Journal of Korea Trade Vol. 24, No. 2, April 2020, 15-30
https://doi.org/10.35611/jkt.2020.24.2.15
ISSN 1229-828X

The MFN Principle at Peril in Investment Treaties - with Particular References to Ansung Housing and Beijing Urban Construction*

JKT 24(2)

Received 28 January 2020
Revised 20 February 2020
Accepted 6 April 2020

Chan-Mo Chung†
School of Law, Inha University, South Korea

Abstract

Purpose – This paper investigates the theories and practices of Most-Favored-Nation (MFN) clauses. The MFN clause became a controversial issue during the past two decades, especially in the context of investment arbitration. This paper aims to clarify a reasonable way to apply MFN clauses. It in particular focuses on the territoriality requirements and the scope of investment activity which are common features included in most of investment treaties.

Design/methodology – This paper analyses two investment arbitration cases, *Ansung Housing* and *Beijing Urban Construction*. Through the case study, this paper reveals limitations of the currently dominant views on the operation of MFN clauses. It then tries to reconstruct the system of MFN application within the relevant arbitration principles.

Findings – Tribunals of recent investment arbitration as represented in the two cases above employed strict literal interpretation of the treaty provisions, especially of the phrase "in its territory". This paper finds a more functional interpretation is appropriate and consistent with theories of public international law and developments of global economy.

Originality/value – Existing studies either stuck to literal interpretation or suggested more flexible interpretation of the phrase "in its territory" without full explanation. This paper tries to fill the gap in the existing discussion by analyzing legal foundations and theoretical structure for an effective interpretation of MFN clauses.

Keywords: Investment Arbitration, Jurisdiction, Most-Favored-Nation, Territoriality
JEL Classifications: G11, K33, K41

1. Introduction

The Most-Favored-Nation (MFN) treatment, which guarantees no less favorable treatment to a beneficiary party than a granting party provides to a third party, has been regarded as a cornerstone of international economic relations. It predates the General Agreement on Tariffs and Trade (GATT) and was inserted as a key principle in all three substantive agreements of the World Trade Organization (WTO). Bilateral investment treaties (BITs) and investment chapters of free trade agreements (FTAs) followed suit and included MFN treatment clauses, which guarantee no less favorable treatment to investors and investments from a contracting party than the party provides to investors and investments from a third party. Although the MFN principle is adopted in most international trade and investment

* An earlier version of this article was presented at the Symposium on the Latest Developments of Sino-Korean International Economic Law co-organized by the Chinese and Korean Societies of International Economic Law in May 2019. This work was supported by an Inha University Research Grant.

† **First and Corresponding author:** cmc@inha.ac.kr

agreements, it has yet to gain the status of customary international law. On the contrary, the difference in perspectives is ever increasing, thereby endangering the stability of international investment law (ILC, 1978/2015).

Although its details vary according to specific wording of the treaty concerned, there used to be a general understanding of the application of the MFN principle. One of the traditional perceptions is that MFN is a substantive principle, which caused some to believe that MFN applies to substantive treatment only, excluding procedural treatment. The *Maffezini v. Spain* (2000) decision allowed the avoidance of an 18-month cooling-off period required prior to submitting a case for investor-state arbitration by invoking another investment treaty without a cooling-off condition by means of the MFN treatment provision of the basic investment treaty. The case challenged the traditional belief and signaled the activation of MFN in the procedural treatment.

Thus, the most frequent controversy concerns whether a complaining investor from a BIT party may rely on an MFN clause to resort to the dispute settlement mechanism of other BITs of the defending state, which the investor deems more favorable. For example, some international arbitration agreements require the complainant to take domestic administrative and/or court proceedings before the investor brings the case to investor-state arbitration.

Arbitral decisions after *Maffezini v. Spain* (2000) have offered diverse views over the possibility of bringing the case directly to arbitration without recourse to the required local procedure. Tribunals in favor include, among others, *Siemens v. Argentina* (2004), *AWG v. Argentina* (2006) and *RosInvest v. Russia* (2007). Tribunals against include, among others, *Berschader v. Russia* (2006), *Telenor v. Hungary* (2006), and *Wintershall v. Argentina* (2008).

Despite numerous scholarly articles having been devoted to this subject (To name only some of the latest, Nikièma, 2017; Pérez-Aznar, 2017; Thulasidhass, 2015; Titi, 2016), the scope of differences seems to continue to widen rather than narrow (Batifort and Heath, 2018; Schill, 2018; Symposium, 2018). This article attempts to suggest a balanced approach to regain the coherency of interpretation of MFN clauses in investment arbitration. The article first discusses two recent arbitral decisions involving Chinese and Korean parties, which dealt with the issue of the application of the MFN clauses of investment treaties.

2. The MFN Principle Applied in *Ansung Housing* and *Beijing Urban Construction*

2.1. *Ansung Housing v. China* (2017)

A Korean construction company, Ansung Housing, brought an International Centre for Settlement of Investment Disputes (ICSID) arbitration against China based on the Korea-China BIT after it incurred severe loss in an investment for developing golf courses and condominium, claiming unfair treatment by the provincial government (*Ansung Housing v. China*, 2017). The first hurdle for the claimant was whether Ansung brought the arbitration within three years since it first acquired (or should have first acquired) knowledge of incurred loss or damage, as required by Article 9(7) of the basic treaty.

In preparation for a situation in which its claim that the three-year period had not elapsed would not be accepted by the tribunal, the claimant attempted to import more favorable treatment from China's BITs with third countries, which do not include a similar limitation period by way of the MFN provision (Article 3(3)) of the basic treaty, which reads:

> 3. Each Contracting Party shall in its territory accord to investors of the other Contracting Party

> and to their investments and activities associated with such investments by the investors of the other Contracting Party treatment no less favorable than that accorded in like circumstances to the investors and investments and associated activities by the investors of any third State (hereinafter referred to as "most-favored-nation treatment") with respect to investments and business activities, including the admission of investment. (Emphasis added by the author)

The claimant argued that the limitation period for arbitration is substantive by nature and the MFN provision is broad enough to cover the limitation period. On the other hand, China argued that the limitation is procedural and the scope of the MFN clause is circumscribed by the words "in its territory" and "investments and business activities."

