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THE PRINCIPLE OF THE MFN CLAUSE AS A GUARANTEE FOR INVESTOR PROTECTION

Khansaa Muhammad Jasim Al-Shamri
College of Law at the American University of Baghdad, Iraq AUIB

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Abstract:

Most-favored-nation clause is of great importance in international law in general, and in investment in particular, as it represents the best guarantees established for the benefit of the investor. This condition raises legal issues in the international framework, including what is related to the scope of its application in substantive and procedural provisions and the role of arbitral tribunals' practices In the development of many concepts related to this condition

Keywords: investment guarantees - MFN clause – procedural provisions of MFN clause

INTRODUCTION

The investment contracts that the state concludes with investors for the purpose of obtaining the capital needed to achieve economic development are of great importance, and this is due to the role they play in the national economy of both the country hosting the investment and the countries that the investors follow. Desirous of growth, the pillar on which the fixed economic structures of the state are built, its infrastructure is organized and its public facilities are managed, in a way that makes these contracts a vital and key factor in achieving its economic plan, and for the countries that investors follow, they constitute more job opportunities and more investments. and capital growth. ( )

In this context, the Egyptian Investment Promotion Law No. 72 of 2017 guarantees the foreign investor many rights that help attract investments, as well as holders of obligations. The investor has the right to establish, expand, and finance investment projects from abroad in foreign currency without restrictions, and has the right to own land, The law stipulates that the foreign investor maintains the safety of the environment and the security of society, and by using local workers who have the qualifications and ability to perform the same task required by the project, as he has the right to use foreign labor, but within the limits of a specific percentage and it can be increased according to the rules explained by the executive regulations of this law. The legislation was not the only tool for attracting investments, as the conclusion of international agreements on investment is one of the means of attracting investments, where international investment agreements are a measure of the degree of the state's ability and readiness to provide a safe environment for investment. The number of bilateral and regional agreements for investments has increased significantly over the last ten years and is still continually increasing. The Most Favored Nation MFN clause represents the common denominator of all these agreements, in light of the various economic developments. Among the most prominent features of those international developments are the major economic blocs, and the signing of the agreement on the partial and gradual liberalization of international trade between member states in the General Agreement on Trade and Tariffs, which is known abbreviated as (GATT) at the conclusion of the Uruguay Round, which began in 1986 and concluded in April (April) 1994, which means that the economies of the different countries will move within the framework of relatively open international markets, Therefore, the growth or development of any economy will be largely related to the ability of its various sectors to produce goods and services competitively with other economies, so that these sectors can continue to compete in the local and international markets.

Research problems and questions

The most favored nation clause (MFN) occupies an important place in international economic law, as it is applied in a broader and comprehensive concept, because of the guarantees it provides to the investor towards the host country, as well as the special protection provided by bilateral and collective investment treaties (BITs) to investors with regard to settlement provisions Disputes, a feature of most modern BITs, allows investors to make claims against the host country for alleged violations of the investment treaty. However, some of these provisions set limits or preconditions regarding investors' access to international arbitration. Notably, of late, investors have resorted to sticking to the MFN clauses of investment treaties in an attempt to avoid those limits or preconditions. The decisions of the arbitral tribunals varied and varied, between the straits for the protection

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of the most favored nation to include only the substantive aspects, while others tended to extend the umbrella of this protection to include the procedural rights of the investor, and we can limit the research problems to the following questions:

• What is the content of the MFN clause, and what are the developments that have occurred in it?

• What are the types of provisions that are applied under the most favored state condition, do the substantive provisions only apply, or does it also include provisions related to the settlement of disputes?

• What are the investor protection mechanisms under the most-favored state clause, and what are the problems posed to the application of provisions related to dispute settlement, and what is the position of the national judiciary and the state regarding arbitration rulings that have prepared the provisions for settling disputes under the MFN clause?

• What is the role of the International Law Commission on the principle of the MFN clause?

Research Methodology and Plan:

The research is based on the inductive analytical approach of the provisions of the most favored nation condition, in light of the judgments and decisions of arbitral tribunals and the work of the United Nations International Law Commission.

The first section:
The essence of MFN
The first Item: The concept of MFN
1. Definition of MFN
2. Evolution of the concept of the MFN
The second Item: Types of MFN
The second section:
Mechanisms of investor protection under the first-favoured state condition
The first Item: Scope of application of the MFN clause in investment
The second Item: Extent of benefit from the means of settling disputes granted under the condition of the most favored nation.

