INCONSISTENCIES IN ICSID AWARDS ON DISPUTES RELATED TO MFN AND UMBRELLA CLAUSE

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Abstract

Investment arbitration has been acclaimed as an important part of Foreign Direct Investment (FDI) movement around the globe because it provides a neutral and trustable forum for settling investment dispute. However, many argue that investment arbitration often becomes advocates of foreign investors and neglect the developing country's interests as the host of investment. This paper aims at studying the investment arbitration awards rendered by International Center for Settlement of Investment Dispute (ICSID) tribunals launched against developing countries. The question is whether and to what extent those awards have equally observed the interests of foreign investors and host states of investments. To answer the questions, this paper employs case study method and use publicly available ICSID cases. This research shows that some ICSID tribunals have inconsistent reasoning which led to contradictory decisions. Apparently, as some cases indicate ICSID tribunals gave more weight to the need to protect foreign investors rather than host countries' development interests. As a consequence, inconsistency and ambiguity have led to uncertainty and unpredictability of the forum. This is not only disadvantaged the parties due to inability to foresee the likely outcome of the disputes but also endanger the ICSID tribunals' credibility as neutral and reliable forum.

Keywords: *ICSID; Investment Arbitration; Foreign Investors; Investment Dispute; MFN; Umbrella Clause*

1. Introduction

The International Centre for Settlement of Investment Dispute (ICSID) was established with two principal functions namely protecting foreign investment through the facilitation of investor-state dispute settlement and facilitating economic development through the promotion of investment flows. Investor-state dispute settlement, hereinafter called investment dispute, is a form of resolution of dispute between foreign investors and the host states where the investments take place. The ICSID arbitration is considered as a neutral forum compare to either the host State's forum or the foreign investors' forum. It was believed that a neutral forum for settlement of investment dispute would improve the investment climate by reducing the fear of political risks which operate as a deterrent to the flow of private foreign capital.[1]

In letting foreign investors in, host country has several interests such as such as transfer of technology and skills, increase income from taxes or sales, establishment of new market as well as increasing its employment level. Therefore, the host country should be given flexibility in creating regulatory framework to achieve those interests. However, there is concern that the

[1] Domenico Di Pietro, "Applicable Law Under Article 42 of the ICSID Convention The Case of Amco v. Indonesia," in *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, ed. Tod Weiler (London: Cameron May Ltd, 2005), 234.

ICSID arbitration has the potential to a bias in favor of foreign investor over competing public interests owned by the host country of investment.[2] This is for example by interpreting clauses in investment treaty broadly to cover wider investors' rights on one hand and restrict host country's regulatory rights.

Since 1990s, investment agreements are made in the form of Bilateral Investment Treaties (BIT)[3] which is a legal tool consisting of rules agreed by two states to govern investments conducted between them.[4] BITs have goals in protecting investment and promoting investment especially in developing countries to support the development.[5] As a mean of investment protection, BITs can include Most-Favored Nation treatment (MFN) clause which is a commitment that the host state of investment not to give less favorable treatment to other foreign investors from different countries.[6] Another common provision found is umbrella clause namely a provision requiring both contracting parties in a treaty to observe all investment obligations in respect to the BIT.[7] Both MFN and umbrella clause are often employed to ensure wider protection for foreign investors. However, their application to each case requires careful interpretation. This is because the clauses contain a very broad sense, and BITs, as the legal basis for the investment, do not define them clearly. As a consequence, the ICSID tribunals are left with the obligation to interpret them.

Scholars have critized ICSID for its inconsistent reasoning in settling investment disputes which create uncertainty and endanger its credibility.[8] They come to different conclusion regardless the similarities of the facts in the cases. This is not only disadvantaged the parties due to inability to foresee the likely outcome of the disputes but also endanger the ICSID tribunals' credibility as neutral and reliable forum. ICSID's reputation might be undermined because

[2] Nathalie, Bernasconi et all, Investment Treaties & Why They Matter to Sustainable Development: Questions&Answers, https://www.iisd.org/system/files/publications/investment_treaties_why_they_matter_sd.pdf

[3] M. Sornarajah, The International Law on Foreign Investment, Third Edition, Cambridge, 2010, page 172.

[4] Jeswald W Salacuse and Nicholas P Sullivan, "Do BITs Really Work: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain," *Harv. Int'l LJ* 46 (2005): 67.

[5] Salacuse and Sullivan, "Do BITs Really Work: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain," 111.

[6] M. Sornarajah, *The International Law on Foreign Investment*, Third Edit (Cambridge University PRess, 2010), 204.

[7] Jarrod Wong, "Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treat Violations, and the Divide between Developing and Developed Countries in Foreign Investment Disputes," *Geo. Mason L. Rev.* 14 (2006): 136.

