MFN clause.[106]

The second, major issue regarding the application of MFN is the possibility to resort to the MFN clause to import more favorable procedural or dispute resolution provisions from a third treaty.[107] For many years it was believed that irrespective of the different wording in each agreement, the MFN clauses may only import the substantive treatments accorded in the agreements concluded with the third parties. However, following the decision of the arbitral tribunal in *Maffezini v Spain* the scope of MFN has been rediscovered in this context. This decision extended the MFN clause likewise to the provisions on dispute settlement.[108] In this case, an Argentinean investor in Spain requested the application of the MFN clause under the Spain-Argentina BIT to benefit from the allegedly more favorable provision in the Chile-Argentina BIT. The tribunal rejected the respondent's argument that the application of the MFN clause was limited to substantive matters or material aspects of the treatment granted to

[104] *Pope & Talbot v Government of Canada (Award on the Merits of Phase 2)* (Ad hoc Arbitration UNCITRAL, 10 April 2001) para 75. Stephan Hobe, "The Development of the Law of Aliens and the Emergence of General Principles of Protection under Public International Law," in *International Investment Law: A Handbook*, eds. Marc Bungenberg et al. (Baden-Baden: Nomos Verlagsgesellschaft, 2015), 16.

[105] Investment Agreement for the COMESA Common Investment Area (adopted 23 May 2007). This non-exhaustive list of factors is mentioned under Article 17(2) which is concerned with NT. However, article 19(2) extends its application to MFN.

[106] See generally Suzanne A. Spears, "Making Way for the Public Interest in International Investment Agreements," in *Evolution in Investment Treaty Law and Arbitration*, eds. Chester Brown and Kate Miles (Cambridge: Cambridge University Press, 2011), 286.

[107] Simon Batifort and J. Benton Heath, "The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization," *The American Journal of International Law* 111, no. 4 (2017): 873.

[108] *Ibid*.

investors and did not cover procedural or jurisdictional questions. The tribunal held that the investor could use the BIT's MFN provision to invoke the dispute settlement provisions of the Chile-Spain BIT, which did not require the investor to pursue local remedies. [109] Since then a number of tribunals have addressed the issue of the application and interpretation of the MFN clauses in a similar way.[110]

However, inconsistencies still exist among arbitral tribunals and scholars as to whether the scope of MFN should be interpreted as such or not. This probably remains to be the most controversial aspect of MFN before the tribunals.[111] Clearly, the IIAs that expressly include,[112] or exclude the application of MFN to matters of dispute settlement produce less controversy.[113] The difficulty arises where the applicable agreement has no specific provision in this regard. So far, there are two major schools of thought evidenced in arbitral practice and scholarly writings. On the one hand, a handful of tribunals, arbitrators, and commentators reject the possibility of the MFN clause application to dispute settlement provisions absent express wording to such effect.[114] On the other hand, some tribunals accept that principally MFN clauses can apply to dispute settlement provisions.[115]Notably, the tribunal in *Siemens v Argentina* endorsed the approach of *Maffezini v Spain,* by stating that

The MFN clause in the Spain BIT refers to 'all matters subject to this Agreement', while the MFN clause in the Treaty refers only to 'treatment'. The arbitral tribunal in Maffezini noted that Spain had used the expression 'all matters subject to this Agreement' only in the case of its BIT with Argentina and 'this treatment' in all other cases. The said tribunal commented that the latter was 'of course a narrower formulation'. The Tribunal concurs that the formulation is narrower but, as concluded above, it considers that the term 'treatment' and the phrase 'activities related to the investments' are sufficiently wide to include settlement of disputes.[116]

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[109] *Maffezini v Spain (Decision of the Tribunal on Objections to Jurisdiction),* para 54. *Emilio Agustín Maffezini v The Kingdom of Spain (Award)* (ICSID Arbitral Tribunal, Case No ARB/97/7, 13 November 2000) 21. C.f. *Plama Consortium Limited v Republic of Bulgaria (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/03/24, 8 February 2005). 'A MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them': at para 223.

[110] Andreas R. Ziegler, "The Nascent International Law on Most-Favoured-Nation (MFN) Clauses in Bilateral Investment Treaties (BITs)," in *European Yearbook of International Economic Law,* eds. C. Herrmann and J. P. Terhechte (Berlin: Springer, 2010), 81.

