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Drafting MFN Clause in Investment Chapter of Trans-Pacific Partnership Agreement

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TABLE OF CONTENTS

Page

EXECUTIVE SUMMARY

1. This memorandum examines interpretation of Most-Favoured-Nation (MFN) treatment standard for substantive protection in the context of international investment law. It also offers proposals for drafting the MFN clause of the Investment Chapter of the Trans-Pacific Partnership (TPP) Agreement. The main purpose of the proposals is to limit the importation of more favourable substantive treatment from other international treaties by invoking the MFN clause in the TPP.

2. In order to achieve the purpose, the comparison method and classification method are main analysis means used in this memorandum. The research in the memorandum focuses on two aspects. First, the current treaty language study regarding the MFN, including the MFN standards and other provisions relating to its application; and second, the case study, namely the debate on the interpretation of the MFN on the issue of importation of substantive treatments in investment dispute settlement practice, especially the tribunals' attitude.

3. With respect to the treaty language, both the formulation method used by the TPP negotiating States and other typical MFN clauses are examined. More emphasis is put on the analysis of MFN clauses in the NAFTA, Energy Charter Treaty and UK Model BIT due to their influence and importance. Considering Argentina's extensive involvement and experiences on investment arbitrations, its BITs are also taken into account together with its investment arbitration practice.

4. From the study on treaty language, the common features probably useful for limit the application of the MFN clause have been found, such as the terms "in like circumstances", "within the territory", *etc*.

5. More useful conclusions come from the analysis of international investment dispute settlement practice involving the subject issue. The memorandum examines twenty-one cases relating to discussion of the application of substantive treatment from reference treaty through MFN clause in basic treaty, in which five cases under NAFTA and sixteen under other BITs. The cases are divided into three different categories according to the different types of more favorable treatment to be imported. In most of the cases, the

claimants wanted to import more favorable FET treatment and/or umbrella clause. The tribunals were more flexible to the importation of the former but stricter to the latter. The combination of the MFN and the FET in a same provision is more likely to lead the success of the importation.

6. The case study shows even though it's hard to define the *ejusdem generis* principle; it still can form crucial obstacles to the invocation of more favorable treatment through MFN clause. The limitation requiring the more favorable treatment to be imported to fall within the scope of the base treaty is quite useful for the limitation, does not create a significant limitation since most of the more favourable treatments can be found within other international investment agreement.

7. In particular, within the NAFTA framework, it's extremely hard for a claimant to successfully reach an importation compare to other BITs and FTAs. The NAFTA practice offered some important experience. The States could use the reservations in treaty provisions, annex and protocols to limit the application of the MFN. Moreover, using footnote or other documents to record the common intention of negotiation States on the limitation has significant effects while the tribunal makes the interpretation based on the Vienna Convention on the Law of Treaties. The contracting party intervention and the establishment of an interpretation note by Free Trade Commission are also examined. However, it turns out more difficult to achieve a consensus on this under the TPP due to the high number of the contracting states compared to NAFTA practice.

8. The memorandum also classifies Chile's BITs, analyzes its FTAs and relevant cases, which reflects the common features and conclusion drew from the above-mentioned treaty practice.

9. As no common method found in formulating the MFN clause among the TPP negotiating States, this memorandum offers the final proposal in general and three drafted MFN clauses mainly based on the research of aforesaid treaty language and investment dispute settlement practice.

10. The first proposal offers the strictest limitation on the application of MFN. Besides the requirements made on the scope of the base treaty, it also adds a burden of proof that

actually grant of treatment has happened on the claimant. The second proposal only put emphasis on the importation of new standards. It limits the MFN extension for the treatment standards that are already accorded in the base treaty. The last proposal provides limitation of MFN via customary international law principles through *ejusdem generis* and scope of the base treaty.

11. As outlined in the explanatory notes for each proposal, with different level of limitation, the three proposals have different possibility to get accepted by the negotiating States, and meanwhile, have different implications on the application of the MFN clause. As case study shows, unless otherwise provided by treaty text, tribunals were more likely to allow the party to attract better or even new treatment standards through the MFN clause. The three different narrow MFN clauses will help Chile to achieve the desired result, namely the non-importation of more favourable treatment standards into the TPP Investment Chapter.

A. INTRODUCTION

A.1. Structure of the Memorandum

12. In practice, the MFN clause in an international investment treaty has been used to import both more favourable substantive rights and procedural treatment included in other treaties through interpretation by tribunals in investment disputes. That function is apart the other function of MFN: to grant that MFN treatment given through internal measures and regulations (both *de iure* and *de facto*) of investors of a third State would be accorded to the investors of contracting party of the treaty incorporating the MFN provision.

13. This memorandum is constituted of six parts. In the introduction, a brief overview of the subject issue and the main question to be dealt with will be given. In the Section B, we focus on MFN practice regarding international investment law instruments and the related case law. In the Section C, Chilean treaty practice of MFN clauses and related cases will be examined in the purpose of understanding the interpretation method followed by the tribunals. In Section D, we focus on the treaty practice of negotiating States of the TPP.

14. In Section E, we maintain the general proposal and three different draft MFN clauses based on the analysis made under Section B and C of the memorandum. The proposed MFN clauses aim to create three different types of limitations to the application of MFN to the importation of more favourable substantive treaty standards.

15. Section F draws a conclusion of the research, including the future possibility with respect to the interpretation on the MFN clause, as well as the possible attitude of TPP negotiating States.

A.2. Inherent Limitations of MFN Substantive Treatment Extension in General

16. In order to address the question, the comparability of the more favourable treatment and *ejusdem generis* principle have to be examined in the beginning. These two boundaries are essential due to their nature as inherent boundaries to the substantive treatment extension via MFN.

17. The *ejusdem generis* principle in Latin has the dictionary meaning of "of the same class or kind"[1]. Legal meaning of the principle does not go apart from the dictionary meaning; each term in a treaty must be examined in line with the scope or genus of the treaty itself. It has been accepted as a limitation for functioning of MFN in *Ambatielos*[2] case. The tribunal in *Ambatielos* case accepted that a MFN clause could only attract matters belonging to the same category of subject as the clause itself relates to[3]. However, it is not always easy to determine the "kind or class"[4]. As it will be discussed in detail in below sections, the current state of law briefly shows that a MFN clause in the base investment treaty can attract any kind of more favourable treatment provided that the reference treaty is also within the scope of international investment law[5]. Therefore, it is important to have a clear wording in the base treaty in order to prevent *de facto* unlimited importation of standards from reference treaties.

18. This principle has been reflected in the Article 9.1 of the Draft Articles on Most-Favoured-Nation Clauses of the International Law Commission (ILC) as follows:

    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[6].

19. However, it does not give any explanation on how to define the subject matter of the base treaty either.

20. In international trade law area, within the framework of the WTO, the MFN clauses work in a straightforward manner. Each WTO member is obliged to extend any measure accorded to a member to every other member which serves to liberalize the trade. However, such mechanical appliance of MFN clause for any substantive treatment

[1] Definition taken from Black's Law Dictionary Deluxe Ninth Edition
[2] *Ambatielos Case*, Greece v. United Kingdom, Judgment of International Court of Justice, 1952
[3] T. Cole; *The Boundaries of Most Favoured National Treatment In International Investment* Law; SSRN, (2011), p. 35
[4] Newcomb, Paradell; *Law and Practice of Investment Treaties: Standards of Treatment*; Kluwer Law International, (2009), p. 204
[5] R. Dolzer, C. Schreuer; *Principles of International Investment Law*; (2008), p. 190
[6] Draft Articles on Most-Favoured-Nation Clauses, adopted by the International Law Commission at its thirtieth session in 1978

standard in the investment law can result in replacing the negotiations took place before concluding the base investment treaty.

21. The claimant must also prove that the more favourable treatment has been accorded to the investor or investment of the non-contracting party in a similar case. This requirement is mostly regulated in the MFN clauses as "like circumstances". Finding the relevant comparator has been more important in case where the claimant has claimed breach of MFN. In these cases, the claimant has to prove that the more favourable treatment has been offered and granted to an investment or investor of a non-contracting party, which is in like circumstances. In both *Parkerings*[7] and *UPS*[8] cases, the claimants could not succeed in their MFN claims due to tribunals' finding that foreign investment in *Parkerings* and the local investment in *UPS* were not in like circumstances with the claimants' investment.

22. This requirement has not been subject to big diversions in cases where the MFN clause was used for attracting the more favourable treatment from reference treaties. In these cases, the more favourable treatment has been offered to a large number of different types of investments or investors. It is relatively easy for a claimant in that case to find a comparator in a huge list of investments in the reference treaty.

A.3. ILC Draft Articles on MFN Treatment

23. The ILC provided a general definition of MFN treatment in Article 5 of the Draft Articles on Most-Favoured-Nation Clauses which reads as follows:

Most-favoured-nation treatment is treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favourable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State.