THE FIRST SECTION
Essence the MFN requirement

The agreements that are concerned with investment deal with many provisions, such as defining investment, laying the foundations and grounds for investments, determining the form and method of compensation in the event of nationalization or confiscation, methods of transferring funds, as well as mechanisms for settling disputes between the foreign investor and the host country for investment and between countries between them and the investors themselves. (1), as well as providing for fair and equitable treatment, national treatment, or most-favoured-nation treatment in a global environment of economic liberalization. Without discrimination and protection by the state for investors in the host country for investments. The MFN clause was contained in bilateral treaties of friendship, commerce and navigation whose main task was to regulate a variety of matters between the parties, usually of a commercial nature (2). We will deal through this topic with the nature of this condition in two demands. We dedicate the first to clarifying the concept of the condition, and we dedicate the second to identifying its types.

The first Item
The concept of MFN

The most-favoured-nation clause has been known since ancient times; But the jurists were not able to reach the real history that countries began to use (3), and the dispute between them extended to the emergence of the same phrase, and resort to it increased with the Industrial Revolution, as countries turned to it with the increase and diversity of areas of cooperation between them. However, the outbreak of the First World War had a negative impact on the countries' adoption of the condition in their agreements that were held at the bilateral level between countries, and this principle remained in regression until the end of this war and the establishment of the League of Nations, and with the League's entry into the implementation phase, the condition moved from bilateral relations to Multilateral relations, where the League of Nations paid attention to the condition and placed it at the forefront of topics that need to be codified for its effective role in international relations (4), and then the International Law Commission, where in 1978 the Committee adopted draft articles on the most favored nation clause (5), and continued to study the subject Due to the change in the circumstances that existed when the Committee dealt with the subject in its reports and in the final draft articles of 1978 (6), and after the Committee completed its study of subsequent developments regarding the MFN clause, it issued its report in 2015 and we will address the most important of what was mentioned in it in a later section of the Research (7). And to clarify the concept of the MFN condition, we will divide this section into two items. In the first, we will discuss the definition of the MFN condition. As for the second, we will deal with in which the concept of the MFN clause developed

1. DEFINITION OF MFN

A most-favoured-nation clause is a treaty clause whereby a state agrees to accord the other contracting partner treatment no less favorable than that which it accords to other states or third states. This provision was an early and special form of the non-discrimination provision, originating from the early treaties of friendship, commerce and navigation. For example, the treaty of 1654 concluded between Great Britain and

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Sweden stipulated the following: "The people, subjects and inhabitants of both Unions, in their respective kingdoms and in the countries, lands and territories attached to them, shall have all the benefits of any other alien, and they shall enjoy all the enjoyment of any other alien; present and future privileges, relations, liberties, and immunities, and this provision does not guarantee granting only that treatment that other foreigners enjoy. It does not guarantee the granting of treatment similar to national treatment. Citizens may receive better or worse treatment than the treatment accorded to foreigners. Most-favoured-nation was not a blanket non-discrimination provision (8).

The principle of the most favored nation in origin is a special system in the treatment of foreigners. It is not an independent form of reciprocity, as some might think, as is the comparison of foreigners with patriots. This principle is intended to "enable nationals of two or more contracting states to benefit from all the benefits granted by the other state to another foreign state directly and without taking any measures, and this condition is absolutely in relation to the rights of foreigners in general, and this may be limited to a specific right or rights. A familiar condition in international relations, and the state aims behind its requirement for this principle, to ensure that its nationals, when treated as aliens in the other state, enjoy all the rights enjoyed by any foreigner of another nationality in that state, not only in the present, but in the future as well. (9).

It was also defined as a condition agreed upon and included in a bilateral or collective treaty under which one or more parties to the agreement (called the "promiser") undertake to grant another party (called the beneficiary) a treatment not inferior to that with which any third party is treated.

The majority of jurisprudence has gone to discuss the issue of the most favored state condition within the framework of researching the effects of treaties for third countries as an exception to the principle of relativity of the effects of treaties. The jurists have defined it by various definitions, as Dr. Abdul Wahed Muhammad Al-Far knows it (the text of the most favored country aims to treat imported goods from the countries that benefit from it in a treatment no less favorable than the treatment granted to the goods of any other country) (10).

As for the Faqih Fini, he defines it as "It is a provision in a treaty according to which one state grants another state those privileges that it has previously granted or may grant in it to any other state" (11).

The international judiciary has referred to this condition in various legal disputes, including the case of the Anglo-Iranian Oil Company in 1952, the case of US nationals in Marrakesh in 1952, and in the Ampatilus case in 1953.

In this sense, the first-favoured-nation treatment clause constitutes a clause in an agreement whereby a contracting state is obligated to grant to investors of the other state party to the agreement a treatment no less favorable than that which it accords in similar circumstances to other foreign states. Article III of the Bilateral Investment Treaty between Canada and Slovakia provides that "A Contracting Party shall accord to the investment or returns of investors of the other Contracting Party in its territory treatment not less favorable than that which it accords. In such circumstances, the investment or returns of investors of any third country ".