The tribunal accepted the postulation that the ambit of an MFN clause is dependent on its wording. It found that while the temporal limitation in Article 9(7) pertains to consent to arbitration, Article 3(3) does not extend MFN treatment to consent to arbitration.

The tribunal also noted that while Article 3(3) does not refer to dispute resolution, Article 3(5) offers specific MFN protection in relation to an investor's access to domestic courts of justice and administrative tribunals and authorities. From the difference, the tribunal drew the implication that the Parties intended not to include dispute resolution within the scope of Article 3(3).

> 5. Treatment accorded to investors of one Contracting Party within the territory of the other Contracting Party with respect to access to the courts of justice and administrative tribunals and authorities both in pursuit and in defense of their rights shall not be less favourable than that accorded to investors of the latter Contracting Party or to investors of any third State.

Furthermore, the tribunal noted that "investments and business activities" is defined in Article 3(1)1 as "the expansion, operation, management, maintenance, use, enjoyment, and sale or other disposal of investments" and found that those activities do not extend to dispute resolution and, thus, Article 3(3) cannot apply to the limitation period for investor-state arbitration.

Based on these considerations, the tribunal found that the wording of the MFN clause in Article 3(3) of the Treaty clearly does not cover dispute settlement, including arbitral consent and conditions to arbitration, such as temporal limitation.

2.2 *Beijing Urban Construction v. Yemen* (2017)

The Beijing Urban Construction Group (BUCG), who won a construction contract for a new airport terminal of Yemen, later brought an ICSID arbitration based on the China-Yemen BIT of 2002, alleging that Yemen had deprived its contractual right unlawfully (*Beijing Urban Construction v. Yemen*, 2017). In an effort to broaden the seemingly limited scope of Article 10(2) of the BIT concerning *ratione materiae*, i.e., "any dispute relating to the amount of compensation for expropriation," BUCG relied on the MFN clause of the basic treaty in order to import a clause with a broader scope from the Yemen-UK BIT. The MFN clause reads:

> Article 3 Investment Treatment
>
> 1. Each Contracting Party shall ensure that fair and equitable treatment is given to the investments of the other Contracting Party in its territory, and such treatment shall, in accordance with its laws and regulations, be no less favourable than the treatment accorded to investments of the most favoured nation, if the latter is more favourable.
>
> Each Contracting Party shall, in accordance with its laws and regulations, ensure that the treatment accorded to investors of the other Contracting Party in its territory with respect to the

> activities relating to their investments shall be no less favorable than the treatment accorded to its domestic investors or no less favourable than the treatment accorded to investors of the most favoured nation, with the more favourable treatment to apply (Emphasis added by the author).

The tribunal paid attention to specific text rather than abstract arguments concerning MFN-based importation of other dispute resolution provisions. It noted that while the word "treatment" may be broad enough to encompass procedural measures, the phrase "in its territory" invokes territorial limits that are directed to substantive provisions in relation to local treatment of the investment.

The tribunal found that in the first paragraph of Article 3(1), dealing with fair and equitable treatment (FET), the words "in the territory" modify "the investment." In addition, it acknowledged that FET does not limit itself to matters of substance and can apply to the dispute resolution mechanisms of other BITs to which Yemen is a party.

With regard to the second paragraph dealing with the MFN, the tribunal sided with the position that the expression, "treatment accorded to investors… in its territory with respect to activities relating to their investments…" invokes territorial limits that tie the MFN applied to activities that take place in a location associated geographically with the investment (*ICS v. Argentina*, 2012). This limitation was considered as not allowing the use of the MFN principle to enlarge the scope of international arbitration beyond those contained in the basic treaty.

3. Critical Observations: The Concepts of Territoriality and Investment Activities

3.1. Territoriality in the Age of Borderless Investment

Mostly relying on the treaty phrase "in its territory," the *Beijing Urban Construction* decision explicitly suggests that investment protection gets the benefit of the MFN only within the territory of the host state when there is such a phrase in the treaty. International arbitration is regarded as being beyond territoriality and cannot benefit from the MFN treatment. Preceding cases are split. Some found relevance or decisive importance in the phrase "in its territory" (*Berschader v. Russia*, 2006; *Daimler v. Argentina*, 2012; ICS, 2012; *Impregilo v. Argentina*, 2011; *ST-AD v. Bulgaria*, 2013), while others did not take note of it at all (*Garanti Koza v. Turkmenistan*, 2013; *Hochtief v. Argentina*, 2011; *Maffezini v. Spain*, 2000; *Venezuela US v. Venezuela*, 2016).

Scholars (Arcuri and Violi, 2017) have noted growing replacement of territoriality by functionality as a source of legitimacy of the exercise of power in the global space. They have conceded, however, that territoriality has well survived rather than perished in the diminishing relevance of geographical space by the technological developments. Territoriality has reconfigured itself in order to embrace regionalism and multilateralism. It is also a useful tool to maintain key public interests which are specific to states. Growing consensus is that territory and function impart meaning each other.

Therefore, a strict literal imposition of territorial requirement would not make sense in a world where the effect of a state action usually crosses the border and the importance and frequency of external affairs increasingly outpace those of internal affairs. Reactionary it would be an interpretation that rigidly restricts the benefit of an MFN clause and provides equal conditions of competition only with regard to domestic relations. However, giving no effect at all to the phrase "in its territory" would also contravene the effectiveness principle of treaty interpretation. The following discussion attempts to find a balanced approach by combining the theory of territoriality in public international law with the realities of the globalized world.

