THE GEORGE WASHINGTON UNIVERSITY

SCHOOL OF BUSINESS & PUBLIC MANAGEMENT

INSTITUTE OF BRAZILIAN ISSUES – IBI

29th Minerva Program

Spring 2011

THE PRINCIPLE OF NON-DISCRIMINATION IN THE BILATERAL INVESTMENT TREATIES: LESSONS FOR BRAZIL

Alexandre Marques da Silva Martins

Advisor: Joseph Pelzman

Washington – DC, April 2011

ACKNOWLEDGMENTS

To professor Ferrer and the IBI staff, who supported me whenever necessary.

To the GWU/IBI professors, who contributed to my development.

To my family, who has encouraged my dreams.

To God, who is always with me.

"Independence of mind or strength of character is rarely found among those who cannot be confident that they will make their way by their own effort." (HAYEK, Friedrich A. von. The Road to Serfdom: Text and Documents, 2007, p. 147)

CONTENTS

Introduction

1. Bilateral investment treaties as an important tool for developing countries

2. The non-discrimination principle applied in the bilateral investment treaties: the national treatment and the most-favored nation clauses

2.1. Introduction

2.2. The national treatment clause

2.2.1. The national treatment in trade and investment contexts

2.2.2. Application of the national treatment by bilateral investment treaties and international investment arbitral courts

2.3. The most-favored nation clause

2.3.1. Definition, origin, and types of most-favored nation clause

2.3.2. The most-favored nation clause applied by international arbitration

3. Brazil and the international investment treaties

3.1. Should Brazil adopt international investment treaties?

3.2. The most-favored nation and the national treatment clauses in the bilateral investment treaties signed by Brazil

3.3. International investment in the MERCOSUR's framework

Final remarks

Bibliography

Table of cases (*ad hoc* arbitral tribunals)

Introduction

Bilateral investment treaties (BITs) are a recent phenomenon in the international arena. However, the number of BITs around the world has significantly augmented. To study their impacts and social consequences is far from easy. Several studies have tried to address this issue but faced a lot of difficulties. A study published by the UNCTAD asserts that

> "the fact that most BITs address basically the same issues does not mean that they have the same underlying rationale, nor does it mean that all agreements provide the same degree of investment protection or have evolved homogeneously over the last decade. Rather, the enormous increase in BITs during the review period has resulted in a greater variety of approaches with regard to individual aspects of their content." (UNCTAD, 2007, p. 141)

Concerning this paper, I plan to develop the study of the impact and effects of the non-discrimination principle on the bilateral investment agreements signed by Brazil. Through that, I intend to investigate whether the Brazilian state manages to articulate efforts in an advantageous way in order to attract more international investments.

On the multilateral approach, the completion of a broad agreement on investments is far from being achieved. As far as the OECD is concerned, in the 90s', such an agreement (Multilateral Agreement on Investment – MAI) resulted in an extremely bitter failure. With regard to the WTO, during the Doha Development Agenda, nations tried to take the discussion to a more serious level; however, due to new stalemates between developing and developed countries, the subject was withdrawn from the negotiation agenda in the mid-2004.

Because of such a downfall, BITs arise as a feasible via for nations to obtain international investments. The quantity of BITs rapidly increased in the 90s', as developing countries and transition economies signed treaties with a broader range of developed countries and resolved to sign BITs between themselves. Then, the first part of this paper is intended to demonstrate that BITs are an important tool for developing countries to have access to international investments.

It is important to highlight that the non-discrimination principle is one of the most important clauses of the BITs and was originated from the GATT/47. The General Agreement on

Tariffs and Trade of 1947 had the non-discrimination principle between its members as a basilar reference. Such an idea of non-discrimination was split into two variants: the most-favored nation clause and the national treatment clause. Translating the two above mentioned clauses into the field of bilateral investment treaties, a nation-party shall grant the other party grants and rights offered to third parties, as well as shall be compelled to offer the other party's investments and investors a treatment not less favorable than the one granted to national investors. Consequently, in the second part of my paper I will examine the different objectives, importance, and evolving interpretations of the non-discrimination principle in trade and investment treaties.

It has been evident that a large number of countries have signed several BITs. Thus, the overlapping of commitments and regulations within different agreements may generate problems of dynamic discrepancy: a) divergence of rules and commitments adopted by a country or block of countries in different agreements, that may lead to discrimination between countries due to the negotiated rules; and b) unwilling extension of commitments bilaterally settled that, in the end, via the most-favored nation clause, might benefit countries that are not signatories of the bilateral agreement at issue.

Consequently, in the next part of this paper, by examining the manner the non-discrimination principle is inserted in the BITs signed by Brazil, I will try to verify the impact and effects of such a situation (mainly in a scenario posterior to the international financial crisis that has recently struck the world) and target at building up a constructive review of Brazil's approach in those BITs and frame a series of recommendations for adjustments to that approach.

To sum up, the final remarks will be mentioned in the last part of this paper.

1. Bilateral investment treaties as an important tool for developing countries

The huge wave of international investments that began in the 1990s is one of most notable aspects of the process of reorganization of the world economy that we could see during the last decade. The big growth of foreign investment before the 2008 crisis can be considered, at the same time, the result and engine of the phenomenon of the integration of the global economy, or globalization (Laplane, 2007, p. 27).

During this process of intense international flow of capital, the most immediate determinant factors can be easily identified: the continuous and vigorous growth of the North American economy and the relative stagnation of Europe, the deregulation of the national financial markets and the opening of the capital accounts in the balance of payments, the changes in the exchange rate and trade regimes in the main developed economies, European integration, the opening of new markets owing to the end of the Cold War, and the opportunities for investment in the so-called "emergent" countries (Laplane, *op. cit.*, p. 27).

In this scenario, several companies located in developed states started allocating direct investment to developing countries. Foreign direct investment (FDI) plays a vital role in the progress of developing nations. As the latter do not have the required conditions to foster their economies alone, the former is necessary to help achieve the economic goals. As a result, the international community perceived that the regulation of the international flow of capital was needed.

While portfolio capital is used in the short run (and for pure speculation in many cases), foreign direct investment is generally applied in the long run. Enterprises decide to put their resources in areas that are attractive. As their money will be used in the construction of plants, employment of workers, transference of technology, payment of taxes, and the like, these companies will go to places that offer them a stable and safe atmosphere. Uncertainty is what investors hate when deciding to do business. They prefer states that provide a secure legal order.

At the beginning of the Uruguay Round, in 1986, the US delegation came up with the idea of a new deep regime for investment measures that harmed trade. Washington believed that the members of the GATT should be more focused on the enforcement of the national treatment and the most favored nation clauses regarding foreign investment. The USA wanted international investors to have minimum standards of treatment. While some developed nations supported the North American proposal, other developing countries were worried about losing sovereignty. These opposing interests led to a deadlock and no specific agreement was attained.[1]

After the Uruguay Round, Washington tried again to suggest the establishment of a multilateral regime for investments. Accordingly, the attempt at a Multilateral Agreement on Investment (MAI) was conducted at the Organization for Economic Cooperation and Development (OECD). In 1995, the governments that were members of the OECD decided it was time to initiate a new round for the achievement of a MAI. Despite the fact that developing nations rejected this agreement, OECD countries, whose majority is formed by developed states, thought it was worthwhile to negotiate such a treaty. Thus, from 1995 to 1998, the MAI structure was secretly made by OECD members. The MAI final version became public only in 1998 and aimed at giving a more systematic and even application of international investments. If it was successful, it could be open to non-members in the near future.

However, when it was disclosed to civil society, it caused a lot of hot debates, especially between non-governmental organizations, labor unions, and businessmen. Criticism was widespread, and the MAI seemed to be destined to failure. That was exactly what happened when France, which had been the host nation during the negotiations, announced, in October 1998, that it would no longer support the MAI application. As unanimity was essential in the OECD's procedures, the MAI campaign was abandoned and a multilateral treaty was considered unfeasible.

At the World Trade Organization (WTO) level, the new official negotiations for the reduction of trade barriers after the Uruguay Round started in 2001 (the so-called Doha Round).

[1] In fact, only an Agreement on Trade-Related Investment Measures (TRIMs Agreement), which is quite narrow in its scope, and the General Agreement on Trade in Services (GATS), which enables foreign entrepreneurs to set up service business inside other WTO countries, were achieved. Obviously, this final result was poor and did not represent what the US delegation predicted.

Everybody expected that the Doha Round would have an auspicious start. At the launch of this new round, it was declared that "a multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment,"[2] was needed. Besides, five years earlier, during the works of the 1996 WTO Ministerial Conference, and as a consequence of the WTO Singapore Declaration[3], WTO states accepted creating a working group whose mission would be to research the interaction between investment and trade. Leal-Arcas (2009a, p. 172) stresses that:

> "The idea was to study the link between trade and investment. Since the MAI was abandoned in 1998, some WTO members looked toward the WTO as the appropriate forum for creating the multilateral investment rules."

Nonetheless, a new impasse emerged. Many developing states were dissatisfied with the "Singapore Issues." Thus, at the Cancún Ministerial Conference, the investment issue was withdrawn from the agenda. In such a meeting, the European Union (EU) agreed to make the "Singapore Issues" more malleable by dropping the investment theme from the Doha Round. The EU's opinion was later endorsed by the US government. As a result, the protection for international investment will probably not be discussed again in the short-run, because the end of the Doha Round is not currently foreseeable.

On account of such a downfall, bilateral investment treaties (BITs) have arisen as an alternative path for nations to obtain international investment. In a multilateral negotiation, consensus is often required. This might turn the process of achieving a final document into a hard task. In an international organization such as the WTO, where a uniform approach among all the members is crucial under a significant number of circumstances, the power of the strongest countries may be diluted principally in favor of developing countries. Moreover, several states want to express to foreign companies their desirability to offer legal instruments that may be able to provide safety against abrupt changes in their internal policies. Therefore, BITs have become a quicker way to acquire more practical protections and stability for investments. While in the foreign investor's perspective BITs may give access to a wide array of

---

[2] WORLD TRADE ORGANIZATION (WTO). **Ministerial Declaration of 14 November 2001**. WT/MIN(01)/DEC/1, paragraph 20.

