

Article

Clearing a Path Through a Tangled Jurisprudence: Most-Favored-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties

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I. INTRODUCTION

Under a most-favored-nation (MFN) clause, the signatories of a treaty agree to accord each other the same treatment they grant to any other nation. The MFN principle of non-discrimination is ubiquitous in contemporary international economic relations. It has long been considered “the corner-stone of all modern commercial treaties,”¹ and it remains at the heart of the contemporary international trade system as Article 1 of the General Agreement on Tariffs and Trade (GATT). The MFN principle has also been used in other fields of international relations, such as consular relations. In the second half of the twentieth century, it was incorporated into the emerging field of international investment law, where it has become a “core element of international investment agreements”² and is included in most of the more than two thousand bilateral investment treaties (BITs) that comprise the field.³

However, two features of international investment law have presented particular difficulties in the application of the MFN principle. First, whereas international trade law is now embodied in multilateral treaties, attempts to establish a broad multilateral agreement on investment (MAI) have failed.⁴ Thus, rather than convergence toward a single MFN clause applicable to all, analogous to GATT Article 1, international investment law presents a multiplicity of differently worded MFN clauses embedded in different treaties, with the result that the MFN clauses are subject to a broad range of interpretations. Second, the relationships between these varied MFN clauses and dispute settlement mechanisms have presented a unique set of problems. Dispute settlement is central to the functioning of international investment law,⁵ yet the multitude of BITs contain varying provisions about when, how, and in which forum investors can bring claims against host states. This diversity of provisions concerning dispute settlement fits uneasily with the MFN principle, which requires that all investors be treated equally, and recent arbitrations conducted under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID) have reached sharply divergent results on the question of whether an MFN clause entitles an investor to invoke the dispute settlement provisions of a third party’s treaty with the host state.

The issue has arisen tangentially in a number of recent arbitrations, but it was of central importance in five cases.⁶ These five decisions are divided: in

1. Stanley K. Hornbeck, *The Most-Favored-Nation Clause* (pt. 1), 3 AM. J. INT’L L. 395, 395 (1909) (internal quotations omitted).

2. U.N. Conference on Trade and Development [UNCTAD], *Most-Favored-Nation Treatment*, 1, U.N. Doc. UNCTAD/ITE/IIT/10(Vol. III) (1999), available at <http://www.unctad.org/en/docs/psiteitd10v3.en.pdf> [hereinafter UNCTAD, *Most-Favored-Nation Treatment*].

3. RUDOLF DOLZER & MARGRETE STEVENS, *BILATERAL INVESTMENT TREATIES* 65 (1995). See also United Nations Conference on Trade and Development, *Quantitative Data on Bilateral Investment Treaties and Double Taxation Treaties*, <http://www.unctad.org/Templates/WebFlyer.asp?intItemID=3150&lang=1>.

4. For a review of efforts to establish an MAI, see Riyaz Dattu, Essay, *A Journey from Havana to Paris: The Fifty-Year Quest for the Elusive Multilateral Agreement on Investment*, 24 FORDHAM INT’L L.J. 275 (2000).

5. See *infra* Subsection III.B.1.

6. The five decisions are: *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 5 ICSID (W. Bank) 396 (2000), available at <http://www.worldbank.org/icsid/cases/>

three cases, *Maffezini*, *Siemens*, and *Gas Natural*, the tribunals upheld the claimants' invocation of third-party dispute settlement provisions via MFN clauses. In the other two cases, *Salini* and *Plama*, the tribunals rejected such invocation. Despite the apparent incompatibility of these decisions, and notwithstanding the insistence by the tribunal in *Plama* on a difference of principle with the *Maffezini* line of cases,⁷ this Article argues that these five cases were all, in fact, correctly decided—although not necessarily for the reasons given by the tribunals. The different outcomes are explained by fundamental differences in the text of the treaties in question and the circumstances in which the MFN question arose.

It will be tempting for future tribunals to see these decisions as representing two incompatible lines of cases and thus to choose sides, as it were, between *Maffezini* and *Plama*. This article argues instead that these decisions can be reconciled and that tribunals would be ill advised to look to these decisions as embodying a presumptive rule to guide future cases. Instead, future tribunals should be careful to interpret each treaty on its own terms and with reference to the specific circumstances in which the claim arises. However, although each dispute must be resolved on a case-by-case basis, the specific provisions and circumstances at issue must be interpreted against a clear understanding of the overall purpose of the international investment law system and the specific aims and functions of dispute settlement and MFN provisions in this field. Such an understanding will tend to favor giving a broad scope to MFN clauses that are not expressly or implicitly limited, but it will also direct the attention of tribunals toward certain factors that will push in the opposite direction in individual cases.

The existing jurisprudence not only lacks coherence and clarity, it also contains much that is incorrect, misleading, and potentially dangerous. The result is that the case law has created more interpretive problems than it has solved. Nevertheless, and perhaps paradoxically, the outcome in each case, at least on the MFN issue, is correct. This Article aims to clear a path through this tangled case law, to show how these cases could be both properly grounded and deprived of potentially mischievous consequences.

Based on a close analysis of the existing case law, this Article argues against a general presumption that the scope of an MFN clause should be construed either broadly or narrowly. However, it does draw several specific conclusions and interpretive recommendations for the future. First, this Article argues that an MFN clause cannot be made to substitute for a state's consent

emilio_DecisiononJurisdiction.pdf; Siemens A.G. v. Argentina, ICSID Case No. ARB/02/8, Decision on Jurisdiction (2004), <http://www.worldbank.org/icsid/cases/siemens-decision-en.pdf>; Salini Costruttori S.p.A. v. Jordan, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 44 I.L.M. 573 (2005), available at <http://www.worldbank.org/icsid/cases/salini-decision.pdf>; Plama Consortium v. Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 44 I.L.M. 721 (2005), available at <http://www.worldbank.org/icsid/cases/plama-decision.pdf>; Gas Natural SDG v. Argentina, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction (2005), <http://www.asil.org/pdfs/GasNat.v.Argentina.pdf>.

7. See *Plama*, para. 223, 44 I.L.M. at 755. (“[T]he principle with multiple exceptions as stated by the tribunal in the *Maffezini* case should instead be a different principle with one, single exception: an 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.”).

to jurisdiction, either to gain access to arbitration in the first instance or to gain access to what might be perceived as a more favorable arbitral forum. Second, where consent exists, ordinary rules of treaty interpretation should apply rather than the sort of presumptions hinted at in *Maffezini* and expressly advocated in *Plama* and *Gas Natural*. Third, dispute settlement mechanisms should be viewed as a package and should not be mixed and matched. As *Siemens* illustrates, this can lead to an anomalous situation in which a state is required to grant every claimant a more favorable set of provisions than those to which it has actually consented in any treaty. Fourth, to invoke provisions of a third-party treaty, a claimant must show that its provisions are not only different but also objectively “more favorable” to claimants generally. Fifth, it remains unusual for a BIT to specify whether the MFN clause applies to dispute settlement,⁸ yet in light of the confused state of current law, states negotiating bilateral investment treaties would be well advised to follow the example of either the United Kingdom or the United States and provide a clear indication of their intent on this question. Following these recommendations, and avoiding the errors highlighted in this Article, should lead to a more coherent approach to MFN issues.

The Article is structured as follows. Part II reviews the historical evolution of MFN clauses in the trade context and their introduction into investment treaties in the second half of the twentieth century. Part III places the debate over the interpretation of the MFN clause in the broader context of the aims and purposes of international investment law as a whole and the MFN clause and dispute settlement provisions in particular. Part IV analyzes the relevant precedents in the jurisprudence of the International Court of Justice (I.C.J.). Part V critically scrutinizes the recent investment arbitrations that have addressed the relationship between MFN clauses and dispute settlement provisions. Part VI draws together a number of conclusions and recommendations aimed at clarifying several key issues and bringing future practice into greater harmony with the policy aims animating the field of international investment law.

II. THE MFN CLAUSE IN HISTORICAL CONTEXT

International investment law is a product of the twentieth century; however, the MFN clause has been a part of international economic relations for centuries. While the MFN clause serves a similar non-discrimination purpose in both the trade and investment contexts, the practical circumstances giving rise to MFN concerns are quite different. In importing the MFN

8. To date, the United Kingdom is the only state with a consistent practice of addressing the issue explicitly by inserting a provision clarifying that the MFN clause does apply to dispute settlement. The United States has been less explicit, but its practice has been to use MFN clauses limited in scope to treatment “with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.” North American Free Trade Agreement, U.S.-Can.-Mex., art. 1103, Dec. 17, 1992, 32 I.L.M. 289, 639 (1993) [hereinafter NAFTA]. In addition, as the *Plama* tribunal discusses, see *infra* Part V.G., the United States insisted on the inclusion of a footnote in the draft Free Trade Agreement of the Americas (F.T.A.A.) to the effect that the *Maffezini* interpretation could not apply to the MFN clause in the FTAA—a clause identical to the one in the NAFTA. The U.S. view is thus sufficiently clear.

principle from the trade context, international investment law has also imported the historical baggage of how MFN clauses have been understood and applied in the trade context over hundreds of years. This history thus plays a central role in how MFN clauses are interpreted today.

Most-favored-nation clauses have been traced back as far as the eleventh century.⁹ Medieval trading cities sought monopolies in the exploitation of foreign markets, but when monopoly could not be achieved, MFN arrangements were the next best alternative, assuring the merchants of the Italian, French, and Spanish trading cities that they would have “opportunities at least equal to those of their rivals.”¹⁰ For example, in 1226, Frederick II granted to citizens of Marseille the same privileges he had previously granted to citizens of Pisa and Genoa.¹¹ In the Middle Ages, however, international commerce “was really carried on by the adventurous few, and was, as a rule, either sporadic or governed by monopolies.”¹² It was not until after the expansion of international commerce itself over the fifteenth and sixteenth centuries that the clause became widespread. The phrase “most-favored-nation” made its first appearance at the end of the seventeenth century.¹³

Powerful states often secured unilateral pledges of MFN treatment from less powerful states. For example, a 1692 treaty between Portugal and England guaranteed MFN treatment to British subjects only.¹⁴ Such one-sided arrangements typically benefited European powers without reciprocal benefits for their non-European counterparts and were “a constant feature of the capitulations.”¹⁵ In the capitulations system, whenever one of the European powers managed to extract a new concession from the state subject to capitulations, that concession would be immediately extended to all of the other powers who held MFN privileges. For example, when Russia defeated the Ottoman Empire in 1774 and extracted commercial privileges in a subsequent treaty, the treaty became the basis of much of the Ottoman Empire’s foreign economic relations.¹⁶ The unilateral MFN clause thus served, in effect, to magnify the strength of the European powers and the weakness of the states subject to capitulations.

A dispute arose between China and Belgium in 1926 when China sought to terminate its one-sided treaty with Belgium. Belgium sought to bring the case before the Permanent Court, but the Chinese refused to participate and instead issued a public statement:

9. Endre Ustor, *First Report on the Most-Favoured Nation Clause*, [1969] 2 Y.B. Int’l L. Comm’n 157, 159, U.N. Doc. A/CN.4/213.

10. *Id.*

11. See Hornbeck, *supra* note 1, at 398-99.

12. *Id.* at 399.

13. *Id.* at 395, 400 (noting that the phrase appears in a 1692 treaty between Denmark and the Hanse cities); see also Ustor, *supra* note 9, at 160 (“The modern form of the clause evolved in the eighteenth century, when the phrase ‘most favored foreign nation’ also appeared.”).

14. See Ustor, *supra* note 9, at 160 (discussing and quoting from that document); see also Hornbeck, *supra* note 1, at 400 (giving the date of the treaty as 1642).

15. Ustor, *supra* note 9, at 161; see also Suzanne Basdevant, *La Clause de la Nation la Plus Favorisée: Effets en Droit International Privé*, reprinted in *LA CLAUSE DE LA NATION LA PLUS FAVORISÉE* 8 (Librairie du Recueil Sirey (Société Anonyme)) (1929). (“La clause de la nation la plus favorisée est le fond de toutes les capitulations.”).

16. Ustor, *supra* note 9, at 161.

The 'unequal treaties' which were exacted from China nearly a century ago have established between Chinese and foreigners discriminations that are now sources of endless discontent and friction with foreign Powers. Such a state of affairs is not as it should be, since intercourse between nations, as between individuals, finds its rational *motif* in the exchange of mutual benefits which will endure and lead to lasting friendship. In an age which has witnessed the coming into existence of the League of Nations . . . , there does not seem to be any valid reason to justify international relations which are not founded on equality and mutuality.¹⁷

This system of capitulations forms the backdrop of the Anglo-Iranian Oil case, discussed in detail in Part IV.A, *infra*.

A. *Conditionality and Reciprocity*

While the unilateral form of the clause has fallen out of favor as being incompatible with the principle of sovereign equality of states, another form of the clause has fallen into disuse because it simply proved unworkable.¹⁸ The "conditional" MFN clause, and the conditional interpretation of MFN clauses generally, are primarily associated with U.S. practice from the 1770s through to the 1920s, although the conditional clause was briefly prevalent in Europe as well in the middle of the nineteenth century.¹⁹ The clause was conditional in the sense that, when an economic concession was granted in exchange for some compensation from the other side—whether such compensation was simple reciprocity or some other form of compensation—the state benefiting from the MFN clause could only secure the concession by granting the same compensation.

The conditional clause had a logical grounding in the principle of reciprocity.²⁰ The idea was that each privilege or concession granted by, for example, the United States was bargained for and paid for with a corresponding concession on the other side. The American view was succinctly expressed by Secretary of State John Sherman in 1898:

[T]he allowance of the same privileges . . . to a nation which makes no compensation, that have been conceded to another nation for compensation, instead of maintaining destroys that equality . . . which 'the most-favored-nation clause' was intended to secure. It concedes for nothing to one friendly nation what the other gets only for a price.²¹

The MFN clause was thus not a means by which a state could get something for nothing, but rather a promise that the terms of any deal would be equally available to any country with an MFN clause. As one commentator put it, the

17. Statement of the Chinese Government, 1929 P.C.I.J. (ser. C) No. 16-I, at 271 (Nov. 6), *quoted in* Ustor, *supra* note 9, at 167.

18. For a general critique of the conditional clause, see RICHARD SNYDER, *THE MOST-FAVORED-NATION CLAUSE: AN ANALYSIS WITH PARTICULAR REFERENCE TO RECENT TREATY PRACTICE AND TARIFFS* 211-22 (1948).

19. Stanley K. Hornbeck, *The Most-Favored-Nation Clause* (pt. 2), 3 AM. J. INT'L L. 619, 620-21 (1909).

20. See Hornbeck, *supra* note 1, at 406.

21. Letter from Secretary of State John Sherman to William I. Buchanan (Jan. 11, 1898), in 5 MOORE'S DIGEST OF INTERNATIONAL LAW 278 (1906), *quoted in* Hornbeck, *supra* note 1, at 408.

conditional clause is thus the equivalent, in practice, of having no MFN clause whatsoever.²²

The reciprocal logic of the conditional clause, with its emphasis on bargaining for special favors and concessions, was well-suited to a protectionist commercial policy. Mutually advantageous concessions could be worked out on a bilateral basis, but high tariff barriers could be retained against any state unwilling or unable to pay for their reduction with an identical concession. In the middle of the nineteenth century, however, tariff policies in Europe underwent a transformation and protectionist policies were gradually abandoned. The key event in this transformation was the 1860 Cobden Treaty, under which the two leading powers, France and Great Britain, lowered tariffs across the board and granted one another unconditional most-favored-nation status.²³ The unconditional MFN clause was seen as a useful instrument for dismantling the protectionist tariff system, since a single breach in the tariff wall would destroy it, at least for those countries benefiting from unconditional MFN clauses. Even when Europe returned to protectionism later in the nineteenth century, the unconditional clause remained in favor.²⁴ The practices of Japan and Latin American countries had tended to vary between the European and the American approaches, in part as a function of the treaty partner.²⁵

The United States, however, maintained its insistence on the conditional MFN clause until after World War I, when it jettisoned both protectionism and conditionality in favor of free trade and unconditional MFN treatment—at least insofar as U.S. exports were concerned.²⁶ In 1924 Secretary of State Hughes urged the Senate to ratify the new treaty with Germany implementing this change in policy:

It was the interest and fundamental aim of this country to secure equality of treatment but the conditional most-favored-nation clause was not in fact productive of equality of treatment and could not guarantee it. Moreover, the ascertaining of what might constitute equivalent compensation in the application of the conditional most-favored-nation principle was found to be difficult or impracticable Under present conditions, the expanding foreign commerce of the United States needs a guarantee of equality of treatment which cannot be furnished by the conditional form of the most-favored-nation clause.²⁷

Thus, in light of the changed position of the United States in the world economy, the conditional clause had ceased to be useful. As the U.N. Special Rapporteur on the MFN clause put it:

22. Boris Nolde, *La Clause de la Nation La Plus Favorisée et les Tarifs Préférentiels*, 39 RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL 1, 91 (1932).

23. Hornbeck, *supra* note 19, at 623.

24. SNYDER, *supra* note 18, at 212. There were, nevertheless, European advocates of the American-style conditional clause in this period. See, e.g., Julius Wolf, *Foreword to DIE MEISTBEGÜNSTIGUNGS-KLAUSEL*, at v (Lorenz Glier ed., 1905). See generally *DIE MEISTBEGÜNSTIGUNGS-KLAUSEL* (Lorenz Glier ed., 1905).