3.2. Territoriality as a Jurisdictional Basis

It would be a stubborn out-of-date interpretation if the letter "territory" in modern economic treaty refuse to interact with the function the treaty is aim to achieve. Customary rule of treaty interpretation as reflected in Article 31 of the Vienna Convention on the Law of Treaties requires to find the ordinary meaning of a word in its context and object and purpose of the treaty. Therefore, it should be recognized that the word need to be interpreted in a flexible manner which is apt to best achieve the aim and purpose of the treaty. In the context of investment treaty, the word "territory" when combined with "investment", as it does in most of cases, reminds of the rationale that the place of destination of the capital concerned should be the host state in order to be protected by the treaty. In a rare situation where the word "territory" is combined with "treatment", it should be understood as playing the role of confining the reach of obligation to that of its jurisdiction. State jurisdiction is founded not only upon its geographical territory but also upon its decisional territory. Decisional territory covers matters which originates abroad but affects its function as a state and thus modern international law recognizes extraterritorial reach of the state's jurisdiction over the matters. Once within borders, the functional territory of a modern state sometimes runs over the borders (Maier, 2016).

International law already understands territoriality as having multiple nuances. In addition, though territoriality is the most commonly invoked ground for exercising state jurisdiction, it is not the only one. Extraterritorial exercise of jurisdiction has been increasingly accepted when the matter concerns a state's legitimate interests, including its people and the economy (Oxman, 1997). A measure that was taken in an extraterritorial place, for example, when the measure was to carry out special functions of the state such as foreign missions, may be attributed to a state and may incur state responsibility for the consequences (Buxbaum, 2009).

Public international law distinguishes subjective territoriality and objective territoriality. Subjective territoriality confines the basis of state jurisdiction to the action originating within the physical boundary of a state. Objective territoriality acknowledges the extension of a state's territorial jurisdiction to take countermeasures when an action originated outside is targeted at, completed, or has an effect on the territory of the state. The tribunal in *Beijing Urban Construction* seemed to understand the meaning of "territory" in the relevant BIT article as subjective territoriality. I submit that the term should be interpreted as objective territoriality, which may have nuanced connotations according to its context as explained below.

3.3. "Treatment … in Its Territory"

In the case of *Ansung Housing* and *Beijing Urban Construction*, the respondent states argued and the tribunals, implicitly in the former and explicitly in the latter, accepted that dispute settlement through arbitration was not carried out in each territory; thus, the state concerned was not obliged to offer MFN treatment with regard to arbitration. This is a problematic interpretation, which lost its validity a long time ago. It was probably valid in the pre-modern age when states' interaction with private parties was limited within their territorial boundaries.

"Treatment… in its territory" needs to be interpreted as meaning "treatment… in its jurisdictional capacity." Grotius was already claimed to have used the word "territorium" to refer not only to the geographical space but also to the sphere within which state jurisdiction exists (Rudolf, 1973). Brownlie (1990) also noted and confirmed its reasonableness that legal profession has for a long time used the term 'territory' to connote jurisdiction. This usage of

language continued until today, coining more elaborate expressions such as "economic territory".

In a globally interdependent world, state officials often meet and treat investors abroad. A state mission located overseas handles visa requests from foreign citizens wishing to visit the state. Suppose that Korea, along with foreign states A and B entered BITs that contain MFN provisions. If officials of the Korean mission to state A discriminate and reject the issuance of visas to investors from state A without a legitimate reason, while the Korean mission to state B issues long-term visas to investors from state B, other conditions being equal, state A investors could say that the Korean treatment concerned violates the MFN obligation. No reasonable mind would argue that, because the treatment is not within the Korean territory, MFN does not apply.

Imagine also the Ministry of Finance of Korea issuing sovereign bonds through JP Morgan in the US and treating some buyers less favorably. Negating responsibility for the bond issuance, claiming that it did not happen within the Korean territory, sounds absurd. The same applies to international dispute settlement. It does not matter where arbitral meetings take place as long as the state is exercising its jurisdictional capacity in the proceedings.

Other examples of "out of territory" but at the invitation of the host state may include the construction of embassies in a foreign country. The treatment during the tender process handled by the mission located in the foreign country should be fairly regarded as treatment in its territory. In the investor-state arbitration, the host state gives the same kind of treatment to once-invited but now disgruntled investors irrespective of the geographical location of the project. In fact, important strategies of the host state with regard to investment arbitration are usually decided within its territory by the headquarter officials.

The examples above suggest that "territory" in the phrase "treatment… in its territory" should be understood as "jurisdictional capacity." Drafters of investment treaties would have preferred "territory" to "jurisdictional capacity" because the former is a term of ordinary usage, while the latter is a specialized legal term. In addition, the territory is the primary source of a state's jurisdictional capacity. It is actually recommended for drafters to use the term "territory" in this situation. It is the role of lawyers to provide proper meaning when disputes break out due to the discrepancy between the natural meaning and the parties' intended meaning of the word "territory."

Although the ordinary meaning of a treaty term is usually given primacy in treaty interpretation, it cannot sustain without the confirmation of its context, object, and purpose of the treaty. I submit that both subjective territoriality and objective territoriality fall down within the scope of the ordinary meaning of "in its territory." The examples I provided above, however, show that only objective territoriality makes sense in its context, object, and purpose of the investment agreements.

From this point of view, one possible alternative reading of Article 3(5) of the China-Korea BIT would be to regard it as an exemplary and reiterating provision emphasizing the importance of the most-favored-nation treatment in the context of domestic proceedings where prejudices against foreignness are always prevailing. Articles 3(3) and 3(5) do not exclude the international application of the MFN clause but simply take it for granted. It may have been motivated by the not quite correct but conventional perception in the trade context that national treatment applies after the goods and services have passed the border of the importing state and most-favored-nation treatment applies on and off the border.

