MFN CLAUSE AND DISPUTE SETTLEMENT: GETTING THE FUNDAMENTAL CONCEPTS RIGHT AND AVOIDING JURISDICTIONAL MINEFIELD WHEN DRAFTING INVESTMENT TREATIES

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Abstrak

Salah satu isu kontroversial di bidang hukum investasi internasional saat ini adalah hubungan antara klausul MFN dan penyelesaian sengketa dalam perjanjian internasional di bidang investasi. Yurisprudensi maupun pendapat para ahli masih berbeda-beda, bahkan kadang bertentangan. Pertanyaan yang mendasar adalah: dalam proses arbitrase internasional, apakah klausul MFN dapat digunakan sebagai dasar untuk memberlakukan ketentuan-ketentuan mengenai penyelesaian sengketa yang dianggap lebih menguntungkan bagi investor dalam perjanjian investasi antara negara tergugat dengan negara ketiga (selain negara asal investor penggugat), sehingga jurisdiksi majelis arbitrase dapat diperluas? Berdasarkan analisa atas putusan-putusan ICJ mengenai klausul MFN serta asas-asas hukum internasional terkait jurisdiksi penyelesaian sengketa, maka penulis menyimpulkan bahwa jawabannya adalah “tidak”. Namun demikian, kesimpulan tersebut bersifat umum. Setiap kasus sangat bergantung kepada bunyi spesifik

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International investment arbitration is notorious for the profound disagreement among tribunals across various unsettled issues. One of the most important of which, from a jurisdictional standpoint, is the relation between the Most-Favored-Nation ("MFN") clause and dispute settlement. More specifically, the use of MFN clause to create or extend an investment tribunal’s jurisdiction by applying more favorable terms from other investment treaties between the respondent state and third states. It is this issue that will be discussed here.¹

A review of several Indonesian investment treaties reveals that the wording of the MFN clauses in those treaties have not been drafted in a way which ensures that Indonesia would avoid such jurisdictional minefield. Given that the government is contemplating a preparation of a model BIT² following the “termination” of existing BITs,³ it is now very

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¹ Hence the article will not deal with substantive MFN protections.  
² See Arif Havas Oegroseno, Revamping Bilateral Treaties, the Jakarta Post on 7 July 2014. It is hoped that the resulting treaties may better
timely to pay close attention to the debate on this controversy and develop a strategic wording of a standard MFN clause. This would still be useful even in the absence of a model BIT whenever the government negotiate an investment treaty, whether bilateral or multilateral.

accommodate Indonesia’s interest and reflect Indonesia’s position nowadays as both a capital-importing and capital-exporting country.

3 See the announcement of the termination at the Netherlands Embassy’s website at http://indonesia.nlembassy.org (16 July 2014). See also, e.g. the Financial Times, Indonesia to terminate more than 60 bilateral investment treaties, at http://www.ft.com (16 July 2014). This development is met with applause by some notable NGOs, while others are raising the specter of more protectionist foreign investment policies. See, e.g. the Polaris Institute, Indonesia Takes a Brave Decision to Terminate its Bilateral Investment Treaty with the Netherlands, at http://www.polarisinstitute.org (16 July 2014). Several international law firms already issued client alerts, with some suggesting that corporate clients may need to restructure their foreign investment in Indonesia. See, e.g. Freshfields Bruckhaus Derringer, Restructure now to protect investments in Indonesia, at http://www.freshfields.com (16 July 2014); Clifford Chance, Alternative Investment Protection Strategies for Indonesia, at https://onlineservices.cliffordchance.com (16 July 2014); Ashurst, Indonesia Terminates Indonesia-Netherlands BIT, at www.ashurst.com (16 July 2014). I wish to point out my agreement with the objection against using the term “termination” as it is not a legally correct characterization of Indonesia’s plan, which seems to be to simply let the existing BITs to expire and negotiate new, more favorable, ones. See Michael Ewing-Chow & Junianto James Losari, Indonesia is Letting its Bilateral Treaties Lapse so as to Renegotiate Better Ones, at http://www.ft.com (16 July 2014).
As such, the purpose of this article is to highlight the issue of MFN clause and dispute settlement, try to argue what the author believes to be the correct position, and offer some observations for the drafting of this specific aspect in future investment treaties. To avoid any doubt from the outset, it is the author’s conclusion that in principle an MFN clause does not apply to dispute settlement unless it can be clearly ascertained that the state parties to the investment treaty intend to do so. Hence, a claimant investor cannot import more favorable dispute settlement provisions from other investment treaties when instituting arbitration proceedings against the host state.

To that end, the article will start with an overview of the relevant investment tribunals’ jurisprudence and legal writings. The crux of the analysis will consist of (i) a discussion of International Court of Justice’s (“ICJ”) precedents on MFN clause; and (ii) the fundamental concepts that should guide us to the correct understanding of MFN clause and jurisdiction. There will be a review of the wording of MFN clauses in several of Indonesia’s existing investment treaties and practical observations for drafting MFN and dispute settlement clauses in future investment treaties, before the article ends with the conclusion.4

4 While it is desirable to provide a very detailed and rigorous analysis of each case or principles mentioned here, the author regrets that space requirement may not permit such treatment. Therefore many of the
II. Overview of the Debate on MFN Clause and Dispute Settlement

a. The Beginning – Pro-MFN Decisions

The controversy started with the seminal case of Maffezini v. Spain in 2000. The “basic treaty” in the case, the Argentina-Spain BIT, requires investors to submit investment dispute first to the domestic court of the host state. If no judgment is rendered in 18 months and the dispute still exists, the investor may then commence international arbitration proceedings against the host state. The Argentinian claimant had not brought any suit before Spanish court before going to the International Centre for Settlement of Investment Disputes (“ICSID”). In order to establish the tribunal’s jurisdiction and bypass the 18-months rule, the claimant invoked the MFN clause in the BIT to apply other Spanish BITs that do not contain such requirement.

It should be noted that the MFN clause in Article IV of the Argentina-Spain BIT reads as follows: “In all matters subject to this Agreement, this treatment shall be no less favorable than that extended by analysis in this article would be cursory and interested readers are invited to refer further to the materials cited (if any).

5 “Basic treaty” in this context means the treaty which forms the basis of the claim. For an explanation on the concept of “basic treaty” when dealing with an MFN clause, see Anglo-Iranian Oil Company case (UK v. Iran), 1952 ICJ Rep. 93 at 109 [Anglo-Iranian Oil Company].