[3] During that meeting, part of the discussion was dedicated to the "Singapore Issues," which, in turn, refers to four permanent working groups established at that Ministerial Conference: government procurement, investment, competition and trade facilitation.

guarantees such as indemnity in case of expropriation and international arbitration, in the host state's view, BITs might be the bridge to new foreign direct investment, which could lead to economic and (oftentimes) political gains.

In the 1990s, the quantity of BITs rapidly increased, as developing countries and transition economies signed treaties with a broader range of developed states and resolved to sign BITs among themselves[4]. Analyzing this phenomenon, Leal-Arcas (*op. cit.*, p. 177) observes that:

> "The year 2001 was a milestone in the evolution of bilateral investment treaties. Ninety-seven countries – the largest number ever – were signatories to at least one treaty. With 158 BITs signed in 2001, the total number of treaties rose to 2,099 from 1,941 the previous year. Most importantly, the number of BITs signed among developing countries increased from thirty-six in 2000 to sixty-six in 2001."

In spite of the fact that BITs volume has gone up during the last two decades, the studies concerning their effectiveness have frequently had opposing findings. Scholars and international organization researchers have investigated whether BITs have succeeded in attracting foreign direct investment to host countries, but there is no uniformity among them.

To scrutinize the consequences of BITs is a difficult matter. The methodologies used by those devoted to studying the subject vary considerably. Some investigations rely on data that are not quite consistent. Furthermore, it is not easy to choose the relevant factors that should be included in the survey. Depending on the countries analyzed, elements that are taken into consideration by researchers may be altered substantially.

What is theoretically necessary to render BIT promises meaningfully credible is investor access to authoritative adjudication. It is through adjudication that vague standards of treatment are given useful legal content, and that inevitable factual disputes are resolved. Access to international arbitration, as opposed to access to municipal courts in the host state, is essentially because investors typically assume that municipal courts in developing countries will lack the technical competence or neutrality to adequately and fairly resolve investment disputes (Yackee, 2007, p. 16).

---

[4] However, it should be mentioned that the number of BITs among developing countries is still very low.

The immediate benefits of authoritative interpretation are twofold. Most immediately, an investor in possession of a favorable international arbitral award has the very real ability to enforce the terms of the award even in the face of continued host state resistance. This is because a network of important international treaties, including most prominently the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), empowers investors to seek award enforcement against host state property located in third-party states. More abstractly, but perhaps even more importantly, authoritative, impartial arbitration awards have the tremendous potential to increase the reputation costs of the host state's breach by publicly clarifying both the facts surrounding the dispute and the content of the relevant legal rules, and by applying those facts to the rules (Yackee, *op. cit.*, p. 17).

It is also useful to say that, when analyzing the BITs effects, one should consider only treaties that have really entered into force. Unfortunately, some researchers sometimes include treaties that are not still legally binding. This happens because they take into consideration the BITs dates of signature instead of the date of entry into force. This observation has practical relevance. In a study in 2005, UNCTAD ascertained that of 2,392 BITs signed by 2004, only 1,718 were in force, that is, only 72% of all BITs considered were compulsory[5]. One emblematic example is the Brazilian case. Brazil signed 16 BITs during the 1990s but did not ratify any of them.

By keeping in mind the dispute settlement provisions as the most fundamental criterion to distinguish the BITs' effectiveness as explained above, it is possible to conclude that the UNCTAD's list of BITs, mentioned in the last paragraph, by failing to account for key procedural differences in treaty content and entry into force, provides a conceptually inadequate "count" of the degree to which states have credibly committed through bilateral treaties to treat investors well. Disaggregating BITs by dispute settlement provisions, and counting only BITs that have entered into force, gives us a quite different picture of the chronology and scope of the BIT phenomenon, both generally and as to particular states (Yackee, *op. cit.*, pp. 31-32).

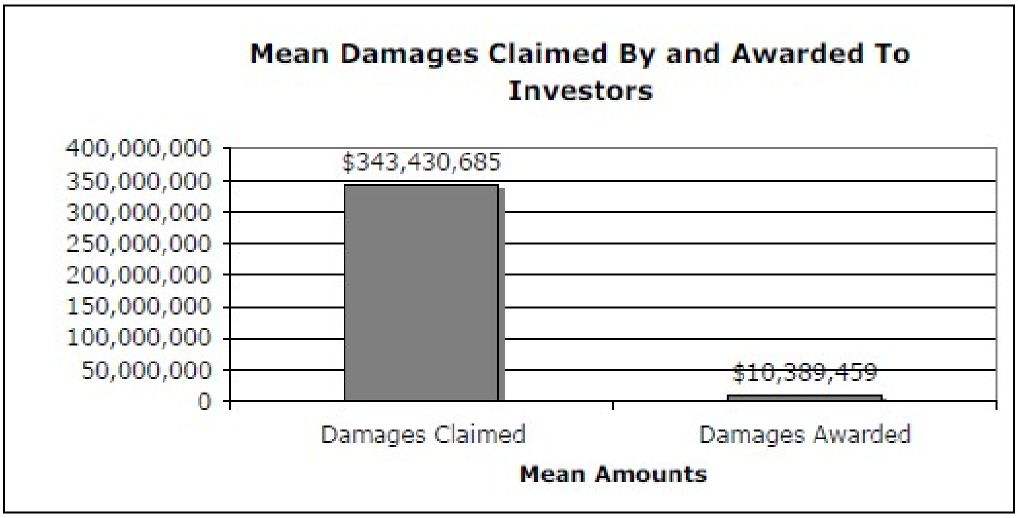
---

[5] UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD). **Occasional Note: Many BITs Have Yet to Enter into Force**. UNCTAD/WEB/ITE/IIA/2005/10 (2005), p. 4.

Is indemnity awarded in international arbitration for bilateral investment treaties violations a myth? Several states and scholars have feared the inclusion of mandatory international arbitration in BITs. The basic argument is that indemnity might be extremely high and states might lose sovereignty. This fear has been challenged by reality. In a large number of cases, states were not convicted and did not have to pay anything. What is more, when arbitral courts decided that indemnity was due, the final amount was much lower than what investors expected.

In a study published in 2007[6], Franck analyzed 82 cases. Only in 52 disputes did arbitral tribunals render sentences that implied damages indemnity (if any) because of an eventual BIT violation. In the majority (31 disputes) of these 52 litigations, complainants got nothing. In the other 21 instances, courts awarded damages. It means that investors were unsuccessful in about 59.6% of the cases brought to the arbitral panels.

In her research, Franck (*op. cit.*, p. 59) found that there was a highly notable difference between the average amounts claimed by investors and those awarded. The difference between the average amounts claimed and awarded was approximately US$333 million. The following chart shows this:

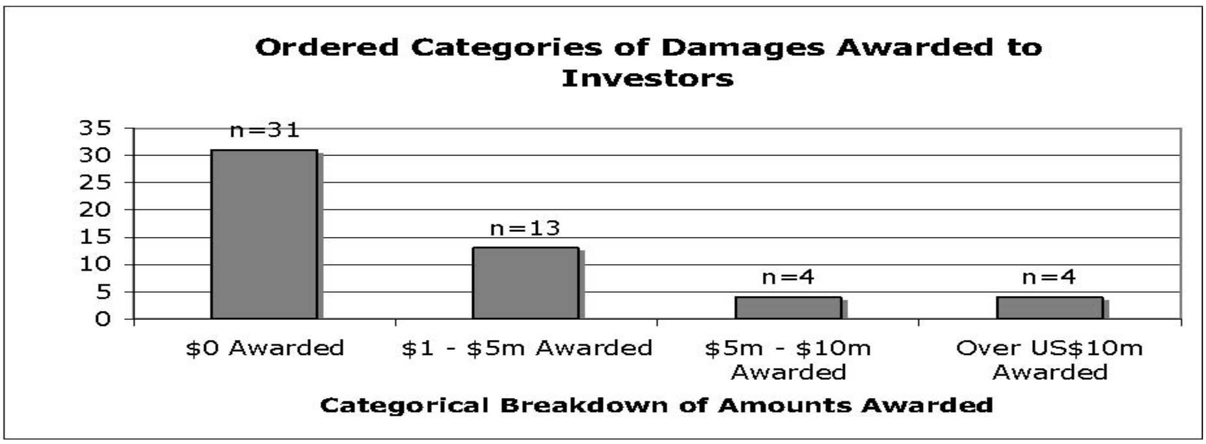


[6] Susan D. Franck. **Empirically Evaluating Claims About Investment Treaty Arbitration**. North Carolina Law Review, vol. 86, p. 1 (2007).

US$343,430,684.88 (n=44; SD=1,509,734,385)—for cases where investors quantified claimed damages and the mean damages awarded by tribunals—US$10,389,459.10 (n=52; SD=10,389,460)—in awards finally resolving treaty claims.

It is also worth noting that for the twenty-one awards where tribunals awarded cash to an investor, the average award was US$25,583,916. This is a US$317.9 million difference between the amount claimed and awarded. Moreover, when considering the thirty-one cases for which there was data about both damages claimed and awarded, the difference was even larger: the average amount claimed was approximately US$404 million while the average amount awarded was approximately US$17 million—a difference of US$387 million (Franck, *op. cit.*, p. 60).

As an average is a particularly blunt statistical instrument, it is helpful to look at damage awards categorically. In contrast to suggestions that tribunals award large sums, tribunals only awarded more than US$10 million in four cases. There were four cases where investors were awarded between US$5–10 million. There were also thirteen investors awarded between US$5 million and US$1. In the remainder of the cases, investors did not receive damages. This suggests that the majority of investors received nothing. When investors did win, they did not win big (Franck, *op. cit.*, pp. 60-61), as follows:



Ordered categories of the U.S. dollar value of awards finally resolving arbitration (n=52), grouping the breakdown of damages awarded to investors for (1) cases awarding investors $0 (n=31), (2) cases awarding investors between $1 to $5 million (n=13), (3) cases awarding investors between $5 million and $10 million (n=4), and (4) cases awarding investors over $10 million (n=4).

