İSTANBUL UNIVERSITY PRESS

Public and Private International Law Bulletin, 43(1): 1–36

DOI: 10.26650/ppil.2023.43.1.1174730
http://ppil.istanbul.edu.tr/tr/_

Public and Private International Law Bulletin

Submitted: 14.09.2022
Accepted: 05.10.2022
Published Online: 01.02.2023

RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

Extension of the Most Favoured Nation Clause to Dispute Settlement Provisions in Bilateral Investment Treaties Which Türkiye is a Party of

Türkiye'nin Taraf Olduğu İki Taraflı Yatırım Anlaşmaları Çerçevesinde En Çok Gözetilen Ulus Kaydının Uyuşmazlık Çözümüne İlişkin Anlaşma Hükümlerine Teşmili

Bilgin Tiryakioğlu*

Abstract
Bilateral investment treaties (BITs) pave the way for international investment arbitration for investors and play a crucial role in the settlement of investment disputes. In 63 years, 2871 BITs have been signed between States and 2231 of them have entered into force since the first BIT concluded between Germany and Pakistan in 1959. This alone reveals the importance of BITs in terms of the disputes arising from investment and their settlement through arbitration. Almost every BIT contains most favored nation (MFN) clause as a standard of treatment. However, the applicability of MFN clauses to procedural provisions of a BIT has been a controversial issue since 2000 when an ICSID tribunal's award was rendered in the Maffezini case. Following the Maffezini case, conflicting arbitral awards have have become the centre of attention as to the scope of MFN clauses in terms of whether they could be extended to dispute resolution provisions. One of the main reasons leading to this controversy is that the BIT provisions regarding MFN clauses as well as dispute resolution provisions have not been formulated in a clear and unambiguous manner. Accordingly, different arbitral tribunals have interpreted BIT provisions differently regarding the extension of MFN clauses to dispute resolution provisions. This problem has had an impact all over the world and has led a radical shift both for arbitral awards that have been rendered by investment tribunals and BIT practices of almost all countries. MFN clauses no longer cover dispute resolution provisions of BITs that have been signed by Turkey since 2010.

Keywords
Dispute Resolution Provision, Investment Arbitration, Bilateral Investment Treaties, Icsid Arbitration, Most Favoured Nation Clause

Öz
Yatırımların Karşılıklı Korunması ve Teşvikine (YKTK) ilişkin anlaşmalar yatırımcılara yatırım tahkimi yolunu açmakta ve yatırım uyuşmazlıklarının çözümünde çok kritik bir rol üstlenmektedir. 1959 yılında Almanya ve Pakistan arasında ilk ikili yatırım anlaşmasının imzalanmasından sonra geçen 63 yılı içinde 2871 anlaşma imzalanmış ve bunlardan 2231'i yürürlüğe girmiştir. Sadece bu sayı bile yatırım uyuşmazlıkları ve bunların tahkim yoluyla çözümü bakımından ikili yatırım anlaşmalarının önemini ortaya koymaktadır. Yatırımlara uygulanacak muamele standardı olarak en çok gözetilen ulus kaydı neredeyse bütün YKTK anlaşmalarında yer almaktadır. Bununla beraber bu kaydın anılan anlaşmalarının usul hükümlerine uygulanıp uygulanmayacağı 2000 yılında Maffezini davasında verilen ICSID kararından bu yana tartışılmaktadır. Maffezini davasından sonra uyuşmazlık çözümüne ilişkin hükümler bakımından en çok gözetilen ulus kaydının kapsamına ilişkin olarak hakem kurullarının vermiş olduğu birbiriyle çelişkili kararlar ilgi odağı haline gelmiştir. Bu tartışmalara yol açan temel neden,

* **Corresponding author:** Bilgin Tiryakioğlu (Prof. Dr.), İhsan Doğramacı Bilkent University, Faculty of Law, Department of International Private Law, Ankara, Turkiye. E-mail: bilgint@bilkent.edu.tr ORCID: 0000-0001-5574-1525

To cite this article: Tiryakioglu B, "Extension of the Most Favoured Nation Clause to Dispute Settlement Provisions in Bilateral Investment Treaties Which Turkey is a Party of" (2023) 43(1) PPIL 1. https://doi.org/10.26650/ppil.2023.43.1.1174730

hem en çok gözetilen ulus kaydı hem uyuşmazlık çözümüne ilişkin YKTK anlaşmalarındaki hükümlerin açık ve sınırları belirli bir biçimde kaleme alınmamış olmasıdır. Dolayısıyla, farklı hakem kurulları yorum yoluyla YKTK anlaşmalarındaki en çok gözetilen ulus kaydının uyuşmazlık çözümüne ilişkin hükümleri kapsayıp kapsamadığına ilişkin farklı sonuçlara ulaşmıştır. Birbiriyle çelişen hakem kararları yatırım tahkimi alanında dünya çapında tartışılmış, sonuçta hem hakem kararlarında hem ikili yatırım anlaşmaları uygulamasında önemli değişikliklerin gerçekleşmesine yol açmıştır. Türkiye'nin 2010 yılından başlayarak imzaladığı YKTK anlaşmalarında da bu değişim gözlenmiş ve en çok gözetilen ulus kaydının artık uyuşmazlık çözümüne ilişkin hükümleri kapsamayacağına ilişkin açık hükümlere yer verilmiştir.

Anahtar Kelimeler
Uyuşmazlık Çözümüne İlişkin Hükümler, Yatırım Tahkimi, İkili Yatırım Anlaşması, ICSID Tahkimi, En Çok Gözetilen Ulus Kaydı

Introduction

There is no doubt that bilateral investment treaties (BITs) on the mutual promotion and protection of investments pave the way for investors to resort to international investment arbitration and play a key part in the settlement of disputes. In addition to BITs, which solely address investments, some free trade agreements (FTAs) and other treaties also include provisions for the promotion and protection of investments. These treaties also play an important part in the settlement of investment disputes through arbitration. As of 24 July 2022, 2,871 BITs have been signed and 2,231 have entered into force.[1] The era of BITs has a history of about 63 years that started on 25.11.1959 with the signing of a treaty between Germany and Pakistan[2]. Previously, states protected their mutual commercial interests through friendship, commerce, and navigation treaties, which trace their origins back to the 15th and 16th centuries[3].

Turkey's era of BITs started on 20.06.1962 with the conclusion of the Federal Republic of Germany – Turkey BIT[4]. After signing this treaty, which is noteworthy as one of the first treaties signed after the BIT era started in the world, Turkey did not sign a BIT with any other state for more than 20 years.[5] In fact, it can be argued that the BIT era started after Turkey signed its second BIT with the United States in 1985[6]. In this period, Turkey signed six BITs up until 1990. Then, in parallel with developments in the world, Turkey took a significant step forward in the promotion of investments by signing another 45 BITs with 45 countries in the 10-year period between 1990-2000. The number of BITs signed between 2000-2010 is 24, one of which is an additional protocol. In the 12-year period from 2010 to the present, 48 BITs have been signed[7].

---

1 Professor Dr; İhsan Doğramacı Bilkent Üniversitesi Faculty of Law, Professor of Law, Private International Law Department, bilgint@bilkent.edu.tr 03122902869

The number of treaties, except BITs, including FTAs, is 424, and 331 of these have entered into force: <https://investmentpolicy.unctad.org/international-investment-agreements> Accessed 24 July 2022. For extensive information on the history of BITs, see Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford 2008) 17-24.

2 This treaty entered into force on 28.04.1961. The Federal Republic of Germany played an active role in the conclusion of the first BITs. This point is demonstrated by the fact that 14 of the 25 BITs that were signed between 1959 and 1963, were between the Federal Republic of Germany and other states.

3 Bilgin Tiryakioğlu, *Doğrudan Yatırımların Uluslararası Hukukta Korunması* (Dayınlarlı 2003) 161 ff.

4 Treaty Between the Federal Republic of Germany and the Republic of Turkey Concerning the Reciprocal Promotion and Reciprocal Protection of Investments, entered into force on 05.12.1965, OG 27.07.1963/11465.

5 The Treaty is the twelfth among the 2807 BITs signed since these treaties were introduced.

6 Treaty between the United States of America and the Republic of Turkey Concerning the Reciprocal Encouragement and Protection of Investments, signed on 03.12.1985 and entered into force on 18.05.1990,OG 13.08.1989/20251.

7 Two of these are free trade agreements. The first is the Agreement on Trade in Services and The Agreement on Investment signed between Turkey and the Republic of Korea on 27.02.2015. As of its entry into force on 01.08.2018,OG 14.04.2016/29684, this agreement has replaced the 1991 BIT with the same country: Agreement for the Reciprocal Promotion and Protection of Investments between the Republic of Turkey and the Republic of Korea (OG 02.05.1994/21922). The second treaty is the free trade agreement between the Republic of Turkey and the Republic of Singapore which was signed on 14.11.2015. Since the treaty has entered into force on 01.10.2017 (n 7), it has replaced the BIT with the Republic of Singapore that was signed in 2008 (OG 19.02.2010/27498).

Based on this information, it can be said that Turkey experienced a very productive period in terms of BITs in the 90s and in the post-2010 period[8]. Throughout this process, Turkey signed new treaties with 13 countries[9] to replace the old BITs it had previously concluded. According to recent data from UNCTAD[10], the Republic of Turkey has signed 138 BITs with other countries for the mutual protection and promotion of investments, 82 of which are in force, and 15 have been terminated for various reasons. [11]

At first glance, it appears that BITs contain similar provisions on numerous matters. Even when only the BITs to which Turkey is a party to are evaluated -especially in the BITs concluded in the same period-, similar provisions that are almost identical are noteworthy. MFN clauses and dispute settlement provisions that are the subject of this study have been drafted with a new approach in the BITs that Turkey has signed since 2010.

Since the first BIT was signed in 1959, the seemingly insignificant differences in the provisions of these treaties, including dispute settlement provisions, have led to a variety of outcomes that cannot be overlooked[12]. BIT provisions which lead to such different outcomes, gave rise to intense debate about the scope of the MFN clauses of BITs. The reason for the debates is that arbitral tribunals interpret the scope of the MFN clause and the content of the dispute settlement provisions in different ways when investors rely on the MFN clause to ensure the application of a third-party treaty's provision that is more favourable to their interests. The fact that even the same BIT provision is interpreted differently by different arbitral tribunals and the failure to establish consistent jurisprudence on this issue is considered to be one of the main reasons for the criticisms directed at investment arbitration today[13].

This article will examine whether the MFN clause in BITs extends to the dispute settlement provisions of other treaties in the context of Turkey's BITs within the framework of different possibilities. Tribunals in both institutional and *ad hoc* international investment arbitration proceedings have been exceedingly faced with the question of extending the MFN clause to the BIT's procedural provisions, and a fundamental change has been observed in the new generation of BITs signed since

8 This information was obtained from the data shared by the Ministry of Industry and Technology: <https://www.sanayi.gov.tr/anlasmalar/yktk/a11602> Accessed 24 July 2022.

9 New BITs were signed with Bangladesh, Belarus, People's Republic of China, Georgia, Kyrgyzstan, Lithuania, Moldova, Uzbekistan, Pakistan, Serbia, Tunisia, Ukraine and Jordan, of which 5 (Georgia, Bangladesh, People's Republic of China, Kyrgyzstan and Uzbekistan) have entered into force.

10 United Nations Conference on Trade and Development.

11 The relevant information was obtained from the table that has been published by <https://investmentpolicy.unctad.org/international-investment-agreements/countries/214/turkey> Accessed 24 July 2022.

12 BITs are therefore not considered to create customary international law: Tiryakioğlu, *Doğrudan Yatırımlar* (n 3) 164.

13 For support see Julie A Maupin, 'MFN-Based Jurisdiction in Investor-State Arbitration: Is there Any Hope for a Consistent Approach' (2011) (14) J Int'l Econ L 157,160.

2010. In our study, we aim to provide a comprehensive assessment to practitioners and scholars in the field of investment arbitration by addressing the interaction of the MFN clause and the dispute settlement provisions in BITs to which Turkey is a party.

In light of Turkey's BITs[14], this study will first focus on the MFN clause and its exceptions, and second, it will analyse the dispute settlement provisions of these agreements and reveal their interaction with the MFN clause. The study will conclude with an evaluation of two different approaches known as the *Maffezini* and *Plama* in the investment law doctrine, which demonstrated the interaction between the MFN clause and dispute settlement provisions from different perspectives and the impact of these approaches on investment arbitration practice and on new generation BITs.

I. The MFN Clause as a Standard of Treatment

A. Purpose and Formulation of MFN Clauses in BITs

One of the most important objectives of an MFN clause is the principle of non-discrimination[15], which means that states that are parties to an international treaty agree to accord to each other or to each other's nationals the most favourable treatment in a certain matter that they have accorded or will accord in the future to third states or their nationals[16].

Nearly all BITs contain traditional standards of national treatment (NT) and MFN, together with relatively new standards of treatments such as fair and equitable, full protection, and security that are afforded to investments. The standard of NT is intended to ensure equal treatment between domestic investors and foreign investors; however, it does not prevent foreign investors from being treated more favourably than domestic investors. In other words, the treatment afforded to foreign investors should be at least as much as that provided to domestic investors. In contrast, the MFN clause ensures that there is equal treatment among foreign investors by preventing discriminatory treatment of foreign investors in similar situations. In the event of an investment dispute, investors have the opportunity to rely on the standards of NT or MFN contained in the applicable BIT, depending on whichever is more favourable. It

14 Despite the existence of BITs, Turkey has signed FTAs with States that have detailed provisions on investment protection. Thus, FTAs containing investment-related provisions between the relevant state and Turkey have replaced BITs. For example, the Turkey-South Korea BIT that got signed on 14.5.1991 (n 7) remained in force until FTA between Turkey and South Korea entered into force on 01.08.2018 (n7).

15 Elif Uzun, 'Milletlerarası Hukuk Açısından En Çok Gözetilen Ulus Kaydı' (2004) (24) MHB 741, 741-742.

16 Hüseyin Pazarcı, *Uluslararası Hukuk Dersleri Birinci Kitap,* (18th edn, Turhan 2019) 92; Melda Sur, *Uluslararası Hukukun Esasları*, (15th edn, Beta 2021) 70; Andreas R Ziegler, 'Most-Favoured-Nation (MFN) Treatment' in August Reinisch (ed), *Standards of Investment Protection* (Oxford 2008) 60; Stephen Fietta, 'Most Favoured Nation Treatment and Dispute Resolution under Bilateral Investment Treaties: A Turning Point?'(2005) 4 IntlALR 131, 132.

should be noted that nearly all BITs that contain NT and MFN standards are drafted in an intertwined manner[17].