[111] Nikièma, *The Most-Favoured-Nation Clause,* 13.

[112] E. g., Agreement between Ukraine and the UK for the Promotion and Reciprocal Protection of Investments (signed 10 February 1993, entered into force 10 February 1993). 'For the avoidance of doubt, it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement': art 3(3). Article 8 is about 'Settlement of Disputes between an Investor and a Host State'. Austrian Model BIT (2008), art 3(3).

[113] E.g., "Singapore- Indonesia BIT," art 5(3). Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation between China and ASEAN (adopted 15 August 2009, entered into force 1 January 2010): art 5(4).

[114] E.g., *Michael Anthony Lee-Chin v Dominican Republic (Dissenting Opinion of Professor Marcelo Kohen)* (ICSID Arbitral Tribunal, Case No UNCT/18/3, 15 July 2020) para 101. *Juvel Ltd and Bithell Holdings Ltd v The Republic of Poland (Partial Final Award)* (ICC Case No 19459/MHM, 26 February 2019) para 443. *Ansung Housing Co, Ltd v People's Republic of China (Award)* (ICSID Arbitral Tribunal, Case No ARB/14/25, 9 March 2017) para 138. *Sanum Investments v Lao People's Democratic Republic (I) (Award on Jurisdiction)* (Permanent Court of Arbitration, Case No 2013-13, 13 December 2013) paras 356-58.

[115] E.g., *RosInvestCo UK Ltd v The Russian Federation (Award on Jurisdiction)* (Stockholm Chamber of Commerce, Case No 079/2005, 5 October 2007) para 132.

[116] *Siemens AG v The Argentine Republic (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/02/8, 3 August 2004) para 103.

As correctly noted by the tribunal in *Sanum Investments v Laos,* 'The more dispute settlement options an investor has, the better it is protected, and the more enhanced the economic cooperation will be between the concerned States'.[117] Thus, the second approach clearly favors foreign investors over the host States.

Principally there is a high premium on certainty when it comes to rules for the settlement of disputes, however, the present inconsistencies in arbitral decisions may *ex ante* result in a lack of predictability regarding the outcome of investment disputes, and has the potential to damage the legitimate expectations of foreign investors.[118] It may, in turn, affect the risk assessments usually made by foreign investors, and can undermine their confidence in the ability of MFN clauses to import a favorable dispute settlement mechanism.[119] Therefore an adequate stipulation of MFN clauses is crucial. In much the same way, the International Law Commission, which has taken up the topic of MFN clauses, has affirmed that 'Whether MFN clauses are to encompass dispute settlement provisions is ultimately up to the States that negotiate such clauses. Explicit language can ensure that a MFN provision does or does not apply to dispute settlement provisions ….'[120]

Against this background, let's admit that MFN clauses need to evolve in this respect, not only to protect foreign investments in general but also to provide predictability for investors, including in the renewable energy sector.[121] This is particularly a significant task, since the most frequently invoked IIA before the investment tribunals, appears to be the ECT; an energy-focused agreement that contains an investment chapter. In addition, the number of energy investment arbitrations is rather high and does continue to rise due to the increasing number of medium and small renewable or conventional energy projects.[122]

Similarly, the tribunals should adopt a more purposive approach to the scope of MFN. It is submitted that, in the absence of any rule to the contrary, the tribunals, in order to determine the scope of the MFN clause with regard to dispute settlement provisions, interpret the intention of the contracting States in conformity with Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT). However, the literal interpretation of various types of MFN provisions does not necessarily lead the interpreter to conclude that the drafting parties have intended to exclude the dispute settlement mechanism from the scope of MFN.[123] It is mainly because deducing the initial intention of the drafters of each IIA through the text of the agreement and contextual interpretation is not an easy task whatsoever. In fact, IIAs are not always the products of significant negotiation and reasonable drafting; many governments have proved to view the signing of investment agreements as 'photo opportunities' with visiting Heads of State and pay significantly less attention to the

[117] *Sanum Investments v Laos,* para 294.

