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Carlos Jiménez Piernas (ed.) /
Alberto M. Aronovitz (ass. ed.)

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From Relativism to Cooperation

Universidad de Alcalá

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José Ángel Rueda García*

The Most-Favoured-Nation Clause as a Remedy Against Fragmentation of International Investment Law. Some Reflections in View of Spanish Practice

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1. Introduction

It may be said that the main cause of the fragmentation of international investment law is the specific drafting of the treaties that regulate this topic, particularly

* Associate, Cuatrecasas, Gonçalves Pereira, Madrid.

bilateral investment treaties between States ("BITs").[1] Two factors should be taken into account in this regard:

On the one hand, an international treaty only binds States party thereto (*res inter alios acta*) and has effect, in principle, on neither non-signatory third-party States (*pacta tertiis nec nocent nec prosunt*) nor, by extension, nationals of those third-party States.

On the other hand, according to the most recent UNCTAD estimates,[2] 182 States and territories are parties to at least one BIT,[3] with 3,240 international investment agreements ("IIAs") having been signed as of 2013. In addition, most of these treaties respond to the same structure with substantive and procedural protections for foreign investments, notwithstanding some differences among them (sometimes particularly relevant). It is therefore reasonable to suggest that, despite the *res inter alios acta* principle, an IIA should not be considered in complete isolation, but rather as a piece of a system which, by definition, should be linked with the rest of elements of that system.

As noted, there can be significant differences between the specific wordings of the IIAs signed by a State. The reasons may be varied: (i) the dynamics of negotiating treaties with little technical rigor, although there is case law where a tribunal has upheld the role of the State officials who negotiated an IIA;[4] (ii) to negotiate based

1 In Spanish, "APPRI" ("*acuerdo de promoción y protección recíproca de inversiones*"). The late Professor García Rodríguez used it systematically in her papers on the Spanish conventional practice on this matter. See GARCÍA RODRÍGUEZ, I., *La protección de las inversiones exteriores* (los Acuerdos de Promoción y Protección Recíproca de Inversiones celebrados por España), Valencia 2005.

2 UNCTAD, World Investment Report [WIR] 2014, available at http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf (25.03.2015).

3 *UNCTAD, World Investment Report [WIR] 2014,* see n. 2, pp. 222-225. Annex table 7 of WIR 2014 refers to "*Economies and territories*" that are party to at least one BIT. That category includes the Special Administrative Regions of Hong Kong and Macau (China), the Palestinian Territory and Taiwan Province of China. We counted Belgium and Luxembourg separately although they usually negotiate BITs jointly under the "Belgo-Luxembourg Economic Union."

4 In *Aguas del Tunari, S.A. v. Bolivia* (ICSID Case No. ARB/02/3), Decision on Respondent's Objections to Jurisdiction, 21.10.2005, available at http://italaw.com/documents/AguasdelTunari-jurisdiction-eng_000.pdf (25.03.2015), the tribunal had to interpret a sentence of Article 1(b)(iii) of the Netherlands-Bolivia BIT in light of the Vienna Convention on the Law of Treaties ("VCLT"), 23.05.1969 (1155 *UNTS* 331; for Spain, BOE No. 142, 13.06.1980). The tribunal held that: "The Tribunal notes that Article 31(4) of the Vienna Convention indicates that a special meaning shall be given to a term if the parties so intended the special meaning. There is no indication in the record that any special meaning for the word 'controlled' was intended by these contracting parties. The Tribunal observes, however, that the negotiators of the Netherlands-Bolivia BIT likely possessed a sophisticated knowledge of business and law. For such persons, the ordinary meaning of a word or phrase also includes the

on the model BITs of each State and treating to combine them the best way; (iii) that, in some cases, one State had to bow to respect the wording of the model BIT of its counterparty; or (iv) that there was no consistent conventional policy between negotiating teams, that worked separately without any coordination.

These differences may be observed in, for example, the current treaty practice of Canada, Mexico and the United States of America ("USA"), the three States party to the North American Free Trade Agreement ("NAFTA"),[5] especially after the critical interpretation the Free Trade Commission of the Treaty gave to some provisions of its Chapter XI in 2001.[6] Since then, new BITs and investment chapters of free trade agreements signed by these three States clearly reflect the influence of that interpretation;[7] in fact, the substantive and procedural provisions

legal meanings given to such words or phrases. The Tribunal thus turns to consider the legal meaning of 'control' and controlled.'" (para. 230; emphasis added). It his dissenting opinion (Declaration attached to the Decision) one of the arbitrators nonetheless concurred with the majority on this point (para. 27).

5 17.12.1992, available at http://www.ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta (25.03.2015).

6 NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions ("2001 Notes of Interpretation"), 31.07.2001, available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/nafta-interpr.aspx?lang=en (25.03. 2015). Undoubtedly the most important issue for the protection of investments has been determining the scope of protection of the standard set out at NAFTA Article 1105(1), "*minimum standard of treatment*," which includes fair and equitable treatment and full protection and security: "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." The Commission held that: *"The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."*

7 For USA see the clarification included in Article 5(2) of its 2012 Model BIT: "For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights", available at http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf (25.03.2015). It had included that clarification in the 2004 Model BIT, available at http://www.state.gov/documents/organization/117601.pdf (25.03.2015). For Canada, see the clarification included in Article 5(2) of its 2004 Model BIT, available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/2004-FIPA-model-en.pdf (25.03.2015), which has also been included in Canadian trade agreements.

of all those new instruments have been drafted since then with greater precision (and more restrictions) than before.[8]

Outside that region, many other States have chosen to regulate the protection of foreign investments between them by using the same open legal concepts but without providing any guidance to interpreters about their contents. The problem lies on the differences in nuance in the wording of these legal concepts which lead to reasonable doubts regarding their intended scope in the IIA at stake. These differences create uncertainty on potential investors and may influence their decision to invest in a particular jurisdiction or, at least, the legal form in which their investment in that jurisdiction will be structured.[9]

Consequently, there arises the need to find a remedy in search of the systemic coherence of the instruments of investment protection of the host State. And this is where most-favoured-nation clauses ("MFN clause") may weave a thread to connect the host State's IIAs in the form of a coherent network of substantive and procedural protections for foreign investors.[10] In this paper we will deal with this problem, faced by practitioners in international investment law daily, from the perspective of the Spanish conventional practice (Chapter 2.). We will then attempt to address it by applying the rules of treaty interpretation accepted in international law (Chapter 3.) and arrive at solutions (Chapter 4.). We will then examine the development of jurisprudence on this matter (Chapter). Finally, we will present some conclusions and proposals (Chapter 6.).

[8] An exception to the influence of the 2001 Notes of Interpretation is Article IV of Spain-Mexico BIT, 10.10.2006 (for Spain, *Boletín Oficial del Estado* "BOE" No. 81, 03.04.2008; correction, BOE No. 121, 19.05.2008), as it does not contain any additional paragraph that may restrain the investors' right to benefit from just the minimum standard of treatment of customary international law. See *infra* n. 32-33 and PASCUAL-VIVES, F.J., Nuevas manifestaciones de la segunda generación de Acuerdos sobre la Promoción y la Protección Recíproca de las Inversiones en España: los acuerdos celebrados con Kuwait y con México, (2008) LX-2 *Revista Española de Derecho Internacional*, p. 695.

[9] As indicated by SALOMON, C. and FRIEDRICH, S., How Most-Favoured-Nation Clauses in Bilateral Investment Treaties Affect Arbitration, (October 2013) *Practical Law Arbitration*, available at http://www.lw.com/thoughtLeadership/favoured-nation-clauses-arbitration (25.03.2015), "[MFN clauses] help avoid economic distortions that would occur through country-by-country liberalization because investors from any country are guaranteed to be treated as well as investors from countries that are most influential in their negotiations with the country where the investment took place."

[10] SCHILL, S.W., Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses, (2009) 27-2 *Berkeley Journal of International Law*, p. 496, p. 568 affirms: "To a certain extent, MFN clauses therefore lock States into the most favorable level of investment protection reached at one point of time and project this level into the future" (footnote omitted).

2. The Problem: Fragmentation of International Law Due to Different Wordings of IIA: Different of Identical Standards?

As indicated above, potential investors are increasingly aware of the existence of IIAs that may protect them in the event their investments abroad fail for reasons that are not strictly economic, i.e., by actions and omissions attributable to the host State. In these circumstances their analysis of potential investment protection should not be left to the subsequent contentious stage between the investor and the host State once a dispute has arisen between them. On the contrary, it is proper and necessary at the time of their investment planning.[11] In fact, reaching one conclusion in the interpretation of IIAs or another may imply that the investment would materialize in many different ways; for example, through the establishment of a company in a State that is party to many IIAs that, in turn, has a fiscal policy favourable for investors.[12]

To show the problem we will take the standard of *fair and equitable treatment* ("FET") as the particular object of our analysis. FET is undoubtedly the standard of protection most often invoked in investment arbitration and most used by tribunals to hold host States liable for IIA breaches.[13] This analysis can be made

[11] See SCHREUER, C., Nationality Planning, in A.W. Rovine (ed.), Contemporary Issues in International Arbitration and Mediation. (2012) *The Fordham Papers*, Leiden/Boston 2013, p. 17.