B. The Scope of the MFN Clause

The parties to an international treaty containing an MFN clause may limit the rights covered by that clause in terms of content or scope[18]. Within these limits, it is generally accepted that if a contracting party to a BIT provides more favourable standards to investors of third-party treaty, foreign investors may use the MFN clause of the applicable BIT to request the same treatment; however, the issue of whether investors can rely on the MFN clause with regard to *all provisions* of the applicable BIT creates heated debates[19].

In most BITs that Turkey has signed since 2010, the scope of the MFN clause is determined by including the expression *in similar situations* or by listing certain investment-related matters. Although the language in MFN clauses can differ, the BIT examples provided below demonstrate that the scope of MFN clauses includes general limitations and, in many cases even the existence of limitations is controversial.

Article 3 of the Turkey-United Kingdom BIT[20] sets out the situations in which an investor of one of the contracting states shall not be treated less favourably than an investor from third country.

(1) *Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or* ***companies or to investments or returns*** *of nationals or companies of any third State.*

(2) *Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards the* ***management, maintenance, use, enjoyment or***

17 For a similar evaluation, see Pınar Baklacı, 'En Çok Gözetilen Ulus Kaydı ve Uyuşmazlık Çözüm Yollarına İlişkin Kurallar' (2009) 5(20) Uluslararası Hukuk ve Politika 59, 62. Article 3(2-3) of the Agreement between the Republic of Turkey and France on the Reciprocal Promotion and Protection of Investments (OG 26.06.2009/272702), which entered into force on 3.8.2009, is one of the hundreds of examples of these two standards being regulated intertwined in the same article. Pursuant to the aforementioned provision,

> *"2- Each Contracting Party shall accord to investments, including revenue, made in its territory by investors of the other Contracting Party fair and equitable treatment in accordance with the principles of international law and shall accord treatment, whichever is more favourable, treatment that is no less favourable than that accorded to investments by its own investors or investors of any third country.*
>
> *3- Each Contracting Party shall accord to an investor of the other Contracting Party within its territory, with respect to its investments and investment-related activities, the treatment accorded to its own investors or to investors of any third country, whichever is more favourable. This rule shall also apply to nationals of a Contracting Party authorised to work in the territory of the other Contracting Party in the framework of professional activities related to an investment".*

18 Uzun, 'En Çok Gözetilen Ulus Kaydı' (n 15) 751.

19 Samet Sevgi, 'En Çok Gözetilen Ulus Kaydının İkili Yatırım Anlaşmalarının Usule İlişkin Hükümleri Üzerindeki Etkisi: *Maffezini* Davası' (2020) 8 (1-2) SHD 89, 97. In fact, as Vessel mentioned '*disputes regarding the scope and meaning of MFN clauses are as old as the clause itself*": Scott Vessel, 'Clearing a Path Through a Tangled Jurisprudence: Most-Favored-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties' (2007) 32 The Yale Journal of International 125, 126.

20 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Turkey for the Promotion and Protection of Investments (OG 09.05.1996/22631).

> ***disposal of their investments**, to treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State.*

The Turkey-Lithuania BIT[21] limits the scope of the MFN clause by using the expression *in similar situations*. This limitation reflects the principle behind the MFN clause, which is expressed in Latin as "*ejusdem generis*"[22], meaning "of the same kind"[23]:

> *"1. Each Party shall permit in its territory investments, and activities associated therewith, on a basis no less favourable than that accorded **in similar situations** to investments of investors of any third country, within the framework of its laws and regulations.*
>
> *2. Each Party shall accord to these investments, once established, treatment no less favourable than that accorded in similar situations to investments of its investors or to investments of investors of any third country, whichever is the most favourable."*

In the vast majority of BITs signed by Turkey since the 1990s and up to 2010, the MFN clause was drafted in accordance with the *ejusdem generis* principle[24]. However, most MFN clauses do not provide a clear expression as to whether the contracting

21 Agreement between the Republic of Turkey and the Republic of Lithuania Concerning the Reciprocal Promotion and Protection of Investments (OG 05.07.1997/23040). The two countries have signed a new BIT that has not entered into force yet. <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3831/lithuania---turkey-bit-2018-> Accessed 24 July 2022.

22 1. The International Law Commission (ILC) has stated with regard to Article 9(1) of the Draft Articles on MFN clauses that *"Under a most-favoured-nation clause the beneficiary State acquires, for itself or for the benefit of persons or things in a determined relationship with it, only those rights which fall within the limits of the subject-matter of the clause"*, confirming the principle of *ejusdem generis*. See Draft Articles on MFN clauses with commentaries, text adopted by the International Law Commission at its thirtieth session (1978) 2(2) Yearbook of the International Law Commission 27.

23 Baklacı (n 17) 63.

24 For examples of BITs that contain similar limitations, see Article 3 of the United States-Turkey BIT (n 6); Article 3 (1-2-3) of the Agreement Between the Republic of Austria and the Republic of Turkey on the Mutual Promotion and the Protection of Investments (OG 10.02.1991/20782); Article 3(2) of the Agreement Between the Republic of Turkey and the Kingdom of Denmark Concerning the Reciprocal Promotion and Protection of Investments (OG 27.05.1992/21240); Article 2(1-2) of the Agreement Between the People's Republic of China and the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investments (OG 01.05.1994/21921); Article 3(2) of the UK-Turkey (n 20); Article 2(1-2) of the Agreement Between the Republic of Turkey and the Republic of Tunisia Concerning the Reciprocal Promotion and Protection of Investments (OG 03.01.2003/24982); Article 3(1-2) of Turkey-Poland BIT (n 24); Article 2(2) and 3(1) of the Agreement Between Japan and the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investments (OG 16.01.1991/21467); Article 2(1-2) of the Agreement Between the Republic of Turkey and Turkmenistan Concerning the Reciprocal Promotion and Protection of Investments (OG 15.01.1995/22172); Article 2(1) of Turkey-Albania Concerning the Reciprocal Promotion and Protection of Investments (OG 27.06.1996/22679); Article 2(1-2) of the Agreement between the Hashemite Kingdom of Jordan and the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investments (OG 17.11.2005/25996); Article 2(1-2) of the Agreement Between the Republic of Turkey and Republic of Moldova Concerning the Reciprocal Promotion and Protection of Investments (OG 12.01.1997/22875); Article 3(1-2) of the Agreement Between the Government of the Republic of Turkey and the Government of the Italian Republic on the Reciprocal Promotion and Protection of Investments (OG 08.07.2004/25516); Article 3(1-2) of the Agreement Between the Government of the State of Israel and the Government of the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investments (OG 02.09.1998/23451M); Article 3(1-2) of the Agreement Between the Republic of Turkey and the Republic of Estonia Concerning the Reciprocal Promotion and Protection of Investments (OG 02.02.1999-23599); Article 2(1-2) of the Agreement Between the Republic of Turkey and the Republic of Cuba Concerning the Reciprocal Promotion and Protection of Investments (OG 15.09.1999/23187); Article 2(1-2) of the Agreement Between the Republic of Turkey and the Republic of Philippines Concerning the Reciprocal Promotion and Protection of Investments (OG 22.07.2005/25883); Article 3(1-2) of the Agreement Between the Slovak Republic and the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investments (OG 24.08.2013/28745); Article 2(1-2) of the Agreement Between the Government of the Republic of Turkey and the Government of Malta Concerning the Reciprocal Promotion and Protection of Investments (OG 08.07.2004/25516); Article 3(1-2) of the Agreement Between the Republic of Turkey and the Republic of Slovenia Concerning the Reciprocal Promotion and Protection of Investments (OG 04.09.2005/25926); Article 3(1-2) of the Agreement Between the Government of the Republic of Turkey and the Government of the Kingdom of Bahrain Concerning the Reciprocal Promotion and Protection of Investments (OG 03.07.2010/27630); Article 2(1-2) of the Agreement Between the Czech Republic and the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investments (OG 15.01.2012/28174).

parties intended the clause to apply to dispute settlement provisions. Therefore, such general limitations do not guarantee that the MFN clause will not be utilised to invoke dispute settlement provisions of a third-party treaty. As will be presented in Part (III) of this study, investment tribunals interpret MFN clauses differently and reach divergent conclusions.

Although it does not reflect general tendency, some BITs signed by Turkey until 2010 contain MFN clauses that do not impose any limitations. Article 4 of the Republic of Turkey-Finland BIT[25] stands out as a very comprehensive provision. The first paragraph of Article 4 clarifies that the MFN clause does not have any limitations:

> *"1. Each Contracting Party shall accord to investments of investors of the other Contracting Party full security and protection, which in any case shall not be less than that accorded to investments of investors of any third State. Each Contracting Party shall observe any obligation it may have entered into with regard to investments."*

As Part (III) of this study will demonstrate, regardless of how comprehensively drafted, the MFN clauses mentioned above do not resolve the debate of whether they cover dispute settlement provisions or not.

C. Exceptions

It should be noted that States traditionally have two exceptions to the MFN clause, regardless of whether it has a narrow or a wide scope: the MFN clause cannot be utilised to invoke provisions of third-party double taxation treaties, nor can it be used to invoke more favourable provisions of regional cooperation, economic cooperation, and customs union treaties. Some BITs, such as the United Kingdom-Turkmenistan BIT, do not include such exceptions and even contain language that requires the MFN clause to be applied to *all provision of the applicable BIT*, including its dispute settlement provision[26].

25 Agreement Between the Government of the Republic of Finland and the Government of the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investments (OG 26.01.2006/26061).

26 While Article 3 of the Treaty includes the MFN and NT treatments, the last paragraph of the Article states that the provisions of this Article shall apply to Articles 1-11 of the Treaty. Given that Article 8 of the Treaty addresses dispute settlement, it is clear that the MFN clause covers dispute settlement provisions. Article 3(3) of the Treaty provides as follows: "*For the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement".* See Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Turkmenistan for the Promotion and Protection of Investments <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2360/download> Accessed 24 July 2022. The same provision is also found in the United Kingdom-Honduras BIT. See Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Honduras for the Promotion and Protection of Investments <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1511/download> Accessed 24 July 2022. It is acknowledged that such a provision does not contain any ambiguity in terms of the MFN clause, and there is no doubt that this provision will also apply to dispute settlement provisions: Paul D Friedland, 'The Scope of Most Favoured Nation Treatment Under the Energy Charter Treaty' in Graham Coop and Clarisse Ribeiro (eds), *Investment Protection and The Energy Charter Treaty* (JurisNet 2008) 103; Anthony C Sinclair and Lucia Ramia, Lucia, 'MFN Treatment and the Adjudication of Investment Disputes'(2009) 21(2) National Law School of India Review 15, 118; Baklacı (n 17) 67.

Turkey's Model BITs reveal its progress with regard to whether MFN clauses can be extended to procedural provisions[27]. Although model BITs are not binding, they indicate a state's approach to BITs[28]. Turkey's 1999 Model BIT[29] illustrates the traditional exceptions to MFN clauses in Article 3(4) as follows:

> *"The provisions of this Article shall have no effect in relation to following agreements entered into by either of the Parties:*
>
> *(a) relating to any existing or future customs unions, regional economic organization or similar international agreements,*
>
> *(b) relating wholly or mainly to taxation."*

Although Article 4(3) of Turkey's 1999 Model BIT has been modified in some BITs, it has been exactly reiterated in most BITs[30] so that the MFN clause was mainly limited with these two exceptions until 2010[31]. However, the majority of Turkey's BITs after 2010 include an additional exception that MFN clauses cannot be extended to procedural provisions of third-party treaties[32].

D. The Extension of the MFN Clause to Procedural Provisions

In investment arbitration practice, there has been less controversy over whether a BIT allows investors to use an MFN clause to invoke more favourable *substantive* provisions contained in a third-party treaty[33]. In spite of its substantive nature, covering the umbrella clause by an MFN are still controversial. Controversy remains when a BIT does not contain provisions specifying whether the MFN standard applies to the *procedural provisions* of a third-party treaty. In this respect, the determining factor is the part of the dispute resolution provision in the applicable BIT that an investor refrains from[34].

27 As far as we could identify, the initial text of Turkey's model BIT in 1999 was updated in 2009. The English texts of these two model treaties have been published: For the text of the Turkish Model Bilateral Investment Treaty May 2009 see <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2852/download> ccessed 24 July 2022. Texts that have subsequently been updated have not been published. Texts that have not been officially published are considered as "draft model": For detailed information see Banu Şit Köşgeroğlu, 'Model İkili Yatırım Anlaşmaları ve Türkiye'nin Model İkili Yatırım Anlaşması Taslağı' (2013) 107 TBB Dergisi 143,149.

28 As of early 2000, there has been a significant increase in the number of states using draft models to negotiate BITs. For further information on the reasons for this increase, see Köşgeroğlu (n 27) 148.

29 Article 4 of the Draft BIT is as follows:

> *"The provisions of this Article shall have no effect in relation to following agreements entered into by either of the Parties:*
>
> *(a) relating to any existing or future customs unions, regional economic organization or similar international agreements, (b) relating wholly or mainly to taxation"*.

30 The exceptions are drafted exactly as in the draft model in Article 2(4) of the Agreement between the Republic of Turkey and the Hellenic Republic Concerning the Reciprocal Promotion and Protection of Investments (OG 01.08.2001/24480).

31 See also Article 3(3) Turkey-Bahrain BIT (n 24).

32 For a similar assessment, see İnci Ataman Figanmeşe, 'The Impact of the *Maffezini* Decision on the Interpretation of MFN Clauses in Investment Treaties' (2011) 8(2) Ankara Law Review 221, 226.

33 For example, in *Bayındır v Pakistan*, the ICSID arbitral tribunal upheld the claimants' invocation of third-party dispute settlement provisions via MFN clauses in the Turkey-Pakistan BIT, which did not include standard of fair and equitable treatment: *Bayindir Insaat Turizm Ticaret ve Sanayi A.S. v Islamic Republic of Pakistan,* 231 ICSID Case No ARB/03/29 <http://www.italaw.com/cases/131> Accessed 24 July 2022.

34 Friedland (n 26) 108-109.

As will be discussed in detail in Part (III) of this study, the award rendered in *Maffezini v Spain*[35], which will be referred to as the *Maffezini* approach, was one of the important milestones in the process that influenced States to narrow the scope of MFN clauses in their BITs. The *Maffezini* approach has been adopted in some subsequent awards and rejected in others. Thus, divergent approaches in relation to the extension of the MFN clause to procedural provisions have become the focus of discussions due to the different interpretations of BIT provisions[36]. The essential question is whether or not jurisdiction can be established by invoking the MFN clause to rely on a more favourable dispute resolution provision of any third-party treaty, when the requirements for jurisdiction have not been fulfilled according to the applicable BIT[37].

With the influence of the *Maffezini* approach and the subsequent debates, it can be observed that BITs concluded after 2010 started to introduce provisions preventing the extension of the MFN clause to the procedural provisions of the third-party treaty. Thereby, the debate as to whether the MFN clause can be used to establish jurisdiction that is not provided for in the applicable BIT has been put to an end.