25. Hornbeck, *supra* note 19, at 625-26.

26. SNYDER, *supra* note 18, at 197 (discussing the U.S. policy of demanding unconditional MFN treatment in treaties while simultaneously maintaining high tariff barriers).

27. Change in Favored-Nation Clauses, 5 HACKWORTH DIGEST OF INTERNATIONAL LAW §502, at 273 (1942), quoted in Endre Ustor, *Fourth Report on the Most-Favoured-Nation Clause*, [1973] 2 Y.B. Int'l L. Comm'n 97, 98, U.N. Doc. A/CN.4/SER.A/1973.

The conditional clause served the purposes of the United States so long as it was a net importer and its primary aim was to protect a growing industrial system. Since the position of the United States in the world economy changed radically after the war, the conditional clause proved to be inadequate. The essential condition for a successful penetration of international markets, i.e. the elimination of discrimination against American products, could only be achieved through the unconditional clause.²⁸

Once the United States abandoned the conditional clause in the early 1920s, that form of the clause effectively disappeared from international commercial agreements.²⁹ One form of the clause, in which MFN treatment is conditioned on material reciprocity, however, continued to be used in the field of consular immunities.³⁰

It has been said that "the most-favored-nation policy adopted by any nation will depend upon the characteristics of its economy and the type of trade policy deemed necessary to protect and foster the development of that economy."³¹ The historical division between countries favoring the conditional form and those favoring the unconditional form is in some ways analogous to the contemporary disputes about whether MFN clauses in investment treaties apply to dispute settlement provisions. Past disputes often concerned the proper interpretation of a treaty which did not clearly state whether it was conditional or unconditional.³² Hornbeck summarized the division of views as follows: "Those countries which have had commercial policies smacking of free trade have shown a preference throughout for the unconditional, while those countries which have been most consistently protectionist . . . have favored the conditional."³³ Put another way, in the context of nineteenth century commercial treaties, those countries who were net importers of goods favored the most restrictive interpretation of the MFN clause, whereas net exporters favored the most expansive interpretation.

Analogously, in the context of contemporary investment treaties, restrictive interpretations of MFN clauses will tend to benefit importers of capital, whereas expansive interpretations will benefit exporters of capital. The analogy, however, is imperfect. One peculiarity of the investment law context is the conflict of interest concerning dispute settlement mechanisms between the state and its nationals who invest abroad. As the *Maffezini* case illustrates, a capital-exporting country will not hesitate to invoke restrictive interpretations of the MFN clause whenever it finds itself in the role of respondent. Moreover, the largest capital-exporting country, the United States, responded to the *Maffezini* award by insisting on the inclusion of a footnote in the draft Free Trade Agreement of the Americas (F.T.A.A.) and other post-

28. Ustor, *supra* note 9, at 163.

29. *See id.*

30. *See* Ustor, *supra* note 27, at 99. It is far from clear, however, what function the MFN clause serves in such contexts: the aim of the material reciprocity requirement appears to be to establish a guarantee of equality between the treatment of nationals of country A in country B with the treatment of nationals of country B in country A, rather than to ensure that there will not be discrimination within country B between nationals of country A and nationals of other countries.

31. SNYDER, *supra* note 18, at 242.

32. Ustor, *supra* note 27, at 101.

33. Hornbeck, *supra* note 19, at 627.

Maffezini treaties³⁴ indicating that the wording of the MFN clause, modeled on that of the NAFTA and most U.S. BITs, precluded its applicability to dispute resolution mechanisms. While the United States may have been more concerned about procedural predictability than about restricting access to arbitration for foreign investors,³⁵ the entire episode illustrates how a state's complex interests do not necessarily map onto those of its investors.

Interestingly, just as the United States has reprised its role as the leading advocate of a restrictive interpretation of the MFN clause, the United Kingdom has become the leading advocate of a broad interpretation. The United Kingdom's model BIT provides expressly that the MFN clause shall apply to dispute settlement.³⁶ In this case, however, the two countries' opposite views do not correspond to different economic positions: While both countries receive significant amounts of foreign direct investment (FDI) inflows—indeed the United States is the world's largest recipient of FDI—these inflows tend to be dwarfed by FDI outflows. The only recent exception to this trend was in 2004, when the United Kingdom experienced a net inflow of investment.³⁷

In any event, most capital-exporting countries are also significant importers of capital and therefore have interests pushing in both directions. The limits of structural economic explanations of the positions taken by states were further illustrated in the case of *Mondev International v. United States*, where the NAFTA contracting parties convened while the arbitration was pending against the United States in order to issue a narrow interpretation of NAFTA article 1105(1).³⁸ This effort was led not by Mexico, but by the United States, and illustrates that in the context of international investment law, the interests of investors and their home states are frequently in conflict.

B. *The Free Trade Movement and Efforts at Codification*

World War I had disrupted the trading and treaty relationships of the nineteenth century, and the early years after the war were marked by a resurgence of mercantilism, including the renunciation of treaties containing MFN clauses by a number of states.³⁹ Dissatisfaction with this new protectionism slowly gave rise to a free trade mood exemplified in the League

34. See, e.g., Draft Investment Chapter of US-Thailand FTA as Proposed by US (2006), http://www.bilaterals.org/article.php3?id_article=4144.

35. There is something of a paradox in the U.S. position on *Maffezini*, since its policy in recent BITs has been to incorporate very flexible and expansive provisions concerning access to arbitration. See DOLZER & STEVENS, *supra* note 3, at 154; see also U.S. Model BIT art. 24 (2004), <http://www.state.gov/documents/organization/38710.pdf>.

36. *Plama Consortium v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, para. 204, 44 I.L.M. 721, 723 (2005), available at <http://www.worldbank.org/icsid/cases/plama-decision.pdf>.

37. UNCTAD, *World Investment Report 2005: Transnational Corporations and the Internationalization of R&D* 303, U.N. Doc. WIR05, available at http://www.unctad.org/en/docs/wir2005annexes_en.pdf [hereinafter UNCTAD, *World Investment Report*].

38. *Mondev Int'l v. United States*, ICSID Case No. ARB(AF)/99/2, paras. 99-103, 6 ICSID (W. Bank) 193, 216-18 (2002), available at <http://www.state.gov/documents/organization/14442.pdf>.

39. See Basdevant, *supra* note 15, at 10; see also Nolde, *supra* note 22, at 33 (noting that the mood at the 1927 Geneva Conference was shaped by frustrations and complications caused by the abandonment of MFN by a number of countries).

of Nations' International Economic Conference of 1927. The Conference concluded that "the mutual grant of unconditional most-favoured-nation treatment as regards Customs duties and conditions of trading is an essential condition of the free and healthy development of commerce between States," and therefore "strongly recommend[ed] that the scope and form of the most-favoured-nation clause should be of the widest and most liberal character and that it should not be weakened or narrowed either by express provisions or by interpretation."⁴⁰ At the same time as the economists recommended a broad interpretation of the MFN clause, the lawyers on a subcommittee of the Committee of Experts for the Progressive Codification of International Law concluded that "it would not seem either necessary or desirable even if it were practicable to endeavour to frame a code provision to govern the case" and that the solution to the problems of interpreting MFN clauses were to be found instead in clear drafting and application of "the ordinary rules of judicial interpretation."⁴¹

The Great Depression dealt a further blow to proponents of free trade, and the MFN principle did not fully reclaim its central position in international commerce until after World War II, when it became the cornerstone of the international trading system as Article 1 of the 1947 General Agreement on Tariffs and Trade (GATT). The adoption of the Dispute Settlement Understanding in 1994 means that states can now bring disputes concerning trade agreements before an international panel that will be empowered to issue decisions that are binding on the parties.⁴² Like the MFN clause itself, the dispute settlement mechanism is rooted in a multilateral treaty, but it does not allow for private parties to bring claims in the way that BITs do. The contemporary questions regarding the applicability of MFN clauses to investor-state dispute settlement mechanisms have not arisen in the trade context, because such mechanisms have not ordinarily been included in trade agreements—or indeed in treaties of any kind.⁴³

C. *Growth Through Investment: The Emergence of International Investment Law After World War II*

The field of international investment law emerged in the second half of the twentieth century as the product of two closely interrelated developments: the adoption of a dense network of bilateral investment treaties (BITs)⁴⁴

40. Ustor, *supra* note 9, at 169 (quoting *The World Economic Conference: Final Report* 34, League of Nations Doc. C.356.M.129.1927.II (C.E.I.46) (1927)).

41. Ustor, *supra* note 9, at 172 (quoting *Report of George Wickersham*, League of Nations Doc. C.205.M.79.1927.V (1927)).

42. Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Understanding Concerning the Rules and Procedures for the Settlement of Disputes, Apr. 15, 1994, 1869 U.N.T.S. 401, available at http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf. Under the GATT system, the affected country could block a panel decision against it, whereas consensus is no longer required under the WTO system.

43. See DOLZER & STEVENS, *supra* note 3, at 119 (noting that investor-state dispute settlement provisions in BITs are "unusual in treaty practice insofar as [they] afford[] private parties the right to pursue claims under an international treaty").

44. Some countries refer to BITs as Bilateral Investment Protection Agreements (BIPAs) or Foreign Investment Protection Agreements (FIPAs).

beginning in 1959 and the establishment of an international forum for the settlement of investor-state disputes through the creation of the World Bank's International Center for the Settlement of Investment Disputes (ICSID) in 1966. The intimate connection between the two developments can be seen in the following statistic: of 1100 BITs in existence in 1996, over 900 provided for ICSID arbitration of investor-state disputes.⁴⁵ The field grew at a phenomenal pace, such that by the end of 2004, some 2392 BITs had been signed, the vast majority of which provide for arbitration under the auspices of ICSID or another arbitral forum.⁴⁶ The proliferation of BITs has been accompanied by an equally remarkable growth in the volume of FDI flows to developing countries—and in the number of investor-state arbitrations. In 1992 such flows reached what was then a record \$47 billion.⁴⁷ By 2004, this amount had increased nearly fivefold to \$233 billion.⁴⁸ Not surprisingly, this investment activity has generated an increasing number of investor-state disputes brought before arbitral tribunals under the ICSID Convention.⁴⁹

The creation of ICSID and the expanding network of BITs were driven by the aim of fostering economic development by increasing flows of international investment. While the explosion of FDI inflows to developing countries may be primarily attributable to changes in domestic laws, regulations and economic policies,⁵⁰ BITs and the access they provide to ICSID or other forms of international arbitration have also played an important role in this growth.⁵¹ Enshrining substantive protections in domestic law or in a bilateral treaty, however, was not enough to reassure many potential investors who sought access to a neutral forum for dispute settlement, a forum whose decisions would be binding on the host state. As UNCTAD's 2003 report on investor-state dispute settlement put it:

It is evident . . . that treatment standards and guarantees are of limited significance unless they are subject to a dispute-settlement system and, ultimately, to enforcement. . . . Indeed, this is a point often made by both foreign investors and host countries. For the former, the security of foreign investment will turn not only on specified safeguards, but also on the assurance that these safeguards are available on a non-discriminatory and timely basis to all foreign investors. Conversely, the host country wishes to ensure that, in the event of a dispute with foreign investors, it will have the means to resolve the legal aspects of that dispute expeditiously and taking into account the concerns of the State, as well as those of foreign investors.⁵²

45. Int'l Ctr. for Settlement of Inv. Disputes [ICSID], *Introduction*, *Bilateral Investment Treaties 1959–1996*, n.1 (1996), <http://www.worldbank.org/icsid/treaties/intro.htm>; see also DOLZER & STEVENS, *supra* note 3, at 129 (“The overwhelming majority of BITs contain a reference to ICSID.”).

46. UNCTAD, *World Investment Report*, *supra* note 37, at 24 (noting that of 2392 signed BITs, approximately thirty percent were still awaiting ratification).

47. DOLZER & STEVENS, *supra* note 3, at xi.

48. UNCTAD, *World Investment Report*, *supra* note 37, at xix.

49. Emmanuel Gaillard, *Chronique des sentences arbitrales*, 131 *JOURNAL DE DROIT INTERNATIONAL* 213, 213-14 (2004) (noting the “geometric” progression in the number of ICSID arbitrations).

50. DOLZER & STEVENS, *supra* note 3, at xi.

51. *Id.* at 12 (“[T]he legal framework and its positive or negative effect on facilitating a particular venture and ensuring compensation in the event of an expropriation will no doubt play a role in the decision of any would-be investor.”).

52. UNCTAD, *DISPUTE SETTLEMENT: INVESTOR-STATE I* (2003), available at http://www.unctad.org/en/docs/iteiit30_en.pdf [hereinafter UNCTAD, *DISPUTE SETTLEMENT*].

Thus while investors sought access to international arbitration, developing countries were reticent about subjecting themselves to the jurisdiction of arbitral tribunals that might be more sensitive to the concerns of investors than to those of states, and they naturally sought to minimize any constraints on their domestic policy-making autonomy.⁵³ The ICSID Convention was an attempt to accommodate both sets of concerns. The Report of the Executive Directors of the World Bank on the ICSID Convention emphasized that “[w]hile the broad objective of the Convention is to encourage a larger flow of private international investment, the provisions of the Convention maintain a careful balance between the interests of investors and those of host States.”⁵⁴

III. THE CHALLENGE OF INTERPRETING MFN CLAUSES IN THE INVESTMENT LAW CONTEXT

Disputes about the scope and meaning of MFN clauses are as old as the clause itself. While the historical disputes over interpreting MFN clauses in the trade context are highly relevant, international investment law has given rise to a set of new and different interpretive challenges.

In 1909, Stanley Horbeck wrote:

Rarely does a conditional provision so extensively used and so vital in its bearing upon economic relations escape misinterpretation and avoid becoming the source of misunderstanding. The experience of [the MFN] clause has been no exception to the rule. All through the diplomatic correspondence of the last century there appear constant disagreements and ever-recurring irritation over what is the meaning and what are the obligations attaching to this or that clause.⁵⁵

The International Law Commission’s effort to bring some clarity to the area has been largely unsuccessful. The draft articles on MFN clauses that the Commission proposed in 1978 were never adopted as a convention⁵⁶ and provide little insight into the questions raised in contemporary arbitrations. Thus the “ever-recurring irritation” continues, and in the field of international investment law the debate is no longer confined to scholarship and diplomatic correspondence but takes place primarily in litigation before arbitral tribunals.

Moreover, “contrary to trade, where the MFN standard only applies to measures at the border, there are many more possibilities to discriminate against foreign investment.”⁵⁷ To make matters worse, while the MFN

53. See JEAN-PIERRE LAVIEC, PROTECTION ET PROMOTION DES INVESTISSEMENTS: ETUDE DE DROIT INTERNATIONAL ECONOMIQUE 9 (1985) (“En fait, nombre de gouvernements et de législateurs ont émis de doutes, et manifesté des réticences sur l’opportunité de ces traités. En fonction des expériences historiques qu’ils ont subies, des pays ayant été colonisés ont craint que certains de leurs intérêts légitimes ne soient, en définitive, lésés.”); DOLZER & STEVENS, *supra* note 3, at 8 (“Latin American countries have had a long-standing tradition of opposition to international rules concerning foreign investment, whether in the form of customary law or treaty law.”).

54. ICSID, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (1965), reprinted in ICSID CONVENTION, REGULATIONS AND RULES 35, 41 (2003), available at http://www.worldbank.org/icsid/basicdoc/ICSID_English.pdf [hereinafter ICSID, *Report of the Executive Directors*].

55. Horbeck, *supra* note 1, at 395.

56. U. N. Int’l Law Comm’n, *Draft Articles on Most-Favoured-Nation Clauses*, U.N. Doc. A/33/10 (1978), reprinted in [1978] 2 Y.B. Int’l L. Comm’n 8, U.N. Doc. A/CN.4/SER.A/1978/Add.1 (pt. 2), available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1_3_1978.pdf.

57. UNCTAD, *Most-Favored-Nation Treatment*, *supra* note 2, at 4.

principle “is a core element of international investment agreements[,]”⁵⁸ it has never been enshrined in a broad, multilateral convention that might have imposed some consistency in the wording and application of MFN clauses.⁵⁹ As a result, today each state finds itself at the hub of a dense network of treaty relationships, all of which are infused with the MFN principle; however, the principle is embodied in clauses that can vary significantly in terms of their text and context.⁶⁰ Indeed what was said of the MFN clause in trade agreements prior to the GATT era could be said with equal force regarding the clause in BITs: “each time the principle of equality of treatment is incorporated in a commercial treaty a *new* clause is born.”⁶¹ As a result of this diversity, “there is no such thing as *the* most-favoured-nation clause: every treaty requires independent examination.”⁶²

While it is certainly true that “the question of whether an MFN clause applies to dispute settlement mechanisms is reducible to a question of interpretation of the treaty of which the investor is a beneficiary[,]”⁶³ the interpretive challenge requires not only an application of the rules of treaty interpretation, but also a clear understanding of the roles of MFN and dispute settlement in the investment law context.

