SHANGHAI COOPERATION ORGANIZATION

Article

DOI: 10.17803/2713-0533.2024.3.29.534-568

China and Shanghai Cooperation Organization: Reconsideration and Improvement of Multilateralizing Effect of Most Favored Nation Clause in BIT

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***Abstract*:** Since the *Maffezini* case, debates upon the application of the Most-Favored-Nation (MFN) clause have never stopped. Research from the perspective of the Shanghai Cooperation Organization (SCO) can test the way for further advancement of this issue. The analysis on the international investment arbitration cases involving the SCO states may shed some light on the crucial point on dispute. At present, the bilateral investment treaties (BIT) between China and other states of the SCO are in an urgent need of renewal in order to meet the interests of deepening investment cooperation. Problems of fragmentation of the interpretation method and of unpredictability of the interpretation conclusion of the MFN clauses manifested in international investment disputes involving SCO states will provide concrete preventative suggestions on the updating of the wording of MFN clauses. Under SCO framework, the multilateral effect of the MFN clause can play a model role for other regional integration organizations to build an integrated and multilateral investment treatment system in the fragmented and bilateralism-based framework of international investment law, and in fact promote investment facilitation for regional organizations.

***Keywords*:** bilateral investment treaty (BIT); Most-Favored-Nation (MFN) Treatment; Shanghai Cooperation Organization (SCO); Multilateralization

Acknowledgments: The article was prepared with the financial support of the Ministry of Justice of the People's Republic of China (project No. 22SFB1013)

Cite as: Yanyan, R. and Zhixin, Zh., (2024). China and Shanghai Cooperation Organization: Reconsideration and Improvement of Multilateralizing Effect of Most Favored Nation Clause in BIT. *Kutafin Law Review*, 11(3), pp. 534–568, doi: 10.17803/2713-0533.2024.3.29.534-568

Contents

I. Introduction

MFN in the context of international investment is an international law obligation arising from specific provisions in the International Investment Agreement (IIA). The application of MFN provisions is usually limited by the *ejusdem generis* principle. "The host state is obliged to grant no less favorable treatment to investors of the other contracting state to the BIT than that the host state grant to third-state's investors in the same or similar matters under like circumstances."[1] The BIT between the host state and the other contracting state is usually called a "basic treaty" and the BIT between the host state and the third party is usually called a "third-party treaty." The MFN clause is able to "make counterbalance between different negotiating powers, entitling the contracting party, which is in lower bargaining position, to the treatment that the party in higher position accords to its other investing partner."[2] The substantive legal effect of the MFN clause is that "once a state accords to investors of another state more favorable treatment, then all the investors of other states which have concluded the MFN clause with the state shall enjoy such favorable treatment."[3] The MFN clause, for its multilateral effect and potential in maintaining fair, liberal and facilitative international investment environment, has become an indispensable structural provision in the standard of treatment section in IIA. According to data released by the United Nations Commission on Trade and Development (UNCTAD), among 2,592 mapped IIAs, only 37 IIAs have no MFN clause. All the BITs concluded between China and other SCO states stipulated Most-Favored-Nation treatment.

Since SCO is a comprehensive international cooperation organization covering the fields of politics, economy, trade and humanities and the Charter of the SCO in 2001 put forward the vision of investment facilitation, the MFN clauses are expected to empower investment facilitation and multilateralization of the SCO. However, the current

[1] UNCTAD Investment PolicyHub. Available at: https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping. P. 13 [Accessed 13.03.2024].

[2] UNCTAD, World Investment Report 2023: Investing in Sustainable Energy for All. New York, United Nations. P. 377.

[3] UNCTAD Investment PolicyHub. P. 13.

MFN clauses in the China — SCO states BITs have obvious differences in wording, which may lead to different scope of application and exceptions, and MFN clauses themselves have a large room for improvement. At the same time, SCO states have constantly been parties to the international investment arbitration involving disputes over MFN clauses, and the respective arbitration tribunals have different opinions on the scope of application. This paper aims to analyze the scope of application of the MFN clause by taking the China — Shanghai Cooperation Organization BIT as an example, combined with the arbitration case of investment disputes involving SCO states, and put forward concrete suggestions, in the future negotiation and upgrading process, for the improvement and perfection of the MFN clauses of the China — SCO states BITs.

II. Evolution of Most-Favored-Nation Clause in BITs between China and Other SCO States

Since the conclusion of the China — Sweden BIT in the early 1980s, the degree of investment liberalization in China has been increasing, and China has become the state which has concluded the most BITs and is the second largest foreign direct investment importer.[4] BITs, which constitute the state's promise to protect the legitimate rights and interests of foreign investors and provide them with remedies, have become an indispensable prerequisite for attracting foreign investment and promoting investment facilitation, and can also provide an impetus for the development of investment facilitation within the SCO. As "one of the most effective state obligation of investor protection in the IIA" (Dolzer and Schreuer, 2012, p. 186), the MFN clause should become an important driving force to promote international investment cooperation among SCO states. At present, the SCO has nine member states, three observer states and 14 dialogue partners. China has concluded BIT with 22 other SCO member states. All of the 22 bilateral investment treaties contain MFN clauses, which establish the treaty obligations under the International Investment Law to build a level playing field for international investment between China and other SCO states and

[4] UNCTAD, World Investment Report 2023: Investing in Sustainable Energy for All. P. 8.

accelerate the implementation of the vision of investment facilitation and liberalization outlined in the Programme for Multilateral Economic and Trade Cooperation of the SCO.

II.1. The Differences of Generations in MFN Clauses in BITs between China and Other SCO States

By searching the MFN clauses stipulated in the BITs between China and other SCO states, it can be seen that the MFN clauses in the BITs between China and other SCO states have certain generational characteristics. In order to expand the effectiveness of the MFN clause in the protection of investors' rights and interests while maintaining the host state's sovereignty over regulating investors, the MFN clauses in "China — SCO states BITs" have undergone one adjustment and can be divided into two generations.

Scope of Application of MFN Clauses Stipulated in China — SCO states BITs

BIT and Time of Conclusion	Scope of Application stipulated
1986 China — Kuwait BIT	Treatment accorded to the investments of investors of either state and the investments' returns, management, maintenance, use, enjoyment or disposal in the territory and maritime zone of the host state
1987 China — Sri Lanka BIT	Treatment accorded to the investments of the investors of either contracting state and the investments' returns in the territory of the host state
1989 China — Pakistan BIT	Treatment accorded to the investments and activities associated with investors of either contracting state in the territory of the host state
1991 China — Mongolia BIT	Treatment accorded to the investments and activities associated with investors of either contracting state in the territory of the host state

1992 China — Kazakhstan BIT	Treatment accorded to the investments and activities associated with investors of either contracting state in the territory of the host state
1992 China — Kyrgyzstan BIT	Treatment accorded to the investments and activities associated with investors of either contracting state in the territory of the host state
1993 China — Belarus BIT	Treatment accorded to the investments and activities associated with investors of either contracting state in the territory of the host state
1993 China — Tajikistan BIT	Treatment accorded to the investments and activities associated with investors of either contracting state in the territory of the host state
1994 China — United Arab Emirates BIT	Treatment accorded to the investments of either contracting state in the territory of the host state and the investments' returns, management, maintenance, use, enjoyment, disposal and other activities associated
1994 China — Azerbaijan BIT	Treatment accorded to the investments and activities associated with investors of either contracting state in the territory of the host state
1995 China — Armenia BIT	Treatment accorded to the investments and activities associated with investors of either contracting state in the territory of the host state
1996 China — Egypt BIT	Treatment accorded to the investments and activities associated with investors of either contracting state in the territory of the host state
1997 China — Saudi Arabia BIT	Treatment accorded, subject to the host state's laws and regulations, to investments of investors of either contracting state and the investments' returns, management, maintenance, use, enjoyment or disposal or the means to assure their rights to such investments like transfers and indemnifications or with any other activities associated with the investments in the territory of the host state