E. The Approach Adopted in BITs That Türkiye Concluded after 2010

The BITs that Turkey has concluded since 2010 clearly demonstrate that the MFN clauses contain an additional exception that explicitly stipulates that the MFN standard will not extend to procedural and/or dispute settlement provisions of a third-party treaty. This is the reflection of Article 3(4) of the 2009 Turkish model BIT that introduced the following provision:

> "*Paragraphs 1 and 2 of this Article do not apply in respect of procedural rights laid down simultaneously by this Agreement and by another similar international agreement to which one of the Contracting Parties is signatory*".

Some BITs that have been drafted in accordance with the 2009 Turkish Model BIT have used this exact provision. The Turkey-Kuwait BIT[38] was one of the first BITs that stipulated that the MFN clause cannot be extended to the procedural provisions[39]. Article 3(4) of the Turkey-Kuwait BIT states that "*Paragraphs 1 and 2 of this Article do not apply* ***in respect of procedural rights*** *laid down simultaneously by this Agreement and by another similar international agreement to which one of the Contracting Parties is signatory*".

35 *Emilio Agustín Maffezini v Kingdom of Spain*, ICSDD Case No ARB/97/7. See <https://www.italaw.com/sites/default/files/case-documents/ita0479.pdf> Accessed 24 July 2022.

36 It is argued that the differences in arbitral awards in relation to the MFN clause do not rise to the level of jurisprudential divergence: August Reinisch, *Maffezini v Spain Case*, 2011 MPEPIL <https://deicl.univie.ac.at/fileadmin/user_upload/i_deicl/VR/VR_Personal/Reinisch/Publikationen/maffezini_spain_epil.pdf> Accessed 24 July 2022.

37 Fietta (n 16) 131; Reinish (n 35) 19.

38 Agreement between the State of Kuwait and the Republic of Turkey for the Reciprocal Promotion and Protection of Investments, (OG 20.01.2012/28179).

39 Other BITs that repeat this provision are as follows: Art. 3/4 (c) of the Agreement between the Government of the Republic of Turkey and the Government of the Republic of Senegal Concerning the Reciprocal Promotion and Protection of Investments (OG 27.03.2012/28246); Article 3/4(c) of the Agreement between the Government of the Republic of Turkey and the Government of Montenegro Concerning the Reciprocal Promotion and Protection of Investments (OG 05.03.2020/31059).

The majority of the BITs that were signed after 2010 directly use the expression of dispute settlement provisions instead of general expressions such as procedural provisions while limiting the scope of MFN clauses[40]. For example, Art. 3, paragraph 5(c) of the Turkey - Azerbaijan BIT[41] prohibited the extension of the MFN standard to dispute settlement provisions:

> *"Paragraphs (1) and (2) of this Article shall not apply in respect of* ***dispute settlement provisions*** *between an investor and the hosting Contracting Party laid down simultaneously by this Agreement and by another similar international agreement to which one of the Contracting Parties is signatory."*

With a few exceptions[42], numerous BITs that Turkey has signed use the same formulation in BITs that Turkey has signed between 2010 and 2017[43]. In some BITs that have been signed during this period, this exception has been included in the article regarding the settlement of investment disputes of the applicable treaty, rather than in

40 In addition to the BITs, some FTAs concluded by Turkey after 2010 also stipulate that the MFN clause cannot be extended to dispute settlement provisions: paragraph 3 of Article 12.5 of Section 12 of the FTA between the Republic of Turkey and the Republic of Singapore (n 7) and Turkey-Korea FTA (n 7).

41 Agreement between the Government of the Republic of Turkey and the Government of the Republic of Azerbaijan on the Reciprocal Protection and Promotion of Investments (OG 02.05.2013/28635).

42 For example, Article 3/5(c) of the Agreement between the Government of the Republic of Turkey and the Government of the Socialist Republic of Viet Nam on the Reciprocal Protection and Promotion of Investments (OG 07.06.2017/30089) and Article 5(5) of the Agreement between the Government of the Republic of Colombia and the Government of the Republic of Turkey on the Reciprocal Protection and Promotion of Investments contain the following provision: "*For greater clarity, treatment referred to in paragraphs 3 and 4 does not encompass dispute resolution procedures such as those in Article 12 and 14 that are provided for in international treaties or trade agreements*." As explained below, such a provision has also been included in some BITs concluded by Turkey in later years (2018 and onwards).

43 The treaties are as follows: Article 5(5) of Agreement between the Government of the United Mexican States and the Government of the Republic of Turkey on the Reciprocal Protection and Promotion of Investments (OG 22.08.2017/30162), Article 3(4/c) of the Agreement between the Government of the Republic of Turkey and the Government of the Kingdom of Cambodia on the Reciprocal Protection and Promotion of Investments, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5833/download Accessed 24 July 2022; Article 4/4(c) of the Agreement between the Government of the Republic of Turkey and the Government of the Republic of Mali Concerning the Reciprocal Protection and Promotion of Investments (OG04.04.2020/31089); Article 4/4(c) of the Agreement between the Republic of Turkey and the Government of the Republic of the Sudan Concerning the Reciprocal Protection and Promotion of Investments (OG 31.12.2016/29935 M); Article 3/5 (d) of the Agreement between the Government of the Republic of Turkey and the Government of the Republic Guatemala Concerning the Reciprocal Protection and Promotion of Investments <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6085/download> Accessed 24 July 2022; Article 3/5(d) of the Agreement between the Republic of Turkey and the People's Republic of China Concerning the Reciprocal Promotion and Protection of Investments (OG 01.10.2020/31261 M); Article 4/4(c) of the Agreement Between the Republic of Turkey and Republic of Moldova Concerning the Reciprocal Promotion and Protection of Investments <https://www5.tbmm.gov.tr/sirasayi/donem27/yil01/ss245.pdf>Accessed 24 July 2022; Article 4/4(c) of the Agreement between the Government of the Republic of Rwanda and the Government of the Republic Turkey Concerning the Reciprocal Protection and Promotion of Investments (OG 24.04.2022/31819); Article 4/4(c) of the Agreement between the Government of the Republic of Turkey and the Government of the Republic Dijbouti Concerning the Reciprocal Protection and Promotion of Investments (OG 05.03.2020/31059); Article 4/4(c) of the Agreement between the Government of the Republic of Turkey and the Government of the Republic Guinea Concerning the Reciprocal Protection and Promotion of Investments (OG 07.06.2017/30089 M); Article 4/4(c) of the Agreement between the Government of the Republic of Turkey and the Government of the Republic Benin Concerning the Reciprocal Protection and Promotion of Investments (OG 05.06.2017/30087 M); Article 6/1 of the Agreement between the Government of the Republic of Turkey and the Government of the Republic Ghana for the Reciprocal Protection and Promotion of Investments (OG 04.04.2020/31089); Article 4/4(b) of the Agreement between the Government of the Republic of Turkey and the Government of the Republic of Gambia on the Reciprocal Protection and Promotion of Investments (OG06.06.2017/30088 M); Article 4/4(c) of the Agreement between the Government of the Republic of Turkey and the Government of the Gabonese Republic Concerning the Reciprocal Protection and Promotion of Investments <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1307/download> Accessed 24 July 2022; Article 4/4(c) of the Agreement between the Government of the Republic of Turkey and the Government of the Islamic Republic of Pakistan Concerning the Reciprocal Protection and Promotion of Investments (OG 07.07.2017/30117 M); Article 4/4(c) of the Agreement between the Government of the Republic of Turkey and the Government of the Republic of Cameroon Concerning the Reciprocal Protection and Promotion of Investments (OG 07.06.2017/30089 M); Article 3/4(c) of the Agreement between the Government of the Republic of Turkey and the Government of the Peoples Republic of Bangladesh Concerning the Reciprocal Protection and Promotion of Investments (OG 10.05.2019/30770 M); Article 3/4(c) of the Agreement between the Government of the Republic of Turkey and the Government of the United Republic of Tanzania Concerning the Reciprocal Protection and Promotion of Investments (OG 25.07.2013/28718 M); Article 4/4(c) of the Agreement between the Government of the Republic of Turkey and the Government of the Republic of Mauritius Concerning the Reciprocal Protection and Promotion of Investments <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6101/download> Accessed 24 July 2022.

the provisions on standards of treatment probably because these treaties are not based on one of Turkey's Model BITs. For example, the Turkey-Nigeria BIT[44] includes the exception that dispute settlement provisions would fall outside the scope of the MFN clause in Article 11 regarding the settlement of investment disputes and not in Article 5 addressing standards of treatment. Article 11(6) introduced the following provision:

"*Paragraphs (1) and (2) of Article 5 (Treatment of Investments) shall not apply in respect of dispute settlement provisions between an investor and the host Contracting Party laid down simultaneously by this Agreement and by another similar international agreement to which one of the Contracting Parties is signatory*"[45].

Based on the provisions of some BITs that have been signed after 2016, we believe that the text of the "2016 Turkish Model of Bilateral Investment Treaty" [46] has been effective. Indeed, the following provision is repeated verbatim in some BITs that Turkey has signed since 2016[47].

"*Most Favoured Nation treatment referred to in paragraph (1) does not include treatment accorded to investors of a non-contracting Party and their investments by provisions concerning the settlement of investment disputes provided for in this Agreement or in other international agreements concluded between a Party and a non-contracting Party."*

Provisions in the BITs that Turkey signed after 2017 also exclude dispute settlement provisions from the scope of the MFN clause. We assume that those BITs probably are based on updated model BIT of Turkey in 2020. Paragraph (c) of Article 4(4) of the latest Model BIT, which we could not ascertain to have been published to date, contains the following provision: "*For greater certainty, the most favoured nation treatment referred to in paragraphs 1 and 2 of this Article does not include investor-to-state dispute settlement procedures or mechanisms, such as those included under Article*

44 Agreement between the Government of the Republic of Turkey and the Government of the Federal Republic of Nigeria Concerning the Reciprocal Protection and Promotion of Investments (OG11.10.2012/28438).

45 Article 9, paragraph 8 of the Agreement between the Government of the Republic of Kenya and the Government of the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investments, which was signed on 08.04.2014 but has not yet entered into force, also includes the exception that the MFN clause shall not apply in terms of dispute settlement in the dispute settlement provision. See <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5543/download> Accessed 24 July 2022.

46 UNCTAD, *Investment Policy website refers to this draft model without specifying its content:* <https://investmentpolicy.unctad.org/international-investment-agreements/model-agreements> Accessed 24 July 2022.

47 Article 4(3)(c) of the Agreement Between the Government of the Republic of Turkey and the Government of Georgia Concerning the Reciprocal Promotion and Protection of Investments (OG 01.06.2021/31498) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6106/download> Accessed 24 July 2022; Article 4/4(c) of the Agreement between the Hashemite Kingdom of Jordan and the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investments, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6097/download Accessed 24 July 2022; Article 4/4(c) of the Agreement between the Government of Ukraine and the Government of the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investments, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6080/download> Accessed 24 July 2022; Article 4/4(c) Agreement between the Government the Republic of Turkey and the Government of of the Republic of Burundi Concerning the Reciprocal Promotion and Protection of Investments, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5838/download> Accessed 24 July 2022; Article 4/4(c) Agreement between the Government the Republic of Turkey and the Government of of the Republic of Côte d'Ivoire Concerning the Reciprocal Promotion and Protection of Investments, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5841/download> Accessed 24 July 2022.

10, that are provided for in other international treaties". With a few exceptions[48], this provision has been included in recent BITs signed after 2017[49].

Although it can contain different expressions or be worded differently, Turkey has adopted essentially the same approach in almost all BITs signed after 2010: the MFN provision cannot be extended to provisions regarding the settlement of investment disputes. With the inclusion of such clear provisions, the issue which caused debate in the past in the practice of international investment arbitration has been largely eliminated[50].

II. Dispute Settlement Provisions

Dispute settlement provisions of investment treaties are of vital importance for an investor who believes that their rights and interests are better protected by recourse to international arbitration than by submission of disputes to domestic courts. In fact, a mechanism in which investors have no choice but to resort to the host state's courts for the settlement of an investment dispute would have a negative impact on investment flows. As safeguard for investors, BIT provisions that allow international arbitration for resolving investment disputes[51] serve as a gateway to the incentives and protection afforded to investors by BITs.[52]

48 Article 4/4(c) of the Agreement between the Republic of Turkey and the Kyrgyz Republic Concerning the Reciprocal Promotion and Protection of Investments (OG 16.08.2019/30860 M); Article 4/5 of the Agreement between the Government of the Republic of Turkey and the Government of the Republic of Serbia Concerning the Reciprocal Promotion and Protection of Investments <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6130/download> Accessed 24 July 2022 and 4/3(c) of the Agreement between the Government of the Republic of Uzbekistan and the Government of the Republic of the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investments (OG 02.04.2020/31087) are similar to the provision in ten Turkish draft model.

49 Article 4/4(c) Agreement between the Government of Burkina Faso and the Government of the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investments https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6087/download Accessed 24 July 2022; Article 4/4(c) of the Agreement between the Government of the Republic of Turkey and the Government of the Islamic Republic of Mauritania Concerning the Reciprocal Promotion and Protection of Investments, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6100/download Accessed 24 July 2022; Article 4/4(c) of the Agreement between the Government of the Republic of Turkey and the Government of the State of Palestine Concerning the Reciprocal Promotion and Protection of Investments https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6105/download Accessed 24 July 2022; Article 4/4(c) of the Agreement between the Republic of Turkey and the Republic of Belarus Concerning the Reciprocal Promotion and Protection of Investments, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5981/download Accessed 24 July 2022; Article 5/8 (c) of the new BIT between Lithuania and Turkey (n.21); Article 4/4 (c) of the Agreement between the Government of the Republic of Chad and the Government of the Republic of Turkey on the Reciprocal Promotion and Protection of Investments <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6088/download Accessed 24 July 2022>.

50 Although there are two clear exceptions to the MFN clause in BITs concluded in the past, it is observed that different arbitral tribunals have applied the Vienna Convention on the Law of Treaties (Art. 31-33) in their interpretation of BITs, but have nevertheless reached different conclusions. For the Turkish text of the Vienna Convention on the Law of Treaties signed on May 23, 1969, see <http://www.turkishgreek.org/kuetuephane/item/140-viyana-andlasmalar-hukuku-soezlesmesi>Accessed 26 April 2020. The Convention entered into force on 27.01.1980. 116 states are parties to the Convention. Turkey is not a party to the Convention. The Convention is characterized as a codification of customary rules in the field of international law of treaties: Elif Uzun, 'Uluslararası Andlaşmaların Geçici Uygulanması-Viyana Andlaşmalar Hukuku Sözleşmesi 25. Madde' (2018) 9(2) İnÜHFD 187, 187-188.