6 Emilio Agustin Maffezini v. Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction of 25 January 2000 [Maffezini].
each Party to the investments made in its territory by investors of a third country.” [emphasis added]. The crux of the tribunal’s reasoning is that “dispute resolution arrangements are inextricably related to the protection of foreign investors,”\(^7\) and that “international arbitration and other dispute settlement arrangements … are essential to the protection of the rights envisaged under the pertinent treaties and are also closely linked to the material aspects of the treatment accorded.”\(^8\) Therefore the tribunal concluded that the MFN benefit in the Argentina-Spain BIT extends to dispute settlement matters, allowing the claimant to bypass the 18-months waiting period.

The tribunal then carved out some limit on its ruling. An investor cannot rely on an MFN clause to get around the following aspects of dispute resolution arrangement: (i) a provision requiring the exhaustion of local remedies; (ii) a fork-in-the-road provision; (iii) a particular choice of arbitration “system” (such as ICSID); and (iv) “precise rules of procedure” in a “highly institutionalized system of arbitration” (such as NAFTA).\(^9\) The tribunal tried to justify these exceptions, as they are “public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the

\(^{7}\) Maffezini, *ibid* at par. 54.  
\(^{8}\) Maffezini, *ibid* at par. 55.  
\(^{9}\) Maffezini, *ibid* at par. 63.
agreement in question.” It is unclear how the tribunal could have arrived at this conclusion, and this particular aspect of the decision has been widely criticized, even by those who in principle advocate the application of MFN clause to dispute settlement.

Nevertheless, some other tribunals quickly followed this judgment albeit with slight differences in facts or in statement of principle. For instance, the tribunal in Siemens v. Argentina went further by expanding the application of MFN clause to dispute settlement even though the MFN clause in the basic BIT does not contain the broad “all matters”

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10 Maffezini, ibid at par. 62.
13 Gas Natural SDG, SA v. Argentina, ICSID Case No. ARB/03/10, Decision on Jurisdiction of 17 June 2005; Suez, Sociedad General de Aguas de Barcelona SA, and Inter Aguas Servicios Integrales del Agua SA v. Argentina, ICSID Case No. ARB/03/17, Decision on Jurisdiction of 16 May 2006; National Grid Plc. v. Argentina, UNCITRAL Arbitration, Decision on Jurisdiction of 20 June 2006 [National Grid].
wording. As such, this line of judgments starts from a presumption that
an MFN clause also applies to dispute settlement.

b. The Backlash – Anti MFN Decisions

Just when it seemed that a consistent jurisprudence was about to
emerge following Siemens, two tribunals declined to apply MFN clause to
jurisdictional matters. In Salini v. Jordan, the dispute concerned final
payment to the claimant pursuant to a construction contract with the
Jordanian government. While the basic treaty, the Jordan-Italy BIT,
provides for ICSID arbitration for treaty violations, the treaty also
expressly states that any dispute arising from investment contract is to be
settled according to the dispute settlement clause in the contract. The
claimant attempted to rely on the MFN clause, arguing that there are
other Jordanian BITs that allow international arbitration to hear
contractual claims.

The tribunal rejected the claimant’s arguments. First they
distinguished the case from Maffezini, noting that the MFN clause in the
Jordan-Italy BIT does not contain the “all matters” language. Also, the
claimant has not established any intention of the state parties to apply
MFN clause in the BIT to matters concerning dispute settlement. On the

14 See Siemens AG v. Argentina, ICSID Case No. ARB/02/8, Decision on
Jurisdiction of 3 August 2004 at par. 82 [Siemens].
ARB/02/13, Award of 31 January 2006 at par. 66 [Salini].
contrary, the express intention is to exclude contractual claims – such as the one in dispute – from the jurisdiction of the tribunal.\(^\text{16}\) Hence the tribunal declined jurisdiction to hear the claim.

Another tribunal rendering decision at about the same time, in \textit{Plama v. Bulgaria}, produced a similar outcome. The basic treaty, the Bulgaria-Cyprus BIT, limited arbitration to a determination of the quantum of damages under the UNCITRAL arbitration rules only.\(^\text{17}\) Meanwhile, the claimant sought to litigate the entire merit of its claim (including the unlawfulness of Bulgaria’s conduct) in ICSID arbitration; hence the tribunal’s judgment. Yet the \textit{Plama} tribunal went even bolder by expressly advocating a new presumption: that “an 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.”\(^\text{18}\) [emphasis added]. Some other tribunals subsequently followed suit.\(^\text{19}\)

\(^{16}\) \textit{Salini, ibid} at par. 118-119.
\(^{17}\) \textit{Plama Consortium Limited v. Bulgaria}, ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 February 2005 at par. 26 \[\textit{Plama}\].
\(^{18}\) \textit{Plama, ibid} at par. 223.
c. The Latest Round of Cases and Taking Stock of the Debate

Based on the illustration above, it is clear that in general the jurisprudence of investment arbitration tribunals is still sharply divided over the issue. The latest round of cases dealing with MFN and dispute settlement in 2011 and 2012 did nothing to end the discord. In *Impregilo v. Argentina*\(^{20}\) and *Hochtief v. Argentina*,\(^ {21}\) the tribunals ruled that the claimant may import a more favorable term from Argentina’s other BITs in order to avoid the pre-arbitration requirement to litigate its claim before local court for 18 months. These decisions, decided by a majority, attracted two very strong dissents that will be highlighted in the analysis below.\(^{22}\) On the other hand, the tribunals in *ICS Inspection v. Argentina*\(^ {23}\) and *Daimler v. Argentina*\(^ {24}\) refused to extend the application of MFN clause to dispute settlement. It seems that there is still a long way from *jurisprudence constante* on this issue.

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*Argentina*, ICSID Case No. ARB/04/14, Award of 8 December 2008 [*Wintershall*].

\(^{20}\) *Impregilo SpA v. Argentina*, ICSID Case No. ARB/07/17, Award of 21 June 2011 [*Impregilo*].

\(^{21}\) *Hochtief AG v. Argentina*, ICSID Case No. ARB/07/31, Decision on Jurisdiction of 24 October 2011 [*Hochtief*].

\(^{22}\) See below, section V.

\(^{23}\) *ICS Inspection and Control Services Limited v. Argentina*, UNCITRAL Case No. 2010-9, Award on Jurisdiction of 10 February 2012 [*ICS Inspection*].

