The Interaction of Most-Favored-Nation (MFN) Clauses
With Dispute Settlement Provisions in Investment Treaties
- A New Continent to Discover?

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A. Introduction

I. Background

Has Maffezi 1 opened the door to an entire new continent for the application of most-favored-nation (MFN) clauses? The “Maffezi Factor” 2 certainly resounds throughout the world of international arbitration. “Who’s Afraid of Maffezi?” 3 commentators wonder. In Maffezi, an Argentine investor in an enterprise for the production and distribution of chemicals in Spain commenced an ICSID arbitration alleging violations of the Argentina-Spain BIT. He relied on the MFN clause in the Chile-Spain BIT, which contained a six-month waiting period, to bypass the 18-month waiting period in the Argentine BIT. The “radical decision” 4 taken in this case is the first in a series to extend the scope of an MFN clause to a bilateral investment treaty’s (BIT) dispute resolution mechanism. Traditionally, 5 such a clause had been relied on regarding substantive rights. The International Law Commission (ILC) defined an MFN clause as "a treaty provision whereby a State undertakes the obligation towards another State to accord most-favoured nation treatment in an agreed sphere of relations". 6 It thus provides the beneficiary with a relative standard of insurance against discrimination, that is, a level of protection defined in relation to the other investment treaties entered into by the "granting" 7 State. 8 From the general wording of most MFN clauses arises now the problem of competing interpretations as to whether or not the parties intended the clause to expand to dispute resolution regimes. The lively debate evoked by Maffezi and subsequent decisions of arbitral tribunals, which often conflict with each other in their outcome and in their analytic methodology, illustrates the great importance ascribed to the effect of MFN clauses on dispute

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1 Emilio Agustin Maffezi v. The Kingdom of Spain (ICSID, Decision on Jurisdiction, Case No. ARB/97/7, 25 January 2000); all cited ICSID cases are available online at: http://www.worldbank.org/icsid/cases/cases.htm and at: http://www.ita.law.uvic.ca/chronological-list.htm.


5 Id., para. 10-037, p. 725.

6 International Law Commission (ILC): Draft Articles on Most-Favoured-Nation Clauses with Commentaries; Text adopted at its 30th session, 1978; in: Yearbook of the International Law Commission, 1978, Vol. II, Part Two; Article 4. Pursuant to Articles 15 et seq. of its Statute the ILC adopted these Draft Articles and recommended to the General Assembly that they may function as a basis for an international convention. The General Assembly did not act upon this recommendation. Nevertheless, the Draft Articles provide a general analysis of MFN clauses.

7 Id., Article 4 (7).

8 Tackaberry/Marriott, supra note 4, para. 10-035, p. 725.
settlement mechanisms. Given the existing uncertainty, disquiet, and fear of undesirable "treaty-shopping", this "thorny area" yet awaits consensus.

The presentations at the Petersberger Schiedstage 2006 reflect very well this state of affairs. A distinguished commentator affirmed the significance of MFN clauses in view of the sheer amount of investment treaties. During 2005, 162 international investment agreements (IIAs) were concluded, among them 70 new bilateral investment treaties (BITs). It elevates the total number of IIAs to nearly 5,500, of BITs to an all-time high of 2,495. At the same time, the structure and provisions of most BITs are largely similar, generally containing similar MFN treatment and investor-state dispute resolution arrangements. Accordingly, this issue recurred throughout the congress. Another expert identified as the key question in this context whether the effect of MFN clauses is confined to substantive rights or stretches to dispute resolution provisions.

II. Methodology
The ongoing discussion is sufficient proof of the further need for a comprehensive and comparative analysis of how MFN clauses interact with dispute resolution mechanisms in investment treaties, at which this paper targets. It will introduce the recurring principles related to MFN clauses and take stock of the relevant case law in its context. By examining the parallels in the various arbitral proceedings as well as the differences in fact, law, interpretation

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10 Telenor Mobile Communications A.S. v. Republic of Hungary (ICSID, Award, Case No. ARB/04/15, 13 September 2006), para. 89.
12 Annual congress organized by the German Arbitration Journal (SchiedsVZ); it was held on 3 and 4 March 2006 in Königswinter, Germany.
14 The term "IIA" includes BITs, double taxation treaties (DTTs) and other preferential trade and investment agreements (PTTAs) according to UNCTAD, supra note 9, p. 11.
15 UNCTAD, supra note 9, p. 2 and p.3, figure 1.
16 Id.
21 Krapfl, Claudia, supra note 13, p. 156.
and outcome, this thesis will analyze the divide of the jurisprudence over how to reconcile an investment treaty's specific dispute settlement arrangement with an MFN clause that may, on the face, allow for the reliance on a more favorable dispute resolution regime in another BIT concluded by the host state. In this context, it will suggest a classification in categories. Moreover, the author addresses in detail the limitations to the applicability of MFN clauses to dispute settlement provisions. The paper will examine recent reactions of state actors to the jurisprudence and suggest possible future measures to ensure a more consistent case law. In order to give a complete picture of the current debate on this issue, the paper takes recourse to commentary whenever necessary or useful.

B. General Principles Related to MFN Clauses

The state parties in the cases here discussed consistently – and unsuccessfully - raised the same general principles to object to jurisdiction. This provided the tribunals with an opportunity to decide on the relevance of these principles and their effect on the scope of application of MFN clauses.

I. The Principle of *Res Inter Alios Acta*

The question upon which the principle of *res inter alios acta*\textsuperscript{22} touches is whether a more favorable treatment in a third-party treaty referred to by recourse to the MFN clause can affect the rights of an investor who is not a party to that treaty. If answered in the negative, the investor could not invoke the provision in the third-party treaty. This was the position held by Spain in *Maffezi*,\textsuperscript{23} followed by Argentina in *Siemens*,\textsuperscript{24} *National Grid*\textsuperscript{25} and *Suez*.\textsuperscript{26} The International Court of Justice (ICJ)\textsuperscript{27} found in the *Anglo-Iranian Oil Company*\textsuperscript{28} case that the basic treaty upon which the beneficiary of the MFN clause could rely is the treaty containing the MFN clause.\textsuperscript{29} It is this basic treaty that establishes the "juridical link"\textsuperscript{30} between

\begin{itemize}
\item \textsuperscript{22} *Res inter alios acta* (Latin): "a thing done between others".
\item \textsuperscript{23} *Maffezi*, supra note 1, para. 41.
\item \textsuperscript{24} *Siemens AG v. The Argentine Republic* (ICSID, Decision on Jurisdiction, Case No. ARB/02/8, 3 August 2004), para. 34, Argentina stated that MFN clauses "constitute a sort of legal anomaly".
\item \textsuperscript{25} *National Grid PLC v. The Argentine Republic* (UNCITRAL Arbitration, Decision on Jurisdiction, 20 June 2006), para. 69.
\item \textsuperscript{26} *Suez*, *Sociedad de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic* (ICSID, Decision on Jurisdiction, Case No. ARB/03/19, 3 August 2006), para. 60.
\item \textsuperscript{27} Pursuant to Article 38 (1) of the ICJ Statute, the decisions of the ICJ constitute a source of international law.
\item \textsuperscript{28} *Anglo-Iranian Oil Company* - United Kingdom v. Iran (International Court of Justice, Judgment on Preliminary Objection, 22 July 1952), 1952 I.C.J. Rep. 39, p. 109.
\item \textsuperscript{29} Id.
\item \textsuperscript{30} Id.
\end{itemize}
the beneficiary state and a third-party treaty and that grants to the beneficiary the rights conferred upon the third party. Therefore, a third-party treaty, "independent of and isolated from the basic treaty", 31 cannot legally affect the relation between the parties - it would be res inter alios acta. This discussion has practical impact on the application of an MFN clause. If and only if the third-party treaty deals with a subject matter to which the basic treaty refers, the beneficiary can invoke the MFN clause in the basic treaty for more favorable treatment. 32 Since this requirement was met in the above cases, the tribunals rightly rejected the objections to jurisdiction based on res inter alios acta.

II. The Ejusdem Generis 33 Rule

The well established 34 ejusdem generis rule stipulates that the MFN clause "can only attract matters belonging to the same category of subject as that to which the clause itself relates". 35 An extension to subject matters not covered by the clause is excluded. 36

The respondent in Maffezini argued that this rule would prevent the investor from relying on more favorable dispute resolution provisions by operation of an MFN clause, regardless of the general 37 character of the clause in dispute. It contended that discrimination - the avoidance of which is the purpose of an MFN clause 38 - could only occur in the context of material economic treatment and not with regard to jurisdictional or procedural matters. 39 Specifically, Spain put forward that "matters" pursuant to Article IV (2) of the Spain-Argentina BIT envisage merely "substantive matters or material aspects" 40 of the protection accorded to the investor. The respondents in Siemens and Plama, 41 for instance, also went along this line of argument stating that according to the principle ejusdem generis an "MFN clause does not implicitly extend to procedural matters". 42

31 Id.
32 See also Maffezini, supra note 1, para. 45.
33 Ejusdem generis (Latin): "of the same kind".
35 Ambatielos Claim - Greece v. United Kingdom (Commission of Arbitration, Award, 6 March 1956), XII U.N. R.I.A.A. 83; see also the definition of MFN clauses under A. 1: "...in an agreed sphere of relation".
36 see also ILC, supra note 6, Article 9.
37 see also ILC, supra note 6, Article 4 (15).
38 UNCTAD, supra note 18, introduction and p.8.
39 Maffezini, supra note 1, para. 42.
40 Maffezini, supra note 1, para. 41.
41 Plama Consortium Limited v. The Republic of Bulgaria (ICSID, Decision on Jurisdiction, Case No. ARB/03/24, 8 February 2005), para. 36.
42 Siemens, supra note 24, para. 46.
The tribunals, however, held that dispute settlement arrangements are today a substantive incentive and an "inextricably[?]" link to the protection of foreign investors. As a consequence, MFN clause can extend to these rights, in full compatibility with the *ejusdem generis* rule. They found support for their view in the case concerning *Rights of Nationals of the United States in Morocco*, which seemed to imply, and in the *Ambatielos* claim, which expressly stressed that the ambit of the MFN clause was limited to the matters contained in the treaty, save the specific intention of the parties to the contrary. The Commission of Arbitration confirmed in the latter case that the "administration of justice" was a matter that could fall within "commerce and navigation" when viewed together with the protection of traders' rights by means of dispute resolution mechanisms. Consular jurisdiction was therefore considered not merely a procedural device but an essential protection mechanism. Unlike some tribunals that opposed a direct transposition of the *Ambatielos* arbitration, the tribunal in *Maffezi* pointed out that international arbitration has replaced the old practices of consular jurisdiction. *Ambatielos* thus supports the view that dispute resolution does come within the scope of an MFN clause. Although not relied on by the jurisprudence, the GATT panel in *U.S. – Section 337* shared the tribunals' standpoint when it found that "enforcement procedures cannot be separated from the substantive provisions they serve to enforce". It is the dispute resolution mechanism that "gives investment treaties their teeth".

