Using MFN to avoid time-bar provisions
Are time-bar provisions substantive or procedural?

Author: Huijuan Ye
Supervisor: Cornél Marian
# Table of Contents

## Abbreviations

1. Introduction.................................................................................................................. 1  
   1.1 The problem ........................................................................................................... 1  
   1.2 Purpose and delimitations of the topic ................................................................. 4  
   1.3 Methodology .......................................................................................................... 5  

2. Are time-bar provisions substantive or procedural in nature? ......................... 5  
   2.1 Time-bar provisions and extinctive prescription in municipal law ................. 7  
      2.1.1 Right or remedy? ........................................................................................... 8  
      2.1.2 Lex arbitri? ..................................................................................................... 11  
   2.2 Time-bar provisions and extinctive prescription in public international law ........................................................................................................ 12  
      2.2.1 Jurisdiction or admissibility? ......................................................................... 13  
      2.2.2 Admissibility or merits? ................................................................................. 15  
   2.3 Concluding remarks ............................................................................................. 17  

3. Can MFN clauses be extended to time-bar provisions? .................................... 17  
   3.1 Why MFN clauses can be extended to dispute settlement provisions .......... 18  
   3.2 Why MFN clauses can not be extended to dispute settlement provisions ........................................................................................................ 21  
   3.3 Application of the reasoning to time-bar provisions discussion ................. 25  
      3.3.1 Treaty interpretation....................................................................................... 25  
      3.3.2 Other considerations ..................................................................................... 30  
      3.3.3 Concluding Remarks..................................................................................... 31  

4. Conclusion .................................................................................................................. 32

## Bibliography
**Abbreviations**

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>BIT</td>
<td>Bilateral investment treaty</td>
</tr>
<tr>
<td>Host State</td>
<td>The State in which a foreign investor, invests</td>
</tr>
<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
</tr>
<tr>
<td>ICSID</td>
<td>The International Centre for Settlement of Investment Disputes</td>
</tr>
<tr>
<td>NAFTA</td>
<td>North American Free Trade Agreement</td>
</tr>
<tr>
<td>Tribunal</td>
<td>An arbitral tribunal adjudicating an investment dispute</td>
</tr>
<tr>
<td>UNCITRAL</td>
<td>United Nations Commission on International Trade Law</td>
</tr>
<tr>
<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
</tr>
<tr>
<td>MFN</td>
<td>Most-favored-nation</td>
</tr>
</tbody>
</table>
1. Introduction

In investment arbitration, the question of whether MFN clauses can be applied to dispute settlement provisions has been heatedly debated. The case law shows that the Tribunals have formed contradictory opinions with regard to this question\(^1\). In the recent ICSID case *Ansung v. China*\(^2\), the Tribunal confronted the question of whether the MFN clause may be applied to circumvent the time-bar provision in the Korea-China BIT. This thesis is therefore prompted by this very question raised in the *Ansung* case.

1.1 The problem

In 2006, Ansung, a Korean company, made an investment of developing a golf course project in Sheyang-Xian, China. Ansung got the investment approval from and entered into an Investment Agreement with the local government.\(^3\) Thereafter the government failed to honor its commitments and assurances to the investor\(^4\), as a consequence of which Ansung was forced to sell its entire investment to avoid further losses.\(^5\) In 2014, Ansung initiated an ICSID arbitration against the People’s Republic of China.\(^6\) In the proceeding, the Respondent objected that Claimant’s claim “manifestly lacked legal merit and should be dismissed” because the Claimant commenced the ICSID arbitration “more than three years after it first acquired knowledge that it had incurred loss or damage, rendering the claim time-barred under Article 9(7) of the China-Korean BIT”.\(^7\) The Respondent also objected that the “MFN Clause in the Treaty cannot save Ansung’s untimely

---

\(^1\) For example, there are cases that support the extension of MFN clauses to dispute settlement provisions: *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, *Gas Natural SDG, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/10, *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrados del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, *National Grid plc v. The Argentine Republic*, UNCITRAL.


\(^2\) *Ansung Housing Co., Ltd. v People’s Republic of China*, ICSID Case No. ARB/14/25, Award, 9 Mar 2017

\(^3\) *Ansung v. China*, paras. 35-36

\(^4\) *Ansung v. China*, paras. 41-51

\(^5\) *Ansung v. China*, para. 52

\(^6\) *Ansung v. China*, para. 53

\(^7\) *Ansung v. China*, para 56
claim.” It thus raised the question of whether the time-bar provision may be covered by the MFN clause of the Treaty.

On one hand, the Claimant, in the need of removing the time-bar provision provided in the Treaty, first argues that the MFN clause can “import substantive rights from other treaties” so it can operate to exclude the time-bar provision in the present Treaty because “the principle of extinctive prescription is considered a substantive right both in international law and in many civil law countries, including Korea and China” and it is less favourable to have such extinctive prescription in the BIT. The Claimant continues to argue that even if the limitation period is to be considered as procedural, in support of many tribunals and commentators, the MFN clause should be “interpreted broadly” and “be extended to the important procedural protection of arbitration provisions”. The words “treatment” and “investment activities” should be “broadly interpreted to include dispute settlement procedures” because “investor-State arbitration is critical to protect investment activities”. Moreover, Claimant contends that “within the territory” does not “prevent application of the MFN Clause to the dispute settlement clause”.

On the other hand, the Respondent contended that Article 3(3) did not apply to dispute settlement provisions in general or to “China’s temporal condition to consent to arbitration in Article 9(7)” in particular. From the perspective of treaty interpretation, China argued that, the text of Article 3(3) “limits MFN treatment to the host State’s territory and covers only investment and business activities” which refers to “the expansion, operation, management, maintenance, use, enjoyment, and sale or other disposal of investments” and “does not include dispute settlement”. And contextually speaking, Article 3(5) “separately provides for MFN treatment for dispute resolution by access to courts and administrative tribunals”, which demonstrates that “the Contracting States do not

8 Ansung v. China, para. 56
9 Ansung v. China, para. 125
10 Ansung v. China, para. 126
11 Ansung v. China, para. 127
12 Ansung v. China, para. 127
13 Ansung v. China, para. 130
14 Ansung v. China, para. 131
consider Article 3(3) to apply to dispute settlement”.

Moreover, from the perspective of treaty practice, the 2012 investment agreement between China, Korea and Japan also limits MFN treatment to “investment activities” including “management, conduct, operation, maintenance, use, enjoyment and sale or other disposition of investments” and the Contracting States “expressly state their understanding that this MFN treatment does not extend to dispute settlement”.

The Tribunal was of the view that “the ambit of an MFN clause is dependent on its wording”. The Tribunal began with “a plain reading” of the MFN clause and stated that “this Article does not extend to MFN treatment for a State’s consent to arbitrate” and in particular “not to the temporal limitation period for investor-State arbitration in Article 9(7)”. The Tribunal supported its conclusion by observing that Article 3(5) offers “specific MFN protection in relation to an investor’s access to courts of justice and administrative tribunals and authorities” and “reference to international dispute resolution is conspicuously absent in the MFN clause in Article 3(3)”. The Tribunal then concluded that Article 3(3) of the China-Korea BIT did not prevent Claimant’s claim from being time-barred under Article 9(7) of the Treaty.

From the case description above, the present author is not satisfied by the reasoning of the Tribunal of Ansung case, for the reason that the Tribunal omitted to decide whether extinctive prescription should be classified as a substantive right or a procedural right. Also the Tribunal just decides that the time-bar provision in Article 9(7) of the Korea-China BIT is a matter of State’s consent to arbitration without stating any reason. Moreover the Tribunal basically reaches its decision by “a plain reading” of the MFN clause without conducting a proper treaty interpretation on the clause. The foregoing reasons urge the present author to look into the questions and to provide analysis for the questions.