3.4. "Investment … in Its Territory"

The *Beijing Urban Construction* tribunal framed its reasoning that the first sentence of Article 3(1) of the China-Yemen BIT concerns fair and equitable treatment, while the second

sentence concerns the most-favored-nation. Albeit having no chance of looking at all the provisions of the BIT, it seems to me that the reading becomes more natural when the first sentence deals with the treatment given to "investments" and the second deals with the treatment given to "investors." Each deals with two dimensions of treatment, which should be fair and equitable and subject to the MFN obligation. I quote it again below, with different highlights.

> Article 3 Investment Treatment
>
> 1. Each Contracting Party shall ensure that fair and equitable treatment is given to the investments of the other Contracting Party in its territory, and such treatment shall, in accordance with its laws and regulations, be no less favourable than the treatment accorded to investments of the most favoured nation, if the latter is more favourable.
>
> Each Contracting Party shall, in accordance with its laws and regulations, ensure that the treatment accorded to investors of the other Contracting Party in its territory with respect to the activities relating to their investments shall be no less favorable than the treatment accorded to its domestic investors or no less favourable than the treatment accorded to investors of the most favoured nation, with the more favourable treatment to apply. (Emphasis added by the author).

This illustrates that the tribunal's understanding of the first sentence as the FET applying to the substantive as well as procedural provisions and the second sentence as the MFN applying to the substantive provisions only is simply a misstep.

It is admitted that the MFN provisions of the two cases have some vagueness and there are a few alternative interpretations. One interpretation of Article 3(1) of the China-Yemen BIT is that, as the tribunal stated, the phrase "in its territory" in the first sentence confines the adjacent word "investment," while "in its territory" in the second sentence confines the nonadjacent word "treatment." The other interpretation is that in both sentences, the phrase "in its territory" confines the nonadjacent word "treatment". I have already discussed how the phrase "treatment…in its territory" should be interpreted in the previous section. The third and more natural reading would be that the phrase "in its territory" in the first and the second sentences confines the immediately foregoing words, "investments" and "investors," respectively. This leads us to discuss the meaning of "in its territory" in the phrase "investments … in its territory" and "investors … in its territory." Since the investor is the person who has made or seeks to make an investment, the same logic applies to the latter. The following discussion focuses on "investment…in its territory" only.

In terms of *Ansung Housing* and *Beijing Urban Construction*, there is no doubt that investors in both cases made investments in the respective host countries. Even in the cases where some or major aspects of investment were carried out outside its territory, the qualification of "investment…in its territory" was recognized when the benefit of the investment was intended to go to the host state. To name a few, pre-shipment inspection service at the port of the exporting country already produced investment disputes in which the tribunals acknowledged the existence of investment in the territory of the states requesting the service. Although the tribunals noted that the final certificates were provided in the host states and that investors established offices in the host states, considerable parts of the investment were carried outside the host-state (*SGS v. Pakistan,* 2003; *SGS v. Philippines,* 2005; *SGS v. Paraguay*; *BIVAC v. Paraguay*, 2009).

With regard to the territoriality of financial instruments issued abroad, the tribunal in *Fedax v. Venezuela* (1997) stated that

> It is a standard feature of many international financial transactions that the funds involved are not physically transferred to the territory of the beneficiary, but at its disposal elsewhere…. The important question is whether the funds made available are utilized by the beneficiary of the credit.

Similarly, in *Abaclat v. Argentina* (2011) and other cases involving Argentina's sovereign bondholders who got them in the overseas secondary market, the tribunals had no difficulty in recognizing that the whole bond issuance scheme was for the benefit of Argentina and the purchase of the bonds in the foreign market was also an investment in Argentina (*Ambiente v. Argentina*, 2013; *Giovani v. Argentina*, 2014).

Therefore, although there are some outliers (*Poštová banka v. Greece*, 2015), the investment tribunals produced a rather consistent case law that "investment … in its territory" should not be read in a strict literal manner but in terms of intended economic effects.

3.5. Dispute Settlement as an Investment Activity

The finding of the *Ansung Housing* tribunal that "the expansion, operation, management, maintenance, use, enjoyment, and sale or other disposal of investments" does not include dispute settlement is supported by some of the previous arbitral awards but opposed by the majority of tribunals (ILC, 2015), including *Siemens v. Argentina* (2004) and *AWG v. Argentina* (2006).

The answer to the question of whether dispute settlement belongs in the category of management and maintenance of investment may depend on one's perceptual standpoint. The ordinary meaning can be found in the Oxford English Dictionary, which defines "management" as "the process of dealing with or controlling things or people." It is so broad as to include settlement of related disputes. "Maintenance," defined as "the act of keeping something in good condition by checking or repairing it regularly," could also include dispute settlement related to keeping the investment in good condition. Disposal of investments also frequently involves disputes and activities for their resolution.

In addition, the phrase "activities associated with … investment" in Article 3(3) of the China-Korea BIT is worth noting. It is difficult to doubt that taking legal procedures against the host state's measure interfering with the investor's use and enjoyment of the investment is an activity associated with investments (Ye, 2017). Therefore, it would be reasonable to assume that the limitation period for investor-state arbitration is a treatment associated with investment.

4. Looking Beyond the Two Cases

4.1. Recent Arbitral and Treaty-making Practices

The *Ansung Housing* and *Beijing Urban Construction* decisions are among many recent arbitral decisions that ruled that the MFN clause cannot change the scope and conditions of arbitral consent and especially the dispute settlement procedure of the basic treaty. *Kiliç v. Turkmenistan* (2013), *Muhammet & Sehil v. Turkmenistan* (2015), *İçkale v. Turkmenistan* (2016), *A11Y v. Czech Republic* (2017), *Anglia Auto Accessories v. Czech Republic* (2017), and *Busta v. Czech Republic* (2017) are non-exhaustive lists. It is currently not clear whether this new wave of cases represents an emerging consensus or a recoil against expansive decisions such as *Maffezini v. Spain* (2000). I am afraid that the decisions discussed here pursued a short-term goal of strong state sovereignty but lost the long-term agenda of good governance of the global economy. This trend, however, is supported by recent state practices by the majority of countries.