In sum, MFN clauses apply to dispute settlement pursuant to the *ejusdem generis* rule provided it is consistent with the contracting parties' intention "as deduced from a reasonable interpretation of the [t]reaty". This result is justified because the judicial sphere forms part of

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43 *Gas Natural SDG, S.A. v. The Argentine Republic* (ICSID, Decision on Jurisdiction, Case No. ARB/03/10, 17 June 2005), para. 31.
44 *Maffezi*, supra note 1, para. 54.
45 *Maffezi*, supra note 1, para. 56; *Plama*, supra note 41, para. 189.
47 "Administration of Justice" included consular jurisdiction, which was essential in the past for the protection of rights of traders.
48 *Ambatielos Claim*, supra note 35.
50 *Maffezi*, supra note 1, para. 55.
51 *United States – Section 337 of the Tariff Act of 1930* (GATT), BISD L/6439-36S/345, adopted on 7 November 1989, para. 5.10. While this case concerned GATT's national treatment rules, the citation applies equally to MFN clauses.
53 *Ambatielos Claim*, supra note 35.
an economic transaction just as its material content. In conformity with the aforementioned, all case law has *in principle* allowed the extension of MFN clauses to dispute resolution.

**III. More Favorable Treatment in Third-Party Treaty**

The benefits that the host state has accorded to a third party may restrict the rights of the beneficiary as well. In order to broaden the investor’s rights they need to be more favorable than the treatment provided by the basic treaty. The mere fact that the third party has not made use of the rights which are due to it under the treaty entered into with the granting state cannot absolve the granting state from its obligation under the clause.\(^{54}\) Most commonly, BITs owe “treatment not less favorable” than that conceded to a third party. According to this formulation, the burden of proof lies on the claimant to show the treatment in the third-party treaty to be different and “more favorable”. The *Asian Agricultural Products* decision\(^{55}\) affirmed the claimant’s onus of proof and gave an example where an investor already failed to prove the first criterion. The panel in the case, which did not concern dispute resolution but liability standards, was not convinced that the Sri Lanka-Switzerland BIT contained a different rule in this respect than the Sri Lanka-UK BIT.\(^{56}\) However, the specific nature of the claimant’s burden does not seem to have been addressed by any tribunal. It thus remains unclear whether the dispute resolution provisions of another treaty would have to be objectively more favorable or whether the proof suffices that they are more favorable in the particular factual circumstances of the claimant.\(^{57}\) The latter approach would lead to the undesirable result that the facts of the individual case determine the applicable law.

In *Maffezi, Siemens, Camuzzi, Gas Natural, National Grid* and *Suez*, the tribunals were confronted with the question whether the respective investor(s) had established that prior submission of the respective dispute to domestic jurisdiction was less advantageous than its direct submission to ICSID arbitration. Spain argued in *Maffezi* that material effects on the MFN standard could only result from "objective disadvantages"\(^{58}\) produced by resort to domestic courts. Followed suit by the other panels, the tribunal did not linger on the issue and categorically stated “[…] that access to such [investor-state] arbitration only after resort to

\(^{54}\) ILC, *supra* note 6, Article 5 (5).

\(^{55}\) *Asian Agricultural Products Ltd. v. Republic of Sri Lanka* (ICSID, Award, Case No. ARB/87/3, 27 June 1990); mentioned also in *Maffezi*, *supra* note 1, para. 51.

\(^{56}\) *Asian Agricultural Products Ltd., supra* note 55, para. 54.

national courts and an eighteen-month waiting period is a less favorable degree of protection than access to arbitration immediately upon expiration of the negotiation period”.59

C. Applicability of MFN Clauses to Dispute Settlement Provisions in the Case Law

I. Methodology of Treaty Interpretation Applied by the Tribunals

The applicable law and the methods of interpretation adopted by the tribunals in the relevant cases provide the basis for their conclusions. As all MFN clauses at issue kept silent as to whether they apply to dispute resolution mechanisms or not, interpretation methods came into sharp focus.

II. Applicable Law

The arbitral agreement between an investor and the host state constitutes neither a contract under domestic law nor a treaty.60 The investor is entitled to take recourse to arbitration on the strength of the host state’s consent in the treaty. Yet, the treaty provisions cannot replace the need for the positively uttered consent by the foreign investor61 pursuant to Article 25 of the ICSID Convention. It is now common practice that an investor accepts the advance consent in a BIT by instituting arbitral proceedings.62 Tribunals have consistently held that such an agreement is governed by the treaty provisions63 and by international law as stipulated in Article 25 (1) of the ICSID Convention.64 This triggers the import of “the historical baggage of how MFN clauses have been understood and applied in the trade context”,65 from which MFN treatment in the area of investment stems.

58 Maffezini, supra note 1, para. 42.
59 Gas Natural, supra note 43, para. 31.
63 CMS Gas Transmission Company v. Republic of Argentina (ICSID, Decision on Jurisdiction, Case No. ARB/01/08, 17 July 2003), para. 88.
64 Ceskoslovenska Obchodni Banka, A.S. v. Slovakia (ICSID, Decision on Jurisdiction, Case No. ARB/97/4, 24 May 1999), para. 35. Article 25 (1) of the ICSID Convention reads as follows: “The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State […] and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. […]”. International law in the sense of this Article includes general customary international law and the general principles of international law.
2. Interpretation in Compliance with the Vienna Convention on the Law of Treaties (VCLT)

The tribunals in the cases here discussed, for instance in Maffezini, 66 MTD, 67 Salini 68 and Camuzzi, 69 expressly adhered to the Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT). Pursuant to Article 31 (1) of the VCLT a treaty shall be interpreted “in good faith in accordance with the ordinary meaning 70 to be given to the terms of the treaty in their context and in the light of its object and purpose”. Article 31 (2) and (3) determines the relevance of preambles and annexes as well as any – also subsequent - agreement between the parties relating to the treaty, any subsequent practice in the application of the treaty and any applicable rules of international law. Article 32 provides supplementary means of interpretation, “including the preparatory work of the treaty and the circumstances of its conclusion”, in order to confirm the meaning found pursuant to Article 31 or to determine the meaning in case of ambiguity or unreasonableness. Although considered customary international law by some tribunals, 71 this appears doubtful in view of the relatively inconsistent practice of states and courts. 72 In fact, they exercise discretion and pick the elements in Article 31 of the VCLT they deem appropriate, with a general predominance of the treaty text. 73 As we will see below, this observation is consistent with the different approaches taken by the tribunals and the greater or lesser weight ascribed to the specific elements of Article 31 of the VCLT. In order to do justice to the highly flexible general rule of Article 31 of the VCLT all means should be taken into account "equally in one operation" 74 in the interpretation process.

3. Effective versus Restrictive Interpretation

The VCLT is silent on whether to apply an effective or a rather restrictive standard of treaty interpretation. The tribunals in SGS v. Philippines 75 and Gas Natural, 76 for instance, applied an

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65 Vesel, supra note 57, p. 129.
66 Maffezini, supra note 1, para. 27.
67 MTD Equity Sdn. Bhd. and MTD Chile S.A. v. The Republic of Chile (ICSID, Award, Case No. ARB/01/7, 25 May 2004), para. 112.
68 Salini, supra note 49, para. 75.
69 Camuzzi International S.A. v. The Argentine Republic (ICSID, Decision on Jurisdiction, Case No. ARB/03/2, 11 May 2005), para. 133.
70 Respectively the special meaning if it is established that the parties so intended, Article 31 (4) of the VCLT.
71 Tokios Tokelës v. Ukraine (ICSID, Decision on Jurisdiction, Case No. ARB/02/18, 29 April 2004), para. 27: "[...], much of which [the rules of the VCLT] reflects customary international law".
73 Id., p. 337, para. 499 and p. 342, para. 508.
74 Id., p. 345, para. 516.
75 SGS Société Générale de Surveillance S.A. v. Republic of the Philippines (ICSID, Decision on Jurisdiction, Case No ARB/02/6, 29 January 2004), para. 116.
76 Gas Natural, supra note 43, para. 49.
expansive – i.e. a pro-investor - approach and focused in their interpretation on the object and purpose of the treaties, thereby supporting a broad construction of MFN clauses. By contrast, the decisions made in *SGS v. Pakistan*\(^77\) and *Telenor* obviously favored a restrictive construction to avoid possible negative effects of a wide interpretation such as “uncertainty and instability”.\(^78\) Likewise, the *Plama* tribunal required “the clear and unambiguous intention”\(^79\) of the parties to extend MFN treatment to dispute resolution. Since neither a liberal nor a restrictive standard of interpretation\(^80\) is mentioned in Article 31 of the VCLT, it seems wise, however, to adopt the prevailing view taken by the tribunal in *Siemens*,\(^81\) which refrained from applying any of these standards. This meets the approval of the tribunal in *Amco* which highlighted that “[...] like any other conventions, a convention to arbitrate is not to be construed restrictively, nor, as a matter of fact, broadly or liberally. It is to be construed in a way which leads to find out and to respect the common will of the parties.”\(^82\)

4. The Authority of Past Decisions

In any decision-finding process, the consideration of previous decisions plays an essential role when it comes to securing coherence and stability of the law. Virtually all tribunals in the cases dealt with in this paper are mindful of the conclusions found in earlier relevant decisions. However, these previous decisions do not have any binding effect on the tribunals in subsequent proceedings. In the case of ICSID arbitration, Art. 53 (1) of the ICSID Convention\(^83\) suggests that no rule of mandatory precedent exists. Article 25 of the ICSID Convention, in conjunction with basic principles of public international law, dictates the same.\(^84\) The decision in *Gas Natural* reflects this approach in both its wording and its structure. The tribunal meticulously rendered its decision before addressing the previous case law.\(^85\) The issue also took center stage in *Siemens*, *National Grid* and *Suez* in all of which Argentina was respondent. Argentina raised the same jurisdictional objections - among them the non-applicability of the

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\(^77\) *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID, Decision of the Tribunal on Objections to Jurisdiction, Case No. ARB/01/13, 6 August 2003), para. 171: “[...] in dubio pars mitior est sequenda, or more tersely, in dubio mitius*. While concerning an umbrella clause, the tribunal’s consideration that the State’s sovereignty would otherwise be unduly restricted is transferable to our context.

\(^78\) *Telenor*, supra note 10, para. 94.

\(^79\) *Plama*, supra note 41, para. 204.

\(^80\) See also Schreuer, Christoph H.: *Diversity and Harmonization of Treaty Interpretation in Investment Arbitration*; in: Transnational Dispute Management, Vol. 3, Issue 2, April 2006, under I. C.