2. The non-discrimination principle applied in the bilateral investment treaties: the national treatment and the most-favored nation clauses

2.1. Introduction

Roughly, the non-discrimination principle relies on the premise that the parties in a legal relationship should be considered in a way that would not imply unfair treatment between them. As to international investment, such a principle plays a prominent role and results basically from the international trade law. Consequently, studying its origin in the trade regime can help acquire better understanding of its nuances and application.

The current most important principles regarding investment and trade were designed to protect aliens. Rules concerning investment were found not only in friendship, commerce and navigation treaties (FCN Treaties), which were quite common in the nineteenth century, but also in the international customary law. As goods started crossing borders, it did not take long before trade would significantly grow and abandon the notion that it only referred to aliens. Thus, multilateral statutory law soon ruled over trade activities. An example was the advent of the General Agreement on Tariffs and Trade (GATT) in 1947.

As the decolonization process emerged in many countries, the customary law regarding investment protection also underwent some intense rejection, especially in Latin America. At that time, a large amount of foreign companies explored natural resources in those countries and thought that their investments were protected by an international standard with a minimum set of rules. However, based on the Calvo doctrine, which alleged that aliens were entitled only to the same level of protection that nationals obtained from their respective legal system, the newly independent countries refused to grant a better treatment to international investors *vis-à-vis* the national ones.

Despite the fact that trade and investment law had common genesis (the treatment of aliens), they have constantly dealt with different purposes: what concerns commerce, to liberate goods flow; concerning investment, to promote incoming financial resources.

International agreements in the trade field are necessary because states can foster their exporting industries, and at the same time they agree to open their national economies to foreign goods, thus stimulating competition between national industries and international products. Hence, trade is characterized by gradual liberation, inter-state exchange and collective rights.

On the one hand, the scenario in the investment arena is rather different. BITs tend to reflect two very distant interests: one state wants to protect its investors with money in another state against any incidental changes to the legislation of the host country, while the latter wishes to achieve a high economic growth. It is quite common to find BITs agreed between either capital exporting or capital importing countries. In addition, foreign investors fear discrimination. A host state can give preference to nationals to the detriment of international investors. Accordingly, one of the core ideas of the BITs is to minimize risk of unfair treatment. Another concern is that when a company decides to invest in a country, FDI remains a long period in that country. Building a plant, hiring people and transferring technology constitute a long process that demands time and a huge amount of financial resources. As a result, such a company significantly risks facing political or economic instability. BITs are established to reduce such threats. In contrast, trade companies do not always undergo the same sort of adversity. They do not need to disburse some substantial amount of money to invest in the country importing their goods. And their physical presence there is not required wherever they do business. Then, if an importing nation is facing political turmoil, trade exporters shift their goods to other markets. So, costs become considerably lower when compared to those born by international investors. DiMascio and Pauwelyn (2008, p. 56) explain that:

> "The trade regime is an interstate construct focused on the macro-issues of market access and trade opportunities to increase overall welfare; the investment regime, in contrast, is centered on the micro-issues of attracting and protecting investments made by individual investors. It is this protection of individual investor rights that is expected to increase FDI flows to nations with an otherwise higher risk premium.
>
> The quid pro quo for thus attracting FDI is making oneself vulnerable to direct claims by individual investors. Most investment treaties soften this inroad into domestic regulatory

> affairs by including little more than a handful of rather vague disciplines, limiting the available remedy to money damages and excluding an obligation of specific performance. Whereas the normal remedy in trade law is compliance, in investment law it is compensation."

Some years ago, the international community failed to attain a multilateral agreement to strongly govern the working rules of investment. This does not mean that investments cannot be regulated. BITs have the mission to simultaneously provide legal safety to investors and signalize that states are willing to receive financial resources to foster their economies. As aforementioned, uncertainty is a factor that must be reduced in international transactions. The non-discrimination principle strives to reach this goal by compelling countries to treat investors in a fair way. Although this may sound quite theoretical, such a fact plays a serious role in the international environment. Consequently, one should consider the non-discrimination principle as a standard derived from patterns produced by procedures or behaviors. It should be deemed as a vector that guides states when dealing with investors. But what level of protection are we talking about? A middle ground position, i.e., neither the best level nor the worst one? Tudor (2008, p. 110) answers this query very well:

> "It is important to note that in the particular context of standardization, the standard represents an *optimum* level, not an *average* level. The role of the standard in the technical field is that of a unifying norm, representing an optimum level of quality to be followed by States or producers, in a certain field. It plays an indicative role."

The non-discrimination principle is split into two variants: the most-favored nation (MFN) clause and the national treatment clause. Transposing these two clauses to the field of the BITs, a state shall confer the other state-party's investors the same beneficial rights as the ones offered to third states' investors (most-favored nation clause), as well as shall mandatorily offer the other state-party's investors a treatment not less favorable than the one granted to national investors (national treatment clause).

It is interesting to note that the modern international investment atmosphere is extremely sparse. As there is no supranational organization regulating investment activities between countries, this implies a fragmented set of norms. Thus, this may lead to

> "regulatory competition among the various models of international investment agreements. This fragmentation of the international investment regime may also create an incentive for treaty shopping by those foreign investors who seek protection even in

> situations where their country has not concluded or ratified investment agreements that offer the same level of protection as those achieved in other countries.” (Leal-Arcas, 2009b, p. 865)

The concepts of MFN and national treatment (further analyzed in the next chapter) have been included within the BITs for a long time. They may be drafted in very different types. This means it is not easy to understand their real implication. The final verdict in the case of an investor-state litigation is oftentimes unpredictable if the core argument of the plaintiff is based on a violation of either the MFN clause or the national treatment clause. Tabet (2007, p. 354) highlights that:

> “Although the standards of national treatment and most favored nation are not new concepts in investment law, it is worth noting that, in this area, their exact contours and scope remain to be defined. Until recently, arbitration concerning investment focused primarily on issues of expropriation and minimal treatment and little discussed the scope of the terms of national treatment and most-favored nation.”

2.2. The national treatment clause

2.2.1. The national treatment in trade and investment contexts

The idea of the national treatment implies that a country has to grant foreign companies, investors, investment, goods or services a treatment no less favorable than that accorded to its domestic ones. The final objective is to provide the same level of protection between international and national parts.

Both in the trade and investment areas, the disputes submitted to arbitration reveal a constant friction between the trend to liberalize trade and investment flows and the state’s right to regulate its tax system and public policies. The international arbitral jurisprudence concerning investment litigation has oscillated between a stronger approach towards the GATT/WTO jurisprudence and its own way to analyze the national treatment clause.

This lack of uniformity in the investment arbitration is somewhat explained by the different backgrounds of the panelists designated to resolve this sort of dispute. On the one hand, the panelists involved in the trade litigation belong to the WTO, which is an institution with a solid structure and a staff of diplomats and experts that can provide useful support to the panelists. On the other hand, the adjudicators designated to solve investment cases may have a substantially different background. They generally come from the commercial private sector. Furthermore, the investor-state model of litigation is a new entity in the international arena that

> "… began attracting wider attention only with the boom in cases starting in the mid-1990s. Its actors may therefore feel a need to establish and legitimize themselves – an exercise that can involve dissident behavior, including the rejection of established WTO precedents." (DiMascio and Pauwelyn, *op. cit.*, p. 59).

To better understand the application of the national treatment in the investment field, one should also examine the GATT/WTO jurisprudence, in that this approach may give an important introduction to the basis and nuances of the national treatment.

The advent of the WTO meant the dawn of a new era in international trade law. States wished to resolve their commercial disagreements with a more sophisticated and solid structure in order to persuade reluctant countries to obey what was decided by the dispute settlement system. To accomplish this mission, the WTO has an Appellate Body that renders decisions that are mandatory. If the loser state does not accept implementing the decision, it may face trade retaliation. The Appellate Body has also another relevant role: it may clarify the rules previously created by the member-states. Accordingly, as for the national treatment, the Appellate Body has announced its main goal as follows:

> "The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III "is to ensure that internal measures 'not be applied to imported or domestic products so as to afford protection to domestic production'". Toward this end, Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products."[7]

The launch of the GATT, in the 1940s, was aimed at liberalizing the trade flow and making possible access to import markets. The basic idea was to foster general welfare among

[7] WORLD TRADE ORGANIZATION (WTO). **Japan – Taxes on Alcoholic Beverages**, at 16-17, WT/DS8/AB/R, WT/DS10/AB/R & WT/DS11/AB/R (adopted Nov. 1996) (footnotes omitted).

nations. As the dreadful economic consequences of the Second World War were still deeply felt, countries needed an institutional support to increase the volume of their commercial relationships. As a result, the GATT national treatment was shaped to guarantee equal chances of competition between imports and internal markets. In the case of a national treatment offense, this means that a member-state of the WTO is not compelled to prove how the administrative measure hampers the trade flow. On the contrary, it has only to demonstrate the existence of this domestic measure and how it harms competitive opportunities and advantages national goods. The Appellate Body has already highlighted this paramount detail of the international trade legislation:

> "[Under GATT Article III (national treatment) it is irrelevant that "the trade effects" of the tax differential between imported and domestic products, as reflected in the volumes of imports, are insignificant or even non-existent; Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products."[8]

In spite of the fact that the national treatment development in international arbitration concerning investment is not solid yet, it is interesting noting that the same subject has had various understandings in GATT/WTO dispute settlement. One could mention at least five different cycles (DiMascio and Pauwelyn, *op. cit*, pp. 62-66).