15 Ansung v. China, para 131
16 Ansung v. China, para 132
17 Ansung v. China, para 137
18 Ansung v. China, para 138
19 Ansung v. China, para. 139
20 Ansung v. China, para. 141
1.2 Purpose and delimitations of the topic

The purpose of the thesis is to study extinctive prescription in investment arbitration context and to identify and evaluate MFN cases that dealt with the question of whether MFN clauses can extend to dispute settlement clause in order to address the following questions:

I. Are time-bar provisions substantive or procedural in nature?

II. Are time-bar provisions jurisdictional matters?

III. In light of the reasoning of previous MFN cases, can MFN clauses be extended to time-bar provisions?

At the outset, this thesis will not deal with the question of whether MFN clauses could have or should have the automatic effect to incorporate other provisions provided by other treaties into the basic treaty.21 This thesis will base on the assumption that MFN clauses could have such effect to incorporate other provisions from other treaties into the basic treaty. Also this thesis will not involve the discussion of whether MFN clauses may import substantive provisions from other treaties. Instead, this thesis’s analysis will build on the assumption that MFN clauses could have the effect of importing substantive protection clauses into the basic treaty in order to let the author focus on the discussion of whether MFN clauses can import procedural provisions from other treaties and render the analysis on the substantive or procedural nature of the time-bar provisions more meaningful.22

---

21 For more information of the debates on this question, see for example: Douglas, Zachary. 'The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails', Journal of International Dispute Settlement, vol. 2/no. 1, (2011), pp. 97-113. And Schill, Stephan W. 'Allocating Adjudicatory Authority: Most-Favoured-Nation Clauses as a Basis of Jurisdiction-A Reply to Zachary Douglas', Journal of International Dispute Settlement, vol. 2/no. 2, (2011), pp. 353-371. However in Dolzer, Rudolf, and Christoph Schreuer. 'Principles of International Investment Law', Anonymous Translator(Second;2nd;2; edn, Oxford, United Kingdom, Oxford University Press, 2012), page 206: "The [MFN] clause may not have any practical significance if the state concerned fails to grant any relevant benefit to a third party. However, as soon as the state does confer a relevant benefit, it is automatically extended to the state that benefits from the MFN clause."

22 Although some Tribunals expressed their views that for a provision to be incorporated by MFN clauses, there is nothing normative about whether this provision should be substantive or procedural. For example, RosInvestCo UK Ltd. v. The Russian Federation, SCC Case No. V079/2005, Award on Jurisdiction, 1 Oct 2007, paras. 98-100
1.3 Methodology

The main body of this thesis will be divided into two parts: (1) the discussion on the substantive or procedural nature of time-bar provisions in investment arbitration context and (2) the analysis of the application of MFN clauses on time-bar provisions.

In order to reach a conclusion on the substantive or procedural nature of time-bar provisions, the author notices that there needs to be a standard to distinguish between substantive and procedural that the author can rely on when dealing with this question. However the author finds it difficult to identify such a standard within the context of investment arbitration. The approach adopted by the author will be a comparative analysis approach in the sense that the author will look into the standards of distinguishing substantive or procedural nature of extinctive prescription in different contexts and try to apply those standards to the context of investment arbitration. Bearing in mind that the contexts are different, the analogy will be conducted in caution. In the first part, two legal questions set forth in section 1.2 will be answered.

When it comes to the second part, the analysis of application of MFN clauses on time-bar provisions, this part is to a large extent based on a review and analysis of arbitral practice. As stated in the beginning, whether MFN clauses can be extended to dispute settlement provisions has been heatedly debated, through the review and analysis of those arbitral practice, the author is seeking the underlying reasons contributed by the Tribunals and trying to apply the similar reasoning to the question of whether MFN clauses can be extended to time-bar provisions. The last legal question set forth in section 1.2 will be addressed in the second part of the main part of the thesis.

2. Are time-bar provisions substantive or procedural in nature?

As mentioned above, this thesis is based on the assumption that the substantive rights can be imported by MFN clauses while procedural provisions can not
necessarily be imported by MFN clauses. And such difference renders the discussion on the nature of time-bar provisions meaningful.

For the purpose of this thesis, the time-bar provisions that will be examined are those clauses provided in the treaties with specific time period limitations, having the effect that, generally speaking, the claimant’s claim can no longer be accepted by the arbitral tribunal after the lapse of time.

In the author’s opinion, time-bar provisions are the same to extinctive prescription. Generally speaking, the effect of time-bar provisions is the same as extinctive prescription in that a time-out claim or a claim that is unduly delayed as well as placing the respondent at a disadvantage in establishing his defense will be barred from bringing in front of an arbitral tribunal, provided that the dispute resolution is arbitration. But for the sake of convenience, when referring to time-bar provisions, this thesis is referring to the extinctive prescription under investment arbitration context. When referring to extinctive prescription, the author is pointing to extinctive prescription under other context.

It would seem reasonable to look into the substantive or procedural nature of extinctive prescription that have already been discussed when discussing whether time-bar provisions are substantive or procedural provisions. Yet any analysis into the two concepts should be approached with caution, for the contexts of their respective application are different.

When it comes to extinctive prescription, there are two distinct contexts, i.e. extinctive prescription in municipal law and extinctive prescription in public international law\(^\text{23}\). In order to explore the substantive or procedural nature of

\(^{23}\) For a detail discussion of these two contexts, see Hobér, Kaj, 1952. 'Extinctive Prescription and Applicable Law in Interstate Arbitration', vol. 88/(2001), Chapter 4.

Professor Kaj Hobér in his book used the term extinctive prescription when referring to international law and limitation or extinctive prescription when discussing municipal law.

In Black’s Law Dictionary, “statute of limitation” is defined as “a statute prescribing limitations to the right of action on certain described causes of action or criminal prosecutions; that is, declaring that no suit shall be maintained on such causes of action, nor any criminal charge be made, unless brought within a specified period of time after the right accrued. Statutes of limitation are statutes of repose, and are such legislative enactments as prescribe the periods within which actions may be brought upon certain claims or within which certain rights may be enforced.”
time-bar provisions, this thesis deems it appropriate to review the nature of extinctive prescription in different contexts and borrow the standards under which such clause can be characterized into substantive or procedural in nature to evaluate the time-bar provisions in investment arbitration context.

2.1 Time-bar provisions and extinctive prescription in municipal law

In common law countries, from a conflict of laws perspective, the traditional approach is that extinctive prescription was characterized as a matter of procedural law and thus governed by *lex fori*.\(^{24}\) The reasoning behind this approach or the standard of such classification is that the limitation rule in question would only take away the remedy, while the right remained, which means that if both the remedy and the right are taken away, the limitation rule would be characterized as substantive and thus governed by *lex causae*.\(^{25}\)

But this approach put the concerns of forum-shopping in spotlight. Because by characterizing extinctive prescription as procedural law governed by *lex fori*, no matter how long the period of limitation is in *lex causae*, a claim would be permitted in the forum as long as the *lex fori* provides for a longer period than *lex causae*.\(^{26}\)

To prevent forum-shopping, US courts have made distinction between extinctive prescription affecting the right, and extinctive prescription affecting only the remedy. If the foreign limitation rule is intended to extinguish the right, it will be characterized as a substantive rule and thus be applied by the court of the forum.\(^{27}\)

After the 1984 Foreign Limitation Periods Act, under which the main rule is that the limitation rules of *lex causae* are to be applied in court actions in England, the

---

As to English law, Osborn’s Concise Law Dictionary defines “statutes of limitation” as “the Statutes which prescribe the periods within which proceedings to enforce a right must be taken or the right of action will be barred.”

\(^{24}\) Ibid, page 259
\(^{25}\) Ibid
\(^{26}\) Ibid, page 257
\(^{27}\) Ibid
position of English law has changed fundamentally.\textsuperscript{28} It firmly classifies the question of extinctive prescription into the category of substantive rule.

From the above mentioned, two observations can be made.