\(^81\) *Siemens*, supra note 24, para. 81.


\(^83\) Article 53 (1) of the ICSID Convention reads in its first part: "The award shall be binding on the parties [...]".

\(^84\) See the extensive discussion in *AES Corp. v. Argentina* (ICSID, Decision on Jurisdiction, Case No. ARB/02/17, 26 April 2005), paras. 17-33.

\(^85\) *Gas Natural*, supra note 43, paras. 20-35, 36.
MFN clause to dispute settlement—in all proceedings. Since a rule of precedent does not exist and each tribunal is sovereign, Argentina had "a valid and legitimate right" to do so. This also explains the legitimacy of the tribunals to deal divergently with the issue discussed here.

II. Analysis and Findings of the Tribunals

I. Textual Analysis

The conflicting authority of the jurisprudence requires a close examination of the specific details in each individual case to be appreciative or critical of the decisions reached. The text of an MFN clause plays a paramount role in determining its scope.

In the first decision of interest, Maffezini, the Argentine investor invoked the MFN clause in Article IV (2) of the Argentina-Spain BIT, which stipulated that “in all matters subject to this Agreement, this treatment [of investments] shall not be less favorable than that extended by each Party to the investments made in its territory by investors of a third country”. Although it did not specifically mention procedural matters, the claimant sought to rely by its operation on the dispute resolution provision in Article 10 of the Chile-Spain BIT, which did not impose any requirement to prior recourse to local courts. The tribunal registered the broad language of the MFN clause referring to “all matters” covered by the treaty. Establishing the close relation between dispute settlement and foreign investment protection, the panel held that the term “treatment” embraces dispute resolution in the instant case. Consistently, the tribunal allowed the reliance on the third-party provision by operation of the MFN clause.

In the MTD case, a Malaysian and a Chilean company brought claims against Chile in the context of an investment in land in Chile for a planned community. The tribunal was confronted with an MFN clause in Article 3 (1) of the Malaysia – Chile BIT that regulated fair and equal treatment in the same sentence. From the plain text, the two standards appeared to be separate. Yet, the tribunal may have understood the MFN clause to comprise fair and equal treatment. Under the tribunal’s reasoning, any obligation in other treaties to be construed as part of fair and equal treatment.

86 See also Continental Casualty Company v. The Argentine Republic (ICSID, Decision on Jurisdiction, Case No. ARB/03/09, 22 February 2006), para. 55.
87 SGS v. Philippines, supra note 75, para. 30.
89 Maffezini, supra note 1, para. 38.
90 See discussion under B. II.
91 Maffezini, supra note 1, para. 64.
equitable would be covered by the MFN clause, unless it was not “specifically relevant” as to the clarification of obligations under the basic treaty. Notably, the tribunal defined the fair and equitable standard as “treatment in an even-handed and just manner”\textsuperscript{92} and interpreted it in the way most conducive to the fulfillment of the BIT’s goal of investment protection. In finding that the provision at hand fell within the ambit of fair and equitable treatment, the tribunal did not only consider the “general nature of the MFN clause”\textsuperscript{93} but also the exclusions in the clause, which related only to tax treatment and regional cooperation. The tribunal in the annulment proceeding, however, clearly distinguished between fair and equitable treatment and the MFN standard. Propagating a broad application of the general MFN clause, it approved of the \textit{Maffezi}ni decision:

“\textbf{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.}\textsuperscript{94}

The second key decision\textsuperscript{94} \textit{Siemens} dealt with a dispute over investments of a German company in Argentina in connection with a contract to establish a system of migration control and personal identification. The tribunal fell into line with \textit{Maffezi}ni and allowed the use of the pertinent MFN clause in Article 3 of the Germany-Argentina BIT. Unlike the clause in \textit{Maffezi}ni, this Article 3 did not provide for more favorable treatment in respect of “all matters” but referred only to no “less favorable treatment” of investments and of “activities related to investments”\textsuperscript{96} Article 3 (3) and (4) contained a list of express exceptions, none of which related to dispute resolution. In its textual analysis, the tribunal found that “[t]he term ‘treatment’ is neither qualified nor described except by the expression ‘not less favorable’”, that “[t]he term ‘activities’ is equally general”, further that “[t]he need for exceptions confirms the generality of the meaning of treatment of activities”\textsuperscript{97} and finally that “[…] reference to national treatment does not limit the advantages that investors may have by operation of the MFN clause”.\textsuperscript{98} Based on these findings, the tribunal concluded that the scope of the clause was

\begin{itemize}
\item \textit{MDT}, \textit{supra} note 67, para. 113.
\item \textit{MDT}, \textit{supra} note 67, para. 104.
\item \textit{Maffezi}ni, \textit{supra} note 67, para. 104.
\item \textit{Maffezi}ni, \textit{supra} note 67, para. 104.
\item \textit{Siemens}, \textit{supra} note 24, para. 82.
\item \textit{Id.}, para. 85.
\item \textit{Id.}, para. 93.
\end{itemize}
not confined to exploitation and management of investments as argued by Argentina.\textsuperscript{99} It covered the protection of investments through access to international arbitration alike.\textsuperscript{100} Considering that the MFN clause in this case is narrower in scope than in \textit{Maffezini}, the decision appears to have stretched the scope of \textit{Maffezini}. The \textit{Siemens} decision thus marks a "significant evolutionary step"\textsuperscript{101} in the applicability of MFN clauses to procedural rights. There does not seem further need to underline how essential dispute resolution is for investors' rights. Rather, the tribunal found that dispute settlement comes within the reach of MFN treatment not because of its specific content, but because it does not differ decisively from any other benefit afforded in investment treaties.

The panel in the subsequent \textit{Salini} case adopted a more restrictive approach. The dispute arose out of allegedly outstanding payments to the Italian claimants in the context of a damn project in Jordan. The MFN clause in Article 3 of the Italy–Jordan BIT is essentially the same as in \textit{Siemens} and requires "no less favourable treatment". Unfortunately, the tribunal did not have the chance to comment on the \textit{Siemens} decision. Specifically, it registered that "the circumstances of this case are different"\textsuperscript{102} from those in \textit{Ambatielos} and \textit{Maffezini} primarily in that the wording of the above clause did not refer to "all matters" subject to the treaty. Based \textit{inter alia} on the clause's language, it concluded that the investor had failed to prove the alleged common intention of the parties to include in "[...] ICSID jurisdiction contractual disputes between an investor and \textit{an} entity of a State Party [...]".\textsuperscript{103} By adding that the MFN clause "does not apply insofar as dispute settlement clauses are concerned",\textsuperscript{104} the tribunal seemed to take the position that MFN provisions do not have any effect on dispute settlement arrangements in treaties if they are less broadly phrased than in \textit{Maffezini} or even in general. While not directly contradicting the decision in \textit{Maffezini}, it nevertheless expressed its concern about the workability of this broad approach.\textsuperscript{105} These considerations leave more questions open than they answer. It is not clear what major differences the tribunal perceived in the text of the MFN clause as opposed to \textit{Maffezini}, for the clause equally referred to the general term "treatment". The \textit{ejusdem generis} rule would have rather suggested an extension to dispute settlement mechanisms as well. This criticism equally applies to the following \textit{Plama} decision.

\textsuperscript{99} \textit{Id.}, para. 86.
\textsuperscript{100} \textit{Id.}, para. 102.
\textsuperscript{101} Scholz, Katja: \textit{Having Your Pie...And Eating it with Chopsticks - Most Favoured Nation Clauses and Procedural Rights}; in: Policy Papers on Transnational Economic Law No. 5 / 2004, p. 4.
\textsuperscript{102} \textit{Salini, supra} note 49, para. 118.
\textsuperscript{103} \textit{Id.}, para. 118.
\textsuperscript{104} \textit{Id.}, para. 119.
\textsuperscript{105} \textit{Id.}, para. 115.
The tribunal in *Plama* proved even more explicit in its rejection of the application of an MFN clause to dispute settlement arrangements. That case concerned a claim brought by a Cypriot company against the Bulgarian government under the Cyprus-Bulgaria BIT in connection with an oil refinery in Bulgaria. The MFN clause in the treaty’s Article 3 substantially conformed to the clauses in *Siemens* and *Salini*. Not surprisingly, the Cypriot claimant argued that the clause referred to all aspects of investment treatment and thus also embraced dispute resolution provisions. As an alternative basis for jurisdiction, the investor specifically relied on Bulgaria’s consent to ICSID arbitration found in Article 8 of the Bulgaria- Finland BIT to overcome the state’s very narrowly circumscribed consent contained in Article 4 of the basic treaty. It provided solely for ad hoc UNCITRAL arbitration as regards the quantum of compensation “due to an investor only after the merits had been adjudicated through the regular administrative and legal procedure(s) of [Bulgaria]”. The tribunal underlined the significance of the dispute settlement regime under the basic treaty:

“Conversely, dispute resolution provisions in a specific treaty have been negotiated with a view to resolving disputes under that treaty. Contracting States cannot be presumed to have agreed to those provisions can be enlarged by incorporating dispute resolution provisions from other treaties negotiated in an entirely different context.”

From the requirement in international commercial arbitration that the insertion of an arbitration agreement into a contract by reference must be clear and unambiguous the tribunal deduced that any intention to incorporate dispute settlement provisions into the BIT needs clear and unambiguous expression alike. Focusing essentially on the wording of the above MFN clause, the Tribunal concluded that the clause "cannot be interpreted as providing consent to submit a dispute under the Bulgaria-Cyprus BIT to ICSID arbitration." In other words, the parties did not have the clear and unambiguous intention to extend MFN treatment to the dispute settlement mechanism and thus did not consent to it. Consistent with *Salini*, the tribunal criticized the line of argument adopted in *Maffezini*, professing that “the expansive interpretation of [the MFN clause] made in the *Maffezini* case went beyond what State Parties to

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105 The claimant first sought to establish the tribunal’s jurisdiction under the Energy Charter Treaty.
106 *Plama, supra* note 41, para. 207.
107 *Id.*, para. 198. See also Article 7(2) of the UNCITRAL Model Law that provides: “The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.”
108 *Id.*, para. 204. See the criticism of this far too restrictive interpretation under C. I. 3.
109 *Plama, supra* note 41, para. 184.
110 *Id.*, paras. 198 et seq.
BITs generally intended to achieve by an MFN provision in a bilateral or multilateral investment treaty". In other words, it held that the construction in Maffezini was lopsidedly weighted in favor of investors’ interests.\textsuperscript{113} Importantly, the tribunal abstained from ultimately disapproving the conclusion in Maffezini. Conceding that the requirement in the settlement provision in the Spain-Argentina BIT to try the dispute in the local courts during the first 18 months was “nonsensical from a practical point of view”,\textsuperscript{114} it ascribed the decision to the “exceptional circumstances”\textsuperscript{115} in that case.