[7] *Parkerings-Compagniet AS v Lithuania*, Award on jurisdiction and merits, ICSID Case No ARB/05/8; (2007)
[8] *United Parcel Service of America Inc. v Canada*, Award and separate opinion, Ad hoc-UNCITRAL Arbitration Rules, (2007)

24. Accordingly, it defined the MFN clause as "a treaty provision whereby a State undertakes an obligation towards another State to accord most-favoured-nation treatment in an agreed sphere of relations."[9]

25. The essential of the MFN treatment represented in the above definition is a treatment not less favourable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State. It explicitly appears in MFN clause in BITs and FTAs we examined.

B. TREATY PRACTICE OF THE STATES AND INTERPRETATION BY TRIBUNALS

26. The memorandum examines twenty-one cases relating to discussion of the application of substantive treatment from reference treaty through MFN clause in basic treaty, in which five cases under NAFTA and sixteen under other BITs. From public available resources, no dispute involving the application of MFN clause to substantive treaty standards under ECT can be found.

27. By invoking reference treaties, the claimants mainly intended to import more favourable fair and equitable treatment (FET) and umbrella clause. Other substantive treatments sought were "effective means of asserting claims and enforcing rights" in *White Industries v India*, "full protection and security" in *Impregilo v Argentina*[10], and the fair market value as more favoured compensation calculation method in *CME v Czech Republic*[11], *etc*.

28. Nine out of twenty-one tribunals accepted to import more favourable treatments from reference treaty through MFN clause[12]. The claims of importation in four NAFTA cases were dismissed. In *Pope Talbot v Canada*, the tribunal accepted the invocation but the

[9] *See* Article 4 of the Draft Articles on Most-Favoured-Nation Clauses
[10] *Impregilo SpA v Argentine Republic*, Final award, ICSID Case No ARB/07/17; (2011)
[11] *CME Czech Republic BV v Czech Republic*, Final Award and Separate Opinion, Ad hoc-UNCITRAL Arbitration Rules, (2003)
[12] *See* Annex G.3.

award was annulled afterwards. Five tribunals did not express their view on this issue as they considered it was not necessary to examine it in their cases.

B.1. Typical MFN Clauses and Relevant Practice

B.1.1. NAFTA Article 1103

29. NAFTA formulated a relative detailed framework of MFN. Besides MFN clause in Article 1103, it stipulates standard of treatment in Article 1104 requiring Contracting Party to accord "the better of the treatment required by Articles 1102 (National Treatment) and 1103".

30. The NAFTA Article 1103 MFN[13] clause reads as follows:

Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

31. The MFN clause puts emphasis on "like circumstances" and the covered investment activities. NAFTA Contacting Parties also made reservations and exceptions in Article 1108 to the MFN application. Moreover, the interpretation note NAFTA Free Trade Commission (FTC) has restrained several tribunals from taking action in favor of investors for importation of new treatment standards.

[13] Canada, Mexico and the United States included an exception to Article 1103 for treatment accorded under all bilateral or multilateral international agreements in force or signed prior to the date of entry into force of this Agreement.

32. In accordance with Article 1108, the contracting parties made reservations to their obligation under Article 1103 by two steps.

33. First, it indicates in general the reservations in NAFTA articles. For example, the carve-out from MFN obligations from the following articles:
    a) Certain existing non-conforming measure and their continuation, prompt renewal and amendment (Article 1108.1-3);
    b) Certain measures with respect to government procurement and governmental subsidies or grants (Article 1108.7); and
    c) Certain measures relating to national security (Article 2102), and intellectual property national treatment (Article 1703).

34. Second, it lists specific excluded treatment or areas in Schedule to Annexes of NAFTA. For instance, in Annex IV, the contracting parties take an exception to Article 1103 for treatment accorded under all bilateral or multilateral international agreements in force or signed prior to the date of entry into force of NAFTA. For international agreements in force or signed after the date of entry into force of NAFTA, they excluded treatment involving aviation, fisheries, maritime matters, or relevant treatment of telecommunications transport[14].

35. For the purposes of NAFTA Chapter 11, Article 1131(2) grants the Free Trade Commission the power to issue binding "interpretations" of NAFTA provisions. The interpretation note form the common intention of contracting parties to interpret NAFTA articles. They have binding effects on tribunals in NAFTA arbitration. Therefore establishing a mechanism by the treaty empowering parties themselves to jointly interpreting the provisions after its conclusion can be a practical way to limit the interpretation discretion of tribunal. It can be used for limit the application of MFN as well. The interpretation note of certain Chapter 11 Provisions issued in 2001[15] has been taken into account by investment tribunals.

36. However, it is worth pointing out that interpretation jointly made by contracting parties is a post-conclusion remedy. It will only be helpful for limit the application of MFN if the

[14] See NAFTA Annex IV: Exceptions from Most-Favored-Nation Treatment.
[15] Statement on NAFTA Article 1105 and the Availability of Arbitration Documents, 31 July 2001

contracting parties have common intention on limitation when they formulate the articles of that treaty. Otherwise, any discrepancy will constitute an amendment to the treaty, not an interpretation note. Further, the increasing TPP negotiating States will be much more than NAFTA contracting States. It increases the difficulty to reach a consensus. Under TPP framework, interpretation note can be considered to limit the application of MFN, but it will be less effective than that under NAFTA.

37. NAFTA Article 1116 and 1117 also provide a possible way to limit the application of MFN by dispute resolution clause.

Article 1116: Claim by an Investor of a Party on Its Own Behalf

1. An investor of a Party may submit to arbitration under this Section a claim that ***another Party has breached an obligation under****:*

(a) Section A or Article 1503(2) (State Enterprises), or

(b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,

and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

(...)

Article 1117: Claim by an Investor of a Party on Behalf of an Enterprise

1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that ***the other Party has breached an obligation under****:*

(a) Section A or Article 1503(2) (State Enterprises), or

(b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

(...)

38. As highlighted in these provisions, a claimant can only claim breach of specific provisions of NAFTA. In case a new standard in a reference treaty to be imported, the

issue whether the imported treatment standard can be regarded as an obligation under the NAFTA will need to be discussed first[16].

39. In all NAFTA cases we examined, except the annulled *Pope Talbot* award, the importation of more favoured treatment requested by claimants was dismissed.

40. *Pope Talbot v Canada*[17] was the first NAFTA case involving Article 1103. Claimant claimed breach of Article 1103 but withdrew the claim later on. Claimant also requested to resort to provisions of more favourable FET standards indicated in reference treaties instead of claiming the direct breach of Article 1103. The tribunal accepted such request; however, instead of referring other Canadian treaties, it only stated that Canada treaty practice was following the United States Model BIT and referred to its provisions. It concluded that Canada violated the FET standard[18]. This conclusion was made by the tribunal before the issuance of interpretation note of the Free Trade Commission regarding the narrow interpretation of Article 1105[19].

41. The tribunal did not evaluate retroactive application of Canada's objection. It stated that the claimant could not benefit from Article 1103 since it withdrew this claim at earlier stage. However, it would not change its conclusion on the claim of breach of Article 1105 regardless of the evaluation of Canada's objection due to the fact that Canada's conduct had violated the FET even under the less onerous standard as indicated in the interpretation note[20].

42. In *UPS v Canada*, the claimant first argued that the interpretation note itself was a breach of Article 1103 because Canada offered more favourable FET standard in reference treaties to investments/investors of the third parties. Nevertheless afterwards at the hearing the claimant primarily turned to argue that Canada had breached its obligation as it was stated in the interpretation note. The tribunal noted that this argument of the claim on Article 1103 was contradiction to primary claim of the claimant and held that the claimed breaches of Article 1103 must fail due to no further specification provided.

[16] Meg Kinnear, Andrea K. Bjorklund, et al., *Investment Disputes Under NAFTA: An Annotated Guide to NAFTA Chapter 11*, March 2008, p.1116
[17] *Pope & Talbot Inc v Canada*, Award on the merits of phase 2, Ad hoc-UNCITRAL Arbitration Rules, (2001)
[18] *Pope & Talbot Inc v Canada*, para. 111
[19] Provision regulating the FET standard
[20] This award was annulled because this conclusion of the tribunal.

Therefore, although the claimant also stated in the event that the tribunal accepted the interpretation note, it should be entitled to better treatment imported from reference treaties, this importation issue relating to claim on Article 1103 was not evaluated[21].

43. In *Canadian Cattlemen Claims v United States* case, the claimants wanted to use Article 1103 to justify that breach was not required to be conducted in the territory of the respondent State. Despite claimants argued that nothing in the Article 1103 was regulating such requirement regarding the place of breach, the tribunal held that Article 1101 was the chapeau of the NAFTA Investment Chapter and the territorial requirement of that article was also applying to Article 1103[22].

44. In *Chemtura v. Canada* case, the Respondent as well as the United States and Mexico in their Article 1128 interventions (US Submission, 31 July 2009; Mexico's Submission, 31 July 2009) firmly opposed of the possibility of importing a FET clause from a BIT concluded by Canada[23]. In the US Submission, it stated that by the interpretation note of Article 1105 and subsequent submissions commenting on that interpretation made by all three Parties, the MFN obligation under Article 1103 did not alter the substantive content of the FET treatment obligation under Article 1105(1). It cited the submission made by Canada and confirmed that Mexico and the United States agreed with Canada's position in the *Pope Talbot* case. Mexico referred to US's submission and held the same position in this regard.