[12] In recent case law see *Mobil Corporation, Venezuela Holdings B.V., Mobil Cerro Negro Holding Ltd., Mobil Venezolana de Petróleos Holdings Inc., Mobil Cerro Negro Ltd. and Mobil Venezolana de Petróleos, Inc. v. Venezuela* (ICSID Case No. ARB/07/27), Decision on Jurisdiction, 10.06.2010, available at http://italaw.com/documents/MobilvVenezuelaJurisdiction.pdf (25.03.2015). In this case a U.S. investor structured an oil investment in Venezuela through a company incorporated in the Netherlands. This company was placed at the top of a corporate chain that held stakes in Venezuelan companies through companies incorporated in the Bahamas which were, in turn, controlled by companies incorporated in Delaware (USA). The arbitral tribunal held that the five companies (incorporated in the Netherlands, Delaware and the Bahamas) were likely to be considered national investors for the purposes of Article 1(b) of the Netherlands-Venezuela BIT of 22.10.1991, and held that it had jurisdiction to hear their claim against Venezuela under the BIT. At para. 204 of the Decision the tribunal found no problem in the structuring of an investment ahead of future disputes against the State: "As stated by the Claimants, the aim of the restructuring of their investments in Venezuela through a Dutch holding was to protect those investments against breaches of their rights by the Venezuelan authorities by gaining access to ICSID arbitration through the BIT. The Tribunal considers that this was a perfectly legitimate goal as far as it concerned future disputes." However, see *infra* para. 205 of this Decision at n. 50.

[13] See, in general SALACUSE, J.W., *The Law of Investment Treaties*, New York 2010, p. 218 *et seq.*; YANNACA-SMALL, K., Fair and Equitable Treatment Standard: Recent

regarding the conventional practice of any State;[14] nonetheless, we will use the Spanish BIT practice as it is the most familiar to us and fully representative of the problem. For greater paradoxical effect, we will focus first on the BITs signed by Spain in a short period of time (2.1.) and then on the BITs that have most recently entered into force for Spain (2.2.).[15]

2.1. BITs Signed by Spain in 1997

In 1997 Spain signed six BITs with six other States. By looking at the date of signature of each BIT, one may deduce that Spain held parallel negotiations with its counterparties that led to signatures sometimes separated by only a day apart.[16]

First, on 8 July 1997 Spain signed a BIT with Costa Rica.[17] FET is included in Article III(1) of the BIT that states that:

> *"Las inversiones realizadas por inversores de una Parte Contratante en el territorio de la otra Parte Contratante deberán recibir en todo momento un tratamiento justo y equitativo y disfrutarán de plena protección y seguridad. Ninguna de las Partes Contratantes deberá, en ningún caso, otorgar a tales inversiones un tratamiento menos favorable que el requerido por el Derecho Internacional."*

A few days later, on 21 July 1997, Spain signed a BIT with Croatia.[18] Article 3(2) on FET states:

> *"Las inversiones o rentas de los inversores de cada Parte Contratante en el territorio de la otra Parte Contratante recibirán en todo momento un tratamiento justo y equitativo de conformidad con el Derecho Internacional."*

On 30 September 1997 Spain signed *ad referendum* a BIT with India.[19] Article 4(1) refers to FET as follows:

Developments, in A. Reinisch (ed.), *Standards of Investment Protection*, Oxford 2008, p. 111 *et seq*.

14 See the problem in other jurisdictions in YANNACA-SMALL, K., see n. 13, pp. 113-118.

15 We leave the dates of entry into force of each BIT apart as they were conditioned by the compliance of Spain and the other party with their respective constitutional requirements for valid consent to the treaty. In addition, for the sole purposes of this paper we opted for including the provisions of the Spanish BITs in their Spanish authentic versions notwithstanding Article 33 of VLCT.

16 The perils of a State signing treaties with a number of countries in a short period of time are well reflected in *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan* (ICSID Case No. ARB/10/1), Decision on Article VII.2 of the Turkey-Turkmenistan Bilateral Investment Treaty, 07.05.2012, available at http://italaw.com/documents/Kilicv. Turkmenistan.pdf (25.03.2015). The tribunal underlined that Turkey had signed four BITs within a five-day period in April-May 1992 with Kyrgyzstan, Uzbekistan, Kazakhstan and Turkmenistan.

17 BOE No. 170, 17.07.1999.

18 BOE No. 259, 29.10.1998.

"Se concederá en todo momento un tratamiento justo y equitativo y plena protección y seguridad a las inversiones realizadas por inversores de una Parte Contratante en el territorio de la otra Parte Contratante."

On 10 November 1997 Spain signed a BIT with Panama.[20] As may be seen easily Article IV(1) thereof has exactly the same wording than that of Article III(1) of the BIT with Costa Rica above and, therefore, it sets out FET in identical terms:

"Las inversiones realizadas por inversores de una Parte Contratante en el territorio de la otra Parte Contratante deberán recibir en todo momento un tratamiento justo y equitativo y disfrutarán de plena protección y seguridad. Ninguna de las Partes Contratantes deberá, en ningún caso, otorgar a tales inversiones un tratamiento menos favorable que el requerido por el Derecho Internacional."

The following day, on 11 November 1997, Spain signed a BIT with Estonia.[21] Article 4(1) thereof states as follows:

"Cada Parte Contratante garantizará en su territorio un tratamiento justo y equitativo a las inversiones realizadas por inversores de la otra Parte Contratante."

Finally, on 11 December 1997 Spain signed *ad referendum* a new BIT with Morocco[22] that substituted the BIT signed on 27 September 1989.[23] Article 3(1) of the new BIT states:

"Las inversiones efectuadas por los inversores de una de las Partes Contratantes en el territorio o en la zona marítima de la otra Parte Contratante deberán recibir en todo momento un tratamiento justo y equitativo en consonancia con los principios del derecho internacional y serán objeto de protección y seguridad plenas e íntegras. Cada una de las Partes Contratantes se compromete a conceder a dichas inversiones un tratamiento no menos favorable que el exigido por el derecho internacional."

With these illustrative examples we can see that the same FET standard is described in multiple ways in such a short period of the Spanish treaty practice:

a) in relation to international law (BIT with Croatia);

b) by taking international law as a minimum (BITs with Costa Rica and Panama);

c) in relation to and taking international law as a minimum, at the same time (BIT with Morocco);

d) with no reference at all to international law (BITs with Estonia and India); and,

19 BOE No. 29, 03.02.1999.
20 BOE No. 254, 23.10.1998.
21 BOE No. 168, 15.07.1998.
22 BOE No. 86, 11.04.2005.
23 BOE No. 32, 06.02.1992. Article 4(1) thereof said on FET: "Cada Parte Contratante asegurará, en su territorio, un tratamiento justo y equitativo a las inversiones de los inversores de la otra Parte Contratante".

e) with reference to another standard of protection that is usually inserted into BITs, the *full protection and security* (BITs with Costa Rica, India, Morocco and Panama).

Then a question arises: did Spain and its counterparties shuffle among five different concepts of FET in that five-month period in 1997?

2.2. BITs Entered into Force for Spain Most Recently

Once the paradoxical effect has been achieved by examining Spain's consecutive and relatively old BITs, it is appropriate to then consider whether the Spanish BIT practice later matured, overcoming differences in the wording of FET, or if, on the contrary, diverging wordings are still the norm. By examining the relevant provisions of the last nine BITs entered into force for Spain, we are going to arrive to the same question as above: did Spain and its counterparties intend to apply five different concepts of FET?

We start with Article 2(3) of the BIT with Colombia, signed on 31 March 2005,[24] describing FET as follows:

> *"Las inversiones realizadas por inversionistas de una Parte Contratante en el territorio de la otra Parte Contratante recibirán un tratamiento justo y equitativo y disfrutarán de plena protección y seguridad, no obstaculizando en modo alguno, mediante medidas arbitrarias o discriminatorias, la gestión, el mantenimiento, el uso, el disfrute y la venta o liquidación de tales inversiones."*

Continuing chronologically, Article 3(1) of the BIT with the former Yugoslav Republic of Macedonia, signed on 20 June 2005:[25]

> *"Las inversiones realizadas por inversores de una Parte Contratante en el territorio de la otra Parte Contratante obtendrán un tratamiento justo y equitativo y disfrutarán de plena protección y seguridad. En ningún caso concederá una Parte Contratante a dichas inversiones un tratamiento menos favorable que el exigido por el derecho internacional."*

Article 3(1) of the BIT with Kuwait, signed on 8 September 2005,[26] states:

[24] BOE No. 219, 12.09.2007. See PASCUAL-VIVES, F.J., El acuerdo sobre la promoción y la protección recíproca de las inversiones celebrado por España y Colombia: la consolidación de una nueva generación de acuerdos en la política convencional española de promoción y protección recíproca de las inversiones, (2007) LIX-2 *Revista Española de Derecho Internacional*, p. 834.

[25] BOE No. 43, 19.02.2007. See PASCUAL-VIVES, F.J., Los acuerdos sobre la protección y la promoción recíproca de inversiones celebradas por España con Moldavia y Macedonia: nuevas tendencias en la política española de promoción y protección recíproca de inversiones, (2007) LIX-1 *Revista Española de Derecho Internacional*, p. 389.

[26] BOE No. 79, 01.04.2008. See PASCUAL-VIVES, F.J., Nuevas manifestaciones..., see n. 8.

"Se concederá un tratamiento justo y equitativo y plena protección y seguridad a las inversiones realizadas por inversores de una Parte Contratante en el territorio de la otra Parte Contratante. En ningún caso concederá una Parte Contratante a dichas inversiones un tratamiento menos favorable que el exigido por el derecho internacional."

On 14 November 2005 Spain signed a new BIT with China[27] that substituted a previous BIT signed on 6 February 1992.[28] Article 3(1) of the new BIT provides as follows:

"A las inversiones de los inversores de cada Parte Contratante se les concederá, en todo momento, un tratamiento justo y equitativo en el territorio de la otra Parte Contratante."