For example, the EU-Canada Comprehensive Economic and Trade Agreement (CETA) of 2016 excludes dispute settlement and substantive obligations in other international investment treaties from the definition of treatment in Article 8.7 paragraph 4. The United States-

Mexico-Canada Agreement (USMCA) of 2018 (the revised NAFTA) notes in Article 14.5 paragraph 4 that whether treatment is accorded in "like circumstances" depends on the totality of the circumstances, including legitimate public welfare objectives. The 2018 Amendment of Korea-US FTA restricted the scope of MFN in Article 11.4, paragraph 3 by removing dispute settlement from the scope of MFN and including a footnote having the same effect as the USMCA Article 14.5(4). Some FTAs such as the India-Malaysia FTA of 2011 and the EU-Singapore Investment Protection Agreement of 2018 do not even include MFN. Popular support is also strong for the restrictive approach (United Nations Conference on Trade and Development, 2018; Public Citizen, 2018).

The ongoing transformation of the international investment protection regime is motivated by various defects of the current system. Past wrongs, however, do not justify current wrongs. Some critics tend to not only remedy the side effects and excesses of MFN but also abolish the MFN itself, its interpretative offspring, and the fundamental legal principles it is based upon. This certainly requires a long discussion and goes beyond the purpose of this paper. It should be pointed out that the fray over the application of MFN in the investment dispute overshoots the target and that it is necessary to reconstruct the destabilized legal edifice in this area. As a small contribution to the efforts, I propose an understanding of the MFN principle that balances the interests of investment protection and host states' sovereign rights, and that builds upon a reconstructed edifice of conventional principles of international arbitration and public international law.

4.2. Balancing the Conventional Principles

4.2.1. Consent to Arbitration

Public international law jurisprudence concerning the consent of states for submission to the jurisdiction of a tribunal requires that any consent should be strictly interpreted and should not be simply presumed (*Status of Eastern Carelia*, 1923). The general principle of international arbitration also dictates that consent to arbitration must be in writing. This requires the explicit expression of a party's intention to consent. Can the claimant satisfy the requirement of explicit expression of consent to arbitration by way of MFN? This is debatable. Although there can be various ways in which consent to arbitration can be made, the invocation of MFN to import arbitration in a third treaty is dependent on uncertain external facts. Moreover, the fact that it is debatable suggests that one should be careful to recognize, if at all, the satisfaction of the existence of consent to arbitration requirement through an MFN clause.

The doctrine of severability in arbitration requires to treat an arbitration clause as constituting a separate and autonomous contract (Blackaby et. al., 2009). Thus, the principle of autonomy of the arbitral clause guarantees the effect of an arbitration clause even in the case where the contract became void and supports the argument that the arbitral clause setting the conditions of consent to arbitration cannot be affected by the operation of an MFN clause. In the exceptional case where an MFN clause is meant to affect the condition or scope of consent to arbitration, the MFN clause should clearly say so, in which case the MFN clause can be considered as the context in the interpretation of the arbitration clause.

A compromise may be considered, namely, that the MFN cannot create consent to arbitration, as the consent is something that restricts state sovereignty, and thus should be made individually. Modification to conditions of a jurisdictional consent may be achieved through MFN provisions (*Venezuela US, S.R.L. v. Bolivarian Republic of Venezuela*, 2016) in limited circumstances as explained below.

4.2.2. Jurisdiction and Admissibility

Conventional wisdom distinguished issues of jurisdiction from those of admissibility. Although some exceptional decisions exist (*RosInvest v. Russia*, 2007; *Garanti Koza v. Turkmenistan*, 2013; *Venezuela US, S.R.L. v. Bolivarian Republic of Venezuela*, 2016), tribunals, generally, did not allow the MFN-based creation of consent to arbitration and expansion of jurisdiction. They, however, are more flexible toward admissibility issues. The dividing line, however, is not clear. Some tribunals took the local-remedy-first requirement as an admissibility condition, which may be overcome through an MFN clause of the investment agreement (*Hochtief v. Argentina*, 2011). Other tribunals see it as a jurisdictional condition that cannot be skipped over via an MFN clause (*Daimler v. Argentina*, 2012). The lack of consistency in the jurisprudence threatened legal stability of international investment.

Some conditions to consent are described as jurisdictional conditions so that an MFN clause cannot go without fulfilling the conditions. How can we distinguish the jurisdictional from the remaining non-jurisdictional conditions? Paulsson (2005) says, "Jurisdictional objection concerns whether the tribunal at hand is the right forum. Admissibility objection concerns whether the claim is at an appropriate state for the tribunal to hear." It seems that the traditional view of admissibility covered a wide range of issues such as timeliness, negotiation or domestic procedure requirement, extinctive prescriptions, waiver of claims, etc. This broad definition, however, does not correspond well with the majority of international investment awards which simply ignored or saw it in a limited way. A more restrictive theory of admissibility would be needed for explaining contemporary awards and for future consistency.

The relevant condition should have a certain nature to qualify as a jurisdictional condition. By "nature," I mean that failure to meet the condition cannot be easily redressed. If the condition is something that can be easily redressed, it may be called a matter of admissibility. This leads to a simple test which may adjust various opinions about the position of admissibility in relation to jurisdiction and merits. The test distinguishes consent to arbitration and the associated jurisdictional conditions that cannot be obtained by unilateral efforts on the part of the claimant on the one hand and conditions such as waiting period or fulfilling domestic procedure that may be satisfied by unilateral efforts of the claimant. Thus, these are non-jurisdictional and are matters of admissibility. The hope to rationalize recent case law on MFN clauses of the BITs and to find room for coexistence of opposing views motivated my suggestion of the test.

Domestic courts and international courts with permanent standing like the International Court of Justice (ICJ) have found it useful to distinguish between jurisdiction and admissibility. The suggested test provides a limited scope for admissibility compared to the traditional view as reflected in the Paulsson's test mentioned above. One might, thus, be hesitant to redraw the boundary of admissibility and toss a large portion of it to jurisdiction. However, challenges to the concept of admissibility do not seem to just come from the application of MFN clauses but seem to have much wider and deeper causes.