The condition of first-favoured-nation treatment is a clause in an agreement under which a contracting state is obligated to accord to investors of the other state party to the agreement treatment no less favorable than that which it accords in similar circumstances to other foreign states. In a more precise sense, if state (A) grants special advantages to state (B)

Under an agreement to encourage foreign investment, investors of country C can claim those same special benefits as country B on the basis of the first-aid clause in the agreement between country A and country C.

Although the MFN clause contributes to the protection of investments, it can reduce or limit the scope of the host state's disposal, if it wishes to conclude other investment agreements in the future, and therefore the MFN clause remains binding on the host country in the future as well. This is because it affects all the privileges granted to countries in an agreement to another country in the event of a future investment agreement with it.

From the foregoing, it is clear that the condition of the most favored country is a condition under which the contracting state is obligated to provide the beneficiary of it in the agreed area (investment field) advantages similar to those granted to the most favored of third countries, a principle stipulated in most investment agreements until it rose to the ranks of the rules Martial law has been endorsed by both international jurisprudence and jurisprudence.

2. Evolution of the concept of the MFN

Given the important position occupied by the MFN clause in international law in general, and in investment relations in particular, many developments have taken place, and the essence of these developments has focused on providing as much as possible to protect the investor. Among the developments that have occurred in the concept of MFN Determining the areas it covers, a question has been raised about the application of the condition within the framework of the GATT, does it apply to goods only or extend to all services as well, and the latest developments in the condition are the scope of its application and is it limited to its substantive provisions only, or does it include its application Also

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procedural provisions (rules for settling disputes)? This is something we will elaborate on

First: The development of the concept of the MFN within the framework of GATT:

Article one of the GATT regulated the provisions of the first-favoured-nation clause in Articles One, Two, and Three (12), according to Article one, the most-favoured-nation treatment at the borders is granted to the goods of the other contracting parties in the GATT, "immediately and unconditionally." In addition to the third article's requirement to grant "National treatment" for those goods once they enter the domestic market of a contracting party to the GATT, the most-favoured-nation principle has become the core of the principle of non-discrimination under the GATT, and has remained so in the framework of the World Trade Organization agreements.

Despite the clarity of the texts that the condition is applied to goods, some questions have been raised about the extent to which the most-favoured-nation condition applies to services as well, and whether it extends to include its application to dispute settlement provisions (procedural provisions).

The most favored nation clause (MFN) occupies an important place in international economic law, and within the framework of providing broader protection to the continuity by providing guarantees to the investor from guarantees towards the host country, and since the GATT agreement is a source for this condition in the economic field, the condition has been interpreted more broadly And a comprehensive concept, as the condition (MFN) has expanded to include a number of areas, as it was initially applied to goods, then it became applied to other areas such as services and aspects related to intellectual property (13).

The Appeals Board of the World Trade Organization has interpreted the scope of the MFN clause in the field of trade in services as well as a dispute settlement issue, after the scope of application of the clause was initially limited to only the field of goods (14).

In fact, the most-favoured-nation rule has been expanded by WTO agreements beyond its specific scope of application to goods and applies to services and the protection of intellectual property rights. (15).

Second: The dispute over the procedural and substantive effects of the most-favoured state requirement:

Regarding the confusion in the interpretation of the MFN clause by the arbitral tribunals, where they sometimes interpreted the condition as including substantive provisions only, and at other times allowed invoking the rules for settling disputes, it became necessary for us to answer the following question: Is the application of the MFN clause limited to rulings Objectivity only? Or does it extend to include both substantive and procedural provisions?

International work has taken place on limiting the MFN clause to substantive rather than procedural provisions (16), until some practices of arbitral tribunals in the recent period have shown us that they are in application of the procedural provisions contained in the MFN clause (provisions for settling investment disputes), and despite the stability of The concept of applying the clause in substantive matters only, but in 2000, in the case of Emilio Agustin Maffezini v The Kingdom of Spain, the arbitral tribunal interpreted the MFN clause broadly to include both procedural and substantive issues. Since then, there have been several instances in which investors have sought MFN invocation of dispute resolution processes. The arbitral tribunals accepted some of these invitations (17) and others were rejected (18).