Following on, Article 3(1) of the BIT with Vietnam, signed on 20 February 2006:[29]

"Las inversiones realizadas por inversores de una Parte Contratante en el territorio de la otra Parte Contratante obtendrán un tratamiento justo y equitativo y disfrutarán de plena protección y seguridad de conformidad con el derecho internacional."

Next, Article 3(1) of the BIT with Moldova, signed on 11 May 2006:[30]

"Se concederá un tratamiento justo y equitativo y plena protección y seguridad a las inversiones realizadas por inversores de una Parte Contratante en el territorio de la otra Parte Contratante. En ningún caso concederá una Parte Contratante a dichas inversiones un tratamiento menos favorable que el exigido por el derecho internacional."

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27 BOE No. 164, 08.07.2008.

28 BOE No. 237, 04.10.1993. Article 3(1) thereof stated as follows: "Se concederá en todo momento un tratamiento justo y equitativo a las inversiones realizadas por inversores de cualquiera de las Partes Contratantes y dichas inversiones gozarán de la protección y seguridad más constantes en el territorio de la otra Parte Contratante. Cada Parte Contratante conviene en que, sin perjuicio de sus disposiciones legales y reglamentarias, no tomará ninguna medida injustificada o discriminatoria que obstaculice la gestión, mantenimiento, utilización o enajenación de las inversiones realizadas en su territorio por inversores de la otra Parte Contratante. Cada Parte Contratante observará cualquier obligación que haya contraído con respecto a las inversiones realizadas por inversores de la otra Parte Contratante." See PASTOR PALOMAR, A., Inversiones España-China bajo el nuevo APPRI 2005, (2006) 12 *Revista Electrónica de Estudios Internacionales*, available at http://www.reei.org/index.php/revista/num12/archivos/PastorPalomar(reei12).pdf (25.03. 2015); and PASCUAL-VIVES, F.J., La profundización de las relaciones bilaterales entre España y China a través del nuevo acuerdo para la protección y la promoción recíproca de las inversiones, (2009) LXI-1 *Revista Española de Derecho Internacional*, p. 305.

29 BOE No. 303, 17.12.2011. See PASCUAL-VIVES, F.J., La protección de las inversiones españolas y las economías emergentes: el APPRI con Vietnam, (2012) LXIV-1 *Revista Española de Derecho Internacional*, p. 237; and RUEDA GARCÍA, J. Á., Entra en vigor el Acuerdo para la promoción y protección recíproca de inversiones (APPRI) entre España y Vietnam de 20 de febrero de 2006, (2012) 4-2 *Cuadernos de Derecho Transnacional*, p. 367, available at http://hosting01.uc3m.es/Erevistas/index.php/CDT/article/viewFile/1628/705 (25.03.2015).

30 BOE No. 37, 12.02.2007; correction, BOE No. 79, 02.04.2007. See PASCUAL-VIVES, F.J., Los acuerdos..., see n. 25.

On 10 October 2006 Spain signed *ad referendum* a new BIT with Mexico[31] that substituted a previous BIT signed on 22 June 1995.[32] Article IV(1) of the new BIT shows an evident influence of Article 1105(1) of NAFTA to which Mexico is a party:[33]

> *"Cada Parte Contratante otorgará a las inversiones de inversores de la otra Parte Contratante, trato acorde con el derecho internacional consuetudinario, incluido trato justo y equitativo, así como protección y seguridad plenas."*

On 22 November 2007 Spain signed *ad referendum* a BIT with Senegal.[34] Article 3(1) includes FET in terms almost identical to the Spain-Vietnam BIT:

> *"Las inversiones realizadas por inversores de una Parte Contratante en el territorio de la otra Parte Contratante recibirán un tratamiento justo y equitativo y disfrutarán de plena protección y seguridad de conformidad con el Derecho Internacional."*

Lastly, Article 3(1) of the BIT with Libya, signed on 17 December 2007,[35] states as follows:

> *"Las inversiones realizadas por inversores de cada Parte Contratante en el territorio de la otra Parte Contratante recibirán un tratamiento justo y equitativo y disfrutarán de plena protección y seguridad."*

It is clear from the above that the standard of FET is also described in many ways in the most recent Spanish conventional practice:

a) in relation to international law (BITs with Vietnam and Senegal);

b) in relation to *customary* international law (BIT with Mexico);

c) by taking international law as a minimum (BITs with the F. Y. R. of Macedonia, Kuwait and Moldova);

d) with no reference at all to international law (BITs with Colombia, China and Libya); and,

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31 See n. 8.

32 BOE No. 32, 06.02.1997. Article 4(1) stated as follows: "Cada Parte Contratante garantizará en su territorio un tratamiento justo y equitativo, conforme al Derecho Internacional, a las inversiones realizadas por inversores de la otra Parte Contratante."

33 See n. 6. However, as we explained (see n. 8) the Spain-Mexico BIT does not contain any explanation similar to those included in the Model BITs of Canada and USA *supra* at n. 7. That absence must be taken into account for the interpretation of this provision and to ascertain the true intent of the two States party when they negotiated the BIT.

34 BOE No. 67, 19.03.2015.

35 BOE No. 237, 01.10.2009. See PASCUAL-VIVES, F.J., España impulsa las inversiones extranjeras en la cuenca mediterránea mediante el APPRI con Libia, (2010) LXII-1 *Revista Española de Derecho Internacional*, p. 277.

e) with the support of the standard of *full protection and security* (BITs with Colombia, the F. Y. R. of Macedonia, Kuwait, Vietnam, Senegal, Moldova, Mexico and Libya).

3. Analysis of IIAs in Light of International Law

Having described the problem of varying wordings of the standard of FET in the Spanish conventional practice, we obviously have *a priori* two potential answers to the question of whether or not Spain and its counterparties agreed on concepts of this standard different in each IIA: yes and no.

To arrive at one of the answers above we have to use a technically accepted method. It is therefore necessary to apply the rules generally accepted in international law for the interpretation of treaties.[36] The aim of the analysis would be, by applying the international law criteria of interpretation, to arrive at conclusions IIA by IIA about what the level of protection each IIA affords to investors under the specific wording of the FET standard in terms of its normative or substantive content. In order to do this one may give a numerical score to each FET provision, for example between 0 (lowest) and 10 (highest), according to the level of protection afforded to investors by that provision (again, in terms of its normative content).

It is nevertheless important to bear in mind that the process of interpretation of these IIAs is not easy in almost all occasions because of the limited materials available for the interpreter to correctly apply the criteria of interpretation: poorly defined and very broad legal concepts, highly vague preambles or absence of publicly available *travaux préparatoires*.[37] Furthermore, the same hermeneutical criteria have already been applied so far by many tribunals that have reached different conclusions.

For example, we must recognize that a literal interpretation of the terms *fair* and *equitable* can lead to the same conceptual vagueness that was criticized by the tribunal in *Saluka v. Czech Republic*[38] but which the tribunal in *MTD v. Chile* had nonetheless accepted as valid.[39]

[36] VCLT see n. 4. For Spain, see also Article 35 of Act 25/2014 on Treaties and other International Agreements, 27.11.2014 (BOE No. 288, 28.11.2014).

[37] See, in general, SCHREUER, C.H., Diversity and Harmonization of Treaty Interpretation in Investment Arbitration, (2006) 3-2 *Transnational Dispute Management*, available at www.transnational-dispute-management.com (25.03.2015).

[38] *Saluka Investments B.V. v. Czech Republic* (UNCITRAL/PCA; place of arbitration: Geneva), Partial Award, 17.03.2006, available at http://italaw.com/documents/Saluka-PartialawardFinal.pdf (25.03.2015), para. 297: "The 'ordinary meaning' of the 'fair and equitable treatment' standard can only be defined by terms of almost equal

Nor is the technique of assigning scores to each FET provision easy. Obviously, if an IIA does not contain the FET standard, it would be logical to assign it a 0 – it is beyond doubt that having a FET clause in an IIA very much increases the possibility for the investor to obtain redress against the actions and omissions of the host State. However, the gradation of the score when this provision does exist is sometimes no more than arbitrary. It is perhaps easier to see this problem with another standard provision in IIAs: the dispute resolution clause between the investor and the State ("ISDS").

Most IIAs allow investors to choose between some types of arbitration: ICSID,[40] ICC,[41] SCC,[42] or *ad hoc* arbitration under the UNCITRAL Rules.[43] Giving a score to an IIA higher than to another by the fact that certain types of arbitration are included and not others can be very arbitrary: for example, one may evaluate an IIA more positively if it only includes ICSID at the ISDS clause *if* we take into account that any award rendered by an ICSID tribunal is not subject to the concept

vagueness (...) This is probably as far as one can get by looking at the 'ordinary meaning' of the terms of Article 3.1 of the Treaty." In this part of the award the Tribunal inserted the same quotation of the award in *MTD v. Chile* see n. 39.

39 *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile* (ICSID Case No. ARB/01/7), Award, 25.05.2004, available at http://italaw.com/documents/MTD-Award_000.pdf (25.03. 2015), para. 113: "In their ordinary meaning, the terms 'fair' and 'equitable' used in Article 3(1) of the BIT mean 'just', 'even-handed', 'unbiased', 'legitimate' (...) Hence, in terms of the BIT, fair and equitable treatment should be understood to be treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment. Its terms are framed as a pro-active statement –'to promote', 'to create', 'to stimulate'- rather than prescriptions for a passive behavior of the State or avoidance of prejudicial conduct to the investors" (footnotes omitted). With no reference to said award, in *Azurix Corp. v. Argentina* (ICSID Case No. ARB/01/12), Award, 23.06.2006, para. 360, available at http://italaw.com/documents/Azurix AwardJuly2006.pdf (25.03. 2015), the tribunal accepted that definition of FET even by mistakenly copying the reference to Article 3(1) of the BIT.