Except the Camuzzi tribunal, which did not need to pronounce on the scope of an MFN clause in the Argentina-Luxembourg BIT, since Argentina - for once - did not object to the investor’s claim once the prior negotiation period had elapsed,\textsuperscript{116} the tribunals in the subsequent Gas Natural, Suez and National Grid cases all followed in essence the textual analysis provided in Maffezini and Siemens.

The dispute in Gas Natural between a Spanish investor and Argentina arose out of a claimed breach of guarantees set forth in the Spain-Argentina BIT by alleged alteration of the calculation mechanism of tariffs. The pertinent MFN clause in Article IV (2) of the Spain-Argentina BIT referred to “treatment of activities related to investments”. Going with the emerging trend,\textsuperscript{117} it affirmed in the present case the approach taken by Maffezini.

Similarly, the tribunal in the more recent decision in Suez found it had jurisdiction over arbitration claims lodged against Argentina concerning an allegedly devaluated water concession during the country’s financial crisis. Supported by the reasoning in Maffezini and Siemens, the tribunal interpreted the MFN clauses contained in the Spain-Argentina and UK-Argentina BITs accordingly. In particular, it held that the right to resort to international arbitration was closely related to the “management, maintenance, use, enjoyment or disposal of their investments”, as the clause stipulated.\textsuperscript{118} Moreover, both MFN clauses explicitly excluded certain matters from the scope of its application. Since dispute settlement was not one of them, the tribunal inferred that it was intended to come within the reach of the provision.

The presiding tribunal in National Grid declared to have jurisdiction in a dispute over purported harm to foreign investments in Argentina’s electricity sector in the context of the country's

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\textsuperscript{112} Id., para. 227.
\textsuperscript{113} See also El Paso Energy International Company v. The Argentine Republic (ICSID, Decision on Jurisdiction, Case No. ARB/03/15, 27 April 2006), para. 70, which expressly advocates a “balanced interpretation” of investment treaties.
\textsuperscript{114} Plama, supra note 41, para. 224.
\textsuperscript{115} Id.
\textsuperscript{116} Camuzzi, supra note 69, para. 121.
financial crisis. It construed the MFN clause at issue, which was the same as in Suez, in the same manner as the Suez tribunal.

The situation has been further obscured, however, by the decision in Berschader.119 Two Belgian investors submitted a dispute over payments under a construction contract for the rehabilitation of the Russian Supreme Court building before the Arbitration Institute of the Stockholm Chamber of Commerce. The tribunal issued a decision declining jurisdiction to hear the claim pursuant to the Russia-Belgium BIT. It held by a majority of two-to-one that the MFN clause did not envisage procedural matters despite its very broad language embracing “all matters” covered by the treaty.121 The claimants were thus blocked from importing more favorable dispute settlement rules found in more recent BITs signed by Russia in order to seek arbitration over the pending investment dispute. Those modern BITs offer a much wider scope for investor-state arbitration of alleged treaty breaches than the relevant Soviet-era investment treaty with its narrow consent-to-arbitration clause, expanding investor-state arbitration only to disputes over the amount of compensation in cases of expropriation or nationalization. Neither the reasons nor the arbitral award have been published. Therefore, the decision leaves room for speculation. The tribunal may have understood the interrelation between an MFN clause and a dispute settlement provision in the sense that a narrow dispute resolution provision indicates the parties’ intention to ultimately confine their consent to arbitration as circumscribed in it. A broad MFN clause would then be of limited use. In such a case, the question remains why a consent-to-arbitration clause should have greater authority than an MFN clause and thus be given priority over the latter.

In the most recent Telenor case, the claimant brought arbitration against the Hungarian government under the terms of the Hungary-Norway BIT. The dispute centered on regulatory measures taken by Hungarian entities which allegedly affected the claimant’s concession for the provision of mobile telephone services. Since the tribunal rejected all of the investor’s claims on grounds of jurisdiction, it did not decide on the purported breach of the fair and equitable treatment owed by the BIT. The tribunal noted that the formulation “this treatment”

119 Suez, supra note 26, para. 57.
(accorded to the investments) in Article IV of the basic treaty was narrower than in the MFN clause in Maffezini.\textsuperscript{122} It held that this term in its ordinary meaning only encompasses “the investor’s substantive rights”,\textsuperscript{123} unless circumstances - which it did not find in the present case - exist to suggest the contrary. Declining the “expansive interpretation”\textsuperscript{124} of MFN clauses in Maffezini, it “wholeheartedly endorse[d]”\textsuperscript{125} the analysis advanced in Plama. As in Plama and Berschader, the basic treaty envisaged investor-state arbitration for expropriation claims only.

Given the general wording of the MFN clauses in Maffezini, but also in Siemens or Suez, their extension to dispute settlement does not appear overly expansive. The MFN clauses in Salini, Plama, Telenor and particularly in Berschader all grant “treatment no less favorable” as well. Their restrictive interpretations do not convince in light of the broad language and the close link between substantive protection and dispute settlement. From a textual perspective alone, the different outcomes in these cases cannot be sufficiently explained. The context or circumstances examined below may provide reasons. As the Gas Natural tribunal understood “[…] the issue of applying a general most-favored-nation clause to the dispute resolution provisions of bilateral investment treaties is not free from doubt, and […] different tribunals faced with different facts and negotiating background may reach different results”.\textsuperscript{126}

2. Contextual Analysis

a) Treaty Practice of State Parties

In its detailed analysis, the Maffezini tribunal examined the practice of the state parties to the BIT in the wording of their dispute settlement provisions in BITs with other states. It found that at the time of the conclusion of the BIT, Argentina would generally require prior resort to domestic courts, while Spain opted for direct access to arbitration following a period of negotiations. However, Argentina later abandoned this legal policy and consented to treaty clauses that were identical to those in Spanish and Chilean BITs.\textsuperscript{127} As a consequence, Argentina’s BITs afforded at the time of the proceedings in their vast majority more favorable dispute resolution provisions than the Argentina-Spain BIT did. In the tribunal’s opinion, this fact indicated discriminatory intent. Its view to expand MFN treatment to dispute settlement was strengthened. Likewise, the panel in Siemens indicated that it would take into account “the

\textsuperscript{122} Telenor, supra note 10, para. 87.
\textsuperscript{123} Id., para. 92.
\textsuperscript{124} Id., para. 89.
\textsuperscript{125} Id., para. 90.
\textsuperscript{126} Gas Natural, supra note 43, para. 49.
existence of a policy of the Respondent if a certain requirement had been consistently included in similar treaties executed by the Respondent.\textsuperscript{128} In the instant case, the tribunal concluded that the respondent had not consistently required in its BITs proceedings before its domestic courts prior to international arbitration. It was thus not "a "sensitive" issue of economic or foreign policy or [...] an essential part of the consent of the Respondent to arbitration".\textsuperscript{129} The National Grid tribunal also analyzed the treaty practice of Argentina and the UK following the conclusion of the BIT so as to gain information about the country's respective interpretation of such clauses. As in Maffezini and Siemens, it found the practice to be inconclusive and thus read the term "treatment" as broadly as described above to cover international arbitration.

The Salini tribunal, too, acknowledged the relevance of a state party's treaty policy. It \textit{inter alia} refused to apply the MFN clause to establish jurisdiction over contract claims in the absence of supporting state practice.\textsuperscript{130} In Plama, the tribunal noted the specific circumstances under which the basic treaty was concluded. The Communist regime in power in Bulgaria at that time took a restrictive attitude towards foreign investment protection and thus favored very narrow international dispute resolution regimes.\textsuperscript{131} Subsequent negotiations between Bulgaria and Cyprus illustrated that the "two Contracting Parties to the BIT themselves did not consider that the MFN provision extends to the dispute settlement provisions in other BITs".\textsuperscript{132} It seems likely that the tribunal in Berschader considered the restrictive state practice during the Soviet era in international arbitration to be consistent enough to constitute a sensitive policy. From the more liberal approach taken by Russia nowadays it did by no means deduce that the parties intended to extend MFN treatment to these wider dispute settlement provisions.

Similarly, the tribunal in Telenor attached particular importance to this part of its analysis. It pointed out that specifically negotiated dispute settlement regimes by the parties cannot be displaced by reference to "general policy considerations regarding investor protection".\textsuperscript{133} It inferred from the fact that both parties to the BIT in question had concluded other BITs which referred all disputes to international arbitration that they had made "a deliberate choice to limit arbitration to the categories specified in [Article XI of the BIT]".\textsuperscript{134}

\textsuperscript{127} \textit{Maffezini, supra} note 1, para. 57.
\textsuperscript{128} \textit{Siemens, supra} note 24, paras. 104 et seq.
\textsuperscript{129} \textit{Id.}
\textsuperscript{130} \textit{Salini, supra} note 49, paras. 115 et seq.
\textsuperscript{131} \textit{Plama, supra} note 41, para. 196.
\textsuperscript{132} \textit{Id.}, para. 195.
\textsuperscript{133} \textit{Telenor, supra} note 10, para. 95.
\textsuperscript{134} \textit{Id.}, para. 97.
It becomes manifest that the tribunals in *Plama, Berschader* and *Telenor* were guided by evidence that the state parties to the respective treaties had specifically negotiated the restricted access to arbitration, whereas the states’ practice in *Maffezini* and *Siemens* proved inconclusive.

b) Circumstances of Reliance on MFN Treatment

(1) Circumvention of 18 Month Waiting Period

In *Maffezini, Siemens, Camuzzi, Gas Natural, Suez* and *National Grid*, the respective respondent contested jurisdiction on the ground that the requirements to file legal action at its national courts prior to the institution of arbitration and to wait until either the competent court had ruled on the dispute or eighteen months had expired with no decision. The claimant(s), however, successfully invoked MFN treatment and relied on dispute settlement provisions in other BITs to which the host state had consented that merely set forth a six-month negotiation period.

In *Siemens*, for instance, Argentina argued that the requirement in Article 10 (2) of the Germany-Argentina BIT only alleviated the local remedies rule and could thus not be implicitly waived. It contended further that this cooling-off period touched the core of its consent to arbitration and pertained to “sensitive economic and foreign policy issues”.\(^\text{135}\) The tribunal noted that the dispute may possibly be settled on the domestic level pursuant to this provision. Still, it held like all other tribunals that the clause at dispute only required the passing of time and was thus “not comparable to the local remedies rule”.\(^\text{136}\) The *Suez* tribunal yet indicated that a waiver to the effect that the investor will not proceed or file an action with domestic courts\(^\text{137}\) could enable the use of an MFN provision to avoid procedural requirements such as the 18 month waiting period.