45. In *ADF v. United States*, the tribunal was not convinced by the Claimant's argument that the reference treaties (US-Albania BIT and US-Estonia BIT) provided higher standards of "fair and equitable treatment" and "full protection and security" than NAFTA Article 1105. Even assuming the two reference treaties did provide better treatment; the Respondent was entitled to the defense of exception provided by NAFTA Article 1108(7)(a). This exception is about governmental procurement by a Contracting Party, which excludes the application of Article 1103[24].

[21] *United Parcel Svc. of Am. Inc. v. Canada*, Award on the Merits, Ad hoc-UNCITRAL Arbitration Rules (June 11, 2007), paras. 182-184
[22] *Canadian Cattlemen for Fair Trade v United States*, Award on jurisdiction, Ad hoc-UNCITRAL Arbitration Rules, (Jan. 28, 2008)
[23] *Chemtura Corporation v Canada*, Award, Ad hoc-UNCITRAL Arbitration Rules (2 August 2010), para.235
[24] *ADF Group Inc. v United States*, Award, ICSID Case No ARB(AF)/00/1 (Jan. 9, 2003), para. 137

B.1.2. Energy Charter Treaty Article 10(7)

46. Energy Charter Treaty provides similar method with NAFTA to define the application of MFN. Besides formulating a separate article of standard of treatment in Article 10(2), it also incorporates it into the MFN clause. The investor is entitled to enjoy treatment no less favourable than national treatment or MFN, which is the better.

Each Contracting Party shall accord to Investments in its Area of Investors of other Contracting Parties, and their related activities including management, maintenance, use, enjoyment or disposal, treatment no less favourable than that which it accords to Investments of its own Investors or of the Investors of any other Contracting Party or any third state and their related activities including management, maintenance, use, enjoyment or disposal, whichever is the most favourable.

47. The MFN text explicitly mentions "Investments in its Area", but no "like circumstances" requirement. However, according to the Statement of Final Act of the European Energy Charter Conference[25], Canada and the United States made declaration on the application of Article 10. The comparison of treatment accorded to investors of one contracting party, or the investments of investors of one contracting party, and the investments or investors of another contracting party shall be conducted based on "similar circumstances" principle. It is only valid if it is made between investors and investments in similar circumstances[26]. The declaration reflects their same attitude to limit the MFN, which can be found in NAFTA cases discussed above.

B.1.3. Argentina BITs

48. Except for common elements, Argentina-US BIT lists exceptions made by each contracting party in the Protocol. The application of MFN clause "subject to the right of

[25] *See Final Act of the European Energy Charter Conference - Statement submitted by the European Communities to the Secretariat of the Energy Charter pursuant to Article 26(3)(b)(ii) of the Energy Charter Treaty*, Official Journal L 380, 31/12/1994, P.0003-0023
[26] *Ibid*, Declaration with respect to Article 10

each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Protocol to this Treaty"[27].

49. Particularly in Article IV (3) of Argentina-US BIT, it mentions the investor shall be offered of more favorable treatment as regards any measures that one contracting party adopts in relation to losses in necessity and national emergency events.

Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favorable than that accorded to its own nationals or companies or to nationals or companies of any third country, whichever is the more favorable treatment, as regards any measures it adopts in relation to such losses.

50. In *CMS v Argentina*[28], the tribunal considered the MFN was inapplicable to Article XI of Argentina-US BIT (emergency clause) on the basis of *ejusdem generis* principle.

B.1.4. UK Model BIT Article 3

51. Article 3 of 2005 UK Model BIT reflects its main consideration of MFN clause. It combines the MFN with the national treatment standard.

(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 their management, maintenance, use, enjoyment or 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.

[27] *See* Argentina-US BIT 1991, Article II (3)
[28] *CMS Gas Transmission Company v Argentina*, Award, ICSID Case No ARB/01/8(2005), para. 377

(3) 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 12 of this Agreement.

52. This provision contains several common factors the Contracting States used to further define the scope and application of the MFN clause. Compare with the MFN clauses mentioned-above, it expressly limited the subject matters "to the provisions of Articles 1 to 12 of this Agreement".

B.2. Other BITs Practice

B.2.1. Cases Relating to the Importation of FET

53. Except for the combination of national treatment and MFN in a same provision, a combination of MFN with FET can also be noted in BITs.

54. In *Paushok v Mongolia* case, the tribunal allowed for integrating the broader FET provisions contained in the Mongolia-US BIT and Mongolia-Denmark BIT into the base treaty, namely Mongolia-Russia BIT. Article 3.1 of Mongolia-Russia BIT requires that each Contracting Party accords investments of investors of the other Contracting Party and activities associated with investments fair and equitable treatment excluding the application of measures that might impair the operation and disposal with investments.

55. Article 3 of the Mongolia-Russia BIT stipulates that:

1. Each Contracting Party shall, in its territory, accord investments of investors of the other Contracting Party and activities associated with investments fair and equitable treatment excluding the application of measures that might impair the operation and disposal with investments.

2. The treatment *mentioned under paragraph 1 of this Article, shall not be less favorable than treatment accorded to investments and activities associated with investments of its own investors or investors of any third State.*

56. The aforesaid wording led the tribunal to decide that the extension of substantive rights relating to the FET was allowed. "If there exist any other BIT between Mongolia and another State, which provides for a more generous FET, an investor under the Treaty is entitled to invoke it[29]."

57. In *Pantechniki v Albania* case, the tribunal was requested to decide on whether the claimant could import the FET standard via specific MFN clause of the Greece-Albania BIT, which was read as follows[30]:

Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, ***no less favourable than that which the latter Contracting Party accords to its own investors or to investors of any third State****. Resulting payments shall be freely transferable.*

58. Albania did not make an explicit contention against this claim, but argued that other treatment standards indicated in the base treaty were already sanctioning any violation of fair and equitable treatment. The tribunal did not accept the MFN extension nor Albania's contention. The tribunal held that since the claim about arbitrariness of the subject matter measures had subjected to the jurisdiction of Albanian courts, it couldn't have jurisdiction over the same claim[31]. Therefore, MFN claim was rejected.

59. In *LESI v Algeria*[32], the Algeria-Italy BIT contains no specific FET provision. By invoking the MFN clause, the tribunal allowed the importation of FET treatment in Algeria-Belgium-Luxembourg Economic Union BIT. The MFN clause in Article 3.1 of the Algeria-Italy BIT reads as follows:

[29] *Paushok and ors v Mongolia*, Award on Jurisdiction and Liability, Ad hoc-UNCITRAL Arbitration Rules (2011), paras. 250-255
[30] The claimant did not invoke the general MFN clause indicated in Article 3.1 of the treaty due to the fact that the issue subjected to the ICSID Tribunal was about a riot and Article 5 of the treaty was specifically dealing with the riots.
[31] *Pantechniki SA Contractors and Engineers v Albania*, Award, ICSID Case No ARB/07/21 (2009), para. 87
[32] *LESI SpA and ASTALDI SpA v Algeria*, ICSID Case No ARB/05/3; (2008)

"Each Contracting State shall accord in its territory, to investments and returns of nationals and legal entities of the other Contracting State, treatment no less favorable than that it accords to investments and returns of its own nationals or legal entities or those of third States benefiting from the most-favored-nation clause, whichever is the most favourable." (Translated from official French text)[33]

60. An important factor considered by the tribunal was common intention of the Contracting States. The object and purpose of the BIT is investment promotion. Although the MFN clause is under Chapter II entitled "Investment Promotion", it should include both promotion and protection of investment. The restriction on the application of MFN to import FET treatment would be contrary to common intention of investment promotion and protection of Contracting States.

61. Further, in the preamble to the BIT, the Contracting States "desire to…create favorable conditions for investments". The MFN clause is formulated in the BIT. Therefore a Contracting State shall not invoke the absence of specific clause in the BIT to avoid the FET obligation imported by invoking MFN clause.

62. The same reasoning has been used by *Bayindir v Pakistan* tribunal; it applied the MFN clause to import the FET standard from another treaty entered into after the Pakistan-Turkey BIT in question. In Pakistan-Turkey BIT, it mentions that parties agree "FET of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources." However, there is no specific FET clause in the BIT.

63. The tribunal stated this might suggest that Turkey and Pakistan intended not to include an FET obligation in the Treaty, but it was not persuaded that this suggestion ruled out the possibility of importing an FET obligation through the MFN clause expressly included in the Treaty.

[33] Original Article 3.1 of the Algeria-Italy BIT: Chacun des Etats contractants accorde sur son territoire, aux investissements et aux revenus afférents des nationaux et des personnes morales de l'autre Etat contractant, un traitement non moins favorable que celui réservé aux investissements et aux revenus y relatifs de ses propres nationaux ou personnes morales ou de ceux de pays tiers bénéficiant de la clause de la nation la plus favorisée, si celui-ci est le plus avantageux.