\textbf{2.1.1 Right or remedy?}

First, it seems that to characterize extinctive prescription as substantive or procedural in nature, the drawing line would be that whether the clause takes away the right or just the remedy. Just as the distinction between limitation periods and statutes of repose, the former is to bar the claimants from submitting cases, but they can be waived by respondents or respondents might be estopped from asserting the statute as a barrier to the action, while the statutes of repose, on the other hand, extinguish the cause of action as of a date certain, and the cause cannot be resurrected.\textsuperscript{29}

To answer this question, it is necessary to review the time-bar provisions provided in the Treaties. NAFTA is a typical multilateral treaty that encompasses time-bar provisions. Article 1116 of NAFTA entitled “Claim by an Investor of a Party on Its Own Behalf” stipulated that:

\begin{itemize}
    \item \textit{1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:}
        \begin{itemize}
            \item \textit{(a) Section A or Article 1503(2) (State Enterprises), or}
            \item \textit{(b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party’s obligations under Section A,}
        \end{itemize}
        \textit{and that the investor has incurred loss or damage by reason of, or arising out of, that breach.}
    \item \textit{2. An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first}
\end{itemize}

\textsuperscript{28} Ibid., page 259
acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.\textsuperscript{30}

According to Article 31 of VCLT\textsuperscript{31}, treaty provisions should be interpreted in good faith in accordance with the ordinary meaning under the context and in light of its object and purpose. Article 1116 of NAFTA sets off both positive limits and negative limit on when an investor may submit a claim or may not make a claim under investor-state dispute resolution. The different wording between “submit a claim to arbitration” and “make a claim” coincides with the ordinary meaning of “submit” and “make” in the sense that “submit” put emphasis on the action of initiating the arbitration while “make” more focus on the results, whether the claim can be accepted or qualified as a claim. Apart from the function of giving guidance to the Tribunal, treaty provisions also act as the guidance to the parties, especially the investor. The phrasings are precise in that to make the first step of starting an arbitration, what matters is that the investor see himself satisfy the conditions set forth in Article 1116(1) of NAFTA. However, the claim can be submitted to the arbitration but can not be accepted if it exceeds the limitation period, which needs to be contested by the respondent and decided by the Tribunal. The time-bar provisions will not automatically prevent the investor from bringing a claim to arbitration.

Article 9(7) of the China-Korea BIT adopted a highly similar wording regarding to time-bar provision and the wording in the China-Korea BIT is relatively clear in supporting the interpretation set forth above:

3. In case of international arbitration, the dispute shall be submitted, at the option of the investor, to:...

7. Notwithstanding the provisions of paragraph 3 of this Article, an investor may not make a claim pursuant to paragraph 3 of this Article if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge that the investor had incurred loss or damage.

\textsuperscript{30} NAFTA full text, available at http://www.sice.oas.org/trade/nafta/chap-111.asp
It is indicated that when it comes to the initiation of a claim, it is up to the claimant to “submit” the dispute. “Notwithstanding” the discretion of the claimant to submit the dispute to investment treaty arbitration, if the claim has been time-barred by Article 9(7) of the BIT, such claim can not be accepted by the Tribunal.

In the author’s opinion, the word “may” in Article 1116(2) of NAFTA seems to indicate that this time-bar provision takes away only the remedy regardless of whether an unaccepted claim would be due to either extinction of remedy or extinction of right. Because by saying that the claim “may” not be accepted, it leaves open the possibility that in exceptional circumstances the claim may also be accepted and that seems to indicate that the right has not been extinguished but the remedy has been taken away, and in some exceptional cases, such remedy can be granted to the investor again. The counter argument may be that it could also be the right that has been taken away for the reason that the right can also in certain respects “survive” and may be used for set-off purposes. However, it is submitted that in that case it can not be qualified as “making a claim” or a “claim”.

By drawing an analogy from the rationale behind the extinctive prescription in municipal law, it may support the characterization of time-bar provisions in treaties taking away only the remedy. Proceeding from the interest of the parties, the debtor has a need to be able to dispose of receipts and other evidence of payments and for the debtor to plan his commercial and economic activities, he must be able to rely on the fact that the expiry of the time period will release him from being asked to pay the amount in question to the creditor. It would seem that extinctive prescription tends to protect the “legitimate expectation” of the debtor and show little sympathy on the creditor who, maybe because of laches, deems too late to exercise his right. Viewing from a bigger picture, for the sake of keeping the market function properly, there is a need to eliminate the uncertainty of the legal relationship between the debtor and the creditor, or to put it in

32 Supra note 34, page 321
33 Ibid, pages 255-256
Professor Hobér’s words, “it is in the public interest to create order, certainty and predictability by ensuring that the legal situation adapts to the factual situation.”

However, from the view of the present author, that’s what happened in the context of municipal law, where there are so many disputes of all kinds that the legislations, generally speaking, prefer efficiency over justice. Under the context of investment treaty arbitration, considering the total numbers of the disputes and the amount of each claim, it would seem less justified if time-bar provisions put efficiency as priority. It is therefore submitted that taking away the remedy from a delayed claim only would be a more balanced approach, in the sense that the right has not extinguished, under certain circumstances the remedy can be granted, or the right can be used for set-off purpose, provided that there is qualified counterclaim from the host state.

For the reasons set forth above, based on the standard of whether the provisions take away the remedy only or the right as well to distinguish between substantive or procedural law, it is in the view of this thesis that time-bar provisions provided in the treaties take away the remedy only and thus should be classified as procedural in nature.

2.1.2 Lex arbitri?

The second observation is that it seems to be true that if limitation period was classified as substantive law, it will be governed by lex causae, on the contrary, if it was considered as procedural law, it will be governed by lex fori.

However, there are no such concepts as lex causae and lex fori in investment treaty arbitration, though there exists the concept of lex arbitri in a way share some similarity to lex fori. A line may not be drawn between being procedural or substantive by observing the location of time-bar provisions, whether they have been placed in the treaty or in the lex arbitri. Because it can be easily rebutted by

34 Ibid, age 256
36 Supra note 34, page 110, note 117
stating the fact that there are many naturally procedural provisions provided in the
treaty, such as the constitution of the Tribunal or the procedure to submit a notice
of intent.

2.2 Time-bar provisions and extinctive prescription in public
international law

Extinctive prescription as a general principle in public international law is
featured in that there is no specific time limits lay down by public international
law, and that it is no enough with the lapse of time to bar a claim - there needs to
be, in essence, unreasonable delay in the presentation of a claim and the
respondent must be placed at a disadvantage in establishing his defense.37

Professor Hobér is of the view that the principle of extinctive prescription in
public international law is procedural in nature, because assuming that the
principle of extinctive prescription is to be applied, the function of extinctive
prescription has been to preclude the claim in question from being tried on its
merits.38 From his point of view, a rule or a principle “which has this function
cannot be characterized as anything else than procedural in nature”, while “a rule
of substantive law is typically intended to resolve a dispute on the merits”.39 It
would seem that, in his opinion as well as in legal literature, extinctive
prescription should be classified as a ground of inadmissibility of state claims and
that though the questions of admissibility may be sometimes closely related to the
merits of the case, “the concept of admissibility” “fulfills a procedural function in
interstate disputes”.40

It is also endorsed by Brownlie that:

“The lapse of time in presentation may bar an international claim in spite of
the fact that no rule of international law lays down a time limit. Special
agreements may exclude categories of claim on a temporal basis, but
otherwise the question is one for the discretion of the tribunal. The rule is

38 Supra note 34, page 322
39 Ibid
40 Ibid
widely accepted by writers and in arbitral jurisprudence ... prescription is a “universal” basis of inadmissibility.”