In the first period, from 1947 through 1987, as the GATT countries prioritized decreasing tariffs, national treatment interpretation was quite lax. Expressions such as "like products" and "less favorable treatment" were quite flexible. Basically, GATT panels decided that a violation of the aforementioned clause had occurred only when there were measures that openly discriminated in favor of national products to the detriment of foreign goods (*de jure* discrimination). However, in 1987, a new phase began when the case Japan – Taxes on Alcoholic Beverages decisively contributed to enlarging the depth of the application of the national treatment. After that case, GATT panels started also considering *de facto* violations, that is, discriminations that harm foreign goods in an indirect way.

---

[8] WORLD TRADE ORGANIZATION (WTO). **Japan – Taxes on Alcoholic Beverages**, *supra* note 10, at 15 & n. 34 (referring to United States – Taxes on Petroleum and Certain Imported Substances, para. 5.1.9, GATT BISD (34th Supp.) at 136 (adopted June 17, 1987)).

Another shift in the GATT jurisprudence could be observed from 1992 to 1995 when some panels used the doctrine of the regulation's "aim and effect" within the like-products analysis. In this situation, "products would not be considered alike if a regulation drew a bona fide distinction between them that did not involve nationality-based discrimination and did not have a protective effect on the conditions of competition in the market." (DiMascio and Pauwelyn, *id.*, p. 63).

The fourth period, from 1995 to 2000, commenced with the establishment of the WTO Appellate Body. In this scenario, the "aims and effects" test was put aside. The Appellate Body based its analysis on competition. In order to know whether there was competition between foreign and national goods, various factors were taken into consideration: the products' properties and end uses, consumers' tastes and habits, and tariff classifications. The mere existence of a different treatment between foreign and domestic goods would not necessarily imply a discrimination proscribed by the GATT/WTO legislation. The latter would occur only if the former hindered competition of foreign goods *vis-à-vis* like national products.

In reaction to an interpretation that focused primarily on the concept of like products, a new switch in the WTO jurisprudence seemed to be emerging from 2000 onwards. Some form of the "aims-and-effects" procedure has been adopted in some case law. Perhaps some members were afraid of the fact that WTO adjudicators were becoming more intrusive regarding states' public policies. In addition, it should be stressed that "the Appellate Body's move from strictly textual to more contextual and teleological interpretation is characteristic of institutions that have gained a basic level of legitimacy" (DiMascio and Pauwelyn, *ibidem*, p. 65). One could observe this new approach when the Appellate Body stated that "we consider that a measure's purposes, objectively manifested in the design, architecture and structure of the measure, *are* intensely pertinent to the task of evaluating whether or not that measure is applied so as to afford protection to domestic production."[9]

---

[9] WORLD TRADE ORGANIZATION (WTO). **Chile – Taxes on Alcoholic Beverages**, para. 71, WT/DS87/AB/R (adopted Jan. 12, 2000).

Having briefly checked the various cycles of the national treatment under the GATT/WTO jurisprudence, one should be able to better comprehend the way the national treatment clause has been developed in international investment arbitration.

The actors in international public law have traditionally been states and international organizations. Mainly due to their capability of making treaties, no other entity was accepted in this structure. However, this wave started changing a couple of decades ago. Companies and individuals began having access to international courts. A highly notable example is the European Integration. Its legal order permits companies and individuals to be plaintiffs in lawsuits brought to its Court of Justice. Another example is the Inter American Court of Human Rights, which accepts the participation of the victim (or the alleged victim) in law claims. This new perspective has broadened the group of actors in international public law.

Following the bias mentioned in the last paragraph, BITs have allowed private companies to sue states before international arbitral courts. Most of the suits are held at the International Centre for Settlement of Investment Disputes (ICSID). Nonetheless, a lot of claims are brought to *ad hoc* arbitral tribunals. Unfortunately, it is a very hard task to try to filter general principles about the national treatment clause in the investment domain from the sentences of these tribunals. A series of elements hampers this task. In all these claims (those of the ICSID inclusive), precedents are not legally binding. There is also no superior court to review the decisions rendered. Another relevant factor is the wide range of textual differences of the national treatment clauses drafted in BITs.

National treatment discipline in investment is deeper than in the commercial atmosphere. Whereas the national treatment found in the GATT/WTO legislation is confined to goods and, eventually, services, its regime in the investment arena entails more aspects. It is related to the whole cycle of an investment. It was noted in an UNCTAD study that:

> "The scope of national treatment in the investment field goes well beyond its use in trade agreements. In particular, the reference to "products" in article III of the GATT is inadequate for investment agreements in that it restricts national treatment to trade in goods. The activities of foreign investors in their host countries encompass a wide array of operations, including international trade in products, trade in components, knowhow and technology, local production and distribution, the raising of finance capital and the provision of services, not to mention the range of transactions involved in the creation

> and administration of a business enterprise. Hence, wider categories of economic transactions may be subjected to national treatment disciplines under investment agreements than under trade agreements."[10]

2.2.2. Application of the national treatment by bilateral investment treaties and international investment arbitral courts

Taking into account the fact that a violation of the national treatment clause in the investment area means a more privileged treatment accorded to domestic investors, one must identify the basis for comparison between foreign and national investors. The praxis in the negotiation between states shows that a large number of BITs do not contain an explicit guidance for comparison. When a BIT has provisions regarding this topic, it tends to use expressions such as "like circumstances", "like situations", "similar situations" and "same circumstances."

A difficulty in solving a dispute in the investment field might be the lack of explicit comparator in a BIT. During the dealing of the MAI, the inclusion of some basis for comparison divided the countries:

> "National treatment and MFN treatment are comparative terms. Some delegations believed that the terms for national and MFN treatment implicitly provide the comparative context for determining whether a measure discriminate against foreign investors and their investments; they considered that the words "in like circumstances" were unnecessary and open to abuse. Other delegations believed that the comparative context should be spelled out…"[11]

In a pragmatic perspective, the issue raised in the paragraph above should be resolved assuming that the expressions "like circumstances", "like situations", "similar situations" and "same circumstances" are all interchangeable. They do not possess significantly different

[10] UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD). **National Treatment. UNCTAD Series on issues in international investment agreements**. UNCTAD/ITE/IIT/11 (Vol. IV) (1999), p. 9.
[11] ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD). **The Multilateral Agreement on Investment: Commentary to the Consolidated Text**. 22 Apr. 1998, DAFFE/MAI(98)8/REV1 at 11.

meanings. Thus, tribunals should consider the factual circumstances under which national and foreign investors exist.

After having found the comparator, how should one proceed? BITs also tend to not provide a clear path to put the national treatment clause into practice. Certain NAFTA tribunals that addressed this issue give a useful orientation. Indeed, it is a three-step approach. Once the comparator is identified, NAFTA tribunals have checked the treatment accorded to each investor and whether one of them received a less beneficial treatment. In the last step, they have analyzed the existence of any legitimate or non-protectionist barrier that might be a justification for the imposition of a different level of standard.

It should be noticed that steps one and three are strongly connected as they deal with burden of proof. NAFTA tribunals have decided that, regarding step one, the plaintiff has to prove that he is in “like circumstances” with his domestic counterpart. In step three, courts have pondered that the defendant has to provide evidence that there is a reasonable ground for different standard unlinked to nationality-based discrimination. Then, there is a shift in the burden of proof from step one to step three.

It is also important to assert that, concerning step one, adjudicators have, for the purpose of identifying the comparator, to keep in mind the regulatory objective of the pattern applied and also those who are affected. The step one procedure “cannot be divorced from the reasons for the treatment in question. For example, if the less favorable treatment in question relates to pollution emission standards in urban areas, the applicable comparator may be other emitters in the geographical area, rather than a direct competitor in the same sector that operates in a less environmentally sensitive area.” (Newcombe and Paradell, 2009, p. 163)

In order to know whether there was a breach of the national treatment, one should take into account the objective results of the measure in question. It would be very hard for a claimant to prove the discriminatory governmental intent or motive. How could the plaintiff know the exact intent of the public measure that harmed him? Unless an official from the government expressly declares that the measure was applied to favor nationals, the only way to demonstrate the existence of a more privileged treatment accorded to domestic companies is to focus on the concrete effects of the aforementioned measure. Under the NAFTA legislation, the tribunal in the Feldman case asserted the following:

> "…requiring a foreign investor to prove that discrimination is based on his nationality could be an insurmountable burden to the Claimant, as that information may only be available to the government. It would be virtually impossible for any claimant to meet the burden of demonstrating that a government's motivation for discrimination is nationality rather than some other reason."[12]

Even considering that the claimant managed to prove the discriminatory intent, this does not automatically imply the occurrence of a treatment that will be more favorable to his domestic counterpart. Despite the government's aim to help his nationals, the international investor has also to prove that the breach of the national treatment effectively happened. This reasoning was confirmed in the S. D. Myers case:

> "Intent is important, but protectionist intent is not necessarily decisive on its own. The existence of intent to favor nationals over non-nationals would not give rise to a breach of Chapter 1102 of the NAFTA if the measure in question were to produce no adverse effect on the non-national complainant. The word 'treatment' suggests that practical impact is required to produce a breach of Article 1102, not merely a motive or intent that is in violation of Chapter 11."[13]

To adequately evaluate whether domestic and foreign investors are in like circumstances, a tribunal must consider the regulatory purpose of the measure in question. National governments have the right to fulfill their public policies. However, when they are trying to achieve their goals, they cannot discriminate between international and domestic companies, unless there is a reasonable exception. One may find this justification by analyzing the regulatory context in which discrimination may arise. Governments have to provide a non-discriminatory ground for regulatory differences that may lead to less favorable treatment. The award rendered in the GAMI case is quite illustrative:

> "The arbitrators are satisfied that a reason exists for the measure which was not itself discriminatory. That measure was plausibly connected with a legitimate goal of policy (ensuring that the sugar industry was in the hands of solvent enterprises) and was applied neither in a discriminatory manner nor as a disguised barrier to equal opportunity."[14]

---

[12] **Marvin Feldman v. Mexico**. ICSID Case n. ARB(AF)/99/1, para. 183.
[13] **Myers (S. D.) v. Canada**. NAFTA/UNCITRAL Tribunal (November 13, 2000), para. 254.
[14] **GAMI Investments, Inc. v. Mexico**. NAFTA/UNCITRAL Tribunal (November 15, 2004), at 114.