A. *Treaty Interpretation*

The rules of treaty interpretation have been codified in the Vienna Convention on the Law of Treaties, in particular Article 31(1), which provides: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”⁶⁴ The International Law Commission explained that this rule “emphasizes the primacy of the text as the basis for the interpretation of a treaty, while at the same time giving a certain place to extrinsic evidence of the intentions of the parties and to the objects and

58. *Id.* at 1.

59. In fact, it has been argued that the failure of the efforts in the 1990s to negotiate a Multilateral Agreement on Investment (MAI) in the OECD context was an indication that “[t]he willingness of countries to enter into regional and bilateral investment agreements does not necessarily signify the unconditional willingness to sign onto a global investment agreement that grants all states, and all investors of all states, rights *vis-a-vis* all other potential host states of investments.” Dattu, *supra* note 4, at 302. If this analysis is correct, it suggests a certain weakness in the commitment to the MFN principle by at least some states. An additional factor behind the failure of the MAI may be that a multilateral solution was necessary in the trade context where free rider problems impeded tariff reductions. Such problems are largely absent from the investment context, where a state’s primary motivation for liberalization is to attract investments rather than to secure more favorable conditions for its capital exports. See generally SNYDER, *supra* note 18, at 197, 199-205.

60. See Org. of Econ. Co-operation and Dev. [OECD], *Most-Favoured-Nation Treatment in International Investment Law* 2-3 (Working Paper No. 2004/2, Sept. 2004), available at <http://www.oecd.org/dataoecd/21/37/33773085.pdf> (noting the diversity of formulation and context of MFN clauses and providing representative samples).

61. SNYDER, *supra* note 18, at 5.

62. ARNOLD DUNCAN MCNAIR, *THE LAW OF TREATIES* 285 n.1 (1938).

63. Emmanuel Gaillard, *Chronique des sentences arbitrales*, 132 *JOURNAL DU DROIT INTERNATIONAL* 135, 162 (2005) [hereinafter Gaillard 2005] (translation by author).

64. Vienna Convention on the Law of Treaties art. 31, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf. [hereinafter Vienna Convention].

purposes of the treaty as means of interpretation.”⁶⁵ The ILC further clarified that the arrangement of Article 31 was not to be understood as “laying down a hierarchical order for the application of the various elements of interpretation in the article.”⁶⁶ Instead, “All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation.”⁶⁷ Former President of the I.C.J. Arnold McNair described the “main task of any tribunal which is asked to apply or construe or interpret a treaty . . . as the duty of giving effect to the expressed intention of the parties, that is, their intention *as expressed in the words used by them in the light of the surrounding circumstances.*”⁶⁸

As the recent cases illustrate, however, the text of most MFN clauses does not provide a clear indication as to whether the parties to the BIT intended the clause to apply to dispute settlement mechanisms. Thus, tribunals have relied heavily on considerations of purpose, surrounding circumstances, and pragmatic considerations, to decide individual cases. The result is a set of opinions that appear irreconcilable in that they apply sharply divergent assumptions regarding these background elements. This Article argues that many of the assumptions made in the recent case law are both unwarranted and unnecessary, but that a proper understanding of the roles of MFN clauses and dispute settlement mechanisms in the BIT context may nevertheless provide some guidance for interpretation.

B. *Objects and Purposes*

As discussed, *supra*, the adoption of BITs, together with the establishment of ICSID, have been motivated by the aim of fostering economic development through increased flows of international investment. Dispute settlement provisions and MFN clauses are integral components of the international investment law system,⁶⁹ but the interaction between them is unclear. UNCTAD’s 2003 report on investor-state dispute settlement suggested a close relationship,⁷⁰ and a closer examination of their respective purposes shows that, in the investment law context, there are strong reasons to believe that unless an MFN clause is limited by its text, context, or

65. *Reports of the Commission to the General Assembly*, [1966] 2 Y.B. Int’l L. Comm’n 218, U.N. Doc. A/6309/Rev. 1/1966, reprinted in 3 UNITED NATIONS CONFERENCE ON THE LAW OF TREATIES 38 (2001).

66. *Id.* at 39.

67. *Id.*

68. ARNOLD DUNCAN MCNAIR, *THE LAW OF TREATIES* 365 (1961); cf. EMERICH DE Vattel, *THE LAW OF NATIONS* 246 (Charles Fenwick trans., Carnegie Institution ed., 2001) (1758) (“Since the sole object of a lawful interpretation of the deed ought to be the discovery of the thoughts of the author or authors of that deed,—*whenever we meet with any obscurity in it, we are to consider what probably were the ideas of those who drew up the deed, and to interpret it accordingly.*”).

69. DOLZER & STEVENS, *supra* note 3, at xii (The four substantive areas usually covered by BITs are: admission, treatment, expropriation of foreign investment, and the settlement of disputes.”).

70. UNCTAD, *DISPUTE SETTLEMENT*, *supra* note 52, at 1 (“It is evident, however, that treatment standards and guarantees are of limited significance unless they are subject to a dispute settlement system and, ultimately, to enforcement. Accordingly, the importance of dispute-settlement mechanisms for issues between a host State and an investor is readily discernible. Indeed, this is a point often made by both foreign investors and host countries. For the former, the security of foreign investment will turn not only on specified safeguards, but also on the assurance that these safeguards are available on a non-discriminatory and timely basis to all foreign investors.”).

surrounding circumstances, it applies to all treatment of investors, including dispute settlement.

1. *The Fundamental Place of Dispute Settlement in International Investment Law*

The rationale underlying the ICSID Convention was that “[t]he creation of an institution designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it.”⁷¹ The same rationale applies to an agreement in a BIT to refer investment disputes to ICSID arbitration—indeed the preambles of BITs routinely refer to the creation of a favorable environment for investment as one of the primary aims.⁷² An atmosphere of mutual confidence conducive to investment is one in which both investors and states are able to plan their affairs with stable expectations about the future and with confidence that their respective rights and prerogatives will be protected by the applicable legal system.

Dispute settlement is thus one of the core features of a BIT. The tribunal in *Gas Natural* reviewed the history of the ICSID Convention and the subsequent wave of BITs and concluded that “a crucial element – indeed perhaps the most crucial element – has been the provision for independent international arbitration of disputes between investors and host states.”⁷³ At least from the perspective of investors, “treatment standards and guarantees are of limited significance unless they are subject to a dispute settlement system and, ultimately, to enforcement.”⁷⁴ The value of treaty-based protections for investors is thus a function not only of the terms of the specific provisions but also of the quality of the mechanism for enforcing those rights against the host state. From the host state’s perspective, meanwhile, consenting to arbitration is a concession, a waiver of the state’s sovereign prerogative not to be haled before an international court without its consent. Thus the state’s interests include ensuring that the forum is unbiased toward the state and that it will not overstep the bounds of the state’s consent and interfere in matters of domestic policy.

71. ICSID, *Report of the Executive Directors*, *supra* note 54, at 40.

72. DOLZER & STEVENS, *supra* note 3, at 20; *see also, e.g.*, Treaty on the Promotion and Reciprocal Protection of Investments, U.K.-Bulg., Dec. 11, 1995, 1997 Gt.Brit. T.S. No. 52, *available at* http://www.unctad.org/sections/dite/ia/docs/bits/uk_bulgaria.pdf (“desiring to create favourable conditions for further development of investment by investors of one State in the territory of the other state”); Tratado sobre Promoción y Protección Recíproca de Inversiones, Arg.-F.R.G., Apr. 9, 1991, 3 Investment Promotion and Protection Treaties 1991, *available at* http://www.unctad.org/sections/dite/ia/docs/bits/germany_argentina_sp.pdf (“con el propósito de crear condiciones favorables para las inversiones de los nacionales o sociedades de uno de los dos estados en el territorio del otro Estado”); Convention concernant l’encouragement et la protection réciproque des investissements, Switz.-Malay., Mar. 1, 1978, 1 Investment Promotion and Protection Treaties 1978, *available at* http://www.unctad.org/sections/dite/ia/docs/bits/switzerland_malaysia_fr.pdf (“Dans l’intention de créer des conditions favorables à l’investissement de capitaux dans les deux Etats”).

73. *Gas Natural SDG v. Argentina*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, para. 29 (2005), <http://www.asil.org/pdfs/GasNat.v.Argentina.pdf>.

74. UNCTAD, DISPUTE SETTLEMENT, *supra* note 52, at 1.

An MFN claim is necessarily premised on the fact that the host state has agreed to different dispute settlement provisions in different BITs. This diversity of provisions requires explaining. One explanation is simply a change in policy. The tribunal in *Maffezini* concluded that Argentina simply “abandoned its prior policy” of requiring an eighteen-month waiting period for domestic litigation and began to accept BITs allowing for direct access to arbitration.⁷⁵ In recent years, a number of states, including the United States, have introduced greater flexibility in their BITs so that investors under the newer BITs have a choice among arbitral fora.⁷⁶

If such an explanation were always the case, there would be no difficulty in applying the MFN clause, because it would both ensure equality of treatment and allow the host state to change its policy without having to renegotiate all of its pre-existing BITs. However, other factors may be at work. By definition, it takes two states to agree to a bilateral treaty. If the parties were on equal footing, we might expect a given BIT to closely resemble a compilation of the less favorable of the two states’ policies on each specific matter. In fact, however, the negotiations are not always undertaken on the basis of equality, especially where the BIT involves a capital-exporting country and a capital-importing country. Not only may capital-importing countries be desperate to attract foreign investment, but the negotiating process itself is stacked against them. As Rudolf Dolzer and Margrete Stevens point out, “[m]ost BIT negotiations take as their starting point model agreements of capital-exporting countries. . . . A central part of BIT negotiations would therefore concern modifications to such a model treaty that may be deemed desirable by the capital-importing countries.”⁷⁷ A capital-importing state may be unable to impose an identical policy on a given issue with respect to all of its treaty partners, and may thus be forced to abandon a provision—such as the waiting period at issue in *Maffezini*—in an individual negotiation without necessarily changing its policy. While we may presume that a given state is aware of its existing MFN commitments when it agrees to a BIT, the state may reasonably (if, perhaps, erroneously) believe that a provision related to dispute settlement would not be within the scope of those existing commitments.

A further factor may be that bilateral relationships or the nature and scope of investments emanating from a given country may affect a host state’s willingness to submit disputes to arbitration. The treaties implicated in *Siemens* were all signed in 1991, and although both Chile and Argentina insisted on the inclusion of a domestic litigation waiting period in their BITs with Germany, they did not include such a provision in the Chile-Argentina BIT. Similarly, when the Chile-Germany BIT was amended in 1997, Chilean

75. *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, para. 57, 5 ICSID (W. Bank) 396, 408 (2000), available at http://www.worldbank.org/icsid/cases/emilio_decisionjurisdiction.pdf.

76. DOLZER & STEVENS, *supra* note 3, at 147-56.

77. *Id.* at 13.

investors were freed from the waiting period, but it was retained, albeit in slightly modified form, for German investors in Chile.⁷⁸

The reasons for this difference are not immediately apparent. It may be that there are fewer investors directly concerned by the Chile-Argentina BIT or that the type of investments made by German investors in Argentina is fundamentally different than that made by Chilean investors. The *Siemens* case involved a contract with a German company to establish a national system of migration control and personal identification in Argentina. It may be that contracts of such a sensitive nature and of national scope are more likely to be made with German firms than with Chilean ones.

Whatever the reasons for the Latin American countries' reluctance to consent to arbitration with German investors, their conduct is difficult to reconcile with the idea that they (or German investors for that matter) understood the MFN clauses in their BITs to apply to the dispute settlement provisions.

2. *The Role Purpose, and Functions of the MFN Clause*

The MFN clause in a BIT is typically placed alongside guarantees of "fair and equitable treatment" and "national treatment." A guarantee of fair and equitable treatment incorporates into the treaty the minimum standard of customary international law and thereby makes a violation of the customary international law standard a violation of the treaty and subject to the treaty's dispute settlement provisions. Such a provision establishes a floor below which treatment cannot sink, for as the International Law Commission has noted, "[a]ll that the most-favoured-nation clause promises is that the contracting party concerned will treat the other party as well as it treats any third State – which may be very badly."⁷⁹ National treatment and MFN provisions work together to ensure that there is no discrimination among investors, regardless of their nationality. A foreign investor who benefits from a BIT is therefore ordinarily entitled to whichever treatment is most favorable: the treatment specified in the BIT between the investors' home country and the host state, the treatment granted by the host state to its own investors, or the treatment granted by the host state to investors of any third state.

The I.C.J. has stated that the purpose of an MFN clause is "to establish and maintain at all times fundamental equality without discrimination among

78. See *Tratado Sobre Fomento y Reciproca Protección de Inversiones* [Treaty for the Promotion and Reciprocal Protection of Investments], Chile-F.R.G., art. 10, Oct. 21, 1991, 3 *Investment Promotion and Protection Treaties* 1991, available at http://www.unctad.org/sections/dite/ia/docs/bits/chile_germany_sp.pdf [hereinafter *Chile-F.R.G. Investment Treaty*] (imposing waiting period); *Protocolo de Enmienda y Suplemento al Tratado Sobre el Fomento Reciproca Protección de Inversiones, del 21 de octubre 1991*, [Amendment Protocol and Supplement to the Treaty for the Promotion and Reciprocal Protection of Investments of October 21, 1991], Chile-F.R.G., arts. 1, 4, Apr. 14, 1997, http://www.unctad.org/sections/dite/ia/docs/bits/chile_germany_sp.pdf [hereinafter *Chile-F.R.G. Protocol and Supplement*] (modifying waiting period applicable to German investors and abolishing it for Chilean investors).

79. *Report of the International Law Commission on the Work of its Thirtieth Session, Commentary on Article 4*, at P8, U.N. Doc. A/33/10 (1978), reprinted in [1978] 2 Y.B. Int'l L. Comm'n 6, 36, U.N. Doc. A/CN.4/SER.A/1978/Add.1 (pt. 2); see also LAVIEC, *supra* note 53, at 90 ("[L]e principe de traitement national accorde une protection juridique qui peut être inférieure à un minimum requis par le droit international . . .").

all of the countries concerned.”⁸⁰ In the specific context of investment law, the purpose has been described as one of “giv[ing] investors a guarantee against certain forms of discrimination by host countries, and [establishing] equality of competitive opportunities between investors from different foreign countries.”⁸¹ It has also been suggested that the MFN clause aims to effect a “general equalization of the legal conditions for competition”⁸² or to “harmoniz[e]”⁸³ or “abolish differences in the legal regime”⁸⁴ applicable to foreign investors in a given state. Since this equalization or harmonization results in convergence at the “most favorable” level of treatment, “MFN clauses have . . . become a significant instrument of economic liberalisation in the investment area.”⁸⁵

An MFN clause also has an important function in stabilizing expectations over time so as to reassure investors about making long-term investments. Absent the MFN clause, an investor would worry that the host state might grant a competitor more favorable conditions for investment and thereby drive the first investor out of business. The MFN clause ensures that any more favorable treatment granted to investors from another country will also inure to the first investor. Similarly, the MFN clause, if construed broadly, reduces transaction costs for states wishing to adopt more investor-friendly policies.⁸⁶ Rather than renegotiating a large number of BITs to incorporate the change, a host state can simply agree to a single BIT with the more favorable provision with the knowledge that by operation of the MFN clauses, the new treatment will apply to investors from any country with a BIT.⁸⁷ Indeed, it has been said in the trade context that “[o]ne of the chief advantages of the unconditional form is that it removes the necessity for repetition of pledges every time conditions are altered by a new commercial treaty.”⁸⁸ However, this presumed benefit carries with it a cost in that it is a

80. Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.), 1952 I.C.J. 176, 192 (Aug. 27).

81. UNCTAD, *Most-Favored-Nation Treatment*, *supra* note 2, at 1.

82. EDOUARD SAUVIGNON, LA CLAUSE DE LA NATION PLUS FAVORISEE 4 (1972) (“*égalité des conditions juridiques de la concurrence*”) (translation by author).

83. Maffezini v. Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction, para. 62, 5 ICSID (W. Bank) 396, 410 (2000), available at http://www.worldbank.org/icsid/cases/emilio_DecisionJurisdiction.pdf; see also Gaillard 2005, *supra* note 63, at 158 (arguing that MFN clauses have the double function of fighting discrimination and contributing to the harmonization of international investment law).

84. LAVIEC, *supra* note 53, at 98 (“L’égalité de traitement accordée par une clause n.p.f. abolit les différences de régime juridique entre les investissements étrangers qui en sont bénéficiaires.”).

85. OECD, *supra* note 60, at 2.

86. See SAUVIGNON, *supra* note 82, at 3 (describing this feature of the MFN clause as a technique for adapting treaties to changed circumstances); SNYDER, *supra* note 18, at 216 (“The very existence of the clause represents the desire of nations . . . to avoid the repetition of previous concessions in every new commercial treaty.”).

87. For example, when the United States first began to sign treaties with the unconditional form of the MFN clause, Secretary of State Cordell Hull explained to Congress that this meant that the United States would henceforth only apply the unconditional version of the clause, notwithstanding the continued existence of conditional clauses in many U.S. treaties, because “[i]f, through the unconditional clause in some other treaty one country obtains a favor ‘freely,’ countries entitled to conditional most-favored-nation treatment become entitled to such favor without any condition.” Memorandum, *Hearing on H.R. 8430 Before the H. Ways & Means Comm.*, 73d Cong. 39 (1934), quoted in SNYDER, *supra* note 18, at 34.