In the light of the above cases, however, it might be premature to assume that an investor is entitled to fully ignore any waiting period by reliance on MFN treatment. In view of the purpose of a waiting period to afford the parties the opportunity to engage in good-faith negotiations prior to initiating arbitration, tribunals have generally found that the provision was just a procedural rule the claimant had to satisfy.\(^\text{138}\) Non-compliance with a waiting period was not

\(^{135}\) *Siemens*, supra note 24, para. 105.

\(^{136}\) Id., paras. 104 et seq.


\(^{138}\) *Ronald S. Lauder v. The Czech Republic* (UNCITRAL Tribunal, Final Award, 3 September 2001), para. 187; available online at: http://www.kluwerarbitration.com.
considered to limit the authority of the tribunals to decide the merits of the dispute, at any rate if negotiations proved futile from the start\textsuperscript{139} or the parties' were unwilling to enter consultations.\textsuperscript{140} In the present cases, the parties had tried negotiations and the issue concerned especially long cooling-off periods. The requirement to submit the dispute to domestic courts for eighteen months creates a considerable burden on the party seeking arbitration with little chance\textsuperscript{141} of advancing the settlement of the dispute. A substantive decision by the domestic courts in a complex investment dispute would probably not be forthcoming within eighteen months, certainly if one includes the possibility of appeals.\textsuperscript{142} Due to these specific circumstances the tribunals allowed the claimant to benefit from more favorable provisions in other BITs entered into by the host state.

(2) Reliance on a Different Type of Arbitration

In \textit{Yaug Chi Oo Trading PTE Ltd.} and \textit{Plama}, the respective claimants unsuccessfully attempted to replace the dispute resolution mechanism in the basic treaty \textit{in toto} by another incorporated from a third-party treaty. In the view of some commentators this would mean a "radical effect"\textsuperscript{143} as compared to the more limited consequences in \textit{Maffeizini or Siemens}, which consisted merely of skipping a preliminary step in accessing arbitration.

In the ASEAN investment arbitration \textit{Yaug Chi Oo Trading PTE Ltd.}, the claimant argued that jurisdiction could be established by operation of Article 8 of the 1998 ASEAN Agreement in conjunction with the Myanmar - Philippines BIT. Without providing in-depth reasoning, the tribunal based its rejection primarily on the irreconcilable conflict between the dispute settlement regimes of the basic and the third-party treaty.\textsuperscript{144} Specifically, Article IX of the BIT stipulated arbitration of investment disputes pursuant to the UNCITRAL Rules. Article X of the 1987 ASEAN Agreement stood in contrast to this, since it assigned a different appointing body.

The extension of the MFN clause in \textit{Plama} would also have cleared the way for arbitration under a different set of rules. According to the tribunal, the parties specifically consented to \textit{ad hoc} arbitration as set forth under the Bulgaria-Cyprus BIT. As a result, they did not intend to allow for MFN treatment to replace this specific agreement by a completely different dispute

\textsuperscript{139} Turner/Mangan/Baykitch, \textit{supra} note 119, p. 126.
\textsuperscript{140} SGS \textit{v.} Pakistan, \textit{supra} note 77, para. 184.
\textsuperscript{141} Schreuer, \textit{supra} note 61, Art. 26, para. 111.
\textsuperscript{142} Siemens, \textit{supra} note 24, para. 78.
\textsuperscript{143} Suez, \textit{supra} note 26, para. 65.
\textsuperscript{144} \textit{Yaug Chi Oo Trading PTE Ltd. v. Government of the Union of Myanmar} (ASEAN Arbitral Tribunal, Award, ASEAN I.D. Case No. ARB/01/1, 27 February 2002), para. 83.
settlement regime, i.e. ICSID arbitration. Instead of going as far as reversing the general rule established in \textit{Maffezi}ni, the tribunal could have based the case on the third and fourth public policy-related exception in \textit{Maffezi}ni to reach the same outcome in this case. It has now the unpleasant effect of reviving the distinction between substantive and jurisdictional matters in the context of MFN treatment.

Remarkably, the \textit{Suez} tribunal noted the possible distinction between a “wholesale adoption” of a completely different dispute resolution mechanism and the more restricted use of the MFN clauses in its case. Regrettably, it did not advance an opinion as to whether an MFN clause could be applied to incorporate a form and scope of arbitration that differs from the arrangements of the basic treaty. In other words, it did not take a stand in favor or to the disadvantage of the reasoning in \textit{Plama}. The tribunal in \textit{National Grid} kept silent on this issue, too. Instead, it adduced distinguishable facts to explain the different outcomes in these cases. In the tribunal’s opinion, the adoption of the claimant’s reasoning in \textit{Plama} would have “extended the interpretation of an MFN clause beyond appropriate limits”. However, cases like \textit{Plama} cannot “justify depriving the MFN clause of its legitimate meaning or purpose in a particular case”.

\textbf{(3) Extension of Jurisdiction to “New” Claims}

The \textit{Salini} tribunal was the first to face the situation in which a claimant invoked the MFN standard to extend the panel’s jurisdiction to contractual claims not covered by the basic treaty. The investors intended to borrow the dispute resolution clause of the Jordan-US and Jordan-UK BIT by virtue of the MFN clause contained in the Italy-Jordan BIT to “widen” the consent to arbitration to contract claims which was not provided in Article 9 (2) of the basic treaty. Unfortunately, the tribunal focused primarily on the text of the MFN clause and did not comment on the impact of this specific circumstance on the outcome of the case. At any rate, the tribunal did not see any need to distinguish between the case in which a claimant attempts to create consent to arbitration that otherwise would not exist through an MFN clause and the

\footnotesize{145 \textit{Plama}, supra note 4, para. 209.}

\footnotesize{146 See infra under E.}


\footnotesize{148 Turner/Mangan/Baykitch, \textit{supra} note 119, p. 118.}

\footnotesize{149 \textit{Suez}, supra note 26, para. 65.}

\footnotesize{150 \textit{National Grid}, supra note 25, para. 92.}

\footnotesize{151 Id.}

\footnotesize{152 This scenario - whether ICSID jurisdiction could rest on “umbrella clauses” in third-party BITs - was also at the center of the \textit{Impreglio S.p.A. v. Pakistan} case (Decision on Jurisdiction of 22 April 2005, Case No. ARB/03/3,}
more limited application of such a clause to sail round a waiting period as in *Maffezini* or *Siemens*. Given the more narrowly worded MFN clause than in *Maffezini* and the lack of submission from which the common intention of the parties to extend MFN treatment to dispute resolution might have been established, the tribunal denied the claimants’ request.

In *Plama*, the application of the MFN clause would not only have installed a new type of arbitration, but also arbitration over a wider range of claims. The tribunal did not specifically base its rejection on this supposedly undesired effect, though. It rather opposed “the principle with multiple exceptions as stated by the tribunal in the *Maffezini*” and concluded that

“[a]n MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.”

Some commentators agree that such a restrictive interpretation applies at any rate when it comes to the conclusion of an arbitration agreement, as in this case, but not when it only concerns the scope of an existing agreement. This view proposes two different standards of interpretation depending on whether MFN treatment alleviates procedural requirements or whether it extends jurisdiction to claims not covered by the basic treaty’s dispute settlement regime. The better arguments militate against such a restrictive approach, among them the silence of the VCLT, the broad term “treatment” in MFN clauses without exclusionary language, the modern trends in international investment law and the notion of the MFN standard as a source of international obligation.

In the subsequent *Berschader* case, the tribunal equally refused to "widen" a communist-era arbitration clause. It is conceivable that the tribunal sought to implement the distinction mentioned by the tribunal in *Suez*, thereby limiting the application of an MFN clause to the

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153 *Plama*, supra note 41, para. 223.
154 *Plama*, supra note 41, para 223.
158 See under C. II. 2. b) (2), p. 23: the possible distinction between a “wholesale adoption” of a completely different dispute resolution mechanism and a more restricted use of an MFN clause.
scope of arbitration set forth in the basic treaty. In such event, its decision would meet with the same criticism as *Plama*.

In the *Telenor* proceeding, the investor invoked the treaty’s MFN clause to borrow better treatment from unspecified third-party treaties in which Hungary did not, as was the case in the basic treaty, limit its consent to ICSID arbitration to disputes “concerning the amount or payment of compensation […] or concerning any other matter consequential upon an act of expropriation”.\(^{159}\) The tribunal found that, in the circumstances of the case, the MFN clause could not be invoked to establish jurisdiction over “categories of claims other than expropriation”\(^{160}\) because this “would subvert the common intention [of the parties] in entering into the BIT […]”.\(^{161}\) Conversely, the extension of consent to arbitration to other categories of claims than those contained in the basic treaty by virtue of an MFN clause remains possible in different circumstances.

3. Purpose and Objective of Dispute Settlement and the MFN Standard

The conclusion of BITs, like the adoption of the ICSID Convention,\(^ {162}\) has been inspired by the aim to promote economic development through investment and its protection. Both MFN treatment and dispute resolution provisions form core elements of the international investment law regime.\(^ {163}\) The ICJ formulated the objective of an MFN clause as "to establish and maintain at all times fundamental equality without discrimination among all of the countries concerned."\(^ {164}\) Specifically within the area of investment law, it arguably has become an instrument to ensure non-discriminatory investment protection, to accord equal competitive opportunities,\(^ {165}\) to harmonize international economic law\(^ {166}\) and to liberalize\(^ {167}\) economic activities. All these purposes of MFN clauses argue for a wide scope of application. Since access to arbitration is a fundamental safeguard afforded to investors under BITs, dispute

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\(^{159}\) Article XI (1) Hungary-Norway BIT.

\(^{160}\) *Telenor*, supra note 10, para. 100.

\(^{161}\) *Id.*


\(^{163}\) *Dolzer/Stevens, supra note 62*, p. xii.

\(^{164}\) *Rights of Nationals of the US in Morocco*, supra note 46, p.192.


\(^{166}\) *Maffezini*, supra note 1, para. 62.

\(^{167}\) *OECD, supra note 34*, p. 2.
settlement mechanisms should come within the scope of an MFN clause, unless the treaties’
text, context or surrounding circumstances specifically provide otherwise.

Several decisions reflect this line of reasoning. In Siemens, the tribunal analyzed the context
first and stated that it was "guided by the purpose of the treaty ["to protect" and "to promote"
investments.] as expressed in its title and preamble". On this basis, the tribunal convincingly
argued that the treaty provisions clearly showed the intention of the parties to create beneficial
conditions for investment. As a rule, the scope of an MFN clause extends to all matters and does
not stop short of dispute resolution. The tribunal held that “[...] the purpose of the MFN clause
is to eliminate the effect of specially negotiated provisions unless they have been excepted. It
complements the undertaking of each State Party to the Treaty not to apply measures
discriminatory to investments under Article 2 [of the BIT].” The tribunal thus seems to
assume that the scope of an MFN clause applies to all matters.