"The fact that the States parties to the Treaty clearly contemplated the importance of the FET rather suggests the contrary. Indeed, even though it does not establish an operative obligation, the preamble is relevant for the interpretation of the MFN clause in its context and in the light of the Treaty's object and purpose pursuant to Article 31(1) of the VCLT.[34]"

64. *ATA v Jordan* is another case which the tribunal emphasized the importance of common intention of Contracting States. In the Preamble of the Turkey-Jordan BIT, Jordan and Turkey agreed "that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources".

65. As for the application the MFN clause, the tribunal considered, by invoking it, the State has assumed the obligation to accord to the Claimant's investment fair and equitable treatment from UK-Jordan BIT and treatment no less favourable than that required by international law formulated in Spain-Jordan BIT[35].

66. *Rumeli Telekom v Kazakhstan* is a case in which the State did not contest the importation of FET by virtue of a MFN clause. The Rumeli Telekom alleged by invoking MFN clause of the BIT, Kazakhstan should bear its international obligations to provide FET treatment imposed by customary international law. Relied on the agreement of the parties on the applicability of the MFN clause contained in the Kazakhstan-Turkey BIT, the tribunal decided to import more favourable provisions for the applicable protection standards of FET from Kazakhstan-UK BIT[36].

67. Although there were no arguments made on whether the FET could be imported via MFN clause in Kazakhstan-Turkey BIT. It is notable this Article II put the requirement of national treatment clause and MFN treatment together. The requirements of "in similar situations" and "within the framework of its laws and regulations" are useful for limiting the application of MFN clause.

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[34] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, Award, ICSID Case No ARB/03/29 (2009), para.155.
[35] *ATA Construction, Industrial and Trading Company v Jordan*, Award, ICSID Case No ARB/08/2 (2010), para. 125
[36] *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Kazakhstan*, Award, ICSID Case no ARB/05/16 (2008), para. 575

B.2.2. Cases Relating to the Importation of Umbrella Clauses

68. In several cases, the claimants intended to import the umbrella clause. The tribunals were cautious on this importation than the importation of FET.

69. As discussed above, in *Paushok v Mongolia* case, the tribunal allowed the integration of the broader provisions FET clause contained in the Mongolia-US BIT and Mongolia-Denmark BIT via MFN clause in Mongolia-Russia BIT. Nevertheless, the tribunal accepted the Respondent's argument that a "MFN clause cannot import an entirely new protection into the Treaty" such as an umbrella clause which creates "a new kind of protection in BITs by transforming non-actionable contractual breaches by state instrumentalities into Treaty violations."[37] The tribunal held the opinion that as to the interpretation of the MFN clause contained in Article 3(2), the extension of substantive rights it allows only has to do with Article 3(1), which deals with FET. The investor cannot use that MFN clause to introduce into the BIT completely new substantive rights, such as those granted under an umbrella clause[38].

70. In *Impregilo v Argentina*, the claimant intended to use MFN clause to import the umbrella clause in the Argentina-US BIT[39]. This umbrella clause provides that each Party shall observe any obligation it may have entered into with regard to investments. The tribunal considered whether some of Impregilo's allegations concerning mere contractual issues could access its jurisdiction, by application of the MFN clause in the base treaty (i.e. Argentina-Italy BIT) and the umbrella clause in the Argentina-US BIT. However, the tribunal thought it was an entirely theoretical question since there would be no contractual issues to be considered between Argentina and Impregilo. Therefore it was unnecessary to express an opinion on whether an extension to contractual issues on the basis of a combination of the MFN clause and the umbrella clause would be justified in other circumstances[40].

[37] *Paushok v Mongolia*, Award on Jurisdiction and Liability, para.517
[38] *Ibid.* para. 570
[39] Argentina-US BIT, Article II (2)(c)
[40] *Impregilo SpA v Argentine Republic*, Final award, ICSID Case No ARB/07/17 (2011), paras. 183-187

71. It's worth pointing out that Argentina argued on this point that the umbrella clause in the Argentina-US BIT is not a matter that is governed by the Argentina-Italy BIT, which contains no umbrella clause whatsoever. It's not clear whether a tribunal will accept this argument, but at least the "matters regulated by this Agreement" can be considered as a limit.

72. In *Impregilo v Pakistan* case, the Claimant intended to rely upon the MFN clause in Pakistan-Italy BIT to access ICSID jurisdiction. It wanted to import "observance of commitments" or "umbrella clause" in several BITs concluded by Pakistan, especially Article 11 of the Pakistani-Swiss BIT. The tribunal did not directly against the importation of umbrella clause via MFN. Instead, it stated that even assuming that the "observance of commitments" could be imported; the guarantee would not cover the contracts. Pakistan did not contest the application of MFN clause for importing umbrella clause. It based its argument on "if there is no breach of the Contracts, there cannot be a violation of the umbrella clause" thus invoked[41].

B.2.3. Cases Relating to Other Issues

73. In *Impregilo v Argentina* case, the MFN issue also related to impose the requirement of "full protection and security" in the Argentina-US BIT on the Respondent State. The tribunal considered since there had been a failure to give the investment fair and equitable treatment, it was not necessary to examine whether there had also been a failure to ensure full protection and security[42].

74. *White Industries v India* reached an "effective means of asserting claims" provision contained in Article 4(5) of the India-Kuwait BIT through Article 4(2) of India-Australia BIT, which provides that:

A Contracting Party shall at all times treat investments in its own territory on a basis no less favourable than that accorded to investments or investors of any third country.

[41] *Impregilo SpA v Pakistan*, Decision on Jurisdiction, ICSID Case No ARB/03/3 (2005), para.222
[42] *Impregilo SpA v Argentine Republic*, Final award, para. 334

75. The tribunal made decision in favor of White Industries based on consideration at two aspects. First, the importation does not "subvert" the negotiated balance of the base treaty. Instead, it achieves exactly the result, which the parties intended to reach by incorporating a MFN clause in the base BIT.[43] Second, it's not contrary to the emphasis in the base treaty on domestic law.

76. In *CME v Czech Republic*, the Article 3(5) of Czech Republic-Northlands BIT stipulates that:

If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain rules, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such rules shall to the extent that they are more favourable prevail over the present agreement.

77. This article was interpreted as a provision entitling investments by investors of the other party to enjoy a treatment more favourable than provided by the base treaty. The "fair market value" method was imported from Czech Republic-US BIT for the compensation calculation[44].

78. In *Romak v Uzbekistan* case, based on MFN clause in Switzerland-Uzbekistan BIT, the Claimant requested the tribunal to examine whether Uzbekistan violated more favorable substantive provisions contained in other investment treaties to which Uzbekistan is a party, of international conventions to which Uzbekistan is a party and, in the alternative, of customary international law.

79. Except for FET in Article 3(1) of Uzbekistan-France BIT, the more favorable substantive provisions Romak wanted to import mainly included "effective means for asserting claims and enforce rights" (Article 2(c) of Annex B to Uzbekistan-Italy BIT) and transparency of State activities affecting the operation of the BIT (Article 4.1 of Uzbekistan-Austria BIT).

[43] *White Industries Australia Ltd v India*, Final Award, Ad hoc-UNCITRAL Arbitration Rules (2011), para.11.2.4.
[44] *CME Czech Republic BV v Czech Republic*, Final Award and Separate Opinion, Ad hoc-UNCITRAL Arbitration Rules (2003), para. 500

The tribunal awarded the Claimant did not own an "investment" within the meaning of Article 1 of the base BIT[45]. The importation issue did not discussed by the tribunal. However, based on the case study, such a broad scope of treatment invocation would hard to be accepted by a tribunal.

80. In *Frontier Petroleum v Czech Republic*, the claimant wanted to rely on the MFN clause of the Czech Republic-Canada BIT, which reads as follows:

Each Contracting Party shall grant investors of the other Contracting Party, as regards their management, use enjoyment or disposal of their investments or returns in its territory, treatment no less favourable than that which it grants to investors of any third State.

81. The claimant requested to have the imported right of court access from European Convention for the Protection of Human Rights and Fundamental Freedoms in aid of its denial of justice claim. The tribunal firstly addressed to the issue that rights arising form European Convention for the Protection of Human Rights and Fundamental Freedoms are not connected to the nationality of people. Every person in the territory of the signatory State has the access to the rights indicated in said Convention. In other words, the claimant did not need to use MFN clause of the BIT to access this right. Also the tribunal held that the claim was not pleaded in detail by either of the parties. Therefore, the claim was considered moot[46].

C. TREATY PRACTICE OF CHILE AND POSSIBLE INTERPRETATIONS

82. Under this section, Chile treaty practice in terms of MFN clauses and investment arbitration tribunal's interpretations regarding those treaties will be examined.