The corridors of international bodies have witnessed an analysis of the provisions of the MFN clause, and in this regard we mention UNCTAD (19), which always provides an analysis and presentation of investment-related issues by presenting and analyzing the judgments of arbitral tribunals, bilateral and multilateral international agreements, as well as the development of the principles of international law The economist, by publishing a series on issues related to international investment agreements and a summary of the decisions of investment arbitral tribunals, we can consider it as a mirror that reflects the reality of international investment. UNCTAD publications have addressed issues related to MFN within the broader discussion of investment agreements, which highlight basic and important information and focus on policy issues that apply to MFN provisions. This is in addition to the efforts of the Organization for Economic Cooperation and Development in the economic field and its role in drafting instruments to facilitate investment for its members, which include commitments to non-discrimination, including commitments in the form of MFN provisions (20)

The second Item

Types of MFN

There is no doubt that the state-sponsored clause provides the investor with a real guarantee. For example, we find that over the past decade, multinational companies (MNEs) from China have expanded rapidly at the international level, with Chinese foreign direct investment flows reaching a record level of 196 billion US dollars in In 2016, Chinese multinational corporations became active investors across a variety of industrial sectors in most countries and economies of the world. Since 2010, regional trade agreements (RTAs) have been negotiated between many countries to reap the benefits of trade liberalization, and then reach the highest rate of investment attraction, by providing an attractive legal environment for investment, by concluding the

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international agreement on attracting investment. the recent Comprehensive and Progressive Agreement for the Trans-Pacific Partnership (CPTPP); Transatlantic Trade and Investment Partnership; And the Regional Comprehensive Economic Partnership (RCEP) (21), the necessities of flexibility of the MFN clause to adapt to the variables of international life have necessarily led to a multiplicity of its types. There are three types of MFN clauses:

1. the conditional MFN clause

The principle of the conditional first-favoured nation condition is based on the establishment of reciprocity between its parties, which appears by granting the beneficiary state the right to enjoy all the advantages and rights that the donor state liberates to the other state for free. The beneficiary must provide the same return as the third country, so in this case if the donor country offers the same benefits and rights to the beneficiary country without providing the same return, then the beneficiary country will find itself in a much better position than the third (favored) country, and this harms the principle of equality On this basis, the conditional clause is the means embodying effective equality of treatment between the parties to the agreement (22).

This type of condition is based on the mutual benefit and is accompanied by a special agreement stipulating the content of compensation. Many negatives are taken from it, a matter that led to its not being included in the GATT, as it supports its adoption to eliminate the balance of customs concessions, given that each member is free to give others a more nurturing treatment, or not to give it a justification by not obtaining the appropriate compensation (23)

In the economic sphere of the nineteenth and early twentieth centuries, most-favoured-nation treatment was often granted conditionally. Instead of automatically granting most-favoured-nation treatment, one country grants it in exchange for an advantage the other provides. That is, a consideration had to be paid to grant the most-favoured-nation treatment. This treatment has been known as 'conditional most-favoured-nation treatment'. This conditional treatment has declined with the growing realization that the donor country obtains economic benefits by granting most-favoured-nation treatment without conditions (24).

2. Unconditional MFN

Under the unconditional MFN clause, the donor country is obligated to provide the beneficiary state with all the benefits and exemptions it offers to the third state, and that the beneficiary state is not obligated to provide any specific consideration or compensation in order to benefit from the benefits decided by the state bound by the condition to the third state, and accordingly The basis is that the state benefiting from this condition enjoys these privileges and advantages as soon as the donor state concludes an agreement through which additional advantages and rights are decided for the third state, regardless of whether these advantages and rights were granted free of charge or in return (25). According to the first, the donor state is obligated to give the beneficiary state immediate and automatic benefits that are not dependent on a request, permission or permit. The condition of the most favored state has been known in its unconditional form in many international conventions explicitly, either by an explicit phrase such as "unconditional" or by an explicit reference to this and an example That trade agreement between Ireland and Romania in 1971, and the significance of the unconditional condition may be implicit, for example, the agreement on trade, economic and technical cooperation between Iraq and Canada in 1982.

It seems important to say that the unconditional adoption of the MFN clause within the GATT was expressly stated on the basis that all advantages granted by any member of the organization to a product originating or destined for any country must be circulated directly and unconditionally to every similar product originating or heading to the territories of all other member states (26)

The content of this type is the extension of the mutual benefits included in modern treaties concluded within the framework of economic and social cooperation between neighboring countries or those with close economic ties to all foreign countries benefiting from the most favored nation clause included in this treaty, which we recommend to include in investment treaties because of its It plays an important role in attracting investments.

3. multilateral MFN clause

The most-favoured-nation clause has retained its prominence in the economic sphere, as multilateral agreements have included provisions regarding MFN treatment. This reflects the economic objective of MFN rule in this area and, in some cases, multilateral agreements that provide for broader non-discrimination obligations have replaced treatment with an MFN clause based on bilateral treaties (27) and a unilaterally binding clause in which one contracting party undertakes Within the treaty that includes the condition granting the other party the most favored country treatment without the other contracting party undertaking to grant the same treatment to the first party. Part of the jurisprudence refers to other types of the most favored country condition, including the general condition, the special condition and the positive condition, according to which the donor country is obligated to grant the beneficiary country all the privileges granted As for the negative condition, the donor country is obligated not to treat the beneficiary country worse than any other country.