1999 China — Bahrain BIT	Treatment accorded to the investments and activities associated with investors of either contracting state in the territory of the host state
1996 China — Cambodia BIT	Treatment accorded to the investments and activities associated with investors of either contracting state in the territory of the host state
1999 China — Qatar BIT	Treatment accorded to the investments and activities associated with investors of either contracting state in the territory of the host state
2000 China — Iran BIT	Full legal protection and fair treatment accorded, in accordance with the laws and regulations of the host state, to investments of investors of either contracting state effected within the territory of the other contracting party
2001 China — Myanmar BIT	Treatment accorded to the investments and activities associated with investors of either contracting state in the territory of the host state
2006 China — India BIT	Treatment accorded to the investments of investors of either contracting state, including in respect of returns of the investments
2006 China — Russia BIT	Treatment accorded to the investments and activities associated with investors of either contracting state
2011 China — Uzbekistan BIT	Treatment accorded, in like circumstances, to the investments of either contracting state with respect to the establishment, acquisition, expansion, management, maintenance, use, enjoyment, sale or disposal hereof
2015 China — Turkey BIT	Treatment regarding investment permission, within the host state's framework of laws and regulations, to the investments and activities associated with investors of either contracting state in the territory of the host state; Treatment is accorded to these investments once established

The first generation of MFN clauses in BITs concluded between China and other SCO states started with 1986 China — Kuwait BIT, ended with the conclusion of 2001 China — Myanmar BIT. This first generation's development was stagnant for 14 years and its main characteristic was that all of the BITS adopted the territorial principle, which meant that the investment stipulated in MFN clauses referred only to the investments established and effected within the territory of the host state. Although the wording of China — Kuwait BIT is a "territory and maritime zone" due to a large number of marine energy investment cooperation projects between China and Kuwait, most of the MFN clauses in first generation defined this principle as only referring to the land under the sovereignty of the host state.

In accordance with the Art. 31 of the *Vienna Convention on the Law of the Sea,* the interpretation of a treaty provision is obliged to start with finding out its ordinary and plain meaning. The ordinary meaning of the phrase "in the territory of the host state" indicates that the prerequisite of comparing the treatment accorded to a contracting party of the basic treaty and that accorded to a non-contracting party and then judging whether the MFN clause has been violated is that both the contracting state and the non-contracting state have made investments or started activities associated with the investments. "Treatment within the territory of the host state" or similar wording has been universally adopted by IIA (Perez-Aznar, 2017, pp. 777–806). The international investment arbitration tribunal, namely the Stockholm Chamber of Commerce (SCC), which is relevant to MFN treatment, made interpretations according to this wording's ordinary meaning and its purpose of contracting. In 2004, in *Berschader* case[5] the SCC clarified that the wording of "treatment within the territory of the host state" means that both the contracting parties intended to limit the scope of the MFN clause to the substantial treatment accorded to the investors of a contracting state in the territory of the host state. The tribunal further reasoned that the provisional obligation the host state undertakes in accordance with another BIT in respect of a contracting

[5] *See* Vladimir Berschader and Motse Berschader v. The Russian Federation (Berschader v. Russia). SCC, Case No. 080/2004, Award and Correction (21 April 2006). Para. 185.

state of that BIT is not the "treatment within the territory of the host state." Besides, in the previous international investment arbitration involving MFN treatment, the point at issue was usually that what kind of provisions can be introduced into a basic treaty from a third-party treaty by the MFN clause, and the *Maffezini v. Spain* case[6] resolved by the International Centre for Settlement of Investment Disputes (ICSID) shed some light on this dispute, clarifying that procedural provisions in a third-party treaty can be introduced into a basic treaty by the MFN clause. The *Berschader* case in 2004 furthered this dispute by reasoning why a more favorable provision in a third-party treaty cannot be introduced into a basic treaty because it is not the "treatment within the territory of the host state."

The second generation of MFN clauses in BITs between China and other states of the SCO began in the China — India BIT in 2006 and the China — Russia BIT in 2006. They were further refined in the China — Uzbekistan BIT in 2011. The MFN clauses of the 2020 China — Turkey BIT basically follow the model of the 2011 China — Turkey BIT. The main features of this generation of MFN clauses can be basically seen in two aspects: one is to dilute the principle of "treatment in territory," and the other is to explicitly incorporate the "like circumstances" rule in the scope of application of the MFN clauses.[7]

The dilution of the principle of "treatment in territory" has gone through several adjustments. In *Berschader* case, the arbitration tribunal denied the legality of importing a substantial provision from a third-party treaty into a basic treaty through the MFN clause. As a consequence, the BIT concluded between China and Russia abandoned the wording of "treatment within the territory of the host state" in

[6] Emilio Agustín Maffezini v. Kingdom of Spain. ICSID, Case No. ARB/97/7. Available at: https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/19/maffezini-v-spain [Accessed 13.03.2024].

[7] *See* Art. 4(1) of the China — Uzbekistan BIT: Each Contracting Party shall accord to investors of the other Contracting Party and the investments thereof treatment no less favorable than that it accords, in like circumstances, to investors and the investments thereof of any third State with respect to the establishment, acquisition, expansion, management, maintenance, use, enjoyment, sale or disposal of investments.

the MFN clause and made the MFN clause extremely vague.[8] To some extent, this indicates that China and Russia, both founding states of the SCO, are trying to include the provisional obligations of the host state to the contracting party of the third-party treaty in the "treatment" of the MFN clause, so as to prevent the arbitral tribunal from completely denying the legitimacy of importing the contents of the third-party treaty into the basic treaty from the perspective of treaty interpretation in the future investment disputes. Compared with the China — Russia BIT, the subsequent China — Turkey BIT revises the dilution of the principle of "treatment within the territory" and uses the expression of "within the territory" again. However, this BIT deconstructs the "treatment" into two parts: the treatment at the pre-establishment stage and the treatment at the post-establishment stage. What is more, it reduces the wording of "within the territory" to the qualifier of treatment at the pre-establishment stage. From the perspective of text interpretation, there are two possible ways of interpreting: the first one is to avoid repetition of the text; the other one is to expand the scope of application of MFN treatment at the post-establishment stage and thereafter provide interpretative feasibility for the importation of third-party treaty provisions through MFN provisions.

The second generation of MFN clauses universally incorporates the "like circumstances" rule.[9] The "like circumstances" rule in the MFN clause has the function of clarifying the reference system needed when making the comparisons of treatment. To be specific, the MFN obligation with the "like circumstances" rule is that the treatment the host state accords to investors of a contracting state shall not be less favorable than the treatment the host state accords to investors of a non-contracting party who are in similar circumstances rather than all

[8] *See* Art. 3(3) of the China — Russia BIT: Neither Contracting Party shall subject investments and activities connected with such investments by the investors of the other Contracting Party to treatment less favorable than that accorded to the investments and activities in connection with such investments by the investors of any third State.