88. SNYDER, *supra* note 18, at 35.

one-way ratchet. A country wishing to shift policy away from investor protections in favor of other policy goals would need to renegotiate or renounce every BIT incorporating the provisions it wishes to change. An MFN clause thus creates a structural bias in favor of liberalization.

All of these apparent purposes of MFN clauses argue in favor of a broad scope of the clause. Indeed, one commentator has argued that the promise of equality of treatment in the MFN clause should apply even to matters outside the subject matter of the basic treaty if their denial could create a disadvantage for beneficiaries of an MFN clause within that subject matter.⁸⁹ In particular, where private rights are at stake, the same commentator urged that the MFN clause should procure to beneficiary nationals access to justice on the same basis as those of the most favored state,⁹⁰ as well as any more favorable rules concerning jurisdiction in cases concerning commercial matters.⁹¹

More recent commentators have noted that one can make a similar structural argument with regard to BITs in general: "Since most of the substantive provisions of the BIT concern the promotion and protection of foreign investment, it could be argued that any ambiguity should be interpreted in a way that would favor the rights granted to a foreign investor."⁹² However, they also emphasized the following caveat:

Such considerations may however be tempered by the fact that the general normative effect of bilateral investment treaties in the final analysis depends on the extent to which they are viewed as 'fair and balanced regimes for foreign investment outside the immediate context of the bilateral relationship.'⁹³

In this vein, it is important to consider BIT provisions in light of the structure of the relationship between investor and host state. Each provision of a BIT is, in essence, a concession on the part of the host state that benefits the investor. Thus while it is true that the purpose of the concessions contained in a BIT is to promote and protect investment, it is equally true that the contracting parties pursue other purposes by *not* making other concessions. The silences of a BIT may thus be pregnant with matters that are of great import to the host state and which are therefore deliberately excluded from the BIT.

The case for a generally "liberal" or pro-investor interpretation of BITs is thus much weaker than it might first appear. Nevertheless, the case for a broad application of the MFN clause remains undiminished. Unlike a liberal reading of a substantive provision that might impose policy obligations on a host state that it did not contemplate nor accept, a broad application of the MFN clause requires only that, once the host state has agreed to grant a particular treatment to one state's investors, the host state must accord the same treatment to others. While "there is no fixed wording or formula of the clause . . . its *raison d'être* is always the same; to establish between the

89. FRANÇOIS HEPP, *THEORIE GENERALE DE LA CLAUSE DE LA NATION LA PLUS FAVORISEE EN DROIT INTERNATIONAL PRIVE* 87-88 (1914).

90. *Id.* at 117; *see also* Basdevant, *supra* note 15, at 13 (including "la protection devant les tribunaux" among the rights which may be included in an MFN clause).

91. HEPP, *supra* note 89, at 124-25.

92. DOLZER & STEVENS, *supra* note 3, at 17.

93. *Id.* at 17-18 (quoting Samuel Asante, *International Law and Investments, in INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS* 668, 676 (Mohammed Bedjaoui ed., 1991)).

contracting parties a treatment equal to that enjoyed by any third nation.”⁹⁴ It would defeat this purpose to impose restrictions on the scope of the MFN clause where no limitations or exceptions are apparent from the text, context, or surrounding circumstances. Moreover, the variety of limitations that are routinely written into MFN clauses demonstrate that states are able to craft MFN clauses that are limited in scope if they so choose.⁹⁵

All of these considerations seem to compel the conclusion that “[a] given clause applies, unless otherwise specifically provided, to all rights, privileges, or immunities that a state accords in its actions as a public institution to a third state,”⁹⁶ and that this includes dispute settlement provisions in a third-party BIT. Indeed, because access to international arbitration is “perhaps the most important safeguard” afforded to investors under bilateral investment treaties, it would be “something of a paradox” to exclude this particular safeguard from the scope of the MFN clause.⁹⁷ Thus, as discussed in detail, *infra*, the Tribunal in *Maffezini* concluded that dispute settlement is so integral to the protection provided by a BIT that the rights of investors simply cannot be considered separately from the means for enforcing those rights.⁹⁸

If, as in *Maffezini*, an investor from one state must wait twenty-four months before gaining access to arbitration while a similarly situated investor from another state can gain access after only six months, this poses an MFN problem. This is not only because “time is money” or because justice delayed can in some cases be justice denied,⁹⁹ but also because the extended waiting period, by increasing the cost and risk for an investor of litigating a dispute, gives the host state broader leeway in its conduct and greater leverage in settlement negotiations. The playing field is no longer level between investors from different states.

C. “Ordinary Meaning” and “Treatment”

The most frequent formulation of the MFN clauses in the BIT context is one that simply requires the host state to accord “treatment no less favorable”

94. SNYDER, *supra* note 18, at 48.

95. See generally *id.* at 245-46 (discussing restrictions placed on the clause). More specifically, the MFN clause in the NAFTA is specifically limited to treatment “with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.” NAFTA, *supra* note 8, art. 1103, at 639. These limits to the scope of the MFN clause would clearly preclude its application to dispute settlement mechanisms.

96. SNYDER, *supra* note 18, at 33.

97. Gaillard 2005, *supra* note 63, at 163 (translated from French to English by author).

98. *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, para. 54, 5 ICSID (W. Bank) 396, 407-08 (2000), available at http://www.worldbank.org/icsid/cases/emilio_DecisiononJurisdiction.pdf; see also *Ambatielos Arbitration (Greece v. U.K.)*, 12 R.I.A.A. 83, 107 (Comm’n of Arb. 1956) (emphasizing the link between the rights of traders and the provisions for protecting those rights).

99. One might envision instances in which such a delay in remedying an expropriation might push an investor into bankruptcy or in which the delay makes it impossible for a would-be investor to participate in a privatization scheme or other time-sensitive investment opportunity. In either case, a remedy at a later date will be ineffective: in the former because it cannot undo the bankruptcy, and in the latter because the potential gains from the missed opportunity may be too speculative to support an award of damages.

than that accorded to investors¹⁰⁰ from third states. However, the term “treatment” is not self-defining. By way of example, the recent BIT between Germany and Thailand included the following non-exhaustive list of treatment that would violate the MFN clause:

The following shall, in particular, be deemed ‘treatment less favourable’ within the meaning of this Article: unequal treatment in the case of restrictions on the purchase of raw or auxiliary materials, of energy or fuel or of means of production or operation of any kind, unequal treatment in the case of impeding the marketing of products inside or outside the country, as well as any other measures having similar effects.¹⁰¹

These and similar lists of examples in other treaties do not provide any clear guidance as to whether “treatment” includes or excludes dispute settlement provisions. Here, again, the bulk of authority supports the view that tribunals should not read restrictions into this term that are not apparent from the text, context, or circumstances.

According to Rudolf Dolzer and Margrete Stevens, “[t]reatment is a broad term which in the context of BITs refers to the legal regime that applies to investments once they have been admitted by the host State.”¹⁰² Jean-Pierre Laviee argues that the equality of treatment required by the MFN clause abolishes all differences in the legal regime applicable to investors from the countries concerned.¹⁰³ The Tribunal in *Plama* found that “It is not clear whether the ordinary meaning of the term ‘treatment’ in the MFN provision of the BIT includes or excludes dispute settlement provisions[.]”¹⁰⁴ but also found that it was not necessary to resolve the question. The Tribunal in *Siemens*, by contrast, concluded that “the term ‘treatment’ is so general that the Tribunal cannot limit its application except as specifically agreed by the parties.”¹⁰⁵

Opponents of this view might contend that parties have something more specific in mind when they refer to “treatment.” According to this view, the overarching purpose of a BIT is to foster investment by imposing discipline and constraints on the conduct of the host state toward foreign investors. Where provisions refer to government “treatment” of investors or investments, they are concerned with primary government conduct—i.e., the sorts of

100. A number of treaties distinguish between the treatment of investors and the treatment of investments, even to the point of including different MFN provisions for the two. *E.g.* Agreement on the Promotion and Reciprocal Protection of Investments, Switz.-Mex., arts. 4(2), 4(3), July 10, 1995, 4 Investment Promotion and Protection Treaties 1995, available at http://www.unctad.org/sections/dite/ia/docs/bits/mexico_switzerland.pdf; Agreement for the Promotion and Protection of Investments, Can.-Croat., arts. 4(1), 4(2), Feb. 3 1997, http://www.unctad.org/sections/dite/ia/docs/bits/canada_croatia.pdf; however, the distinction does not affect the general analysis here, therefore the term investor is used for ease of reference.

101. Treaty Concerning the Encouragement and Reciprocal Protection of Investments, Thail.-F.R.G., art. 3(2), June 24, 2002, http://www.unctad.org/sections/dite/ia/docs/bits/germany_thailand.pdf.

102. DOLZER & STEVENS, *supra* note 3, at 58, citing LAVIEE, *supra* note 53, at 79 (“Une fois admis, un investissement est soumis à un régime juridique donné, déterminé par l’Etat territorial, que le terme de «traitement» recouvre.”).

103. LAVIEE, *supra* note 53, at 98.

104. *Plama Consortium v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, para. 189, 44 I.L.M. 721, 750 (2005), available at <http://www.worldbank.org/icsid/cases/plama-decision.pdf>.

105. *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, para. 106 (2004), <http://www.worldbank.org/icsid/cases/siemens-decision.pdf>.

actions by the government that might give rise to a claim by an investor. The function of the provisions on fair and equitable treatment, national treatment, and MFN work together to set a floor for such conduct by the state and to ensure that the host state does not discriminate in granting treatment above that floor.

Such a critique, however, amounts to an argument that the term “treatment” has a special meaning in the context of a given BIT, or perhaps in BITs generally, that is more restrictive than the term itself suggests. Article 31(4) of the Vienna Convention provides for such situations, but places the burden squarely on the party advocating the special meaning.¹⁰⁶ Thus in the *Legal Status of Eastern Greenland* case, when Norway contended that the word “Greenland” in certain legal documents referred only to the colonized area of the West coast, the Permanent Court said that “[t]his is a point as to which the burden of proof lies on Norway If it is alleged by one of the Parties that some unusual or exceptional meaning is to be attributed to it, it lies on that Party to establish its contention.”¹⁰⁷ In individual cases, therefore, it may be possible to make textual or contextual arguments that the parties meant something more specific and narrow than the broad term “treatment” would imply.¹⁰⁸ Whether or not such a hypothetical argument would succeed in a given case, the point is that the party arguing for such a special meaning bears the burden of persuading the tribunal that the more restrictive meaning was intended.

As a general matter of interpretation, therefore, the advocates of including dispute settlement with the scope of MFN clauses have the stronger case, at least where the clause is broadly worded. Ultimately, however, tribunals may not rely on general cases or presumptions but must interpret each BIT, and each MFN clause, on its own terms. Differences in wording and context, the existence (or lack) of evidence about the parties’ actual intent, concerns about treaty shopping, and other pragmatic issues will all need to be factored into any tribunal’s decision about how to interpret and apply a given MFN clause. Specific cases, meanwhile, must be evaluated against the broader purposes of the international investment law system. As Charles Calvo argued, where a term is unclear or susceptible to multiple meanings, one must “be concerned with the practical consequences, with the justice or injustice, the advantage or disadvantage that may result from giving it a particular meaning.”¹⁰⁹

106. Vienna Convention, *supra* note 64, art. 31(4) (“A special meaning shall be given to a term if it is established that the parties so intended.”).

107. *Legal Status of Eastern Greenland* (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53, at 49 (Apr. 5).

108. In the NAFTA, for example, an argument could be made that, even in the absence of the limiting text within the MFN clause itself, which clearly does not extend to dispute settlement, the clause would, in any event, not apply to dispute settlement, because the scope of the entire investment chapter is limited to “measures adopted or maintained by a party[.]” NAFTA, *supra* note 8, art. 1101, at 639, and the term “measure” is used throughout the treaty in a manner that is limited to the domestic actions of the NAFTA states.

109. CHARLES CALVO, *LE DROIT INTERNATIONAL* § 715, at 671 (Georges Jacob Orléans 1880) (“[I]l faut se préoccuper des conséquences pratiques, de la justice ou de l’injustice, de l’avantage ou du désavantage pouvant résulter de la signification particulière qui sera donnée à une expression douteuse ou susceptible de plusieurs sens.”).

IV. THE I.C.J. ON MFN CLAUSES AND JURISDICTIONAL MATTERS

Much of the debate over the proper scope and meaning of MFN clauses has focused on the few statements on the subject made by the International Court of Justice (I.C.J.). In a small number of cases, the I.C.J. has been called on to interpret the scope of a given MFN clause as it related to the jurisdiction of the I.C.J. itself or another forum. The I.C.J.'s pronouncements have not done much to clarify the subject, nor have they directly addressed the issues at stake in recent investment arbitrations. Nevertheless, the I.C.J. case law addresses a number of interpretive questions with important implications for current investment disputes.

Of particular importance is the *Anglo-Iranian Oil* case, in which the jurisdiction of the I.C.J. itself was in question, as well as the *Ambatielos* case, in which the I.C.J. ordered the United Kingdom to submit to arbitration on the question of whether the MFN clause in its treaty with Greece applied to matters of administration of justice and in which the arbitral commission concluded that such matters were within the scope of the MFN clause. Also of some interest is the *Rights of U.S. Nationals in Morocco* case, in which the I.C.J. emphasized that rights obtained through an MFN clause are dependent on the continuing existence of the third-party treaty from which they are derived. These cases will be discussed in chronological order.

A. *Anglo-Iranian Oil*¹¹⁰

On May 10, 1927, Iran denounced all treaties then in effect relating to the system of capitulations.¹¹¹ Three years later, Iran adopted a declaration in which it accepted compulsory jurisdiction of the Permanent Court of International Justice (P.C.I.J.), but only for disputes arising after its declaration and based on treaties or conventions subsequent to the declaration. The United Kingdom had a longstanding treaty with Persia that was not specifically denounced and which contained an MFN clause. The United Kingdom maintained that this MFN clause entitled its citizens to the same treatment as was guaranteed to citizens of Denmark under a post-declaration treaty. Iran contested the Court's jurisdiction on the basis that Iran had not consented to the Permanent Court's jurisdiction over disputes concerning its treaty with the United Kingdom.

The I.C.J., as successor to the P.C.I.J., held that it lacked jurisdiction because the base treaty between United Kingdom and Persia was entered before the declaration and therefore could not provide the basis for jurisdiction. The Court rejected the United Kingdom's argument that the dispute 'directly' concerned the Treaty of 1934 between Denmark and Iran, a treaty accepted by Iran after the ratification of her declaration, because the United Kingdom did not have any right to invoke the Denmark-Iran treaty. The Court explained:

110. *Anglo-Iranian Oil Co. (U.K. v. Iran)*, Judgment on Jurisdiction, 1952 I.C.J. 93 (July 22).

111. *Id.* at 105.

[I]n order that the United Kingdom may enjoy the benefit of any treaty concluded by Iran with a third party by virtue of a most-favoured-nation clause contained in a treaty concluded by the United Kingdom with Iran, the United Kingdom must be in a position to invoke the latter treaty. The treaty containing the most-favoured-nation clause is the basic treaty upon which the United Kingdom must rely. It is this treaty which establishes the juridical link between the United Kingdom and a third-party treaty and confers upon that state the rights enjoyed by the third party. A third-party treaty, independent of and isolated from the basic treaty, cannot produce any legal effect as between the United Kingdom and Iran: it is *res inter alios acta*.¹¹²

The Court further rejected an alternative version of the argument proposed by the United Kingdom.

If Denmark, it is argued, can bring before the Court questions as to the application of her 1934 Treaty with Iran, and if the United Kingdom cannot bring before the Court questions as to the application of the same Treaty to the benefit of which she is entitled under the most-favoured-nation clause, then the United Kingdom would not be in the position of the most-favoured-nation. The Court needs only observe that the most-favoured-nation clause in the [Anglo-Persian] Treaties of 1857 and 1903 between Iran and the United Kingdom has no relation whatever to jurisdictional matters between the two Governments. If Denmark is entitled . . . to bring before the Court any dispute as to the application of its Treaty with Iran, it is because that Treaty is subsequent to the ratification of the Iranian Declaration. This can not give rise to any question relating to most-favoured-nation treatment.¹¹³

The reasoning of the I.C.J.'s decision here is far from clear. Is it that consent to jurisdiction of the I.C.J. is not "treatment" within the meaning of the MFN clause? Or is it that jurisdictional questions are separate from substantive ones, i.e. that the MFN clause entitles the United Kingdom to the same substantive treatment as Denmark, but that the United Kingdom cannot invoke the I.C.J.'s jurisdiction for a determination of whether British nationals are getting the treatment to which they are entitled?