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Despite the fact that the most-favoured-nation treatment is a common commitment between bilateral investment treaties, the way of expressing this commitment varies, and in this regard, six types of commitment can be identified, as follows: Granted to an investor or investments. The agreement between Austria and the Czech and Slovak Republics is an example of this type, and the second type of obligation is the case in which the scope of the transaction to be granted is expanded with reference to "all" types of transaction. One example of this type is the agreement between Argentina and Spain, which states that the MFN clause applies to "all matters covered by the agreement" and a third type of obligation is the case in which the term "transaction" relates to specific aspects of the investment process, such as "management of the investment process." Investments to which MFN treatment applies, "maintenance" and "use" operations, and "the fourth type is where the MFN treatment is linked to specific obligations under the treaty, such as the obligation to provide fair and equitable treatment." The fifth type of obligation is to comply with The case in which MFN treatment is granted only to those investors or those investments "in similar circumstances." The sixth type is those agreements that appear to include territorial boundaries. For example, the agreement between Italy and Jordan of 21 July 1996 provides for the agreement of the two contracting parties to provide most-favoured-nation treatment "within the borders of their respective territories" (28)

As for the main elements of the most-favoured-nation clause, they were identified by the International Law Commission in the 1978 draft articles, by saying that most-favoured-nation provisions in bilateral or multilateral treaties consist of the following main elements. First, the state agrees under this provision to grant a certain level of treatment to a state or countries Others, and for persons and entities with a specific relationship to this country or countries. Second, the level of treatment granted under an MFN provision is determined by the treatment accorded by the donor country to a third country ("no less favourable"), and third, the obligation under an MFN clause applies to the transaction. which are of the same category as treatment accorded to a third country only ("of the same type")) Fourth, persons or entities entitled to benefit from MFN treatment are only those persons or entities who are of the same class as persons or entities of a third country who are entitled to them to obtain the required treatment, and since it is the second and third elements that raise the greatest number of difficulties when applying the provisions of the most favored nation. No less caring treatment, and the question of whether the requested treatment is of the same class as treatment accorded to a third country, to disputes under both GATT and WTO. As will be seen below, the question of whether the treatment requested is of the same category as that accorded to a third country is at the heart of all current controversies in the field of investment. (29)

In sum, the principle of MFN means that the host country grants investors of a foreign country the same treatment that it grants in similar cases to investors of all other foreign countries in its territory. This rule can be applied to any investment-related activities such as exploitation, management, use, sale and liquidation. This rule can be applied unilaterally or interchangeably, conditionally or unconditionally, that is, the first-favored-nation rule aims to prevent all discrimination based on nationality against foreign state investors. It binds the host country to certain limits that it follows in its current and future investment policy and prevents it from discriminating against the investors of a foreign country at the expense of the investors of other foreign countries.

THE SECOND SECTION

Mechanisms of investor protection under the first-favoured state condition

Investment contracts contribute to strengthening the establishment of the state's infrastructure, and then the question was raised about the nature of the activity that could benefit from the provisions of the provisions of the most favored country within the framework of investment development. The mechanisms of investor protection are related to issues of a procedural and objective nature, but international jurisprudence and arbitration did not agree on resolving issues related to the nature of the provisions in question. It is a matter that raises several questions in this aspect, that require serious solutions to determine effective frameworks for protecting the investor within the framework of the most-favoured-nation condition, a matter to which the International Law Commission has contributed with remarkable efforts. In this section, we will discuss the mechanisms of investor protection under the MFN clause in two demands. We devote the first to examining the scope of the MFN clause, and we will discuss in the second requirement the extent of benefiting from the means of settling disputes granted under the MFN clause.

The first Item

Scope of application of the MFN clause in investment

If the application of the most-favoured-nation condition in the framework of trade is determined in specific areas such as: customs rights, then in the field of investment it expresses a general concept that covers everything related to the treatment of foreign investment in the host country, such as: transfer of interests and