[9] *See* Art. 3(4) of the China — Turkey BIT: Within the framework of the hosting Contracting Party's laws and regulations, each Contracting Party shall admit in its territory investments on a basis no less favourable than that accorded in like circumstances to investments of investors of any third State.

the treatment accorded to all the investors of a non-contracting state. The incorporation of the "like circumstances" rule makes the MFN clause more in line with its purpose and the development trend of international investment agreements. MFN treatment is considered to ensure that investors of a negotiating party that is in a lower position can enjoy more preferential treatment granted by the other party that is in a higher position to investors of non-contracting states. On the other hand, MFN treatment also limits the autonomous will of the stronger party for it makes the stronger party to conclude BITs more carefully especially when negotiating on the content included in the treaty. It also impacts the principle of international law that "treaties do not create obligations for third states." The rule of "like circumstances" has a moderating effect on the conflict between the two values. Some scholars believe that this rule is an inherent constitutive element of MFN treatment and regardless of the exact wording of specific MFN clauses, they should be interpreted as they contained "like circumstance" rule (Perez-Aznar, 2017, p. 798). What is more, investment treaties that have come into force since 2010 have also generally incorporated "like circumstances" rules into MFN clauses.[10] However, there are still many BITs that do not include the "like circumstances" rule in MFN clauses, and it is worth considering whether the "like circumstances" rule has been the inherent constitutive element of MFN clauses.

II.2. The Comparison between the MFN Exception Clauses in China — SCO State BITs

A comparison between the exceptions set in MFN clauses of different China — other SCO states BIT would to some extent reveal the different attitudes SCO states hold to the scope of MFN. The MFN exception clauses in such BITs have listed only a small number of exceptions to which the MFN clause does not apply. Those exceptions listed in different BITs are similar and can therefore be divided into two types. The first type is the exception of a regional economic integration

[10] *See* 2017 the China — Hong Kong SAR BIT, the 2017 Japan — Israel BIT, the 2016 Rwanda — Turkey BIT, the 2016 Canada — Hong Kong SAR BIT, the 2016 Canada — Mongolia BIT.

agreement, that is the preference or treatment granted to a state by another state in accordance with a regional economic agreement such as a free trade agreement or a customs union agreement does not fall within the scope of application of the MFN clause. Such preferences or treatment cannot be spread among the parties to the basic treaty even if it is more favorable. The second is the exception of international agreements related to tariffs, that is one state waives or reduces taxes on investors from another state in accordance with international agreements on or partially on taxation. Since the relevant preferential treatment is granted to everyone among the parties based on the principle of equality and reciprocity, then the relevant tax preferential treatment cannot be unconditionally spread among the parties to the basic treaty.

In the MFN exception clauses in recent China — SCO states BITs, the dispute settlement mechanism has been a new exception. The China — Uzbekistan BIT and the China — Turkey BIT both expressly stipulated that MFN treatment does not apply to "dispute settlement mechanism stipulated in other IIA." What is also worth mentioning is that the 2001 China — Myanmar BIT does not list dispute settlement mechanism as a exception, but the 2009 *Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation between the People's Republic of China and the Association of Southeast Asian Nations* has incorporated dispute settlement mechanism in the MFN exception clause,[11] which means that in the investment disputes between China and Myanmar, dispute settlement resolution set out in the other BIT cannot be applied to such disputes. Since *Maffezini v. Spain* in 2000 triggered the dispute over whether the MFN clause can be used to introduce the dispute settlement mechanism set out in a third-party treaty into the basic treaty, the later arbitration tribunal has not reached a conclusion on this dispute, and the SCO states have become the parties to the relevant disputes for many times.[12] The MFN

[11] *See* Art. 5(4) of China — ASAN IIA: For greater certainty, the obligation in this Article does not encompass a requirement for a Party to extend to investors of another Party dispute resolution procedures other than those set out in this Agreement.

[12] *See* H&H Enterprises Investments Inc v. Arab Republic of Egypt. ICSID, Case No. ARBO9/15; AsiaPhos Limited and Norwest Chemicals Pte Limited v. People's Republic of China. ICSID, Case No. ADM/21/1; Ansung Housing Co Ltd. v. People's

exception clause in the China — Russia BIT is relatively special for it does not specify in the MFN clause that the MFN treatment applies to procedural matters, nor does it include procedural matters in the MFN exception clause. Instead, it adds in its protocol that the MFN treatment applies to the administrative review procedure conducted by investors of one party in another party.

III. Disputes Involving MFN Treatment in respect of SCO States

Similar to the national treatment clause, the MFN clause is used to regulate issues related to discrimination against foreign investors based on nationality, and the specific application should be based on comparison (Ustor, 1974, p. 117). In international arbitration of investment disputes, the purpose of invoking the MFN clause is usually to request the arbitral tribunal to apply the more preferential treatment in a third-party treaty to the parties to the basic treaty, and rarely invokes the MFN clauses to attempts to allege that the domestic measures of the host state violate MFN treatment and thus constitute discrimination (Wang, 2020, p. 184). In international investment arbitration involving SCO states, the purpose of invoking the MFN clause by the parties concerned is not only to reach the modification or derogation of the basic treaty by comparing the basic treaty with the third-party treaty, but also to obtain more preferential treatment granted to other foreign investors by the host state according to its domestic measures.

III.1. Invoke MFN Clauses to Expand the Content of Basic Treaty

It has been recognized by many arbitral tribunals that MFN clauses can be used to import substantial provisions like the Fair and Equitable Treatment clause from a third-party treaties into the basic

Republic of China. ICSID, Case No. ARB/14/25; Vladimir Berschader and Motse Berschader v. The Russian Federation. SCC Case No. 080/2004; RosInvest Co UK Ltd v. Russian Federation. SCC Case No. V079/2005; Beijing Urban Construction Group Co Ltd v. Republic of Yemen (Beijing Group v. Yemen). ICSID, Case No. ARB/14/30.

treaties, thus creating new investor protection obligations for parties to the basic treaties.[13] A scholar points out that this practice is no longer controversial, and it creates a unified standard of investment protection treatment for investors from different countries, making the legal framework for regulating investors more harmonious (Sharmin, 2018, p. 85). In contrast, international investment arbitration cases where SCO states are disputing parties focus more on revising or derogating the procedural provisions in the basic treaty through MFN clauses, which is still in debates.

In *AsiaPhos* [Singapore investor] *v. China*, the claimant held that the MFN clause of the 1985 China — Singapore BIT expressly stipulates that Art. 5, 6 and 11 do not fall within the scope of application of MFN treatment.[14] However, the dispute settlement mechanism in the 1985 China — Singapore BIT is stipulated in Art. 13. Moreover, the MFN clause, as a clause aimed at ensuring that the treatment previously granted by the host state to investors of one state matches the treatment later granted by the host state to investors of another state, its application to the dispute settlement mechanism is barrier-free.[15] The Tribunal first cited the *Berschader v. Russia* case that also involved the SCO states. The arbitral tribunal of *Berschader v. Russia* pointed out that the replacement of the dispute settlement clause set out in the basic treaty through the MFN clause is legitimate only in two circumstances: first, the MFN clause "expressly and unambiguously" clarifies that it can be applied to the dispute settlement clause; second, modifying the dispute settlement provisions of the basic treaties through MFN provisions is in line with the contracting purposes of the parties. The Tribunal held

[13] Rumeli Telekom, A.S. and Telsim Mobil Telekomunikasyon Hizmetleri; AS. v. Republic of Kazakhstan (Rumeli v. Kazakhstan). ICSID, Case No. ARB/05/16, Award (29 July 2008), Para. 560, 575 and 581–619; LESI SpA and ASTALDI; SpA v. People's Democratic Republic of Algeria (LESI v. Algeria). ICSID, Case No. ARB/05/3, Award (12 November 2008), Para. 150–164; ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan (ATA v. Jordan). ICSID, Case No. ARB/08/2, Award (18 May 2010), Para. 125 and 133.3; OAO Tatneft v. Ukraine (OAO Tatneft v. Ukraine). UNCITRAL, Award (29 July 2014), Para. 365.