From the conclusion set forth above of the procedural nature of extinctive prescription rule in public international law under interstate disputes, one observation can be made that time-bar provisions should be considered as substantive in nature if they can be considered in the merits stage to resolve a dispute on the merits. In contrast, the time-bar provisions should be characterized as procedural in nature if their function is to preclude the claim from being tried on the merits. However there are two stages that can carry on the function of precluding the claim from being tried on the merits, viz., jurisdiction and admissibility. Considering the closely related relationship between admissibility and merits, this thesis will put these three concepts, i.e. jurisdiction, admissibility and merits in pairs to examine to which stage time-bar provisions should belong and start with jurisdiction.

2.2.1 Jurisdiction or admissibility?

One possible argument for characterizing time-bar provisions as a ground for jurisdiction objection may be that by incorporating time-bar provisions into the treaties, the contracting states have limited their consent to arbitration to those claims filed timely or within the limitation period. When taking the time-bar provisions as a condition to the consent of the states to investment arbitration, it would seem reasonable to classified time-bar issue as a jurisdictional issue.

Indeed, it is not always easy to distinguish between jurisdiction and admissibility, but the hard works of scholars may shed some lights on this matter.

Keith Highet in his dissenting opinion in Waste Management v. Mexico stated that “Jurisdiction is the power of the tribunal to hear the case; admissibility is whether the case itself is defective – whether it is appropriate for the tribunal to hear it”.

---

42 Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/98/2, Dissenting Opinion, 8 May 2000, para. 58
Another distinction is that while jurisdiction is procedural in nature, the notion of admissibility has a lot to do with the merits of the case. Often admissibility is addressed as ‘substantive admissibility’, obviously in order to stress the substantive nature of the notion of admissibility. But this is not so much helpful for the purpose of this thesis trying to define the substantive or procedural nature of a possibly “procedural” (jurisdiction) or “substantive” (admissibility) defense.

To distinguish jurisdiction and admissibility, “the nub of the classification problem is whether the success of the objection necessarily negates consent to the forum”. In other words: “is the objecting party taking aim at the tribunal or at the claim?”

It is submitted that this test is of great value when distinguishing jurisdiction and admissibility. Take the requirement of “investment” as an example. When the claim does not meet the requirement as being an investment, this claim shall not be heard by this investment arbitration tribunal, not that the claim can no longer be raised at all.

So when it comes to time-bar provisions provided in the treaties, the practical question for classification would be that when the claim does not meet the requirement set forth by time-bar provisions, “was it the parties’ intention that the relevant claim should no longer be arbitrated” by investment arbitration “but rather in some other forum”, or “was it that the claim could no longer be raised at all?”

According to the wording of Article 1116(2) of NAFTA, it is relatively clear that the clause is not intended to direct the claim to any other forum but that such a claim can not be brought any more for the lapse of time. The hidden premise is

46 Ibid
48 An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.
that this claim has already been recognized as a claim that belong to this arbitration, but for the reason of being time-barred, this claim can no longer be raised. Therefore, the time-barred provision can not be characterized as a ground for jurisdiction objection.

2.2.2 Admissibility or merits?

One possible argument for putting time-bar issues into merits stage may be that in order to identify the critical time of triggering such a time-bar provision, there is a need to look into the extensive factual evidence of the case and make legal evaluation on such matter. The time-bar issue necessarily touches upon the merits and thus should be considered in the merits phase.

Admissibility and merits are so closely related, as noted by Keith Hight in his dissenting opinion in Waste Management v. Mexico that “a tribunal may be able to determine a challenge to the admissibility of a claim without invading the merits of the case, but it is more likely that such an examination will have to be postponed and joined to the merits”. But the premise is that such questions do not “possess, in the circumstances of the case, an exclusively preliminary character”. As to the exclusively preliminary character, this author found it well illustrated by Laird:

In investor-state arbitration, objections to admissibility have essentially been framed by submitting that, even if all the facts submitted were true, the claimant would still be unsuccessful. The focus appears to be on whether there is an arguable, legal dispute . . . In this type of objection to admissibility there is clearly a fine line between it and a challenge on the merits.

In Methanex v. US., the USA made several challenges to admissibility concerned substantive provisions under Section A of Chapter 11, which Methanex alleges

---

49 Waste Management v. Mexico, Dissenting Opinion Attached to the Award, 2 June 2000, para. 58
breach by the USA. The Tribunal:“The USA’s challenges to admissibility are based upon the legal submission that, even assuming all the facts alleged by Methanex to be true, there could still never be a breach of the individual provisions pleaded by Methanex; and hence Methanex’ claims are bound to fail, regardless of any factual evidence to be adduced by Methanex. Thus with regard to the challenge to Methanex’s claim under Article 1102, the USA submitted:“... our 1102 objection is an admissibility objection. In other words, that taking all of the allegations of fact made to be true, including uncontested facts, that as a matter of law, there can be no claim, and that the claim is ripe for dismissal at this stage for that reason”.

The definition of “inadmissibility” by the USA that even assuming all the facts alleged to be true, there could still never be a breach of the provisions provided in the treaties, as correctly pointed out by Jan Paulsson, “may be a very good definition of a motion to dismiss for failure to state a cause of action, or, to use the expression current in England, a strike-out application.” The defense raised by the USA is a defense on the merits instead of a matter of admissibility, because “the USA was not arguing that the case was unhearable, but that it was legally hopeless”, and “that is precisely how one should understand the difference between a challenge of inadmissibility and a strike-out application”. The ultimate objective of such defense is to demonstrate that there is no breach of the substantive provisions provided in the treaty. By doing this, the USA is in essence arguing on the merits, which is markedly different from the matter of admissibility, whose ultimate objective may be that even if there is such breach pleaded by the claimant, there will still be no claim where the respondent can be held responsible. When it comes to time-bar provisions in the treaties, there is no such function as excluding the substantive breach of the treaty provisions even if all the pleaded facts are true, but excluding a claim be acceptable by the Tribunal, even if there is

52 Methanex Corporation v. United States of America, UNCITRAL, Partial Award on Jurisdiction and Admissibility, 7 August 2002, page 262, para. 108
53 Ibid, para. 109
54 Supra note 44, page 607
55 Ibid
substantive breach of the treaty. Considering the function of time-bar provisions as such, it would seem that time-bar provisions should be considered as an admissibility issue rather than on the merits.

2.3 Concluding remarks

The difficulty in answering the question of whether time-bar provisions are substantive or procedural lies in that the standard of distinguishing is not always clear. This thesis tries to approach and answer to this question from two similar concepts, i.e. the extinctive prescription in municipal law and the extinctive prescription in public international law.

One drawing line extracted from the municipal law concept is to see whether the provisions take away the remedy only or the right as well. Proceeding from that line, by interpreting the wording of typical time-bar provisions in the treaties and considering the rationale behind, it is submitted that time-bar provisions are of procedural character taking away the remedy only.

Another standard imported from the public international law concept is to see whether the provisions are using to resolve the dispute or just functioning in a preliminary character. After identifying the stage where time-bar provisions should be applied, it is submitted that they are acting in admissibility phase. Its ultimate objective is not to decide whether there is a breach of treaty and thus time-bar provisions should be classified as procedural in nature as well.

And it is a relief that the results of these two approaches are not contradictory to each other, for it would be a great puzzle to demonstrate which approach should be adopted and the reasons behind.

3. Can MFN clauses be extended to time-bar provisions?

Having concluded that time-bar provisions are procedural in nature, especially that it can not affect the right of the investors but only the remedy of the investors, it can no longer be considered as falling into a substantive protection or
substantive right category. Based on the assumption that MFN clauses can incorporate substantive protections from other treaties but not necessarily the procedural provisions, it is clear that time-bar provisions can not be covered by MFN clauses as a substantive protection. Therefore it is only possible for time-bar provisions to be covered by MFN clauses under the discussion of whether procedural provisions can be covered by MFN clause.