\(^{24}\) *Daimler Financial Services AG v. Argentina*, ICSID Case No. ARB/05/1, Award on Jurisdiction of 22 August 2012.
The same can be said of legal commentators, some in principle being pro-MFN\(^{25}\) while others are anti-MFN.\(^{26}\) Nevertheless, a consensus emerges that much depends on the wording of the MFN clause in the basic treaty.\(^{27}\) Ascertaining the effect of an MFN clause, just like any other treaty provisions, is basically an exercise in treaty interpretation.\(^{28}\) First it should be noted that there’s no such thing as the MFN clause; each MFN clause in each investment treaty is unique, the exact wording being different from one investment treaty to the other. This is true even among various BITs signed by one state. It is one of the reasons that many tribunals have come to different conclusions on the relation between MFN clause and dispute settlement.

Some investment treaties expressly determine whether the MFN clause there apply to dispute settlement or not.\(^{29}\) If this is the case, then

\(^{25}\) See, among others, Gaillard, *supra* note 12; Christoph Schreuer et al., *The ICSID Convention: A Commentary*, 2nd ed. (2009) at 245-248 [Schreuer].; Vesel, *supra* note 11 at 185-186 seem to support this view although less unequivocal, emphasising that the MFN clause cannot substitute actual state consent to arbitration.


\(^{27}\) Schreuer, *supra* note 25 at 248; Freyer & Herlihy, *supra* note 11 at 82;

\(^{28}\) *ICS Inspection, supra* note 23 at par. 275.

\(^{29}\) To be elaborated below. See section V(a).
tribunals simply have to follow the wording of the basic treaty. But of course, controversy has arisen in many proceedings precisely because of the absence of such clear language. It is submitted that the basic position should be the one put forth by the Plama tribunal: that an MFN clause does not apply to dispute settlement unless it can be clearly ascertained that the state parties intend otherwise. Therefore claimants cannot benefit from more favorable provisions in other treaties in order to establish or expand the jurisdiction of a tribunal. In reaching that conclusion, the analysis below will start with an elaboration of three ICJ cases related to MFN clause that have influenced early ICSID tribunals in this regard (section III). Afterwards, there will be an elaboration of the fundamental concepts that should be applied when dealing with the issue of MFN and dispute settlement (section IV).

III. ICJ Cases on MFN Clause

Some commentators have observed that the sharp division among investment tribunals’ precedents on MFN and dispute settlement could be traced back among others to contradictory interpretations of the three ICJ judgments concerning MFN clause, namely the Anglo-Iranian Oil

30 Gaillard, supra note 12 at 3.
Hence the court’s consideration in these cases merits close consideration. It will be shown below that those three cases cannot be used to support the view that MFN clause extend to dispute settlement as a procedural matter.

a. Anglo-Iranian Oil Company

In 1951 the Iranian government nationalized the oil industry, giving rise to a dispute with the Anglo-Iranian Oil Company, a United Kingdom (“UK”) incorporated company that had been given an oil concession in 1931. The dispute was later taken up by the UK government which brought a claim against Iran before the ICJ. Iran had made an optional declaration in 1932, under which Iran accepted the court’s jurisdiction but only over disputes concerning the interpretation or application of treaties or conventions entered into by Iran after the ratification of the declaration. The court held that it has no jurisdiction to adjudicate UK’s claim because the 1857 and 1903 Iran-UK treaties, under which the UK brought the claim, had been concluded before Iran’s optional declaration of 1932.

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31 See Douglas, supra note 11 at 344-345; Vesel, supra note 11 at 147-154.
32 Anglo-Iranian Oil Company, supra note 5 at 102.
33 Anglo-Iranian Oil Company, supra note 5 at 107.
The UK tried to argue *inter alia* that it could nevertheless bring the claim by virtue of the MFN clause in both treaties. This is because Iran had concluded another treaty with Denmark in 1934 that would enable Denmark to submit a dispute with Iran concerning the interpretation and application of that treaty to the ICJ. Insofar as the UK could not submit its dispute with Iran to the court, then the UK would not in a position of a most favored nation *vis-à-vis* Denmark.\(^{34}\)

However, the court rejected the UK’s MFN argument, holding that an MFN benefit could not extend to jurisdictional matters. This is especially telling when put within the context of the modern debate on MFN clause and jurisdiction because the MFN clause in the UK-Iran treaty was couched in broad terms, requiring MFN treatment “in every respect” and “in all respect.”\(^{35}\) In an oft-quoted passage the Court stated:

\(^{34}\) *Anglo-Iranian Oil Company, supra* note 5 at 110.

\(^{35}\) See *Anglo-Iranian Oil Company, supra* note 5 at 108. Article IX of the Treaty of 1857: “The High Contracting Parties engage that, in the establishment and recognition of Consuls-General, Consuls, Vice-Consuls, and Consular Agents, each shall be placed in the dominions of the other on the footing of the most-favored nation; and that the treatment of their respective subjects, and their trade, shall also, *in every respect*, be placed on the footing of the treatment of the subjects and commerce of the most-favored nation.” Article II of the Commercial Convention of 1903: “It is formally stipulated that British subjects and importations in Persia, as well as Persian subjects and Persian importations in the British Empire, shall continue to enjoy *in all respects*, the regime of the most-favored nation.” [emphasis added].
“The Court needs only observe that the most-favored-nation clause in the Treaties of 1857 and 1903 between Iran and the United Kingdom has no relation whatever to jurisdictional matters between the two Governments. If Denmark is entitled under Article 36, paragraph 2, of the Statute, to bring before the Court any dispute as to the application of its Treaty with Iran, it is because that Treaty is subsequent to the ratification of the Iranian Declaration. This can not give rise to any question relating to most-favored-nation treatment.”

It is submitted that the above passage is sufficiently clear as a general proposition on the relation between MFN clause and the jurisdiction of a court or tribunal. The court effectively distinguished between substantive benefit emanating from an MFN clause and jurisdictional matters that fall outside the ambit of that clause.