[14] Art. 4 of 1985 China — Singapore BIT: Subject to Art. 5, 6 and 11, neither Contracting Party shall in its territory subject investments admitted...

[15] *See* AsiaPhos Limited and Norwest Chemicals Pte Limited v. People's Republic of China. ICSID, Case No. ADM/21/1, Award, p. 14.

that the wording of excluding Art. 5, 6 and 11 from the MFN application scope in the basic treaty does not expressly and unambiguously allow the replacement of the dispute settlement clause in accordance with the MFN clause. For the purposes of the contracting Parties, the Tribunal held that the exchange of letters between the contracting parties during the signing period of the 1985 China — Singapore BIT indicated that the contracting parties recognized that the arbitration consent listed in the dispute settlement clause could be modified after renegotiation and new agreement was reached, and the new arbitration clause would replace the dispute settlement clause of the basic treaty. Therefore, the introduction of a new dispute settlement mechanism directly based on the MFN clause is not consistent with the contracting purpose of the parties.[16]

In *Pugachev* [French investor] *v. Russia*,[17] the claimant *Pugachev* held that since *Maffezini* case first used the MFN clause to circumvent procedural matters such as "exhaustion of local remedies" and cooling-off periods, and in many subsequent cases, the arbitral tribunal supported the modification or reduction of the procedural provisions of the basic treaty through the MFN clause,[18] MFN clause's application to procedural matters has been a well-settled practice.[19] The Respondent, the Russian Federation, held different view that indeed, it is true that many arbitral tribunals support the application of MFN clauses to procedural matters, it does not mean that this approach is free of doubt, and different arbitral tribunals will reach different conclusions facing

[16] AsiaPhos Limited and Norwest Chemicals Pte Limited v. People's Republic of China. ICSID, Case No. ADM/21/1, Award, pp. 78–80.

[17] Sergei Viktorovich Pugachev v. The Russian Federation. No administering institution.

[18] *See* Siemens AG v. Argentina. ICSID, Case No. ARB/02/8; Gas Natural SDG, S.A. v. Argentina. ICSID, Case No. ARB/03/10; Camuzzi International, S.A. v. The Argentine Republic. ICSID, Case No. ARB/03/2; RosInvest v. The Russian Federation. SCC, Case No. V079/2005; National Grid plc v. Argentine Republic. UNCITRAL; Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal SA v. Argentina and AWG Group Ltd v. Argentina. ICSID, Case No. ARB/03/19.

[19] *See* Sergei Viktorovich Pugachev v. The Russian Federation. Award on Jurisdiction dated 18 June 2020, p. 60.

different cases and different BITs.[20] Since the claimant did not acquire French nationality at the time of the investment involved, the 1989 France — Russia BIT was not applicable, and the tribunal awarded that it has no jurisdiction and did not review the MFN issue.

In *RosInvest* [UK investor] *v. Russia*, the claimant, RosInvest, sought to introduce the dispute settlement provisions of the Denmark — Russia BIT with the wider scope of the arbitration consent through the MFN clause. The arbitral tribunal first pointed out that, in terms of the impact on investors, since the substantial provisions in the third-party treaty can be introduced through the MFN clause, it is more reasonable to introduce procedural provisions with less impact on the rights and interests of the parties through the MFN clause. Secondly, from the perspective of the protection of investors' rights and interests, procedural clauses like substantial clauses have protective value for investors and their investments on the same dispute matter, and are both worthy of preferential modification through MFN clauses. In addition, the Tribunal took a different view from *AsiaPhos v. China*. The Tribunal held that the fact that the dispute settlement matters were not explicitly specified in the MFN exception clause meant that the application of the MFN clause to the dispute settlement matters was legitimate.[21]

In *Berschader* [Belgian investor] *v. Russia*, in addition to the aforementioned disputes about the introduction of substantive provisions through MFN clauses, there were also disputes about the introduction of procedural provisions through MFN clauses. The respondent, the Russian Federation, does not expressly object to the application of the MFN clause to procedural benefit, pointing out that the BIT applied in this case is the Belgium — USSR BIT, and the treatment referred to in the MFN clause is the "treatment within the territory of the Soviet Union." Therefore, only clauses in BITs concluded by the Soviet Union rather than Russia and a third-party state can be introduced through MFN clauses. Therefore, the dispute settlement procedures

[20] Sergei Viktorovich Pugachev v. The Russian Federation. Award on Jurisdiction dated 18 June 2020, p. 39.

[21] *See* RosInvest Co UK Ltd. v. The Russian Federation. SCC, Case No. V079/2005. Award on Jurisdiction, pp. 75–79.

stipulated in the UK — Russia BIT, which was advocated by the claimant Bershchader, cannot be introduced into the basic treaty. Although the arbitral tribunal rejected the Russian Federation's defence of the treaty succession, it also rejected the intention of the parties to agree to introduce a dispute settlement mechanism through the MFN clause at the time of the conclusion of the treaty from the perspective of treaty interpretation. That is, the term "within the territory" indicates that the treatment referred to in the MFN clause is the treatment actually enjoyed by foreign investors in the territory of the host state, while the right to settle disputes through international arbitration tribunals is not the treatment enjoyed in the territory of the host state.[22]

III.2. Invoke MFN Treatment to Derogate Domestic Measures by the Host State

Disputes about obtaining a more favourable treatment of a host state under domestic measures through MFN provisions often revolve around "like circumstances." In *Bayindir* [Turkish investor] *v. Pakistan,* claimant Bayindir held that of the 35 construction projects contracted by the National Highway Authority of Pakistan to multiple foreign investors, only 6 were completed on schedule, but only Bayindir received a termination notice and its personnel and property were expelled from Pakistan. Bayindir received significantly lower domestic treatment than other foreign investors. Bayindir first advocated the introduction of fair and equitable treatment (FET) clauses in a third-party treaties through MFN clauses, and second, Pakistan constituted a violation of the FET clause newly imported in the BIT between Turkey and Pakistan. The arbitral tribunal recognized the applicant's claim to invoke the FET clause through the MFN clause, but further pointed out that the application of the FET clause must follow the "like circumstances" rule, and the 29 construction projects that had not been completed on schedule were delayed for different reasons, such as the change of the subject matter of the construction contract, renegotiation of the

[22] *See* Vladimir Berschader, Moise Berschader v. The Russian Federation. SCC, Arbitration V (080/2004). Award Rendered in Stockholm on 21 April 2006, pp. 56–70.

construction period, capital turnover, land ownership, etc. The claimant only proved that it had received different treatment from other foreign investors, but failed to prove that it was in similar circumstances with other foreign investors, so the claimant did not violate the introduced FET clause.[23]

In *Tashkent* [Uzbekistan investor] *v. Kyrgyzstan,*[24] the claimant Tashkent argued that Kyrgyzstan nationalized only four Uzbek-owned resorts located on the Issyk-Kul Lake (which is located in Kyrgyzstan) and did not take similar measures against other resorts owned by foreign investors near the lake. Such differential treatment in Kyrgyzstan took place when all foreign investors were in a similar situation and thus violated the provisions of the MFN.[25] The tribunal did not award on the alleged violation of the MFN, having ruled that Kyrgyzstan's measures constituted illegal expropriation.