In the current arbitral practice, there are debates on whether MFN clauses can incorporate dispute settlement provisions. Given that dispute settlement provisions can be roughly classified as procedural in nature, the debates on such matter may shed some lights on the discussion of the application of MFN clauses on time-bar provisions. Therefore, in this section, the author will discuss whether time-bar provisions can be incorporated by MFN clauses building on the analysis of the arbitral practice that dealt with whether MFN clauses can extend to dispute settlement provisions.

3.1 Why MFN clauses can be extended to dispute settlement provisions?

There are a stream of cases that follow the decisions of Maffezini v. Spain illustrating why MFN clauses can also be extended to dispute settlement provisions. Their main reasons can be summarized as follow:

First, the dispute settlement is so essential to the protection of the rights under the treaty that “it is closely linked to the material aspects of the treatment accorded”.

---


57 Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (English), 25 Jan 2000, paras. 54-55. In RoshInvestCo UK Ltd. v. The Russian Federation, SCC Case No. V079/2005, Award on Jurisdiction, 1 Oct 2007, the Tribunal stated that: “If this effect is generally accepted in the context of substantive protection, the Tribunal sees no reason not to accept it in the context of procedural clauses such as arbitration clauses…. an arbitration clause, at least in the context of expropriation, is of the same protective value as any substantive protection afforded by applicable provisions such as Article 5 of the BIT.” In Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v.
dispute settlement provisions in a third treaty “may be extended to the beneficiary of the MFN clause as they are fully compatible with the *ejusdem generis* principle”\(^{58}\), provided that they are “more favourable to the protection of the investor’s right and interests”, \(^{59}\) and that they are not subject to the “limits arising from public policy considerations”\(^{60}\) that “the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in question.”\(^{61}\) According to the *Maffezini* Tribunal, those “fundamental conditions” are exhaustion of local remedies, fork in the road, particular arbitration forum (such as ICSID) and highly institutionalized system of arbitration (such as NAFTA), which can not be altered by the operation of MFN because “these very specific provisions reflect the precise will of the contracting parties”.\(^{62}\)

Second, when the dispute resolution is neither expressly included in the scope of the MFN clause, nor expressly included in the exceptions of the application of the MFN clause, the interpretation rule of *expressio unius est exclusio alterius* should be applied.\(^{63}\)

Third, from the perspective of treaty interpretation, the wording of “in all matters” clearly includes dispute settlement, which is “clearly a ‘matter’ governed by the

---

\(^{58}\) *Maffezini* v. Spain, para. 56.

The opinion that the significance of dispute settlement provisions to the protection of investments and investors make it possible to be covered by MFN clause is also endorsed by other Tribunals, such as *Gas Natural SDG, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005, where the Tribunal stated that: “the critical issue is whether or not the dispute settlement provisions of bilateral investment treaties constitute part of the bundle of protections granted to foreign investors by host states”, and the Tribunal is convinced that dispute resolution provision is a “significant substantive incentive and protection for foreign investors” and that “assurance of independent international arbitration is an important – perhaps the most important – element in investor protection.”

\(^{59}\) *Maffezini* v. Spain, para. 56

\(^{60}\) *Maffezini* v. Spain, para. 56

And such policy considerations are endorsed by many arbitral tribunals, for example, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 Aug 2004.

\(^{61}\) *Maffezini* v. Spain, para. 62

\(^{62}\) *Maffezini* v. Spain, para. 63

\(^{63}\) *National Grid plc v. The Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 20 Jun 2006, para. 82. This is also supported by *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, 16 May 2006, para. 56 and *RosInvest v. Russia*, para. 135.
Argentina-Spain BIT”64. According to the Suez Tribunal, the ordinary meaning of “treatment” includes “the rights and privileges granted and the obligations and burdens imposed by a Contracting State on investments made by investors covered by the treaty.”65 Moreover, in light of the purpose of the basic treaty, for example, in Garanti Koza LLP v. Turkmenistan66, the object and purpose of the U.K.- Turkmenistan BIT is “to create favourable conditions for greater investment.”67 The Tribunal stated that “[a]ssuring a prospective investor that neither he nor his investment will be subjected to treatment less favorable than the treatment accorded to investors from third countries and their investments, insofar as the process available to resolve any disputes with the host country that may arise under the BIT is concerned, certainly seems to create a favorable condition for investment by the investor so protected.”68

Fourth, “the purpose of the MFN clause is to eliminate the effect of specially negotiated provisions unless they have been excepted. It complements the undertaking of each State Party to the Treaty not to apply measures discriminatory to investments under Article 2.” 69

---

64 Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic, ICSID Case No. ARB/03/17, Decision on Jurisdiction, 16 May 2006, para. 55
65 Suez v. Argentina, para. 55
In National Grid v. Argentina, the Tribunal concurs with the conclusion drawn by the Ambatielos, Rights of US Nationals in Morocco, and Maffezini that “the element of dispute settlement at issue was part of the protection – treatment – of investors”.
In Siemens v. Argentina, the Tribunal stated that: “‘Treatment’ in its ordinary meaning refers to behavior in respect of an entity or a person. The term ‘treatment’ is neither qualified nor described except by the expression ‘not less favorable’. The term ‘activities’ is equally general. The need for exceptions confirms the generality of the meaning of treatment or activities rather than setting limits beyond what is said in the exceptions……..Treatment in Article 3 refers to treatment under the Treaty in general and not only under that article……the term ‘treatment’ and the phrase ‘activities related to the investments’ are sufficiently wide to include settlement of disputes.”
In Renta 4 v. Russia, the Tribunal stated that: “There is no textual basis or legal rule to say that "treatment" does not encompass the host state's acceptance of international arbitration.”
66 Garanti Koza LLP v. Turkmenistan, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent, 3 Jul 2013
67 Garanti Koza LLP v. Turkmenistan, para. 63
68 Garanti Koza LLP v. Turkmenistan, para. 63
69 Siemens v. Argentina, para. 106
In Roshinvest v. Russia, the Tribunal stated that: “While indeed the application of the MFN clause of Article 3 widens the scope of Article 8 and thus is in conflict to its limitation, this is a normal result of the application of MFN clauses, the very character and intention of which is that protection not accepted in one treaty is widened by transferring the protection accorded in another treaty.”
Fifth, the subsequent practice of the Contracting States shows no conclusive evidence as to the position of the Respondent.  

3.2 Why MFN clauses cannot be extended to dispute settlement provisions

The Tribunals are rather divergent with regards to the question whether MFN clauses can extend to dispute settlement provisions. After presenting the reasons for affirmative answer to this question, this section will shed some lights on the reasons for rejecting such extension by the Tribunals. There are also a line of cases that follow the *Salini v. Jordan* and *Plama v. Bulgaria*, expressing their views as to the reasons why MFN clauses do not encompass dispute settlement provisions, which can be summarized as follow:

First, to allow for MFN clause being applied on dispute settlement clauses or procedural issues, it seems important to the Tribunal that the BIT expressly includes dispute settlement into the application of MFN, or the BIT encompasses a broad MFN clause using such as “all rights or all matters covered by the agreement”, or there may be any evidence showing the common intention of the Contracting Parties to include such dispute settlement into the ambit of MFN clause. The agreement of the parties to arbitrate should be “clear and unambiguous”. “Doubts as to the parties' clear and unambiguous intention can

---

S.A. v. The Russian Federation, SCC No. 24/2007, Award on Preliminary Objections, 20 Mar 2009, the Tribunal stated that: “It is not convincing for a State to argue in general terms that it accepted a particular "system of arbitration" with respect to nationals of one country but did not so consent with respect to nationals of another. The extension of commitments is in the very nature of MFN clauses. Drafters wishing to do so would have little difficulty in defining restrictions that would go further than the general ejusdem generis constraint.”

National Grid v. Argentina, paras. 84-85

*Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 9 Nov 2004*

*Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 Feb 2005*

But in *Plama v. Bulgaria*, the Tribunal raised the standard for incorporating dispute settlement provisions by MFN clauses to “clear and unambiguous” and opined that even the expression “with respect to all matters” can not meet the requirement that the agreement to arbitrate should be “clear and unambiguous”.