[8] Diana Marie Wick, "The Counter-Productivity of ICSID Denunciation and Proposals for Change," *J. Int'l Bus. & L.* 11 (2012): 244.

developing countries, which make the majority of host states of investment, may denunciate themselves from ICSID as has been done by Bolivia, Ecuador and Venezuela.[9]

This paper proceeds in several stages that allow for a systematic deliberation. Part one provides an overview of BITs on how it serves as legal tools to protect investment made in another country and at the same time serve as tool to support development in the host state of investment. Part two explains the jurisdiction of ICSID Tribunals. Part three presents the ICSID's cases that involve contradictory interpretation of MFN and umbrella clauses. The cases presented are *Impregilo, Maffezini, Salini & Italstrad, Vivendi* and *SGS*. Part four provides discussion on how MFN and umbrella clauses should be approached, not merely for protecting the investors but also for protecting the interest of the host states. The last part concludes the paper on the note that ICSID tribunals have to be consistent in determining its jurisdiction and take into account the host countries' intention in interpreting MFN and umbrella clause.

2. Methods

To answer the questions, this research paper employs a normative method by doing a library research to obtain secondary data. The legal materials learned include primary legal materials; such as BIT and ICSID Convention; as well as secondary legal materials; such as books, journal articles relevant to the topic and relevant arbitral awards. Data collecting method will use documentary study towards the previous stated legal materials. The data analysis will employ qualitative analysis, particularly by operating content analysis.

3. Results and Discussion

BIT are generally signed by developed country as capital exporting state with developing country as capital importing state.[10] From developed country perspective, the main reason for BIT is that foreign investors' fear that host country's law will be unfair and cannot protect their interests. In addition, dynamic inconsistency problem also becomes significant reason for developed countries. BIT serves as a legal framework to protect foreign investors whenever the government in host country changes policies in such a way that disadvantages the foreign investors. Thus, they need international law to rely on. On the other hand, developing country needs to attract foreign investors to help with developing their economies. Developing countries

[9] Wick, "The Counter-Productivity of ICSID Denunciation and Proposals for Change," 242.
[10] Andrew T Guzman, "Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties," *Va. j. Int'l L.* 38 (1997): 652.

promote investment in their territory by making binding commitment with developed countries in the form of BIT which give foreign investors more favorable conditions.

3.1. Most-favored-nation (MFN)

The general structures of a BIT consist of, among other things, definitions and scope of application; condition for the entry of foreign investment and investors; general standards of treatment of foreign investment and investors; expropriation; and dispute settlement mechanism.[11] Among the most common standards are national treatment, most-favored-nation (MFN) treatment, fair and equitable treatment and full protection as well as security. The dispute settlement provision contains consent of the host state of investment to submit to investment arbitration. This carries consequence that foreign investor has a right to directly initiate arbitration proceedings against the host state upon alleged breach of the BIT.[12] It is also common for contracting parties to incorporate umbrella clause in BITs. The umbrella clause is a provision that requires each party to observe all investment obligations it has assumed with respect to investors from the other party in a BIT.[13]

MFN clause is to request each contracting state to provide to investors of the other contracting state treatment that is "no less favorable than that accorded to the investors of third states." [14] This means that any favorable provision in a BIT will be available to every other country with whom the host country enters into a BIT that contain MFN clause. It is believed that MFN clause raises the level of protection guaranteed by each BIT concluded by a country to the level guaranteed by that country's most protective BIT.[15] In order to gain the benefits of MFN treatment, the investors shall demonstrate that investment or investor of another state has received more favorable treatment.[16] In order to avoid conflict, host states can exclude some areas of activity from the operation of the MFN clause. For example, there may be general exceptions for measures necessary to maintain public order and national security.[17]

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[11] Jeswald W Salacause, *The Law of Investment Treaties* (Oxford University Press, 2010), 126.

[12] Stephan W Schill, "Mulitilateralizing Investment Treaties through Most-Favored-Nation Clauses," *Berkeley J. Int'l Law* 27 (2009): 497.

[13] Wong, "Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treat Violations, and the Divide between Developing and Developed Countries in Foreign Investment Disputes," 135.

[14] Gabriel Egli, "Don't Get Bit: Addressing ICSID's Inconsistent Application of Most-Favored-Nation Clauses to Dispute Resolution Provisions," *Pepp. L. Rev.* 34 (2006): 1064.

[15] Egli, "Don't Get Bit: Addressing ICSID's Inconsistent Application of Most-Favored-Nation Clauses to Dispute Resolution Provisions," 1064.

[16] Kenneth J. Vandelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* (Oxford University Press, 2010), 358.

[17] Vandelde, *Bilateral Investment Treaties: History, Policy, and Interpretation*, 358.

MFN clause is considered as an inter-state obligation. Notwithstanding, nowadays the clause can be extended to cover foreign investment activities in the context of investment treaties. An investor covered by a BIT with an MFN clause can invoke the benefits granted to third party nationals by another BIT of the host state and adopt them into its relationship with the host state.[18] Regrettably, the application and interpretation of MFN clause has been creating complexities in both national courts and international arbitral tribunals. The concern is on how far the clause' scope can take effect.[19] In international investment law, the tension emerges on whether MFN clause's application can cover procedural and jurisdiction issues. ICSID tribunals do not uniformly address this matter. Some tribunals endorse broad approach by including procedural and jurisdiction issue, whereas others take the contrary.