Different from *Bayindir* and *Tashkent*, in *İçkale* [Turkish investor] *v. Turkmenistan* case, the tribunal directly rejected the claimant's claim to introduce the FET provisions through the MFN provisions and pointed out that the existence of the MFN obligations preconditions that the different investors of the contracting party and of the non-contracting party used for comparison are in similar circumstances.[26] Only under this premise, the MFN clause's function of introducing provisions in third treaty is activated. Although both arbitral tribunals reasoned around "similar circumstances," the arbitral tribunal in *Bayindir* case held that "similar circumstances" did not affect the introduction of the content of a third-party treaties. If different BITs concluded by

[23] *See* Bayindir Insaat Turizm Ticaret ve Sanayi a.ş. v. Islamic Republic of Pakistan. ICISD case, No. arb/03/29. Award dated 27 August 2009, pp. 120–123.

[24] JSC Tashkent Mechanical Plant, JSCB Asaka, JSCB Uzbek Industrial and Construction Bank, National Bank for Foreign Economic Activity of the Republic of Uzbekistan v. Kyrgyz Republic. ICSID, Case No. ARB(AF)/16/4.

[25] Art. 3.1 of the Kyrgyzstan — Uzbekistan BIT (1996): Each Contracting Party shall provide fair and equitable treatment to investments and the income of investors of the other Contracting Party on its territory, no less favorable than that it accords to investments and revenues of its own investors and/or investments and returns of investors of any third state.

[26] İçkale İnşaat Limited Şirketi v. Turkmenistan. ICSID, Case No. ARB/10/24. Award dated 8 March 2016, Para. 328.

the same state stipulate different levels of preferential treatment, then the more preferential treatment should be unconditionally extended to the other BIT. And "like circumstances" is only used as a criterion to judge whether the introduced FET clause has been violated. However, the arbitral tribunal in the *Ickale* case placed the review of "similar circumstances" before the introduction of the content of a third-party treaty, holding that the spread of the more preferential treatment to other BITs was not unconditional, and that more preferential treatment could be introduced into the basic treaty only when the provisions of different BITs would enable investors of different nationalities to obtain different levels of preferential treatment under similar circumstances.

IV. The Dilemma in the Interpretation of MFN Clause in China — SCO State BIT

Although there have been no MFN international investment disputes between China and other SCO states, the above-mentioned MFN investment disputes involving SCO states are still effective in reflecting the attitude of SCO states towards the application of MFN provisions, which may provide guidelines for the application and improvement of MFN provisions in BITs between China and other SCO states in the future. In the above cases, whether introducing procedural clauses through MFN clauses or changing the treatment under the domestic measures of the host state through MFN clauses, arbitral tribunals have made different reasoning and judgments in each similar issue, and the "inconsistent awards" problem is essentially the result of "inconsistent interpretation" (Jin, 2020, pp. 179–181). Therefore, problems in the application of MFN provisions in BITs between China and other SCO state should be predicted from the perspective of treaty interpretation, according to the above cases.

IV.1. The Difficulty to Clarify the Subjective Requirements for Importation of Procedural Clauses

In BITs between China and SCO states, it is difficult to clearly explain the scope of application of MFN clauses simply based on the

text. On the one hand, the scope of application of the MFN clause is only summarized by elements such as "territory," "investors," "investment," and "investments-associated activities," without "expressly and unambiguously" specifying procedural clauses such as a dispute settlement mechanism. On the other hand, the MFN exception clause generally does not include the dispute settlement mechanism. However, according to the *Vienna Convention on the Law of Treaties*, treaties should be interpreted in accordance with their plain wording and context and with reference to the usual meaning of the object and purpose of the treaty. When the meaning is still unclear or difficult to understand, supplementary information of interpretation should be utilized. Therefore, the MFN clauses in the BITs of China — SCO states should be interpreted from two perspectives: the text of the treaty and supplementary information.

In *AsiaPhos v. China*, when the provisions of the treaty could not expressly and unambiguously indicate that the MFN clause could be applied to the dispute settlement mechanism, the arbitral tribunal used information related to the preparation of the treaty conclusion, namely, the exchange of letters during the negotiation process. In the letters, both contracting parties agree that that the dispute settlement mechanism should be modified after additional negotiations and the consensus is reached. They further specify that the agreements made during the exchange of letters shall be part of the BIT.[27] However, not all cases have such supplementary means of interpretation. In *RosInvest*, unable to find supplementary information to help interpret the MFN provisions, the arbitral tribunal used an interpretation method, which is not generally recognized by international investment law, holding that the procedural nature of the dispute settlement mechanism makes it less important than the substantive provisions and should be deservedly introduced into the basic treaty.[28] In addition, the tribunal again retreated to the terms of the treaty after the fruitlessness of the interpretation through supplementary materials, pointing out that the

[27] *See* AsiaPhos Limited and Norwest Chemicals Pte Limited v. People's Republic of China. ICSID, Case No. ADM/21/1, Award, p. 14.

[28] *See* RosInvestCo UK Ltd. v. The Russian Federation. SCC, Case No. V079/2005. Award on Jurisdiction, pp. 77–79.

exception clause not listing the dispute settlement mechanism was sufficient to provide legitimacy for the application of the MFN clause to the dispute settlement mechanism. The arbitral tribunal in *RosInvest* case did not only use the special interpretation method, which is not generally recognized in the field of international investment dispute arbitration, but it also interpreted the treaty without making recourse to supplementary means of interpretation stipulated in the *Vienna Convention on the Law of Treaties*. Indeed, it is difficult to find out whether the arbitral tribunal subjectively seeks the most favorable interpretation mode after having reached a prior conclusion. However, "the interpretation task of arbitrators should be to make sure that the meaning of treaty terms is consistent with the motivation of the parties when they conclude the treaty, and it is to discover rather than create the meaning of treaty terms" (Mingxin, 2015, p. 176). Such interpretation method is obviously not in line with the functional positioning of international investment arbitration tribunals.

In the aforementioned cases, in order to prove the jurisdiction of the arbitral tribunal, the claimant tries to introduce the more favorable arbitration clauses in a third-party treaty through the MFN clause. However, China and Russia, as the respondent, and even the arbitral tribunal, as the adjudicator, did not explicitly deny the legality of applying the MFN clause to the dispute settlement mechanism. Rather, they showed their negative perspective through interpreting MFN clauses from specific BIT's wording and parties' contracting situations. Perhaps, as some scholar stated, the *Maffezini* case, more than two decades ago, opened the door to the application of MFN provisions to dispute settlement procedures (Garmoza, 2010, p. 14) leading the application of MFN clause on dispute settlement mechanism to an affirmative conclusion (Qiao, 2011, pp. 61–62). There is an opinion in the academic literature connecting the finality of an arbitration award to the award of *Maffezini* case and pointing out that this precedent finally affirmed the applicability of a MFN clause to dispute settlement procedure (Mrisho et al., 2023, p. 311). The debates over the application of MFN provisions on disputes settlement mechanism should be advanced to the specific conditions under which MFN provisions are able to apply to the dispute settlement mechanism in

individual cases. In addition, the relevant disputes are not an issue of "consistency of awards" but of "consistency of interpretations" (Huang, 2022, pp. 49–51). The research on the application of MFN clauses to dispute settlement procedures should focus on clarifying the specific conditions for application so as to promote the consistency in the interpretation mode of the scope of application of MFN clauses rather than the consistency in the scope of application of MFN clauses. What is also note-worthy is that the relevant documents of the thirty-sixth session of Working Group III of the United Nations Commission on International Trade Law (UNCITRAL) also pointed out that the study of "consistency of rulings" should focus on whether relevant awards are in the same scene and field.[29] To sum up, the problems in the scope of application of MFN clauses in BITs between China and SCO states are as follows: the exception clauses are relatively similar and do not clearly indicate the states' attitude towards introducing a new dispute settlement mechanism through MFN clauses, which makes it difficult to predict the interpretation conclusion of the arbitral tribunal on this issue in international investment disputes.