[45] *Romak SA v Uzbekistan*, Award, PCA Case No AA280 (2009), para. 211
[46] *Frontier Petroleum Services Ltd. v. Czech Republic*, Final Award, PCA-UNCITRAL Arbitration Rules (2010), para. 338

C.1. BIT Practice

C.1.1 First Group

83. In the first group of the treaties, MFN is regulated as a separate and individual treatment standard. Article 4.2 of the Chile-Australia BIT, which applies only for the disputes regarding the investments made before 6 March 2009, is an example for this group:

A Contracting Party shall at all times treat investments of the investors of one Contracting Party and activities associated with investments in its territory on a basis no less favourable than that accorded to investments of investors of any third country.

84. Article 3.2 of Argentina-Chile BIT, which is the first BIT between two Latin America counties, reads as follows:

Neither Contracting Party shall subject nationals or companies of the other Contracting Party, as regards their activity in connection with investments in its territory, to treatment less favourable than it accords to its own nationals or companies or to nationals or companies of any third State.

85. Article 3.1 of Malaysia-Chile BIT reads as follows:

Investments made by investors of either Contracting Party in the territory of the other Contracting Party shall receive treatment ***which is fair and equitable, and not less favourable than that accorded to investments made by investors of any third State.*** (Emphasis added)

86. In all of the above-mentioned examples, MFN treatment has been offered to the investments as a separate treatment standard. In other words, it is not related or limited to the other treatment standards in the base treaty. If it has been proved that the investment of non-contracting State has been treated in a better way, the investment of the contracting

states will receive the same better treatment. *MTD v Chile*[47] case is a good example for understanding the possible interpretations of the first group MFN clauses.

87. MTD Equity Sdn. Bhd. (MTD), a company incorporated under Malaysian laws, decided to make an investment in Chile. The investment was about purchasing a land and constructing a new city on that land. Even though Foreign Investment Committee granted the permission, the investment could not be conducted because of the obstacles with respect to the local zoning plan. MTD decided to seek remedies against Chile based on Malaysia-Chile BIT.

88. MTD requested the tribunal to incorporate the more favourable treatment standards (which actually are not FET standards) from the Croatia and Denmark BITs by offering a broad understanding of fair and equitable treatment. The tribunal accepted such request with the following reasoning[48]:

The question for the Tribunal is whether the provisions of the Croatia BIT and the Denmark BIT which deal with the obligation to award permits subsequent to approval of an investment and to fulfillment of contractual obligations, respectively, can be considered to be part of fair and equitable treatment…. ***The Tribunal has concluded that, under the BIT, the fair and equitable standard of treatment has to be interpreted in the manner most conducive to fulfill the objective of the BIT to protect investments and create conditions favorable to investments. The Tribunal considers that to include as part of the protections of the BIT those included in Article 3(1) of the Denmark BIT and Article 3(3) and (4) [sic — this should read Article 4(1)] of the Croatia BIT is in consonance with this purpose.*** *The Tribunal is further convinced of this conclusion by the fact that the exclusions in the MFN clause relate to tax treatment and regional cooperation, matters alien to the BIT but that, because of the general nature of the MFN clause, the Contracting Parties considered it prudent to exclude. A contrario sensu, other matters that can be construed to be part of the fair and equitable treatment of investors would be covered by the clause* (emphasis added)

[47] *MTD Equity Sdn Bhd and MTD Chile SA v Chile,* Award, ICSID Case No ARB/01/7, (2004)
[48] *Ibid*, paras. 103-104

89. This interpretation has attracted a serious criticism from the annulment committee. The annulment committee did not regard the importation of new standards to the base treaty as fault in law but did disagree with interpretation of fair and equitable treatment. But the annulment committee clearly stated that the link stated in the Article 3.1 of the BIT does not create any condition for importation of the new standard. More specifically:

The most-favoured-nation clause in Article 3(1) is not limited to attracting more favourable levels of treatment accorded to investments from third States only where they can be considered to fall within the scope of the fair and equitable treatment standard. Article 3(1) attracts any more favourable treatment extended to third State investments and does so unconditionally[49].

90. Therefore, current case law reveals that link established between MFN and any other substantive treatment standard does not provide a limitation for importation of new standards from reference treaties. Unless such limitation is coming from a customary international law rule or a binding interpretation note or from the wording of the treaty, current jurisprudence is keen on not limiting the substantive treatment extension via MFN.

C.1.2. Second Group

91. The second group is the MFN clauses that have been regulated as a joint treatment with national-treatment standard (so called MFNT). First example for this group is Article 4.2 of Lebanon-Chile BIT, which reads as follows:

Each Contracting Party shall accord to the investments of investors of the other Contracting Party made in its territory a treatment which is no less favorable than that accorded to the investments of its own investors or of investors of any third country, if the latter one is more favorable.

92. The second example for this group is Article 3.2 of the Austria-Chile BIT:

[49] *Ibid. at note 63*, para.64

Each Contracting Party shall accord to investments of investors of the other Contracting Party in its territory a treatment which is no less favourable than that accorded to investments made by its own investors or to investments made by investors of any third country, whichever is the most favourable.

93. In both of the examples, contracting states have provided the guarantee that investments of the other contracting party will receive the most-favoured-treatment on a nation-wise basis. The comparator pool has ben widened in this group compared to the first group. Therefore it can be easier to find the more favourable treatment and request application of that treatment.

C.1.3. Third Group

94. Switzerland-Chile and Finland-Chile BIT's are the examples for the third group. In the MFN clauses falling under this group MFN treatment has been directly linked to another treatment (mostly fair equitable treatment).

95. The language of Article 4.2 of Switzerland-Chile BIT creates that the link between FET and MFN as follows:

Each Contracting Party shall ensure fair and equitable treatment within its territory of the investments of the investors of the other Contracting Party. ***This treatment shall not be less favourable*** *than that granted by each Contracting Party to investments made within its territory by its own investors, or than that granted by each Contracting Party to the investments made within its territory by investors of the most favoured nation, if this latter treatment is more favourable. (*Emphasis added)

96. In this group of clauses, MFN is directly related to the other treatment standard indicated in the clause. Therefore, this type of MFN clause will only attract more favourable treatments, which can be directly linked with the treatment linked to the MFN in the base treaty. However, due to the debated scope of the FET[50], this link can led up with no pragmatic result and MFN can be used to import more favourable treatment.

[50] See footnote no. 63

C.2. FTA Practice

97. One should also note the MFN clauses in free trade agreements (FTA). The wording of the MFN provisions in FTAs concluded by Chile[51] are also contains a separate and individual MFN treatment standard. Article 10.3 of the US-Chile FTA is a good example for this:

1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

98. Main difference in the wording of the FTAs is the pre-establishment aspects of the MFN clause. Due to the nature of the FTAs, the investors and investments are granted with the pre-entry and post-entry standards. This difference does not create a significant difference in determining the limits of the substantive treatment extension via MFN due to the broad wording of the clauses.

99. Nevertheless, FTA Contracting Parties used "annex" or "footnote" in treaty texts or negotiating drafts to limit the scope of MFN. With the explicit wording, the discretion of tribunal's interpretation of MFN will be limited in the scope desired by the parties.

100. The limitation by annex has been used in FTA concluded by Chile. In Chile-Colombia FTA, Parties states the limitation of MFN clause (Article 9.3) in Annex 9.3 as follows:

[51] Chile signed FTA with Turkey on 14 July 2009, Australia on 30 July 2008, Japan on 27 March 2007, Colombia on 27 November 2006, Peru on 22 August 2006, Panama on 27 June 2006, China on18 November 2005, EFTA on 26 June 2003, United States of America on 6 June 2003, Republic of Korea on 15 February 2003, Costa Rica, El Salvador, Guatemala, Honduras (Chile-Central America) on 18 October 1999, Mexico (ACE 41) on 17 April 1998, Canada on 5 December 1996, MERCOSUR (ACE 35) on 25 June 1996, Vietnam on 12 November 2011 and Malaysia on 13 November 2010. Except for the last two FTAs, the others have entered into force.

The Parties agree that the scope of Article 9.3, covers only matters relating to the establishment, acquisition, expansion, management, conduct, operation, sale or other disposition related to the investment and, therefore, does not apply to procedural matters including dispute resolution mechanisms as contained in Section B of this Chapter. (Translated from Spanish text) [52]

Canada-Peru FTA followed the same way. It formulated similar wording in Annex 804.1 to limit the application of MFN[53].

The 2003 Free Trade Agreement of the Americas (FTAA) Draft and the CAFTA-DR negotiating text included footnotes to limit its MFN clause to substantive treatment.

D. TREATY PRACTICE OF TPP NEGOTIATING STATES

D.1. Australia[54]

101. MFN, unlike national treatment standard, is included in all of the Australia BIT's for post-establishment investments[55]. In the BIT's concluded by Australia, the MFN is as follows in majority of the treaties:

Each Contracting Party shall at all times treat investors and investments in its own territory on a basis no less favourable than that accorded to investors of any third country

[52] Original Annex 9.3 of Chile-Colombia FTA: "Las Partes acuerdan que el ámbito de aplicación del Artículo 9.3, sólo comprende las materias relacionadas al establecimiento, adquisición, expansión, administración, conducción, operación, venta u otra disposición relativa a la inversión y, por lo tanto, no será aplicable a materias procedimentales, incluyendo mecanismos de solución de controversias como el contenido en la Sección B de este Capítulo."