*Salini v. Jordan*, paras. 116-118

For example, in *Plama v. Bulgaria*, the Tribunal finds that the communist regime and the attempts of revising the dispute settlement provisions made by the Contracting Parties, indicate that the Contracting Parties did not extend the MFN provisions to dispute settlement provisions.

*Plama v. Bulgaria*, para. 198

But in Vladimir Berschader and Moïse Berschader v. The Russian Federation, SCC Case No. 080/2004, Award, 21 Apr 2006, the Tribunal is skeptical of the proposition made by Plama Tribunal that agreement to arbitrate should be “clear and ambiguous”, but it agrees that “if an agreement to arbitrate is to be reached by
arise if the agreement to arbitrate is to be reached by incorporation by reference.” 76 Therefore, “the intention to incorporate dispute settlement provisions must be clearly and unambiguously expressed.” 77 Doubts may be created when some dispute settlement provisions in comparable treaties only accept disputes “arising out of the particular BIT”, 78 and there are also doubts as to how to decide what is more favourable. 79 As a result, “an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.” 80

Second, the lack of express exclusion of dispute settlement provisions in the MFN clause does not mean a contrario that “the dispute resolution provisions must be deemed to be incorporated”. 81 And the maxim of expressio unius est exclusio alterius means that “if a treaty provision expressly excludes the application of a treaty term to one thing (e.g., the articles of another identified treaty), then other things in the same class of whatever was excluded (e.g., the articles of other treaties which were not identified) are, logically to be included in the application of the treaty term.” 82 “Thus, for Article VII to have been encompassed in the scope of Article II.2 by reason of an exclusion found in Article II.4, the exclusion might have been expected to be formulated in terms such as “[t]he provisions of

incorporation by reference, doubts as to the intentions of the parties may arise” and thus “particular care should be exercised in ascertaining the intentions of the parties”. But it is endorsed by Wintershall Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/04/14, Award, 8 Dec 2008, where the Tribunal reaffirms that the agreement to arbitration must be “clear and unambiguous” and that the dispute settlement can not be replaced unless the MFN clause clearly and unambiguously indicates the otherwise.

Then it is criticized by Austrian Airlines v. The Slovak Republic, UNCITRAL, Final Award, 9 Oct 2009, where the Tribunal considers that it must interpret the MFN clause “neither restrictively nor expansively but rather objectively and in good faith”, because “there is no principle of either restrictive or expansive interpretation of an agreement to arbitrate in international law.” 83

76 Plama v. Bulgaria, para. 199
77 Plama v. Bulgaria, para. 204
78 Plama v. Bulgaria, para. 206
79 Plama v. Bulgaria, para. 208
80 Plama v. Bulgaria, paras. 213-223
81 Plama v. Bulgaria, paras. 201-203
82 Kiliç v. Turkmenistan, para. 7.7.3
this Article shall not apply in relation to the provisions of Articles VI and VIII of this Treaty,” 83 instead of “the treatment of an investor’s investments found in certain other treaties or agreements.” 84

Third, “it is one thing to add to the treatment provided in one treaty more favorable treatment provided elsewhere. It is quite another thing to replace a procedure specifically negotiated by parties with an entirely different mechanism.” 85 It is the intention of the Contracting States that matters, and it can not be overrode by “general policy considerations” or “some abstract principle of investment protection in favour of a putative investor”. 86 By referring “all disputes” to arbitration in other BITs, while referring only expropriation claims to arbitration in the current BIT, it can be assumed that it is the Contracting Parties’ “common intention to limit the jurisdiction of the arbitral tribunal to the categories so specific” and such intention can not be “subverted” by the MFN clause. 87

Fourth, the Tribunals should not rely on Ambatielos case 88 because Ambatielos used MFN to import substantive provisions instead of dealing with the application of a dispute settlement clause. 89 And there is rising risk of “treaty shopping” arouse by the approach adopted in Maffezini case. 90 It will also generate

---

83 Kiliç v. Turkmenistan, para. 7.7.4
84 Kiliç v. Turkmenistan, para. 7.7.6
85 Plama v. Bulgaria, para. 209
Similarly in Telenor Mobile Communications A.S. v. The Republic of Hungary, Award, 13 Sep 2006, the Tribunal opined that it is quite another thing to bypass the limitation of the base treaty by using an MFN clause when there is no clear language to show this particular intention of the Contracting Parties.
86 Telenor v. Hungary, para. 95
87 Telenor v. Hungary, para. 95
Also in Wintershall v. Argentina, the Tribunal first concludes that the 18-month requirement is a jurisdiction requirement, not a mere procedural provision and that “it is part and parcel of Argentina’s integrated ‘offer’ for ICSID arbitration” so it can only be dispensed with by clear MFN clause which indicates such intention of the parties.
It is also endorsed by Austrian Airlines v. Slovak that “Faced with a manifest, specific intent to restrict arbitration to disputes over the amount of compensation for expropriation to the exclusion of disputes over the principle of expropriation, it would be paradoxical to invalidate that specific intent by virtue of the general, unspecific intent expressed in the MFN clause. As a result of these contextual considerations, the specific intent expressed in Articles 8, 4(4) and 4(5) informs the scope of the general intent expressed in Article 3(1), with the result that the former prevails over the latter. In other words, the restrictive dispute settlement mechanism for expropriation claims set out in Articles 8, 4(4) and 4(5) constitutes an exception to the scope of Article 3(1). Hence, the MFN clause does not apply to the settlement of disputes over the legality of expropriations.”
88 Ambatielos (Greece v. United Kingdom of Great Britain and Northern Ireland), Award (6 March 1956)
89 Salini v. Jordan, 9 Nov 2004, para. 112
90 Salini v. Jordan, para. 115
“uncertainty and instability”.

Fifth, from the perspective of treaty interpretation, the ordinary meaning of the word “treatment” is unclear whether it includes or excludes dispute settlement provisions. It can be argued that the MFN clause includes dispute settlement for it has not been listed on the exceptions of MFN but it may also be argued the opposite for the word “privileges” may indicate that MFN should be related to substantive protection. And the ordinary meaning of “investment related activities” used in the MFN clause refer generally to “conduct of investor’s business activities in the territory of the host state rather than activities related to or associated with the settlement of disputes between the investors and the Host State”. Also since the MFN clause is inapplicable in several matters of the BIT, the expression of “all matters” can not be understood “literally”. The object and purpose of the BIT are legally insufficient to support that the Contracting Parties’ intentions were to let investors rely on dispute settlement clauses in other BIT by the operation of MFN clause from basic treaty.

Sixth, it seems not likely to the Tribunal that the Contracting Parties even “contemplated the possibility” of expanding the arbitration clause by MFN clause because this issue had not been “clearly addressed” at the time of the conclusion, otherwise the Contracting Parties must have had clarified this intention by expressly referring to dispute settlement provisions in the MFN clause. It

---

91 Telenor v. Hungary, para. 94
92 Plama v. Bulgaria, paras. 189-190
93 Plama v. Bulgaria, para. 191
94 Wintershall v. Argentina, para. 170-171
95 Berschader v. Russia, paras. 186-192
96 Plama v. Bulgaria, para. 193
97 Berschader v. Russia, para. 202
therefore creates doubts as to whether the parties intended to include dispute settlement in MFN clause.\textsuperscript{98}

Seventh, even applying the approach of \textit{Maffezini} case, the Claimant’s contention will fall into the exceptions of the \textit{Maffezini}.\textsuperscript{99}

Eighth, accepting extension of MFN clauses to dispute settlement provisions would render Treaty’s “carefully crafted jurisdictional preconditions of the Contracting Parties’ offer to arbitrate disputes” “without any effect from the moment this BIT was adopted”.\textsuperscript{100} However, treaties “must be interpreted in the light of the principle of effectiveness of all their provisions”.\textsuperscript{101}

\textbf{3.3 Application of the reasoning to time-bar provisions discussion}

After presenting all the main reasons for the Tribunals to accept or reject the extension of MFN clauses to dispute settlement provisions. This section will examine those reasons and focus on answering the question of whether MFN clauses can be applied to time-bar provisions. Since this thesis is prompted by the \textit{Ansung} case, the analysis in this section will base on the BIT and circumstances of \textit{Ansung} case.