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conditions of nationalization or expropriation, and in general, This condition includes all the rights and benefits that benefit the most favored country, except in the event that there is an exception in the agreement that states otherwise (30), and since the purpose of the research was to deal with the condition as a guarantee to protect the investor, we will focus on the scope of application of the condition to serve the purpose of the research, by identifying the beneficiary of the condition.
In 1978, the International Law Commission, in the context of its study of the MFN clause, made clear who has the right to benefit from the MFN clause, and many agreements limit the benefit from the MFN rule to the investment field (31), and we will define the concept of investment in The framework of the relationship between bilateral agreements and the jurisprudence of the International Center for the Resolution of Investment-Related Disputes, where Article (32) of the agreement that established the Center refers to the following: "The Center's jurisdiction, the jurisdiction of the Center extends to disputes of a legal nature that arise between a contracting state and a national of a contracting state. Others, which are directly related to an investment, provided that the parties to the dispute agree in writing to put them to the center. And when the parties to the dispute have given their mutual consent, neither of them may withdraw it alone."
Accordingly, according to Article 25 of the Washington Agreement that established the center, it is not possible to resort to the center's courts to settle a dispute between the contracting parties unless three conditions are met, namely, the parties' consent to submit the dispute to arbitration before the center, and that the dispute exists between the contracting state or a public legal person belonging to it and a citizen of another country, and finally that the origin of the dispute is related to investment.
According to the aforementioned article, the center is specialized in disputes related to investment only, and that investment is the beating heart of the arbitration and conciliation systems in the center. It was also approved by Article 1 of the Agreement, which stipulates that the Center's offer is to provide means of conciliation and arbitration in order to settle disputes related to investments. It is clear that these references did not indicate a clear indication that the relationship between the dispute or investment should be a direct or indirect one, as indicated by it. Article 25 Paragraph 1 of the Agreement requires that the dispute be directly related to an investment.
The concept of investment had been raised in the judgment of the Arbitration Court in the "Amco.V.Indonesia" case, and the dispute in this case was related to an investment agreement concluded between the Indonesian government and the American company "Amco." It exceeded its authority when it considered the actions of both the Indonesian army and police represented in interfering with the seizure of a hotel. The intervention of the Indonesian army and police against the American company is an integral part of the dispute related to the investment agreement (33)
The absence of a clear, precise and general definition of the concept of investment led to the arbitrators' intervention within the center's framework to define the concept of investment, relying at the same time on the Washington Agreement and many bilateral agreements. The arbitrators did not neglect the contribution of jurisprudence in clarifying the objective criteria in this field.
It should be clarified that the ambiguity of the concept of investment is due to its belonging mainly to economic sciences before it was gradually included in legal sciences and the jurists attempted to define it. These jurisprudential attempts generated a narrow classical concept of investment represented in providing a "in-kind contribution", with the aim of limiting it to a specific set of operations that It cannot go beyond the concept of the scope of direct investment.
Some arbitration rulings have been exposed to determine what is meant by investment contracts, as one of the arbitrators in the SAPPHIRE arbitration against the Iranian Oil Company described the investment contract as: "A contract between a national company that takes the form of a public project, and a foreign commercial company subject to foreign civil law, and all this contract does not focus on operations It gives the foreign company the right to exploit natural resources for a long period, and obliges the foreign company to establish huge investments and facilities of a permanent nature" (), but a jurisprudential controversy has arisen about the extent to which the nature of the investment covered by protection is determined, in particular, whether the investment should Contributes to the economic development of the host country, but according to the findings of the International Law Commission, the definition of investment is that it is an issue related to the investment agreement as a whole and does not raise any total issues regarding the terms of the MFN or their interpretation. (34).

THE SECOND ITEM

Extent of benefit from the means of settling disputes granted under the condition of the most favored nation

Within the framework of the application of the most-favoured-nation condition in the field of settling investment disputes, problems related to the type of provisions that are called for implementation, and whether they include procedural or substantive provisions only? What is the role of the International

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Law Commission in solving this problem? This is a matter that we will deal with by examining this item in two points. We dedicate the first to examining the problematic application of settlement provisions disputes contained in the MFN condition. As for the second one, we deal with the work of the International Law Commission on the extent to which the means of settling disputes granted under the MFN clause are used.

1. **The problem of applying settlement provisions about disputes contained in the MFN clause**

Most-Favoured-Nation (MFN) clauses have been included in international trade treaties for centuries. It occupies a prominent place in international investment agreements. Despite its long and widespread use, investment law doctrine and arbitration practice still encounter difficulty in applying and interpreting the provisions of this clause, particularly with regard to the scope of its application. The question mainly revolves around the meaning and obligations associated with this condition? (35)

And if the international action has settled on the application of the substantive provisions of the condition without the procedural as detailed in the first topic, and since attracting investments is the goal of any developing country, add to that the desire of investors to obtain sufficient guarantees to protect their investments, a matter that created several attempts seeking To benefit from the dispute settlement procedures granted under the most-favoured-nation clause.

The dispute arose between the different interpretations of the arbitral tribunals, about the extent to which the dispute settlement provisions contained in the MFN clause could be applied, starting with the Maffezini case, and during the International Law Committee's study of the MFN clauses, a question was raised about this issue, "Whether the dispute settlement provisions are contained in a treaty with a third party may be considered reasonably relevant to the fair and equitable treatment to which the MFN clause applies under the fundamental treaties on commerce, navigation or investments, and, consequently, whether it may be considered a subject matter." The arbitral tribunal reached that conclusion Based on the decision of the Arbitral Tribunal in the Ambatielos case: "There are good reasons for concluding that today's dispute settlement arrangements are closely related to the protection of foreign investors, because they are also linked to the protection of the rights of traders under trade treaties" (36).