Whether MFN clause can be extended further to procedural and jurisdiction is the big issue of interpretation in a treaty. Interpretation would not be needed should the MFN clause in the treaty expressly intended to apply to dispute settlement provisions or is expressly limited to substantive investors rights. Difficulties arise when a MFN clause is worded openly without explicitly excluding or including matters of dispute resolution or the host state's consent to arbitration, as formulated in the German model treaty. Notably, such openly worded MFN clauses are the ones most frequently found in investment treaties.[20]

3.2. Umbrella Clause

Umbrella clause is a provision in an investment treaty which requires the parties to observe any obligations in regard to investment.[21] The importance of umbrella clause is to preserve the commitment that was made to the foreign investor at time of the contract.[22] The existence of umbrella clause in investment treaty complicates the jurisdictional issue. Consent to treaty arbitration is given in investment treaty, and usually in a broad language.[23] It is not clear if this means that tribunal jurisdiction only applies to dispute arising out from treaty or can extend into dispute arising out of the investment contract.[24] The most contentious issue in relation to clauses of this kind is whether, and under what circumstances, they place investment agreements, that is,

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[18] Schill, "Mulitilateralizing Investment Treaties through Most-Favored-Nation Clauses," 504.
[19] Schill, "Mulitilateralizing Investment Treaties through Most-Favored-Nation Clauses," 505.
[20] Schill, "Mulitilateralizing Investment Treaties through Most-Favored-Nation Clauses," 549.
[21] Christoph Schreuer, "Consent to Arbitration," in *The Oxford Handbook of International Investment Law*, ed. Christoph Schreuer, Peter Muchlinski, and Federico Ortino (Oxford University Press, 2008), 838.
[22] Sornarajah, *The International Law on Foreign Investment*, 304..
[23] Schreuer, "Consent to Arbitration," 838.
[24] Schreuer, "Consent to Arbitration," 838.

contracts between the host state and the investor, under the treaty's protection.[25] Interpretation given by ICSID tribunals varies from case to case.[26]

Due to its catch-all nature,[27] umbrella clause does not benefit the host country since the effect of the placement of the umbrella clause in the BIT is uncertain. Foreign investors may bring any related investment cases before arbitral tribunal, even though such cases were not intended in the BIT. Thus, host state's sovereignty is at risk and interests are at risks.

3.3. The Implementation of MFN and Umbrella Clause

Some tribunals decided that the jurisdiction of treaty-based tribunals prevails over any other forum selection for claims based on the violation of the treaty. This is for example as has happened in *Compania de Aguas del Aconquicja, S.A. & Compagnies Generale des Eaux v. Argentine Republic* as well as in *SGS Societe Generale de Surveillance S.A. v. Republic of Philippines.* In these cases, the tribunals held that umbrella clause is applicable to governmental or commercial breach. This broad interpretation would relieve investors of the obligation to demonstrate a violation of substantive treaty standards. This is because the breach of contract or of municipal law would suffice to constitute a treaty violation.[28]

On the other hand, others argue that forum selection clauses, such as those in the contract, should take precedence over treaty-based dispute settlement concerning the violation of an umbrella clause.[29] Some ICSID tribunals took the stand that even though umbrella clause should be interpreted broadly, it does not mean that every commercial dispute can be submitted to arbitration. Instead, the dispute must be breach of investment-related contract that qualify as investment under the relevant investment treaty.[30] This is considering the fact that a host state may breach a treaty without breaching a contract and vice versa.[31]

There is a split in ICSID tribunals in interpreting and determining the scope of MFN and umbrella clause. A number of tribunals have shown reluctance to apply wider interpretation and

[25] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2008), 153.
[26] Schill, "Mulitilateralizing Investment Treaties through Most-Favored-Nation Clauses," 63.
[27] Sornarajah, *The International Law on Foreign Investment*, 304.
[28] Stephan W Schill, "Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties," *Minn. J. Int'l L.* 18 (2009): 40.
[29] Schill, "Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties," 63.
[30] Schill, "Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties," 45.
[31] Schill, "Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties," 31.

application and therefore decline to give MFN and umbrella clause their full potentials.[32] On the contrary, many tribunals choose to apply extensive interpretation and application of MFN and umbrella clause which led to contradictory result compare to the former approach.

Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) as a legal tool for treaty interpretation set forth the basic rules of treaty interpretation. Article 31 stipulates that a good faith is the central principle in treaty interpretation. This is done in accordance with the plain meaning given by the wordings in accordance with its object and purpose. Furthermore, Article 32 rules that evidence may be used in order to confirm the meaning that is suggested by article 31 when interpretation resulted is ambiguous or absurd. Nevertheless, there is still disagreement among legal scholars regarding the application of Article 31 and 32of the VCLT. Some scholars define that using those articles mean agreeing upon broad interpretation of the clause. Thus, broadly formulated MFN clause is usually broad enough to apply not only to more favorable substantive treatment but also to more favorable procedural rights. They further argue that ordinary meaning allows the tribunal to extent the scope of MFN to cover investor-state dispute settlement.