For example, different from the ICJ practice, the jurisdiction-admissibility distinction in the arena of investment arbitration causes ambivalence of usefulness and confusion. It is often said that in the case of inadmissibility, flexible solutions such as staying the proceedings, rather than dismissing the case, would be available (Pauker, 2018). However, most investment arbitrations are handled by ad hoc tribunals. Thus, it is pointed out that staying the case in the arbitration is not very different from rejecting the case in its effect. Critics also argue that it would be an unexpected surprise if naming some condition as an admissibility issue empowers the invocation of MFN and deprives judicial review including ad hoc Committee review in the case of ICSID arbitration (Söderlund and Burova, 2018).

The exhaustion of local remedies is a long-established rule that should be satisfied before the dispute elevates to a state-state dispute settlement including diplomatic protection (*Interhandel Case*, 1959). The rule, however, became an optional choice in the context of investor-state dispute settlement (ISDS). Article 26 of the ICSID Convention states that "consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention." Some tribunals opined that when a local proceedings requirement is very specific to represent an inseparable part of the consent to arbitration, it is a jurisdictional condition (*Kiliç v. Turkmenistan*, 2013). The decision of whether a local proceedings requirement is specific enough, however, would only increase vagueness and unpredictability. Its treatment as an admissibility issue that may be avoidable by way of an MFN clause would be clear-cut when, irrespective of its specificity, we rely on the criterion whether the requirement can be satisfied by the claimant's own efforts. Once regarded as a general rule of customary international law, the scope of exhaustion of local remedies has thus been circumscribed, allowing a growing part of international disputes directly before international tribunals.

It might be too hasty to discard the distinction between jurisdiction and admissibility in the face of international efforts for ISDS reform, the European Union and the UNCITRAL Working Group III in particular, one of the objectives of which is to provide stability to arbitration by establishing a permanent arbitration court. Until the reform project be completed, there is a need to be careful in using the distinction and limit it to the uncontroversial and essential circumstances only. The unilateral or self-fulfillment test that I have suggested earlier would enable circumvention of unnecessarily burdensome conditions on the claimants without affecting responding state's vital interests and eventual consequences of the case. This limited concept of admissibility would include waiting periods and domestic proceeding requirements but exclude the limitation period such as that of *Ansung Housing*, as the claimant cannot rewind the time.

4.2.3. Substance and Procedure

Despite the existence of outliers and an often blurring borderline, the distinction between substantive and procedural law is well established in international law as evidenced by the judgments of the International Court of Justice (*Jurisdictional Immunities*, 2012; *Arrest Warrant*, 2002). I admit that it is a useful distinction recognized in domestic as well as international law. However, I doubt whether this distinction should affect the application of an MFN clause. Some argue that the word "treatment" in "MFN treatment" means substantive treatment only, as in the case of the tribunal in *Beijing Urban Construction*. The cases that took a restrictive approach to MFN clauses generally approved this position. Both parties in *Ansung Housing* presupposed that the distinction was relevant, apparently due to the perception that MFN may be invoked with regard to substantive but not procedural provisions of an investment treaty. I am not persuaded, and I find the reason, if any, to be weak for a procedural treatment to be excluded. Substantive protection of investment loses its value when there lacks an effective procedural protection mechanism. MFN treatment is certainly meant to apply to both substantive and procedural treatment, unless otherwise stated.

It is, however, true that dispute settlement procedures are usually a part of the arbitration clause, which is severable from other treaty provisions in accordance with the principle of autonomy as mentioned above, and that it is sometimes difficult to determine whether there is less favorable treatment when different dispute settlement procedures are applied. In this

sense, from a treaty-making point of view, it could be a plausible policy to remove dispute settlement from the scope of MFN. Others, like drafters of the UK Model BIT, might think differently and say that it is only a matter of degree of difficulty and can be solved by the principle of burden of proof. That is, if the claimant cannot prove that the alternative procedure is more favorable on the whole, they cannot import the procedure through an MFN clause. Therefore, for the purpose of interpretation of MFN provision as applied, apart from treaty-making, the distinction of substantive and procedural treatment does not make much difference.

Second sentence of Article 8.7(4) of the CETA states that "Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute "treatment," and thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a Party pursuant to those obligations." It is ironic that MFN aversive decisions (*İçkale v. Turkmenistan*, 2016), reserved treaty-making practices, and critics (Pérez-Aznar, 2017; Batifort and Heath, 2018) also contribute to equal treatment of substantive and procedural provisions by challenging the presumption that substantive treatment in general can be incorporated through MFN clauses. I concur with their argument that an MFN-based wholesale importation of substantive protection is not justifiable but disagree with their insistence that substantive standards of third party treaties should be applied in reality before being imported.

4.3. Interpretive Suggestions

All tribunals pay respect to the text of agreements. When the text is vague, legal principles and doctrines may play a role. Unfortunately, text-based decisions and jurisprudential doctrines have not always been supportive of each other with regard to the application of MFN clauses. Thus, while it is a good thing that the veil of the MFN clause has been lifted to some extent through recent investment arbitration cases, there are some concerns that the ideological conflicts exposed in these cases would distort the whole picture of the MFN and related principles. Exceptions to the MFN, whether through treaty making or interpretation, should be utilized rather than putting the principle itself in peril.

While territorial boundary in the pre-modern world was identical to jurisdictional boundary, in the modern world, states' interests and interaction often go beyond the territorial boundary. Think of launching a satellite in a developing country. Not many developing countries have the capability to design and build satellite objects. Only several developing countries have the capability to launch satellites. The remaining countries procure some of the designing, building, launching, and maintenance services from foreign private entities. Imagine also building a scientific or living base in the Arctic or on the Moon. Countries have no territorial claim but they may have a jurisdictional claim. Investors involved in those kinds of activities have legitimate interests to secure the protection of their investment in those projects. Thus, "treatment … in its jurisdictional capacity" might be the proper interpretive alternative to the treaty phrase "treatment … in its territory." The resurrection of the pre-modern concept of physical territory to resolve the disputes of the (post)-modern world is preposterous. The suggested understanding of "treatment … in its territory" will resonate with the well-established interpretation of "investment … in its territory," as "investment intended to benefit the host state."