Looking at the history of both the ICSID Convention and BITs, the Gas Natural tribunal found
that the provision for independent international arbitration of investor-state disputes had been a
determining factor, conceived to grant to host states freedom from political pressure by the
receiving state’s government. The tribunal concluded that “unless it appears clearly that the
state parties to a BIT or the parties to a particular investment agreement settled on a different
method for resolution of disputes that may arise, most-favored-nation provisions in BITs
should be understood to be applicable to dispute settlement” This adds up to an effective
interpretation, which has been considered too extensive above. Yet, a different line of
argument produces a similar result. Since the compatibility of the extension of MFN treatment
to dispute settlement with the ejusdem generis rule is generally acknowledged, an MFN clause
covers dispute resolution in case of doubt. However, this does not mean that the parties’
intention to exclude international arbitration from MFN treatment has to “appear clearly”. It
merely has to appear, howsoever, to exclude all doubt.

The Plama tribunal expressed the concern that "undue emphasis on the object and purpose" would favor teleological interpretation and might render the intentions of the parties irrelevant.

This objection can be reconciled with the argumentative thread above under the condition that

168 Siemens, supra note 24, para. 81.
169 Siemens, supra note 24, para. 106.
170 Gas Natural, supra note 43, para. 49.
171 See under C. I. 3.
172 Plama, supra note 41, para. 193.
such emphasis on the object and purpose is only deemed undue if the invocation of an MFN clause goes beyond the circumvention of procedural requirements that arbitrarily discriminate against particular foreign investors.

D. Limitations to the Applicability of MFN Clauses to Dispute Settlement

I. The Conflict

MFN treatment constitutes a core principle in investment treaties that elevates the protection standard to the level guaranteed by the most protective BIT. At the same time, it allows for flexibility of states to pursue their policies regarding foreign investment. This flexibility may result in “intended incoherence” of BITs concluded with different states. Freedom of contract prevails over the MFN standard of treatment. A host state can limit the standard’s application through exceptions and reservations to it based on public policy. In cases in which the host state has not expressly confined MFN treatment, there is the risk of an unlimited application of MFN clauses. The Maffezini tribunal was the first to voice the fundamental conflict all tribunals in our context found themselves in:

“A distinction has to be made between the legitimate extension of rights and benefits by means of the operation of the clause, on the one hand, and disruptive treaty-shopping that would play havoc with the policy objectives of underlying specific treaty provisions, on the other hand.”

In sum, the application of MFN clauses must not infringe fundamental principles of international law, impose outcomes not consented to by the parties or “otherwise disrupt the predictability and stability of the international investment law system”.

II. General Guideline

The mere reference to specific categories of limitations in Maffezini cannot explain for what reason an investor should be barred from invoking MFN treatment to avoid exhaustion of domestic remedies, to benefit from a fork in the road clause, from a “particular arbitration

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173 Teitelbaum, supra note 3, p. 233.
175 UNCTAD, supra note 18, p. 39.
176 Id., pp. 6 et seq.
177 Maffezini, supra note 1, para. 63.
178 Vesel, supra note 57, p. 30.

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forum” or from a “highly institutionalized system of arbitration”.179 The lack of explicit justification of these limitations has been criticized.180 Moreover, the focus on public policy,181 as a category supposedly exempted from MFN treatment, met criticism, for it would render treaty interpretation ineffective if, after the construction of an MFN clause, its scope were narrowed due to restrictions that the parties did not expressly formulate.182 In contrast, the harsh criticism that was expressed by the Plama and Telenor tribunals which presumed the exclusion of dispute settlement from the scope of an MFN clause definitely goes too far.183

On closer examination, the Maffeini tribunal does provide a guideline by stating somewhat vaguely that "the MFN clause could not be interpreted to apply to terms that the parties understood to be fundamental conditions of their consent to be bound by the BIT"184 This more appropriate and consistent approach shifts the focus to treaty interpretation, in the process of which public policy matters find consideration. They are treated as exceptions flowing from the intentions of the parties as expressed in the basic treaty.185 Such a specifically expressed intention would take precedence over any unexpressed intention imported by use of an MFN clause, following the “generally accepted technique of interpretation and conflict resolution in international law”186 lex specialis derogat legi generali.

Tribunals in subsequent cases have denied the possible application of third-party BITs in situations where the imported rights have a significant impact on the balance of rights so as to "go to the core of matters that must be specifically negotiated by the contracting parties".187 Evidently, it is difficult to determine with precision when such tests have been met. By introducing the criteria of “consistent policy”188 regarding “sensitive economic and foreign policy issues”,189 the Siemens decision added another element as to when public policy considerations are of fundamental importance to the consent to arbitration. Since discrimination

179 Maffeini, supra note 1, para. 63.
180 Plama, supra note 41, para. 221: “The present Tribunal was puzzled as to what the origin of these “public policy considerations” is;” see also Salini, supra note 49, para. 115; Savage, supra note 52, p. 32.
181 Maffeini, supra note 1, para. 62.
182 Gaillard, supra note 92, para. "Limits to Jurisdiction".
183 See under B. II., C. I. 3., C. II. 2. b) (2) and (3), C. II. 3.
184 Maffeini, supra note 1, para. 63.
185 See also Freyer/Herlihy, supra note 11, p. 82.
187 Tecnicas Mediam ambientales Tecmed S.A. v. The United Mexican States (ICSID, Case No. ARB (AF)/00/2, 29 May 2003), para. 69.
188 Siemens, supra note 24, para. 105.
189 Id., paras. 57, 104 et seq.
in the dress of public policy is filtered out, it narrows its potential scope but still allows for the recognition of sensitive matters of national foreign or economic policy. Nonetheless, the specific circumstances in the individual case remain decisive when it comes to determine whether an MFN clause does or does not apply to dispute settlement provisions.

III. The Limitations As Mentioned in Maffezini

1. Article 26 of the ICSID Convention and the Local Remedies Rule

Article 26 of the ICSID Convention expresses clearly that prior exhaustion of local remedies is not required unless a Contracting State has so conditioned his consent to ICSID arbitration. It reads as follows:

“Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.”

Consequently, Article 26 reverses the traditional international law rule\textsuperscript{190} which requires resort to all - administrative and judicial - remedies available under the domestic law of the respective state. Being “one of the basic rules in international law”,\textsuperscript{191} the rule of exhaustion of local remedies intends to grant to the respondent State the first opportunity to straighten out the harm and to make amends. The option under Article 26 has been of little practical relevance: only Israel conditioned its consent to Article 26 upon ratification in 1983, but withdrew the condition in 1991.\textsuperscript{192} In other words, none of the state parties in the above proceedings had subjected their acceptance to Article 26 to any such condition. The arbitral tribunals did not need to decide whether such a conditioned consent may be circumvented by the reliance on an MFN clause.

As international custom and the option in Article 26, 2\textsuperscript{nd} phrase indicate, it may generally be presumed that the exhaustion of domestic remedies constitutes a fundamental condition to and thus an essential part of the consent to arbitration. However, this does not mean that the rule could not be bypassed by operation of an MFN clause under appropriate circumstances. The \textit{de facto} insignificance of the option in Article 26 does not lead to another conclusion. A BIT itself may expressly stipulate the exhaustion of local remedies and thus underline the fundamental

\begin{footnotesize}
\begin{enumerate}
\item Schreuer, \textit{supra} note 61, Art. 26, paras. 94 et seq.
\item Schreuer, \textit{supra} note 61, Art. 26, para. 101.
\end{enumerate}
\end{footnotesize}
importance of the rule.\textsuperscript{193} And if already the requirement to resort to local remedies within a strict time frame\textsuperscript{194} might constitute a basic condition to consent to arbitration under circumstances different from e.g. those in Maffezi,\textsuperscript{195} this applies \textit{a fortiori} to the exhaustion of local remedies.

2. Fork in the Road Clause

A fork in the road clause gives the option of either submitting a dispute to domestic courts or to international arbitration. As soon as a party avails itself of its right to choose and institutes proceedings in one of the designated fora, this choice becomes final and irreversible. It is a “road of no return”\textsuperscript{196} and all other options cease for both parties. In this context, it is essential to establish if the parties and the causes of action in the two proceedings are identical. According to the prevailing case law,\textsuperscript{197} the access to international arbitration is barred only if the same party has previously submitted the same dispute to the domestic courts.

In a sense, the fork in the road clause is the opposite of the local remedies rule, for the investor has to choose between remedies instead of being forced to use both domestic and international remedies. Both have in common that they set the basic procedure rather than mere modalities. Therefore, one may reasonably expect these clauses to receive a similar treatment. This triggers the disputable presumption that a fork in the road clause forms an individually negotiated basis for the arbitration agreement and is consequently excluded from MFN treatment. Still, the definite assessment depends on the circumstances of the particular case.

It seems worthwhile to examine in more detail the circumstances in which a fork in the road clause may become relevant. The aforementioned presumption applies in all cases but, dependent on the situation, further issues may arise. The \textit{Maffezi} tribunal had probably in mind the case in which the basic treaty contains a fork in the road clause based upon which the investor files a lawsuit and then decides to initiate arbitral proceedings by invoking, through an MFN clause in the basic treaty, the dispute settlement mechanism of a third-party treaty that does not contain a fork in the road clause and provides for international arbitration. In this case, the investor has made his choice, which is a final choice in the context of the “either-or

\begin{footnotesize}
\textsuperscript{193} Article 7 (2) of the 1981 Romania-Sri Lanka BIT is one of the rare examples thereof.

\textsuperscript{194} See note 136: The dispute settlement provisions contained in \textit{Maffezi}, Siemens, Gas Natural, National Grid, and Suez were technically not requirements to exhaust local remedies.

\textsuperscript{195} As seen in the discussion notably under C. II. 2. b) (1), it would, however, be very difficult to supply satisfactory evidence that a mere waiting period, which potentially balances the investors’ rights against the rights of state parties, goes to the core of the BIT.

\textsuperscript{196} Hague Conference on Private International Law (HccH): \textit{The Future Convention on Exclusive Choice of Court Agreements and Arbitration}, Preliminary Document No 32 of June 2003, p. 12, which also refers to the Latin maxim “una via electa non datur recursus ad alteram”.
\end{footnotesize}
procedure”. It is indeed hard to imagine that reliance on MFN treatment for consent to arbitration would not be contrary to the intention of the parties that have included a fork in the road clause in their treaty, especially once the court has rendered a final judgment.

A different situation emerges when the investor decides not to go to court but to initiate arbitral proceedings by using the basic treaty’s MFN clause to rely on the fork in the road clause of a third-party treaty with a broader consent to arbitration. In the event that the basic treaty does not contain a fork in the road clause, the additional problem materializes whether a fork in the road clause can in fact be more favorable than a simple consent to arbitration. The answer depends on the viewpoint: The fork in the road clause as such is less favorable as it implies a choice, its consent to arbitration, looked at isolatedly, more favorable. The clause’s “package deal” militates against the latter view, which would lead to an unjustified “cherry-picking”.