The Court first states that it is not necessary to consider the "meaning and the scope" of the MFN clause and that the Court may "confine[] itself" to the dates in order to conclude that the United Kingdom cannot invoke the jurisdiction of the court.¹¹⁴ Then, in response to what it viewed as a "quite different form" of the United Kingdom's MFN argument, the Court appears to hold that the jurisdiction of the Court is outside the scope of the MFN clause itself—stating that the MFN clause "has no relation whatever to jurisdictional matters"—but then immediately returns to the dates as if their recitation were enough to resolve the matter.¹¹⁵ The Court accepts that the MFN clause in the United Kingdom's treaty entitles British nationals to the same substantive treatment as Danish nationals but also accepts that Denmark can invoke the jurisdiction of the Court to enforce its treaty rights but the United Kingdom cannot. Nevertheless the I.C.J. concludes without explanation that this difference in treatment of British and Danish nationals "can not give rise to any question relating to most-favoured-nation treatment."¹¹⁶

112. *Id.* at 109.

113. *Id.* at 108-09, 110.

114. *Id.* at 109.

115. *Id.* at 110.

116. Anglo-Iranian Oil Co. (U.K. v. Iran), Judgment on Jurisdiction, 1952 I.C.J. 110 (July 22).

In his separate, concurring opinion, President Arnold McNair provided a clearer explanation. McNair emphasized that the “Court . . . must be satisfied that any State which is brought before it by virtue of such a Declaration has consented to the jurisdiction.”¹¹⁷ He also cited the *Chorzow Factory Case* for the following proposition:

[T]he Court will . . . only affirm its jurisdiction provided that the force of the arguments militating in favour of it is preponderant. . . . When considering whether it has jurisdiction or not, the Court’s aim is always to ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it.¹¹⁸

Since the Iranian Declaration specifically excluded consent for disputes arising out of pre-Declaration treaties such as the Anglo-Persian treaty, there could be no jurisdiction.

McNair also emphasized two aspects of the case which are relevant to the broader issues implicated in the case. First, he noted “the large part that had been played by the most-favoured-nation clauses in creating the network of the capitulatory system in Iran and elsewhere” as an important factor in understanding the intentions of Iran in its Declaration; for “from the point of view of a State which had been subject to a system of Capitulations for at least a century and had only recently denounced them and emerged into a new status, it would be surprising if the most-favoured-nation principle was not regarded as an obnoxious concomitant of that system.”¹¹⁹ Second, McNair expressly acknowledged that the United Kingdom would have been able to rely on the MFN clause on the merits had it been able to surmount the jurisdictional hurdle presented by the Iranian declaration:

Unquestionably, if the jurisdiction of the Court in this case had already been established and if the Court was now dealing with the merits, the United Kingdom would be entitled to invoke against Iran the most-favoured-nation clause . . . of the Anglo-Persian Treaty of 1857, for the purpose of claiming the benefit of the provisions of the Irano-Danish Treaty of 1934 as the treatment of foreign nationals and their property. But that is not the question now before the Court. The question is whether the United Kingdom can effectively base the jurisdiction of the Court on the Irano-Danish Treaty of 1934 as a treaty ‘postérieur à la ratification de cette declaration’—which is quite another matter.¹²⁰

In his dissent, Judge Hackworth objected to the Court’s approach, which in his view addressed the jurisdictional question from the wrong direction. The “basic” treaty, in his view, was the one defining the substantive rights in dispute:

The gravamen of the complaint of the United Kingdom Government is that Iran has not accorded to a British national, the Anglo-Iranian Oil Company, the benefits of international law and that, as a result, the Company has suffered a denial of justice. The provisions with respect to the application of the principles of international law are not to be found in the most-favoured-nation clause of the earlier treaties of 1857 and 1903 between Iran and the United Kingdom, but are embodied in the later treaties between Iran and Denmark of 1934; between Iran and Switzerland of that same year, and between Iran

117. *Id.* at 116-17 (McNair, Pres., concurring).

118. *Id.*, quoting *Factory at Chorzów* (Ger. v. Pol.), 1928 P.C.I.J. (Ser. A), No. 9, at 32 (July 26), available at http://www.worldcourts.com/pcij/eng/decisions/1927.07.26_chorzow/.

119. *Anglo-Iranian Oil*, 1952 I.C.J. at 119.

120. *Id.* at 122.

and Turkey of 1937. It is to these treaties and not to the most-favoured-nation clause that we must look in determining the rights of British nationals in Iran.¹²¹

For Hackworth, the United Kingdom was not trying to invoke or enforce any provision of an objectionable, capitulation-era treaty, but was merely trying to secure for its nationals the same treatment to which Danish nationals were entitled by their post-Declaration treaty—treatment to which the United Kingdom was entitled under the MFN clause. Since the facts giving rise to the dispute and the substantive rules of law applicable to the dispute (the Danish treaty) post-dated the declaration, Hackworth saw I.C.J. jurisdiction as perfectly compatible with the Iranian declaration.

Hackworth worried that the Court's restrictive reading of the Iranian declaration was rooted more in the Court's presumptions than in an effort to understand the intent of the government of Iran through a close reading of the text:

[W]hen a State has filed a declaration . . . accepting jurisdiction, it has performed a voluntary act

. . . . It is no part of the functions of the court to give such a declaration a broader meaning or a more restrictive meaning than the State itself has seen fit to prescribe. Our duty is to find that plain and reasonable meaning which more nearly comports with the purpose of the State as disclosed by the language which it itself has employed.¹²²

Implicit in Hackworth's dissent is the view that Iran's purpose in the Declaration was to prevent the I.C.J. from hearing any claim against it premised on the onerous provisions of a capitulation era treaty. Since the United Kingdom was only seeking treatment which Iran had consented to *after* the Declaration—and that treatment consisted solely in the minimum requirements of customary international law, there was no problem. This ignores the possibility, however, that one of Iran's purposes may have been to force countries with pre-Declaration treaties to renegotiate new treaties with Iran on a footing of equality. This latter purpose would be defeated by Hackworth's proposed interpretation.

In a second dissent, Judge Read expressly rejected the "theory of restrictive interpretation of jurisdictional clauses":

It has been contended that the Court should apply a restrictive construction to the provisions of the Declaration, because it is a treaty provision or clause conferring jurisdiction on the Court. Further, it has been suggested that a jurisdictional clause is a limitation upon the sovereignty of a State, and that, therefore, it should be strictly construed.

The making of a declaration is an exercise of state sovereignty and not, in any sense, a limitation. It should therefore be construed in such a manner as to give effect to the intention of the State, as indicated by the words used; and not by a restrictive interpretation, designed to frustrate the intention of the State in exercising this sovereign power.¹²³

121. Anglo-Iranian Oil Co. (U.K. v. Iran), Judgment on Jurisdiction, 1952 I.C.J. 110, 137-3 (July 22) (Hackworth, J., dissenting).

122. *Id.* at 139-40.

123. *Id.* at 143 (Read, J., dissenting).

It is important to note that the majority did not expressly adopt (nor reject) a theory of restrictive interpretation of jurisdictional clauses¹²⁴ and no such presumption was required to reach the Court's result.

Read is surely correct that a declaration or treaty by which a state accepts the Court's jurisdiction should be interpreted neither broadly nor strictly but rather in a manner that gives effect to the state's intention. However, the import of the Permanent Court's statement in the *Chorzow Factory Case* quoted by President McNair was not to impose a presumption against jurisdiction but rather to place a burden on the party seeking to invoke jurisdiction to show, by a preponderance of arguments, that consent to jurisdiction has in fact been granted. For the Court's majority, the combination of an MFN clause with the host state's consent to jurisdiction over disputes with a third state was not enough to establish consent, and the terms and purpose of the Iranian declaration were preponderant considerations in the other direction. Understood in this manner, *Anglo-Iranian Oil* has particular relevance for contemporary disputes over MFN clauses and dispute settlement.

B. *Rights of U.S. Nationals in Morocco*¹²⁵

This case involved two separate MFN holdings. First, the Court held that an MFN clause entitled the United States to protest discrimination in favor of France concerning imports into the French zone of Morocco. This holding is neither controversial nor particularly relevant to contemporary investment disputes. Second, the Court held that the United States could not use its MFN clause to import consular rights from a treaty that was no longer in force.

In the past, the United States had enjoyed the same consular rights as Spain and the United Kingdom by virtue of the MFN clause in its treaty with Morocco. However, when Spain and the United Kingdom renounced these rights, the United States nevertheless claimed it was entitled to continue to enjoy the same rights on the theory that these provisions had been incorporated by reference into the United States's treaty or, alternatively, that the United States was entitled to continue in the enjoyment of those rights as a matter of custom and usage. The I.C.J. emphatically rejected both arguments.

As to the MFN argument, the Court held that:

It is sufficient to reject this argument on the ground that it would lead to a position in which the United States was entitled to exercise consular jurisdiction in the French Zone notwithstanding the loss of this right by Great Britain. This result would be contrary to the intention of the most-favoured-nation clauses to establish and maintain at all times fundamental equality without discrimination as between the countries concerned.¹²⁶

The court went on to reject the U.S. contention that its consular rights were founded on "custom and usage":

124. See *Mondev Int'l v. U.S.* Case No. ARB (AF)/99/2 6 ICSID (W. Bank) 192 (2004), available at <http://www.state.gov/documents/organization/14442.pdf>.

125. *Rights of Nationals of the United States of America in Morocco* (Fr. v. U.S.), 1952 I.C.J. 176 (Aug. 27).

126. *Id.* at 192.

[T]he United States consular jurisdiction was in fact based, not on custom or usage, but on treaty rights. At all stages, it was based on the provisions either of the Treaty of 1787 or of the Treaty of 1836, together with the provisions of treaties concluded by Morocco with other Powers, especially with Great Britain and Spain, invoked by virtue of the most-favoured-nation clauses.¹²⁷

Consequently, when the treaties of Great Britain and Spain were no longer in force, the United States could no longer claim the benefit of their provisions.

C. *Ambatielos (I.C.J.)*¹²⁸

The Anglo-Greek Declaration of 1926 provided that disputes about the validity of claims under the 1886 Anglo-Greek commercial treaty were to be submitted to a Commission of Arbitration for binding resolution. The Greek claimant had initially brought his claim against the U.K. government in a U.K. court, but after his claim was rejected by the trial court and the Court of Appeals, he declined to pursue an appeal to the House of Lords and instead sought to claim that the conduct of the courts and the U.K. government during these proceedings amounted to a denial of justice, that this denial of justice was a violation of various treaties between the United Kingdom and third states incorporating customary international law standards, and that Greece was entitled to invoke these treaties by virtue of the MFN clause in the 1886 Anglo-Greek treaty. The Court summarized the legal dispute between the parties as follows:

The United Kingdom Government . . . contends that Article X of the Treaty of 1886, dealing with matters of commerce and navigation, cannot be invoked to claim the benefits of provisions in other treaties concerning judicial proceedings, which, in the Treaty of 1886, form the subject of a separate article. . . . On the other hand, the Hellenic Government has contended that a litigation arising out of a commercial contract may be considered as a matter relating to commerce and thus falling within the term 'all matters relating to commerce and navigation' to which the most-favoured nation clause in Article X of the Treaty of 1886 applies.¹²⁹

The I.C.J. did not directly address this question, but instead held that it presented a bona fide dispute regarding the interpretation of the 1886 treaty, and therefore was to be resolved by a Commission of Arbitration.

While not addressing the merits, the Court's opinion did consider the principle that a state must consent to arbitration:

The Court is not departing from the principle, which is well-established in international law and accepted by its own jurisprudence as well as that of the Permanent Court of International Justice, to the effect that a State may not be compelled to submit its disputes to arbitration without its consent; but it observes that, in this case, the question is whether the consent given by the Parties in signing the Declaration of 1926 to arbitrate a certain category of disputes, does or does not extend to the *Ambatielos* claim.¹³⁰

127. *Id.* at 199.

128. *Ambatielos Case (Greece v. U.K.)*, 1953 I.C.J. 10 (May 19).

129. *Id.* at 21.

130. *Id.* at 19.

The Court thus rejected the idea, advanced recently by the Tribunal in *Plama*, that a state's consent to arbitration should be construed narrowly.¹³¹

Writing for four dissenters, President McNair objected to the Court's central holding because, in his view, the *ejusdem generis* principle precluded an MFN clause in a commercial treaty from applying to judicial matters.¹³²

D. *Ambatielos (Commission of Arbitration)*¹³³

The Commission of Arbitration ultimately held that the scope of the MFN clause could indeed extend to the administration of justice, but that, as a matter of substantive law, it "applies only to privileges, favours and immunities granted to other countries, and therefore cannot incorporate the principles of international law in the said Treaty."¹³⁴ Thus the Greek claimant was denied relief. Since the decision of the Commission bears directly on the issue presented in recent investment arbitrations and has been discussed extensively therein, it is therefore worth quoting at some length.

The Commission began by noting that the scope of an MFN clause is limited and "can only attract matters belonging to the same category of subject as that to which the clause itself relates."¹³⁵ In the treaty at issue, the MFN clause was defined as including "all matters relating to commerce and navigation."¹³⁶ In the Commission's view, this expression "has not, in itself, a strictly defined meaning" and that "in practice, the meaning given to it is fairly flexible."¹³⁷ The Commission expressed its conclusion that the administration of justice was within the scope of the MFN clause in the following terms:

It is true that the 'administration of justice,' when viewed in isolation, is a subject-matter other than 'commerce and navigation,' but this is not necessarily so when it is viewed in connection with the protection of the rights of traders. Protection of the rights of traders naturally finds a place among the matters dealt with by Treaties of commerce and navigation.

Therefore it cannot be said that the administration of justice, in so far as it is concerned with the protection of these rights, must necessarily be excluded from the field of application of the most-favoured-nation clause, when the latter includes 'all matters relating to commerce and navigation.'¹³⁸

131. *Plama Consortium v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, para. 198, 44 I.L.M. 721, 751-752 (2005), available at <http://www.worldbank.org/icsid/cases/plama-decision.pdf>.

As discussed further, *infra*, the *Plama* tribunal conflated the question of the existence *vel non* of a state's consent to arbitrate with the question of the scope of a state's consent. While the *Plama* tribunal is correct that consent to arbitrate must be clearly and unambiguously expressed, where consent is clearly present, the question of the scope of that consent does not oblige arbitrators to place their thumbs on the scale against jurisdiction.

132. *Ambatielos Case*, 1953 I.C.J. at 34 (McNair, Pres., dissenting) ("But, having regard to its terms, Article X promises most-favoured-nation treatment only in matters of commerce and navigation; it makes no provision concerning the administration of justice . . . The most-favoured-nation clause in Article X cannot be extended to matters other than those in respect of which it has been stipulated.").

133. *Ambatielos Arbitration (Greece v. U.K.)*, 12 R.I.A.A. 83 (Comm'n of Arb. 1956).

134. *Id.* at 108.

135. *Id.* at 107.

136. *Id.* (internal quotations omitted).

137. *Id.*

138. *Ambatielos Arbitration (Greece v. U.K.)*, 12 R.I.A.A. 83, 107 (Comm'n of Arb. 1956).

Ultimately, the Commission concluded, the scope of an MFN clause “can only be determined in accordance with the intention of the Contracting Parties as deduced from a reasonable interpretation of the Treaty.”¹³⁹ In light of the wording of Article X, which included the phrase, “it being their (the Contracting Parties’) intention that the trade and navigation of each country shall be placed, *in all respects*, by the other on the footing of the most favoured nation,”¹⁴⁰ the Commission concluded that the parties intended for jurisdictional matters to be within the scope of the MFN clause.

Transposed to the investment context, this award stands, at a minimum, for the proposition that, absent textual indications to the contrary, if an investment treaty contains a broad MFN clause to the effect that the investments and investors of each country shall be placed “in all respects” by the other on the footing of the most-favored-nation, such a clause also applies to provisions within the treaty concerning the protection of the rights of investors. As discussed *infra*, the arbitral awards in *Maffezini* and *Siemens* are clearly consistent with this holding. However, it does not follow that the contrary results in *Salini* and *Plama* are incompatible with *Ambatielos* because they occurred in cases in which the MFN clause was less expansively worded than the one at issue in *Ambatielos* and in which other parts of the treaty more clearly indicated the parties’ intentions with respect to dispute settlement mechanisms.

IV. THE MFN CLAUSE IN INVESTMENT ARBITRATIONS: 1990-2006

In recent years, MFN clauses have been at issue in a growing number of investment arbitrations. A number of cases have directly addressed the relationship between MFN clauses and dispute settlement provisions. These include: *Maffezini v. Spain*,¹⁴¹ *Siemens v. Argentina*,¹⁴² *Salini v. Jordan*,¹⁴³ and *Plama v. Bulgaria*.¹⁴⁴ Three additional cases—*Asian Agricultural Products v. Sri Lanka*,¹⁴⁵ *Yaung Chee Oo Trading v. Myanmar*,¹⁴⁶ and *Tecmed v. Mexico*¹⁴⁷—have addressed MFN clauses in a more tangential way, but the statements of these tribunals are nevertheless worth considering carefully, in particular because they may have mischievous consequences if taken as authoritative by subsequent tribunals. This Part discusses each of these cases

139. *Id.*

140. *Id.* (emphasis in original) (internal quotation omitted).

141. *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 5 ICSID (W. Bank) 396 (2000), available at <http://www.worldbank.org/icsid/cases/emilio-DecisiononJurisdiction.pdf>.

142. *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (2004), available at <http://www.worldbank.org/icsid/cases/siemens-decision-en.pdf>.