40 Created by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18.03.1965 (575 UNTS 159; for Spain, BOE No. 219, 13.09.1994). See https://icsid.worldbank.org (25.03.2015). In many occasions, reference is made also to ICSID's 1978 Additional Facility.

41 International Court of Arbitration of the International Chamber of Commerce. See http://www.iccwbo.org/index_court.asp (25.03.2015).

42 Arbitration Institute of the Stockholm Chamber of Commerce. See http://sccinstitute.com/ (25.03.2015).

43 The original version of the Rules was approved by Resolution 31/98 of the United Nations General Assembly ("UNGA"), 15.12.1976, available at http://www.uncitral.org/pdf/english/texts/ arbitration/arb-rules/arb-rules.pdf (25.03.2015). Revisions of the Rules were approved by UNGA Resolution 65/22, 06.12.2010, available at http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf (25.03.2015); and UNGA Resolution 68/109, 16.12.2013, available at http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf (25.03.2015).

of "place of arbitration" for the purposes of its annulment, recognition and enforcement, as are the awards rendered by any ICC, SCC or UNCITRAL tribunal;[44] or, more negatively *if* we take into account that ICSID awards are subject to annulment by *ad hoc* Committees that have interpreted ICSID Convention Article 52 divergently.[45]

4. Two Possible Solutions to the Problem and Implications

After the analysis of the problem in light of international law we may arrive at the same two possible solutions to the question of whether or not Spain and its counterparties agreed on concepts of this standard different in each IIA: yes and no.

4.1. Affirmative Answer: Different Standards

If we conclude in the *affirmative*, (i) the FET standards are different; (ii) in 1997 Spain decided to grant different FET treatment to investors from Costa Rica/ Panama, Croatia, Estonia, India and Morocco; (iii) from 2005 onwards Spain did the same with investors from China, Colombia, Kuwait, Libya, the F. Y. R. of Macedonia, Mexico, Moldova and Vietnam/Senegal; and (iv) differences were introduced by Spain and its counterparty intentionally for some reasons which must be ascertained.

In this regard, Spain may certainly justify this conclusion in the exercise of its sovereign powers, both for future negotiations and as a defence for any arbitration proceeding initiated by a foreign investor. That is what happened in *Pope & Talbot v. Canada*,[46] where Canada (supported by USA as intervenor) claimed that this had been its intention when it negotiated NAFTA Article 1105(1) against the wording of the BITs that it had previously signed with other States. Although the

[44] Subject to a *seat* for the purposes of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10.06.1958 (330 UNTS 38; for Spain, BOE No. 164, 11.07.1977), available at http://www.uncitral.org/pdf/1958NYConvention.pdf (25.03. 2015). See RUEDA GARCÍA, J.Á., La aplicabilidad del Convenio de Nueva York al arbitraje de inversiones: efectos de las reservas al Convenio, (2010) 2-1 *Cuadernos de Derecho Transnacional*, p. 203, available at http://hosting01.uc3m.es/Erevistas/index.php/CDT/issue/view/10 (25.03.2015); CLAROS ALEGRÍA, P. & RUEDA GARCÍA, J.Á., Spain, in J. Fouret (ed.), *Enforcement of Investment Treaty Awards*, London 2015, p. 403.

[45] See, in general, SCHREUER, C.H. *et al.*, *The ICSID Convention. A Commentary*, 2nd. ed., New York 2009, p. 890 *et seq.*

[46] *Pope & Talbot Inc. v. Canada* (UNCITRAL; place of arbitration: Montreal, QU), Award on the Merits of Phase 2, 10.04.2001, available at http://italaw.com/documents/Award_Merits2001_04_10 _Pope_001.pdf (25.03.2015).

tribunal condemned that defence as absurd and rejected it accordingly,[47] shortly later Canada and its two partner States did confirm such intention through the 2001 Notes of Interpretation.[48]

This raises the question whether there is any remedy for an investor to which Spain had apparently granted a level of protection lower than to other investors. In this sense we find two solutions the strength of which depends on the degree of development of the concerned investment.

a) On the one hand, we would recommend that the investor channel their investment through a State that it has an IIA with Spain which, according to the above analysis, contains the highest level of protection. This solution is appropriate for both the beginning and during the development of the investment;[49] however, it may be invalid in the event of an existing dispute between the investor and the host State given that it could be argued that the investor would try to win the jurisdiction of the tribunal or the highest level of protection of the investment through *treaty shopping*.[50]

[47] See n. 46 para. 118. The arbitral tribunal concluded that it was not possible for Canada (and the other parties to the NAFTA) to have had decided to grant less favourable treatment to investors of another NAFTA party against investors from States parties that had signed BITs, especially when NAFTA Article 102(1)(c) includes the objective of increasing investment opportunities between those States.

[48] See n. 6.

[49] See, for example, *ADC Affiliate Ltd. and ADC & ADMC Management Ltd. v. Hungary* (ICSID Case No. ARB/03/16), Award, 02.10.2006, paras. 352-362, available at http://ita.law.uvic.ca/documents/ ADCvHungaryAward.pdf (25.03.2015), on the investment of Canadian investors in Hungary through companies incorporated in Cyprus; *Mobil Corporation and others v. Venezuela* (ICSID Case No. ARB/07/27), Decision on Jurisdiction, see n. 12, para. 204; *Cemex Caracas Investments B.V. and Cemex Caracas II Investments B.V. v. Venezuela* (ICSID Case No. ARB/08/15), Decision on Jurisdiction, 30.12.2010, paras. 149-158, available at http://italaw.com/documents/CEMEX_v_Venezuela_Jurisdiction_Sp.pdf (25.03.2015), on the investment of Mexican investors in Venezuela through holding companies incorporated in the Netherlands with intermediate companies incorporated in the Cayman Islands.

[50] *Mobil Corporation and others v. Venezuela* (ICSID Case No. ARB/07/27), Decision on Jurisdiction, see n. 12, para. 205: "With respect to pre-existing disputes, the situation is different and the Tribunal considers that to restructure investments only in order to gain jurisdiction under a BIT for such disputes would constitute, to take the words of the Phoenix Tribunal, 'an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs'. The Claimants seem indeed to be conscious of this, when they state that they 'invoke ICSID jurisdiction on the basis of the consent expressed in the Treaty only for disputes arising under the Treaty for action that the Respondent took or continued to take after the restructuring was completed'" (footnotes omitted).

b) On the other hand, the investor can turn their attention to the MFN clauses that are present in all those 15 BITs.[51] Thus, they would try to invoke the highest level of protection provided by Spain in another BIT with a State of which the investor is not a national. The limit to this argument is the specific wording of the MFN clause, which in some cases may limit the import of clauses from other BITs,[52] as well as general rules of international law.[53]

4.2. Negative Answer: Identical Standards

One may also conclude in the *negative*. In that case (i) the standards are materially the same; and (ii) Spain committed itself internationally to grant the same level of protection to investors of the 15 States referred to above. In this scenario, the investor may be confident in simply invoking the corresponding standard of the applicable IIA and trusting that, in the event of a dispute against the State, the body that would resolve it under the ISDS clause would apply that standard in an homogeneous way, as an organ under other IIA would do. The investor would act that way, for example, if they believe that the tribunal will consider *ex officio* the whole conventional practice of the respondent State (in our case, Spain).

However, leaving this point here seems deeply risky and a prudent investor should always act as if the answer were *affirmative*, particularly with the invocation of the MFN in the basic IIA. We should have to keep in mind, at least, the following considerations:

First. Every word in a legal norm should be understood to have been included for some reason. Dismissing the content of a provision plainly is contrary to the principle of *verba aliquid operari debent*, accepted as an hermeneutic approach of legal texts in international law, unless there is some evidence to ascertain the intent of the States in negotiating the treaty, such as a subsequent statement of them or the minutes of the *travaux préparatoires* (which are very uncommon in the field of BITs).

[51] Article IV(1) of Spain-Costa Rica BIT, Article 4(1) of Spain-Croatia BIT, Article 5(1) of Spain-India BIT, Article V(1) of Spain-Panama BIT, Article 4(2) of Spain-Estonia BIT, Article 4(1) of Spain-Morocco BIT, Article 3(1) of Spain-Colombia BIT, Article 4(1) of Spain-the F. Y. R. of Macedonia BIT, Article 4(1) of Spain-Kuwait BIT, Article 3(2) of Spain-China BIT, Article 4(1) of Spain-Vietnam BIT, Article 4(1) of Spain-Moldova BIT, Article III(1) of Spain-Mexico BIT, Article 4(1) of Spain-Senegal BIT and Article 4(1) of Spain-Libya BIT.

[52] For the purposes of this paper, see Article 4(2) of Spain-Estonia BIT (and, less clearly, Article 3(3) of Spain-China BIT), where the MFN clauses seem to be limited to FET. See *infra* n. 128.

[53] For Spain see Article 33(2) of Act 25/2014 on Treaties and other International Agreements, see n. 36, states: "Los efectos jurídicos de la cláusula de la nación más favorecida inserta en tratados internacionales en los que España sea parte se determinarán de conformidad con las normas de Derecho internacional."