Assuming that a government may have several possibilities to attain the public policies previously established, is there any reliable guide to help arbitrators assess whether a certain governmental measure was legitimately chosen? Does this measure have to be simultaneously proportional and necessary? How should one ascertain the margin of appreciation under such a circumstance? Governments should be allowed to choose the best measure available to them. Nevertheless, the measure adopted must be proportional and necessary at the same time. Jurisprudence concerning art. XX of GATT/47 could provide a safe guide to investment litigation. Newcombe and Paradell (*op. cit.*, p. 178) explain that "the Appellate Body has stated that the required degree of nexus between a measure and a legitimate objective will [sic] based on the relative importance of the interest or value furthered by the challenged measure."

It is hard to find clear orientation in the decisions rendered by arbitral tribunals in order to answer the queries above. Nonetheless, the panel in the Trucking case may suggest, correctly, that a different standard should not be greater than necessary for reasonable regulatory purposes. In this case, Mexico argued that the US Administration had violate to its obligations regarding national treatment under NAFTA when it refused to lift a moratorium on the processing of applications allowing Mexican trucking companies to operate in US border states. The panel established to solve the dispute highlighted that

> "… the panel is of the view that the proper interpretation of Article 1202 requires that differential treatment should be no greater than necessary for legitimate regulatory reasons such as safety, and that such different treatment be equivalent to the treatment accorded to domestic service providers… it seems unlikely to the Panel that the "in like circumstances" language in Articles 1202 and 1203 could be expected to permit maintenance of a very significant barrier to NAFTA trade, namely a prohibition on cross-border trucking services."[15]

2.3. The most-favored nation clause

2.3.1. Definition, origin, and types of most-favored nation clause

[15] **Cross-Border Trucking Services**. NAFTA Arbitral Panel (February 6, 2001), at 258.

In the international investment treaties, an MFN clause is understood to mean that an investor from a party in an international agreement, or/and his investment (depending on the way the provisions of the treaty are drafted), would be treated by the host state no less favorably regarding a certain matter than another foreign investor (or/and his investment), who, in turn, benefits from a different treaty signed between his country and the host country. A right from the MFN clause generally comes from a BIT. However, it may also originate from Friendship, Commerce and Navigation Treaties under very rare circumstances.

During negotiations, states may draft an MFN provision in various manners. Some MFN clauses are narrow, others are broad. The depth of an MFN clause changes depending on the context, object, and aim of the treaty in question. Oftentimes, an MFN obligation may be drafted together with a national treatment obligation in the same clause. A common example is the German 1998 Model Treaty[16]:

> "(1) Neither Contracting State shall subject investments in its territory owned or controlled by investors of the other Contracting State to treatment less favourable than it accords to investments of its own investors or to investments of investors of any third State.
>
> (2) Neither Contracting State shall subject investors of the other Contracting State, as regards their activity in connection with investments in its territory, to treatment less favourable than it accords to its own investors or to investors of any third State."

Another relevant distinction is between the establishment and post-establishment phases. The latter means the period of the investor's permanence in the national market. The former indicates the phase prior to the investor's entrance into the market. Sometimes, states do not allow international investors to freely access the internal market. States try to protect their sovereignty in this specific phase. On the one hand, the traditional European model BIT only encompasses the post-establishment phase, making no reference to the expression "in like circumstances". On the other hand, the ordinary MFN clause in the US and Canadian BITs contain explicit provisions to both the establishment and post-establishment phases and is applied "in like circumstances". However, their BITs frequently list the sorts of transactions that

[16] Germany is the country that has signed more BITs around the world.

are covered. An example of the MFN clause in a US treaty is found in the US – Chile Free Trade Agreement. Its article 10.3 provides that:

> "(1) Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investment in its territory.
>
> (2) Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments."

Some subjects tend to be excluded from the incidence of an MFN clause in a BIT. Countries feel these topics are essential for sovereignty and implementation of public policies. The most common exceptions are regional economic integration, matters of taxation, subsidies, and government procurement. For example, Annex IV of NAFTA is dedicated to list exceptions to MFN obligation for treatment given pursuant to all prior bilateral or multilateral international agreements and for treatment granted pursuant to all such future agreements mainly with respect to aviation, fisheries, maritime matters, telecommunications networks and transport services (except for measures covered by the Telecommunications chapter of NAFTA or to the production, sale, licensing or radio or televisions programming).

The exception with relation to matters of taxation needs to be explained in depth. Tax issues are delicate in that they deal with states' sovereignty. Such an exception permits a country to grant a preferential tax treatment to nationals and firms of another state without having to give the same level of treatment to the counterparts of a country with which it has signed a BIT. By elaborating the aforementioned exception, states are free to handle tax problems in treaties that relates specifically to them. A study published by UNCTAD stresses that:

> "The exception allows a country to conclude a tax treaty granting special tax treatment to the investment of another country in return for other concessions without having to be concerned that other countries will have a right to the same treatment by virtue of the MFN provision in their BITs. Another reason for addressing tax relations through a

> separate treaty is that the complexity of tax matters may render such matters unsuitable of inclusion in the kind of standardized provisions that are typical of BITs."[17]

The service sector has become prominent in international trade transactions. More and more companies provide services abroad. Investment has significantly increased in this area in previous decades. During the Uruguay Round, states agreed upon elaborating a treaty specifically devoted to dealing with services in order to offer legal safety for traders. This treaty is the so-called "General Agreement on Trade in Services" (GATS). The GATS contains an MFN clause in its article II. However, it should be mentioned that some countries have notified WTO in relation to eventual commitments assumed in regional integration treaties or BITs. These commitments, in turn, may grant a higher standard of protection to their members and constitute an exception to the MFN obligation under the GATS.

GATS Article V(1) (entitled Economic Integration) does not prevent any of its members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement, provided that such an agreement meets the conditions set out in paragraph 1 of that article. Furthermore, GATS article V(6) provides that a service supplier of any member that is a juridical person constituted under the law of a party to an agreement meeting the conditions of paragraph 1 shall be entitled to treatment granted under such agreement, provided that it engages in substantive business operations in the territory of the parties to such agreement. As mentioned in the last paragraph, based on this exception to the MFN treatment contained in the GATS, several nations have expressed that certain agreements are exemptions to the MFN obligation. For instance, Poland has notified provisions on "commercial presence contained in promotion and protection of foreign investments agreements that go beyond limitations embodied in Poland's schedule of specific commitments." Singapore has also elaborated exemptions for preferential treatment coming from Investment Guarantees Agreements. Concrete examples of these exceptions are found in NAFTA articles 1101 and 1139, and EC Treaty articles 43-48.

An important concept concerning MFN treatment is the basic treaty. When considering two treaties, one between the granting country and the beneficiary country possessing the MFN

[17] UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD). **Bilateral Investment Treaties in the Mid-1990s**. UNCTAD/ITE/IIT/7 (1998), p. 63.

standard, and the other between the conferring country and a third country, the agreement that has the MFN obligation is called the basic treaty. The International Court of Justice has already clarified this concept in a paramount precedent. It stated, by majority, that "this the treaty which establishes the juridical link between the beneficiary State and a third party treaty and confers upon that State the rights enjoyed by the third party. A third-party treaty, independent and isolated from the basic treaty, cannot produce any legal effect as between … the beneficiary State and … the granting State (it is *res inter alios acta*)."[18] [19]

Having analyzed both the national treatment and the MFN obligation, how should eventual international investment arbitration be decided if either national treatment or MFN standard is more favorable? To which standard would the investor be entitled? On the whole, doctrine tends to accept that the investor can rely on each treatment in an independent way (both obligations are cumulative), unless there is a provision in a treaty that states otherwise. A useful guide to this topic is what the International Law Commission stressed in 1978:

> "The right of the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, to most-favoured-nation treatment under a most-favoured-nation clause is without prejudice to national treatment or other treatment which the granting State has accorded to that beneficiary State with respect to the same subject-matter as that of the most-favoured-nation clause."[20]

2.3.2. The most-favored nation clause applied by international arbitration

Unfortunately, a significant amount of BITs do not provide a solid basis in order to find the comparator when applying the MFN obligation. Exceptions to this rule are the BITs signed by the US that make reference to "in like circumstances".

---

[18] International Court of Justice. **Anglo-Iranian Oil Co. Case (UK v. Iran) (1952) ICJ Rep. 93**, at. 109.

[19] A study published by OECD asserts that "the decision of the Court contributed greatly to the clarification of the legal theory. Before the Court's decision, several legal writers presented the operation of the MFN treatment clause as an exception to the rule *pacta tertiis nec nocent nec prosunt* (i.e. that treaties produce effects only as between the contracting parties). Legal theory is now unanimous in endorsing the findings of the majority of the Court in the *Anglo-Iranian* case." (ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD). **Most-Favoured-Nation Treatment in International Investment Law.** September 2004, pp. 21-22).

[20] INTERNATIONAL LAW COMMISSION. **Draft Articles on Most-Favoured-Nation Clauses**. Art. 19(2), 1978.