Without clear delineation in the basic investment treaty, MFN will be applied to treatment within the jurisdictional scope, irrespective of its substantive or procedural nature. The changing landscape of a growing number of MFN-aversive awards, popular anti-globalism, and responding state practices require a new balance. This paper proposed that an MFN-

based change to dispute settlement procedure should be limited to better "fringe" conditions that do not affect the "core" conditions of consent to arbitration. The key criterion that distinguishes between the fringe and core conditions of arbitration would be whether the condition can be fulfilled through the claimant's own effort.

5. Conclusion

Ansung Housing and *Beijing Urban Construction* exemplify the current trends in the application of MFN clauses of investment agreements. In contrast to the far-reaching decisions of *Maffezini v. Spain (2000)* and its descendants, reactionary views gained the mainstream of contemporary decisions. One of the characteristics of those decisions is to limit the state. This paper criticizes the decisions as having pursued a short-term goal of strong state sovereignty but lost the long-term agenda of good governance of the global economy. As a keystone for the reconstruction of the stumbled legal theories related to the MFN principle, this paper proposes that the principle of objective territoriality should be employed in the interpretation of "territory" in the investment treaty. It has proved that the flexible interpretation of the term "territory" is justified both by the well-established principles of international law and by the demands of ever globalizing society. This paper also finds that the principle of admissibility is still useful but should be limited to non-core conditions in arbitration that may be fulfilled through a claimant's own efforts. This reconstructed understanding of conventional theories will help the application of MFN clauses in investment disputes to regain consistency.

Appendix / Appendices

Article 3 of Korea-China BIT of 2007

Treatment of Investment

1. Each Contracting Party shall in its territory accord to investors of the other Contracting Party and to their investments treatment no less favourable than the treatment it accords in like circumstances to its own investors and their investments (hereinafter referred to as "national treatment") with respect to the expansion, operation, management, maintenance, use, enjoyment, and sale or other disposal of investments (hereinafter referred to as "investment and business activities").

2. The paragraph 3 of Article 2 and the paragraph 1 of the Article 3 do not apply to any existing non-conforming measure maintained within its territory of the People's Republic of China or any future amendment thereto provided that the amendment does not increase the non-conforming effect of such a measure from what it was immediately before the amendment took effect.

Treatment granted to investments once admitted shall in no case be made restrictive than the treatment granted at the time when the original investment was made.

The People's Republic of China will take all appropriate measures to progressively remove all non-conforming measures.

3. Each Contracting Party shall in its territory accord to investors of the other Contracting Party and to their investments and activities associated with such investments by the investors of the other Contracting Party treatment no less favourable than that accorded in like circumstances to the investors and investments and associated activities by the investors of any third State (hereinafter referred to as "most-favoured-nation treatment") with respect to investments and business activities, including the admission of investment.

4. The provisions of Paragraph 3 of this Article shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege by virtue of:

(a) any customs union, free trade zone, economic union and any international agreement resulting in such unions, or similar institutions;
(b) any international agreement or arrangement relating wholly or mainly to taxation;
(c) any arrangements for facilitating small scale frontier trade in border areas.

5. Treatment accorded to investors of one Contracting Party within the territory of the other Contracting Party with respect to access to the courts of justice and administrative tribunals and authorities both in pursuit and in defence of their rights shall not be less favourable than that accorded to investors of the latter Contracting Party or to investors of any third State.

References

Arcuri, A. and F. Violi (2017), "Reconfiguring Territoriality in International Economic Law", *Netherlands Yearbook of International Law*, 2016, 175-215.

Batifort, S. and J. B. Heath (2018), "The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization", *American Journal of International Law (AJIL),* 111, 873-913.

Blackaby, N., C. Partasides, M. Hunter and A. Redfern (2009), *Redfern and Hunter on International Arbitration,* Oxford, UK: Oxford University Press.

Brownlie, I. (1990), *Principles of Public International Law*, Oxford, UK: Clarendon Press.

Buxbaum, H. L. (2009), "Territory, Territoriality, and the Resolution of Jurisdictional Conflict", *American Journal of Comparative Law*, 57, 631-675.

ICC (2005), "Jurisdiction and Admissibility". In J. Paulsson (Ed.), *Global Reflections on International Law, Commerce and Dispute Resolution*, Paris: Author, 601-617.

ILC (1978), "Draft Articles on Most-Favoured-Nation Clauses with Commentaries", *Yearbook of the International Law Commission*, 2, 16-73.

ILC (2015), *Final Report: Study Group on the Most-Favoured-Nation Clause* (ILC Report, No. A/CN.4/L.852), New York, NY: United Nations.

Maier, C. S. (2016), *Once Within Borders - Territories of Power, Wealth, and Belonging since 1500*, Cambridge, MA: Harvard University Press.

Nikièma, S. H. (2017), *The Most-Favoured-Nation Clause in Investment Treaties*, Manitoba, Canada: International Institute for Sustainable Development.

Oxman, B. H. (1997), "Jurisdiction of States". In R. Bernhardt (Ed.), *Encyclopedia of Public International Law* (Volume III), Amsterdam: North-Holland, 45-69.

Pauker, S. A. (2018), "Admissibility of Claims in Investment Treaty Arbitration", *Arbitration International*, 34, 1-78.