The court did state in another part of the judgment that it does not consider it necessary to deliberate on the “meaning and the scope” of the MFN clause. This particular passage has been used by the Siemens tribunal to justify its departure from the Anglo-Iranian precedent and applying the MFN clause to circumvent the precondition for the tribunal’s jurisdiction. However, read in the context of the court’s entire judgment, it is reasonable to view this as meaning that the court does not consider

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36 Anglo-Iranian Oil Company, supra note 5 at 110 (emphasis added).
37 See also the elaboration in the concurring opinion of Lord McNair: Anglo-Iranian Oil Company, supra note 5 at 110.
38 Anglo-Iranian Oil Company, supra note 5 at 109.
39 See Siemens, supra note 14 at par. 95-96.
the meaning and scope of the MFN clause as it applies to substantive MFN protection. When it comes to the issue of the court’s jurisdiction, the court was unequivocal in its rejection to applying the MFN clause to extend its jurisdiction beyond the limit prescribed by Iran’s declaration. On the other hand, the tribunal in Plama faithfully followed ICJ’s conclusion that the MFN clause has no relation to jurisdictional matters.40

b. Case Concerning the Rights of US Nationals in Morocco

At the heart of the case was the question of whether the United States is entitled to exercise consular jurisdiction in Morocco in cases where an American citizen is the defendant. In 1836 the United States concluded a bilateral treaty with Morocco conferring consular jurisdiction to the United States in all civil and criminal cases between American citizens. The United States here asserted that, by virtue of the MFN clause in the US-Moroccan treaty, all cases in which an American citizen is the defendant also fall within its consular jurisdiction to the extent that subsequent treaties between Morocco and Great Britain and Spain confer such broader jurisdiction on those states.41 France, which was the protector of Morocco at this time, disputed the United States’ assertion and

40 Plama, supra note 17 at par. 214.
41 Case Concerning the Rights of Nationals of the United States of America in Morocco (France v. USA), 1952 I.C.J. Rep 176 at 187-188 [Rights of US Nationals in Morocco].
instituted proceedings against the United States before the ICJ.

It should be noted, however, that the court’s jurisdiction in the case, based on France’s and the United States’ declarations under the optional clause, was never in dispute. Hence the MFN clause in the US-Moroccan treaty was invoked not in relation to any aspect of the court’s jurisdiction or procedure. It was instead invoked in relation to the United States’ substantive right to exercise consular jurisdiction under the treaty.\(^42\) Therefore this case should not have been considered to guide investment treaty tribunals either way on the question of MFN clause and the tribunal’s jurisdiction.

The *Plama* tribunal indeed made such observation.\(^43\) On the other hand, others have mistakenly relied on this case to extend their jurisdiction or import different procedural rules from other treaties by way of an MFN clause. For example, the tribunal in *Siemens* stated, “...it is evident that the ICJ accepted that MFN clauses may extend to provisions related to jurisdictional matters, but this was not really the issue between

\(^{42}\) See Douglas, *supra* note 11 at 349. In short, the court rejected the United States’ assertion of “permanent incorporation by reference” so that any right to exercise broader consular jurisdiction, which the United States may have enjoyed under the MFN clause, will cease insofar as Morocco treaties’ with third states that confer such broader rights have expired. See *Rights of US Nationals in Morocco*, *ibid* at 191.

\(^{43}\) See, among others, *Plama, supra* note 17 at par. 213.
c. Ambatielos Case

Mr. Ambatielos was a Greek ship owner who had concluded a contract with the British Ministry of Shipping. When a dispute subsequently arose, Ambatielos brought a claim before the English Admiralty Court in accordance with the contract. The admiralty court ruled against Ambatielos, and a subsequent appeal also failed. Afterward the Hellenic government took up Ambatielos’ claim and instituted proceedings against the United Kingdom before the ICJ. While the court ruled that it is without jurisdiction to hear the merit Greece’s claim, the court nevertheless found it has jurisdiction to rule that the United Kingdom must submit to arbitration pursuant to a Declaration to the 1926 Treaty of Commerce and Navigation between the two states (“TCN Treaty”).

It is the arbitration tribunal’s decision that has been the focus of attention with respect to MFN and jurisdiction. One of Greece’s main submissions was that Ambatielos had been denied “free access to the Courts of Justice” guaranteed under Article XV of the TCN Treaty. This

44 Supra note 12 at par. 99; see also National Grid v. Argentina, supra note 13 at par. 70, 87.
45 See the facts of the case in Ambatielos (Greece v. United Kingdom), 1952 ICJ Rep. 28 at 46 and 1953 ICJ Rep. 10 at 57 [Ambatielos (ICJ)].
46 The provision reads: “The subjects of each of the two Contracting Parties
is because (i) the British officials had failed to disclose material evidence in favor of Ambatielos in the admiralty court proceedings; and (ii) the English Court of Appeal had refused to grant Ambatielos the leave to produce additional evidence.\footnote{47} Relying on the MFN clause in Article X of the TCN Treaty,\footnote{48} the Hellenic government argues the proper scope of the “free access to the Courts of Justice” by invoking provisions concerning administration of justice from other UK bilateral treaties. Hence the issue, as far as the MFN clause is concerned, is whether such clause in the TCN Treaty extends to matters concerning the administration of justice by UK courts.

It should be clarified first that the term “administration of justice” here is akin to the concept of “denial of justice” (“DoJ”) under international law. DoJ in principle is a concept whereby a state incurs

\begin{quote}
in the dominions and possessions of the other shall have free access to the Courts of Justice for the prosecution and defense of their rights…” See Ambatielos (ICJ), \textit{ibid} at 20.
\end{quote}

\footnote{47} \textit{The Ambatielos Claim (Greece v. The United Kingdom)}, XII UNRIAA 91 at 98-99 [Ambatielos Arbitration].

\footnote{48} The provision reads: “\textit{The Contracting Parties agree that, in all matters relating to commerce and navigation, any privilege, favor or immunity whatever which either Contracting Party has actually granted or may hereafter grant to the subjects or citizens of any other State shall be extended immediately and unconditionally to the subjects or citizens of the other Contracting Party; it being their intention that the trade and navigation of each country shall be placed, in all respects, by the other on the footing of the most favored nation.” [Emphasis added]
international responsibility if it administers its laws to aliens in a fundamentally unfair manner. As argued by Greece, the treatment received by Ambatielos from UK courts would have amounted to DoJ. While Article XV of the TCN provides for “free access to Courts of Justice”, the provision does not expressly mention the concept of DoJ. According to Greece, Ambatielos is entitled to no less favorable treatment than those stipulated in UK’s other bilateral treaties that provides for protection from DoJ.

The arbitration panel, noting that Article X of the TCN Treaty stipulates that MFN is to apply in all matters relating to commerce and navigation – and that such term does not have strictly defined meaning, states:

“...It is true that the ‘administration of justice’, when viewed in isolation, is a subject-matter other than ‘commerce and navigation’, but this is not necessarily so when it is viewed in connection with the protection of the rights of traders. Protection of the rights of traders naturally finds a place among the matters dealt with by treaties of commerce and navigation. Therefore it cannot be said that the administration of justice, in so far as it is concerned with the protection of these rights, must necessarily be excluded from the field of application of the most-favored-nation clause, when the latter includes ‘all matters relating to commerce and navigation.’”