It is a difficult situation when one has to compare the treatment of investors and investments under the host state's measures. The latter would have to give appropriate reasons for the purpose of justifying a differentiation between investors or investments. A good example that illustrates this last situation was the dispute Parkerings-Compagniet AS v. Lithuania where the plaintiff argued that the MFN standard of the BIT between Lithuania and Norway had not been respected. The comparator, a Dutch company called Pinus Proprius, got a more favorable treatment in relation to the building of a parking complex. The tribunal asserted that the Lithuanian government succeeded in providing legitimate grounds to justify an exception of the MFN standard:

> "The refusal by the Municipality of Vilnius to authorize BP's project in Gedimino was justified by various concerns, especially in terms of historical and archaeological preservation and environmental protection. These concerns are peculiar to the extension of BP's project in the Old Town and thus could justify different treatment with Pinus Proprius. In the absence of convincing evidence that Pinus Proprius benefited from a more favourable treatment in terms of administrative requirement, the Arbitral Tribunal finds that the Claimant failed to demonstrate a discrimination concerning the Gedimino car park."[21]

Another relevant aspect with respect to the MFN practice in international arbitration is the *ejusdem generis* principle. It means that an MFN clause can only deal with issues that belong to the same subject matter or the identical category of subject as that to which the clause refers. Even though its meaning may be apparently simple, praxis has demonstrated that its operation may be difficult. Negotiators of an MFN clause may face the dilemma of drafting it in broad terms or composing it too explicitly. This difficulty was evident in the Maffezini v. Spain case where the tribunal held that "… if a third-party treaty contains provisions for the settlement of disputes that are more favourable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favoured nation clause as they are fully compatible with the *ejusdem generis* principle."[22] The claimant was an Argentinian investor who alleged the breach of the MFN standard contained in the Argentine-Spain BIT because of the more favorable jurisdictional provisions of the 1991 Chile-Spain BIT.[23] The Argentinian investor highlighted that, because the Argentine-Spain BIT

[21] **Parkerings-Compagniet AS v. Lithuania.** ICSID Case n. ARB/05/8 (September 11, 2007), at 396.
[22] **Maffezini v. Spain**. ICSID Case n. ARB/97/7 (January 25, 2000), p. 21.
[23] The Argentine-Spain BIT established a waiting period of 18 months before an investor-state arbitration was initiated. However, the Chile-Spain BIT ruled that a six-month period was necessary for investor-state arbitration.

used the expression "in all matters subject to this Agreement", the more advantageous provisions of the other treaty would also to be applied in favor of the plaintiff. Although the court recognized the breach of the MFN standard, it pointed out the following caveat: "… as a matter of principle, the beneficiary of the clause should not be able to override public policy considerations that the contracting parties might not have envisaged as fundamental conditions for their acceptance of the agreement in question, particularly if the beneficiary is a private investor."[24]

Controversies concerning procedural matters did not only arise in the Maffezini v. Spain case; other arbitral cases also had to face such issues. Indeed, the debate whether the MFN clause should be applied only to substantive rules or should be extended to procedural provisions is one of the most problematic questions in international investment arbitration. A large number of those who defend the impossibility of application of the aforementioned clause to procedural matters stress that the aim of the contracting parties was to limit MFN obligation to substantive rules. This last position was confirmed by the arbitral court in the Plasma v. Bulgaria case:

> "[A]n 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."[25]

The discussion about the use of an MFN clause to enlarge the jurisdiction of a treaty-based tribunal is even more delicate. In other words, would the use of an MFN standard in order to incorporate a more favorable consent to arbitration granted by the host country in third-countries BITs be viable? This hypothesis occurs mainly

> "in situations where some BITs of a host State do not contain consent to investor-State dispute resolution at all, while others allow such recourse, where some host State BITs limit recourse to investor-State arbitration to certain causes of action, while others encompass a broader range of causes of action, and where different host State BITs provide for recourse to different dispute settlement fora … The majority of cases … have refused to accept such an extension." (Schill, 2009, p. 164).

[24] **Maffezini v. Spain**, p. 23.
[25] **Plama Consortium Ltd. V. Bulgaria**. ICSID Case n. ARB/03/24, Decision on Jurisdiction (8 February 2005), para. 223.

3. Brazil and international investment treaties

3.1. Should Brazil adopt international investment treaties?

Brazil signed 14 BITs in the 1990s. However, the fact that it did not ratify any of these BITs is striking.

The table below shows the BITs signed by Brazil and their dates of signature:[26]

Table 1 – Brazil's BITs

Country/territory	Date of Signature
Portugal	09 February 1994
Chile	22 March 1994
United Kingdom	19 July 1994
Switzerland	11 November 1994
France	21 March 1995
Finland	28 March 1995
Italy	03 April 1995
Denmark	04 May 1995
Venezuela	04 July 1995
Korea, Republic of	01 September 1995
Germany	21 September 1995
Cuba	26 June 1997
Netherlands	25 November 1998
Belgium/Luxembourg	06 January 1999

Some reasons explain why Brazil decided not to ratify this group of BITs. The first reason is of a political nature. Brazilian politicians feared that the country could lose sovereignty. They stated that the principle of equality of nations would be at stake if those treaties entered into force. Besides, this type of agreements was considered a consequence of the Washington

[26] UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD). **Bilateral Investment Treaties 1959-1999**. UNCTAD/ITE/IIA/2 (2000), p. 34.

Consensus influenced by neo-liberal tendencies and the OECD's recommendations. At that time, politicians thought that sovereignty was crucial to help national development and permit a strong Brazilian presence in the international arena. They also sensed that the way those BITs were drafted would harm the national interest because those agreements created obligations basically only for host states. As Brazil was an investment importer at that moment, its counterparts in the treaties would have only rights instead of duties.

The second justification is based on economic grounds. Brazil was managing to attract inward foreign investment. Many multinational companies were building plants and transferring technology. Privatizations also contributed to increase the level of FDI in the national territory. In spite of the fact that other developing nations had signed BITs to get more international resources, this behavior was not welcomed by Brazilian authorities. Brasília felt confident in continuing to adopt a pessimistic view in relation to BITs.

The third explanation is legal and more technical. Some asymmetries between some BITs provisions and the internal Brazilian legislation were pointed out. Those BITs provided that a prompt and effective compensation should be awarded in freely convertible currency in case of expropriation. Thus, this condition would collide with the Brazilian laws that adopt diverse criteria to solve the expropriation issue. In fact, national legislation admits the possibility of other forms of indemnity such as "expropriation with payment in public debt bonds issued with the prior approval of the Federal Senate, redeemable within up to 10 years, in equal and successive annual installments, ensuring the real value of the compensation ant the legal interest" (paragraphs 3 and 4, item 3, of article 182 of the Brazilian Constitution). Moreover, while BITs allow investors to freely transfer capital (for example: profits, royalties, and dividends), the Brazilian law n. 4131 of September 3rd 1962 imposes more rigid conditions for the transference of capital to foreign countries. In addition, Brazil seemed to approve the Calvo Doctrine. This explains why politicians did not accept investor-state arbitration held by an international arbitral tribunal.

Brazil's reluctance with respect to BIT's is not valid anymore.

The Brazilian economy was the world's eighth largest by GDP (Purchasing Power Parity) with an amount of US$2.194 trillion in 2010.[27] Its stock of FDI at home totaled US$349.2 billion on December 31st 2010, occupying the thirteenth position in the world ranking.[28] The Brazilian economy has consolidated its stability. One should also take into account other elements in order to assess the FDI development in Brazil: "the domestic consumption growth, the export expansion, the privatization process, a competitive currency, and a relatively stable juridical system" (Wei, 2010, pp. 7-8). What is more, BITs are a useful way to preserve investments that have already been made in the national territory. Swenson stresses that "countries that had already received larger stocks of foreign investment were more likely to sign BITs than were countries that had been less successful in attracting foreign investment … BITs may have enabled these countries to hold onto previous investments" (Swenson, 2009, p. 457). Thus, one may observe that the panorama has significantly changed during the last two decades.

Notwithstanding the importance of the motives listed in the last paragraph, the most relevant factor to accepting BITs politically is that several Brazilian multinationals are exporting at a high level. The stock of Brazilian FDI abroad totaled US$131 billion as of December 31st 2010.[29] The table below indicates the 20 largest Brazilian exporters and their participation in the total exports of all Brazilian firms, which totaled US$201.91 billion in 2010:[30]

Table 2 – Brazil's 20 largest exporters

1	Vale	US$24.04 billion (11.91%)
2	Petrobrás	US$18.18 billion (9.01%)
3	Bunge	US$4.30 billion (2.13%)
4	Embraer	US$4.15 billion (2.06%)
5	Samarco Mineração	US$3.21 billion (1.59%)
6	Cargill	US$3.02 billion (1.50%)
7	ADM do Brasil	US$2.63 billion (1.30%)
8	Braskem	US$2.47 billion (1.22%)
9	Sadia	US$2.28 billion (1.13%)
10	BRF	US$2.12 billion (1.05%)
11	ArcelorMittal	US$2.03 billion (1.01%)

[27] CENTRAL INTELLIGENCE AGENCY (CIA). **The World Factbook**.
[28] *Id*.
[29] *Ibidem.*
[30] Ministério do Desenvolvimento, Indústria e Comércio Exterior. Available at www.mdic.gov.br. Access on: April 4th 2011.

12	Shell Brasil	US$1.93 billion (0.96%)
13	Volkswagen	US$1.75 billion (0.87%)
14	Louis Dreyfus	US$1.75 billion (0.87%)
15	JBS	US$1.73 billion (0.86%)
16	Copersucar	US$1.62 billion (0.81%)
17	Fibria	US$1.57 billion (0.78%)
18	Mercedes Benz	US$1.54 billion (0.77%)
19	CBMM	US$1.54 billion (0.77%)
20	General Motors	US$1.46 billion (0.73%)

In the Brazilian case, it is essential to analyze BITs' feasibility, not only from a host state's perspective, but also from a home state's view. Accordingly, BITs may be a powerful tool to foster Brazilian exports. If Brazilian authorities want Brazil to be a prominent global trader, they must support policies that augment Brazil's commercial flow. BITs are one of them.

3.2. The most-favored nation and the national treatment clauses in the bilateral investment treaties signed by Brazil

The idea in this section is to assess the main questions with respect to MFN and national treatment obligations in the BITs signed but not ratified by Brazil. Despite the absence of BITs in the current Brazilian framework, the importance of the analysis of such clauses in the series of BITs signed by the Brazilian government resides in the fact that it permits ascertaining both the mistakes and the gains they would have caused if those BITs had been ratified. Thus, this approach might act as a guide in the BITs Brazil might sign in the near future.