[118] Brown, Ortino and Arato, "Lack of Consistency." Zachary Douglas, "The MFN Clause in Investment Arbitration: Treaty interpretation Off the Rails," *Journal of International Dispute Settlement* 2, no. 1 (2011): 98.

[119] Kyla Tienhaara, "Unilateral Commitments to Investment Protection: Does the Promise of Stability Restrict Environmental Policy Development?" *Yearbook of International Environmental Law* 17, (2008): 148-59.

[120] *Report of the International Law Commission, Sixty-seventh session,* UN Doc A/70/10 (15 August 2015) para 216.

[121] Brown, Ortino and Arato, "Lack of Consistency."

[122] Orsat Miljenić, "Energy Charter Treaty: Standards of Investment Protection," *Croatian International Relations Review* 24, no. 83 (2018), 24(83): 78.

[123] Yannick Radi," The Application of the Most-Favoured-Nation Clause to the Dispute Settlement Provisions of Bilateral Investment Treaties: Domesticating the 'Trojan Horse'," *The European Journal of International Law* 18, no. 4 (2007): 765.

terms of agreements.[124]

Moreover, interpreting MFN as encompassing the dispute settlement mechanism appears to be in line with the principle of *effet utile,* which is a general principle underlying Article 31(1) of the VCLT. According to this principle, the drafters have adopted a norm to be applied and the arbitrators have to apply them in a manner that best guarantees the effectiveness of the treaty (*ut res magis valeat quam pereat*).[125] Accordingly, the ordinary meaning of the terms of a treaty is the most important element in its interpretation, and tribunals shall not supplant the ordinary meaning of a text that expresses the intention of the drafters. Interestingly, this approach is in closer line with creating a multilateral order for a single global economy that is based on non-discriminatory and uniform rules for investors in every investment-related aspect. This is considered a significant contribution of MFN in this context as there are various reasons why uniform rules on investment protection are preferable to a conglomerate of fragmented and diverging bilateral rules.[126]

However, the narrow interpretations of MFN which exclude dispute settlement provisions are hardly in conformity with these principles.[127] These do not (logically) represent the proper interpretations of MFN. This is primarily because the parties to a treaty are often 'aware that their agreement can have an indirect effect through the operation of the most-favoured-nation clause'.[128] Had the parties preferred to limit the scope of an MFN clause, they could do so by adopting a clear restrictive language, or by excluding MFN *in toto*.[129] The principle of freedom of contract which includes 'the freedom to shape the content of the contract' totally endorses this conclusion (*La liberté de façonner le contenu du contrat*).[130] Moreover, the growing treaty practice of stipulating this type of exclusion to the MFN clause, *per se*, reflects and confirms this line of argument.[131]

It is important to note that the possible contribution of MFN clauses in the protection and promotion of foreign investments in renewable energy is challenged by another ubiquitous problem. Not only most IIAs do not mention renewable energies but also are often inattentive to the energy sector.[132] Often, at best they provide for

[124] N. Skovgaard Poulsen and Aisbett, "When the claim hits." For instance, in *SGS v Pakistan*, when learning of the dispute, Pakistan's attorney general actually had to look up 'BITs' and 'ICSID' on Google. In fact, the treaty itself was nowhere to be found, and the government had to request a copy from Switzerland through formal channels. Hence, Pakistan was unable to provide the tribunal with any *Travaux Préparatoires* on the terms of the BIT: at 279-281.

[125] Daniel Rietiker, "The Principle of 'Effectiveness' in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and Its Consistency with Public International Law – No Need for the Concept of Treaty Sui Generis," *Nordic Journal of International Law* 79, no. 2 (2010): 256.

[126] W. Schill, "Multilateralizing Investment Treaties," 500-568.

[127] Radi, "The Application of the Most-Favoured-Nation Clause," 759-761.

[128] International Law Commission, *Yearbook of the International Law Commission 1978-Volume II, Part Two,* 26.

[129] Radi, "The Application of the Most-Favoured-Nation Clause," 774. Ziegler, "The Nascent International Law on Most-Favoured-Nation (MFN) Clauses," 81.

[130] Jean-Baptiste Racine et al., *European Contract Law-Materials for a Common Frame of Reference: terminology, Guiding Principles, Model Rules,* eds. Bénédicte Fauvarque-Cosson and Denis Mazeaud (Munich: Sellier. European Law Publishers, 2008), 431-32.