49 On the concept of DoJ in general, see Jan Paulsson, Denial of Justice in International Law (2005), Chapter 4.
Thus in the passage above the arbitration panel found that MFN may operate in matters concerning “administration of justice” – also subject to the extent it is connected with the rights of traders and the wording of the MFN clause itself.\footnote{Although note that the arbitration panel ultimately does not find UK treaties with other states to be more favorable than the TCN Treaty in this regard. See \textit{Ambatielos Arbitration}, supra note 47 at 322-323.}

However, it remains that “administration of justice” or DoJ in this context concerns the \textit{substance} of an investor’s rights under an investment treaty, namely whether the investor is entitled to a protection from a fundamentally or manifestly unfair administration of justice. This is not a case where the claimant, Greece, seeks to establish the arbitral panel’s jurisdiction through the MFN clause where none actually exists. The panel’s own jurisdiction is not in dispute.

Therefore, like the \textit{Rights of US Nationals in Morocco}, this case does not shed any light on the question of MFN clause and a tribunal’s jurisdiction. Some early investment treaty tribunals have correctly pointed this out.\footnote{\textit{Plama}, supra note 17 at par. 215; \textit{Salini}, supra note 15 at par. 112.} But again some other tribunals have surprisingly had an entirely contrary reading. The\textit{ Maffezini} tribunal purportedly relied on the \textit{Ambatielos} decision and wrote that the arbitral panel had concluded, “The protection of the rights of persons engaged in commerce and navigation by means of dispute settlement provisions embraces the overall treatment
of traders covered by the clause.” This is of course erroneous. The dispute settlement provision in the TCN Treaty was never an issue in the Ambatielos arbitration.

IV. Getting the Fundamental Concepts Right

Since the Maffezini tribunal became the first one to apply MFN clause on matters concerning the tribunal’s jurisdiction up until the latest ones in Impregilo and Hochtief, the emphasis has been on the nature of dispute settlement mechanism (in particular, access to international arbitration) as being essential to the protection of foreign investment. In general, this view attaches great importance to the object and purpose of the treaty as one of the means of interpretation. However, such emphasis led those tribunals to the wrong direction. If we subscribe to this view, then there is no logical bar to the importation of, for instance, an ICSID clause into an investment treaty that does not provide for international arbitration at all. Surely this is not a desirable outcome even for the proponent of applying MFN clause to jurisdictional matters.

As advocated most strongly by Professor Douglas, the proper question instead is whether there is an intrinsic distinction between substantive obligations of investment protection, on the one hand, and investment treaty provisions on the jurisdiction of tribunals, on the other;

53 Maffezini, supra note 6 at par. 50.
54 Impregilo, supra note 20 [Prof. Stern, separate and dissenting opinion] at par. 35.
such distinction making the application of the MFN clause to the latter impermissible.\textsuperscript{55} It is submitted here that they are indeed intrinsically different. Therefore dispute settlement matters fall outside the ambit of an MFN clause.

In order to reach such conclusion, it is essential to get at least two fundamental concepts right. They are (i) the rule of consent; (ii) the distinction between jurisdiction and admissibility. While the first concept should be straightforward, the second one often proves difficult to ascertain or apply in practice. Once these two concepts are clarified, the idea of the intrinsic distinction between MFN clause and dispute resolution provision would be clearer. Such idea will be discussed here in the context of the broader concept of “severability of dispute resolution clause.”

\textit{a. The Rule of Consent}

The first fundamental concept is the rule of consent, whereas the jurisdiction of an international court or tribunal is based on the consent of the parties.\textsuperscript{56} This rule is of general application, universally applied by

\textsuperscript{55} Douglas, \textit{supra} note 11 at 345.

\textsuperscript{56} A classic formulation of this basic rule is Art. 36 of ICJ Statute, which states, “The jurisdiction of the Court comprises all cases which the parties refer to it and all matters provided for in … treaties and conventions in force”.

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Like any form of arbitration, investment arbitration is always based on an arbitration agreement or consent as the essential basis of the tribunal’s jurisdiction.

While in case of inter-state courts or tribunals the mutual consent of the parties is straightforward, that is not always the case in investment arbitration. Most investment arbitrations are based on an investment treaty between states, such as BITs, that provide for reciprocal protection for investors from the other state party or pursuant to an option of submitting to international arbitration in the respondent state’s domestic investment law. Here the mutual consent may be best explained as an emanating from the interplay between the respondent state’s offer to arbitrate and the claimant investor’s acceptance of such offer. The offer is made by the state in an investment treaty or in national investment law, which is then perfected by the investor’s acceptance when instituting proceedings.

In that vein, anyone familiar with the concept of offer and acceptance in contract law would no doubt also recognize that a counter-

57 See Shabtai Rosenne, International Courts and Tribunals, Jurisdiction and Admissibility of Inter-State Applications, Max Planck Encyclopedia of Public International Law at par. 4.
58 Andrea Marco Steingruber, Consent in International Arbitration (2012) at 254 [Steingruber].
59 Steingruber, ibid.
60 See, among others, Schreuer, supra note 25 at 190 et seq.
offer would, in turn, require the acceptance of the party making the original offer in order to constitute a mutual agreement. This is the point advanced by arbitrator Thomas in his *Hochtief* dissent. He argued that Hochtief, by invoking the MFN clause to import jurisdictional terms from other treaty, has effectively attempted to alter and eliminate the conditions of Argentina’s consent. In his view, this interplay generates a “counter-offer on different terms” instead of a “perfected consent”.  

Hence, jurisdiction cannot simply be established by referring to dispute resolution clause in other treaty by virtue of an MFN clause – at least insofar as the respondent state has not consented to such application of the MFN clause.

Another aspect of the rule of consent is the requirement for clarity and unambiguity. First, consent to arbitration must be made in writing – a universal rule both under international law and domestic arbitration laws. The consent made in writing must furthermore be explicit and not merely construed. This should caution tribunals from taking exactly the

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61 *Hochtief*, *supra* note 21 [Thomas, separate and dissenting opinion] at par. 27. See also

62 See e.g. Art. 25(1) of the ICSID Convention, stating “The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment… which the parties to the dispute consent in writing to submit to the Centre.” For a reflection of this rule in Indonesian Arbitration Law, see Article 1(3) and 9(1) of Law No. 30 of 1999, State Gazette No. 138 (1999), Supp. No. 3872 [*Indonesian Arbitration Law*].