143. *Salini Costruttori S.p.A v. Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 44 I.L.M. 573 (2004), available at <http://www.worldbank.org/icsid/cases/salini-decision-en.pdf>.

144. *Plama Consortium v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 44 I.L.M. 721 (2005), available at <http://www.worldbank.org/icsid/cases/plama-decision.pdf>.

145. *Asian Agricultural Products v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 30 I.L.M. 580 (1991).

146. *Yaung Chi Oo Trading v. Myanmar*, ASEAN Case No. ARB/01/1, Award, 8 ICSID (W. Bank) 452 (2003).

147. *Tecmed v. Mexico*, ICSID Case No. ARB (AF)/00/2, Award, 43 I.L.M. 133 (2003), available at <http://www.investmentclaims.com/decisions/Tecnicas-Mexico-Award-29May2003-Eng.pdf>.

in chronological order so as to highlight the development of the jurisprudence as well as the dialogue among the various tribunals.

A. *Asian Agricultural Products v. Sri Lanka*¹⁴⁸

The interest of *Asian Agricultural Products* lies not only in the dramatic circumstances in which it arose, but also because it raised a question which remains unanswered, i.e. whether a claimant invoking an MFN clause must prove that the provisions in a third-party treaty are objectively more favorable, or merely that they are more favorable in that claimant's particular circumstances.

In the context of Sri Lanka's ongoing civil conflict, Sri Lankan armed forces requisitioned and destroyed a British company's farm, killing a large number of employees in the process. Sri Lanka claimed that the destruction of the farm was incidental to its military campaign and that the BIT contained an exemption for war and civil disturbance. The company sought to circumvent the exemption by reference to the Swiss treaty, which did not contain an equivalent clause. The Tribunal, however, rejected the company's argument as being premised on an incorrect view that the Sri Lanka-Switzerland Treaty imposed a more favorable standard of strict liability for protection and security of investments.¹⁴⁹ The Tribunal nevertheless held that the Claimant was entitled to recover because the Sri Lanka authorities had failed to meet the minimum standard of customary international law requiring due diligence in avoiding unnecessary damage to property.¹⁵⁰

In addressing the MFN argument, the Tribunal noted that, because it did not interpret the Sri Lanka-Switzerland treaty as imposing strict liability, "it is not proven that the Sri Lanka/Switzerland Treaty contains rules more favorable than those provided for under the Sri Lanka/U.K. Treaty, and hence, Article 3 of the latter Treaty [the MFN clause] cannot be justifiably invoked in the present case."¹⁵¹ The Tribunal thus highlighted the fact that a claimant bears the burden of proving that the provisions it seeks to import from a third-party treaty are in fact more favorable than the analogous provisions of the treaty between the host state and the claimant's home country.

The Tribunal did not, however, address the nature of the burden facing the claimant, for example, whether a claimant must prove that the dispute settlement provisions are objectively more favorable as a general matter, or whether it would be enough to show that, in the claimant's particular factual circumstances, the dispute settlement provisions of another treaty would be more favorable. It does not appear that any tribunal has specifically addressed this issue, but it would seem that in order to avoid a situation in which the applicable law depends on the specific factual circumstances of the individual claimant, the burden on a claimant should be to show that the desired dispute settlement provisions are objectively more favorable.

148. *Asian Agricultural Products*, 30 I.L.M. at 580.

149. *Id.* para. 54, at 602-03.

150. *Id.* paras. 67-86, at 608-19.

151. *Asian Agricultural Products Ltd v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, para. 54, 30 I.L.M. 580, 602-03 (1991).

The Tribunal also held forth at some length about the rules of treaty interpretation, and there was a dispute between the majority and the dissenter—who believed that the claim should have been dismissed outright—concerning the application of the ‘*generalia specialibus non derogant*’ principle. The dissent quoted the following statement of the principle from Haratzi:

According to this principle proclaimed by Grotius, at the interpretation of treaties the proper course is to guarantee priority to the specific provisions against the provisions of a general nature of the treaty, or in other words, the existence of a specific provision will withdraw a question governed by it from under the effect of the general provisions of the treaty.¹⁵²

This principle has been evoked as an argument against allowing a claimant to import provisions through an MFN clause that would contradict specific provisions of the claimant’s own BIT. One must be wary of any attempt to apply this principle of interpretation to an MFN clause, because it risks nullifying the purpose of the clause. An MFN clause is always general, yet its purpose is to replace a specific provision in the same treaty with an equally specific, but more favorable, provision from another treaty.

B. *Maffezini v. Spain*¹⁵³

The leading case in this area is *Maffezini*, which was the first case to hold that an investor could import the dispute settlement provisions from a third-party treaty. The case involved a dispute between, on the one side, an Argentinian who had invested in an enterprise for the production and distribution of chemical products in the Spanish region of Galicia and, on the other side, the Spanish government. The Argentina-Spain BIT included an eighteen-month domestic litigation waiting period before an investor could initiate ICSID arbitration.¹⁵⁴ The claimant invoked the MFN clause in the Argentina-Spain BIT, together with the absence of a waiting period in Spain’s BIT with Chile, in order to avoid the necessity of litigation in Spanish courts and proceed directly to ICSID arbitration.

Maffezini is thus the first of the recent decisions to address directly the question of whether an MFN clause entitles a claimant to invoke dispute settlement provisions from third-party treaties. The Tribunal’s affirmative response to the question has drawn a fair amount of comment from subsequent tribunals and commentators.¹⁵⁵ The facts of the *Maffezini* case were somewhat

152. *Id.* at 636 (Asante, J., dissenting) (quoting GYÖRGY HARASZTI, *SOME FUNDAMENTAL PROBLEMS OF THE LAW OF TREATIES* (1973)).

153. *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 5 ICSID (W. Bank) 396 (2000), available at http://www.worldbank.org/icsid/cases/emilio_DecisiononJurisdiction.pdf.

154. Acuerdo para la Promoción y la Protección Recíproca de Inversiones [Agreement for the Promotion and Protection of Reciprocal Investments], Arg.-Spain, art. X, §3(a), 3 Investment Promotion and Protection Treaties 1991 [hereinafter Arg.-Spain Investment Treaty], quoted in *Maffezini*, para. 24, 5 ICSID (W. Bank) at 400-01.

155. See discussion of *Salini*, *infra* Section V.F, and *Plama*, *infra* Section V.G. For a critical assessment of the *Maffezini* award, see Stephen Fietta, *Most Favoured Nation Treatment and Dispute Settlement Resolution Under Bilateral Investment Treaties: A Turning Point*, 8 INT’L ARB. L. R. 131 (2005). For more favorable assessments, see John Boscarol and Orlando Silva, *The Widening*

unusual in that they involved an investor from a more typically capital-importing country (Argentina) bringing a claim against the government of a capital-exporting country (Spain). This role reversal, coupled with the fact that Spain routinely seeks access to arbitration for its own investors, meant that Spain's arguments against arbitral jurisdiction could not be based on public policy considerations. One wonders whether a different result might have been reached in this landmark case had the legal question been presented in a more typical fact scenario—such as that in *Siemens v. Argentina*. In any event it is important to bear in mind the north-south dimension of debates over the applicability of MFN clauses to dispute settlement mechanisms, since a broad reading of the MFN clause will tend to benefit investors at the expense of host states, whereas a narrow reading will have the opposite effect.¹⁵⁶

The legal question presented in *Maffezini* was whether or not an Argentinean investor could avoid the provision in the Spain-Argentina BIT requiring that a claimant bring proceedings in a domestic court and allow those proceedings to continue for eighteen months prior to resorting to international arbitration. The provision did not require exhaustion of domestic remedies,¹⁵⁷ and therefore essentially constituted an extended waiting period prior to the initiation of arbitration. The claimant sought to circumvent this waiting period by means of the MFN clause and the Spain-Chile BIT, which allowed Chilean investors in Spain to go straight to arbitration. In concluding that the investor could benefit from the more favorable provisions of the Spain-Chile BIT, the Tribunal emphasized that in different circumstances, i.e. if the host state had made the exhaustion of domestic remedies a condition for its consent to arbitration under Article 26 of the ICSID Convention, the Tribunal would reject jurisdiction absent such exhaustion, even if a third-party BIT contained no exhaustion requirement.¹⁵⁸

The MFN clause in the Spain-Argentina BIT provided that “[i]n all matters subject to this Agreement, this treatment shall not be less favorable than that extended by each Party to the investments made in its territory by investors of a third country.”¹⁵⁹ In order to determine the scope of this clause, the Tribunal cited the *Anglo-Iranian Oil* case for the idea that the scope of a

Application of the MFN Obligation and its Impact on Investor Protection, 11 INT'L TRADE L. & REG. 61 (2005); Gaillard 2005, *supra* note 63, at 157-63 (discussing the holding of *Maffezini* in the context of commentary on *Siemens*).

156. This has also been a feature of the MFN clause in other contexts. In its *Commentary on the Draft Articles on Most-Favoured-Nation Clauses*, the International Law Commission noted the “problem which the application of the most-favoured-nation clause creates in the field of economic relations when a striking inequality exists between the development of the States concerned” and “devoted special attention to the manner in which the need of developing countries for preferences in the form of exceptions to the most-favoured-nation clause in the field of economic relations can be given expression in legal rules.” *Report of the International Law Commission to the General Assembly on the Work of Its Thirtieth Session*, U.N. Doc. A/33/10 (1978), reprinted in [1978] 2 Y.B. Int'l L. Comm'n 6, 12, 14, U.N. Doc. A/CN.4/SER.A/1978/Add.1. The Draft Articles accordingly included Article 24, which provides that “A developed beneficiary state is not entitled under a most-favoured-nation clause to any preferential treatment in the field of trade extended by a developing granting state to a developing third state . . .” *Id.* at 155.

157. *Maffezini*, paras. 29-31, 5 ICSID (W. Bank) at 401-02.

158. *Id.* para. 63, at 410.

159. *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, para. 38, 5 ICSID (W. Bank) 396, 404 (2000), available at http://www.worldbank.org/icsid/cases/emilio_DecisiononJurisdiction.pdf, quoting Arg.-Spain Investment Treaty, *supra* note 154, art. IV, § 2.

claimant's rights under the MFN clause was to be determined by looking at the "basic" treaty, i.e. the Spain-Argentina BIT:

[I]f, as the Tribunal believes, the right approach is to consider that the subject matter to which the clause applies is indeed established by the basic treaty, it follows that if these matters are more favorably treated in a third-party treaty then, by operation of the clause, that treatment is extended to the beneficiary under the basic treaty.¹⁶⁰

The Tribunal then turned to the *ejusdem generis* question, i.e. whether or not dispute settlement provisions belonged "to the same category of subject as that to which the clause itself relates" and discussed the decision of the Commission of Arbitration in *Ambatielos*.¹⁶¹ The Tribunal followed *Ambatielos* and concluded that:

Notwithstanding the fact that the basic treaty containing the clause does not refer expressly to dispute settlement as covered by the most favored nation clause, the Tribunal considers that there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights of traders under treaties of commerce. . . .

These modern developments are essential, however, to the protection of the rights envisaged under the pertinent treaties; they are also closely linked to the material aspects of the treatment accorded. Traders and investors, like their States of nationality, have traditionally felt that their rights and interests are better protected by recourse to international arbitration than by submission of disputes to domestic courts, while the host governments have traditionally felt that the protection of domestic courts is to be preferred. . . .

From the above considerations it can be concluded that if a third-party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause as they are fully compatible with the *ejusdem generis* principle.¹⁶²

The upshot of the Tribunal's holding is that it is neither possible nor desirable to separate treaty rights from treaty remedies and then to apply the MFN principle only to the rights and not to the remedies. Indeed, from the perspective of investors, it would not be too much of an exaggeration to say that their rights exist only to the extent that they can be enforced through binding international arbitration. Under this view, therefore, more favorable dispute settlement procedures are tantamount to more favorable rights.

The Tribunal qualified its holding that the MFN clause could be used to import dispute settlement provisions from a third-party treaty by noting that "[t]his operation of the most favored nation clause does, however, have some important limits arising from public policy considerations" ¹⁶³ In particular, the Tribunal announced that "[a]s a matter of principle, the beneficiary of the clause should not be able to override public policy considerations that the contracting parties might have envisaged as

160. *Id.* para. 45, at 405.

161. *Id.* para. 49, at 406, quoting *Ambatielos* Arbitration (Greece v. U.K.), 12 R.I.A.A. 83, 107 (Comm'n of Arb. 1956).

162. *Id.* paras. 54-56, at 407-08 (footnotes omitted).

163. *Maffezini*, para. 56, 5 ICSID (W. Bank) at 408.

fundamental conditions for their acceptance of the agreement in question”¹⁶⁴

The Tribunal went on to identify four such “situations not present in the instant case.”¹⁶⁵

1. “[I]f one contracting party has conditioned its consent to arbitration on the exhaustion of local remedies, . . . this requirement could not be bypassed by invoking the most favored nation clause . . . since the stipulated condition reflects a fundamental rule of international law.”¹⁶⁶
2. A so-called fork-in-the-road provision requiring an irrevocable choice between submission of the dispute to domestic courts or international arbitration “cannot be bypassed by invoking the clause,” because “it would upset the finality of arrangements that many countries deem important as a matter of public policy.”¹⁶⁷
3. “[I]f the agreement provides for a particular arbitration forum, such as ICSID, for example, this option cannot be changed by invoking the clause, in order to refer the dispute to a different system of arbitration.”¹⁶⁸
4. “[I]f the parties have agreed to a highly institutionalized system of arbitration that incorporates precise rules of procedure” such as NAFTA, “it is clear that neither of these mechanisms could be altered by the operation of the clause because these very specific provisions reflect the precise will of the contracting parties.”¹⁶⁹

The Tribunal also noted two more general public policy considerations. It welcomed the “fact that the application of the most favored nation clause to dispute settlement arrangements in the context of investment treaties might result in the harmonization and enlargement of the scope of such arrangements,”¹⁷⁰ but it also worried about the possibility of “disruptive treaty-shopping that would play havoc with the policy objectives of underlying specific treaty provisions, on the other hand.”¹⁷¹ The Tribunal’s analysis of these public policy considerations came in for sharp criticism in the *Salini* and *Plama* cases, discussed below in Parts IV.F and IV.G, respectively.

In explaining its central holding, the Tribunal placed particular importance on the respective practices of Spain and Argentina in determining the parties’ intent as to whether the dispute settlement provisions of their BIT could be modified by reference to the Spain-Chile BIT:

164. *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, para. 62, 5 ICSID (W. Bank) 396, 410 (2000), available at http://www.worldbank.org/icsid/cases/emilio_DecisiononJurisdiction.pdf.

165. *Id.* para. 63, at 410.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, para. 62, 5 ICSID (W. Bank) 396, 410 (2000), available at http://www.worldbank.org/icsid/cases/emilio_DecisiononJurisdiction.pdf.

171. *Id.* para. 63, at 410.

The Claimant has convincingly explained that at the time of the negotiations of the Agreement, Argentina still sought to require some form of prior exhaustion of local remedies, while Spain supported the policy of a direct right of submission to arbitration, which was reflected in the numerous agreements it negotiated with other countries at that time. . . . Argentina later abandoned its prior policy, and like Spain and Chile, accepted treaty clauses providing for the direct submission of disputes to arbitration following a period of negotiations.¹⁷²

The Tribunal then described the typical Spanish practice of requiring a six month negotiation period prior to arbitration but then leaving investors the choice of resorting to arbitration or domestic courts, as well as its practice in a few cases of providing for arbitration exclusively. The fact that the treaties include different dispute resolution mechanisms (six, nine, or twelve month negotiation periods followed by sometimes optional, sometimes mandatory resort to arbitration) but were negotiated at the same time persuaded the Tribunal that Spain did not consider the waiting period an important public policy requirement.

One might wonder why the Tribunal did not conclude that the diversity of dispute settlement mechanisms in Spain's BITs demonstrated that Spain did not consider the MFN clause to apply to such provisions. The Spain-Chile and Spain-Argentina BITs were concluded one day apart. There is indeed something odd about the idea, implicit in the Tribunal's decision, that Spain was simultaneously signing two treaties knowing that the provisions of one treaty were less favorable and therefore would never actually be applied by Spain. This seemingly odd behavior, however, is precisely what is required by the MFN principle, at least since the abandonment of the conditional form of the clause and the concomitant principle of material reciprocity. The MFN principle requires Spain to treat all foreign investors equally, but it does not require Argentina to treat Spanish investors the same way that Argentinean investors are treated in Spain. A given BIT, therefore, establishes a floor for treatment that corresponds to the less favorable treatment offered by the two countries on any given issue at that specific point in time.

The Tribunal's discussion of state practice is rather puzzling. Argentina's practice is irrelevant to the treatment to which an Argentinean investor in Spain is entitled, which is the most favorable of (a) the Spain-Argentina BIT, (b) Spain's other BITs, and (c) the treatment Spain affords its own nationals *in Spain*. Spanish treaty practice with third countries is relevant only as evidence that Spain did not have a policy of insisting on waiting periods and therefore cannot argue that its consent to arbitration was conditioned on compliance with the clause. More problematic, however, is the Tribunal's reference to Spanish *negotiating* practice:

The Spanish treaty practice is also relevant in connection with another aspect of the clause. Most treaties concluded by Spain have a model clause to the effect that . . . 'Each Party shall guarantee in its territory fair and equitable treatment for the investments made by investors of the other Party This treatment shall not be less favourable than that extended by each Party to the investments made in its territory by its own investors . . .'