[53] Annex 804.1 of Canada-Peru FTA: "For greater clarity, treatment 'with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments' referred to in paragraphs 1 and 2 of Article 804 (MFN clause) does not encompass dispute resolution mechanisms, such as those in Section B, that are provided for in international treaties or trade agreements."

[54] *See* signed BITs of Australia: Australia/Argentina BIT 1995; Australia/Chile BIT 1996; Australia/China BIT 1988; Australia/Czech Republic BIT 1993; Australia/Egypt BIT 2001; Australia/Hong Kong BIT 1993; Australia/Hungary BIT 1991; Australia/India BIT 1999; Australia/Indonesia BIT 1992; Australia/Laos BIT 1994; Australia/Lithuania BIT 1998; Australia/Mexico BIT 2005; Australia/Pakistan BIT 1998; Australia/Papua New Guinea BIT 1990; Australia/Peru BIT 1995; Australia/Philippines BIT 1995; Australia/Poland BIT 1991; Australia/Romania BIT 1993; Australia/Sri Lanka BIT 2002; Australia/Turkey BIT 2005; Australia/Uruguay BIT 2001 and Australia/Vietnam BIT 1991.

[55] Please note that Australia-Turkey BIT also creates pre-establishment treatment.

and their investments, provided that a Contracting Party shall not be obliged to extend any treatment, preference or privilege resulting from:
(a) any customs union, economic union, free trade area or regional economic integration agreement to which the Contracting Party belongs; or
(b) the provisions of a double taxation agreement with a third country.

102. The provision only carves out the privileges granted in an FTA system and the privileges given to the investor because of the double taxation agreements. However, taxation measures resulting in expropriation was excluded. And in case of inconsistency with a tax convention, the convention prevails.

103. Since the wording of the clause does not provide any kind limitation for importation of more favourable treatments from reference treaties, it is possible that future claimants can be successful in such a claim.

D.2. New Zealand[56]

104. In New Zealand BIT's, the combination of MFN clause with the national treatment standard can be found. It is not possible to see any kind of limitation to the standard MFN clause which reads as follows:

Neither Contracting Party shall in its area subject investments or returns of investors of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of investors of any other State or, subject to its laws and regulations, that which it accords to investments or returns of its own investors.

Neither Contracting Party shall in its area subject investors of the other Contracting Party as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to investors of any other State or, subject to its laws and regulations, that which it accords to investments or returns of its own investors.

[56] *See* signed BITs of New Zealand: Argentina/New Zealand BIT 1999; Chile/New Zealand BIT; China/New Zealand BIT 1988 and Hong Kong Special Administrative Region of China/New Zealand BIT 1995

D.3. United States of America[57]

105. The US Model BIT also does not stipulate limitation to substantial extension of standards via MFN[58].

Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

106. However, NAFTA interpretation note and consistent submissions of the NAFTA disputes, which do not involve the US Government, prove that the US is also keen to limit the MFN provision to actual treatment situation instead of importation of hypothetical standards into the original BIT by the investor.

D.4. Peru, Singapore, Malaysia, Brunei and Vietnam

107. In Peru BITs[59], Malaysia[60] and Singapore BITs,[61] MFN clauses are formulated as a joint treatment with national treatment standard for investments. Except for FTA and taxation, there is no special limit to the application of MFN.

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[57] *See* signed US BITs on http://www.unctadxi.org/templates/DocSearch.aspx?id=779%20
[58] Please see below para. 106 for analysis on 2012 Model BIT
[59] *See* signed BITs of Peru: Argentina/Peru BIT 1994; Australia/Peru BIT 1995; Belgium–Luxembourg Economic Union/Peru BIT 2005; Canada/Peru BIT 2006; China/Peru BIT 1994; Denmark/Peru BIT 1994; France/Peru BIT 1993; Germany/Peru BIT 1995; Italy/Peru BIT 1994; Netherlands/Peru BIT 1994; Spain/Peru BIT 1994; Switzerland/Peru BIT 1991 and United Kingdom/Peru BIT 1993.
[60] *See* signed BITs of Malaysia: Argentina/Malaysia BIT 1994; Austria/Malaysia BIT 1985; Belgium–Luxembourg Economic Union/Malaysia BIT 1979; China/Malaysia BIT 1988; Czech Republic/Malaysia BIT 1996; Denmark/Malaysia BIT 1992; France/Malaysia BIT 1975; Germany/Malaysia BIT 1960; Hungary/Malaysia BIT 1993; Malaysia/Italy BIT 1988; Netherlands/Malaysia BIT 1971; Pakistan/Malaysia BIT 1995; Poland/Malaysia BIT 1993; Spain/Malaysia BIT 1995; Switzerland/Malaysia BIT 1978; and United Kingdom/Malaysia BIT 1981.
[61] *See* signed BITs of Singapore: China/Singapore BIT 1985; Czech Republic/Singapore BIT 1995; France/Singapore BIT 1975; Germany/Singapore BIT 1973; Hungary/Singapore BIT 1997;

108. It is not possible to draw a common ground for Brunei BIT's due to the fact that only two BIT's ratified by Brunei are available in public area.[62] In Brunei-China BIT, MFN clause is offered jointly with national treatment standard for investments and with a limitation to the treatment standards indicated in the base treaty. In Brunei-Germany BIT, it's a separate treatment standard.

109. It is also not common to see any limitation on MFN clauses in Vietnam BITs except the carve-out provision for FTA privileges granted to third party investors.[63]

110. The main point of this analysis is to understand whether it is possible to draw a common approach between the negotiating parties, which may be useful for drafting the MFN Clause for the TPP Investment Chapter. However, by examining the BIT practice of the negotiating States, a common intention between the negotiating States cannot be found. Therefore, in the next section of this memorandum instead of offering a narrower MFN which seems to be in line with the BIT practice of the parties or their negotiation intention, the proposed draft MFN clause will more based on the analysis of model MFN clauses and of tribunals' interpretation in investment dispute settlement.

D.5. Japan[64]

111. It is also still worth examining Japan BITs since Japan is active in preparing to join TPP. In Japan BITs, the MFN clause has been limited to business activities or investment activities. However, this limitation does not prohibit the importation of standards due to its broad language. For example, in Japan-Egypt BIT the examples for business activities are indicated as "every type of establishment, management, employment of special

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Netherlands/Singapore BIT 1972; Poland/Singapore BIT 1993; Singapore/Pakistan BIT 1995; Slovenia/Singapore BIT 1999; Switzerland/Singapore BIT 1978 and United Kingdom/Singapore BIT 1975.

[62] *See* signed BITs of Brunei: China/Brunei Darussalam BIT 2000 and Germany/Brunei Darussalam BIT 1998.

[63] *See* signed BITs of Vietnam: Argentina/Vietnam BIT 1996; Australia/Vietnam BIT 1991; Austria/Vietnam BIT 1995; Belgium–Luxembourg Economic Union/Vietnam BIT 1991; China/Vietnam BIT 1992; Czech Republic/Vietnam BIT 1997; Denmark/Vietnam BIT 1993; France/Vietnam BIT 1992; Germany/Vietnam BIT 1993; Hungary/Vietnam BIT 1994; Italy/Vietnam BIT 1990; Japan/Vietnam BIT 2003; Netherlands/Vietnam BIT 1994; Poland/Viet Nam BIT 1994; Russian Federation/Vietnam BIT 1994; Switzerland/Vietnam BIT 1992; and United Kingdom/Vietnam BIT 2002.

[64] *See* signed BITs of Japan: China/Japan BIT 1988; Japan/Bangladesh BIT 1998; Japan/Cambodia BIT 2007; Japan/Egypt BIT 1977; Japan/Hong Kong BIT 1997; Japan/Republic of Korea BIT 2002; Japan/Lao People's Democratic Republic BIT 2008; Japan/Mongolia BIT 2001; Japan/Pakistan BIT 1998; Japan/Russian Federation BIT 1998; Japan/Sri Lanka BIT 1982; Japan/Turkey BIT 1992 and Japan/Vietnam BIT 2003.

personnel and conclusion/execution of contracts". Apart from this explanatory note, in Japan-Colombia BIT a special has been regulated in MFN provision for preventing importation of dispute resolution clauses via MFN, but none of these exception clauses regulate any limitation for importation of new treatment standards.

E. PROPOSALS FOR DRAFTING TPP MFN CLAUSE

112. In this section, we summarize the possible methods that can be used to limit the importation of more favorable treatment from reference treaty based on study on the previous cases and treaty formulation. We then propose three MFN clauses with different limitations on substantive treatment extension.