63 Schreuer, *supra* note 25 at 191; see also *Cable TV v. St. Kitts and Nevis*, ICSID Case No. ARB/95/2, Award of 13 January 1997 at paras. 4.02-4.17.
opposite course: finding jurisdiction based on interpretation of ambiguous MFN clauses. In the words of the ICS tribunal, “the MFN clause must also be in itself a manifestation of consent to the arbitration of investment disputes according to the rules that the MFN provision might attract from other comparator treaties.”

b. Distinction between Jurisdiction and Admissibility

Some commentators try to reconcile the opposing camps of pro- and anti-MFN decisions by drawing a distinction between the Maffezini-Siemens line of cases, which concerns an attempt to bypass a procedural obstacle to arbitration proceedings (an issue of admissibility related to the timing of instituting arbitration proceedings) and the Salini-Plama line of cases, which concerns a more dramatic attempt to create or extend the tribunal’s jurisdiction beyond the consent of the state parties to the basic investment treaty. It is submitted here that this is an erroneous understanding of the distinction of jurisdiction and admissibility. This may seem theoretical. But in practice there have been judgments by courts and tribunals which hinged on an incorrect analysis on the characterization of a procedural objection as going to jurisdiction or

64 ICS Inspection, supra note 23 at par. 278.
65 See, among others, Freyer & Herlihy, supra note 11 at 82; Steingruber, supra note 58 at par. 14.57.
admissibility, thus attracting heavy criticism.\textsuperscript{66}

As we shall see, some investment tribunals also made the same mistake and this led to applying the MFN clause to extend the tribunal’s jurisdiction beyond state’s consent. Granted, the distinction is often quite difficult to articulate. One oft-quoted formulation is by Judge Fitzmaurice, who wrote as follows:

An objection to jurisdiction “is a plea that the tribunal itself is incompetent to give any ruling at all whether as to the merits or as to the admissibility of the claim”;

An objection to admissibility “is a plea that the tribunal should rule the claim to be inadmissible on some ground other than its ultimate merits.”\textsuperscript{67}

In short, the notion “jurisdiction” concerns the court’s competence to hear the case: the parties’ consent. Meanwhile, the notion “admissibility” concerns the propriety of the court’s hearing the case. As the ICJ put it, “… even if the Court has jurisdiction and the facts stated by

\textsuperscript{66} One of the most famous examples of such judgment is the South West Africa Case (Second Phase), 1966 ICJ Rep. 6. In the investment arbitration context, the distinction between jurisdiction and admissibility is decisive in the fierce debate between the majority and the dissent in Abaclat and Others v. Argentina, ICSID Case No. ARB/07/5, Decision on Jurisdiction of 4 August 2011, a much celebrated decision where the majority decision accept jurisdiction to hear a mass-claim brought by 180,000 claimants – eventually down to 60,000.

the applicant State are assumed to be correct, nonetheless there are reasons why the Court should not proceed to an examination of the merits.”

Some examples of objection on admissibility are those concerning the claimant’s standing, mootness of claim, necessary third party and exhaustion of local remedies. The last type of example is of particular interest here.

In *Hochtief*, the tribunal considered that the requirement of 18-month litigation period in local Argentinian court before instituting international arbitration proceedings could be regarded as “a provision going to the admissibility of the claim rather than to the jurisdiction of the Tribunal.” In the eyes of the tribunal, utilizing the MFN clause to allow the claimants the benefit of no waiting period in another treaty is merely an issue of procedures. Hence the tribunal operates within the framework of jurisdiction that it already had; this is not about creating or extending jurisdiction or state’s consent.

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72 E.g. *Interhandel Case (Switzerland v. United States of America)*, 159 I.C.J. Rep. 6.

73 *Hochtief*, supra note 21 at par. 96.
It is difficult to see how such a view can be justified. If an investment treaty requires prior recourse to local courts before the investor may institute international arbitration, such recourse becomes a precondition to states’ consent to arbitration.\(^7^4\) As noted by Professor Stern in her Impregilo dissent, that condition qualifies state’s consent in the treaty and it is therefore a matter of jurisdiction.\(^7^5\) Seen this way, the invocation of MFN clause to import even a seemingly procedural rule (such as prior recourse to local remedies) from other treaties is in fact a jurisdictional issue.\(^7^6\) Indeed the logic of the Hochtief majority was severely criticized by arbitrator Thomas’ dissents, which refer to the majority’s reasoning as “putting the cart before the horse.”\(^7^7\)

In this vein, whether the claimants attempt to extend the jurisdiction of the tribunal or borrow a more generous procedural rule from another treaty should not make any difference. All those attempts

\(^7^4\) See Daimler, supra note 24 at 78-79; ICS Inspection, supra note 23 at 86.
\(^7^5\) Impregilo, supra note 20 [Prof. Stern, separate and dissenting opinion] at par. 82-88.
\(^7^6\) For instance, see one commentator’s comment, “Presumably, if the exhaustion of local remedies is framed as a condition of consent in the BIT, then the matter is properly dealt with as a jurisdictional issue of consent, the claim itself being admissible.” [emphasis added], David A.R. Williams, Jurisdiction and Admissibility, in The Oxford Handbook of International Investment Law (2008) at 928.
\(^7^7\) Hochtief, supra note 21 [Thomas, separate and dissenting opinion] at par. 81.
should ultimately be considered as matters of jurisdiction that cannot be
overcome by an MFN clause. It seems that those who advocate the
application of MFN clause when the claimant merely tries to bypass
procedural requirements have lost sight of this subtle but important
distinction between jurisdiction and admissibility.

c. The Intrinsic Distinction and Severability of Dispute
Resolution Clause

The rule of consent and a correct conception of jurisdictional
matters, elaborated above, lead to the third fundamental concept: that
dispute resolution clause is intrinsically distinct from MFN clause. This in
fact merely reflects a general principle more commonly expressed in
contract law: that a dispute resolution clause is severable from the rest of
the agreement.\textsuperscript{78} It follows that a dispute resolution clause, and in
particular the conditions for an investment tribunal’s jurisdiction, cannot
fall within the ambit of an MFN clause. There are several reasons
underlying this distinction.