51 For an evaluation of the dispute settlement provisions and the arbitration proceedings envisaged in the BITs concluded by Turkey until the 2000s, see Faruk Kerem Giray, 'Türkiye'nin Taraf Olduğu İki Taraflı Yatırımların Karşılıklı Teşviki ve Korunması Anlaşmalarında Öngörülen İhtilaf Çözüm Yolları' (1997) 17(1-2) MHB 217, 223ff.

52 For a similar view Yas Banifatemi, 'The Emerging Jurisprudence on the Most-Favoured-Nation Treatment in Investment Arbitration' in Andrea K Bjorklund, Ian A Laird and Sergey Ripinsky (eds.), *Investment Treaty Law: Current Issues III* (BIICIL 2009) 270; Vessel (n 19) 144.

The common characteristic of dispute settlement provisions of BITs and FTAs[53] is to give effect to the protection afforded to investments, however, the way in which these provisions are drafted may differ. Different formulation of dispute settlement provisions may have significance regarding the protection afforded to investments. Divergent provisions are the main reason why third-party dispute settlement provisions via MFN clauses[54] are invoked. Divergence, while strengthening the role of the MFN clause, also fuels controversy in investment arbitration practice. Nevertheless, such a difference will not play any role when the scope of an MFN clause explicitly expressed in applicable BIT[55] and investment tribunals must comply with the boundaries provided in an MFN clause with respect to its scope[56]. It must be noted that all explanations and discussions concerning settlement provisions hereinafter cover BITs that do not explicitly define the scope of MFN clauses. We will analyse dispute settlement provisions below with a twofold distinction in terms of their phases and scope.

A. Distinction based on the Tier of Dispute Settlement Clauses

The dispute settlement provisions generally do not allow the investor to directly resort to arbitration. In an arbitration agreement regarding commercial disputes, parties may also require a preliminary stage before arbitration; however, this does not reflect the general tendency in commercial arbitration. In investment arbitration, stages such as notification of the dispute to the host state, negotiations and/or resorting to amicable solutions, resorting to non-binding third-party procedures and/or to local courts may separately or together be envisaged. Some of these preliminary stages may be drafted as mandatory procedures that must be exhausted prior to arbitration, or they may be optional procedures.

1. Stages and Cooling-off Period After the Notice

What is common to the dispute settlement provisions of almost all BITs is that the host state and the investor are required to meet in good faith/peaceful negotiations to resolve the dispute within the period specified in the same provision.[57] This phase

53 Until the 1990s, trade agreements containing provisions on investments did not have any role in dispute settlement: Köşgeroğlu (n 27) 148.

54 Yusuf Çalışkan, 'ICSID Jurisdiction: *Whose Dictionary Will be Used for the Definition of Investment and the Scope of Consent'* in Ceyda Süral and Ekin Ömeroğlu (eds), *Foreign Investment Law* (Seçkin 2016) 99-100.

55 See also Vessel (n 19) 18; Baklacı (n 17) 74-76.

56 *Banifatemi*, argues that unless otherwise explicitly stated when determining the scope of the MFN clause, there would be no reasonable explanation for not invoking this clause for dispute settlement provisions, however, in the event that there exists an explicit limitation on this issue, it should be respected: Banifatemi (n 52) 271.

57 For example, Article 7 of Turkey-Bahrain BIT (n 24); Turkey-Estonia BIT (n 24) and Agreement Between the Republic of Turkey and the Council of Ministers of Bosnia and Herzegovina Concerning the Reciprocal Promotion and Protection of Investments (OG 04.05.2000/24039); Article 8 of Czech Republic-Turkey BIT (n 24); Article 8 of the Agreement Between the Government of the Republic of Turkey and the Government of Kingdom of Morocco for the Promotion and Protection of Investments (OG 04.05.2004/25452); Article 9 of the Agreement Between the Republic of Turkey and the United Arab Emirates Concerning the Reciprocal Promotion and Protection of Investments (OG 15.06.2011/27965).

is called the cooling-off period[58]. In the majority of BITs, this period starts with the investor's notice to the host state's government[59]. Some BITs can stipulate that the investor will have to apply to the local courts after the lapse of the cooling-off period. In this case, the investor will have to wait for a certain period of time before being able to initiate arbitration proceedings. Although the cooling-off period, which starts to run after the notification by the investor, and the periods foreseen for the following processes may seem like a formality at first glance, this is not the case. The consequences attached to these periods are crucial in terms of granting the investor access to arbitration and in the procedural decisions of the arbitral tribunal. For example, in the case of *Maffezini v Spain*, the implications of which will be discussed in Part (III) below, the 6-month cooling-off period in Article 10 of the Argentina-Spain BIT[60] (and the subsequent 18-month period to wait for the final decision by the domestic court) could lead to the rejection of the case on procedural grounds. Thus, the investor utilised the MFN clause in Article 4(2) of the applicable BIT to invoke more favourable dispute resolution provisions of a third-party treaty, and the ICSID tribunal allowed the investor to invoke the provision (which does not impose a cooling-off period) of another BIT to which Spain is a party[61]. As in this case, BITs can sometimes provide for the investor to resort to the courts of the host state within a certain period of time in addition to this step.

The legal character of the cooling-off period mainly depends on the interpretation of the language of the BIT. The reason why some investment tribunals reach divergent conclusions by interpretation on this issue is not only related to the drafting of these provisions, but is also influenced by various factors such as policy considerations and the view of alternative dispute settlement methods[62]. In fact, ambiguous BIT provisions, particularly those relating to dispute settlement, allow tribunals to interpret them in different ways and are therefore considered to be one of the reasons for the lack of uniformity and consistency in investment arbitration awards[63].

Indeed, some arbitral tribunals view cooling-off periods as a permission given to the parties to enter into good-faith negotiations before the arbitration process is

58 Aravind Ganesh, 'Cooling of Period (investment arbitration)' (2017) 7 MPIL 1, 2.

59 The application is made with a letter that is sent to the host state. In the field of investment arbitration, the process usually starts with this letter, known as a "trigger letter". The letter must contain sufficient details regarding the existence and nature of the dispute. In *Western NIS Enterprise Fund v Ukraine,* the ICSID tribunal pointed out that a proper notification is an essential element of a state's consent to arbitration, as it provides the state with the opportunity to take action through its competent organs, review the situation and perhaps resolve the dispute through mediation (para 5). For the award see <http://www.italaw.com/cases/1167> Accessed 24 July 2022.

60 Agreement Between the Argentine Republic and the Kingdom of Spain on the Reciprocal Promotion and Protection of Investments <https://www.investorstatelawguide.com/documents/documents/BIT-0008%20-%20Argentina-Spain%20(1991)%20%5Benglish%20translation%5D%20UNTS.pdf> Accessed 24 July 2022.

61 *Emilio Agustín Maffezini v The Kingdom of Spain* ICSID Case No ARB/97/7 para 19-64. See <https://www.italaw.com/sites/default/files/case-documents/ita0479.pdf> Accessed 24 July 2022.

62 Ganesh (n 58) 11.

63 Serhat Eskiyörük and Gürkan Çağan, 'Yeni Nesil İki Yanlı Yatırım Anlaşmalarında Güncel Eğilimler' (2021) 19 (220) Legal Hukuk Dergisi 1607,1626.

initiated, as in the case of *Bayindir v Pakistan*[64], while others, as in the case of *Kılıç v Turkmenistan*[65], consider the cooling-off period to be mandatory. Other tribunals consider it futile to wait for these periods to pass, whether it is mandatory or not[66].

Dispute settlement provisions in BITs can be considered to be multi-tiered provisions since the investor's right to resort to international arbitration is subject to the exhaustion of some phases and/or the lapse of the cooling-off period. The tiers differ among different BITs. As in the Turkey-Argentina BIT[67], the multi-tiered approach is expressly stipulated, while this is not clearly stated in other treaties, such as the Turkey-United Kingdom BIT[68].

As demonstrated below, Article 8 of the Turkey-Argentina BIT sets forth the cooling-off in a clear and simple manner.

"(1) Any dispute concerning investment under the terms of this Convention between a Contracting Party and an investor of the other Contracting Party shall, as far as possible, be settled amicably.

(2) If the dispute cannot be settled within six months after it has been raised by either party, it shall, at the request of the investor, be submitted to:"

The first paragraph of Article 8 of the Turkey-United Kingdom BIT specifies the types of disputes that fall within the scope of this provision by defining the term dispute. In its second paragraph, it makes the application to ICSID arbitration conditional on the parties not having reached a resolution within one year:

"(2) Each Contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes (hereinafter referred to as "the Centre ") for settlement by arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States', opened for signature at Washington on 18 March 1965 any legal dispute arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former. A company which is incorporated or constituted under the law in force in the territory of one Contracting Party and in which before such a dispute arises, the majority of shares are owned by nationals or companies of the other Contracting Party shall in accordance with Article 25(2)(b) of the Convention be treated for the purposes of the Convention as a company of the

64 *Bayindir Insaat Turizm Ticaret ve Sanayi A.S. v Islamic Republic of Pakistan,* para 98 ICSID Case No ARB/03/29 http://www.italaw.com/cases/131 Accessed 24 July 2022.

65 *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v Turkmenistan*, para 6.2.7 ICSID Case No ARB/10/1 <http://www.italaw.com/cases/1220> Accessed 24 July 2022.

66 For arbitral awards finding that cooling-off periods would be futile, see *Lauder v The Czech Republic*, para 187-191(UNCITRAL) <http://www.italaw.com/cases/610> Accessed 24 July 2022; *Consorzio Groupement L.E.S.I. DIPENTA v People's Democratic Republic of Algeria*, para 32(iv), ICSID Case No ARB/03708 <http://italaw.com/cases/323> Accessed 24 July 2022; *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, para 184, ICSID Case No ARB/10/13 http://www.italaw.com/cases/1009 Accessed 24 July 2022, *Ethyl Corporation v The Government of Canada*, para 84, (UNCITRAL) <http://www.italaw.com/cases/409> Accessed 24 July 2022.

67 Agreement Between the Republic of Argentina and the Republic of Turkey on the Promotion and Reciprocal Protection of Investments (OG 30.03.1995/22243).

68 UK-Turkey BIT (n 20).

other Contracting Party. If any such dispute should arise and agreement cannot be reached within one year between the Parties to this dispute through the pursuit of local remedies or otherwise, then, if the national or company affected who consents in writing to submit the dispute to the Centre for settlement by arbitration under the Convention, either party may institute proceedings by addressing a request to that effect to the Secretary-General of the Centre as provided in Articles 28 and 36 of the Convention."

The first step of the process, which starts with the notification of the foreign investor, is to resolve the investment dispute by peaceful means, and the time period foreseen for the settlement of the dispute is 6 months in the vast majority of BITs to which Turkey is a party[69].

2. Options Available to the Investor after the Cooling-Off Period

BITs provide different mechanisms regarding how to proceed if the investment dispute has not been resolved through amicable means (such as good faith negotiation and consultation) during the cooling-off period or if the local court has not rendered a final decision within the specified period of time. Based on these differences, in order to provide systematic convenience, the dispute settlement provisions of BITs are discussed below under four categories.

a. Resorting Local Courts as Mandatory Pre-Arbitral Phase

The provisions of some BITs provide for the investor's recourse to the courts of the host state as a preliminary stage after the completion of peaceful negotiations, irrespective of whether third-party procedures additionally are provided for in the BIT or not. If this step is stipulated as a mandatory phase, the failure to apply to the host state's courts will prevent the investor from resorting to international arbitration unless the host state courts *do render a final decision* within a certain period of time. Investors seek to rely on the MFN clause to overcome such dispute settlement provisions which eliminate the most fundamental BIT protection. For example, there have been attempts by Turkish investors to invoke third-party dispute resolution provision via an MFN clause to overcome the requirement for resorting to local courts as stipulated in Article 7 of the Turkish-Turkmenistan BIT[70]. This article is formulated as follows:

"1. Disputes between one of the Parties and one investor of the other Party, in connection with his investment, shall be notified in writing, including a detailed information, by the investor to the recipient Party of the investment. As far as possible, the investor and the concerned Party shall endeavour to settle these disputes by consultations and negotiations in good faith.

69 Some agreements provide for a period of 3 months, while others provide for a period of 1 year: See, for example, Article 8/(2) of Turkey-Slovenia BIT (n 24) provides for a period of 3 months. Article 9 of the Agreement Between the Belgium-Luxemburg Economic Union and the Government of the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investments (OG 08.10.1989-20306) provides for a period of 1 year.

70 Turkey-Turkmenistan BIT (n 24).

2. If these disputes cannot be settled in this way within six months following the written notification mentioned in paragraph 1, the dispute can be submitted, as the investor may choose to: […]"

In some ICSID cases initiated by Turkish investors against Turkmenistan, the tribunal's interpretation of Article 7 of the Turkey-Turkmenistan BIT as a mandatory provision that requires the investor to apply to the host state's courts can be considered to be a double-edged sword. If investors apply to the local court, as stipulated in Article 7, it will constitute *res judicata* and the investor will lose his or her option to resort to arbitration. If investors directly initiate an arbitration case without resorting to the local court, there is a significant probability that the arbitration case will be rejected on jurisdictional grounds[71].

In *Kilic v Turkmenistan* the tribunal discussed the meaning of Article 7 of the Turkey-Turkmenistan BIT[72] and interpreted it as mandatory provision that required the investor to apply to the host state's courts before initiating an arbitration and dismissed the case due to the lack of jurisdiction[73]. In contrast, the ICSID arbitral tribunal in *Muhammet Çap v Türkmenistan*[74] considered Article 7(2) of the same BIT as a procedural option available to the investor[75], and rejected Turkmenistan's objection[76].

The provision mentioned above, which causes such contradictory arbitral awards, is also included in some of Turkey's other BITs[77]. The BITs Turkey has signed in recent years do not include the preliminary stage requiring to resort to local courts due to the problems that such provisions create in arbitration practice. As will be demonstrated in title (b) below, while some BITs offer resorting to the local courts as an option to the

71 Bilgin Tiryakioğlu, 'Yatırım Tahkiminde (Uyuşmazlık Çözüm Kayıtları Kapsamında) Yetki ve Kabul Edilebilirlik' in Hatice Özdemir Kocasakal and Süheyla Balkar (eds), *Tahkim Anlaşması* (Onikilevha 2020)93.

72 *Decision on Article VII.2 of the Turkiye-Turkmenistan Bilateral Investment Treaty*, ICSID Case No ARB/10/1, <https://www.italaw.com/sites/default/files/case-documents/ita0932.pdf> Accessed 24 July 2022.

73 Award dated 02.07.2013, ICSID Case No ARB/10/1 Accessed 24 July 2022.

74 *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v Turkmenistan*, ICSID Case No ARB/12/6. (http://www.italaw.com/cases/2036)

75 *Decision on Respondent's Objection to Jurisdiction under Article VII (2), para 247 ve 280* (ICSID Case No ARB/12/6). For the award dated 13.2.2015 see. http://www.italaw.com/sites/default/files/case-documents/italaw4163.pdf Accessed 24 July 2022.