\textbf{3.3.1 Treaty interpretation}

Before moving to the discussion of the \textit{Ansung} case, one fundamental question has to be answered – how should we interpret the MFN clause? Should we follow the position of \textit{Plama} Tribunal that “the intention to incorporate dispute settlement provisions must be clearly and unambiguously expressed”\textsuperscript{102} and thus need to make an assumption of not incorporating such provisions unless stated clearly otherwise, which, to a certain extent, in the view of the author, is taking a more restrictive approach to interpret the MFN clause? On the contrary to \textit{Plama}

\begin{thebibliography}
\item Berschader v. Russia, para. 202
\item Wintershall v. Argentina, paras. 173-176
\item \textit{Kiliç} v. Turkmenistan, para. 7.4.3
\item \textit{Kiliç} v. Turkmenistan, para. 7.4.4
\item Supra note 77
\end{thebibliography}
decision, where the Tribunal failed to illustrate how it is a principle in both domestic law and international law, the author is convinced by the Austrian Airlines Tribunal at this point that the MFN clause should be interpreted “neither restrictively nor expansively but rather objectively and in good faith”, because “there is no principle of either restrictive or expansive interpretation of an agreement to arbitrate in international law.”¹⁰³ As stated by Professor Schreuer:

“The argument that the MFN clause is inapplicable in cases where the basic treaty limits or refrains from granting consent, since the parties’ intention in that respect is clear, is not convincing. An MFN clause is not a rule of interpretation that comes into play only where the wording of the basic treaty leaves room for doubt. It is intended to endow its beneficiary with rights that are additional to the rights contained in the basic treaty. The meaning of an MFN clause is that whoever is entitled to rely on it be granted rights accruing from a third party treaty even if these rights clearly go beyond the basic treaty.”¹⁰⁴

Therefore the interpretation rules provided in the VCLT should apply to all provisions of a treaty, including the MFN clause.¹⁰⁵

Moving to the discussion of the Ansung case, Article 3 of the China-Korea BIT entitled “Treatment of Investment” provides that:

“3. Each Contracting Party shall in its territory accord to investors of the other Contracting Party and to their investments and activities associated with such investments by the investors of the other Contracting Party treatment no less favourable than that accorded in like circumstances to the investors and investments and associated activities by the investors of any third State (hereinafter referred to as “most-favoured-nation treatment”) with respect to investments and business activities [defined in paragraph 1 as “the expansion, operation, management, use, enjoyment, and sale or other disposal of investments”], including the admission of investment.

4. The provisions of Paragraph 3 of this Article shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege by virtue of:

¹⁰³ Austrian Airlines v. Slovak, para. 119
(a) any customs union, free trade zone, economic union and any international agreement resulting in such unions, or similar institutions;
(b) any international agreement or arrangement relating wholly or mainly to taxation;
(c) any arrangements for facilitating small scale frontier trade in border areas.

5. Treatment accorded to investors of one Contracting Party within the territory of the other Contracting Party with respect to access to the courts of justice and administrative tribunals and authorities both in pursuit and in defence of their rights shall not be less favourable than that accorded to investors of the latter Contracting Party or to investors of any third State.”

According to Article 31(1) of the VCLT, Article 3 should be interpreted in good faith in accordance with the ordinary meaning and the context and in the light of the object and purpose of the treaty.

The ordinary meaning of “treatment” in paragraph 3, in the view of the author, does not confine to substantive rights. It refers to the way how the State is treating the investor and the term “treatment” should be construed as general in nature as pointed out by Siemens Tribunal and there is no “textual basis” for such restrictive reading. In any event, the term “treatment” is “unclear” as stated by the Plama Tribunal. However, in paragraph 5, the expression “[t]reatment…with respect to access to the courts of justice and administrative tribunals and authorities” shows the generality and broad meaning of the term “treatment” in the sense that “access to” a certain institution would be also qualified as “treatment”. Under such contextual consideration, it is therefore not difficult to infer that “access to” investment arbitration should be construed as within the meaning of “treatment”.

Paragraph 3 also sets forth limitations to the kind of “treatment” that can be compared and imported by operation of the MFN clause. The “treatment” should be related to “investments and business activities”, i.e. “the expansion, operation, management, use, enjoyment, and sale or other disposal of investments”, including the “admission of investment”. It would seem plausible to read this

107 Supra note 65
108 Supra note 92
limitation as confining the “treatment” to “substantive rights”. However, the present author notices that the “treatment” “with respect to” the “use” and “enjoyment” of investments “shall” be accorded to “investors” and to “their investments and activities associated with such investments”. It is difficult to doubt that the breach of treaty by the host state such as expropriation “interferes with the investor’s use and enjoyment of the investment and that the submission to arbitration forms a highly relevant part of the corresponding protection for the investor by granting him, in case of interference with his use and enjoyment”.  

And it is also difficult to doubt that “access to” investment arbitration is exactly the activity “associated with” the investment by the investor, especially considering the expression in National Treatment provided in paragraph 1 of Article 3, where the phrase “activities associated with such investments” is absent.  

Paragraph 4 constitutes the exceptions to the MFN clause provided in paragraph 3. The Tribunals in National Grid and Suez conclude that the maxim of *expressio unius est exclusio alterius* should be applied, while the Tribunal in *Kiliç v. Turkmenistan* opines that the operation of such maxim should be that by excluding one thing to the application of the MFN clause, the rest of the things in the same class of the former would fall into the ambit of the MFN clause.  

The present author disagrees with the approach of *Kiliç* Tribunal. The premise of the approach adopted by *Kiliç* Tribunal is that whatever covered by the MFN clause can only be classified in one category. For example, if the MFN clause only covers treatments of investments found in certain *other treaties or agreements*, and the exceptions exclude treatments related to tax matters found in certain *other treaties or agreements*, then it becomes logical to have the same

109 RosInvest v. Russia, para. 130  
110 Article 3 paragraph 1 of China-Korea BIT reads:  
1. Each Contracting Party shall in its territory accord to investors of the other Contracting Party and to their investments treatment no less favourable than the treatment it accords in like circumstances to its own investors and their investments (hereinafter referred to as “national treatment”) with respect to the expansion, operation, management, maintenance, use, enjoyment, and sale or other disposal of investments (hereinafter referred to as “investment and business activities”).  
111 Supra note 63  
112 Supra note 82
conclusion of Kiliç Tribunal. But if the MFN clause not only covers treatments of investments found in certain other treaties or agreements, but also the treatments found in the current treaty, excluding tax matters of treatments found in certain other treaties or agreements does not necessarily mean that the MFN clause can only cover treatments of investments found in certain other treaties or agreements.

The problem of the approach adopted by Kiliç Tribunal is that it uses the exceptions of the MFN clause to infer and define the original possible scope of the MFN clause, but the original possible scope of the MFN clause can only be define by the text of the clause itself. It is the combination of the original possible scope of the MFN clause and the exceptions of the MFN clause that define the actual applicable scope of the MFN clause. There is no basis for applying such “ejusdem generis principle” to the exceptions of the MFN clause, unless one can assure that after excluding one thing, the rest of the things are exactly the whole scope of the MFN clause. Therefore paragraph 4 can not restrain the scope of the MFN clause in paragraph 3 to the same class of the treatments provided in paragraph 4. And the regular operation of expressio unius est exclusio alterius should be adopted.