ICSID Convention requires three jurisdictional elements: consent, personal jurisdiction (*ratione personae)*, and subject matter jurisdiction (*ratione materiae)*.[33] All types of arbitration require consent from the parties,[34] and the consent can take different forms. International investment law recognizes two types of arbitration namely contract-based arbitration and treaty-based arbitration. Contract-based arbitration is arbitration conducted due to breach of investment contract between foreign investors and the host states. The consent is given by the state in the arbitration clause which specifically designated to the investor to whom the investment made and only in respect to the dispute resulted from breach of the contract.[35] Meanwhile, treaty-based arbitration is arbitration proceeding as the result of breach of treaty filed by foreign investors against the host states of investments. In the treaty, the state gives consent to all investors who satisfy nationality criteria and whose investment is protected by the treaty in advance of the dispute.[36]

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[32] Jonathan B Potts, "Stabilizing the Role of Umbrella Clauses in Bilateral Investment Treaties: Intent, Reliance, and Internationalization," *Va. J. Int'l L.* 51 (2010): 1006.

[33] David AR Williams, "Jurisdiction and Admissibility," in *The Oxford Handbook of International Investment Law*, ed. Christoph Schreuer, Peter Muchlinski, and Federico Ortino (Oxford University Press, 2008), 871.

[34] Sornarajah, *The International Law on Foreign Investment*, 306.

[35] Sornarajah, *The International Law on Foreign Investment*, 306.

[36] Sornarajah, *The International Law on Foreign Investment*, 306.

In respect to personal jurisdiction, ICSID arbitration is only available to states which already ratify it and to their nationals. To determine the nationality of a corporation, tribunal can use the test of incorporation which means that a company has the nationality of the state in which it is incorporated. Another test is using "seat test" meaning looking at the location of the seat of the company's effective management. Difficulties arise when a person change his nationality or companies migrate from one state to another which usually happens to gain advantages such as jurisdiction shopping. If this case takes place, the host country of investment against which arbitration proceedings are brought could not have consented to jurisdiction, even if the wording of the treaty is satisfied.[37]

Article 25(1) of the Convention stipulates that the jurisdiction of ICSID is for legal disputes arising out of an investment. The word 'legal' refers to among other things, dispute about the validity, interpretation, expropriation, breach, or termination of an agreement.[38] Meanwhile, ICSID does not provide a definition regarding the notion of 'investment.' As a consequence, there are different definitions of investment in every BIT which provide flexibility for arbitral tribunals to give meaning of it. This means that in determining 'investment,' the tribunal has to consider both of Article 25(1) and individual BIT in order to address parties' intention on what they have actually agreed on.[39]

ICSID conflicting decision regarding MFN can be seen in these cases. In *Impregilo v. Argentina,*[40] the claimant, Impregilo, launched an arbitration proceeding against Argentina under Argentina-Italy BIT. The BIT stipulates that investor may submit a case to ICSID arbitration after submission of the dispute to the Argentina courts for a period of eighteen months.[41] The claimant failed to submit the dispute to the Argentina court and argued that MFN clause the majority of the tribunals held that MFN clause does extend to procedural issues. Therefore, the US-Argentina BIT six months period shall apply to *Impregilo*.

In *Maffezini v. Kingdom of Spain,*[42] the tribunal declared to have the jurisdiction over the case saying that the MFN clause can be extended to procedural issues. They use BIT goals in the reasoning saying that since the aim of BIT is to give protection to foreign investors against arbitrariness of the host states, it does not make any sense to exclude procedural issues from the

[37] Sornarajah, *The International Law on Foreign Investment*, 328.
[38] Williams, "Jurisdiction and Admissibility," 873.
[39] Williams, "Jurisdiction and Admissibility," 877.
[40] Impregilo S.p.A v. Argentie Republic, ICSID Case No. ARB/07/17.
[41] Article 8 (2) of the Argentina-Italy BIT.
[42] Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7.

scope of the protection. Thus, MFN should be extended to cover dispute settlement matter.[43] In *Salini Constutorri S.p.A and Italstrade S.p.A v. Hashemite Kingdom of Jordan,*[44] the tribunal dismissed the claim for lack of jurisdiction claiming that except the parties expressly stated that the MFN clause is to cover procedural issue, the clause shall be understood as only apply to substantial rights.[45]

Conflicting decision over umbrella clause appear in the following decisions. In *Compania de Aguas del Aconquicja, S.A. & Vivendi Universal S.A v. Argentine Republic.*[46] The tribunal held that due to the close connection, the Argentine Federal Government cannot be held liable unless and until Claimants have used their rights in proceedings designated by the contract which is the contentious administrative courts of Tucuman. Once they have used that recourse and have their rights denied, either procedurally or substantively, the claimants can refer to the ICSID."The tribunal admitted that it has to make interpretation on the contract application to determine which actions of the Tucuman Province were considered as exercising its sovereign authority, and which actions were parts of its role as contracting party. According to the tribunal, such an interpretation shall be done by the domestic court of Argentina which is the Contentious Administrative Tribunals of Tucuman.[47]