76 In another dispute based on the Turkey-Turkmenistan BIT, the ICSID arbitral tribunal interpreted the reference to the investor's recourse to domestic courts in the dispute settlement provision of Article 7(2) as a procedural rather than a jurisdictional pre-requisite: *İçkale İnşaat Limited Şirketi v Turkmenistan*, (ICSID Case No ARB/10/24). For the ICSID arbitral tribunal's award dated 8.3.2016, see <http://italaw.com/cases/2560> Accessed 24 July 2022.

77 This provision, which has become a point of debate, is also included in Turkey's BITs with Tajikistan, Kyrgyzstan, Uzbekistan, Bosnia-Herzegovina, Mongolia, Syria and Georgia. See Article 10(2) of the Agreement Between the Republic of Turkey and the Republic of Tajikistan Concerning the Reciprocal Promotion and Protection of Investments (OG 12.09.1997/23108); Article 7(2) Turkey-Kyrgyz Republic BIT (OG 12.02.1995/22200), which was terminated with the entry into force of the new BIT on 18.03.2020 (n 48), Article 7(2) of the Agreement between the Government of the Republic of Uzbekistan and the Government of the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investments (OG 12.02.1995/22200), which was terminated with the entry into force of the new BIT on 09.07.2020 (n 48); Article 8(2) of Turkey- Bosnia and Herzegovina BIT (n 57), Article 7(2) of the Agreement Between the Government of the Republic of Turkey and the Government of Mongolia Concerning the Reciprocal Promotion and Protection of Investments (OG 28.02.2000/23978), Article 7(2) of the Agreement Between the Republic of Turkey and the Syrian Arab Republic Concerning the Reciprocal Promotion and Protection of Investments (OG 28.12.2005/26037), Article 7(3) of Turkey-Georgia BIT (n 47).

investor, in some other treaties, this provision is accompanied by a fork-in-the-road clause, as will be set out under title (c) below[78].

b. Resorting to Local Courts as One of the Options

Such provisions do not prevent the investor from resorting to arbitration. The investor may either resort to international arbitration or the host state's courts for the settlement of an investment dispute. These provisions require that the local courts have not rendered a final decision within a certain period of time[79] when an investor exercises the local court option. For example, according to article 7 (2) of the BIT between Turkey and Lithuania[80] if the dispute cannot be resolved peacefully within six months, the dispute may be submitted to one of the authorities provided in the article:

> *"(a) the International Center for Settlement of Investment Disputes (ICSID) set up by the "Convention on Settlement of Investment Disputes Between States and Nationals of other States";*
>
> *(b) an ad hoc court of arbitration laid down under the Arbitration Rules of Procedure of the United Nations Commission for International Trade Law (UNCITRAL)*
>
> *(c) the Court of Arbitration of the Paris International Chamber of Commerce;*
>
> *(d) the courts of justice of the Party that is a party to the dispute. However, the investor who has brought the dispute before the said courts can only apply to one of the dispute settlement procedures under (a), (b) or (c) of this Article if a final award has not been rendered within one year."*

Some dispute settlement provisions that only offer ICSID arbitration is usually subject to a condition[81]. Some of them require that the dispute has never been submitted to the host state's courts while others require that the host state's courts have not rendered a final decision[82].

78 Such provisions that remove the possibility for the investor to change its choice are known as fork-in-the-road provisions. For example, Article 10(3) of the new Turkey-Georgia BIT (n 47), which replaced 1992 BIT between Turkey and Georgia, removed the application to host state courts from being a preliminary phase and presented it as an option to the investor with a provision that constitutes a fork-in-the-road.

79 One of the few exceptions is the Agreement between the Government of the Russian Federation and the Government of the Republic of Turkey regarding the Promotion and Reciprocal Protection of Investments (OG 16.05.2000/24051). In the treaty, recourse to domestic courts is provided as an option together with arbitration, but there is no limitation on the failure of the domestic court to render a decision within a certain period of time if this option is exercised. Pursuant to Article 10 (2) of the aforementioned agreement, if the disputes cannot be resolved through negotiations in good faith within 6 months, the investor's options, which do not constitute a fork in the road, are determined as follows "*a) a competent court or arbitration tribunal of the Contracting Party in the territory of which the investments were made; b) the Arbitration Institution of the Stockholm Chamber of Commerce; c) an ad hoc arbitration tribunal in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).*"

80 Lithuania Turkey BIT (n 21); Turkey-Albania BIT (n 24).

81 For example, see Article 6(3)(a)(ii) of United States-Turkey BIT (n 6); Article 11(2) of Japan-Turkey BIT (n 24).

82 For examples of BITs that make the investor's access to ICSID arbitration conditional on the absence of a final award from the host state courts see Art. 8(2) of the Agreement on Reciprocal Encouragement and Protection of Investments between the Kingdom of the Netherlands and the Republic of Turkey (OG 08.09.1989/20276); Article 7/2(ii) of Turkey-Tunisia BIT (n 24); Article 8(3) of the Agreement between the Swiss Confederation and the Republic of Turkey on the Reciprocal Promotion and Protection of Investments (OG 06.10.1989/20304). Article 8(1) of Finland-Turkey BIT (n 25), Article 8(2) of UK-Turkey BIT (n 20); Article 8 of Turkey-Finland BIT (n 25) provide for ICSID arbitration if the dispute has not been within 1 year by local courts or other means.

Although they are drafted differently, it can be concluded that dispute settlement provisions that offer ICSID arbitration as one of the options[83] are the most preferred ones by investors due to the advantages of ICSID arbitration. However, the same cannot be said for BIT provisions that only provide for ICSID arbitration. For various reasons, investors may want to circumvent such dispute settlement provisions as well by relying on the MFN provision. There are two possibilities where investors may rely on other BITs that offer options of international arbitration other than ICSID arbitration: Either because the conditions (*ratione materiae* and *ratione personae*) for the jurisdiction of ICSID have not been met, or because the cooling-off period before applying to ICSID arbitration has not passed.

c. Resorting to Local Court as an Option Subject to Fork-in-the-Road Clause

Fork-in-the-road provisions indicating that the investor's choice is final are included in most BITs that Turkey has recently signed. Although recourse to the courts of the host state is offered as an option to the investor in the dispute settlement provisions that include fork-in-the-road-provisions, the investor's choice will be final when the investor exercises the option of the host state's courts and the possibility of resorting to arbitration will be lost[84].

The options offered by dispute settlement provisions that contain a fork-in-the-road provision may be drafted in different ways. In some BITs, the option offered to the investor is specified as either recourse to the local court or ICSID arbitration[85], while others offer more than two options by allowing the investor to choose between the local court and more than one arbitration method[86].

83 For example, Article 10(2) of the Agreement Between the Republic of Hungary and the Republic of Turkey for the Reciprocal Promotion and Protection of Investments offers the investor two options, arbitration under UNCITRAL rules or arbitration under ICSID rules. However, it stated that if the investor has gone to the local courts, the investor can exercise these options provided that a final decision has not been taken within 18 months (OG 22.02.1995/22210). Article 7(2) Turkey-Moldova BIT (n 24) has adopted the same approach and states that the investor can use arbitration options provided that the final decision has not been taken within 1 year if the investor has gone to local courts. Article 9(2) of the Agreement Between the Republic of Turkey and the Kingdom of Spain on the Reciprocal Promotion and Protection of Investments provides the investor with the option to submit the dispute to arbitration under the rules of ICC, ICSID or UNCITRAL, provided that, in the event that the dispute has been submitted to the local courts, a final decision has not been rendered within one year or the dispute in the local court has been withdrawn (OG 01.12.1997/23187).

84 Christoph Schreuer, 'Travelling the BIT-Route-Of Waiting Periods, Umbrella Clauses and Forks in the Road' (2004) 5(2) The Journal of World Investment & Trade 231, 232 ff. Fork-in-the road clauses can also serve to prevent parallel proceedings in investment arbitration: Gülüm Bayraktaroğlu Özçelik, 'ICSID Hakem Kararlarında "Yol Ayrımı" (*"Fork in the Road"*) Kayıtları' (2020) 40(1) PPIL 497, 501.

85 For example, according to article 8 of the Turkey-France BIT (n 17),

"If the dispute has not been settled within six months from the time it was raised by one of the disputing parties, it shall be submitted, at the request of the investor, to the courts of the host state or the International Centre for the Settlement of Investment Disputes (ICSID) established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature in Washington on March 18, 1965. When the investor has submitted or agreed to submit the dispute to the courts or to arbitration, the choice of procedure is final."

86 Article 8 of the Turkey-Argentina BIT (n 67) provides that in cases where the dispute is not resolved in good faith, the investor may submit the dispute to the competent courts of the host state or to arbitration pursuant to the ICSID or UNCITRAL rules and in the event that the dispute is submitted to the competent courts of the host state or to international arbitration, the choice made by the investor shall be final.

Dispute settlement provision with the fork-in-the-road clause (irrespective of the number of options offered therein) have the potential to enable investors to use an MFN clause since it eliminates investor's right to resort to arbitration once the investor filed a case before the host state's courts.

d. Local Courts are not one of the Options

It will not be necessary for investors to rely on the MFN clause when dispute settlement provisions do not include an option to resort to local courts among their options. This is because there is no need for investors to seek to avoid such a dispute settlement provision and therefore rely on the MFN clause. While such provisions offer the investor multiple arbitration options, they do not include any expression concerning the recourse to the local court. Therefore, whether or not the foreign investor has resorted to the host state's court is not important. For example, in article 7 of the Turkey-Greece BIT the investor is provided with four options (ICSID, *Ad hoc* arbitration under UNCITRAL Rules, ICC)[87] for dispute resolution, among which the host state court is not included.

It should be noted that these kinds of provisions do not prevent the investor from resorting to the local court. However, even if the investor has applied to the local court, this will not have any adverse effect[88]. Currently, such provisions have been abandoned in BITs.

B. Distinction based on the Subject Matter and Scope of Dispute Settlement Provisions

1. Broad Scope Dispute Settlement Provisions

Even though it can be drafted in different ways, dispute settlement provisions that include 'all disputes related to the investor's investment' are well-known examples of this kind of provisions. It can be said that they were mostly accepted in Turkish BITs signed after the 90s which were drafted using either the expression 'disputes related to investment' or 'disputes related to the investment of the investor' [89].

Umbrella clauses that provide additional protection to the investor[90] are also classified as broad dispute resolution provisions since they extend the investment

87 Turkey-Greece BIT (n 30).

88 Similarly, Article 8(2) of Turkey-Poland BIT (n 24). provides two options in the event that arbitration is resorted to without any reference to the courts of the host State: ICSID arbitration or ad hoc arbitration under the UNCITRAL rules.

89 For example, see Articles 7(1) of Turkey-Albania BIT (n 24); Agreement between the Republic of Turkey and the Kingdom of Thailand Concerning the Reciprocal Promotion and Protection of Investments (OG 03.07.2010/27630), Turkey-Bahrain BIT (n 24), Turkey-Tunisia BIT (n 24)), Article 8(1) of Swiss Confederation and Turkey BIT (n 82), Article 10(1) of the Agreement between the Government of the Republic of Turkey and the Government of the Islamic Republic of Pakistan Concerning the Reciprocal Protection and Promotion of Investments (OG 07.07.2017/30117).

90 Christoph Schreuer, 'Investment Treaty Arbitration and Jurisdiction over Contract Claims-the Vivendi I Case Considered' in Todd Weiler (ed), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron 2005) 301-303.

protection beyond the applicable BIT[91]. Investors can rely on an umbrella clause for pure contractual claims before investment arbitration tribunals[92]. In addition to broadening the scope of the dispute resolution provisions, umbrella clauses provide substantive protection to investors[93].

Broad dispute settlement provisions, especially when applied together with the umbrella clauses, stand out as the most favourable provisions for investors. By relying on the MFN clause in the applicable BIT that does not contain an umbrella provision, investors can request resolution of the dispute in accordance with a BIT containing an umbrella clause, in this way they have the opportunity to take their contractual claims before an investment tribunal. While the mere existence of umbrella clauses has led to profound disagreements in investment arbitration, the invocation on umbrella clauses in other BITs via an MFN clause has taken these discussions to the extreme. According to UNCTAD, it is noteworthy that there has been a tendency in recent years to no longer include umbrella clauses in BITs. While this is seen as the beginning of the end for umbrella clauses, confusion and debate still persists due to the old generation bilateral investment treaties[94].

2. Narrow Scope Dispute Settlement Provisions

This type of provision has a different level of restrictions. The least restrictive provisions in BITs are those that limit investment disputes to cases where the host state violates its obligations under the relevant BIT. Such dispute settlement provisions, which are usually expressed as "*This Article shall apply to disputes between one Contracting Party and an investor of the State of the other Contracting Party concerning an alleged breach of an obligation of the former under this Agreement, which causes loss or damage to the investor or its investments*" [95] reflect the general trend of BITs concluded since 2017[96].

91 For example, the umbrella clause has been expressed as follows in Article 4 of the Finland-Turkey BIT (n 25): "*Each Contracting Party shall observe any obligation it may have entered into with regard to investments*". Similar provisions can be found in Article 10 of the Swiss Confederation-Turkey BIT (n 82), Article 2(3) of the Treaty between the United States-Turkey BIT (n 6); Article 2(2) of UK-Turkey BIT (n 20).

92 David Collins, *An Introduction to International Investment Law* (2106 Cambridge University Press) 146; Jarrod Wong, 'Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide between Developing and Developed Countries in Foreign Investment Disputes' (2006) 14 George Mason Law Review 137, 139; İlyas Gölcüklü, 'Umbrella Clauses in the ICSID Arbitration' (2017) 37(2) Public and Private International Law Bulletin 352, 360.

93 Taida Begic Sarkinovic, 'Umbrella Clauses and Their Policy Implications'(2011) 24 Hague Yearbook of International Law 313, 316; Wong (n 92) 138. For detailed analysis for broad and restrictive approach to umbrella clauses see Gölcüklü (n 92) 367-371.

94 Samantha Rowe and Svetlana Portman, 'Current Trends in 'Umbrella Clause' Claims Arising from Breaches of Contractual Obligations' (2021) International Bar Association https://www.ibanet.org/current-trends-umbrella-clause-claims -Accessed 24 July 2022.

95 This provision is taken from the Article 10(1) of Ukraine -Turkey BIT (n 47).

96 For examples of BITs signed around this period that have not yet entered into force and contain provisions to this effect, see Article 10(1) of Burkina Faso-Turkey BIT (n 49); Article 10(1) of Turkey-Palestine BIT (n 49); Article 12(1) of Lithuania-Turkey BIT (n 21); Article 12(1) Turkey-Serbia BIT (n 48); Article 10(1) of Turkey-Belarus BIT (n 49).