E.1. General Propose on Possible Limitation Methods

113. First of all, the explicit wording of limitation in a MFN clause itself is the most important and effective way to reach the limitation purpose. Based on the discussion in Section A, B and C, three draft MFN clauses are formulated in the following sub-section. The terms used in these draft clauses, including "in like circumstances", "within the territory", the requirements about the scope of the base treaty and *the ejusdem generis* principle form obstacles to the invocation of more favorable treatment through MFN clause. Furthermore, the wording used by 2005 UK Model BIT limiting the application of MFN clause to specific provisions in the base treaty is a practical way if negotiating parties can reach agreement on this.

114. Noted more from FTA practice, the covered activities of MFN can also limited by the contracting parties in "establishment, acquisition, expansion, management, conduct, operation, sale or other disposition related to the investment". However, from the case law study, it is a broad scope similar to "investment of investor". For avoiding unnecessary debate on the scope of the covered activities among TPP negotiating States, the latter language is used in the proposed three MFN clauses in the following sub-sections. Nevertheless, if TPP negotiating States can reach agreement on a more limited scope of the covered activities, the NAFTA formulation still can be taken as reference.

115. Second, as an alternative to the MFN clause wording itself, dispute resolution clause can also serve as a limitation for litigation relating to the imported more favorable treatments. This method has been used in NAFTA Article 1116 and 1117. In accordance these two provisions, a claimant can only claim breach of specific provisions of NAFTA. The same method can be used for the TPP. If the dispute resolution clearly regulates that the arbitral tribunal will only have jurisdiction for resolving the disputes regarding obligation arising out of TPP; the arbitral will not have jurisdiction to deal with imported new or improved obligations.

116. Third method is making reservations to the application of MFN clause. The reservation can be made collectively by all negotiation States in the TPP text, or separately by a negotiating State in annex or protocol to the TPP. The text of NAFTA can be reference. For example, if Chile intend to prevent the invocation by MFN from all current existing treaties signed by Chile, the reservation can be made as follows:

"Chile takes an exception to Article [MFN Clause] for treatment accorded under all bilateral or multilateral international agreements in force or signed prior to the date of entry into force of this Agreement."

117. For treaties in force and that to be signed after the conclusion of TPP, Chile can put a specific time limit on it in reservation if it deems fits. The reservation can also be made in form of excluding some activities, like the following:

"For international agreements in force or signed after the date of entry into force of this Agreement, Chile takes an exception to Article [MFN Clause] for treatment accorded under those agreements involving [aviation, fisheries, maritime matters, etc.]"

118. At last, the mechanisms of party interpretation and intervention have been proved very strong to block the invocation through MFN clause in NAFTA system. Although as discussed above in B.1.1, it will be more difficult to attain the same effect with NAFTA FTC under TPP framework, but the establishment of an interpretation committee making binding interpretations still can be considered. In the event a dispute arose, an interpretation reached by representatives of contracting States in the interpretation

committee probably will be the last way to limit the discretion of the tribunal for interpreting the TPP.

E.2. Draft MFN Clauses

E.2.1. First Proposal

119. This proposal is aimed to limit any kind of substantive treatment extension via the MFN clause in the base treaty.

Each Contracting Party shall at all times treat investors and investments in its own territory on a basis no less favourable than that given to investors of any third country and their investments in like circumstances, provided that investor proves that the more favourable treatment has been given to the investments or investors of the Non-Contracting Party in the territory of the Contracting Party. The Contracting Party is not obliged to accord the proved more favourable treatment if the more favourable treatment is not one of the treatment standards regulated under this treaty or the more favourable treatment extends the scope of the treatment standards regulated under this treaty.

For avoidance of doubt, this provision does not cover the substantive protection standards indicated in other treaties.

120. First characteristic of this clause is it provides an additional condition for the application of MFN. The contracting party will be obliged to offer the more favourable treatment if investor can show that the requested more favourable treatment has been given in the territory of that contracting party. The following two exceptions will not apply unless investor succeeds in proving the more favourable treatment.

121. The proven more favourable treatment will apply only if requested treatment falls under both of the following categories: (i) the requested treatment has to be within the scope of the treatment standards already indicated in the TPP and (ii) the requested treatment must not widen the scope of current treatment standards indicated in the TPP. As a result, such clause will not serve as a tool for importing new or improved treatment standards to the

TPP disputes. The claimant investors will only have the chance to claim breach of the MFN by proving the more favourable treatment under the conditions mentioned above.

122. For example, if a claimant initiates arbitration against Chile based on the TPP, the claimant wants to invoke the FET standard from Chile-Denmark BIT by using the MFN clause of the TPP. In order achieve this purpose the claimant has to prove that: (i) a Danish investor or investment has been given this better FET standard; (ii) FET standard is regulated under TPP therefore it is not an alien standard to FET; and (iii) FET standard from Chile-Denmark BIT does not extend the scope of the FET standard regulated under the TPP. The claimant will not be able to invoke the FET standard form Chile-Denmark BIT unless these three cumulative conditions have been met.

123. Based on NAFTA experience, US and Canada can favor such approach since it will not change the scope of the TPP by using MFN as an importation tool. However, this proposal contains the risk of leaving MFN clause without any significance. Under the above-mentioned three conditions, it may impossible to use MFN clause as an importation tool for invoking the better standards mainly due to the third condition. If the treatment to be imported has to fall within the same scope as that originally offered treatment under the base treaty, this treatment will be more or less the same with the original treatment. Therefore, in practice this proposal may make the MFN clause not to be used as an importation tool at all. The only possibility of this standard to be used will be claiming the breach of MFN standard itself. However, in most of the MFN cases, breach of MFN is not claimed at all. In almost all of the cases the claimants' intention is to attract the more favourable treatment. Therefore, the usage of MFN will relatively be limited.

E.2.2. Second Proposal

124. This proposal has the purpose of only importing the treatment standards, which are not alien to the TPP Investment Chapter.

Each Contracting Party shall at all times treat investors and investments in its own territory on a basis no less favourable than that accorded to investors of any third country and their investments in like circumstances, provided that any Contracting Party shall not

be obliged to offer new types of protection standards or substantive treatment standards which have not been indicated in this treaty.

125. Before importing and applying the new standards, the tribunal has to show that the more favourable treatment is within the scope of the treatment indicated in the base treaty. Purpose of this clause is to prohibit the investment treaty tribunals to accept importation of the new treatment standard which have not been indicated in the base treaty and maybe even not negotiated by the contracting States of the base treaty. However, the investors will be able to attract improved or more favourable treatment standards, which are already granted in the TPP.

126. In this case, if the claimant launches arbitration against Chile based on the TPP and wants to invoke the FET standard from Chile-Denmark BIT and the TPP does not contain FET standard, the claimant will not be able to attract the FET clause. However, if TPP contains FET standard as a substantive protection standard and the investor proves that FET standard regulated under the Chile-Denmark BIT is more favorable to the investor compared to FET standard regulated under TPP, the investor can invoke FET from Chile-Denmark BIT by using the MFN clause in the TPP.

E.2.3. Third Proposal

127. This proposal does not offer any specific condition or carve out provisions other than the customary international law rules.

Each Contracting Party shall at all times treat investors and investments in its own territory on a basis no less favourable than that accorded to investors of any third country and their investments in like circumstances, provided that any Contracting Party shall not be obliged to offer new types of treatment in case such importation be against the ejusdem generis principle or the more favourable treatment would be outside the scope of this treaty.

128. As stated above, *ejusdem generis* and scope of the base treaty are limitations arising from customary international law rules. Tribunals on several cases mentioned these principles, however they interpreted these principles broadly. For example in *MTD v Chile* case, the

tribunal stated that since the scope of the treaty is protection of investments, any treatment standard regarding protection of investments is within the scope of the base treaty. Also the tribunal in *CME v Czech* case did not regard these principles as restrictive for incorporating new treatment standards.

129. The purpose of this proposal is relying on its physibility. As stated in Section D most of the BITs concluded by the negotiating States are similar to the third proposal. Therefore, it can have a big chance of being accepted by the parties, however it will most probably not serve as limit for importation of new treatment standards.

130. US 2012 Model BIT also enhances the success chance of this proposal. There were possibilities regarding changing the substantive protections in the BIT. However, these possibilities were not accepted, including the possibility of carving out the broad treatment standards. It turned out by still keeping the broad wording of the MFN treatment in 2004 Model BIT.

131. Under this proposal, we cannot foresee any different examples other than the *MTD, Bayindir or CME* cases. The claimant will be able to invoke any better treatment standard form reference BIT's if it proves that the reference treaty also concerns protection of investments. However, the mentioning of the *ejusdem generis* principle will reduce the burden of proof from the respondent State for a defense on such claim.

F. CONCLUSION

132. For figuring out the features of current formulation methods for MFN clause and potential defects, the typical MFN texts in BITs and FTAs have been firstly analyzed in general together with relevant cases in this memorandum. The main characteristics, common elements and basic principles of MFN clause reflected in typical MFN texts therefore became clear. Meanwhile, the case study provided a general overview of tribunals' attitude towards the importation of substantive treatment via MFN clause. In the majority of the cases that have allowed the extension, the main reason of the tribunals' acceptation was the language of the MFN left the possibility for such interpretation. Unless otherwise

provided by text, tribunals were more likely to accept to attract better or even new treatment standards through MFN.