The award was then reviewed by ICSID ad hoc committee which later stated that the tribunal was correct in jurisdiction issue. Nevertheless, the ad hoc committee found that the tribunal had manifestly exceeded its powers by not examining the merits of some of the claims before it. As a result, the award was partially annulled. According to the ad hoc committee, a particular investment dispute can involve the issues of the interpretation and application of the BIT's standards and questions of contract at the same time. In respect to the relation between breach of contract and breach of treaty, the ad hoc committee held that a state cannot rely on an exclusive jurisdiction clause in a contract. This means that the state's action can still be characterized as breaching international law and therefore arbitrable under the treaty.[48]

Societe Generale de Surveillance S.A. (SGS) v. Pakistan: the tribunal rejected the investor's broad construction of the umbrella clause. Further it rejected Pakistan' objections and

43 Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7.
44 *Salini Constutorri S.p.A and Italstrade S.p.A v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13
45 *Salini Constutorri S.p.A and Italstrade S.p.A v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13
46 *Compania de Aguas del Aconquicja, S.A. & Vivendi Universal S.A v. Argentine Republic* ICSID Case No. ARB/97/3.
47 *Compania de Aguas del Aconquicja, S.A. & Vivendi Universal S.A v. Argentine Republic* ICSID Case No. ARB/97/3.
48 *Compania de Aguas del Aconquicja, S.A. & Vivendi Universal S.A v. Argentine Republic* ICSID Case No. ARB/97/3.

accept jurisdiction over SGS's treaty claims but refused to entertain SGS's contract claims. The tribunal asserted exclusive jurisdiction over the treaty claims and upheld Pakistani arbitrator's exclusive jurisdiction over the contract claim.

Societe Generale de Surveillance S.A. (SGS) v. Republic of Philippines[49]: the tribunal declared to have jurisdiction over the case base on Article VIII (2) of the BIT. This is regardless the fact that the claim arose from the CISS Agreement and did not involve breach of substantive standard of the BIT. It further claimed that the BIT provision which say that "each contracting party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the contracting party" transformed every contractual obligation into BIT obligation. The tribunal reasoned that protecting investments through an aggressive interpretation of umbrella clauses supported the BIT's object of promoting investments.

The cases discussed above show that ICSID tribunals apply contradictory approach in determining the scope of MFN clause. In *Impregilo* and *Maffezini,* they use broad interpretation by including procedural matter in the MFN clause. On the other hand, they use restrictive interpretation in examining the same issue in *Salini & Italstrade*. In supporting extensive interpretation of MFN clause, the tribunals have articulated interpretive principles that broaden the scope of the clause into more favorable provision concerning the admissibility of investor-state arbitration. They stressed the importance of investor state dispute settlement for the effective protection of foreign investors. Regrettably, the tribunals did not distinguish substantive rights to which MFN clauses undoubtedly apply from their procedural implementation. As a result, the tribunals decided that the MFN clause shall be constructed extensively since there is no clear and express clause stipulating that the MFN clause was meant otherwise. The tribunal further asserted that the broad wording merits the presumption that "they were intended to be applied more generally, including the investor dispute settlement options."[50]

The broad interpretation of MFN clause does not have theoretical support. Professor Brigitte Stern in her dissent[51] pointed out that as of the formal jurisdictional rules of law, the application of MFN clause to jurisdictional issue is unacceptable. In interpreting MFN clause, tribunals should recognize the role of *ejusdem generis* principle as an essential element. Under this principle, the substantive treatment and the jurisdictional treatment are to be treated

[49] *Societe Generale de Surveillance S.A. v. Republic of Philippines* ICSID Case No. ARB/02/6.
[50] Schill, "Mulitilateralizing Investment Treaties through Most-Favored-Nation Clauses," 540.
[51] Impregilo S.p.A v. Argentie Republic, ICSID Case No. ARB/07/17, Concurring and Dissenting Opinion.

differently because "the qualifying conditions to benefit from each treatment are not the same."[52] By virtue of *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.[53] MFN clause is designated to cover substantial matters in BIT. Since substantive law and procedural law fall in different category of law, MFN clause in substantive is not applicable for procedural law.

Besides, it must be distinguished between rights and fundamental conditions for accessing those rights. MFN clause is intended to protect substantial rights of the foreign investment, and the dispute settlement clause is meant to protect those rights should breach take place. The argument that dispute settlement arrangements are related to protection of foreign investors was legally insufficient to demonstrate that the parties to the BIT intended to MFN clause to cover dispute resolution. Clear and unambiguous intention does not require interpretation to detect parties' agreement to arbitrate. Exception to *ejusdim generis* principle applies if the parties intentionally decided to include the dispute settlement mechanism within the scope of the MFN clause. This means that if such intention is not expressly stated, narrow interpretation of the MFN clause must be applied.

