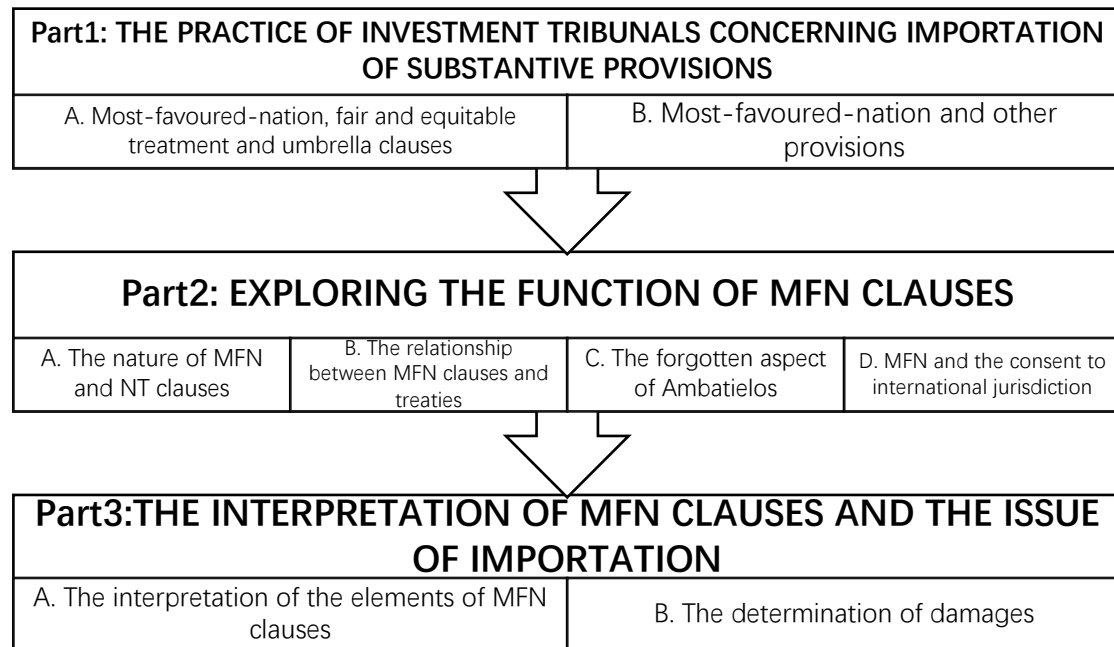


**Title:** The Use of Most-Favored-Nation Clauses to Import Substantive Treaty Provisions in International Investment Agreements

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## I. Structure of the article



## II. Research Object and Question

- Research Object: Concerning MFN and external measures concerns the use of MFN clauses to import absent substantive provisions into the base treaty.
- Question: Whether importing substantive treaty provisions in IIAs by MFN clauses is a proper use of MFN clauses in IIAs.

## III. Research Purpose and Significance

### ● Purpose

As investment tribunals use MFN clauses to introduce new treaty standards to expand tribunal jurisdiction in a more aggressive manner, it is increasingly common for parties to include in newly negotiated IIAs a clause preventing the importation of substantive obligations through MFN clauses. Against this background, this article aims to explore how courts should correctly treat the importation of substantive clauses and provide theoretical guidance for arbitration courts.

### ● Significance

Although there are an important number of tribunals that have dealt with this research object, the doctrinal analysis of this situation is rather rare. This article fills a theoretical gap in this area.

## IV. Type of scholarship

- A combination of doctrinal, descriptive scholarship.
  - Doctrinal method
    - Any analysis of an MFN clause must closely consider the specific wording of the MFN clause in accordance with the rules of interpretation in the VCLT.
    - Regard to the question of whether MFN clauses may be used to alter ISDS provisions contained in BITs has been the object of controversy in arbitral decisions and doctrine, The authors infer a practical consensus by analyzing multiple cases in which MFN was invoked into ISDS provision.
  - Descriptive method
    - Describes the origin of the MFN clause, the status of the use of MFN treatment, and the most-favored-nation clause is now used in many different areas of international law, including trade, transportation, consular relations, intellectual property rights and the protection of foreign investment, and is widely introduced in BITs.

## **V. About Information**

- The primary sources of this article are mainly including core decisions of international courts and tribunals, as well as the works of the International Law Commission (ILC) concerning MFN clauses, and state practice.

## **VI. Main Argument**

- This article has argued that typical MFN clauses included within BITs cannot be used to import a provision that is not included in the base treaty to create a new obligation.

## **VII. Argumentation**

- Firstly, analyses the practice of investment tribunals as relates to the importation of substantive provisions through MFN clauses. Citing a large number of cases, respectively analyzed the importation of Fair and Equitable treatment, Umbrella Clauses and other provisions.
- Secondly, exploring the function of MFN clauses. It analyses whether MFN clauses can be used to import a substantive provision to include a new obligation and to give a tribunal jurisdiction to decide on breaches of imported provisions, thus exploring the nature, scope, and limits of MFN clauses and the principle of consent to international jurisdiction.
  - In this part, the author mainly analyzes the close connection between MFN and NT and believes that they can take similar explanation methods and similar cases as references.
  - It also analyzes the relationship between the MFN and the treaty, citing the conclusion of the ILC that the role of the MFN clause is not to create new obligations.
  - And through the analysis of the Swiss bilateral investment agreement, as well as the analysis of the MFN clause by experts in the negotiation of

the framework of the multilateral investment agreement, and the WTO dispute settlement agency's analysis of whether or not there is a breach of the MFN provisions under the relevant agreements of the WTO treaty.

- Thirdly, this article explores how tribunals should proceed when faced with such disputes, elements of interpreting MFN clauses under customary state law norms, and the potential determination of damages.

### **VIII. Conclusion**

- The standard MFN clauses included in IIAs should not be used to import treaty provisions from other treaties unless a clear and unambiguous intention of the contracting parties can be identified in the terms of the base treaty itself.