IV.2. The Debates over the Nature of the Treatment

Another imperfection of MFN clauses in BITs between China — SCO states is that they do not specify that the treatment stipulated in MFN clauses is "the treaty-level treatment to be" or "the factual level treatment." Taking the cases of *Bayindir v. Pakistan* and *İckale v. Turkmenistan* as examples, the BITs involved in the two cases have completely the same provisions on "treatment" and set up special articles to list in detail various investor rights that the parties hope the host state will protect.[30] Besides, both MFN clauses have incorporated

[29] UNCITRAL. Possible Reform of Investor-State Dispute Settlement (ISDS): Consistency and Related Matters, A/CN.9/WG.III/WP.150[R], 2018, New York, United Nations. Para. 10.

[30] Art. 1(2) of the Turkey — Turkmenistan BIT and Art. 1(2) of the Turkey — Pakistan BIT: (a) shares, stocks or any other form of participation in companies, (b) returns reinvested, claims to money or any other rights to legitimate performance having financial value related to an investment, (c) movable an immovable property, as well as any other rights in rem such as mortgages, liens, pledges and any other similar rights.

the wording of "like circumstances."[31] However, completely consistent and detailed terms are not enough to ensure the predictability and consistency of interpretation conclusions in international investment arbitration cases. In the two cases, the arbitral tribunals conducted the "like circumstances" review at different times, which essentially stems from the arbitral tribunal's understanding of "treatment" rather than "like circumstances." The arbitral tribunal in the *Bayindir* case unconditionally introduced the provisions in a third-party BIT into the basic BIT, and used "similar circumstances" to judge whether the introduced provisions were violated, indicating that the arbitral tribunal in this case interpreted "treatment" as the "the treaty-level treatment," which is a kind of treatment in the due state. That is, merely the treaty provision and not the exact and existing treatment foreign investors have actually enjoyed. This view has also been supported by scholars and arbitral tribunals.[32] It means a higher standard of protection for international investors and an automatic and unconditional multilateralization (Xu, 2013, p. 257). However, the arbitration tribunal in the *İckale* case first made the "similar circumstances" review and then judged whether to introduce the more favorable provisions in the third-party treaty into the basic treaty, indicating that it interpreted "treatment" as "the actual and concrete treatment," the situation in which foreign investors can have access to the legal framework of the host state. This view defined the treatment as the actual state. If in fact the situations of investors of the contracting party to the basic treaty and of the non-contracting party are not similar, or if no investors of the party to the BIT that includes more preferential treatment have made investments in the host state, there are no two qualified treatments for comparison, and the multilateralization function of the MFN clause cannot be activated.

The BIT between Turkey and Turkmenistan and the BIT between Turkey and Pakistan both stipulate "treatment" in great detail, but

[31] Art. 2(2) of the Turkey — Turkmenistan BIT and Art. 2(2) of the Turkey — Pakistan BIT: Each Party shall accord to these investments, once established, treatment no less favorable than that accorded in similar situations.

[32] MTD Equity Sdn. Bhd. and MTD Chile, S.A. v. Public of Chile. ICSID, Case No. ARB/ 01/7, Decision on Annulment, 21 March 2007, Para. 64.

still fail to guarantee the consistency of the arbitration tribunal's interpretation on "treatment." The particular reason lies in that the two detailed MFN clauses only list the objective activities associated with investments and ignore the distinction between the MFN clauses' factual status and their legal effect. That is, it is not indicated in BITs whether the so-called "treatment" is the actual state or situation that domestic investors can obtain in the host state, or the legal effect that the investment protection provisions ought to have. BITs between China and SCO states also adopt the traditional mode of listing the objective activities referred to by the treatment, without specifying whether the treatment should be interpreted as merely a provision wording stipulated therein or the actual situation of investors in the host state. Therefore, it may be difficult to clarify the reference system for a "more preferential treatment" in future international investment disputes between China and other SCO states.

V. Suggestions on Improving the MFN Clauses in the Future BIT Upgrading Negotiations

At present, the scale of China's investment in Russia and Central Asian states continues to expand, and its investment continues to increase (Wang, 2021, p. 93) In November 2021, the *14th Five-Year Plan for High-Quality Development of Foreign Trade* issued by the Ministry of Commerce of China pointed out that China should strengthen economic and trade cooperation mechanisms with Russia and Central Asian states, implement economic and trade cooperation agreements with the Eurasian Economic Union, and promote bilateral trade and investment cooperation. In 2023, the *Report on the Development of China's Overseas Investment and Cooperation 2022* released by the Ministry of Commerce indicated that China's wind power investment and solar photovoltaic investment are mainly concentrated in Central Asia at present.[33] Agricultural investment is concentrated in states and regions such as Central Asia and Russia. Russia and Central Asian states are important investment input states of China, and bilateral investment

[33] PRC Ministry of Commerce. China's Outbound Investment and Cooperation Development Report 2022, pp. 51, 61.

treaties between China and relevant states should be further upgraded to meet the needs of China's continuous expansion of investment scale in relevant states. At present, negotiations on upgrading bilateral investment treaty between China and Russia started in December 2022.[34] As the Belt and Road Initiative continues to advance, investment cooperation between China and other SCO states will be further deepened, and a new round of negotiations on upgrading BITs will also be launched. The improvement of MFN provisions in future BIT upgrade negotiations should be carried out from the following three aspects.

V.1. Improving the Wording of Treatment

First of all, when setting out the scope of "treatment," the word of "investment-related activities" should be avoided, nor should the treatment be specified by citing other investor treatment clauses. Contracting parties should try to set out the objective activities that they wish to be covered by MFN treatment. BITs concluded by China after 2010 basically follow this explicit wording mode. China — Canada BIT defines treatment through amply listing activities associated with such treatment: "establishment, purchase, expansion, management, operation and sale or other disposal of investments within its territory."[35] The China — Uzbekistan BIT[36] and the China — Tanzania BIT[37] add some more detailed activities: maintain, use and enjoy investments. Such explicit provisions have also been adopted in the *Regional Economic Comprehensive Partnership Agreement* to which China is a party and in the recent BITs between China and other SCO states.[38] This indicates that the use of the explicit wording mode to specify "treatment" has

[34] PRC Ministry of Commerce, Russia's Ministry of Economic Development. Joint Statement on Initiating Negotiations on Upgrading the Investment Agreement between the Government of the People's Republic of China and the Government of the Russian Federation Signed on 9 November 2006.

[35] Art. 5(1)(2) of the China — Canada BIT.

[36] Art. 4(1) of the China — Uzbekistan BIT.

[37] Art. 4(1) of the China — Tanzania BIT.