Application of MFN clauses to matters of dispute settlement would lead to an uncertainty and chaotic situation because investors have the option to pick and choose provision from the various BITs. On the other hand, the hosts state which has not specifically agree thereto can be confronted with a large number of changes of dispute settlement provisions from the various BITs in which it has concluded. It is important to reduce the dangers in such extensive interpretation by limiting the operation of MFN clause in international investment law. It does not seem to be reasonable to allow a party to an agreement to receive treatment not actually promised in that agreement. If MFN is interpreted broadly, an "already enormously powerful clause would potentially be transforms into a replacement for the treaty itself" by collecting many more favorable treatment offered to any third party in other BITs while avoiding any restrictions.[54] Unless that treatment can in some way be incorporated into the treaty in which the MFN clause is contained, it is simply unavailable to the beneficiary of the MFN clause, whether it is indeed more favorable or not.[55]

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[52] Impregilo S.p.A v. Argentie Republic, ICSID Case No. ARB/07/17, Concurring and Dissenting Opinion.

[53] Tony Cole, "The Boundaries of Most Favored Nation Treatment in International Investment Law," *Mich. J. Int'l L.* 33 (2011): 567.

[54] Cole, "The Boundaries of Most Favored Nation Treatment in International Investment Law," 560.

[55] Cole, "The Boundaries of Most Favored Nation Treatment in International Investment Law," 562.

The appropriate approach of MFN clause is shown in *Salini*. While the tribunal did not assert that MFN clauses could not broaden the jurisdiction of treaty based- tribunals, it reasoned that such an effect could only be considered if the investors could prove that the states parties intended to extend an MFN clause to questions of dispute settlement. The tribunal also acknowledged the difference between substantive rights and procedural rights. In this context, it pointed to the principle of separability of arbitration clause in order to justify the non-application of MFN clauses to dispute settlement provisions.[56] Separability in this respect means that substantive right and procedural right shall be separated since those two rights cover two different matters.

This article submits that expanding MFN clause to dispute settlement issues will place foreign investors above, instead of equal, the host states. Broad interpretation of MFN clause will allow foreign investors to pick the best rules and forum for them. They will almost always choose a short cut to international arbitration rather than requirement to exhaust local remedies. Unfortunately, that might not what the host state intended when treaty negotiation took place. Failing to give effect to party's intention when interpreting MFN clause is not only considered as dishonoring the "will" of the party, but also ignoring article 32 of VCLT. It shall be noted that 'intention to legally bound' must carry meaning that both contracting states approve the same thing in the same sense, and their minds shall meet as to all the terms.[57] It is important to note that in concluding a treaty, the contracting parties may give concession and counter concession to each other. Different BIT result in different procedural requirements in dispute settlement process. It really depends on how the contracting states negotiate such dispute settlement whether to directly refer to ICSID arbitration, having negotiation prior to arbitration or use domestic mean first before submitting the dispute to arbitration.

Unlike substantive issues, jurisdictional issue is based on consent by the contracting states. Consequently, MFN clause cannot apply to dispute settlement under ICSID because ICSID arbitration needs a written consent. Therefore, different means of dispute settlement process cannot be considered as discrimination. So long the tribunals respect the agreement between the contracting parties, their interpretation on MFN clause can have strong foundation.

Not all claims can be arbitrated under the ICSID, an ordinary commercial contract for example, is not arbitrable because it does not fulfill the requirement to be considered as

[56] *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24

[57] Nicholas C Dranias, "Consideration as Contract: A Secular Natural Law of Contracts," *Tex. Rev. L. & Pol.* 12 (2007): 281.

investment.[58] However, to determine whether certain contract is commercial or investment is also a tricky issue. In some ICSID cases, the tribunal ruled that in order "to make a decision as to its jurisdiction, it had to look at the way the claim was presented."[59] Some tribunals also said that in order to determine the nature of the claim, they must look at the merit of the disputes which means that they need to examine the case through a proceeding.

The facts in *SGS v. Pakistan* are comparable to that of *SGS v. Philippines*, however the result is significantly different. The perspective of whether or not umbrella clause can be defined broadly to cover contractual disputes creates differences between ICSID tribunals over the role of BITs, the function of ICSID tribunals, and the relationship between national and international dispute settlement procedures.[60] In respect to the scope and the jurisdiction, the tribunal *SGS v. Pakistan* rejected broad interpretation of umbrella clause, saying that contract claim and treaty claim are separated and therefore refused to examine SGS's contract claim. This is a sound argument because there is a fundamental different between contract and treaty in respect to the parties involved and the subject matter. Investment contract is concluded between investor and the host state, while investment treaty is concluded between states. Investment treaty addresses general issues such as protection, promotion and liberalization of investment. Investment contract on the other hand consist of more specific matters governing the investment activities between investors and the host state.

For the sake of *pacta sunt servanda* principle, investment dispute between state and investor concerning breach of contract should be governed by domestic law in the forum chosen in the contract. By signing an investment contract, the intention of the parties was to render contractual breaches as contractual claims instead of treaty claims. In other words, ICSID tribunals shall not have jurisdiction over disputes arising from contract claims because of inexistence of party's consent. Moreover, the contract should serve as *lex specialis* which prevails over the BIT as the *lex generali.*[61] Creating jurisdiction for ICSID tribunal over contract breach dispute is definitely not intended by the host states at the signing of the contract. Therefore, ICSID tribunal shall not arbitrate alleged contractual breach done by state. Further,