[] While this clause applies to national treatment of foreign investors, it may also be understood to embrace the treatment required by a Government for its investors abroad, as evidenced by the treaties made to ensure their protection. Hence, if a Government

172. *Id.* para. 57, at 410.

seeks to obtain a dispute settlement method for its investors abroad, which is more favorable than that granted under the basic treaty to foreign investors in its territory, the clause may be construed so as to require a similar treatment of the latter.¹⁷³

This passage appears to conflate the requirements of the MFN clause with the principle of material reciprocity, which is not implicated in the unconditional MFN clause. The only circumstances in which Spain is *required* to accord foreign investors the same treatment that it seeks for its own investors abroad is when that treatment is either (a) enshrined in a treaty or (b) embodied in Spanish law applicable to Spanish investors (assuming the foreign investor benefits from a national treatment provision). Spain's negotiating position does not, without a corresponding treaty provision that an investor may invoke directly or through an MFN clause, create any legal obligations for Spain. Moreover, the Tribunal's reference to national treatment is particularly misplaced in the investment law context, for no country allows its own nationals to pursue investment claims against it through international arbitration; indeed in the ICSID context, such an oxymoronic practice is expressly barred.¹⁷⁴

The Tribunal's attempt to extend the concept of "national treatment" extraterritorially is both unsound as a matter of principle and incompatible with the text of the very clause the Tribunal quotes in support of it, which refers to the treatment "extended by each Party to the investments made *in its territory* by its own investors."¹⁷⁵ In ordinary circumstances this new principle would be redundant, since the same treatment could be claimed through the MFN clause.¹⁷⁶ However, it could have a mischievous impact in at least one scenario. Suppose the MFN clause in the Spain-Argentina BIT expressly provided that it did not apply to dispute settlement mechanisms. Under the Tribunal's expansive view of the national treatment requirement, an Argentine investor could nevertheless claim an entitlement to proceed directly to arbitration, a clear violation of the parties' intentions.

C. *Yaung Chi Oo Trading v. Myanmar*¹⁷⁷

The MFN clause was not central to this case and the argument based on it appears to have been thrown in by the Claimant just in case. Nevertheless, although the Tribunal dismissed the Claimant's argument, it did not appear to

173. *Id.* para. 61, at 409-10 (footnote omitted).

174. Article 25 of the ICSID Convention limits the jurisdiction of ICSID to "any legal dispute arising directly out of an investment, between a Contracting State . . . and a national of another Contracting State."

175. *Maffezini*, para. 61, 5 ICSID (W. Bank) at 411-12, quoting ACUERDO PARA LA PROMOCIÓN Y PROTECCIÓN RECÍPROCA DE INVERSIONES, Alg.-Spain, art. 4, Dec. 23, 1994, 5 Investment Promotion and Protection Treaties 1994, available at http://www.unctad.org/sections/dite/ia/docs/bits/spain_algeria_sp.pdf (emphasis added).

176. It is theoretically possible to imagine a scenario in which Spain had a policy of *seeking* access to arbitration for its investors but had never actually secured it for them through a treaty. In this implausible scenario it would be extraordinary indeed to require Spain to gratuitously provide the very treatment that its best efforts had been unable to secure for its own investors.

177. *Yaung Chi Oo Trading Pte Ltd. v. Myanmar*, ASEAN Case No. ARB/01/1, Request for Provisional Measures, 8 ICSID (W. Bank) 452 (2003).

have any difficulty with the idea that an MFN clause could substitute for consent to an entirely different arbitral forum.

The Tribunal, on its way to concluding that it lacked jurisdiction, dismissed the Claimant's MFN argument in a single paragraph:

Subsidiarily, the Claimant argued that jurisdiction could be attracted on the basis of the most-favoured nation clause contained in Article 8 of the Framework Agreement, read in conjunction with the bilateral investment treaty between Myanmar and the Philippines concluded on 17 February 1998. However Article IX of that Agreement provides for arbitration of investment disputes pursuant to the UNCITRAL Rules, with a different appointing authority from the one designated in Article X of the 1987 ASEAN Agreement. As the Tribunal pointed out in its Order No. 2, if a party wishes to rely on the jurisdictional possibility affirmed by an ICSID Tribunal in *Maffezini v. Kingdom of Spain*, it would normally be incumbent on it to rely on that possibility, and on the other treaty in question, at the time of instituting the arbitral proceedings.¹⁷⁸

This passage is nevertheless interesting in that it deals with one of the four public policy exceptions enumerated in *Maffezini*, yet the Tribunal does not appear to see any problem with the idea that an MFN clause could provide access to a different arbitration forum than the one foreseen in the base treaty—provided the Claimant chooses the forum when it initiates the arbitral proceedings. The Tribunal may simply have failed to devote adequate attention to an argument it considered tangential, but it is nonetheless troubling that the Tribunal cites *Maffezini* as having affirmed a possibility that *Maffezini* in fact specifically rejected.¹⁷⁹

D. *Tecmed v. Mexico*¹⁸⁰

As in *Yaung Chi Oo*, the MFN issue was not of central importance in *Tecmed*; in fact, it was raised only in oral arguments and was summarily dismissed by the Tribunal. Yet the Tribunal's passing reference may have broader implications in that it repeats a variant of the argument, drawn from Haratzi and Grotius and discussed in *Asian Agricultural Products*, to the effect that specifically negotiated provisions could not be modified by an MFN clause. As noted above, a dispute over an MFN clause is an entirely inappropriate context in which to invoke the interpretive principle according to which specific provisions trump general ones, because it would lead to an exceedingly narrow scope for MFN clauses—so narrow as to vitiate the very purpose of MFN clauses.

The Claimant in *Tecmed* sought retroactive application of a treaty on the grounds that absent such application the investor would be receiving less favorable treatment than a similarly situated Austrian investor. The Tribunal noted the claimant's reference to *Maffezini* but refused to consider the Austrian treaty:

178. *Id.* para. 83, at 487 (footnote omitted).

179. See *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, para. 63, 5 ICSID (W. Bank) 396, 410 (2000), available at http://www.worldbank.org/icsid/cases/emilio_DecisiononJurisdiction.pdf.

180. *Tecmed v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award, 43 I.L.M. 133 (2003), available at <http://www.investmentclaims.com/decisions/Tecnicas-Mexico-Award-29May2003-Eng.pdf>.

The Arbitral Tribunal will not examine the provisions of such Treaty in detail in light of such principle, because it deems that matters relating to the application over time of the Agreement, which involve more the time dimension of application of its substantive provisions rather than matters of procedure or jurisdiction, due to their significance and importance, go to the core of matters that must be deemed to be specifically negotiated by the Contracting Parties. These are determining factors for their acceptance of the Agreement, as they are directly linked to the identification of the substantive protection regime applicable to the foreign investor and, particularly, to the general (national or international) legal context within which such regime operates, as well as to the access of the foreign investor to the substantive provisions of such regime. Their application cannot therefore be impaired by the principle contained in the most favored nation clause.¹⁸¹

This treatment of the MFN issue is strange for several reasons. First, hitherto, the application of the MFN principle to substantive provisions has never been seen as problematic. The core purpose of the MFN clause is to ensure substantive equality in the treatment of investors of different nationalities, and as the cases discussed here abundantly illustrate, the more problematic question has always been whether the MFN clause *also* applies to procedural and jurisdictional questions. Consequently, the Tribunal's distinction of *Tecmed* from *Maffezini* as presenting a substantive question rather than a procedural or jurisdictional one does not support the Tribunal's conclusion that the MFN clause is inapplicable.

Second, the Tribunal compounds this error by asserting that matters "deemed to be specifically negotiated by the Contracting Parties"¹⁸² cannot be modified through the operation of the MFN clause. The Tribunal's view that any provisions related to the "substantive protection regime" constitute "determining factors for their acceptance of the Agreement"¹⁸³ is inconsistent with the purpose and normal operation of the MFN clause. As the history of the MFN clause indicates, the aim of an unconditional MFN clause is to prevent two states from specially negotiating provisions that they are unwilling to apply to others. In *Siemens*, Argentina sought to invoke *Tecmed* for this strange proposition,¹⁸⁴ but the Tribunal in *Siemens* correctly rejected this argument, because "[i]n fact, the purpose of the MFN clause is to eliminate the effect of specially negotiated provisions unless they have been excepted."¹⁸⁵

Although the Tribunal's analysis turns the MFN clause inside-out, its specific conclusion—that the Claimant could not secure retroactive application of its BIT through the MFN clause—is nonetheless correct, albeit for different reasons. International law contains a strong presumption against the retroactive application of treaties. This presumption is codified in Article 28 of the Vienna Convention on the Law of Treaties.¹⁸⁶ The question here, therefore, is whether or not a "different intention" could be "otherwise

181. *Id.* para. 69, at 147.

182. *Id.*

183. *Id.*

184. *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, para. 50 (2004), <http://www.worldbank.org/icsid/cases/siemens-decision-en.pdf>.

185. *Id.* para. 106.

186. Vienna Convention, *supra* note 64, art. 28, at 339 ("Unless a different intention appears from the treaty or is otherwise established, 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.").

established” through an MFN clause and a third-party treaty. It is highly doubtful, although perhaps not impossible, that such an intention could be established in this way. The fact that the MFN clause itself is contained in the very treaty whose retroactive application is sought would make such an argument depend on a form of chronological bootstrapping that few if any tribunals would be likely to accept.

E. *Siemens v. Argentina*¹⁸⁷

The *Siemens* case was in many respects a repeat of *Maffezini* and reinforced its interpretive approach by applying the same reasoning even in a case in which the MFN clause was less broadly-worded than in *Maffezini*. As in *Maffezini*, the case involved an Argentinean BIT with a waiting period for domestic litigation, a claimant who sought to avoid application of the clause by reference to a third-party treaty with Chile, and a conclusion by the Tribunal that dispute settlement provisions were within the scope of the MFN clause. The principal difference—apart from the fact that Argentina was now the respondent rather than the home state of the claimant—was that the wording of the applicable MFN clause in the Germany-Argentina BIT was less explicitly broad in scope. Argentina vigorously urged this distinction upon the Tribunal, but without success:

The Tribunal notes that the MFN clause in the Spain BIT refers to ‘all matters subject to this Agreement’, while the MFN clause in the Treaty refers only to ‘treatment’. The arbitral tribunal in *Maffezini* noted that Spain had used the expression ‘all matters subject to this Agreement’ only in the case of its BIT with Argentina and ‘this treatment’ in all other cases. The said tribunal commented that the latter was ‘of course a narrower formulation’. The Tribunal concurs that the formulation is narrower but, as concluded above, it considers that the term ‘treatment’ and the phrase ‘activities related to the investments’ are sufficiently wide to include settlement of disputes.¹⁸⁸

The wording of the clause thus presented a distinction without a difference.

While the outcome and rationale is largely the same as in *Maffezini*, the *Siemens* Tribunal provides a more extensive explanation of the methodology and rationale of its decision. It begins its analysis with the Vienna Convention on the Law of Treaties:

The Tribunal considers that the Treaty has to be interpreted neither liberally nor restrictively, as neither of these adverbs is part of Article 31(1) of the Vienna Convention. The Tribunal shall be guided by the purpose of the Treaty as expressed in its title and preamble. It is a treaty ‘to protect’ and ‘to promote’ investments. The preamble provides that the parties have agreed to the provisions of the Treaty for the purpose of creating favorable conditions for the investments of nationals or companies of one of the two States in the territory of the other State. Both parties recognize that the promotion and protection of these investments by a treaty may stimulate private economic initiative and increase the well-being of the peoples of both countries. The intention of the parties is

187. *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (2004), <http://www.worldbank.org/icsid/cases/siemens-decision-en.pdf>.

188. *Id.* para. 103. The reference “as concluded above” is to para. 85, where the Tribunal concluded that “[t]reatment in Article 3 refers to treatment under the Treaty in general and not only under that Article.”

clear. It is to create favorable conditions for investments and to stimulate private initiative.¹⁸⁹

The Tribunal thus expressly anchors its holding in its understanding that the purpose of the treaty as a whole is to “protect” and “promote” investments. While this is not wrong in itself, one must be wary of placing too much weight on such statements of purpose in BITs, for doing so could lead tribunals to resolve all doubtful questions in favor of investors on the theory that better protection for investors will always be more in keeping with the “purpose” of the treaty. Moreover, while the treaty as a whole may have one purpose, a specific provision may have a separate purpose which is of equal importance to one or both contracting parties—for example, preserving the integrity and core functions of the domestic court system. It is thus important, as Article 31(1) of the Vienna Convention states, to consider the *context* as well as the purpose.

The Tribunal next considers the parties’ conflicting interpretations of *Anglo-Iranian Oil*, *Rights of U.S. Nationals in Morocco*, and *Ambatielos*. The Tribunal distinguishes *Anglo-Iranian Oil* on the ground that “[a]s stated by the I.C.J. itself, it is clear that the I.C.J. did not consider the ‘meaning or scope of the MFN clause,’ including whether the clause would extend to settlement of disputes.”¹⁹⁰ As noted in the discussion of this case above, this is not quite accurate, for the Tribunal ignores the fact that on the very next page of its opinion, in response to what it saw as a different argument, the I.C.J. did consider the scope and meaning of the clause and concluded “that the most-favoured-nation clause in the Treaties of 1857 and 1903 between Iran and the United Kingdom has no relation whatever to the jurisdictional matters between the two Governments.”¹⁹¹

Anglo-Iranian Oil is the outlier of the three cases in that it was the only one to reject the applicability of the MFN clause to a jurisdictional matter, and since all three were decided within one year of each other, the difference would not appear to be attributable to a change in the views or composition of the I.C.J. The pivotal factor in the case was the Iranian Declaration, because in accordance with its terms, Iran had not consented to the jurisdiction of the I.C.J. for disputes with the United Kingdom. At issue was not the terms or timing of the United Kingdom’s right to bring a dispute with Iran before the I.C.J., but rather the existence of that right at all. To find an analogous situation in the contemporary investment context, one would have to imagine a situation in which the claimant’s basic BIT contained an MFN clause but no arbitration clause, whereas a third-party BIT with the host state contained an arbitration clause. It is unlikely that any tribunal would sustain its jurisdiction in such a scenario. In fact, when a less extreme version of this scenario was presented in the *Plama* case, discussed in detail, *infra*, the Tribunal declined jurisdiction.

The Tribunal in *Siemens* found more support in the *Rights of U.S. Nationals in Morocco* case, stating that “It is evident that the I.C.J. accepted

189. *Id.* para. 81 (footnote omitted).

190. *Id.* para. 96 (quoting *Anglo-Iranian Oil Co. (U.K. v. Iran)*, 1952 I.C.J. 93, 109 (July 22)).

191. *Anglo-Iranian Oil Co. (U.K. v. Iran)*, 1952 I.C.J. 93, 110 (July 22).

that MFN clauses may extend to provisions related to jurisdictional matters, but this was not really the issue between the parties.”¹⁹² This is true, but it is also true that the jurisdictional matters at issue were quite different from those present in *Siemens*. The issue was whether or not U.S. consular courts could continue to exercise jurisdiction over criminal and civil matters involving U.S. nationals within Morocco. Thus the thorny questions related to the scope and extent of a state’s consent to the jurisdiction of an international tribunal—the very questions at the heart of the dispute in *Siemens* and the other contemporary cases—were simply not present.

Finally, the Tribunal considered the award of the Commission of Arbitration in *Ambatielos*: “The Respondent has argued that, in *Ambatielos*, administration of justice refers to substantive procedural rights like just and equitable treatment and not to purely jurisdictional matters. The Tribunal does not find any basis in the reasoning of the Commission to justify such distinction.”¹⁹³ In the Tribunal’s view, the rationale of *Ambatielos* applies *a fortiori* in the BIT context:

On the other hand, the Tribunal finds that the Treaty itself, together with so many other treaties of investment protection, has as a distinctive feature special dispute settlement mechanisms not normally open to investors. Access to these mechanisms is part of the protection offered under the Treaty. It is part of the treatment of foreign investors and investments and of the advantages accessible through a MFN clause.¹⁹⁴

After thus relying on *Ambatielos* for support for its decision, the Tribunal noted as if in passing that, “This conclusion concurs with the findings of the arbitral tribunal in *Maffezini*.”¹⁹⁵

The question of state practice was also raised, but as in *Maffezini*, the inconsistency of Argentina’s practice precluded an argument that its consent to jurisdiction was premised on compliance with the domestic litigation waiting period:

As to the claim that Article 10(2) reflects the policy of Argentina, the Respondent has not presented any evidence beyond its affirmations to this effect in the written pleadings. The Tribunal would consider an indication of the existence of a policy of the Respondent if a certain requirement has been consistently included in similar treaties executed by the Respondent. The Chile BIT was signed on August 2, 1991, only a few months before the Treaty. The Spain BIT was entered into on October 3, 1991. The US-Argentina BIT, which does not require institution of judicial proceedings prior to arbitration, was executed on November 14, 1991. This lack of consistency among the BITs entered into by the Respondent during the same year as the Treaty was signed does not support the argument that the institution of proceedings before the local courts is a ‘sensitive’ issue of economic or foreign policy or that it is an essential part of the consent of the Respondent to arbitration. The Respondent has sought for its own nationals as investors in Chile or the United States similar treatment to that sought by the Claimant in these proceedings.¹⁹⁶

Notwithstanding the irrelevant reference to the treatment Argentina “has sought for its own nationals as investors”—and the lack of evidence as to

192. *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, para. 99 (2004), <http://www.worldbank.org/icsid/cases/siemens-decision-en.pdf>.