[131] Nikièma, *The Most-Favoured-Nation Clause,* 23. E.g., "Agreement between Ukraine and the UK," art 3(3). C.f. Bilateral Agreement for the Promotion and Protection of Investments between the UK and Colombia (signed 17 March 2010, entered into force 10 October 2014) art III (2). Whitsitt and Bankes, "The Evolution of International Investment Law," 221-22.

[132] C.f. Free Trade Agreement between the EU and Viet Nam, 2020 OJ L 186/3 (adopted 30 June 2019, entered into force 1 August 2020). Interestingly it has allocated a special chapter to Non-Tariff Barriers to

favorable treatment or facilitation of trade and investment in goods and services of particular relevance to this sector, in a soft law form.[133] Principally, these obligations would not even be binding on the parties to the basic agreements.[134] Nevertheless, these soft law obligations can play an educational and informing role by suggesting to governments and arbitral tribunals the relevant approaches under instruments that are made by 'one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty', or as the 'relevant rules of international law applicable in the relations between the parties'.[135] As for now, it is still to be seen, whether or not the MFN clauses will be able to import such often scattered and long-neglected soft law provisions as binding obligations in favor of renewable energy investments.

V. CONCLUSION

The interpretation and application of MFN in international investment law are uneasy. Although the multilateralization of investment obligations can dramatically improve investment protection in the renewable energy sector, investors often encounter double standards in the application of MFN clauses. In addition, IIAs do not address the renewable energy sector and its related investments in a systematic manner whatsoever. Therefore, one may conclude that compared to trade law, the international investment law regime seems a generation behind when it comes to unleashing the MFN multilateralization potential in relation to the protection of renewable energy investments. Hence, there needs to be a change in both treaty law as well as investment arbitration. Firstly, IIAs should incorporate more detailed MFN clauses which exactly clarify the scope of their application. A relevant example is the Investment Agreement for the COMESA Common Investment Area which obliges the tribunals to expand their interpretation of the MFN clause. This is particularly important for the relatively new sector of renewable energies where the determination of 'like circumstances' on the mere basis of 'economic sectors' has been challenging not only in investment law but also in the framework of international trade law. Secondly, IIAs may incorporate positive or negative lists, which is not a common practice of most agreements so far. These lists may cover renewable energies and the related sectors to benefit from this treatment. Thirdly, the inclusion of procedural rights under the umbrella of the MFN clause is significant since it equips the investors with possible additional layers of protection. As correctly stated by the tribunal in *Sanum Investments v Laos,* 'The more dispute settlement options an investor has, the better it is protected, and the more enhanced the economic cooperation will be between the concerned States'.

In any case, if the State parties do not prefer such trends, they better adopt a decisive language that excludes specific sectors, or the possibility to import procedural rights from other agreements. For instance, evidence of this trend may be found in the Singapore-Indonesia BIT. This is a preferable approach since it brings greater consistency and harmony to arbitral awards while increasing the

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[133] E.g., Agreement between the EU and Japan for an Economic Partnership (signed 17 July 2018, entered into force 1 February 2019).

[134] Arnold N. Pronto, "Understanding the Hard/Soft Distinction in International Law," *Vanderbilt Journal of Transnational Law* 48, no. 4 (2015): 948.

[135] VCLT, arts 31(2)(b) and 31(3)(c). Rafael Leal-Arcas, "The Multilateralization of International Investment Law," *North Carolina Journal of International Law* 35, no. 1 (2009): 33-136, 76.

predictability of available dispute settlement mechanisms. All these may be equally achieved by providing additional guidance on the interpretation of the MFN clause and its different legal aspects.

MFN multilateralization in investment law has properties similar to international trade law that, *inter alia,* call into play some generalized normative principles. MFN may unprecedentedly add a normative layer to the fragmented investment law system in terms of the renewable energy transition context. Given the nearly ubiquitous presence of MFN clauses in IIAs, governments can innovatively incorporate binding, or non-binding, pro-renewable energy investment provisions into their agreements, and thereby gradually disseminate such normative layer of protection to the bulk of IIAs signed by either of the parties.

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