Second. Relying on the legal research that the seized tribunal might make is an uncertain solution. It may be that the tribunal does not make it because it does not support the principle of *jura novit arbiter*, on which there is no consensus in practice.

Third. In connection therewith, the very sensitivity of each member of the tribunal is a relevant dimension, as when interpreting a treaty the arbitrator has to make an analysis as proposed in this paper. With examples in case law,[54] we cannot rule out that among the arbitrators persist interpretations on international investment law that may be "biased" either in favour of investors (giving high scores to the IIAs) or in favour of host States (giving low scores thereto),[55] in many times simply because of the legal background of each member of the arbitral tribunal (in particular, in terms of the tradition of accountability of the actions and omissions of the State they are qualified in).

Fourth. Last but not least, we must remember that Professor Schwarzenberger said that "[i]*t is clear that MFN clauses serve as insurance against incompetent draftsmanship and lack of imagination on the part of those who are responsible for the conclusion of international treaties*."[56]

5. Case Law Reflects the Scarce Invocation of MFN Clauses to Import or Compare Substantive Provisions of Investment Protection

Foreign investors, by definition acting as claimants in all arbitration proceedings against States under an IIA,[57] have in the MFN clause a useful tool to avoid the

[54] See, for example, *In the Matter of an Arbitration between Petroleum Development (Trucial Coast) Ltd. and the Sheikh of Abu Dhabi*, Award by Lord Asquith of Bishopstone, (1952) 1 *International and Comparative Law Quarterly*, p. 247, where the umpire rejected to apply Abu Dhabi domestic law and applied English law instead.

[55] Particularly, by using the teleological criterion of Article 31(1) of VCLT (see n. 4). See the interesting remarks made by SCHREUER, C.H., Diversity and Harmonization..., see n. 37, at p. 3.

[56] SCHWARZENBERGER, G., The Most-Favoured Nation Standard in British State Practice, (1945) 22 *British Yearbook of International Law*, at pp. 99-100.

[57] As confirmed in *Spyridon Roussalis v. Romania* (ICSID Case No. ARB/06/1), Award, 07.12.2011, available at http://italaw.com/documents/SpyridonRoussalis_v_Romania_Award_7Dec2011.pdf (25.03.2015) when the majority rejected all seven counterclaims presented by Romania (paras. 859-877). See, however, the dissenting opinion of one of the arbitrators of 28.11.2011, available at http://italaw.com/documents/*SpyridonRoussalis_v_Romania* _Declaration_28Nov2011.pdf (25.03.2015). In addition, see *Hesham T. M. Al Warraq v. Indonesia* (UNCITRAL; place of arbitration: Singapore), Final Award, 15.12.2014, paras. 655-666, available at http://www.italaw.com/sites/default/files/case-documents/italaw4164.pdf (25.03.2015), where the

problem of fragmentation of international investment law due to the specific wording of different IIAs.

The practice of investment treaty arbitration shows so far how MFN clauses have been frequently invoked to overcome specific *procedural* issues arising from the specific wording of the arbitration offer made by the host State in the ISDS clause of the concerned IIA.[58] Such is the case of, for example, (i) arbitration offers limited to the quantification by the tribunal of compensation for expropriation but not extensible to the determination of the existence of the expropriation itself;[59] or (ii) arbitration offers requiring the prior filing of a claim with the host State's domestic courts so that, after a period without having a final resolution of the case, the investor may file the request for arbitration.[60] The solutions reached are far from being harmonious[61] – in fact, there have been cases where several tribunals have solved the problem at hand in totally opposed ways even though they had to apply the same IIA.[62]

tribunal found it had jurisdiction to hear Indonesia's counterclaim pursuant to the specific wording of the treaty.

58 Or even for the retroactive application of a BIT. See *Técnicas Medioambientales Tecmed, S.A. v. Mexico* (ICSID Case No. ARB (AF)/00/2; place of arbitration: Washington, DC), Award, 29.05.2003, para. 69, available at http://italaw.com/documents/Tecnicas_001.pdf (25.03.2015), about the application of the Austria-Mexico BIT to bypass temporal restrictions of the 1995 Spain-Mexico BIT.

59 See, in general, *Renta 4 S.V.S.A., Ahorro Corporación Emergentes F.I., Ahorro Corporación Eurofondo F.I., Rovime Inversiones SICAV, S.A., Quasar de Valores SICAV, S.A., Orgor de Valores SICAV, S.A. and GBI 9000 SICAV, S.A. v. Russia* (SCC Case No. 24/2007; place of arbitration: Stockholm), Award on Preliminary Objections, 20.03.2009, available at http://italaw.com/documents/Renta.pdf (25.03.2015), in which the arbitral tribunal did not allow the claimants to use the MFN clause included in Article 5(2) of the Spain-USSR BIT, 26.10.1990 (BOE No. 301, 17.12.1991), applicable to Russia by succession, to expand the scope of Russia's consent to international arbitration inserted in Article 10(1) of the same BIT: "Los conflictos entre una de las Partes y un inversor de la otra Parte relativos a la cuantía o a la forma de pago de las indemnizaciones correspondientes en virtud del artículo 6 del presente Convenio [nationalization and expropriation]."

60 See, *par excellence*, *Emilio Agustín Maffezini v. Spain* (ICSID Case No. ARB/97/7), Decision of the Tribunal on Objections to Jurisdiction, 25.01.2000, available at http://italaw.com/documents/Maffezini-Jurisdiction-English_001.pdf (25.03.2015), in which the tribunal accepted that the claimant could bypass requirements of domestic litigation set out in Article X(2)-(3) of the Argentina-Spain BIT and, invoking the MFN clause in Article IV(2) of that BIT, to directly resort to investment arbitration under the Chile-Spain BIT.

61 See, in general, PARKER, S.L., A BIT at a Time: The Proper Extension of the MFN Clause to Dispute Settlement Provisions in Bilateral Investment Treaties, (2012) 2-1 *The Arbitration Brief*, p. 30.

62 As in the case of Article X(2)-(3) of the Spain-Argentina BIT in *Maffezini* (see n. 60), Article X(2)-(3) of Germany-Argentina BIT requires that, in the event of a dispute, the

It is less usual, however, for investors to invoke the MFN clause in the context of the (peacefully accepted) rationale of this clause,[63] *i.e.*, obtaining the best possible *substantive* protection of investment.[64] A review of arbitral practice[65] shows only few examples of invocation of the MFN clauses in the basic IIA for either importing clauses not present in the basic IIA (5.1.) or, more importantly, comparing the contents of clauses in other IIAs with those of the basic IIA and subsequently importing them into the basic IIA (5.2.). This practice has been labelled as "cherry-picking."[66]

investor must file a lawsuit in the domestic courts of the host State and, if after 18 months from the filing of the claim no decision on the merits has been rendered, or the dispute between the parties persists, then the investor may file a request for arbitration. In *Siemens AG v. Argentina* (ICSID Case No. ARB/02/8), Decision on Jurisdiction, 03.08.2004, available at http://italaw.com/documents/Siemens Jurisdiction-Spanish-3August2004.pdf (25.03.2015) the tribunal allowed the German claimant to bypass the prerequisite set forth at Article X(2) by invoking, through the MFN clause of Article III(1) of the BIT, the Chile-Argentina BIT which does not impose that requirement. A similar solution was reached by the majority at *Hochtief AG v. Argentina* (ICSID Case No. ARB/07/31), Decision on Jurisdiction, 24.10.2011, available at http://italaw.com/sites/default/files/case-documents/ita0405.pdf (25.03.2015); separate and dissenting opinion available at http://italaw.com/sites/default/files/case-documents/ita0407.pdf (25.03.2015). However, this solution was rejected in *Wintershall AG v. Argentina* (ICSID Case No. ARB/04/14), Award, 08.12.2008, available at http://italaw.com/documents/Wintershall_v_Argentina_Award_Sp.pdf (25.03.2015); and *Daimler Financial Services v. Argentina* (ICSID Case No. ARB/05/1), Award, 22.08.2012, available at http://www.italaw. com/sites/default/files/case-documents/ita1082.pdf, with dissention opinion available at http://www.italaw.com/sites/default/files/case-documents/ita1083.pdf (25.03.2015) and other opinion available at http://www.italaw.com/sites/default/files/case-documents/ita1084.pdf (25.03.2015).

63 On the *ejusdem generis* rule, see commentary to Articles 9 and 10 of the Draft Articles on Most-favoured-nation Clauses at (1978) *Yearbook of the International Law Commission*, vol. II, Part Two, pp. 27-33; and DOLZER, R. & SCHREUER, C., *Principles of International Investment Law*, 2nd. ed., New York 2012, pp. 206-207.

64 *Vladimir Berschader and Moïse Berschader v. Russian Federation* (SCC Case No. 080/2004; place of arbitration: Stockholm), Award, 21.04.2006, available at http://www.italaw.com/sites/default/files/case-documents/ita0079_0.pdf (25.03.2015), para. 179: "it is universally agreed that the very essence of an MFN provision in a BIT is to afford to investors all material protection provided by subsequent treaties."

65 See a brief but comprehensive review of case law in SALOMON, C. and FRIEDRICH, S., see n. 9. See also ACCONCI, P., Most-Favoured-Nation Treatment, in P. Muchlinski et al. (eds.), The Oxford Handbook of International Investment Law, Oxford, 2008, pp. 381-387.

66 UNCTAD, *WIR 2014*, see n. 2, at p. 122. In *Hesham T. M. Al Warraq v. Indonesia*, Final Award, see n. 57, at paras. 385 or 398, Indonesia expressly accused the claimant of "*cherry-picking*" provisions from other investment treaties and importing "*obligations from other treaties* carte blanche."