[38] *See* Art. 4(2) of the Hungary — Kyrgyzstan BIT, Art. 5(1) of the Myanmar — Singapore BIT, Art. 4(3) of the Saudi Arabia — Hong Kong Special Administrative Region BIT, Art. 5(2) of the Kazakhstan — Singapore BIT, Art. 4(2) of the Kyrgyzstan —

become the trend of drafting MFN clauses when SCO states conclude BITs. In addition, the difference in the meaning of the word "relevant" in different languages will also lead to inconsistent interpretation in international investment dispute arbitration. In *AsiaPhos* case, the respondent — China — believes that the Chinese version of the BIT involved in the case uses the word 有关 (youguan), and it should be a strong connection in the Chinese context. That is, it is directly generated from or directly related to something. It matches the English words "over" or "concerning," while the claimant believes that the English version of the BIT uses the word "involving," which means an abstract and extensive relationship.[39] In *Sanum v. Laos*[40] and *Heilongjiang International Economic & Technical Cooperative Corp v. Mongolia,*[41] the disputing parties also had debates over the Chinese word 有关 and its equivalents in other languages. It can be seen that 有关 in the Chinese context is not simply corresponding to "concerning," "over" and "involving" in English. Therefore, changing "activities involving investments" or similar wording to explicitly listing the investment activities that contracting parties wish to protect not only conforms to the trend of SCO states to conclude BITs, but also helps to promote the consistency of the meanings of the provisions in the Chinese and foreign languages versions of BITs, thus promoting the consistency of the interpretation.

In addition, the actual, or the concrete nature of "treatment" shall be specified in the MFN clause, making it clear that "treatment" shall be the actual situation that investors of the other party find themselves in according to the provisions of the BIT and the domestic laws and regulations of the host state. Without specifying such an "actual" nature,

Turkey BIT, Art. 5(2) of the Kazakhstan — Singapore BIT, Art. 4(2) of the Kazakhstan — United Arab Emirates BIT, Art. 4(2) of the Turkey — Uzbekistan BIT.

[39] AsiaPhos Limited and Norwest Chemicals Pte Limited v. People's Republic of China. ICSID, Case No. ADM/21/1, Dissenting Opinion, p. 5.

[40] Sanum Investments Limited v. The Government of the Lao People's Democratic Republic. Judgment of the Court of Appeal of Singapore 57, 29 September 2016, Para. 126.

[41] China Heilongjiang International Economic & Technical Cooperative Corp et al. v. Mongolia. Permanent Court of Arbitration (PCA), Case No. 2010-20, Award, 30 June 2017, Para. 439.

the MFN clause may be interpreted as being able to import more favorable provisions in a third-party treaties into the basic treaty unconditionally, thus creating unpredictable new treaty obligations for the parties and improperly breaking through the relativism of bilateral treaties. The arbitral Tribunal in *ICS v. Argentina* had pointed out that "treatment" should be the obligation of the host state to the foreign investor through its domestic legal framework in accordance with its international law obligations to be observed under international treaties or customary international law.[42] The tribunal in *Daimler v. Argentina* held that the term "treatment" originally refers to the way one party treats the other, and in the context of international investment refers to the act or omission of a host state in order to regulate, protect or otherwise interact with a particular investor and his investment.[43] In both cases, the views of the arbitral tribunals indicated that "treatment" is not a BIT stipulation as it should be, but the actual treatment accorded to foreign investors by the host state through its domestic legal framework. To make it clear, the method to reflect the "actual nature" in the MFN clause, the tribunals can refer to the China — Saudi Arabia BIT in which the wording of "subject to its laws and regulations" was adopted[44] or refer to the Turkey — Venezuela BIT to use the expression of "within the framework of its laws and regulations"[45] to indicate that the treatment referred to in the MFN clause is the actual treatment that the host state can give under its national laws and regulations.

[42] ICS Inspection and Control Services Limited (United Kingdom) v. The Argentine Republic. PCA, Award on Jurisdiction, Para. 296.

[43] Daimler Financial Services AG v. Argentine Republic. ICSID, Case No. ARB/05/1. Award, Para. 218–220.

[44] Art. 3(2) of the China — Saudi Arabia BIT: Subject to its laws and regulations, each Contracting Party shall grant investments once admitted and investment returns of the investors of the other Contracting Party a treatment not less favorable than that accorded to investment and investment returns of its investors.

[45] Art. 5(1) of the Turkey — Venezuela BIT: Each Contracting Party shall admit in its territory investments on a basis no less favorable than that accorded in like circumstances to investments of investors of any third State, within the framework of its national laws and regulations.

V.2. Incorporating the "Like Circumstances" Rule to Clarify the Prerequisite of Application

The rule of "like circumstances" is an important precondition for the application of the MFN clause, which means that the MFN clause in each treaty has its own specific application premise that the investors used for comparison are in same or similar situations (Yannick, 2007, p. 767). The advantage of the "like circumstances" rule is that it helps to prevent the blind application of MFN provisions in order to level the international investment environment. The non-discriminatory nature of the MFN clause requires that the host state shall not discriminate against nationals of the contracting state in the host state compared with nationals of other states, so as to create a level playing field among nationals of different states regardless of their nationality (Schill, 2009, p. 516). The premise of the existence of such discrimination is that the home state investor who is treated differently is in a similar situation as compared with the third state investor. It should be presumed that the host state does not take discriminatory measures against the investors of the home state and the host state does not undertake the obligation of MFN if the "like circumstances" standard has not been met.[46]

It is not a rule of customary international law to follow such a rule in the application of the MFN clause. If the MFN clause does not expressly incorporate the wording of "like circumstances," arbitral tribunals in international investment disputes do not necessarily and automatically apply this rule.[47] In order to clarify the applicable precondition of the MFN clause, the expression of "like or similar situation or circumstances" should be incorporated to the MFN clause in the future upgraded BIT between China and SCO states. It can refer to the China — Turkey BIT and the China — Uzbekistan BIT for exact wording. According to the data revealed by the UNCTAD, a total of 39 BITs have come into force since 2020, involving Turkey,

[46] İçkale İnşaat Limited Sirketi v. Turkmenistan. ICSID, Case No. ARB/10/24, Para. 328.

[47] *See* Bayindir Insaat Turizm Ticaret ve Sanayi a.ş. v. Islamic Republic of Pakistan. ICISD, Case No. ARB/03/29.

Uzbekistan, Kyrgyzstan, India, Iran, Myanmar and other SCO states.[48] Among them, only Angola — United Arab Emirates BIT and United Arab Emirates — Zimbabwe BIT do not include the "like circumstances" rule in the MFN clause. The Belarus — India BIT even goes so far as to explain that whether investors of different nationalities are in similar situations should be judged from the perspective of the situation as a whole. It also gives some illustrative and non-exhaustive examples of several factors to determine: (a) the goods or services produced or consumed by the investment; (b) the actual or potential impact of the investment on the local area or environment; (c) practical challenges of managing investments.[49] The data shows that the incorporation of "like circumstances" rules is not only a new trend of MFN clauses in the world, but also a new trend for SCO, which can provide guidance for the future negotiation of BITs between China and SCO states.

V.3. Clarifying China's Attitude towards Application on Procedural Matters

The purpose of specifying in the MFN exception clause whether the MFN clause applies to the dispute settlement mechanism in third-party treaties is to promote "consistency in interpretation methods" and "predictability of interpretation conclusions" in international investment dispute cases. If the basic treaty does not clearly indicate

[48] Japan — Bahrain BIT, Hungary — Oman BIT, Jersey — United Arab Emirates BIT, Congo — Rwanda BIT, North Macedonia — United Arab Emirates BIT, Georgia — Japan BIT, Israel — United Arab Emirates BIT, Hungary — Kyrgyzstan BIT, Zambia — United Arab Emirates BIT, Hong Kong Special Administrative Region — Mexico BIT, Cote d'Ivoire — Japan BIT, Morocco — Japan BIT, Myanmar — Singapore BIT, Belarus — Uzbekistan BIT, Hong Kong Special Administrative Region — United Arab Emirates BIT, Korea — Uzbekistan BIT, Australia — Uruguay BIT, Cape Verde — Hungary BIT, Australia — Hong Kong Special Administrative Region BIT, Japan — Jordan BIT, United Arab Emirates — Uruguay BIT, Indonesia — Singapore BIT, Belarus — India BIT, Zambia — Turkey BIT, United Arab Emirates state — Zimbabwe BIT, Singapore — Rwanda BIT, Kenya — Singapore BIT, Japan — United Arab Emirates BIT, Kyrgyzstan — Turkey BIT, Belarus — Turkey BIT, Hungary — Iran BIT, Rwanda — United Arab Emirates BIT, Turkey — Uzbekistan BIT, Costa Rica — United Arab Emirates BIT, Angola — United Arab Emirates BIT, Ethiopia — United Arab Emirates BIT, Cote d'Ivoire — Turkey BIT and China — Turkey BIT.