133. The Chile BIT practice and related cases then have been examined as well, followed by the analysis on treaty languages of MFN of other TPP negotiating States. Given no common intention or drafting method could be drawn from treaty languages of TPP negotiating States, the drafting proposals mainly based on analysis of typical MFN clauses and precedent tribunals' interpretations.

134. Inspired by above-mentioned analysis, some conclusions about possible limitation methods in general have been drew before giving the proposed MFN clauses. The drafted three MFN clauses for TPP Investment Chapter reflected the useful limitation on treaty text stated in said conclusions. They provided different levels of limitation to the importation of treatment standards from reference treaty.

135. As it has already stated in our explanatory notes of draft proposals, according to the NAFTA practice, it seems that US will prefer the strict limitation. In the event that Canada and Mexico join the TPP in the near future and participate in the negotiation on the investment chapter, they may follow US's way as the same we can see from previous NAFTA cases. It's hard to find that other negotiating States limit the application of MFN for importing substantive treatment in their treaty language. Depending on their roles to be more as host State or home State for investor, the negotiating States will hold diverse opinions on this issue. As no cases involved these States either, an appropriate conclusion about their attitude is not practical to make at this stage.

G. ANNEXES

G.1. MFN Clauses in Chile BITs

No.	State	Drafting Method	FTA Exceptions	Taxation Exceptions	Other Exceptions	Specific Regulations
1	Argentina	Regulated as a separate treatment	Yes			Concessionary financed investments are also regarded as investments
2	Australia	Regulated as a separate treatment	Yes			
3	Austria	Regulated as a joint treatment with national treatment standard	Yes	Yes		
4	China	Regulated as an accessory of fair and equitable treatment standard and protection standard	Yes	For double taxation treaties	Frontier trade treatments	
5	Denmark	Regulated as a separate treatment for investors, investments and returns of investments				Leased goods for investments are regarded as investments
6	Finland	Regulated as an accessory of fair and equitable treatment standard for investments of investors	Yes	For double taxation treaties		Leased goods for investments are regarded as investments
7	Greece	Regulated as a joint treatment with national treatment standard	Yes	For treaties related partly or wholly to taxation		
8	Hungary	Regulated as a joint treatment with national treatment standard for investments of the investors	Yes	For treaties related partly or wholly to taxation		
9	Indonesia	Regulated as a separate treatment	Yes	For treaties related partly or wholly to taxation		Treaty will apply to only investments admitted in line with Foreign Investment Law
10	Korea	Regulated as a separate treatment for investments, investors and returns	Yes	For treaties related partly or wholly to taxation		

No.	State	Drafting Method	FTA Exceptions	Taxation Exceptions	Other Exceptions	Specific Regulations
11	Lebanon	Regulated as a joint treatment with national treatment standard for investments of the investors	Yes	For treaties related partly or wholly to taxation		
12	Netherlands	Linked to the treatment standards indicated in the reference treaty	Yes			Specific provision which allows importation of the treatment standards not indicated in the reference treaty
13	Poland	Regulated as a joint treatment with national treatment standard	Yes	For treaties related partly or wholly to taxation		
14	Swiss	Regulated as an accessory of fair and equitable treatment standard for investments of investors	Yes	For double taxation treaties		
15	UK	Regulated as a joint treatment with national treatment standard for investments of the investors	Yes	For taxation legislation and treaties		Special application provision

G.2. MFN Clauses in TPP Negotiating States' BITs

No.	State	Drafting Method	FTA Exceptions	Taxation Exceptions	Other Exceptions	Specific Regulations
1	Australia	Regulated as a separate treatment for investments	Yes	Double taxation treaties		
2	Brunei	In China BIT, the MFN is limited to the treatment standards indicated in the base treaty. In Germany it is regulated as a separate treatment standard	Yes	For matters related to taxation		
3	Japan	Linked to investment activities such as establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and disposal of investments	Only in Turkey and South Korea BIT	For any tax measures	Government procurement	
4	New Zealand	Regulated as a separate treatment for investments, investors and returns	Yes	For matters of taxation		
5	Peru	Regulated as a joint treatment with national treatment standard for investments	Yes	For matters related to taxation		
6	Malaysia	Regulated as an accessory of fair and equitable treatment standard for investments of investors	-	-		
7	Singapore	Regulated as a joint treatment with national treatment standard for investments	Yes	For matters related to taxation		
8	US	Regulated as a separate treatment for investments and investors	Yes	For all taxation measures except measures resulting in expropriation and in case of inconsistency with a tax convention such convention prevails		MFN clause is limited to establishment, acquisition, expansion, management, conduct, operation and disposition of investments
9	Vietnam	Regulated as a separate treatment for investments	Yes	For matters related to taxation		

G.3. List of Investment Arbitration Cases Concerning Application of MFN Clause

No.	Claimant	Respondent	Arbitration Procedure	Date of Award	Base Treaty	Reference Treaty	Import of Claimed More Favoured Treatment
1	White	India	UNCITRAL	30 November 2011	India-Australia BIT	India-Kuwait BIT	Accepted
2	Pantechniki	Albania	ICSID	28 July 2009	Greece-Albania BIT	Other Albanian BIT's	Dismissed
3	LESI	Algeria	ICSID	12 November 2008	Algeria-Italy BIT	Algeria-Belgium-Luxembourg Economic Union	Accepted
4	Impregilo SpA	Argentina	ICSID	21 June 2011	Argentina-Italy BIT	Argentina-US BIT	Tribunal recorded claimant's contention of import, but considered it was not necessary to examine it in this case.
5	CMS	Argentina	ICSID	12 May 2005	US-Argentina BIT	Other Argentina BITs	Dismissed
6	Chemtura	Canada	UNCITRAL	2 August 2010	NAFTA	16 Canadian BITs entered into force after 1 January 1994	Dismissed
7	UPS	Canada	UCNITRAL	24 May 2007	NAFTA	Other Canadian BIT's	No specific discussion on importation issue, but the claim of MFN breach was dismissed.

No.	Claimant	Respondent	Arbitration Procedure	Date of Award	Base Treaty	Reference Treaty	Import of Claimed More Favoured Treatment
8	Pope Talbot	Canada	UNCITRAL	10 April 2001	NAFTA	US Model BIT[65]	Accepted. Award annulled afterwards.
9	MTD	Chile	ICSID	25 May 2004	Chile-Malaysia BIT	Chile-Croatia BIT, Chile-Denmark BIT	Accepted
10	Frontier Petroleum Services	Czech Republic	UNCITRAL	12 November 2010	Canada-Czech Republic BIT	European Convention for the Protection of Human Rights and Fundamental Freedoms	Dismissed
11	Impregilo SpA	Pakistan	ICSID	22 April 2005	Pakistan-Italy BIT	Pakistan-Switzerland BIT	No view from the tribunal.
12	Paushok	Mongolia	UNCITRAL	28 April 2011	Mongolia-Russia BIT	Mongolia-US BIT, Mongolia-Denmark BIT	Partially accepted
13	CME	Czech Republic	UNCITRAL	14 March 2003	Czech Republic-Netherlands BIT	Czech Republic-US BIT	Accepted
14	Siag	Egypt	ICSID	1 June 2009	Egypt-Italy BIT	Greece-Egypt BIT	Tribunal considered that no need for Claimant to invoke rights under Greece-Egypt BIT.
15	ATA	Jordan	ICSID	18 May 2010	Jordan-Turkey BIT	Jordan-UK BIT, Jordan-Spain BIT	Accepted
16	Rumeli	Kazakhstan	ICSID	29 July 2008	Kazakhstan-Turkey BIT	Kazakhstan-UK BIT	Accepted. Respondent agreed with the import.

[65] Tribunal held that the US Model BIT practice was followed by Canada.

No.	Claimant	Respondent	Arbitration Procedure	Date of Award	Base Treaty	Reference Treaty	Import of Claimed More Favoured Treatment
	Telekom						
17	Bayindir	Pakistan	ICSID	27 August 2009	Pakistan-Turkey BIT	Pakistan-Switzerland BIT, Pakistan-Denmark BIT	Accepted
18	Austrian Airlines	Slovak	UNCITRAL	9 October 2009	Slovak-Austria BIT	Other Slovak BITs	No view from the tribunal.
19	Canadian Cattlemen	US	UNCITRAL	28 January 2008	NAFTA	Other USA BIT's	Dismissed
20	ADF (Canada)	US	ICSID Additional Facility Rules	9 January 2003	NAFTA	US-Albania BIT, US-Estonia BIT	Dismissed
21	Romak SA (Switzerland)	Uzbekistan	PCA/ UNCITRAL Arbitration Rules	26 November 2009	Uzbekistan-Switzerland BIT	Uzbekistan-Italy BIT, Uzbekistan-Austria BIT, Uzbekistan-France BIT	No view from the tribunal.

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