5.1. Importing Clauses from other IIAs not Present in the Basic IIA

It seems reasonable that an investor would try to find a standard of protection in the network of IIAs in force for the host State if the basic IIA does not include it. This is the consequence of scoring the basic IIA with a 0, according to the methodology proposed above. Three cases[67] may shed light to this practice as far as FET is concerned.[68]

First, in *Bayindir v. Pakistan*[69] the claimant faced the absence of FET in the Turkey-Pakistan BIT. Although the preamble of the BIT makes a vague reference to FET as "*desirable in order to maintain a stable framework for investment*,"[70] the claimant invoked the MFN clause in Article II(2) of the BIT[71] to request the application of the standard inserted, among other BITs, into Article II(2) of the United Kingdom-Pakistan BIT.[72] In its Decision on Jurisdiction the arbitral tribunal accepted *prima facie* that the claimant could invoke the MFN clause for that purpose.[73] In its final

[67] A fourth, less representative case might be mentioned, *ATA Construction, Industrial and Trading Company v. Jordan* (ICSID Case No. ARB/08/2), Award, 18.05.2010, available at http://www.italaw.com/sites/default/files/case-documents/ita0043.pdf (25.03.2015), where the claimant invoked the MFN clause of Article 11(2) of the Turkey-Jordan BIT to import the FET standard of the United Kingdom-Jordan BIT (para. 73). The tribunal ultimately held Jordan liable for a breach of both the letter and the spirit of the basic BIT (para. 125), referring only in a footnote to the FET standard of the United-Kingdom-Jordan BIT (n. 16).

[68] For the import of other investment protection clauses see, for example, *White Industries Australia Ltd. v. India* (UNCITRAL; place of arbitration: London), Award, 30.11.2011, available at http://italaw.com/documents/WhiteIndustriesv.IndiaAward.pdf (25.03.2015), with the "*effective means of asserting claims and enforcing rights*" clause of Article 4(5) of the Kuwait-India BIT imported into the basic Australia-India BIT; or *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentina* (ICSID Case No. ARB/03/23), Award, 11.06.2012, available at http://www.italaw.com/sites/default/files/case-documents/ita1069.pdf (25.03.2015), with the umbrella clauses of the Luxembourg-Argentina BIT and Germany-Argentina BIT imported into the basic France-Argentina BIT.

[69] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Turkey* (ICSID Case No. ARB/03/29), Award, 27.08.2009, available at http://italaw.com/documents/Bayandiraward.pdf (25.03.2015).

[70] See n. 69, para. 154.

[71] See n. 69, para. 156: "*Each Party shall accord to these investments, once established, treatment no less favourable than that accorded in similar situations to investments of its investors or to investments of investors of any third country, whichever is the most favourable*."

[72] See n. 69, para. 148. Throughout the proceedings the claimant also invoked the FET clauses included in the BITs in force between Pakistan and Australia, China, Denmark, France, Lebanon, the Netherlands, Sri Lanka and Switzerland.

[73] Decision on Jurisdiction, 14.11.2005, para. 232: "Under these circumstances and for the purposes of assessing jurisdiction, the Tribunal considers, prima facie, that

Award the tribunal, after analysing the preamble of the BIT and the concrete wording of the MFN clause, found no obstacle to accept claimant's proposal:[74]

> *"The ordinary meaning of the words used in Article II(2) together with the limitations provided in Article II(4) show that the parties to the Treaty did not intend to exclude the importation of a more favourable substantive standard of treatment accorded to investors of third countries. This reading is supported by the preamble's insistence on FET."*[75]

Although the parties in the proceeding focused the debate on the scope of FET under Article II(2) of the United Kingdom-Pakistan BIT,[76] the tribunal compared it with that included in Article 4(1) of the Switzerland-Pakistan BIT.[77] For the tribunal the protection afforded by both articles was very similar;[78] however, it found a main difference between both treaties: the United Kingdom-Pakistan BIT was signed before the Turkey-Pakistan BIT while the Switzerland-Pakistan BIT was signed after the Turkey-Pakistan BIT. For the tribunal:

> *"This difference matters in connection with the Respondent's objection that, when they concluded the Treaty, Turkey and Pakistan cannot have intended to include an FET clause such as the one in the Pakistan-UK BIT or else they would have inserted an express provision. That argument only applies to clauses that pre-date the conclusion of the Treaty. It does not apply to Article 4 of the Pakistan-Switzerland BIT which was concluded after the Treaty. The*

Pakistan is bound to treat investments of Turkish nationals 'fairly and equitably'", available at http://italaw.com/documents/ Bayindr-jurisdiction.pdf (25.03.2015).

74 Award, see n. 69, para. 155. For the tribunal the fact that Turkey and Pakistan had made a reference to FET in the preamble of their BIT was an argument in favour of accepting the import of the standard included in other BITs signed by Pakistan.

75 Award, see n. 69, para. 157.

76 United Kingdom-Pakistan BIT, 30.11.1994, available at http://www.unctad.org/sections/dite/iia/docs/bits/uk_pakistan.pdf (25.03.2015), Article II(2): "Investment of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party."

77 Switzerland-Pakistan BIT, 11.07.1995, available at http://www.unctad.org/sections/dite/iia/docs/bits/switzerland_pakistan_fr.pdf (25.03.2015), Article 4(1): "Chaque Partie Contractante protégera sur son territoire les investissements effectués conformément à ses lois et règlements par des investisseurs de l'autre Partie Contractante et n'entravera pas, par des mesures injustifiées ou discriminatoires, la gestion, l'entretien, l'utilisation, la jouissance, l'accroissement, la vente et, le cas échéant, la liquidation de tels investissements. En particulier, chaque Partie Contractante délivrera les autorisations visées à l'article 3, alinéa (2), du présent Accord."

78 Award, see n. 69, para. 166.

fact that the latter entered into force thereafter is irrelevant to ascertain the intention of the State parties at the time of conclusion."[79]

From this the tribunal concluded that the provision relevant for assessing Pakistan's international responsibility towards the Turkish claimant was Article 4(1) of the Switzerland-Pakistan BIT:

"Hence, by virtue both of the time of its conclusion and its close similarity to Article II(2) of the Pakistan-UK BIT, Article 4 of the Pakistan-Switzerland BIT can be used as the applicable FET standard in the present case. This said, a similar result would be reached by applying Articles 2(2) and 3(1) of the Pakistan-Denmark BIT of 18 July 1996."[80]

Second, in *Rumeli v. Kazakhstan*[81] the claimants relied on the MFN clause in Article II(1) of the Turkey-Kazakhstan BIT to attract a number of standards of protection (including FET) that were included in other BITs in force in Kazakhstan, particularly in the United Kingdom-Kazakhstan BIT. Kazakhstan did acknowledge that it was bound to afford the investor said more favourable treatment, so it was reflected by the tribunal in the Award:

"The parties agree that in view of the MFN clause contained in the BIT, Respondent's international obligations assumed in other bilateral treaties, and in particular the United Kingdom-Kazakhstan BIT, are applicable to this case, such obligations including:

- the obligation to ensure the fair and equitable treatment of the investments of investors of the other Contracting Party;

- the duty not to deny justice;

- the obligation to accord full protection and security to such investments; and

- the obligation not to impair by unreasonable, arbitrary, or discriminatory measures the management, maintenance, use, enjoyment, or disposal of such investments.

The parties also agree to a large extent on the test applicable for each of these obligations, as we will see below."[82]

Once it assessed the facts of the dispute according to the basic BIT, the tribunal found Kazakhstan liable implicitly under both treaties by holding that

"Respondent breached its obligation to accord the investor the fair and equitable treatment imposed on Respondent by virtue of the Most Favourable Nation Clause contained in Article II(1) of the Bilateral Investment Treaty."[83]

79 Award, see n. 69, para. 166.

80 Award, see n. 69 para. 167.

81 *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v. Kazakhstan* (ICSID Case No. ARB/05/16), Award, 29.07.2008, available at http://italaw.com/documents/Telsimaward. pdf (25.03.2015).

82 *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v. Kazakhstan* see n. 81, para. 575.

Third, in *H.T.A. al Warraq v. Indonesia*[84] the Saudi Arabian claimant pursued a claim against Indonesia under the little-known Agreement on the Promotion, Protection and Guarantee of Investment among Member States of the Organisation of the Islamic Conference ("OIC Agreement").[85] As the OIC Agreement lacked a specific reference to FET, the claimant used the MFN clause inserted into Article 8 thereof[86] to import the FET clause of Article 3 of the United Kingdom-Indonesia BIT.[87] As Indonesia invoked against him certain requirements on equality of investment sector, as well as on admission of investments included in the former, the claimant replied by further invoking the FET clauses of Indonesia's BITs with the Netherlands, Singapore and India.[88]

The tribunal started its analysis by pointing out that:

> *"There are two views regarding the application of MFN clauses. The first view is that the MFN clause would only operate to the extent that a provision in another treaty is compatible in principle with the scheme negotiated by the parties in the basic treaty and departs from it only in a detail consistent with the broader scheme. The other view adopts a literal interpretation that would extend the operation of the MFN clause to all areas of other treaties, regardless of any comparison or judgment or compatibility. However, even under this view, the ejusdem generis rule would still apply. The two treaties would still have to deal with the same subject matter, as is the case with the protection of investments treaties."*[89]

The tribunal compared the OIC Agreement and the UK-Indonesia BIT and concluded that the subject matter of both treaties was the protection of foreign investment.[90] The tribunal further noted that the MFN clause applied to import other clauses of a treaty as long as the *ejusdem generis* rule applied.[91] Then, the

[83] *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v. Kazakhstan* see n. 81 *dispositif*, para. 1.