The Tribunal in Ansung case observes that Article 3(5) offers “specific MFN protection in relation to an investor’s access to courts of justice and administrative tribunals and authorities” and “reference to international dispute resolution is conspicuously absent in the MFN clause in Article 3(3)”.

However, to the present author, Article 3(5) of the BIT is another exception to the MFN clause in Article 3(3) of the BIT. Because Article 3(3) sets forth a limitation of “in like circumstances” which is absent in Article 3(5) of the BIT. It can be inferred that the Contracting States do not intend to subject the MFN clause with respect to the access to domestic courts to such a limitation of “in like circumstances”. On the contrary to the interpretation of the Tribunal, it may be further inferred that the original possible scope of the MFN clause in Article 3(3) includes “access to” domestic courts and international tribunals but “access to” domestic courts needs to be provided in a separate clause because it should subject to less limitation.

Moreover, the object and purpose found in the preamble of China-Korea BIT is to

---

113 Supra note 19
“further promote investment” and “to create favourable conditions for investments by investors…by according favourable treatment and protection to such investments and business activities in connection therewith”114. The author submits that the operation of an MFN clause to remove the time-bar provisions and grant “access to” investment arbitration does not against the object and purpose of the BIT.

3.3.2 Other considerations

There is a plausible argument that extending the MFN clause would render the “carefully crafted jurisdictional preconditions of the Contracting Parties’ offer to arbitrate disputes” “without any effect from the moment this BIT was adopted”,115 which is prohibited by the principle of effectiveness. First, in the opinion of the author, all provisions in the treaty are “carefully crafted”. It is difficult to understand the reasons for bringing up the “jurisdictional preconditions” argument. Regardless the difficulty to see where this “public policy considerations” come from as pointed out by Plama Tribunal116, it is also unconvincing to bring up the “jurisdictional preconditions” argument against the application of MFN clauses to dispute settlement.117 Second, “the function of the MFN standard is stated to be ‘the elimination of discrimination, the correction of oversights and the adaptation of treaties to changing circumstances’”.118 And “it is in the nature of an MFN clause to be used to displace a treaty provision deemed less favorable in favor of another clause, from another treaty, deemed more favorable. The MFN clause

114 China-Korea BIT, Preamble
115 Supra note 101
116 Plama v. Bulgaria, para. 221
117 Supra note 105, p. 274
118 The acceptance of MFN clauses for the purposes of attracting substantive standards from other treaties but their rejection when it comes to dispute settlement, leads to a paradoxical situation. The importation of additional substantive standards of protection by way of an MFN clause inevitably has effects on the jurisdiction of tribunals. This is particularly evident where the jurisdiction of a tribunal is limited to violations of the treaty. If the basic treaty does not contain an umbrella clause or a guarantee of fair and equitable treatment, the applicability of these standards by way of an MFN clause will also widen the jurisdiction of a tribunal. The effect is that certain jurisdictional limitations in clauses dealing with dispute settlement can be overcome with the help of an MFN clause while others cannot.”
119 Hobér, Kaj., ‘mfn Clauses and Dispute Resolution in Investment Treaties: Have we Reached the End of the Road?’, (Oxford University Press, 2009), 35. Similarly, in RosIvest v. Russia, the Tribunal stated that:
“While indeed the application of the MFN clause of Article 3 widens the scope of Article 8 and thus is in conflict to its limitation, this is a normal result of the application of MFN clauses, the very character and intention of which is that protection not accepted in one treaty is widened by transferring the protection accorded in another treaty.”

Page 30 of 36
itself would be deprived of effet utile if it could never be used to override another provision of the treaty.”\textsuperscript{119} But in any event, as concluded in part 2 of the thesis, time-bar provisions are not jurisdictional matters.

As to the principle of “contemporaneity” argument\textsuperscript{120}, the author submits that the principle of contemporaneity can not bar the application of Article 3(3) to Article 9(7), because “the best indication of the intentions of the State parties” “is the text of the treaty they signed”.\textsuperscript{121} Also when signing the China-Korea BIT, there were already a lot of debates on whether MFN clauses can be extended to dispute settlement. If the Contracting Parties did not intend to incorporate the dispute settlement, they can just easily include the dispute settlement in the exceptions of the MFN clause.

Now the question comes to whether removing the time-bar provisions can be considered as more favourable treatment. According to the UNTAD Paper: “[t]he MFN Treatment provision is a relative standard, which means that it implies a comparative test. It requires a comparison as well as the finding of more favourable treatment granted to investors of a given nationality as opposed to the investors covered by the basic treaty.” But a finding of an alleged breach “calls not only for the finding of an objective difference in treatment between two foreign investors, but also for a competitive disadvantage directly stemming from this difference in the treatment.”\textsuperscript{122} It is rather clear that the investor who’s claim being time-barred by Article 9(7) comparing to those free from such restriction, will suffer a “competitive disadvantage directly stemming from” the difference of the treatment. Therefore, the investors that not subject to the time-bar provisions are having a more favourable treatment comparing to the investors of the current case.

### 3.3.3 Concluding Remarks

\textsuperscript{119} Garanti Koza LLP v. Turkmenistan, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent, 3 Jul 2013, para. 54

\textsuperscript{120} Supra note 98

\textsuperscript{121} Garanti Koza LLP v. Turkmenistan, para. 57

\textsuperscript{122} UNCTAD, MOST-FAVOURSED-NATION TREATMENT (UNCTAD Series on Issues in International Investment Agreements II 2010), pp. 23-24
For the reasons set forth above, treatment with respect to “access to” investment arbitration is within the scope of Article 3(3) of the BIT. And it is difficult to doubt that the time-bar provision in Article 9(7) of the BIT which may prevent the claimant from “making a claim” to investment arbitration, is related to the “access to” investment arbitration and thus fall into the ambit of the MFN clause. Moreover, since the time-bar provisions satisfy the requirement of being “less favourable”, the author is of the view that the MFN clause in the Ansung case can cover the time-bar provision sets forth in Article 9(7) of the BIT.

4. Conclusion

As stated in the introduction, this thesis is based on the assumption that the MFN clause can incorporate substantive protections or substantive rights from other treaties but can not necessarily incorporate procedural provisions. Therefore, the starting point of this thesis is to examine whether time-bar provisions are substantive or procedural. If the author found in part 2 that time-bar provisions should be classified as substantive provisions, it would render all the discussion in part 3 unnecessary. However after all the discussion, this thesis have answered all three legal questions set forth in the beginning. Through the discussion of whether time-bar provisions take away only the remedy or the right and the discussion of the phase when time-bar provisions will come into play, the author concludes that time-bar provisions take away only the remedy and should be classified as an admissibility issue leading to the first conclusion that time-bar provisions are procedural provisions.

The first conclusion makes it meaningful to continue the discussion in part 3 whether MFN clauses can be extended to time-bar provisions. The author admits that this question is very much depending on the wording of the MFN clause and chooses Ansung case as an example for the purpose of analysis. After examining and applying all the main reasons for the acceptance and rejection of extending MFN clauses to dispute settlement provisions, by using Article 31(1) of VCLT as an interpretation vehicle, the author is convinced that the MFN clause in Ansung case can be applied to time-bar provisions.
Bibliography

Books

Dolzer, Rudolf, and Christoph Schreuer. 'Principles of International Investment Law', Anonymous Translator(Second;2nd;2; edn, Oxford, United Kingdom, Oxford University Press, 2012)

Hobér, Kaj, 1952. 'Extinctive Prescription and Applicable Law in Interstate Arbitration', vol. 88/(2001)


Electronic Sources


Paulsson, Jan, ‘Jurisdiction and Admissibility’, TDM 1 (2009)

Hobér, Kaj., ‘mfn Clauses and Dispute Resolution in Investment Treaties: Have we Reached the End of the Road?’, (Oxford University Press, 2009)

UNCTAD, MOST-FAVOURERATED-NATION TREATMENT (UNCTAD Series on Issues in International Investment Agreements II 2010)