It is yet another question whether an investor could incorporate the fork in the road clause of a third-party treaty by recourse to an MFN clause if the basic treaty does not provide consent to arbitration at all. This situation touches upon the specific problem in Salini, Plama, Berschader and Telenor where the scope of arbitration consented to in the basic treaty would have been widened by application of an MFN clause. In this situation, the “import” of the entire package would at any rate not fork the clause and result in a “cherry-picking” like the previous case.

3. Particular Arbitration Forum and Highly Institutionalized System of Arbitration

The limitations in the context of particular arbitration fori and highly institutionalized systems of arbitration relate to the situations with which the tribunals in Young Chi Oo Trading PTE Ltd and Plama were confronted.\textsuperscript{198} They concern the invocation of an MFN clause to rely on a specific set of rules such as the UNCITRAL rules or a completely different type of arbitration like ICSID. Following the call for a balanced approach in Maffezini, the panel in National Grid emphasized these limits as well.\textsuperscript{199}

The Siemens tribunal, however, may possibly have taken a different position. It disapproved of the argument that the investor claiming a benefit under a third-party treaty should be obliged to import the advantages and disadvantages of that treaty as a whole.\textsuperscript{200} According to the tribunal, this line of reasoning runs contrary to the clause’s objective of harmonizing the benefits owed by the various BITs to which the host state is a party. It concludes that “[…] this is not the meaning of an MFN clause. As its own name indicates, it relates only to more favorable

\textsuperscript{197} Lauder, supra note 138, paras.162 et seq.; CMS, supra note 53, paras. 77-82.
\textsuperscript{198} See under C. II. 2. b) (2).
\textsuperscript{199} National Grid, supra note 25, paras. 91 et seq.
treatment”. The tribunal’s view was rightly criticized as it would create a multitude of dispute settlement combinations rather than equal treatment of investors and predictable legal surroundings for investment. The tribunal itself had to acknowledge that the disadvantages contained in a treaty may have been meant to offset the claimed advantages. Therefore, it appears more sensible to treat dispute resolution regimes as “a package [that] cannot be mixed and matched” This solution provides for “package-shopping” of dispute resolution regimes as opposed to “provision-shopping” or cherry-picking.

Apparently, the tribunal in *Yaung Chi Oo Trading PTE Ltd.* acted on the assumption that the particular sets of rules contained in the basic treaty were a “package” that formed an essential part of the consent to arbitration. On this condition it could rightly not be untied and partially replaced by specific, more favorable provisions found in another treaty’s set of rules.

4. Other Public Policy Considerations

The aspects mentioned above do not treat the potential limitations exhaustively. The *Maffezini* tribunal realized that and left it to future tribunals to add further points of relevance. The use of MFN clauses to enable retroactive application of BITs is such a point. Restricting the scope of MFN treatment to acts that occur after the respective BIT has entered into force is a "public policy consideration" that the granting state generally envisages as fundamental condition to its consent to arbitration. Overriding this limitation by invoking the MFN standard would "offend the finality of arrangements and betray the parties' intention as expressed in the BIT".

The tribunal in the interim case *Tecmed* had an opportunity to fall into line with this view. The case is yet is another example of an unsuccessful attempt at applying a third-party provision by operation of an MFN clause. The Spanish investor invoked the MFN clause contained in the Spain-Mexico BIT to incorporate the provision in the Austria-Mexico BIT which, unlike the basic treaty, provided for retroactive application of the BIT to acts that took place before the agreement entered into force. The tribunal held that this restriction over time in the basic treaty exhibits the “essential core of the negotiations of the contracting parties” and relates directly to the treaty’s substantive protection mechanism and the “legal context within which [it]

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200 *Siemens, supra* note 24, para. 119.
201 *Siemens, supra* note 24, para. 120.
202 Fietta, *supra* note 147, p. 135.
203 Vesel, *supra* note 57, p. 32.
205 *Tecmed, supra* note 187, para. 74.
operates”.

Since the panel considered “matters relating to the application over time” to be “determining factors for [the Contracting Parties’] acceptance of the Agreement”, it found a strong presumption against the retroactive application in the absence of such a provision in the basic treaty. Article 28 of the VCLT codifies this presumption. The requirement to specifically negotiate matters of the BIT’s temporal application can be regarded as a substantiation of the limitations referred to in Maffezini. Given the express reference to Maffezini, it appears unlikely that the tribunal saw in the decision a first step in limiting the scope of Maffezini. In particular, the Tecmed tribunal applied the standard specified in Maffezini to ascertain that the time limit was a fundamental part of the parties’ will. At the same time, it insinuated that other procedural requirements would stop short of the core of the specific negotiations.

In summary, the public policy-related limitations seem to require a subjective determination of a state’s policy from treaties unrelated to the BIT at issue, although the VCLT does not define these sources as relevant means of interpretation. Moreover, the understanding of limitations as ultimate barriers appears to contravene the concept of MFN treatment. An MFN clause is not only a treaty provision, but also a source of international law. As a consequence hereof, obligations under international law may develop that do not necessarily coincide with those set forth in the specific treaty. The contents of these new international obligations cannot always be foreseen at the conclusion of the basic treaty, for they hinge on other, possibly subsequent, international treaties. However, the parties know that the obligations “multilateralize” the liberalization of trade and thus accomplish their set public policy aim. In this sense, it furnishes a “shorthand” formula, which renders it unnecessary to rewrite existing treaties in order to incorporate more liberal obligations. The following remark from 1948 may provide guidance:

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206 Id., para. 69.
207 Id.
208 Article 28 of the VCLT (Non-retroactivity of treaties) reads as follows: “Unless a different intention appears [...], its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.”
209 Maffezini, supra note 1, paras. 25 et seq., 62 et seq., footnoted to the conclusion in Tecmed, supra note 187, para. 69.
210 Fietta, supra note 147, takes a different view, p. 133.
211 Similar conclusion: Teitelbaum, supra note 3, p. 230.
213 Aconcii, supra note 156, p. 31.

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“It is clear that MFN clauses serve as insurance against incompetent draftsmanship and lack of imagination on
the part of those who are responsible for the conclusion of international treaties. [...] it is thus true that the
standard of MFN treatment has the effect of putting the services of the shrewdest negotiator of a third country
gratuitously at the disposal of one's own country [...]”

E. Possible Ways out of the Uncertainty

I. Recent Reactions to the Jurisprudence on the Scope of MFN Clauses
The steps recently taken by state actors demonstrate an increased awareness of the potential
application of MFN clauses to dispute resolution. Bearing in mind the importance of the
clause’s text, some states have expressly limited MFN treatment. The modification of
capital-exporting countries’ model BITs deserves special attention, since “[m]ost BIT
negotiations take [them] as their starting point”. Other states such as China seem less
concerned by the decisions in Maffezi and Siemens.

For example, the third draft text of the Free Trade Area of the Americas (FTAA), published
on 21 November 2003, excluded the operation of Maffezi from the scope of the MFN clause
contained in Article 5. Being negotiated by 34 states it is a clear vote against an extension

217 The FTAA is available online at: http://www.ftaa-alca.org/FTAADraft03/ChapterXVII_e.asp.
218 Article 5 of the FTAA (Most-Favored-Nation Treatment) reads – including the attached note 13 - as follows:

[5.1. 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 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] [to investments of investors of another Party] treatment no less favorable
than that it accords, in like circumstances, to investments in its territory 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.]

[5.1. Each Party shall accord to the investments of investors of the other Parties made in its territory treatment
which is no less favorable than that accorded[ in like circumstances,] to investments by investors of a non-Party.]

[5.2. While recognizing the generality of the MFN principle, a smaller economy may be exempted from same in
those circumstances where it extends more favourable treatment to investors/investments from other smaller
economies in the Hemisphere.]

[5.3. The treatment accorded by a Party under paragraph 5.1 means, with respect to a state or province, treatment
no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to
investors, and to investments of investors, of any other Party or of a non-Party.]

[Note [13]: One delegation proposes the following footnote to be included in the negotiating history as a reflection
of the Parties’ shared understanding of the Most-Favored-Nation Article and the Maffezi case. This footnote
would be deleted in the final text of the Agreement:}
of MFN treatment to procedural rights. Remarkably, the drafters of the Central American Free Trade Agreement (CAFTA) of 28 January 2004 chose the same unusual means to utter their concern about the Maffezini decision on jurisdiction. The draft text of the CAFTA makes express reference to this decision in two footnotes which are attached to the MFN clause contained in Chapter 10, Section A, Article 10.4 (2) and carve out Maffezini from its application. These notes were to be “included in the negotiating history as a reflection of the Parties’ shared understanding […]” and “[…] intent that this clause does not encompass international dispute resolution mechanisms such as those contained in Section C of this Chapter, and therefore could not reasonably lead to a conclusion similar to that of the Maffezini case.” The drafters apparently feared the knock-on effect of Maffezini, even though the MFN clause in Article 10.4 (1) of the CAFTA already diverged from the broad MFN clause in Maffezini in its limited scope.

Article 4 of the U.S. Draft Model BIT of 2004 chooses the exact same wording as the MFN clause in the CAFTA, yet without containing a corresponding footnote. Hence it remains unsettled whether its scope is really expressly limited to substantive rights or whether the "management of investments" might not extend to dispute resolution, to which the omission of a footnote or clarification seems to point.

Moreover, Canada’s 2004 Model BIT circumscribes MFN treatment more narrowly than do most of the country’s existing BITs, which refer in their MFN clauses in general terms to “treatment to investments”. Apparently in response to Maffezini, the Model BIT now limits MFN treatment in Article 4 “to the establishment, acquisition, expansion, management,

The Parties note the recent decision of the arbitral tribunal in Maffezini (Arg.) v. Kingdom of Spain, which found an unusually broad most favored nation clause in an Argentina-Spain agreement to encompass international dispute resolution procedures. See Decision on Jurisdiction §§ 38-64 (January 25, 2000), reprinted in 16 ICSID Rev. – F.I.L.J. 212 (2002). By contrast, the Most-Favored-Nation Article of this Agreement is expressly limited in its scope to matters “with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.” The Parties share the understanding and intent that this clause does not encompass international dispute resolution mechanisms such as those contained in Section C.2.b. (Dispute Settlement between a Party and an Investor of Another Party) of this Chapter, and therefore could not reasonably lead to a conclusion similar to that of the Maffezini case.]