From the above provisions, it is evident that the application of the provisions relating to the settlement of disputes contained in the MFN clause represents a type of protection for investors, and this can be justified by the fact that the means of settling disputes related to investment disputes, is one of the important tools for attracting investment because it provides the investor with a guarantee to obtain his money In the case of nationalization or abuse, then the application of the dispute settlement provisions stipulated in the most favored nation condition is one of the ways to provide investment guarantees.

Although some arbitral tribunals have decided to import the provisions of the most-favoured-nation clause as a guarantee for the investor, some national courts have rejected this approach and the arbitration decisions ruling their jurisdiction have been canceled based on the most-favoured-nation clause. The arbitral tribunal is competent on the basis of the most-favoured-nation condition, during its consideration of an appeal for nullity of the arbitration award issued in the dispute between the Libyan government against D.S. Construction of the United Arab Emirates, where the arbitral tribunal ruled its jurisdiction to consider the dispute based on the most-favoured-nation condition (and here we note that the arbitral tribunal has invoked the procedural provisions of the condition), and the (Libyan government) appealed for the nullity of the arbitral award issued on February 15, 2018 in Paris, issued by a court The Permanent Arbitration of the International Chamber of Commerce, and on March 23, 2021, the Paris Court of Appeal ruled that the arbitration award was invalid (37).

Whereas, D.S. Construction FZCO, the jurisdiction of the arbitral tribunal, is based on the approval of the Libyan government to apply the rules of UNCITRAL, and this approval can be deduced from Article 11 of the bilateral treaty concluded between the Republic of Libya and Austria, and on the basis of Article 8 of the Treaty of the Organization of Islamic Cooperation, which I described D.S. Company. Construction FZCO on the most-favoured-nation requirement (38),

The arbitral tribunal decided its jurisdiction, but the ruling was overruled by the Paris Court of Appeal in France on the basis of invoking the procedural provisions of the MFN clause.

The matter did not stop at the national courts' refusal to apply the procedural provisions of the most-favoured-nation clause, but also some international arbitration bodies rejected it. Among the cases in which the refusal to invoke the procedural rulings of the most-favoured-nation clause was supported is the case of Etisaluna and Others v Iraq, where a ruling was issued On April 3, 2020, the arbitral tribunal addressed whether the MFN clause in Article 8 of the Organization of Islamic Cooperation (OIC) agreement allows a foreign investor to import an item that allows access to the International Center for Settlement of Investment Disputes (ICSID) based on ICSID agreements Bilateral Investments (BITs) between Iraq and other countries,

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and the arbitral tribunal rejected the plaintiffs' requests to use the MFN clause in the OIC agreement to import Iraq's consent to arbitration from other BITs. The arbitral tribunal ruled that it lacked jurisdiction on the grounds that the OIC Convention does not provide for explicit consent to ICSID arbitration. (39)

It can be said that the reason for the difference in the arbitral tribunals' approach in applying the most favored nation clause is that some commissions require the existence of an explicit text for the purposes of implementation, at a time when others interpret it broadly in order to invoke the provisions of dispute settlement, and their argument in this is that the international investment approach is Primarily directed to protect the investor.

2. The role of the International Law Commission On rethe principle of the MFN

In its report on the study of the MFN clause, the International Law Commission concluded a number of conclusions and recommendations regarding the interpretation of the MFN clause. These results, in fact, represent answers to three questions, the first of which is: Can the provisions of the MFN be applied to the provisions of the MFN? Dispute settlement in bilateral investment treaties? Second, is the jurisdiction of an arbitral tribunal affected by the terms in BITs regarding the type of dispute settlement provisions that investors may invoke? The third is: What are the important factors in the interpretation process when determining whether or not an MFN provision in a BIT applies to the conditions necessary to invoke dispute settlement provisions?

There is nothing precluding the possibility of applying the provisions of the most favored nation, to the provisions for settling disputes contained in bilateral investment treaties, despite the controversy surrounding them in some of the precedents of the decisions of arbitral tribunals. This is the case regardless of the possibility that the idea was originally based on a misinterpretation of what the Arbitral Tribunal in the Ampatielos case meant when it noted that "administration of justice" fell within the scope of an MFN provision but included a reference to "all matters relating to commerce and navigation.".

This and other cases have raised questions by some arbitral tribunals as to whether dispute settlement provisions are inherently covered by MFN terms. The Salini Arbitral Tribunal questioned whether the Arbitral Tribunal's decision in the Ampatielos case was an argument in favor of this idea, citing the opinions of the dissenting judges in the previous decision of the International Court of Justice that "commerce and navigation" did not include "the administration of justice" and pointed out The Salini Arbitral Tribunal further noted that the Ambatielos Arbitral Tribunal, however, when referring to the "administration of justice", was not referring to procedural provisions or the settlement of disputes, but to substantive provisions under other investment treaties relating to the fair treatment of citizens and fairness.