First, there’s a substantive-procedural distinction in that an MFN
clause governs substantive aspect of a treaty while dispute resolution

\textsuperscript{78} Plama, supra note 17 at par. 212: “This matter can also be viewed as
forming part of the nowadays generally accepted principle of the separability
(autonomy) of the arbitration clause. Dispute resolution provisions constitute an
agreement on their own ...”. For an example reflecting this principle under
domestic law, see \textit{inter alia} Article 10 of Indonesian Arbitration Law, \textit{supra}
ote note 61.
clause governs procedural aspect for the implementation of the treaty.\textsuperscript{79} This means that the \textit{ejusdem generis} principle prevents the two to be equated, thus also preventing the MFN clause to be applied to dispute settlement mechanisms.\textsuperscript{80} In this vein, one can also easily relate this to such distinction made under international law more generally.\textsuperscript{81} There have been many instances where the ICJ has distinguished between substantive and procedural rules,\textsuperscript{82} and in particular relevance here: when the distinction led the court to decline jurisdiction when the nature of the substantive rule arguably calls for an opposite result.\textsuperscript{83}

\textsuperscript{79} See, for example, \textit{Telenor}, supra note 19 at par. 92.

\textsuperscript{80} \textit{Impregilo}, supra note 20 [Prof. Stern, separate and dissenting opinion] at par. 28. Based on the \textit{ejusdem generis} principle, an MFN clause “can only attract matters belonging to the same category of subject as that to which the clause itself relates.” See \textit{Ambatielos Arbitration}, supra note 47 at 107. Put differently, MFN clauses confer “only those rights which fall within the limits of the subject-matter of the clause.” See International Law Commission’s Draft Articles on Most-Favored-Nation Clauses, Yearbook of the International Law Commission, 1978, Vol. II, Part Two, Article 9.1.

\textsuperscript{81} For a comprehensive discussion on this point, see Stefan Talmon, \textit{Jus Cogens after Germany v. Italy: Substantive and Procedural Rules Distinguished}, 25 Leiden J. Int’l. L. 979 (2012).

\textsuperscript{82} Most recently – and notably – in the decision where the court upheld Germany’s immunity before Italian courts in cases concerning allegation of \textit{jus cogens} violations, \textit{Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)}, 2012 ICJ Rep. 99.

\textsuperscript{83} \textit{Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of Congo v. Rwanda)} [Decision on Jurisdiction and Admissibility], 2006 ICJ Rep. 6 at par. 34.
Second, there is a distinction between the rights as such and fundamental conditions for access to the rights, a point made by Professor Stern in her Impregilo dissent.\(^8^4\) Coming back to the rule of consent, she explained that unlike domestic legal order where jurisdictional treatment is inherent in substantive treatment (there is always an automatic recourse to courts to protect one’s right), in international legal order there is no such automatic recourse to adjudication. There is a supplementary condition in order for recourse to arbitration to be granted to investor.\(^8^5\) As MFN clause only applies to rights that investors do enjoy under a given treaty as opposed to rights for which certain conditions are still to be satisfied,\(^8^6\) it again follows that the *ejusdem generis* principle prevents the application of an MFN clause to jurisdictional matters governing the conditions of state’s consent to arbitrate.

V. MFN Clauses in Indonesian Investment Treaties and Some Drafting Observations

\(^8^4\) *Impregilo, supra* note 20 [Prof. Stern, separate and dissenting opinion] at par. 47.

\(^8^5\) *Impregilo, supra* note 20 [Prof. Stern, separate and dissenting opinion] at par. 45.

Notwithstanding the correct position advocated in this article, in principle there is no bar for states to agree that MFN protection in an investment treaty is to extend to jurisdictional matters or vice versa. Either way, it is obviously very important to ensure that there is legal certainty about the effect (or lack thereof) of the MFN clause in a given treaty. When a dispute arises, the parties’ strategy and behavior will very much be shaped by their understanding of the rules governing dispute settlement: how long they should attempt negotiation, what action can they take afterwards and where, etc.

As already noted, eventually much of the outcome in each case depends on the wording of the basic treaty. It goes without saying that a precise drafting of the clause will remove much of the controversy and surprise in the case. However, it seems that the MFN clauses in existing investment treaties concluded by Indonesia have not been conceived with this jurisdictional issue in mind - at least those that the author has reviewed. In fact, many of the treaties contain only general or standard

87 Under international law, there is no general or principal restriction on states as to what can be agreed or governed in a treaty (see S.S. Wimbledon, (1923) PCIJ Ser. A No. 1 at 24) so long as the terms of the treaty does not violate *jus cogens* or peremptory norms, see Article 53 of the Vienna Convention on the Law of Treaties, 1155 UNTS 331 (1969) [VCLT].

88 All treaties cited in this article are retrieved through the Indonesian Ministry of Foreign Affairs’ database at http://treaty.kemlu.go.id.
MFN clause.\textsuperscript{89} Therefore it leaves Indonesia vulnerable when facing an arbitration claim by foreign investors. Going forward, careful attention must be given when drafting and negotiating the MFN clause in an investment treaty. Below are some of the things that can be considered.

\textbf{a. Express Wording Either to Extend or Not to Extend MFN Benefit to Dispute Settlement or Jurisdictional Matters}

The clearest evidence of state parties’ intention is one that is expressly stated in the treaty. States may expressly provide that dispute settlement would be subjected to the MFN clause. Conversely, states wishing to exclude dispute resolution from the scope of MFN clause could also easily insert such wording in the BIT.\textsuperscript{90} For example of the former, Article 3(3) of the UK Model BIT provides:

\footnotesize{\begin{quote}
89 See, e.g., Article 3 of the Indonesia-Germany BIT; Article 4 of the Indonesia-Libya BIT; Article III of the Indonesia-Mozambique BIT; Article 3 of the Indonesia-Russia BIT; Article 3 of the Indonesia-Serbia BIT.

90 See for example the Free Trade of the Americas (FTAA) draft of 21 November 2003, where in reaction to the \textit{Maffezini} decision states in footnote 13: “The Parties note the recent decision of the arbitral tribunal in the \textit{Maffezini} (Arg.) v. Kingdom of Spain, which found an unusually broad most favored nation clause in an Argentina-Spain agreement to encompass international dispute resolution procedures. ... By contrast, the Most-Favored-Nation Article of this Agreement is expressly limited in its scope to matters “with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.” The Parties share the understanding and intent that this clause does not encompass international dispute resolution mechanisms...” [Emphasis added].
\end{quote}}
“For 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.”  