Consumption and saving decisions are relevant topics in economy. People and firms analyze how much they are willing to consume or save depending on how the economy's prospects will be both in the short-run and in the long-run. The cost/benefit analysis is present in any aspect of the decision process. The same phenomenon occurs regarding investment:

> "Like consumption and saving decisions, the decision about how much to invest depends largely on expectations about the economy's future. Investment also shares in common with saving and consumption the idea of a trade-off between the present and the future. In making a capital investment, a firm commits its current resources (which could otherwise be used, for example, to pay increased dividends to shareholders) to increasing its capacity to produce and earn profits in the future." (Abel; Bernanke; Croushore, 2011, p. 120)

By keeping in mind that BITs play a primary role in the decision-making process with relation to investment, it is also manifest that MFN and national treatment standards are fundamental keys for investors' analysis. Subsequently, one country must evaluate very well the effects of these clauses in its BITs.

When states are assessing the eventual impacts of a BIT under negotiation, they may refuse to draft an MFN standard because they may "consider it to be a disincentive to negotiate mutually acceptable improvements in their relations, e.g. investment or trade, as one party may benefit from improvement only made by the other party without having to improve its own standards. It can thus lead to so-called free rider effects" (Ziegler, 2010, p. 80). If Brazilian officials, during a round of negotiations, wish to reduce the impact of this problem, a viable path is

> "to make it not automatic or unconditional but conditional (conditional MFN treatment). An alternative is to provide explicit (temporary) exceptions … Conditional MFN treatment normally means that the application of new, more favourable rules or preferences is only granted to existing treaty partners if they agree to apply the same rules; conditional MFN treatment therefore is basically a right to obtain more favourable treatment upon condition of doing the same (reciprocity) while unconditional MFN treatment requires no renewed commitment by this beneficiary." (Ziegler, *op. cit.*, p. 80)

During the mid-1990s, Brazilian negotiators preferred to adopt the post-establishment model concerning the MFN and national treatment obligations. In this situation, Scandiucci Filho asserts that "the domestic legislature has the prerogative to stop, select, filter, limit or encourage the admission of the foreign investor, regardless of the conditions offered to the functioning of the Brazilian company, but cannot discriminate against him once admitted, that is, during the phase that investment is established in the country" (2007, p. 286).

A typical post-establishment model is contained in article 2.1 of the Brazil-Germany BIT which provides that "each Contracting Party shall promote, as far as possible, and shall admit investments of investors of the other Contracting Party in its territory, in accordance with existing legal provisions, and shall accord to such investments fair and equitable treatment."

In some of the Brazilian BITs, the MFN and national treatment clauses are drafted together. A good example is the Brazil-Holland BIT, whose article 3.2. reads: "more specifically, each Contracting Party shall grant to such investments treatment which in no case be less favorable than that accorded either to investments of its own investors, or to investments of investors of a third State, whichever is more favorable to the investor in question."

Unfortunately, neither the MFN clause nor the national treatment standard provide safe guidance to find the comparator *vis-à-vis* the foreign investor or investment. Unlike the US model BIT, there is no reference to the expression "in like circumstances." This lack of parameters might cause a certain difficulty to arbitrators in eventual litigation.

Another significant point is that a large number of Brazilian BITs misuse the terms "investor" and "investment" in relation to MFN and national treatment obligations; that is, they use both terms indistinctly in such clauses. However, these two concepts are generally defined in the first article of a BIT. As a result, this misuse may cause the final judgment of an arbitral dispute to be more complex.

Brazilian BITs frequently provide that each contracting party shall grant non-discriminatory, fair and equitable treatment to investments made by investors of the other contracting party in its territory. The interpretation of fair and equitable treatment may be very subjective. Nonetheless, it is aimed at granting the foreign investment a general protection against arbitrary measures decided by the host country. Under fair and equitable treatment, the protection conferred to the foreign investor does not depend on the treatment granted to the national investor in analogous situations. Thus, the fair and equitable standard is different from the MFN and the national treatment obligations, as it provides a minimum level of protection. The guarantees offered by the MFN and national treatment clauses are at a higher level than those conferred by fair and equitable treatment.

Sometimes, a BIT may make reference not only to the expression "foreign investment" but also to the expression "investments in which investors of the other contracting party have holdings." In the Brazilian-Germany BIT, a problem of interpretation may occur because its article 3.1 uses both expressions for providing protection for investments under the MFN and the national treatment standard. However, its article 3.2 extends this protection to the activities related to investments made in the host state. The problem is that, in the second case, the protection is not also expanded to the "investments in which investors of the other contracting party have holdings," that is, the provision of article 3.2 makes reference only to the broader expression "investments," which might raise the question of whether it also encompasses the "investments in which investors of the other contracting party have holdings."

Brazilian BITs follow the tendency to exclude from the MFN and the national treatment clauses better treatments conferred by processes of economic integration and tax treaties (especially agreements aimed at avoiding double taxation).

Brasília should pay attention to the undesired extension of advantages via the MFN obligation when it assumes additional responsibilities in other texts other than a BIT. For instance, article 7.1 of the Brazil-Germany BIT provides that "if the laws of any contracting party or obligations under international law, which exist or will exist between the contracting parties beyond this agreement, result in a general or especial regulation in which it is given to investments of investors of the other contracting party a more favorable treatment than that provided in this agreement, this regulation will prevail to the extent that it is more favorable." Such an advantage may be expanded to investments of investors of a third country that signs a BIT with Brazil. In case of a great series of BITs that provide the MFN standard, the inclusion of a clause that provides additional obligations via extra different texts may be treacherous.

The Maffezini v. Spain dispute showed that if the contracting parties draft a very generic expression regarding MFN obligation, they may face serious obstacles in international arbitration. The Brazil-Italy BIT may lead to trouble because it provides, in its article 3.1, that "in all matters governed by this agreement, the treatment referred to in paragraph 2 of Article II shall not be less favorable than that accorded by a contracting party to investments made in its territory by investors of a third country." The term "in all matters governed by this agreement" is very broad. For instance, while article 8.2 of the same BIT provides that an investor can choose local courts or international arbitration to solve disputes against the other state, article 8.3 provides that "opting for one of these two alternatives will be final and irreversible." If Brazil ratifies another BIT that grants a more favorable treatment concerning procedural matters to another foreign investor, this advantage shall be expended to an Italian investor owing to the MFN clause. This is what happened with the Brazil-Finland BIT. Its article 9.3 reads the following: "an investor who has submitted a dispute to national jurisdiction may still have recourse to any court of arbitration referred to in paragraph 2 of this Article if, before being issued any ruling on the matter by a national court, such an investor states that he no longer continues with his lawsuit in national courts." As this last provision is more advantageous than that contained in article 8.3 of the Brazil-Italy BIT, it trumps the rule given by article 8.3.

3.3. International investment in the MERCOSUR's framework

MERCOSUR was launched by the Treaty of Asunción in 1991. At the beginning, the member-states intended to establish a common market in the region. This process would lead to the creation of an External Common Tariff (ECT). However, the honey-moon period was over and stagnation arose. The ECT is far from reality in MERCOSUR. Crises occurred and many experts in international trade and investment believed that this economic process of integration would not be feasible.

One reason that may have contributed to hamper MERCOSUR's development is the wide gap between its members. While Argentina and Brazil are the largest players, Paraguay and Uruguay have had more difficulty putting their matters in the agenda. Consequently, these two countries may feel excluded from the negotiations. Flôres Jr. explains that

> "the lack of a third huge partner, which may be able to alter the combinatorial alliances, by thus avoiding the monotonous conflict between the two largest States-Parties, is worrying. In the present situation, the gaps now focus on either one of the smaller States-Parties or on a big one. In the first case, they are considered low priority and, at best, converted into a demand for funds or exceptions. In the second case, they become an additional item on the agenda of conflict, then being confined to the generally unproductive bilateral dialogue." (2007, p. 199).

There are two treaties relating to investment in the MERCOSUR. The Colônia Protocol, signed on January 17th 1994, deals with investment from the states-parties. The Buenos Aires Protocol, signed on August 5th 1994, deals with investment from third-party states. Neither has entered into force, mainly on account of the asymmetries between MERCOSUR's members.

Roughly, the aforementioned treaties have the same structure established in the Brazilian BITs.

A relevant observation is that the Buenos Aires Protocol provides, in article 2.C.2, that "States-Parties undertake to grant to investments of investors of Third States a treatment no more favorable than that established in this Protocol." The problem resides in the question of what would happen if a MERCOSUR member had conferred a more beneficial treatment to an investor from a third-party state before the signature of the aforementioned protocol or if, in addition to this last situation, a BIT that was signed with a different third-party state after the eventual entry into force of the Buenos Aires Protocol and, via the MFN standard, allowed an investor to benefit from a different BIT previously signed.

In this last case, there would be the following sequence of treaties: a) a BIT prior to the Buenos Aires Protocol (let's say BIT A), b) the Buenos Aires Protocol, and c) another BIT ratified after the Buenos Aires Protocol (BIT B). The doubt is whether, because of the restriction imposed by the Buenos Aires Protocol, BIT B would manage to give, via the MFN obligation, the more favorable treatment contained in BIT A. It is difficult to answer.