[58] Article 25 of ICSID Convention.
[59] Christoph Schreuer, "Investment Treaty Arbitration and Jurisdiction over Contract Claims-the Vivendi I Case Considered," in *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, ed. Tod Weiler (London: Cameron May Ltd, 2005), 316.
[60] Yuval Shany, "Contract Claims vs. Treaty Claims: Mapping Conflicts Between ICSID Decisions on Multisourced Investment Claims," *The American Journal of International Law* 99, no. 4 (2005): 843.
[61] Diane A Desierto, "Necessity and Supplementary Means of Interpretation for Non-Precluded Measures in Bilateral Investment Treaties," *U. Pa. J. Int'l L.* 31 (2009): 830.

the tribunal denied the need to coordinate between national and international proceeding. On the contrary, the tribunal in *SGS v. Philippines* as well as in *Vivendi v. Argentina* resorted to broad interpretation of umbrella clause and asserting that there is a strong link between contract claim and treaty claim. Thus, the tribunal accepted to examine SGS claim, but decided to stay ICSID proceeding until the contract claim sort out by Philippine's court.

In respect to the division of tasks between national and international proceedings, *Vivendi v. Argentina* and *SGS v. Pakistan* decisions recognize parallel proceeding of the contract and treaty claim before domestic and ICSID tribunals. This means that, the ICSID tribunal did not see any importance to coordinate with domestic arbitration. However, in *SGS v. Philippines* the tribunal decided to stay the arbitration proceedings with respect to the treaty claim until the related contract claim was settled. In other words, the tribunal open themselves to coordinate with the domestic dispute settlement.

Tribunals approach to expansive interpretation of MFN and umbrella clause has forced host countries of investment to arbitrate even though they have not given consent or did not give consent. Not only it is a form of disrespect of host country's intention, but also it is putting unnecessary financial burden. Given the fact that most host states are developing countries, dragging dispute directly to arbitration is economically ineffective. Arbitration is costly for most developing countries. This becomes even worse when the decision is in favor to the investors which penalize the host states to pay enormous amount of financial damage.

Further impact of MFN and umbrella clause interpretation is inconsistency in ICSID arbitral decisions as some tribunals define those clauses extensively while other restrictively. The first explanation on why there is no consistency is because ICSID does not recognize the binding force of precedent. Arbitration was always thought of as an independent, separate means of dispute resolution which has no relationship with other tribunals and thus has little or no influence from any other previous proceedings.[62] Base on those characteristics, the concept of jurisprudence does not exist to the arbitration context.

However, in practice, there are growing number of arbitral tribunals referring to previous tribunals or affirm previous decisions when dealing with similar legal facts.[63] As a result, some common principles and rules in international investment law emerge slowly from the practice of

[62] Catherine Kessedjian, "To Give or Not to Give Precedential Value to Investment Arbitration Awards?," in *The Future of Investment Arbitration*, ed. Catherine A. Rogers and Roger P. Alford (Oxford University Press, 2009), 44.

[63] Kessedjian, "To Give or Not to Give Precedential Value to Investment Arbitration Awards?," 45.

these arbitral tribunals and therefore uniformity is developing. This accord with business need that prefers uniformity as it is the simplest way to conduct investment. Uniformity in the law would allow investors to enter markets with a favorable cost-benefit balance

Even though binding force of precedent generally does not apply in all arbitration, since there is a greater need for uniformity, ICSID should consider giving precedential value to selected landmark previous awards. ICSID has a closed set of rules which apply and there is uniformity of the type of disputes submitted before it. Furthermore, ICSID regularly publishes its decisions so that it can be assessed publicly. Those factors suffice to give reasons why binding precedent should come into play. The doctrine of precedent enhances security, predictability, and governance. It also conforms with the general principle of law known as "the legitimate expectation of the parties."[64]

Second explanation why ICSID tribunals decided cases differently is ideological reason. The ICSID tribunals experience an "ideological divide" between arbitrators on how the problems can be addressed which created by "multiplicity of legal sources and procedures implicated in contemporary investment disputes."[65]

The outcome of the case study presented in regard to MFN clause as well as umbrella clause all lead to jurisdictional issues. The way the tribunal decide its jurisdiction shall be by interpreting the submission of the parties and by making determinations based on jurisdictional facts.[66] This corresponds with tribunal determinations in narrowing interpretation of the MFN clause as well as umbrella clause by considering parties' intention at the making of the BITs. Absence of express statement to include procedural issues in such clauses shows that the jurisdictional facts do not establish.

4. Conclusions

The cases presented in this paper reveal inconsistent approaches by the ICSID tribunals in give meaning to MFN and umbrella clause. The extended interpretation of MFN to procedural matters gives support to foreign investors to oppose dispute settlement mechanism agreed in the BIT. In most cases foreign investors deny the application of domestic measures. In respect to development interests, the extended interpretation of MFN and umbrella clause may cause the

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64 Kessedjian, "To Give or Not to Give Precedential Value to Investment Arbitration Awards?," 54.

65 Shany, "Contract Claims vs. Treaty Claims: Mapping Conflicts Between ICSID Decisions on Multisourced Investment Claims," 844.