220 Article 10.4 (2) of the CAFTA reads as follows: “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 other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.” Available online at: http://2005.sice.oas.org/Trade/CAFTA/Chap10_e.pdf.
221 Singh, supra note 229, p. 333.
conduct, operation and sale or other disposition of investments in its territory”. Nevertheless, it needs further clarification whether the term “management of investment” may cover dispute settlement as well.

Pursuant to its Article 6 (A) b), Model International Agreement on Investment for Sustainable Development of the International Institute for Sustainable Development (IISD) confines most-favoured-nation treatment “to the substantive provisions of other international agreements relating to investment that enter into force after this Agreement has entered into force.” A footnote 8 clarifies that “this Article [6] does not apply to procedural, institutional or dispute settlement provisions of other international agreements relating to investment that enter into force after this Agreement.” With the positive reception of this agreement in mind, this specific clause might be incorporated into revised or future BITs.

Some states, in particular Argentina, have had painful experiences with investment arbitration in general and with the broad interpretation of MFN clauses in particular. Although no new arbitration proceedings were initiated against Argentina at any rate from January through November 2006, the country found itself on the losing side in four investment treaty arbitrations over roughly the last two years. With a number of Argentine BITs being due for renegotiation in the near future, the scope and extent of the country’s treaty obligations is expected to become more limited.

On the other end of the scale, the Model UK BIT includes expressly dispute resolution provisions in Article 3 (3), which was implemented inter alia into the United Kingdom – Bosnia and Herzegovina BIT. It reads as follows: “For the avoidance of doubt, it is confirmed that the treatment provided for in paragraph [...] (2) above shall apply to the

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222 Boscaroli/Silva, supra note 137, p. 67.
226 UNCTAD, supra note 19, p. 6: "42 (known!) claims have been lodged against Argentina, 39 of which relate at least in part to that country's crisis."
227 Schaefer, supra note 20, p. 254.
230 Professor Loukas Mistelis, School of Law, Queen Mary, University of London, in his presentation “Convergence of International Commercial Arbitration and Investment Arbitration” for the students of the Master Programme “International Commercial Arbitration Law” at Stockholm University, Sweden on 28 March 2007.
provisions of Articles 1 to 11 of this Agreement.”

Furthermore, the new China-Germany BIT, which contains in Article 9 a broad investor-State dispute resolution clause principally allowing for arbitration of any dispute concerning investments after a six-month cooling-off period, as well as other “new generation” BITs concluded by China with e.g. the Netherlands and Finland suggest a development in favor of “investment treaty-shopping”. Commentators agree that the dispute resolution clause in the Germany-China BIT may be a “suitable test case” for the expansion of arbitration rights through BITs that provide for MFN treatment but contain only “emasculated” dispute settlement provisions. Taken into account that China as the rising economic power had signed 113 BITs as of mid 2005, many of which restrict international arbitration to disputes over compensation for expropriation and nationalization, this holds true all the more. Should the Salini and Plama approach be followed, however, a claimant will encounter difficulties in extending MFN treatment to dispute resolution if the basic treaty lacks express wording to this effect. Given China’s consistently restrictive policy as reflected in the vast majority of its BITs and the ICSID Convention, the investor will hardly find a corresponding articulation outside the BIT. Up to the present, no foreign company is known to have initiated arbitral proceedings against China.

In short, the picture seems as colorful as the opinions diverse. Depending on their particular experiences and economic interests, the state actors keep the door to MFN treatment (half) closed or (half) open for procedural rights.

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232 Article 3 (2) refers to MFN treatment and Article 8 to dispute settlement.
233 In force since 11 November 2005.
234 Pursuant to Ad Article 9 of the Protocol the consent to arbitration is subject to the following additional conditions: “(a) the investor has referred the issue to an administrative review procedure according to Chinese law, (b) the dispute still exists three months after he has brought the issue to the review procedure, and (c) in case the issue has been brought to a Chinese court, it can be withdrawn by the investor according to Chinese law.”
235 Agreement on Encouragement and Reciprocal Protection of Investments between the Government of the People’s Republic of China and the Government of the Kingdom of the Netherlands, signed on 26 November 2001, in force since 1 August 2004. Article 9 and Ad Article 9 of the Protocol contain a broad consent to arbitration on the condition of prior exhaustion of the “domestic Administrative Reconsideration procedure specified by the laws and regulations of the People’s Republic”.
236 Agreement between the Government of the Republic of Finland and the Government of the People’s Republic of China on the Encouragement and Reciprocal Protection of Investments, signed on 15 November 2004; Article 9 (no amendment in the Protocol!) contains a broad unconditional consent to arbitration with yet rather detailed provisions mapping out the arbitral procedure, e.g. Article 9 (3) regulates the nomination of the presiding arbitrator, who must be a national of a third State, by the two party-appointed arbitrators.
237 Schaefer, supra note 20, p. 255; also Savage, supra note 52, p. 31.
238 Cymrot, supra note 2, p. 83.
239 see also Savage, supra note 52, p. 33.
II. Future Options to Reconcile the Conflicting Opinions

The aforementioned routes taken by state actors are likely to be followed by others. Nonetheless, there are further-reaching suggestions as how to render the case law more coherent and consistent - not only with regard to the scope of MFN clauses.²⁴¹

The establishment of a multilateral institutionalized facility whereby uniform interpretations of the BITs could be adopted is desirable, but unrealistic. As opposed to the NAFTA which confers upon the Free Trade Commission, a body composed of representatives of the three member states, this exact power of binding interpretation,²⁴² the great number of BITs, of state parties and of different interests involved impedes the creation of a similar body in the field of BITs.

For the same reasons, the attempt to incorporate an appellate mechanism into the ICSID Convention has been dropped.²⁴³ The draft allowed appeals based on an error of fact or law. An error in a tribunal’s interpretation of the scope of an MFN clause would thus have been eligible to review. Irrespective of problems with possible national setting aside procedures, differently composed appeals tribunals yet could not provide for consistent interpretations. The same considerations apply with regard to the bilateral appellate body as set forth in Annex D of the U.S. Draft Model BIT of 2004.

Some distinguished commentators have proposed to install a mechanism that preventively rules on interpretation issues while the case is pending.²⁴⁴ They make reference to Article 234 of the Treaty establishing the European Community. Admitting the usefulness of this approach, it still contains a strong visionary element and will therefore not be realized in the near future.

Interpretative statements of states regarding the scope of MFN clauses in specific BITs do not lead to uniform interpretation of the issue in general. However, they efficiently contribute to more homogenous outcomes in disputes over the interpretation of specific treaties and may thus influence the general discussion. So far, a common position about the interpretation of a BIT has been taken by the Netherlands and the Czech Republic in CME,²⁴⁵ but none specifically in

²⁴² Articles 2001 (1), 1131 (2) NAFTA.
²⁴⁵ CME Czech Republic B.V. v. The Czech Republic (UNCITRAL, Partial Award, 13 September 2001), paras.
our context. Article 9 of the state parties' BIT set forth "consultations" as to the resolution of interpretative matters. Article 30 (3) U.S. Draft Model BIT of 2004 \(^{246}\) takes this idea a step further and foresees insofar a joint decision of the state parties that "shall be binding on a tribunal". In addition, it states that "any decision or award issued by a tribunal must be consistent with that joint decision". With the uncertainty on the scope of the MFN clause continuing, such a provision might become more common, particularly since it provides the states with a tool to continuously interpret the BIT. Obviously, a common interpretation taken by states against the background of an instant investor-state arbitration to which one of these states is respondent would be restrictive and thus bar the reliance on dispute resolution provisions by operation of the MFN clause.

F. Conclusion

The above discussion has shown that the critical question is no longer whether an MFN clause can apply to dispute resolution, but rather how far such a clause might be extended to permit a party to avail itself of the dispute settlement mechanism contained in a BIT entered into by the host state with a third state. This issue seems most delicate in situations where the basic treaty provides for a wholly different dispute resolution mechanism and forum. \(^{247}\) It becomes particularly relevant in cases that involve broadly phrased MFN clauses and a not clearly defined intention of the parties as to its extension to dispute settlement. The final word has not been said.

Yet, there are partially specifiable reasons for the different outcomes in the relevant cases. Essentially, three different subject-matters of procedural and substantive nature \(^{248}\) have crystallized. The tribunals in *Maffezini, Siemens, Gas Natural, Suez* and *National Grid* endorsed the use of MFN clauses intended to bypass prior recourse to domestic courts. It hence "only" altered the procedure of the dispute resolution mechanism to which the investors already had access. In contrast, the panels in *Yaung Chi Oo Trading PTE Ltd.* and *Plama* denied recourse to MFN clauses to "shop" for an entirely different dispute settlement mechanism. Finally, the tribunals in *Salini, Bershader* and *Telenor* equally rejected the reliance on a

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\(^{246}\) Available online at: http://www.bilaterals.org/article.php3?id_article=137.

\(^{247}\) Same opinion Sutton, Stephen D.: *Emilio Agustin Maffezini v. Kingdom of Spain and the ICSID Secretary-General’s Screening Power*; in: Arbitration International, Volume 21, No. 1, p. 125.

third-party dispute resolution provision by strength of the MFN clause to establish their jurisdiction over contractual claims of compensation arguably not covered by the basic treaty. In addition, the communist-era BITs with restricted dispute settlement provisions in Plama and Berschader stand out. This distinction yet fails to explain the principally narrow approach adopted by the tribunals in Plama and Telenor regarding the extension of MFN treatment to dispute settlement. Their approach stands in clear contrast to the jurisprudence in Maffezini or Siemens. That is the open wound. For it to heal, it needs balancing or reconciliation of the clashing positions.

Most simply, the state actors could expressly include dispute settlement arrangements in or exclude them from the text of a new or revised BIT. Up to date, however, the approaches of the UK or of the CAFTA have not found followers. Opposed interests may be at its bottom, for only the developed countries as investor states typically press for an embedding. Given the impact of this controversial issue, states might initiate renegotiations of BITs more frequently in the future.

Alternatively, it will remain to future tribunals to reconcile the conflicting opinions. In view of the growth and diversity of the BIT universe with its "wide variations in language among MFN clauses", the tribunals face great challenges for securing a more coherent case law. Moreover, it has become clear that there is no one-fit-all solution. An examination of the precise wording, structure and context of the specific BIT in dispute remains indispensable.

The tribunals have mapped out limitations and restrictions, which do not adhere to rigid boundaries despite their occasional appearance but are rooted in their specific circumstances. Allusion to an entire new continent of investors' rights would hence overstate the extension of MFN treatment so far approved by tribunals. The jurisprudence has set foot and taken the first steps on a new territory that may provide additional rights for investors, may contain "undesirable" international obligations for state adverse parties and as yet creates uncertainty for all. It is not until its interior and its frontiers have been further explored and secured that this land enjoys peace.

250 Freyer/Herlihy, supra note 11, p. 60.
251 Schaefer, supra note 20, p. 256.
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