Introduction

Since its inclusion in the first bilateral investment treaty (Germany-Pakistan BIT), the Most-Favored-Nation (MFN) clause has become a frequently included provision in international investment agreements (IIAs). MFN clause interpretation and application is a controversial topic in international investment law. Debates are mainly concerned with the appropriate scope of the MFN clause in IIAs, especially the extent to which a given clause incorporates substantive and procedural treatment in other IIAs. It has been argued that the MFN clause should be applied as a treaty tool to multilateralize more favorable treatment. If this argument is accepted, an expansive interpretation of a given MFN clause – which extends its application to procedural and/or substantive provisions not contained in the basic treaty – should be preferred.1 Meanwhile, some scholars insist on a case-by-case examination of MFN clauses without presumptions.2 This debate has led to inconsistent decisions in Investor-State Dispute Settlement (ISDS). ISDS tribunals have adopted different – and, at times, directly opposing – interpretations of MFN clauses, this despite relying on similar interpretation methods.

This book critically engages with the above discussion in order to propose a more balanced method for interpreting MFN clauses in IIAs. Its arguments are developed over the course of six chapters in total. Chapter 1 traces the use of the MFN clause from a historical perspective: from its beginnings in the 11th century to its inclusion in modern IIAs. It is noted that the prevalence of the MFN clause in international agreements reflects the contemporary status observed in the global economy of given time. It thrives in liberal economic atmospheres and recedes in times of war or times of economic conservatism. The current IIA system is witnessing a paradigm shift whereby treaties are pursuing a more balanced relationship between state interests and investor protection, and the MFN clause plays a key role in the type of IIAs pursued by states.


Chapter 2 discusses the main methods of interpretation applicable to MFN clauses, looking mainly at customary international law and Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT). This chapter shows that tribunals have reached diverging conclusions based on their assumptions about the relationship between the regulatory power of host states and the protection of foreign investments and investors, even when relying on the same interpretive methods.

Chapter 3 continues examining the MFN clause in case law. It focuses on cases in which claimants invoke the MFN clause to obtain a higher standard of substantive treatment. Specifically, two groups of cases are analyzed. The first of these includes cases in which the MFN clause has been used to provide de facto more favorable treatment to claimants. The second group includes cases in which the MFN clause has been used to accord higher standards of treaty protection, including the fair and equitable treatment (FET) standard, full protection and security, the protection afforded by umbrella clauses, and stronger protections in relation to expropriation.

The case law concerning the procedural application of MFN clauses will be examined in Chapters 4 and 5. Chapter 4 examines the case law on the application of MFN clauses to avoid procedural preconditions, such as the one contained in Article X(2) of the Spain-Argentina BIT, which requires that disputes be brought before a domestic court of the host state within a certain period of time before any claim can be brought in front of the international tribunal. Chapter 5 deals with cases in which MFN clauses have been invoked to extend the jurisdiction of tribunals. Specific analysis is provided for each case, including in relation to the position adopted by each tribunal and its application of interpretive methods. After examining the case law, Chapter 6 concludes with observations on the changing nature of the formulation of MFN clauses in modern IIA s and considers the manner in which states, as potential disputing parties, may respond to expansive invocations of MFN clauses in ISDS practice.

Throughout the above chapters, it is suggested that the MFN clause plays an essential role in the current trend of IIA renegotiation, and that MFN clauses in IIAs should not as a general proposition be employed as a tool which multilateralizes international obligations. The interpretation and application of MFN clauses should be based on a case-by-case assessment, not on tribunal assumptions. Specifically, interpretation should be guided by the interpretive methods of international law, including Articles 31 and 32 of the VCLT and the ejusdem generis principle. In addition, tribunals should consider other seminal parameters to adopt responsible MFN interpretations. These parameters include, for example, the fundamental role of state consent to international
arbitration, a proper balance between investment protection and countries’ regulatory space, as well as the ongoing IIA reform to strengthen countries’ right to regulate on urgent issues such as sustainable development, public health and climate change, among others.