Pérez-Aznar, F. (2017), "The Use of Most-Favoured-Nation Clauses to Import Substantive Treaty Provisions in International Investment Agreements", *Journal of International Economic Law,*

20, 777–805.
Public Citizen (2018), *Analysis of the NAFTA 2.0 Text Relative to the Essential Changes We Have Demanded to Stop NAFTA's Ongoing Damage* (Report), Washington, DC: Author. Available from https://www.citizen.org/wp-content/uploads/nafta_text_analysis_how_the_new_nafta_text_measures_against_the_essential_changes_we_have_demanded_to_stop_naftas_ongoing_damage.pdf
Rudolf, W. (1973) "Report of Professor Rudolf", in Rudolf, W. and W. S. Habscheid (Eds.), *Territorial Boundary of the State Law (Territoriale Grenzen der Staatlichen Rechtsetzung)*, Book 11, Karlsruhe, Germany: C. F. Müller Publishing, 7-45.
Schill, S. W. (2018), "MFN Clauses as Bilateral Commitments to Multilateralism: A Reply to Simon Batifort and J. Benton Heath", *AJIL,* 111, 914-935.
Söderlund, C. and E. Burova (2018), "Is There Such a Thing as Admissibility in Investment Arbitration?", *ICSID Review*, 33, 525-559.
Symposium on Simon Batifort and J. Benton Heath (2018), "The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization", *American Journal of International Law Unbound*, 112, 38-63.
Thulasidhass, P. R. (2015), "Most-Favoured-Nation Treatment in International Investment Law: Ascertaining the Limits through Interpretative Principles", *Amsterdam Law Forum,* 7, 3-24.
Titi, C. (2016), "Most-Favoured-Nation Treatment: Survival Clauses and Reform of International Investment Law", *Journal of International Arbitration,* 33, 425-440.
United Nations Conference on Trade and Development (2018), *UNCTAD's Reform Package for the International Investment Regime*, New York, NY: United Nations.
Ye, H. (2017), *Using MFN to Avoid Time-bar Provisions: Are Time-bar Provisions Substantive or Procedural?* (Master's Thesis), Uppsala, Sweden: Uppsala Universitet Department of Law.

A11Y LTD. v. Czech Republic, ICSID Case No. UNCT/15/1, Jurisdiction (9 February 2017).
Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5 (formerly Giovanna a Beccara and Others v. The Argentine Republic), Decision on Jurisdiction and Admissibility (4 August 2011).
Ambiente Ufficio S.p.A. and others v. Argentine Republic, ICSID Case No. ARB/08/9 (formerly Giordano Alpi and others v. Argentine Republic), Decision on Jurisdiction and Admissibility (8 February 2013).
Anglia Auto Accessories Ltd. v. Czech Republic, SCC Case No. V 2014/181, Final Award (10 March 2017).
Ansung Housing Co., Ltd. v. People's Republic of China, ICSID Case No. ARB/14/25, Award (9 March 2017).
Arrest Warrant of 11 April 2000 (Congo v. Belgium), ICJ Reports, Judgement of 14 February 2002.
AWG Group Ltd. v. The Argentine Republic, UNCITRAL, Decision on Jurisdiction (3 August 2006).
Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen, ICSID Case No. ARB/14/30, Decision on Jurisdiction (31 May 2017).
Berschader v. Russia, SCC Case No. 080/2004, Award (21 April 2006).
BIVAC v. Paraguay, ICSID Case No. ARB/07/9, Jurisdiction (29 May 2009).
Daimler v. Argentina, ICSID Case No. ARB/05/1, Award (22 August 2012).
Fedax v. Venezuela, ICSID Case No. ARB/96/3, Jurisdiction (11 July 1997).
Garanti Koza LLP v. Turkmenistan, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction (3 July 2013).
Giovanni Alemanni and Others v. The Argentine Republic, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility (17 November 2014).
Hochtief AG v. The Argentine Republic, ICSID Case No. ARB/07/31, Jurisdiction (24 October 2011).

ICS Inspection and Control Services Limited v. The Republic of Argentina, UNCITRAL, PCA Case No. 2010-9, Jurisdiction (10 February 2012).

İçkale İnşaat Limited Şirketi v. Turkmenistan, ICSID Case No. ARB/10/24, Award (8 March 2016).

Impregilo v. Argentina, ICSID Case No. ARB/07/17, Award (21 June 2011).

Interhandel Case, ICJ Reports 1959.

Ivan Peter Busta and James Peter Busta v. Czech Republic, SCC Case No. V 2015/014, Final Award (10 March 2017).

Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), ICJ Reports, Judgement of 3 February 2012.

Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan, ICSID Case No. ARB/10/1, Award (2 July 2013).

Maffezini v. Spain, ICSID Case No. ARB/97/7, Jurisdiction (25 January 2000).

Muhammet Çap & Sehil Inşaat v. Turkmenistan, ICSID Case No. ARB/12/6, Jurisdiction (13 February 2015).

Poštová banka and Istrokapital v. Greece, ICSID Case No. ARB/13/8, Award (9 April 2015).

RosInvest v. Russia, SCC Case No. V079/2005, Jurisdiction (1 October, 2007).

SGS v. Pakistan, ICSID Case No. ARB/01/13, Jurisdiction (6 August 2003).

SGS v. Philippines, ICSID Case No. ARB/02/6, Jurisdiction (22 April 2005).

SGS v. Paraguay, ICSID Case No. ARB/ 07/29, Jurisdiction (12 Feb. 2010).

Siemens v. Argentina, ICSID Case No. ARB/02/8, Jurisdiction (3 August 2004).

ST-AD v. Bulgaria, UNCITRAL, PCA Case No. 2011-06, Award on Jurisdiction (18 July 2013).

Status of Eastern Carelia, PCIJ Advisory Opinion Series B/05, (23 July 1923).

Telenor v. Hungary, ICSID Case RB/04/15, Award (13 September 2006).

Venezuela US, S.R.L. v. Bolivarian Republic of Venezuela, PCA Case No. 2013-34, Award on Jurisdiction (26 July 2016).

Wintershall v. Argentina, ICSID Case No. ARB/04/14, Award (8 December 2008).