66 Frédéric G Sourgens, "By Equal Contest of Arms: Jurisdictional Proof in Investor-State Arbitrations," *NCJ Int'l L. & Com. Reg.* 38 (2012): 953.

host country becomes reluctant in exercising its regulatory power for example: to increase tax, to require transfer of new skills and technology, or to impose new employment policy due to the fear of being considered as breaching the BIT.

Furthermore, equalizing contract breach with treaty breach under umbrella clause has forced host states of investment to arbitrate on disputes they do not give consent to. Such expanding roles of MFN and umbrella clause have put host state of investment in disadvantage position. Not only because the extensive meaning disregards the state's intention, but also financially unfavorable due to the high cost of arbitration. Moreover, their inconsistency creates uncertainties in investment law. BIT clauses shall offer consent to arbitration in a narrower term or requiring the investment to have been specifically approved in writing as a conditional of consent.

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References

Bernasconi, Natalie et all, Investment treaties & Why they Matter to Sustainable Development https://www.iisd.org/publications/investment-treaties-and-why-they-matter-sustainable-development-questions-and-answers downloaded 11/9/2021.

Bradlow, Daniel D., and Alfred Escher. *Legal Aspects of Foreign Direct Investment*. Kluwer Law International, 1999.

Cole, Tony. "The Boundaries of Most Favored Nation Treatment in International Investment Law." *Mich. J. Int'l L.* 33 (2011): 537.

Desierto, Diane A. "Necessity and Supplementary Means of Interpretation for Non-Precluded Measures in Bilateral Investment Treaties." *U. Pa. J. Int'l L.* 31 (2009): 827.

Dolzer, Rudolf, and Christoph Schreuer. *Principles of International Investment Law*. Oxford University Press, 2008.

Dranias, Nicholas C. "Consideration as Contract: A Secular Natural Law of Contracts." *Tex.*

Rev. L. & Pol. 12 (2007): 267.

Egli, Gabriel. "Don't Get Bit: Addressing ICSID's Inconsistent Application of Most-Favored-Nation Clauses to Dispute Resolution Provisions." *Pepp. L. Rev.* 34 (2006): 1045.

Guzman, Andrew T. "Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties." *Va. j. Int'l L.* 38 (1997): 639.

Hallward, Marry, Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit And They Could Bite https://papers.ssrn.com/so13/papers.cfm?abstract_id=636541, downloaded 10/9/2021.

Kessedjian, Catherine. "To Give or Not to Give Precedential Value to Investment Arbitration Awards?" In *The Future of Investment Arbitration*, edited by Catherine A. Rogers and Roger P. Alford. Oxford University Press, 2009.

Pietro, Domenico Di. "Applicable Law Under Article 42 of the ICSID Convention The Case of Amco v. Indonesia." In *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, edited by Tod Weiler. London: Cameron May Ltd, 2005.

Potts, Jonathan B. "Stabilizing the Role of Umbrella Clauses in Bilateral Investment Treaties: Intent, Reliance, and Internationalization." *Va. J. Int'l L.* 51 (2010): 1005.

Salacause, Jeswald W. *The Law of Investment Treaties*. Oxford University Press, 2010.

Salacuse, Jeswald W, and Nicholas P Sullivan. "Do BITs Really Work: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain." *Harv. Int'l LJ* 46 (2005): 67.

Schill, Stephan W. "Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties." *Minn. J. Int'l L.* 18 (2009): 1.

———. "Mulitilateralizing Investment Treaties through Most-Favored-Nation Clauses." *Berkeley J. Int'l Law* 27 (2009): 496.

Schreuer, Christoph. "Consent to Arbitration." In *The Oxford Handbook of International Investment Law*, edited by Christoph Schreuer, Peter Muchlinski, and Federico Ortino. Oxford University Press, 2008.

———. "Investment Treaty Arbitration and Jurisdiction over Contract Claims-the Vivendi I Case Considered." In *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, edited by Tod Weiler. London: Cameron May Ltd, 2005.

Shany, Yuval. "Contract Claims vs. Treaty Claims: Mapping Conflicts Between ICSID

Decisions on Multisourced Investment Claims." *The American Journal of International Law* 99, no. 4 (2005): 835–51.

Sornarajah, M. *The International Law on Foreign Investment*. Third Edit. Cambridge University PRess, 2010.

Sourgens, Frédéric G. "By Equal Contest of Arms: Jurisdictional Proof in Investor-State Arbitrations." *NCJ Int'l L. & Com. Reg.* 38 (2012): 875.

Vandelde, Kenneth J. *Bilateral Investment Treaties: History, Policy, and Interpretation*. Oxford University Press, 2010.

Wick, Diana Marie. "The Counter-Productivity of ICSID Denunciation and Proposals for Change." *J. Int'l Bus. & L.* 11 (2012): 239.

Williams, David AR. "Jurisdiction and Admissibility." In *The Oxford Handbook of International Investment Law*, edited by Christoph Schreuer, Peter Muchlinski, and Federico Ortino. Oxford University Press, 2008.

Wong, Jarrod. "Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treat Violations, and the Divide between Developing and Developed Countries in Foreign Investment Disputes." *Geo. Mason L. Rev.* 14 (2006): 135.