[49] Art. 4(1) of the Belarus — India BIT.

whether the MFN clause can be used to introduce the dispute settlement mechanism in the third treaty, the international investment dispute arbitral tribunal will often interpret it from many different and subjective aspects. The *Maffezini* case did not only introduce the dispute settlement mechanism, but also set a precedent for the interpretation of the MFN clause without mentioning the text of the MFN clause at all, bringing a trend of excessive reference to precedent in the relevant rulings on this issue. Later the *Gas Natural v. Argentina*[50] tribunal and the *Tecmed v. Argentina*[51] tribunal also similarly and directly appealed to the contracting background and had a preference for invoking prior arbitral awards without analyzing the terms of the treaty. Some of the rulings even used the scholar doctrine.[52] The aforementioned *RosInvest* case even deviated from the interpretation sequence of "terms — preparation information" stipulated in the *Vienna Convention on the Law of Treaties*.

China should expressly and unambiguously clarify in the future BITs with other SCO states that the MFN clause cannot be used to introduce the dispute settlement mechanism. On the one hand, it can directly state in the MFN exception clause that "the treatment referred to in this Article does not include the dispute settlement mechanism or procedure under any other international agreement." A more precise expression could be used, "MFN treatment referred to in this Article does not include or does not apply to dispute settlement mechanisms or procedures between investors and contracting party, as listed in article…" On the other hand, it can indicate in the preparatory documents such as a letter of exchange or protocols that "both parties agree that the dispute settlement mechanism in the treaty can only be modified after the parties renegotiation and agreement and at that time the new provisions will replace the original provisions of the treaty."

[50] *See* Gas Natural SDG, S.A. v. The Argentine Republic. ICSID, Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction.

[51] *See* Técnicas Medioambientales Tecmed v. United Mexican States. ICSID, Case No. ARB(AF)/00/2, Award dated 29 May 2003.

[52] *See* Plama Consortium Limited v. Republic of Bulgaria. ICSID, Case No. ARB/03/24, Decision on Jurisdiction; Wintershall Aktiengesellschaft v. Argentine Republic. ICSID, Case No. ARB/04/14, Award dated 8 December 2008.

Another important way is stipulating in the protocol that "the parties agree to apply the MFN provisions to specific procedural matters just as the China — Russia BIT does."[53] In addition, if upgrading negotiations cannot be initiated for the time being, the contracting parties can make clarifications by issuing a joint statement. For example, the China — Kazakhstan BIT, the China — Kyrgyzstan BIT and the China — Tajikistan BIT all stipulate that the contracting parties can meet to study the supplement to the treaty. China and the above-mentioned countries can make such a clarification by means of a joint statement before the negotiation on the upgrade of the BIT.

VI. Future Prospects: The Realistic Effect of the MFN Clause as the Link Point of Investment Treatment Multilateralization

However, the domestic investment laws of China, Russia, Pakistan, Tajikistan, Uzbekistan, Kazakhstan, and Kyrgyzstan are all oriented and aimed at attracting foreign investment, and all require foreign investment to promote sustainable development in the host state in terms of environment, human rights, labor protection, and related ideological values. However, the huge differences in political system, state system, religion and moral values among SCO states also make them adopt different standards for foreign investment access (Wang, 2019, p. 29). In addition, among the BITs between China and other SCO states, only the China — India BIT, the China — Russia BIT, and the China — Uzbekistan BIT contain national treatment clauses, and all of them are post-establishment national treatment (post-establishment national treatment means that the treatment enjoyed by foreign investors or foreign-invested enterprises after establishment is no less favorable than that enjoyed by domestic investors or enterprises in the domestic country). At present, the SCO is still facing difficulties in integrating old and new states and different expectations for economic cooperation among states.

[53] Art. 3 of the Protocol of the China — Russia BIT stipulates that the domestic administrative reconsideration procedure should be conducted on a basis of most favored nation treatment.

Multinationalization of investment protection standard and investment facilitation within the framework of SCO face many problems, especially the problem that the mechanism of investment facilitation and multilateralization in the form of multilateral investment agreement has not yet been established. In the stage of investment access, although the differences of SCO states in terms of polity, state system, religion and morality lead to different standards for investment access, the prevailing MFN clause makes it possible for foreign investors to propose the same preferential rights for access to a host state. Obviously, there are intergenerational differences in investments protection clauses in BITs between China and SCO states, but investors of parties to the older generation of BITs can enjoy a more preferential treatment accorded to investors of parties as compared with the new generation of BITs, such as the FET clause or more preferential expropriation and compensation provisions, if the standard of "similar circumstances" is met.

If the MFN clause can correctly play its role as a link of investment treatment protection multilateralization and help solve various difficulties of investment treatment multilateralization within the framework of SCO, it will have a great practical effect based on its investment potential. The SCO has become an international organization with important global influence in diplomatic, political, economic and trade, cultural and other fields. Since its establishment in 2001, the SCO has been deepening cooperation in energy, finance, economy, trade and investment. At present, under its framework regional economic ties are becoming increasingly close. Among them, investment has become an important form of regional economic cooperation, and the scale of investment cooperation among SCO countries is expanding day by day. The SCO countries are basically covered by the Belt and Road Initiative. As early as the end of 2019, China's investment in various types of SCO member states had reached 87 billion US dollars. Deepening the SCO's direct investment has become one of the priorities for strengthening regional cooperation (Wei and Sun, 2023, p. 78). The development goal of SCO requires its member states to continuously deepen economic, trade and investment cooperation.

At present, the investment law system under the framework of SCO is still largely bilateral, and the process of investment facilitation is

still fragmented. Therefore, in the practice of investment arbitration, investors of SCO state states can resort to the MFN clause in their BITs to break the dualism-based investment system, so that the *de facto* multilateralization and integrated investor protection treatment can emerge. In this way, the overseas interests of investors from one SCO state to another SCO state will be protected as much as possible.

VII. Conclusion

MFN treatment, as a multilateralization obligation given to the contracting parties under the bilateral international investment mechanism, has made the MFN clause a common link in the construction of multilateralization investment system under the framework of the bilateralism-based international investment law. At present, investment cooperation within the SCO is faced with problems such as the incomplete implementation of investment facilitation measures and the deeply rooted bilateralism. However, the current international investment arbitration cases involving SCO states show that there are problems such as the fragmentation of the interpretation method of the scope of application of the MFN clause by the arbitration tribunal, which leads to the improper expansion of the discretion of the arbitration tribunal. In this regard, China, as one of the founding states of the Shanghai Cooperation Organization, should strive to continue to improve the MFN clause through subsequent supplement, renegotiation and upgrading of the BITs, so that the MFN clause can focus on the "actual treatment," respect national sovereignty, and ensure that foreign investors in the host state can exactly enjoy the most favorable treatment under the domestic legal framework of the host state.

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