Some commentators seem to take the position that the state parties’ intention must be clearly envisaged in the treaty. However, this would be too restrictive. There is no reason not to subscribe to the parties’ intention if such intention can be clearly ascertained in some way, even if not expressed in the treaty itself. Article 31 and 32 of the Vienna Convention on the Law of Treaties (“VCLT”) do envisage such possibility by allowing recourse among others to contemporaneous documents or travaux préparatoires.

As for Indonesia, none of its existing investment treaties reviewed by the author contain this kind of wording. For obvious reason, it is

91 The 2005 version with amendments in 2006. Article 3 being the MFN clause while dispute settlement between investors and host state is governed in Article 8.

92 See Douglas, supra note 11 at 362.

93 Cf. Berschander, supra note 19 at 68, where the tribunal relied among others on evidence from the time of the negotiations of the Belgium-Russia BIT, which demonstrated that Russia did not intend for the MFN clause to extend to dispute resolution provisions. This led to the tribunal rejecting claimant’s plea to apply MFN clause to extend the tribunal’s jurisdiction beyond only determining the amount and mode of compensation (as provided in the basic treaty).

94 All of these treaties are cited in the footnotes or referred to in the text.
It is advisable to insert such clarification in future investment treaties – be it for applying or not applying the MFN clause to dispute settlement.

b. Making the MFN Clause as Detailed as Possible, Enumerating its Scope of Application

Another possibility is to enumerate the scope of the MFN clause in detail. If an MFN clause expressly provides for limitations, such limitations must be given effect. Some MFN clauses in Indonesian investment treaties follow this model.95 For example, Article 6(2) of the ASEAN Comprehensive Investment Agreement states:

“Each Member State shall accord to investments of investors of another Member State treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any other Member State or a non-Member State with respect to the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.”

Another example on a bilateral level is Article 4(2) of the Indonesia-UK BIT, which states:

“Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, use, enjoyment or disposal of their investments, to

95 See, e.g., Article 4 of Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation Among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea; Article 3(2) of the Indonesia-Denmark BIT.
treatment less favorable than that which it accords to nationals or companies of any third State.”

Regarding this kind of wording, one commentator noted that “the settlement of disputes not being part of this enumeration, it is thus excluded from the scope of the clause.”\(^96\) While that is true, it is only one of the possible interpretations of the clause. In fact, the tribunal in Hochtief considered recourse to dispute settlement to be one aspect of investment “management”, leading to the pro-MFN decision.\(^97\) Therefore even a detailed enumeration may not be enough without an unequivocal clarification in the text of the treaty about the relation between MFN and dispute settlement.

c. The “all matters” language in the MFN Clause

There is at least one of Indonesian investment treaties that contain this kind of wording. Article 3(2) of the Indonesia-North Korea BIT states:

“More particularly, each Contracting Party shall accord to such investments treatment which in any case shall not be less favorable than that accorded to investments of investors of any third state.”

As regards an MFN clause containing a broad “all matters” language such as the one in Maffezini\(^98\) – or its variant like the above, it

\(^{96}\) Gaillard, \textit{supra} note 12 at 3; see also Vesel, \textit{supra} note 11 at 185.

\(^{97}\) Hochtief, \textit{supra} note 21 at 17-18.

\(^{98}\) See above, section II(a).
may be argued that it is reasonable to extend the MFN benefit to dispute settlement based on the ordinary meaning of the text. While it is true that treaty interpretation requires tribunals to start from the ordinary meaning of the text, interpreting a treaty based on Article 31 of the VCLT is a holistic exercise whereby the text must also be interpreted in their context.

In Berschander v. Russia, the tribunal refused to apply MFN to dispute settlement even though textually it is reasonable to do so; the MFN clause in the basic treaty being applicable to “all matters covered by the treaty” and “in particular to Articles 4, 5, and 6” [emphasis added]. Hence, on its face there is no textual limitation to the application of MFN to dispute settlement. However, the tribunal considered that the MFN clause cannot be read literally, and applying it to some other articles – such as Article 1 governing definitions – would be nonsensical.

Be that as it may, most tribunals facing an MFN clause which contains an “in all matters” wording – or its variant – tend to decide that the clause would also apply to dispute settlement. As such, an MFN

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99 VCLT, supra note 87. The provision states that a treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.

100 Berschander, supra note 19 at 54.

101 Berschander, supra note 19 at 64-65.

102 This is the circumstance, among others, in Maffezini, supra note 6 and Impregilo, supra note 20 at par. 12, 103-104. The exception other than the Berschander tribunal is Wintershall, supra note 19.
clause containing wordings like “all matters” may still be interpreted either way. Therefore it is advisable for Indonesia to reconsider agreeing to such broad wording of MFN clause in future investment treaties.

d. **Expressly Limiting the Scope of an Arbitral Tribunal’s Jurisdiction in the Dispute Settlement Clause**

As noted above, the dispute resolution clause in *Salini* and *Plama* are two examples that limit a tribunal’s jurisdiction by excluding contractual claims or just deciding on the amount of compensation. However, there are at least two caveats. First, again the very unpredictable nature of investment tribunals’ jurisprudence means that decisions concerning MFN, even with a detailed dispute settlement clause, may still go either way. Second, the limitations put into dispute settlement clause more often is based on consideration pertaining to state policy concerning dispute settlement itself. For instance, it is well known that communist countries in the olden days were highly averse to international courts and tribunals, hence their BITs contained highly restrictive dispute resolution clause. In this sense, the issue of MFN is merely an afterthought when drafting the dispute settlement clause – if considered at all. Therefore it would be less complicated to clarify the relation between MFN and dispute resolution in a separate provision.

103 See above, section II(b).
104 See Berschander, *supra* note 19 at 68.
VI. Conclusion

In view of the highly divergent jurisprudence on the issue of MFN and dispute settlement, one should return to the fundamental concepts of consent, jurisdiction and severability of dispute settlement clause. This would lead to a correct basic position that an MFN clause does not apply to dispute settlement. In particular, an MFN clause cannot be used to apply jurisdictional terms from other treaties deemed to be more favorable for the claimant in investment arbitration. Nevertheless, it is ultimately up to state parties in the treaty to govern the relation between MFN and dispute settlement. A review of several investment treaties concluded by Indonesia show that this controversial issue has not been specifically addressed, opening the door for uncertainty should any dispute with an investor ends up in the hands of an investment tribunal. A more precise drafting of the clause would be necessary in future negotiation of investment treaties.