[84] Final Award, see n. 69.

[85] Approved and opened for signature by Resolution 7/12-E of the Twelfth Islamic Conference of Foreign Ministers, 01-05.06.1981.

[86] Final Award, see n. 69, para. 381: "[t]he Investors of any contracting party shall enjoy, within the context of economic activity in which they have employed their investments in the territories of another contracting party, a treatment not less favourable than the treatment accorded lo investors belonging to another State not party to this Agreement, in the context of that activity and in respect of rights and privileges accorded to those investors."

[87] Final Award, see n. 69 para. 382. As Article 2 of the OIC Agreement referred to the investor's right to "*adequate protection and security*", the claimant also invoked the MFN clause to import the "*full protection and security*" clause of Article 3(2) of the UK-Indonesia BIT in the event the former were a lower standard. See Award, at paras. 423-424. In the end, the tribunal found no difference between both standards. See Award, at para. 630.

[88] Final Award, see n. 69 paras. 386-390. See Indonesia's defences at paras. 397-406.

[89] Final Award, see n. 69 para. 544.

[90] Final Award, see n. 69 paras. 547-551.

[91] Final Award, see n. 69 paras. 551.

tribunal rejected Indonesia's defence on the applicability of the MFN clause only to the same economic activity as the UK-Indonesia BIT had no restriction on its applicability to the banking sector in which the investor had invested.[92] Furthermore, the tribunal rejected Indonesia's defence on the admission requirement apparently set out in the UK-Indonesia BIT and further acknowledged that the claimant in any event had also invoked other BITs entered into by Indonesia.[93] As a consequence, the tribunal affirmed that the claimant was entitled to FET under the UK-Indonesia BIT and subsequently held Indonesia liable for the breach of that provision.[94]

5.2. Comparing Clauses from Other IIAs to those of the Basic IIA and Subsequent Import into the Basic IIA

With respect to the core of this paper we are aware of only very few cases in which arbitral tribunals have had to compare protection in various IIAs as a result of the invocation of MFN clauses by claimants. The solution arrived at by each tribunal very much depended on the treaty at stake (NAFTA *v.* ordinary BITs).

5.2.1. NAFTA Cases: The Influence of the 2001 Notes of Interpretation against Imports

Arbitral practice under NAFTA has been very much affected in this point by the 2001 Notes of Interpretation.[95]

First, in *Pope & Talbot v. Canada*, as noted earlier, the claimant argued that NAFTA Article 1105(1) should be interpreted according to the BITs previously concluded by the three States party thereof as the investor advocated a liberal and protective interpretation of the provision. Canada responded by asserting that a violation of the Treaty could only take place if the State's conduct had been "*egregious*."[96] The tribunal analysed the concept of FET in BITs concluded by the three States party to the NAFTA and accepted the claimant's argument: the tribunal held that the FET

92 Final Award, see n. 69 paras.552.

93 Final Award, see n. 69 paras.553-554.

94 Final Award, see n. 69 paras.556-621.

95 This notwithstanding, in *W.R. Clayton and others v. Canada* (UNCITRAL/PCA Case No. 2009-04; place of arbitration: Toronto, ON), Award on Jurisdiction and Liability, 17.03.2015, available at http://www.italaw.com/sites/default/files/case-documents/italaw4212.pdf (25.03.2015), and dissenting opinion, 10.03.2015, available at http://www.italaw. com/sites/default/files/case-documents/italaw4213.pdf (25.03. 2015), the arbitral tribunal held Canada liable for a breach of NAFTA Article 1105 without the need to compare Canada's investment protection obligations under other IIAs (para. 604). The investor nonetheless claimed MFN treatment under NAFTA Article 1103 for other purposes (paras. 635-646).

96 Award see n. 46, para. 108, being "*egregious*" an adjective traditionally linked to the notion of the minimum standard of treatment of customary international law.

standard enshrined in Article 1105(1) should be interpreted according to the "*fairness*."[97] Such a finding (raising the level of protection afforded to foreign investors) prompted NAFTA parties to agree on the binding 2001 Notes of Interpretation.

Second, in *ADF v. United States of America*,[98] given the wording of Article 1105(1) and the fact that the 2001 Notes of Interpretation were issued one day prior to the submission by the claimant of one of its pleadings,[99] the claimant requested, by invoking the MFN clause of NAFTA Article 1103, the application of Article II(3)(a)-(b) of the Albania-USA BIT and Article II(3)(b) of the Estonia-USA BIT. The claimant asserted that these two provisions on FET were separate, distinct and "*self-contained*" standards that were more favourable than NAFTA Article 1105(1) linking to the minimum standard of treatment of customary international law.[100] However, the tribunal rejected the claimant's argument by holding that the claimant failed to prove the existence of those autonomous standards and that, in any case, it failed to prove that the State's conduct was contrary to its international obligations.[101]

Third, in *Chemtura v. Canada*[102] a U.S. claimant argued that the standard of FET enshrined in NAFTA Article 1105(1) should be interpreted by the tribunal pursuant to 16 BITs signed by Canada which came into force after 1 January 1994 (date of NAFTA's entry into force), which oblige Canada to provide FET "independent" from the minimum standard of treatment of customary international law. The claimant did so by invoking the MFN clause of Article 1103.[103] Given the inevitable opposition of Canada and the other two NAFTA parties,[104] the tribunal rejected all allegations of Canada's international responsibility in line with the tribunal in *ADF v. United States of America*:

> *"…the Tribunal has taken into account the evolution of international customary law as a result inter alia of the conclusion of numerous BITs providing for fair and equitable treatment. Second, the Tribunal has found no facts in the conduct of the Respondent that*

97 Award see n. 46para. 111.

98 *ADF Group Inc. v. United States of America* (ICSID Case No. ARB(AF)/00/1; place of arbitration: Washington, DC), Award, 09.01.2003, available at http://italaw.com/documents/ADF-award_000.pdf (25.03.2015).

99 See n. 6.

100 See n. 6 , paras. 77-80.

101 See n. 6paras. 187 and 194.

102 *Chemtura Corporation v. Canada* (UNCITRAL: place of arbitration: Ottawa, ON), Award, 04.08.2010, available at http://italaw.com/documents/ChemturaAward.pdf (25.03. 2015).

103 See n. 102 para. 226.

104 See n. 102 para. 235. Mexico and USA intervened in the proceedings according to NAFTA Article 1128 to "*firmly*" oppose to the possibility of importing the FET standard included in Canadian BITs.

would even come close to the type of treatment required for a breach of the FET standard. Quite to the contrary, the record shows that the Respondent treated the Claimant and its investment in good faith and on an equal footing with other registrants of lindane-based products. Third, the Claimant has not established that the FET clause of any of the treaties to which it indistinctly refers grants any additional measure of protection not afforded by Article 1105 of NAFTA. Fourth and last, the Claimant has in any case not established that the Respondent's conduct was in breach of such hypothetical additional measure of protection allegedly afforded by an imported FET clause."[105]

5.2.2. BIT Cases: Peaceful Acceptance by Arbitral Tribunals

First, in *MTD v. Chile*[106] the claimants considered that there were shortcomings in the wording of Article 2(2) of the Malaysia-Chile BIT[107] so, by invoking the MFN clause of Article 3(1) thereof,[108] they argued that they were entitled to be protected by a number of provisions of the Denmark-Chile and Croatia-Chile BITs.[109] Chile did not submit arguments against the application of these BITs to the case; it simply asserted that even if the MFN clause were applicable, the facts of the case showed that there had been no treaty breach.[110] The tribunal accepted the claimants' solution:

"The Tribunal has concluded that, under the BIT, the fair and equitable standard of treatment has to be interpreted in the manner most conducive to fulfill the objective of the BIT to protect investments and create conditions favorable to investments. The Tribunal considers that to include as part of the protections of the BIT those included in Article 3(1) of the Denmark BIT and Article 3(3) and 4 of the Croatia BIT is in consonance with this purpose. The Tribunal is further convinced of this conclusion by the fact that the exclusions in the MFN clause relate to tax treatment and regional cooperation, matters alien to the BIT but that, because of the general nature of the MFN clause, the Contracting Parties considered it prudent to exclude."[111]

The tribunal had then to decide whether the facts of the case were (i) a breach of FET under the Malaysia-Chile and Croatia-Chile BITs; (ii) a breach of a foreign investment contract under the Denmark-Chile BIT; (iii) a breach of the obligation

105 See n. 102 para. 236 (emphasis added).

106 Award, see n. 39.

107 Malaysia-Chile BIT, 11.11.1992, available at http://www. unctad.org/sections/dite/iia/docs/bits/chile_malasia_sp.pdf (25.03.2015), Article 2(2): "A las inversiones de los inversionistas de cualquiera de las Partes Contratantes se les otorgará, en todo momento, un tratamiento justo y equitativo y gozarán de protección y seguridad plenas en el territorio de la otra Parte Contratante."

108 Article 3(1): "Las inversiones hechas por los inversionistas de cualquiera de las Partes Contratantes en el territorio de la otra Parte Contratante recibirán un tratamiento justo y equitativo, y no menos favorable que aquel concedido a las inversiones hechas por los inversionistas de cualquier tercer Estado."