Molinuevo and Torrent explain well the chaotic situation described above:

> "On the relationship between BITs, it shows that, far from being an homogeneous mass of agreements that all cover more or less alike the same issues, as is very often thought, different approaches towards investment protection and liberalization run through the global web of bilateral agreements. The BITs "spaghetti bowl", indeed, is not made of one single pasta; *tagliatelle* and *fettucine* of quite different making and cooking cross over and overlap. This mix of different *pastas* of investment regulation is not legally inert, commitments on investment may expand through the intersection of MFN clauses and the whole bowl may become much more difficult to digest than usually thought." (2004, p. 15)

Final remarks

FDI plays a vital role in the progress of developing nations that do not have the required conditions to foster their economies all by themselves. Therefore, FDI is necessary to help them achieve their economic goals. From such a panorama, BITs are relevant. As Vandevelde points out, “a liberal investment policy rests on principles of investment neutrality, investment security, and market facilitation. Of these three, most BITs promote principally investment security.” (2010, p. 108)

The non-discrimination principle relies on the premise that the parties involved in a legal relationship should be considered in a way that would not imply unfair treatment between them. As to international investment, such a principle plays a prominent role and has been originated basically from the international trade law.

To understand better the application of the non-discrimination principle to the investment field, one should also examine the GATT/WTO jurisprudence because this approach may give an important introduction to the basis and nuances of the non-discrimination principle.

The scope of the national treatment, regarding the investment area, goes well beyond its implementation in trade agreements. Thus, a wider range of categories of economic transactions may be subjected to national treatment disciplines under investment agreements than to those under commercial agreements. Nevertheless, when it comes to politics, its concession is ordinarily more delicate than granting an MFN standard because the “national treatment may require difficult changes in existing laws and policies favouring national companies, while most-favoured-nation treatment usually does not.” (Salacuse, 2010, p. 246)

During negotiations, states may draft an MFN provision in various manners. Some MFN clauses are narrow; others, broad. The depth of an MFN clause changes depending on the context, object, and aim of the treaty under discussion. This factor may contribute to hamper the process of standardization of the international arbitral jurisprudence concerning investment law.

Due to the lack of explicit guidance in several BIT's MFN and national treatment provisions, arbitral tribunals had to develop specific rules in order to resolve matters brought before them. However, as international investment law is a relatively new area in the legal world, arbitral jurisprudence has a long way ahead.

Brazil signed 14 BITs in the 1990s but did not ratify any of them. However, the reasons that led to the non-ratification of these treaties have become weaker. Brazil has managed to stabilize its economy during the last two decades. Besides, Brazilian investment abroad has significantly increased. This last element changes considerably the way one should evaluate the viability for Brazil to sign new BITs.

Certain terminological imprecisions, with relation to MFN and national treatment obligations, exist in the BITs signed by the Brazilian government. Although, in international negotiations, it is not always easy to draft such clauses in an advantageous way for the Brazilian interests, these imprecisions should be changed for the purpose of attaining more legal safety to national investors.

Brasília should also pay attention to eventual undesired extension of obligations via the MFN standard whenever the negotiation of a BIT is in dispute. In the case of a great series of BITs providing the MFN standard, there may be an unwilling expansion of commitments bilaterally settled that, in the end, via the MFN clause, may favor countries that are not signatories of the bilateral agreement at issue.

Developing states are endeavoring to attract foreign investment in order to foster their economies in a reality where competition among countries becomes ever and ever stronger. As de Soto highlights, "we must not forget that globalization is occurring because developing and former communist nations are opening up their once protected economies, stabilizing their currencies, and drafting regulatory frameworks to enhance international trade and private investment." (2000, p. 210). In such a scenario, as BITs play a very active role, the Brazilian government must urgently re-assess national policies towards such treaties.

Bibliography

ABEL, Andrew B.; BERNANKE, Ben S.; CROUSHORE, Dean. **Macroeconomics**. United States: Addison-Wesley, 2011.

CENTRAL INTELLIGENCE AGENCY (CIA). **The World Factbook**.

De SOTO, Hernando. **The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else**. New York: Basic Books, 2000.

DiMASCIO, NICHOLAS; PAUWELYN, Joost. **Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?** The American Journal of International Law, 102: 48-89, 2008.

FLÔRES JR., Renato G. **Investimento Direto Estrangeiro no Mercosul: Uma Visão Geral.** In: AMARAL JÚNIOR, Alberto do; SANCHEZ, Michelle Ratton (coords.). *Regulamentação Internacional dos Investimentos: algumas lições para o Brasil*. São Paulo: Aduaneiras, 2007:199-225.

FRANCK, Susan D. **Empirically Evaluating Claims About Investment Treaty Arbitration**. North Carolina Law Review, vol. 86, p. 1 (2007).

HAYEK, Friedrich A. von. **The Road to Serfdom: Text and Documents**. The Definitive Edition. Chicago: The University of Chicago Press, 2007.

INTERNATIONAL COURT OF JUSTICE. **Anglo-Iranian Oil Co. Case (UK v. Iran) (1952) ICJ Rep. 93**.

INTERNATIONAL LAW COMMISSION. **Draft Articles on Most-Favoured-Nation Clauses**, 1978.

LAPLANE, Mariano Francisco. **Fluxos de Investimento e o Processo de Globalização**. In: AMARAL JÚNIOR, Alberto do; SANCHEZ, Michelle Ratton (coords.). *Regulamentação Internacional dos Investimentos: algumas lições para o Brasil*. São Paulo: Aduaneiras, 2007: 27-36.

LEAL-ARCAS, Rafael. **The Multilateralization of International Investment Law**. North Carolina Journal of International Law and Commercial Regulation, 35:33-135, 2009a.

__________Towards the Multilateralization of International Investment Law. Journal of World Investment and Trade, 10:865-919, 2009b.

MOLINUEVO, Martín; TORRENT, Ramon. **BITs and GATS: variable geometry or a bit (or a lot) of a mess?** Observatório de la Globalización, Universidad de Barcelona, processed, 2004.

NEWCOMBE, Andrew; PARADELL, Lluís. **Law and Practice of Investment Treaties. Standards of Treatment**. The Netherlands: Kluwer Law International, 2009.

ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD). **Most-Favoured-Nation Treatment in International Investment Law.** September 2004.

__________The Multilateral Agreement on Investment: Commentary to the Consolidated Text. 22 Apr. 1998, DAFFE/MAI(98)8/REV1.

SALACUSE, Jeswald W. **The Law of Investment Treaties**. New York: Oxford University Press, 2010.

SCANDIUCCI FILHO, José Gilberto. **O Brasil e os Acordos Bilaterais de Investimentos**. In: AMARAL JÚNIOR, Alberto do Amaral; SANCHEZ, Michelle Ratton (coords). *Regulamentação Internacional dos Investimentos: algumas lições para o Brasil*. São Paulo: Aduaneiras, 2007: 271-301.

SCHILL, Stephan W. **The Multilateralization of International Investment Law**. New York: Cambridge University Press, 2009.

SWENSON, Deborah L. **Why do developing countries sign BITs?** In: SAUVANT, Karl P.; SACHS, Lisa E. (eds.). *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows*. New York: Oxford University Press, 2009: 437-457.

TABET, Sylvie. **Application de l'obligation de traitement national et de traitement de la nation la plus favorisée dans la jurisprudence arbitrale en matière d'investissement. Nouveaux problèmes à la lumière de la jurisprudence de l'OMC**. In: KAHN, Philippe; WÄLDE, Thomas W. (eds.). *Les Aspects Nouveaux du Droit des Investissements Internationaux. New Aspects of International Investment Law*. Leiden/Boston: Martinus Nijhoff Publishers, 2007: 353-389.

TUDOR, Ioana. **The *Fair and Equitable Treatment Standard* in the International Law of Foreign Investment**. New York: Oxford University Press, 2008.

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD). **Bilateral Investment Treaties 1959-1999**. UNCTAD/ITE/IIA/2 (2000).

__________Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking. UNCTAD/ITE/IIA/2006/5 (2007).

__________Bilateral Investment Treaties in the Mid-1990s. UNCTAD/ITE/IIT/7 (1998).

__________National Treatment. UNCTAD Series on issues in international investment agreements. UNCTAD/ITE/IIT/11 (Vol. IV) (1999).

__________**Occasional Note: Many BITs Have Yet to Enter into Force**. UNCTAD/WEB/ITE/IIA/2005/10 (2005).

VANDEVELDE, Kenneth J. **Bilateral Investment Treaties: history, policy, and interpretation**. New York: Oxford University Press, 2010.

WEI, Dan. **Bilateral investment treaties: an empirical analysis of the practices of Brazil and China**. European Journal of Law and Economics. DOI 10.1007/s10657-010-9157-z, 2010.

WORLD TRADE ORGANIZATION (WTO). **Chile – Taxes on Alcoholic Beverages,** WT/DS87/AB/R.

__________**Japan – Taxes on Alcoholic Beverages**, WT/DS8/AB/R, WT/DS10/AB/R & WT/DS11/AB/R.

__________**Ministerial Declaration of 14 November 2001**. WT/MIN(01)/DEC/1.

YACKEE, Jason Webb. **Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties**. ExpressO. Available at http://works.bepress.com/jason_yackee/1. Access on 03/14/2011.

ZIEGLER, Andreas R. **The Nascent International Law on Most-Favoured-Nation (MFN) Clauses in Bilateral Investment Treaties (BITs)**. In: HERMANN, C.; TERHECHTE J. P. (eds.). *European Yearbook of International Economic Law 2010, Volume 1, Part 1*. Germany: Springer-Verlag, 2010:77-101.

Table of cases (*ad hoc* arbitral tribunals)

Cross-Border Trucking Services. NAFTA Arbitral Panel (February 6, 2001).

GAMI Investments, Inc. v. Mexico. NAFTA/UNCITRAL Tribunal (November 15, 2004).

Marvin Feldman v. Mexico. ICSID Case n. ARB(AF)/99/1 (December 16, 2002).

Maffezini v. Spain. ICSID Case n. ARB/97/7 (January 25, 2000),

Myers (S. D.) v. Canada. NAFTA/UNCITRAL Tribunal (November 13, 2000).

Parkerings-Compagniet AS v. Lithuania. ICSID Case n. ARB/05/8 (September 11, 2007).

Plama Consortium Ltd. V. Bulgaria. ICSID Case n. ARB/03/24, Decision on Jurisdiction (8 February 2005).