Restrictions regarding the scope of dispute settlement provisions can also be determined by enumerating the types of disputes or excluding certain issues, as well as by imposing the requirement of compliance with the legislation of the host state. BITs[97] which include provisions explicitly considering disputes as related to investment permits without mentioning contractual obligations between the investor and the host state, were generally signed in the 80s and the early 90s and are essentially expressed as follows:

> *"(a) the interpretation or application of any investment authorization granted by a Contracting Party's foreign investment authority to an investor of the other Contracting Party; or*
>
> *(b) a breach of any right conferred or created by this Agreement with respect to an investment."*

Some BITs, on the one hand, impose limitations in their dispute resolution provisions by enumerating different aspects of investment, they also contain umbrella clauses, on the other hand. For example, while Article 8(1) of the Turkey-Denmark BIT[98] identifies two categories of investment disputes, as in the example given above, Article 3(1) of the same BIT stipulates that each Contracting Party "*shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party."* Undoubtedly, arbitral tribunals would likely reach different conclusions if applicable BIT contains such confusing provisions[99].

Dispute settlement provisions narrowing the subject matter exclude some parts of the protection provided by the BIT. This situation is rarely encountered in Turkish BITs. Article 7(b) of the 1990 Turkish-People's Republic of China BIT[100] only covers disputes relating to the amount of compensation arising as a result of expropriation and

97 This provision is taken from Article 8(1) of the Netherlands-Turkey BIT (n 82).

For examples of other BITs signed in the same period, which include essentially the same provision, see. Article 9(1) of Belgium-Luxemburg Economic Union and Turkey BIT (n 69); Article 9(1) of Austria-Turkey BIT (n 24); Article 8(1) of Turkey-Denmark BIT (n 24); Article 6(1) of the Agreement between the Government of the Republic of Turkey and the Government of Romania on the Reciprocal Promotion and Protection of Investments, signed in 1991 <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2986/download> Accessed). The same provision has been adopted in Article 6(1) of the new BIT that was signed between these two states in 2008 (OG 03.07.2010/27630).

98 Turkey-Denmark BIT (n 24). Similar provisions can be found in other BITs as well. For example, Article 6(1) Turkey-Romania (n 97).

99 Two ICSID arbitral awards in particular have been the focus of the doctrinal debate as to whether contractual claims may be brought before an investment arbitral tribunal under the relevant BIT. The first award has been rendered in the case of *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan* (ICSID Case No ARB/01/13*) (SGS v Pakistan)*, where the tribunal found that it did not have jurisdiction over contractual claims: *Decision on Jurisdiction*, <https://www.italaw.com/sites/default/files/case-documents/ita0779.pdf> Accessed 24 July 2022. The second award was rendered in the case of *SGS Société Générale de Surveillance S.A. v Republic of the Philippines* (ICSID Case No ARB/02/6*) (SGS v Philippines*), where the ICSID tribunal held that it had jurisdiction over contractual claims but that the claim was not admissible: <https://www.italaw.com/sites/default/files/case-documents/ita0782.pdf> Accessed 24 July 2022. For these awards, see also Stanimir A Alexandrov, 'Introductory Note to International Centre for the Settlement of Investment Disputes (ICSID): *SGS Société Générale de Surveillance S.A. v Pakistan'* (2003) 42(6) ILM 1285, 1285 ff; Emmanuel Gaillard, 'Investment Treaty Arbitration and Jurisdiction Over Contract Claims – the SGS Cases Considered' in Todd Weiler (ed), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron 2005) 336 ff.

100 China-Turkey BIT (n 24). The treaty was terminated on 20.08.1994. A new Agreement between the two country was signed on 29.07.2015 and this limitation was not included (n 43).

nationalization: *"If a dispute involving the amount of compensation resulting from an expropriation or nationalization referred to in Article III cannot be settled within one year from the date upon which the dispute arose, it may be submitted to an ad-hoc arbitral tribunal for settlement in accordance with the Arbitration Rules of UNCITRAL by each party subject to the dispute."* Such provisions are no longer included in BITs. The prevailing trend today is to limit the scope of the dispute settlement provision to only cover the violations of the BIT.

Compliance with host state's legislation does not, by itself, affect the scope of investment disputes. If a BIT requires the compliance with host state legislation only as an element of investment definition, it does not limit the scope of the dispute resolution provision. For example, Article 2(2) of the Turkey-Finland BIT[101], on the one hand, stipulates that this treaty will be applied to investments made in accordance with the laws and regulations of the host country. Article 8, on the other hand, does not impose such a limitation regarding investment disputes. Compliance with the host state's legislation would limit the scope of dispute settlement provisions only when used for the definition of an investment dispute. For example, compliance with the host state' legislation plays an important part in determining an investment dispute in Article 10(8) of the Turkey-Uzbekistan BIT[102]. Accordingly, "*Only the disputes arising directly out of an investment made in conformity with laws and regulations of the State of the host Contracting Party and that effectively started shall be subject to the jurisdiction of ICSID or any other international dispute mechanism as agreed upon under paragraph 4 of this Article.*" Due to its limiting effect, there is a possibility that such a dispute settlement provision may be circumvented with the MFN clause.

Finally, under this Part, we find it useful to address a limitation that is specific to Turkey. The dispute settlement provisions of some of Turkey's BITs contain the limitation that Turkey has set forth in its notification[103] pursuant to Article 25/4 of the ICSID Convention[104]. Such provisions are generally included in the treaties signed in accordance with the 2009 Turkish Model BIT. The aforementioned notification states that Turkey does not consent to ICSID arbitration for investments that have not effectively started and for disputes regarding the property and real rights of immovable property. Therefore, investors will not be able to resort to ICSID or any

101 Finland-Turkey BIT (n 25).

102 Agreement between the Uzbekistan-Turkey BIT (n 48). There are similar limitations in Article 10(4) of Turkey-Kyrgyz Republic (n 48).

103 In *PSEG Global Inc., The North American Coal Corporation, and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v Republic of Turkey,* Turkey relied on this notification to raise a jurisdictional objection under Article 25(4) of the ICSID Convention, arguing that the consent requirement was not met, but the arbitral tribunal rejected Turkey's objection and held that it had jurisdiction: ICSID Case No ARB/02/5, para 146-147 <https://www.italaw.com/sites/default/files/case-documents/ita0694.pdf>Accessed 24 July 2022.

104 In its notification to the ICSID General Secretariat on 23.02.1989, Turkey stated that only disputes arising directly out of investment activities that have received the necessary permits in accordance with Turkish laws and have in fact commenced will be subject to the jurisdiction of the Center.

other international arbitration mechanisms for investments that have not effectively started and concern the property and real rights of immovable property. For example, Article 10 (3) of the Turkey-Saudi Arabia BIT has provided the following provision:

> "*Notwithstanding the provisions of paragraph 2 of this Article; both Contracting Parties agree that the Notifications, submitted respectively by the Republic of Turkey on March 3, 1989 and the Kingdom of Saudi Arabia on May 8, 1980 to the International Centre for the Settlement of Investment Disputes (ICSID) concerning classes of disputes considered suitable or unsuitable for submission to ICSID, will constitute an integral part of this Agreement and the classes of disputes considered unsuitable for submission to ICSID in the aforementioned Notifications shall not be submitted to ICSID or any international dispute settlement mechanism, unless otherwise agreed by the host Contracting Party"*

It is unlikely that investors will be able to circumvent the limitations imposed by such provisions in some of Turkey's recently signed BITs[105] by relying on the MFN clause. It is unacceptable that the MFN clause is used to disregard the intention that contracting states have specifically and expressly set out in their BIT.

III. Examples of Arbitral Awards Discussing the Relationship Between the MFN Clause and Dispute Settlement Provisions

The explanations and statements made so far reveal the situations that may create interaction between the MFN clause and the dispute resolution provisions. It would be appropriate to consider the arbitral awards that have directly addressed the relationship between MFN clauses and dispute settlement provisions in order to provide a better overview. We are going to analyse this relationship under two approaches stemming from the awards rendered by ICSID tribunals, known as *Maffezini-Siemens* and the *Salini-Plama* approach[106].

A. The *Maffezini and Siemens* Approach

Maffezini v. Spain[107] is the first case that directly addresses the question of whether an MFN clause entitles a claimant to invoke dispute settlement provisions from third-party treaties. The Tribunal's affirmative response received worldwide attention and impact subsequent investment awards with respect to the extension

105 Article 10(5) of Turkey-Burundi BIT (n 47) contains a similar provision: "*In deciding whether an investment dispute is within the jurisdiction of ICSID and competence of the tribunal, the arbitral tribunal established under paragraph 3 (b) shall comply with the notification submitted by the Republic of Turkey on March 3, 1989 to ICSID in accordance with Article 25 (4) of ICSID Convention, concerning classes of disputes considered suitable or unsuitable for submission to the jurisdiction of ICSID, as an integral part of this Agreement*." For examples of treaties that include similar provisions see Article 10(5) of Turkey-Côte d'Ivoire BIT (n 47); Article 14/6(a) and (b) of on Article 12(12) of the Lithuania Turkey (n 21); Article 10(5) of Jordan-Turkey BIT (n 47); Article 9(4)(a) and (b) of Turkey-China BIT (n 43); Article 10(5) of Turkey-Belarus BIT (n 49).

106 For the distinction with the same titles, see Friedland (n 26) 107. Some authors prefer the distinction between the *Maffezini* and *Plama* approach to point out the difference in jurisprudence on this issue: Banifatemi (n 52) 251; Maupin (n 13) 107.

107 *Emilio Agustín Maffezini v Kingdom of Spain*, *Decision of The Tribunal On Objections to Jurisdiction,*

ICSID Case No Arb/97/7 <https://www.italaw.com/sites/default/files/case-documents/ita0479.pdf> Accessed 24 July 2022.

of the MFN clause to dispute settlement provisions. For this reason, while the *Maffezini* decision is considered as one of the most cited awards in the field of investment arbitration[108], it is also known as the trigger for the change in the scope of MFN clauses in BITs[109].

In this case, Mr. Maffezini, the investor, filed a lawsuit against Spain before ICSID, claiming that the treatment of his investment constituted a violation of the Argentina-Spain BIT[110] and that this violation resulted from the actions of Spanish institutions that are attributable to Spain. Spain objected to the jurisdiction of ICSID on a number of issues. The most important one for the purpose of this study was the non-fulfilment of the requirement that the investor applies to the local courts, which is stipulated in article 10(2) of the Argentina-Spain BIT. In its objection, Spain also claimed that the requirement of article 10(3) of the Argentina-Spain BIT was not fulfilled. Pursuant to this provision, before the investor can resort to arbitration after applying to the host state's courts, one of three situations should be met. The first situation is that the host state's courts have not resolved the dispute within 18 months, the second is that the dispute still between the parties continues even if the host state's court has rendered a decision within 18 months, and the third is that the parties agree on going to arbitration. As a matter of fact, article 10(3) did not require exhaustion of domestic remedies, and therefore essentially constituted an extended waiting period prior to the initiation of arbitration[111].

Mr. Maffezini submitted that Article 4(2), containing the MFN clause of the BIT between Spain and Argentina explicitly stipulates that this standard will apply to *all matters subject to this Agreement*[112], therefore, relying on this standard, he requested the arbitral tribunal to apply the more favourable dispute settlement clause[113] in Spain's BIT with Chile[114]. Spain, on the other hand, argued that the expression *all matters* in Article 4(2) covered only the material or substantial provisions of the BIT, not procedural or jurisdictional issues. The arbitral tribunal rejected Spain's objection, based on a number of previous international awards and the phrase *'all matters subject*

108 Vessel (n 19) 156; Ganesh (n 58) 11. For a comprehensive summary for the facts that give rise to the *Maffezini* award, see Sevgi (n 19) 97-99.

109 Ataman-Figanmeşe (n 32) 221.

110 Argentine-Spain BIT (n 60).

111 *Decision on Objections of Jurisdiction*, (n 107) para 35. Tribunal also emphasized that if the host state had made the exhaustion of domestic remedies a condition for its consent to arbitration under Article 26 of the ICSID Convention, the Tribunal would reject jurisdiction absent such exhaustion, even if a third-party BIT contained no exhaustion requirement: para 63.

112 The second paragraph of Article 4 of the Treaty concerning the MFN clause states that the MFN clause will be relied upon "*in all matters governed by this Agreement*".

113 In Agreement on the Reciprocal Protection and Promotion of Investments between Spain and Chile, see <https://treaties.un.org/doc/publication/unts/volume%201774/volume-1774-i-30883-english.pdf> Accessed 24 July 2022, if the parties are unable to reach an agreement during the 6-month mediation period, the investor can resort to arbitration without recourse to the courts of the host state.

114 Spain-Chile BIT (n 113).

to this Agreement' in Article 4 of the BIT between the two countries, and emphasising that the dispute settlement provisions also provide substantive protection[115].

The Tribunal also considered the question of whether dispute settlement provisions belonged to the same category of subject as that to which the clause itself relates (*ejusdem generis*) and concluded that:

> *Notwithstanding the fact that the basic treaty containing the clause does not refer expressly to dispute settlement as covered by the most favored nation clause, the Tribunal considers that there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights of traders under treaties of commerce....*
> *These modem developments are essential, however, to the protection of the rights envisaged under the pertinent treaties; they are also closely linked to the material aspects of the treatment accorded. ....*
> *From the above considerations it can be concluded that if a third-party treaty protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause as they are fully compatible with the ejusdem generis principle*[116].

The Tribunal's assessment on public policy considerations to support its holding that the MFN clause could be used to import dispute settlement provisions from a third-party treaty should not be overlooked that: *'[t]his operation of the most favored nation clause does, however, have some important limits arising from public policy considerations ....*' *The Tribunal declare that '[a]s a matter of principle, the beneficiary of the clause should not be able to override public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in question'*. [117]

Based on this observation, it should be concluded that if a State requires the exhaustion of local remedies as a pre-condition to arbitration, or if the BIT provides for the final choice between domestic courts and international arbitration, or if it only provides for ICSID arbitration, the MFN clause should not be used to circumvent these requirements[118].

---

115 *Maffezini, Decision on Objections of Jurisdiction*, (n 107) para 55. Similarly, in the dispute *Camuzzi v Argentina* that was brought before ICSID by relying on the Argentina-Belgo-Luxemburg Economic Union BIT, the MFN provision in Article 4 of the Agreement covered all matters governed by the Agreement. The Arbitral Tribunal accepted the claimant's request to extend the MFN clause to the dispute settlement provision without any explanation, as Argentina did not raise any objection. *Camuzzi International S.A. v Republic of Argentina,* ICSID Case No ARB/03/7, *Decision of the Tribunal on Objections to Jurisdiction (10 June 2005)*: <https://www.italaw.com/sites/default/files/case-documents/ita0108.pdf> Accessed 26 April 2022). See also Agreement between the Republic of Argentina and the Belgo-Luxembourg Economic Union for the Promotion and Reciprocal Protection of Investments<https://edit.wti.org/app.php/document/show/2e057d21-0ac4-408f-9074-0a57e6a39e82> Accessed 24 July 2022.