109 Award see n. 39, para. 100.

110 Award see n. 39, para. 100.

111 Award see n. 39, , para. 104.

of non-interference by arbitrary or discriminatory measures on the use and enjoyment of the investment under the Croatia-Chile BIT, and a breach of the duty to grant the necessary permits to qualified investments under that same treaty; and (iv) an expropriation of the investment under the Malaysia-Chile BIT.[112]

The interest of this decision relies on the tribunal's analysis of FET since the other two standards (umbrella clause and prohibition of interference) were not included in the Malaysia-Chile BIT but imported thereof through the MFN clause. The difference between the two treaties on FET was that the Croatia-Chile BIT recognized that the right to FET "*shall not be hindered in practice*."[113] The tribunal found that Chile had violated the standard because the State had approved a foreign investment contract that contravened the urban planning area where the investment was to be developed.[114] Nevertheless, the tribunal failed to specify in the award if the finding of liability was the result of applying the BIT invoked through the MFN clause (Croatia-Chile) or whether the basic BIT was sufficient (Malaysia-Chile);[115] it is also an issue highlighted by the *ad hoc* Committee that rejected some years later the application for annulment of the award submitted by Chile.[116]

[112] Award see n. 39, para. 105.

[113] Award see n. 39, para. 107. Croatia-Chile BIT, 28.11.1994, available at http://www.unctad. org/sections/dite/iia/docs/bits/chile_croatia.pdf (25.03.2015), Article 4(1): "Each Contracting Party shall extend fair and equitable treatment to investments made by investors of the other Contracting Party on its territory and shall ensure that the exercise of the right thus recognized shall not be hindered in practice." (emphasis added).

[114] Award, see n. 39, para. 166.

[115] Confusion arises from the wording of the award. When the tribunal begins its interpretation of the concept of FET (para. 113) it makes reference to "*Article 3(1) of the BIT*," that appears in a footnote which contains the MFN clause in the Malaysia-Chile BIT. As highlighted *supra* (see n. 107-108), Articles 2(2) and 3(1) of the Malaysia-Chile BIT refer to FET, one independently with full protection and security (Article 2.2) and the other under the MFN clause (Article 3(1)). However, in the *dispositif* of the Award, the tribunal held that "*The Respondent has breached its obligations under Article 3(1) of the BIT*" (para. 253.1), which refers again to Article 3(1) of the Malaysia-Chile BIT. It seems that the tribunal in the *dispositif* found Chile liable for violating the FET standard of the Malaysia-Chile BIT incorporating more favourable provisions of other BITs.

[116] Decision on Annulment, 21.03.2007, para. 64, available at http://italaw.com/documents/MTD-Chile_Ad_Hoc_Committee_Decision_000.pdf (25.03.2015). In any case, the *ad hoc* Committee concluded that the fact that the tribunal did not provide more reasons on the scope of Article 4(1) of the Croatia-Chile BIT did not affect the outcome of the case.

Second, in *Sergei Paushok and others v. Mongolia*[117] claimants were aware of the shortcomings presented by the Russia-Mongolia BIT, in particular the restrictions introduced in Article 3(1) regarding the definition of FET:

> *"Each Contracting Party shall, in its territory, accord investments of investors of the other Contracting Party and activities associated with investments fair and equitable treatment excluding the application of measures that might impair the operation and disposal with investments."*[118]

Therefore the claimants examined the conventional practice of Mongolia and made submissions, through the MFN clause of Article 3(2) of the BIT,[119] on other standards included in BITs in force between Mongolia and Austria, Denmark, the Netherlands, the United Kingdom and USA. For the claimants the object of an MFN clause is to harmonize

> *"the benefits that Mongolia offers under the Treaty with any more favourable benefits that Mongolia offers under other investment treaties."*[120]

The tribunal explicitly accepted the investors' approach by stating that:

> *"the MFN clause of the Treaty allows for the integration into it of the broader provisions contained in the U.S. Mongolia BIT and the Denmark-Mongolia BIT."*[121]

However, the tribunal set out some limits to a general reliance on other BITs through the MFN clause. The tribunal did not depart from the tradition of interpretation of the MFN clause when it said that:

> *"Historically, tribunals have tended to construe MFN clauses broadly and they have regularly accepted to import substantive rights into an investment treaty from treaties that the host State has signed with other countries."*[122]

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117 *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Mongolia* (UNCITRAL; place of arbitration: The Hague), Award on Jurisdiction and Responsibility, 28.04.2011, available at http://italaw.com/documents/PaushokAward.pdf (25.03.2015).

118 Reproduced at *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Mongolia* see n. 117, para. 563.

119 Reproduced at *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Mongolia* see n. 117, para. 562: "*The treatment mentioned under paragraph 1 of this Article* [3(1)]*, shall not be less favorable than treatment accorded to investments and activities associated with investments of its own investors or investors of any third State.*"

120 *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Mongolia* see n. 117, para. 248.

121 *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Mongolia* see n. 117, para. 254.

122 *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Mongolia* see n. 117, para. 565.

However, the tribunal took into account the systematic placement of the MFN in Article 3(2) of the BIT, just below the investor's right to receive FET. So the tribunal stated that:

> *"The Treaty is quite clear as to the interpretation to be given to the MFN clause contained in Article 3(2): the extension of substantive rights it allows only has to do with Article 3(1) which deals with fair and equitable treatment."*[123]

As a result:

> *"If there exists any other BIT between Mongolia and another State which provides for a more generous provision relating to fair and equitable treatment, an investor under the Treaty is entitled to invoke it. But, such investor cannot use that MFN clause to introduce into the Treaty completely new substantive rights, such as those granted under an umbrella clause."*[124]

This distinction led the tribunal to accept that the investor could claim a broader definition of FET in Article 3(2) of the Denmark-Mongolia BIT,[125] which ultimately led the tribunal to declare the existence of a violation of Article 3(1) of the Russia-Mongolia BIT

> *"expanded through the MFN clause to include the text of the Denmark-Mongolia BIT."*[126]

Nonetheless, the tribunal did not allow the investor to invoke the "umbrella clause" contained in Article II(2)(c) of the USA-Mongolia BIT.[127] This solution is diametrically different from that reached in *MTD v. Chile* where, although the MFN clause was located with reference to FET in Article 3(1) of the Malaysia-Chile

123 *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Mongolia* see n. 117, para. 570.

124 *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Mongolia* see n. 117, para. 570.

125 *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Mongolia* see n. 117 paras. 571-572. Article 3(2) of the Denmark-Mongolia BIT states as follows: "Each Contracting Party shall in its territory accord investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investment, fair and equitable treatment which in no case shall be less favourable than that accorded to its own investors or to investors of any third state, whichever of these standards is the more favourable."

126 *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Mongolia* see n. 117 para. 596. We have to clarify, however, that the arbitral tribunal did not make explicitly any analysis, even literal, comparing Article 3(1) of the Russia-Mongolia BIT with Article 3(2) of the Denmark-Mongolia BIT.

127 *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Mongolia* see n. 117 paras. 573 and 609 in relation to para. 566. For the same reason claimants were not allowed to plead the "umbrella clause" contained in Article 2(3) of the Denmark-Mongolia BIT or in Article 2(2) of the United Kingdom-Mongolia BIT (para. 567).

BIT,[128] the tribunal nevertheless accepted claimants' reliance on the "umbrella clause" contained in the Denmark-Chile BIT.[129]

6. Conclusions and Proposals

Any investor deciding to invest in a particular State should always review the whole network of IIAs of that State to take the best decision in terms of structuring their investment. Once a dispute has arisen with the host State, if the basic IIA (the one giving them legal standing against the host State) refers to more favourable treatment the host State is committed to grant to nationals of third States (i.e., containing an MFN clause), then the investor should immediately consult those other IIAs to check if the host State in fact agreed to grant greater protection to other investors.

In the event that the investor, by comparing IIAs, observes different wordings in the standards they would claim against the host State (for example, in the fair and equitable treatment standard), they should not hesitate to use the MFN clause of the basic IIA as many times as necessary to argue before the tribunal that they have the right to the maximum level of protection granted by the host State in its IIA network. In doing so, the investor overcomes the problem of probing into whether different IIA wordings were due to the conscious intent of the States party to the IIAs or to any peculiar circumstance that might have happened during treaty drafting. In other words, through the MFN clause the investor avoids the problem of fragmentation of international investment law due to different wordings of IIAs. This problem may be identified in the conventional practice of almost all States party to IIAs (including, for the purposes of this paper, Spain). In any event, the validity of this solution very much depends on the specific wording of the MFN clause itself.

Case law to date shows little interest from investors in analysing the whole IIA practice of the host State. When they have done so it has been mostly for importing more favourable provisions concerning investor-State dispute settlement.

[128] For Spain's conventional practice see n. 52.

[129] Award, see n. 39, para. 104, although the tribunal did not consider that Chile had breached the foreign investment contract and hence its international obligations under the BIT (para. 188). The *ad hoc* Committee expressly condemned "*the uncertainty in the Tribunal's handling*" of Article 3(1) of the Malaysia-Chile BIT (see n. 108) although it "*was without incidence for its resolution of the case*." (*see* n. 116, para. 64). Anyway, the *ad hoc* Commission held: "The most-favoured-nation clause in Article 3(1) is not limited to attracting more favourable levels of treatment accorded to investments from third States only where they can be considered to fall within the scope of the fair and equitable treatment standard. Article 3(1) attracts any more favourable treatment extended to third State investments and does so unconditionally" (para. 64).

There are just timid examples in which investors have invoked MFN clauses to import substantive clauses not existing in the basic IIA or, more importantly, to compare IIAs and subsequently import more favourable clauses into the basic IIA.