The International Law Commission concluded that the lesson is cool to the parties, and that when the parties expressly include conditions for resorting to dispute settlement within the framework of their MFN, no difficulties arise. Likewise, when the parties expressly exclude the application of the MFN provision to the terms of recourse to dispute settlement, no difficulties arise in the same way, but the problem is raised in the case of the lack of clarity of the clause, which has resulted in inconsistencies in the decisions of arbitral tribunals.

The problem that led to the different approaches of arbitral tribunals' decisions is primarily related to interpretation. The International Law Commission has limited the various interpretations of arbitral tribunals to the following points:

First, when an MFN clause simply provides for "treatment no less favourable" without any description that may be invoked to extend the scope of the treatment to be granted, arbitral tribunals always refuse to interpret that provision as including dispute settlement.

Second, when an MFN clause includes provisions referring to "all kinds of treatment" or "all matters" regulated by the treaty, arbitral tribunals tend to give a broad interpretation of these provisions, and to conclude that they are applicable to dispute settlement provisions. In only one case, a provision in broad terms was not considered applicable to dispute settlement.

Third, when an MFN describes treatment to be received by reference to "use," "manage," "maintenance," "utilize," and "disposal," the majority of arbitral tribunals conclude that these provisions are broad enough to Dispute settlement provisions include.

Fourth, in the two cases directly linking the MFN clause to fair and equitable treatment, neither body has concluded that this clause includes dispute settlement provisions.

Fifth, in cases where a territorial limitation was placed on an MFN clause, the outcome has been mixed. Some cases have concluded that the territorial restriction is not important in determining whether the condition includes dispute settlement provisions, while in other cases it has been determined that the territorial restriction clause prevents the inclusion of international dispute settlement provisions within the MFN clause.

Sixth, in all cases in which an MFN clause is limited to its application to investors or investments "in similar circumstances" or "in similar situations," no arbitral tribunal has treated the question of whether or not this provision applies to dispute settlement provisions as a matter of importance.

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For our part, we conclude that the essence of the problem lies in the different interpretations of the condition of the most favored country, so we recommend that the State, while concluding the investment agreement, give this condition a high degree of importance and clarity, by explicitly stating whether it includes procedures for settling or disputes or You intend to exclude it from the scope of application of the condition.

CONCLUSION

The issue of investment is one of the issues that are characterized by development, whether this development focuses on its place (in terms of the issue of investment and its fields), or on the legislative frameworks regulating it (legal rules), and countries strive to attract foreign investors by providing various guarantees and encouraging privileges. On this, both at the internal level, through the continuous review of its laws related to the promotion of investment, in order to include the largest possible number of mechanisms for the protection of foreign investment, or at the external level through the conclusion and ratification of many bilateral and collective agreements related to the promotion and protection of foreign investment.

It has become clear to us through the research that the state's first-care condition is one of the best guarantees established in favor of the investor. and recommendations:

FIRST: RESEARCH RESULTS

• The condition of the most favored nation is a condition under which the contracting state is obligated to provide the beneficiary of it in the agreed area (investment field) advantages similar to those granted to the most favored of third countries, and it is a principle stipulated in most investment agreements until it rose to the ranks of customary rules and was supported Both international jurisprudence and jurisprudence.

• The concept of the most favored nation clause in the World Trade Organization agreements has evolved beyond its specific scope of application to goods and has become applicable to the field of services and the protection of intellectual property rights

• International work has taken place on the limitation of the MFN clause to substantive rather than procedural provisions, to the point that some practices of arbitral tribunals have applied the procedural provisions of the condition.

Defining the definition of investment is a matter related to the investment agreement as a whole and does not raise any macro issues regarding MFN terms or their interpretation, which is what the International Law Commission has concluded.

• Implementation of the provisions for settling disputes contained in the most-favoured-nation clause represents a kind of protection for investors.

• There is nothing precluding the possibility of applying the provisions of the most favored nation to the provisions for settling disputes contained in bilateral investment treaties despite the controversy surrounding them in some precedents of the decisions of arbitral tribunals, which is what the International Law Commission reached in its study.

• The problem that led to the different approaches to the decisions of the arbitral tribunals is related primarily to the interpretation of the MFN clause.

SECOND: RECOMMENDATIONS

• Inclusion of the condition in international agreements as it is an essential pillar for encouraging investment.

• We recommend that the state, when it is in the process of concluding the investment agreement, give this condition a high degree of importance and clarity, by explicitly stating whether it includes procedures for settling, or disputes, or intends to exclude them from the scope of application of the condition.

• We recommend the arbitral tribunals to comply with the will of the parties and adopt them during the application of the procedural provisions of the most favored nation condition.

• The MFN clause must be interpreted on the basis of treaty interpretation rules.

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