116 *Decision on Objections of Jurisdiction*, (n 115) para 54-56.

117 *ibid* para 56.

118 Reinish (n 36) 2.

The *Maffezini* approach has been followed by subsequent cases, both in terms of cooling-off periods and public policy considerations. For example, the *Maffezini* approach stating that dispute settlement provisions drafted with fundamental public policy considerations will fall outside the scope of the MFN clause was used in *Técnicas Medioambientales Tecmed SA v United Mexican States* (*Tecmed v Mexico*) [119]. In this case, brought under ICSID's Additional Facility Rules[120], the Spanish claimant sought to circumvent the jurisdictional limitation with respect to time in the relevant Mexico-Spain BIT[121] by using the MFN clause. The ICSID arbitral tribunal rejected the claimant's request for retroactive application of the substantive standards of the Treaty, noting that issues relating to the temporal application of the relevant Treaty were one of the most important points specifically negotiated by the Contracting Parties[122]. Thus, as set out in the *Maffezini* award, the tribunal has held that the MFN clause does not apply in respect of an issue raised as a matter of fundamental public policy considerations.

The *Maffezini* approach concerning the use of the substantive standards of other BITs through the MFN clause was adopted in *ADF Group Inc v United States of America*[123] and *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile.*[124]

Siemens AG v The Argentine Republic (Siemens v Argentina) is another case in which the *Maffezini* approach regarding the extension of the MFN clause to dispute settlement provisions was reinforced[125]. In *Siemens v. Argentina* case was considered a repeat of Maffezini in many respects and the Tribunal adopted the Maffezzini approach by applying the same reasoning. As in *Maffezini*, the Tribunal allowed the claimant to avoid the provision of the Germany-Argentina BIT[126] that requires the claimant to resort to the domestic courts within 18 months before initiation to arbitration by invoking the MFN clause, and applied the dispute settlement provision of the Argentina-Chile BIT[127] that does not require a cooling-off period before initiating an arbitration[128]. However, the scope of the MFN clause in the Argentina-Germany BIT

119 ICSID Case No ARB (AF)/00/2 <https://www.italaw.com/sites/default/files/case-documents/ita0854.pdf> Accessed 24 July 2022.

120 *ICSID Additional Facility Rules* <https://icsid.worldbank.org/sites/default/files/AFR_2006%20English-final.pdf> Accessed 24 July 2022.

121 Agreement on the Promotion and Reciprocal Protection of Investments between the United Mexican States and the Kingdom of Spain <https://edit.wti.org/document/show/491c32fd-04f5-4574-88b1-f781f962ac87> Accessed 24 July 2022.

122 *Tecmed v Mexico* (n 119) para 69.

123 ICSID Case No ARB (AF)/00/1, para 193-198 <https://www.italaw.com/sites/default/files/case-documents/ita0009.pdf> Accessed 24 July 2022.

124 ICSID Case No ARB 01/07, para 103 <https://www.italaw.com/sites/default/files/case-documents/ita0544.pdf> Accessed 24 July 2022.

125 ICSID Case No ARB/02/08 <https://www.italaw.com/sites/default/files/case-documents/ita0788.pdf> Accessed 24 July 2022.

126 Treaty between the Federal Republic of Germany and the Argentine Republic on the Promotion and Reciprocal Protection of Investments <https://edit.wti.org/document/show/e07555b1-6863-4314-860e-94a35ba0ee52> Accessed 24 July 2022.

127 Treaty between the Argentine Republic and the Republic of Chile on Promotion and Reciprocal Protection of Investments <https://edit.wti.org/document/show/f5e84f76-7ecc-48ec-8d3e-27635979c52b> Accessed 24 July 2022.

128 *Siemens v Argentina,* (n 125) para 102.

was not as broad as in the Argentina-Spain BIT that was used in the *Maffezini* case. The Tribunal in *Siemens* also allowed the investor to invoke the dispute settlement provision of the Argentina-Chile BIT, while disregarding the less favourable part of that provision, namely, the fork-in-the-road clause. The Tribunal rejected Argentina's objection that the investor should be barred from invoking ICSID arbitration because it had previously initiated an administrative proceeding before the Argentine courts, and allowed the MFN standard to be applied in this regard as well[129].

Another important case among the decisions mirroring the *Maffezini* approach is the case of *Gas Natural SDG SA v The Argentine Republic (Gas Natural v Argentina)*, which was also brought before the ICSID[130]. The Tribunal concluded that the MFN clause relied upon by the claimant in the Argentina-Spain BIT[131] is comprehensive[132], covering all matters governed by the BIT and therefore also dispute settlement matters. Emphasising that the guarantee of independent international arbitration is the most crucial element in investor protection[133], the arbitral tribunal permitted the application of another dispute settlement provision and its international arbitration option by relying on the MFN clause. The tribunal also stated that with respect to the investor's right to directly initiate international arbitration proceedings there were no public policy considerations that would justify not giving effect to the MFN clause[134]. This approach was adopted in the case of *National Grid PLC v The Argentine Republic (National Grid)* [135], which was conducted under UNCITRAL rules and based on the Argentina-United Kingdom BIT[136], and in the cases of *Suez, Sociedad General de Aguas de Barcelona, S.A.* and *Vivendi Universal S.A. v. The Argentine Republic and AWG Group Ltd v The Argentine Republic (Suez)* [137], which were conducted under ICSID and UNCITRAL arbitration rules.

Another arbitral award following the *Maffezini* approach was rendered in the *RosInvest* case[138], in which the use of the MFN clause was allowed (unlike other awards upholding the *Maffezini* award) not only to overcome certain procedural obstacles,

129 *ibid* para 102.

130 *Gas Natural SDG, SA v The Argentine Republic*, ICSID Case No ARB/03/10. For the award dated 17.06.2005 see <https://www.italaw.com/sites/default/files/case-documents/ita0354.pdf> Accessed 24 July 2022.

131 Argentine-Spain BIT (n 60).

132 The *Maffezini* award relied on the same Argentine-Spain BIT (n 60).

133 *Gas Natural v Argentina* (n 130) para 49.

134 *Gas Natural v Argentina* (n 130) para 28.

135 *National Grid, Decision on Jurisdiction,* 20.06.2006: <https://www.italaw.com/sites/default/files/case-documents/ita0553.pdf> Accessed 24 July 2022.

136 Agreement between The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/126/download> Accessed 24 July 2022.

137 *Suez, Decision on Jurisdiction,* 03.09.2006: <https://www.italaw.com/sites/default/files/case-documents/ita0049.pdf> Accessed 24 July 2022.

138 *RosInvest Co UK Ltd v The Russian Federation,* Arb V07/2005, *Award on Jurisdiction* (SCC 2007): <https://www.italaw.com/sites/default/files/case-documents/ita0719.pdf >Accessed 24 July 2022.

but also for the purpose of establishing consent to arbitration, and hence jurisdiction, which was not provided for in the applicable BIT[139].

B. The *Salini-Palma* Approach

The *Salini-Plama* approach is the approach adopted in two ICSID awards, both of which were rendered at very similar periods, to the effect that the MFN clause cannot be extended to dispute settlement provisions. In *Salini Costruttori SpA and Italstrade SpA v Hashemite Kingdom of Jordan (Salini)*[140], the Tribunal refused to rely on the *Maffezini* approach. The MFN clause in Article 3 of the Italy-Jordan BIT[141] explicitly states which issues are covered by the MFN clause[142]. According to the Tribunal, this provision, unlike the MFN clause applied in *Maffezini*, is not broad enough to provide a basis for ICSID arbitration as envisaged in other host-state BITs, since it does not refer to all matters governed by the treaty. The respondent, Jordan, objected to jurisdiction, arguing that the dispute was essentially based on a contractual claim, that the investment contract between the investor and the host State contained a dispute settlement provision for contractual claims, and that by adopting Article 9(2) of the Italy-Jordan BIT, the contracting States had agreed on the application of the contractual provision for contractual claims[143]. The claimant, on the other hand, sought to rely on the MFN clause in Article 3 of the Italy-Jordan BIT to rely on the provisions of Jordan's BITs with the United Kingdom and the United States, which allow an investor to refer a dispute to an investment arbitral tribunal despite the existence of a separate contractual dispute settlement clause. The Tribunal ruled that the MFN clause in Article 3 of the Italy-Jordan BIT could not be extended to dispute settlement provisions, and that contractual claims were subject to the procedures provided for in the contract[144]. The Tribunal in the *Salini* case, which rendered its decision on jurisdiction approximately 3 months after the decision in the *Siemens* case, explicitly criticised the approaches adopted in the *Maffezini* and cases for allowing the investor to engage in treaty shopping. In a single sentence, the Salini award has gone down in the history of investment law as an award clearly signalling a move away from the expansionist approach adopted in the Maffezini[145].

139 Undoubtedly, in interpreting the MFN clause, the award has reached a conclusion that exceeds the intention of the States that are parties to the applicable BIT. See also Ataman-Figanmeşe (n 32) 235-236.

140 *Salini, Decision on Jurisdiction,* 09.11.2004, ICSID Case No ARB/02/13 <https://www.italaw.com/sites/default/files/case-documents/ita0735.pdf> Accessed 24 July 2022.

141 Agreement Between the Government of the Hashemite Kingdom of Jordan and the Government of the Italian Republic on the Promotion and Protection of Investments, see <https://www.italaw.com/sites/default/files/laws/italaw6154.pdf> Accessed 24 July 2022.

142 Article 3(1) of the Agreement contains the following provision: *"Both Contracting Parties, within the bounds of their own territory, shall grant investments effected by, and the income accruing to, investors of the Contracting Party no less favourable treatment than that accorded to investments effected by, and income accruing to, its own nationals or investors of Third States".*

143 According to this provision, in case the investor and an entity of the Contracting Parties have stipulated an investment Agreement, the procedure foreseen in such investment Agreement shall apply.

144 *Salini*, (n 140) para 119.

145 For a similar view, see Fietta (n 16) 136.

In *Plama Consortium Limited v Republic of Bulgaria (Plama)*[146], an investor from Southern Cyprus sought to establish the ICSID's jurisdiction over a dispute with Bulgaria based on the Energy Charter Treaty and the Bulgaria-Southern Cyprus BIT[147]. Although the Tribunal found jurisdiction with respect to the Energy Charter Treaty, its assessment of the claims based on the Bulgaria-Southern Cyprus BIT is noteworthy for the scope of the MFN clause. The investor sought to circumvent the extremely narrow dispute settlement provision of Article 4 of the Treaty, which was signed between the two states during the communist regime in Bulgaria, by using the provision in Article 3(1) that "*each Contracting Party shall apply to the investments in its territory by investors of the other Contracting Party a treatment which is not less favourable than that accorded to investments by investors of third states*." The Tribunal has not allowed the use of the MFN clause in Article 3(1) of the Bulgaria- Southern Cyprus BIT to establish a jurisdiction not provided for in the applicable BIT by relying on the dispute settlement clauses in Bulgaria's BITs with other States[148]. The tribunal reversed the *Maffezini* presumption by stating that the MFN clause in the original treaty cannot be extended to dispute settlement provisions in another treaty, unless the original treaty provides for it beyond doubt[149]. A contrary approach would have amounted to disregarding the intent of the contracting parties of the original treaty[150].

In *Telenor Mobile Communications AS v Republic of Hungary*[151], the investor sought to circumvent the relevant provision of the Hungary-Norway BIT[152], which limited the scope of the dispute settlement provision to expropriation, by relying on the fair and equitable treatment and other standards of treatment in another treaty. Adopting the *Salini-Plama* approach, the ICSID tribunal did not allow the MFN clause to be used to establish jurisdiction over a matter not provided for in the treaty.

Investment law doctrine argues that the different approaches adopted in the *Maffezini* and *Salini-Plama* cases do not warrant the assumption of a deep jurisprudential inconsistency[153]. Indeed, in the *Maffezini* case, the investor sought to extend the MFN

146 *Plama, Decision on Jurisdiction,* 08.02.2005, ICSID Case No ARB/03/24: <https://www.italaw.com/sites/default/files/case-documents/ita0669.pdf >Accessed 24 July 2022.

147 Agreement between The Government of The People's Republic of Bulgaria and The Government of The Republic of Cyprus on Mutual Encouragement and Protection of Investments:

<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/522/download> Accessed 24 July 2022.

148 "Each Contracting Party shall apply to the investments in its territory by investors of the other Contracting Party a treatment which is not less favourable than that accorded to investments by investors of third states".

149 *Plama*, (n 146) para 223.

150 Çalışkan (n 54) 100.

151 *Telenor*, *Award* 22.06.2006, ICSID Case No ARB/03/24:

<https://www.italaw.com/sites/default/files/case-documents/ita0858.pdf> Accessed 24 July 2022.

152 Agreement between the Government of the Kingdom of Norway and the Government of the Republic of Hungary on the Promotion and Reciprocal Protection of Investments <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5327/download> Accessed 24 July 2022.

153 Reinish (n 35)19; comp. Fietta (n 16) 131,135.

clause to procedural provisions in order to avoid the 18-month cooling-off period for ICSID arbitration[154] set forth in the Argentina-Spain BIT, whereas in the *Salini* and *Plama* cases, the investor sought to establish a jurisdiction that was not provided for in the original treaty in order to ultimately to proceed to ICSID arbitration. Thus, in the *Plama* case, the tribunal referred to the difference between a more favourable treatment provided for elsewhere in the BIT and the substitution of an entirely different procedure instead of one specifically negotiated by contracting parties to the BIT[155]. Indeed, a distinction must be drawn between the investor's use of the MFN clause to circumvent hurdle of the cooling-off period and the investor's use of the MFN clause to invoke a remedy not provided for in the BIT[156]. In this respect, the different results obtained in the aforementioned cases on the basis of the different circumstances do not constitute an inconsistency in jurisprudence. On the other hand, in the *Maffezini* and *Siemens v Argentina* cases, when the investor used the MFN clauses in the underlying treaties to overcome procedural obstacles, ICSID's jurisdiction was already accepted in the dispute settlement provisions, so no further treaty was relied upon to establish jurisdiction. This was instrumental in the tribunals' decision in favour of the claimant[157]. In the *Plama* case, as in the earlier *Salini* award, the claimants sought to establish jurisdiction that would not have been possible under normal circumstances, and the tribunal refused to allow it[158].

The main source of jurisprudential inconsistency arose over the scope of the MFN clause. In the *Maffezini* case, the provision of the Spain-Argentina BIT was much broader than the provision of the Bulgaria-Southern Cyprus BIT in the *Plama* case[159]. In *Maffezini*, the ICSID tribunal noted that the MFN clause in the Spain-Argentina BIT did not explicitly refer to dispute settlement, but that dispute settlement provisions were an integral part of the protection of foreign investments[160]. In the *Plama* case, the ICSID tribunal held that the MFN clause does not extend to dispute settlement provisions provided for in another treaty, unless otherwise established beyond doubt

154 In the *Camuzzi, Gas Natural, National Grid, Siemens, Suez* cases, the MFN clause was sought to be used for the same reason.

155 *Plama*, para 209.

156 Friedland (n 26) 106; *Maupin*, for both disutations, prefers the term "MFN Based Jurisdiction": Maupin (n 13) 159.

157 Ataman-Figanmeşe (n 32) 229.

158 In *Telenor Mobile Communications AS v Republic of Hungary*, the tribunal's assessment was similar: The MFN clause may be used to overcome procedural obstacles; however, it should not be permitted to be used in matters where States parties to the BIT have deliberately preclude ICSID's jurisdiction. In this case, the claimant sought to rely on another treaty's fair and equitable treatment standards and other standards of treatment by circumventing the relevant provision of the Norway-Hungary BIT (n 152), which limited the scope of the dispute settlement provision to expropriation.

159 In the *Berschader* case based on the Belgium-Luxembourg BIT, the arbitral tribunal did not allow the extension of the MFN clause to the dispute settlement clause, despite the existence of a comprehensive MFN clause in Article 2 of the Agreement (in all matters covered by this Agreement): *Vladimir Berschader and Moise Berschader v The Russian Federation,* Case No 080/2004, Arbitration Institute of the Stockholm Chamber of Commerce, Award (21.04.2006): <<https://www.italaw.com/sites/default/files/case-documents/ita0079>_0.pdf Accessed 24 July 2022. For the Belgium-Luxembourg BIT, see Agreement between the Governments of The Kingdom of Belgium and the Grand Duchy of Luxembourg, and the Government of the Union of Soviet Socialist Republics, Concerning the Mutual Encouragement and Protection of Investments <https://edit.wti.org/app.php/document/show/bc883946-ac64-4e50-9b78-8f13137f128e> Accessed 24 July 2022.

160 *Mafezzini,* (n 107) para 54.

in the BIT. At this point, it is clear that there is inconsistent jurisprudence between these approaches.

Conclusion

In our study, we have concluded that some of the debate on the interaction between the MFN clause and the dispute settlement provisions of BITs stems from the wording of the treaties, and some of it stems from arbitral awards that interpret the wording differently. With a few exceptions, it was not until the 2010s that BITs explicitly stated that dispute settlement provisions were excluded from the scope of the MFN provision. In this case, the use of the MFN clause to establish jurisdiction would mean disregarding the intent of the contracting states to the relevant BIT. Although the existing jurisprudence have lacked coherence and clarity, it appears that the confusion created by the two different approaches, *Maffezini-Siemens* and *Salini-Plama*, has resulted in a positive development. We believe that inconsistency in jurisprudence would remain unless BITs limit the scope of the MFN clause. States have now started to clearly reveal their intentions by excluding dispute settlement provisions when determining the scope of the MFN clause in their BITs. As a matter of fact, in this study, in which almost all BITs signed by Turkey were reviewed, the analysis of both the MFN clause and the dispute settlement provisions clearly reveals this change. It is a positive development that the dispute settlement provisions have been excluded from the scope of the MFN clause in the vast majority of the BITs signed by Turkey after 2010.

Nevertheless, there is still a possibility that these discussions may reoccur in arbitration proceedings initiated on the basis of earlier BITs that Turkey has signed.

Hakem Değerlendirmesi: Dış bağımsız.
Çıkar Çatışması: Yazar çıkar çatışması bildirmemiştir.
Finansal Destek: Yazar bu çalışma için finansal destek almadığını beyan etmiştir.

Peer-review: Externally peer-reviewed.
Conflict of Interest: The author has no conflict of interest to declare.
Grant Support: The author declared that this study has received no financial support.

Bibliyografya/Bibliography

Books, Articles and Other Sources

Alexandrov SA, 'Introductory Note to International Centre for the Settlement of Investment Disputes (ICSID): SGS Société Générale de Surveillance S.A. v. Pakistan' (2003) 42(6) ILM 1285-1289.

Ataman-Figanmeşe İ, 'The Impact of the *Maffezini* Decision on the Interpretation of MFN Clauses in Investment Treaties' (2011) 8(2) Ankara Law Review 221-237.

Baklacı P, 'En Çok Gözetilen Ulus Kaydı ve Uyuşmazlık Çözüm Yollarına İlişkin Kurallar', (2009) 5(20) Uluslararası Hukuk ve Politika, 59-78.

Banifatemi Y, 'The Emerging Jurisprudence on the Most-Favoured-Nation Treatment in Investment Arbitration' in Andrea K Bjorklund, Ian A Laird and Sergey Ripinsky (eds.), *Investment Treaty Law: Current Issues III* (BIICIL 2009) 241-273.

Bayraktaroğlu Özçelik G, 'ICSID Hakem Kararlarında "Yol Ayrımı" ("*Fork in the Road"*) Kayıtları' (2020) 40(1) PPIL 497-518.

Collins D, *An Introduction to International Investment Law* (Cambridge University Press 2016).

Çalışkan Y, 'ICSID Jurisdiction: *Whose Dictionary Will be Used for the Definition of Investment and the Scope of Consent'* in Ceyda Süral and Ekin Ömeroğlu (eds), *Foreign Investment Law* (Seçkin 2016) 91-106.

Dolzer R and Schreuer C, *Principles of International Investment Law* (Oxford 2008).

Eskiyörük S and Çağan G, 'Yeni Nesil İki Yanlı Yatırım Anlaşmalarında Güncel Eğilimler', (2021) 19 (220) Legal Hukuk Dergisi 1607-1644.

Fietta S, 'Most Favoured Nation Treatment and Dispute Resolution under Bilateral Investment Treaties: A Turning Point?', (2005) 4 IntlALR 131-138.

Friedland PD, 'The Scope of Most Favoured Nation Treatment Under the Energy Charter Treaty' in Graham Coop and Clarisse Ribeiro (eds), *Investment Protection and The Energy Charter Treaty* (JurisNet 2008) 101-114.

Gaillard E, 'Investment Treaty Arbitration and Jurisdiction Over Contract Claims – the SGS Cases Considered' in Todd Weiler (ed), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron 2005) 325-346.

Ganesh A, 'Cooling of Period (Investment Arbitration)' (2017)7 MPIL 1-15.

Giray FK, 'Türkiye'nin Taraf Olduğu İki Taraflı Yatırımların Karşılıklı Teşviki ve Korunması Anlaşmalarında Öngörülen İhtilaf Çözüm Yolları' (1997) 17(1-2) MHB 217-228.

Gölcüklü İ, 'Umbrella Clauses in the ICSID Arbitration' (2017) 37(2) PPIL 352-375.

Köşgeroğlu Şit B, 'Model İkili Yatırım Anlaşmaları ve Türkiye'nin Model İkili Yatırım Anlaşması Taslağı' (2013) 107 TBB Dergisi 143-172.

Maupin JA, 'MFN-Based Jurisdiction in Investor-State Arbitration: Is there Any Hope for a Consistent Approacah' (2011) 14 J. Int'l Econ L 157-190.

Pazarcı H, *Uluslararası Hukuk Dersleri Birinci Kitap,* (18th edn, Turhan 2019).

Reinisch A, '*Maffezini v Spain Case*, Max Planck Encyclopaedia of Public International Law' (2011) MPEPIL.

Rowe S and Svetlana P, 'Current Trends in 'Umbrella Clause' Claims Arising From Breaches of Contractual Obligations' (2021) International Bar Association https://www.ibanet.org/current-trends-umbrella-clause-claims >Accessed 24 July 2022.

Sarkinovic, TB, 'Umbrella Clauses an Their Policy Implications' (2011) 24 Hague Yearbook of International Law 313-357.

Schreuer C, 'Investment Treaty Arbitration and Jurisdiction over Contract Claims-the Vivendi I Case Considered' in Todd Weiler (ed), *International Investment Law and Arbirtation: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron 2005) 281-323 (Investment).

Schreuer C, 'Travelling the BIT-Route-Of Waiting Periods, Umbrella Clauses and Forks in the Road' (2004) 5(2)The Journal of World Investment & Trade 231-256. (BIT-Route).

Sevgi S, 'En Çok Gözetilen Ulus Kaydının İkili Yatırım Anlaşmalarının Usule İlişkin Hükümleri Üzerindeki Etkisi: *Maffezini* Davası' (2020) 8 (1-2) SHD 89-123.

Sinclair AC and Ramia L, 'MFN Treatment and the Adjudication of Investment Disputes' (2009) 21(2) National Law School of India Review 15-124.

Stoppioni E, 'Jurisdictional Impact of Most-Favoured-Nation Clauses' (2017), http://www.mpi.lu/fileadmin/mpi/medien/research/MPEiPro/EiPro_Sample_Jurisdictional_Impact_of_MFN_Clauses_2017-Feb.pdf

Sur M, *Uluslararası Hukukun Esasları*, (15th edn, Beta 2021).

Tiryakioğlu B, *Doğrudan Yatırımların Uluslararası Hukukta Korunması* (Dayınlarlı 2003) (Doğrudan Yatırmlar).

Tiryakioğlu B, 'Yatırım Tahkiminde (Uyuşmazlık Çözüm Kayıtları Kapsamında) Yetki ve Kabul Edilebilirlik' in Hatice Özdemir Kocasakal and Süheyla Balkar (eds), *Tahkim Anlaşması* (Onikilevha 2020) 87-101 (Yetki).

Uzun E, 'Milletlerarası Hukuk Açısından En Çok Gözetilen Ulus Kaydı' (2004) 24 MHB 741-766 (En Çok Gözetilen Ulus Kaydı).

Uzun E, 'Uluslararası Andlaşmaların Geçici Uygulanması-Viyana Andlaşmalar Hukuku Sözleşmesi 25. Madde' (2018) 9(2) İnÜHFD 187-210 (Viyana Andlaşmalar Hukuku).

Vessel S, 'Clearing a Path Through a Tangled Jurisprudence: Most-Favored-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties' (2007) 32 The Yale Journal of International 125-189.

Wong J, 'Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide between Developing and Developed Countries in Foreign Investment Disputes' (2006) 14 George Mason Law Review 137-179.

Ziegler AR, 'Most-Favoured-Nation (MFN) Treatment' in August Reinisch (ed), *Standards of Investment Protection* (Oxford 2008) 59-86.

Awards

ADF Group Inc v United States of America, ICSID Case No ARB (AF)/00/1, https://www.italaw.com/sites/default/files/case-documents/ita0009.pdf

Bayindir Insaat Turizm Ticaret ve Sanayi A.S. v Islamic Republic of Pakistan, ICSID Case No ARB/03/29, http://www.italaw.com/cases/131

Camuzzi International S.A. v Republic of Argentina, ICSID Case No ARB/03/7, Decision of the Tribunal on Objections to Jurisdiction, https://www.italaw.com/sites/default/files/case-documents/ita0108.pdf

Consorzio Groupement L.E.S.I. DIPENTA v People's Democratic Republic of Algeria, ICSID Case No ARB/03708 http://italaw.com/cases/323

Emilio Agustín Maffezini v Kingdom of Spain, ICSDD Case No ARB/97/7, https://www.italaw.com/sites/default/files/case-documents/ita0479.pdf

Ethyl Corporation v The Government of Canada, (UNCITRAL) http://www.italaw.com/cases/409

Gas Natural SDG, S.A. v The Argentine Republic, ICSID Case No ARB/03/10, https://www.italaw.com/sites/default/files/case-documents/ita0354.pdf

İçkale İnşaat Limited Şirketi v Turkmenistan, (8.3.2016) ICSID Case No ARB/10/24, http://italaw.com/cases/2560

Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v Turkmenistan, Decision on Article VII.2 of the Turkiye-Turkmenistan Bilateral Investment Treaty, ICSID Case No ARB/10/1, https://www.italaw.com/sites/default/files/case-documents/ita0932.pdf

Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v Turkmenistan, Award, ICSID Case No ARB/10/1, http://www.italaw.com/cases/1220

MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile, ICSID Case No ARB 01/07, https://www.italaw.com/sites/default/files/case-documents/ita0544.pdf

Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v Turkmenistan, Decision on Respondent's Objection to Jurisdiction under Article VII (2), ICSID Case No ARB/12/6, http://www.italaw.com/sites/default/files/case-documents/italaw4163.pdf

Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v Turkmenistan, ICSID Case No ARB/12/6, http://www.italaw.com/cases/2036

National Grid PLC v The Argentine Republic, Decision on Jurisdiction, https://www.italaw.com/sites/default/files/case-documents/ita0553.pdf

Plama Consortium Limited v Republic of Bulgaria, Decision on Jurisdiction, ICSID Case No ARB/03/24, https://www.italaw.com/sites/default/files/case-documents/ita0669.pdf

PSEG Global Inc., The North American Coal Corporation, and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v Republic of Turkey, ICSID Case No ARB/02/5, https://www.italaw.com/sites/default/files/case-documents/ita0694.pdf

Ronald S. Lauder v The Czech Republic, (UNCITRAL), http://www.italaw.com/cases/610

RosInvest Co UK Ltd v The Russian Federation, Award on Jurisdiction (SCC Arb V079/2005), https://www.italaw.com/sites/default/files/case-documents/ita0719.pdf

Salini Costruttori SpA and Italstrade SpA v Hashemite Kingdom of Jordan, Decision on Jurisdiction, ICSID Case No ARB/02/13, https://www.italaw.com/sites/default/files/case-documents/ita0735.pdf

SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan, ICSID Case No ARB/10/13, http://www.italaw.com/cases/1009

SGS Société Générale de Surveillance S.A. v Republic of the Philippines, ICSID Case No ARB/02/6, https://www.italaw.com/sites/default/files/case-documents/ita0782.pdf

Siemens AG v The Argentine Republic ICSID Case No ARB/02/08, https://www.italaw.com/sites/default/files/case-documents/ita0788.pdf

Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal S.A. v Argentine Republic ve *AWG Group Ltd v The Argentine Republic (Suez)*, ICSID Case No ARB/03/19, Decision on Jurisdiction, https://www.italaw.com/sites/default/files/case-documents/ita0049.pdf

Telenor Mobile Communications AS v Republic of Hungary, ICSID Case No ARB/03/24, https://www.italaw.com/sites/default/files/case-documents/ita0858.pdf

Vladimir Berschader and Moise Berschader v The Russian Federation, Case No 080/2004, https://www.italaw.com/sites/default/files/case-documents/ita0079_0.pdf

Western NIS Enterprise Fund v Ukraine, ICSID Case No ARB/04/02, http://www.italaw.com/cases/1167