193. *Id.* para. 102.

194. *Id.*

195. *Id.* para. 103.

196. *Id.* para. 105.

whether Argentina *sought* such treatment or merely consented to it—the analysis here is persuasive. The implication is that the host state’s practice will only provide a defense to an MFN-based claim in the rare circumstance in which a state has been extraordinarily consistent in its practice, but for a single treaty containing a more favorable provision.¹⁹⁷ For if a state’s treaty practice were consistent without exception, then no MFN issue could arise; if, on the other hand, a state’s practice on a given issue varies, then it is precluded from arguing that any one position on that issue is a sensitive issue of public policy. As Emmanuel Gaillard has suggested, one situation in which this question is likely to arise in the coming years will be if and when China abandons its steadfast practice of consenting to arbitration for the sole purpose of determining the amount of compensation required as a result of an expropriation. The first treaty to which China agrees that includes a broader consent to arbitration will likely trigger a flood of MFN-based claims.¹⁹⁸ Tribunals addressing such claims would be well-advised not to place too much weight on consistency of state practice. Instead, their jurisdictional decisions will rest on firmer footing if they focus on the issue of consent, following the implicit rationale of *Anglo-Iranian Oil* and *Plama*—which involved an arbitration clause very similar to the one presently employed by China.

Finally, the Tribunal in *Siemens* considered the question of whether a claimant invoking third-party treaty provisions through an MFN clause must import the third-party treaty’s provisions as a whole or whether it may import only the more beneficial terms in isolation from their context. In an analysis that confuses the way an MFN clause operates, the Tribunal comes to the rather startling conclusion that such cherry-picking is permissible:

As regards the issue of whether the claim of a benefit under an MFN clause triggers application of the whole treaty, it depends on the terms of the clause, but only to the extent that it is advantageous to the beneficiary of the clause. The MFN clause would be of limited use otherwise. This understanding does not mean that the investor in Argentina will enjoy a more favorable treatment than the investor in Chile. The MFN clause works both ways. The investor in Chile will be able to claim similar benefits under the Chile BIT.

[T]he Tribunal considers that, as a general matter, claiming a benefit by the operation of an MFN clause does not carry with it the acceptance of all the terms of the treaty which provides for such benefit whether or not they are considered beneficial to the party making the claim; neither does it entail that the claiming party has access to all benefits under such treaty. This will depend on the terms of the MFN clause and other terms of the treaties involved.¹⁹⁹

The implication of this holding is that the German investor in Argentina is permitted to claim the right of direct access to arbitration from the Argentina-Chile BIT but without being bound by the fork-in-the-road provision, since the Germany-Argentina BIT lacks such a provision. The result is to impose on

197. State practice would be much more relevant if the state practice in question was practice in *applying* as opposed to *negotiating* the relevant treaty provisions. See Vienna Convention, *supra* note 64, art. 31(3). While the Vienna Convention does not say so explicitly, it seems that practice in applying an identical provision in another treaty could also be illuminating.

198. Gaillard 2005, *supra* note 63, at 159-60.

199. *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, paras. 108-09 (2004), <http://www.worldbank.org/icsid/cases/siemens-decision-en.pdf>.

Argentina a combination of dispute settlement provisions to which Argentina had never consented to grant to anyone. Moreover, while the *Maffezini* award was of course not binding on the Tribunal in *Siemens*, it is worth bearing in mind that the fork-in-the-road provision was one of the four types of provisions which the Tribunal in *Maffezini* thought could not be circumvented by an MFN clause,²⁰⁰ yet the Tribunal here does not explain the basis for its disagreement with *Maffezini* on this point.

The Tribunal explains its rejection of the idea that an investor must import the dispute settlement mechanism as a whole, rather than only isolated provisions, in the following terms:

This understanding of the operation of the MFN clause would defeat the intended result of the clause which is to harmonize benefits agreed with a party with those considered more favorable granted to another party. It would oblige the party claiming a benefit under a treaty to consider the advantages and disadvantages of that treaty as a whole rather than just the benefits. The Tribunal recognizes that there may be merit in the proposition that, since a treaty has been negotiated as a package, for other parties to benefit from it, they also should be subject to its disadvantages. The disadvantages may have been a trade-off for the claimed advantages. However, this is not the meaning of an MFN clause. As its own name indicates, it relates only to more favorable treatment. There is also no correlation between the generality of the application of a particular clause and the generality of benefits and disadvantages that the treaty concerned may include. Even if the MFN clause is of a general nature, its application will be related only to the benefits that the treaty of reference may grant and to the extent that benefits are perceived to be such. As already noted, there may be public policy considerations that limit the benefits that may be claimed by the operation of an MFN clause, but those pleaded by the Respondent have not been considered by the Tribunal to be applicable in this case.²⁰¹

The Tribunal here misunderstands both the operation of the MFN clause and the import of its decision. It is neither precisely correct nor particularly relevant for the Tribunal to assert that the “investor in Chile will be able to claim similar benefits under the Chile BIT.” Under the Tribunal’s holding, it would be true that the *German* investor in Chile could claim similar benefits in both Argentina and Chile; however, we do not know whether Argentinean investors in Chile, like their German counterparts, would be able to circumvent the fork-in-the-road provision without looking at Chile’s BIT with Germany.²⁰² In any event, the purpose of the MFN clause in the Germany-Argentina BIT is not to ensure that German investors enjoy the same rights in both Argentina and Chile but rather to ensure that German and Chilean investors in Argentina are treated equally.

200. *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, para. 63, 5 ICSID (W. Bank) 396, 410 (2000), available at http://www.worldbank.org/icsid/cases/emilio_DecisiononJurisdiction.pdf; see also *supra* note 16969 and accompanying text.

201. *Siemens*, ICSID Case No. ARB/02/8, para. 120.

202. In fact, the 1991 Chile-Germany BIT did contain an eighteen-month domestic litigation requirement analogous to that in the Argentina-Germany BIT, but of course no fork-in-the-road provision, because a fork-in-the-road provision would contradict the waiting period provision. Chile-F.R.G. Investment Treaty, *supra* note 78, art. 10. Interestingly, the dispute settlement provisions were modified by a 1997 protocol which allowed Chilean investors to proceed directly to arbitration but retained the waiting period for German investors in Chile—subject to the proviso that “each Contracting Party could offer more favorable treatment” [“cada Parte Contratante podrá ofrecer un trato más favorable”]. See Chile-F.R.G. Protocol and Supplement, *supra* note 78, arts. 1, 4.

It is true, however, that under the Tribunal's view, both Chilean and German investors in Argentina could claim entitlement to arbitration without a fork-in-the-road—thus the non-discrimination principle is respected. The problem is that the treatment required is *not* the most favorable treatment accorded by Argentina, but in fact *more favorable* treatment than it has agreed to accord anyone—and Argentina is now obliged to grant this extra-favorable treatment to investors from any country with whom it has a BIT containing an MFN clause. The result of the widespread application of this view could only be chaos and a legitimate sense of injustice on the part of host states.

The difficulty is in finding a satisfactory middle point between requiring the importation of an entire treaty on the one hand, and allowing claimants to cherry pick individual provisions—or even words or phrases—out of context. A variant of the *ejusdem generis* principle may be of some use here as a limiting principle that would allow a claimant to import a set of related provisions—for example, the entire dispute-settlement mechanism—from another treaty, but without being obliged to import the entire treaty. Tribunals will then be faced with the potentially difficult task of determining which provisions are sufficiently related that they must be imported together or not at all, but these difficulties are modest in comparison to those which would result from unlimited provision-by-provision treaty shopping. A further implication is that claimants wishing to take advantage of more favorable dispute settlement provisions in other treaties must be careful to avoid foreclosing this option. In this case, for example, Siemens had to make a strategic choice at the outset of whether to bring an action in local courts in order to toll the waiting period in the Germany-Argentina BIT or to forego the court action in order to comply with the fork-in-the-road provision of the Chile-Argentina BIT.

F. *Salini v. Jordan*²⁰³

After *Maffezini* and *Siemens*, it may have appeared that proponents of a broad reading of the applicability of MFN clauses to dispute settlement mechanisms were on their way to winning the day. *Salini*, however, was the first case to reject such application, and when read against the backdrop of the previous cases, it suggests that the specific terms of the treaty in question as well as the factual circumstances in which the MFN claim arises are more important than any general principle of giving MFN clauses a “broad” or “narrow” scope.

The case involved a dispute over the final payment due to two Italian companies following completion of the construction of the Karameh Dam in Jordan. Article 9 of the Jordan-Italy BIT provided for ICSID arbitration of disputes concerning treaty violations, but it also provided that, where an investment was made pursuant to an investment contract, the contractual

203. *Salini Costruttori S.p.A. v. Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 44 I.L.M. 573 (2004), available at <http://www.worldbank.org/icsid/cases/salini-decision.pdf> (reproduced in part).

dispute settlement procedures would govern.²⁰⁴ The dam project was subject to an investment contract that required disputes to be settled in Jordanian courts unless the parties agreed to refer the dispute to arbitration.²⁰⁵ The Italian claimants nevertheless sought to bring their contractual claims before an ICSID tribunal on the theory that Jordan's BITs with the United States and other countries allowed investors from such countries to bring contractual claims to arbitration, and therefore that the MFN clause entitled Italian investors to do likewise. The Tribunal rejected this argument, holding that it lacked jurisdiction over contractual claims, but that it would have jurisdiction over claims based on breaches of the treaty itself.

Two provisions of the Jordan-Italy BIT were central to the Tribunal's decision. First was the MFN provision included in Articles 3(1) and (2):

1. Both Contracting Parties, within the bounds of their own territory, shall grant investments effected by, and the income accruing to, investors of the other Contracting Party, no less favourable treatment than that accorded to investments effected by, and income accruing to, its own nationals or investors of Third States.

2. In case, from the legislation of one of the Contracting Parties, or from the international obligations in force or that may come into force in the future for one of the Contracting Parties, should come out a legal framework according to which the investors of the other Contracting Party would be granted a more favourable treatment than the one foreseen in this Agreement, the treatment granted to the investors of such other Parties will apply also for outstanding relationships.²⁰⁶

Second was Article 9(2), which provided that "[i]n case the investor and an entity of the Contracting Parties have stipulated an investment Agreement, the procedure foreseen in such investment agreement shall apply."²⁰⁷

The Tribunal sought to distinguish these provisions from the ones at issue in *Ambatielos* and *Maffezini*:

The Tribunal observes that the circumstances of this case are different [than in *Maffezini* and *Ambatielos*]. Indeed, Article 3 of the BIT between Italy and Jordan does not include any provision extending its scope of application to dispute settlement. It does not envisage 'all rights or all matters covered by the agreement'. Furthermore, the Claimants have submitted nothing from which it *might* be established that the common intention of the Parties was to have the most-favored-nation clause apply to dispute settlement. Quite on the contrary, the intention as expressed in Article 9(2) of the BIT was to exclude from ICSID jurisdiction contractual disputes between an investor and an entity of a State Party in order that such disputes might be settled in accordance with the procedures set forth in the investment agreements. Lastly, the Claimants have not cited any practice in Jordan or Italy in support of their claims.

From this, the Tribunal concludes that Article 3 of the BIT does not apply insofar as dispute settlement clauses are concerned.²⁰⁸

204. *Id.* para. 66, at 584 (quoting Agreement on the Promotion and Protection of Investments, Italy-Jordan, art. 9, July 21, 1996, available at http://www.unctad.org/sections/dite/iaa/docs/bits/italy_jordan.pdf).

205. *Id.* para. 71, at 586.

206. *Id.* para. 104, at 591 (quoting Agreement on the Promotion and Protection of Investments, Italy-Jordan, art. 3 §§1-2, July 21, 1996, available at http://www.unctad.org/sections/dite/iaa/docs/bits/italy_jordan.pdf).

207. *Id.* para. 70, at 585 (quoting Agreement on the Promotion and Protection of Investments, Italy-Jordan, art. 9, §2, July 21, 1996, available at http://www.unctad.org/sections/dite/iaa/docs/bits/italy_jordan.pdf).

208. *Id.* paras. 118-19, at 592.

There is somewhat less to this distinction than meets the eye. First, the MFN clauses in *Ambatielos* and *Maffezini* did not expressly extend to dispute settlement, nor did the claimants in those cases submit any evidence—other than arguments based on the text and purpose—in their efforts to show that the parties’ intention was to give the MFN clause a broad scope limited only by the subject matter of the treaty. In support of its statement, the Tribunal refers to the emphasis in *Maffezini* on Spanish treaty practice, but this is not evidence of Spain’s intent to have the MFN clause apply to dispute settlement provisions, but rather evidence of the existence or lack of a Spanish public policy that would act as a bar to such application.

On this point, therefore, the difference is not related to the circumstances of the cases but rather to the tribunals’ respective starting points: In *Maffezini* the Tribunal presumed that an expansively worded MFN clause was intended to apply broadly, absent limiting language or a compelling argument for a contrary intention; whereas in *Salini* the Tribunal starts from the presumption that the MFN clause does not apply unless it can be specifically demonstrated that the parties intended it to apply to the specific issue in question. The MFN clause is by its very nature a general provision, for as one commentator writes, “The parties to a treaty containing the clause do not know in what way, or when, a country will be most favored. All that these parties do know is that they must generalize concessions granted to any third country.”²⁰⁹ Since most MFN clauses only refer to “treatment” without further specification, *Salini*’s restrictive approach would essentially read those clauses out of existence.

Second, it is at least arguable whether much weight can be placed on the presence or absence of terms such as “all rights” or “all matters.” Article 3(2) refers to “treatment granted to the investors,” and in *Siemens*, which was decided just three months before *Salini*,²¹⁰ the Tribunal found that “the term ‘treatment’ is so general that the Tribunal cannot limit its application except as specifically agreed by the parties”²¹¹ and accordingly “it considers that the term ‘treatment’ and the phrase ‘activities related to the investments’ are sufficiently wide to include settlement of disputes.”²¹²

The only clear distinction between the cases, therefore, is the presence in this case of Article 9(2). This distinction is fundamental, although not for the reason given by the Tribunal. For while it is true that this provision clearly establishes the parties’ intent at the time of the BIT as to how contractual disputes were to be handled, it does not, on its own, tell us anything about the parties’ intentions as to whether the provision could be modified through the MFN clause. In *Maffezini*, the Spain-Argentina BIT clearly established the parties’ intention that an eighteen-month domestic litigation period was required before arbitration could be initiated, yet the Tribunal held that this

209. SNYDER, *supra* note 18, at 13 (footnote omitted).

210. There is no reference to the *Siemens* case in the *Salini* decision. See generally *Salini Costruttori S.p.A. v. Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 44 I.L.M. 573 (2004), available at <http://www.worldbank.org/icsid/cases/salini-decision.pdf> (reproduced in part).

211. *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, para. 106 (2004), <http://www.worldbank.org/icsid/cases/siemens-decision-en.pdf>.

212. *Id.* para. 103.

clearly intended requirement could be altered through the operation of the MFN clause.

However, although Article 9(2) does not tell us anything about *the scope of the MFN clause*, it tells us a great deal about *the scope of Jordan's consent to arbitration* with Italian investors. Simply put, Article 9(2) establishes that Jordan has not consented to the arbitration of contractual disputes with Italian investors. As the I.C.J. observed in *Ambatielos*, "the question is whether the consent given by the Parties . . . to arbitrate a certain category of disputes[] does or does not extend to the [claimant's] claim."²¹³ Article 9(2) answers this question in the negative, and as the I.C.J. held in *Anglo-Iranian Oil*, a clear provision excluding certain disputes from a state's consent to jurisdiction cannot be circumvented through an MFN clause and a third-party treaty. The outcome in *Salini* is justified, therefore, not on the basis of the Tribunal's presumption that MFN clauses do not apply to dispute settlement mechanisms, but rather because of the fundamental rule of international law that the jurisdiction of an international tribunal is based on consent.

While this line of reasoning would have provided a solid justification for the outcome reached in *Salini*, the Tribunal instead chose to challenge the basis of *Maffezini*, because "The current Tribunal shares the concerns that have been expressed in numerous quarters with regard to the solution adopted in the *Maffezini* case. Its fear is that the precautions taken by authors of the award may in practice prove difficult to apply, thereby adding more uncertainties to the risk of "treaty shopping."²¹⁴ While these pragmatic concerns are both legitimate and important, it is not clear on what basis the Tribunal injects these concerns into its interpretation of the Italy-Jordan BIT in the form of a presumption that MFN clauses do not apply to dispute settlement provisions. Moreover, in its challenge to *Maffezini*, the Tribunal misrepresents in some respects both *Maffezini* and the *Ambatielos* decision on which it largely relied.

As to *Ambatielos*, the Tribunal here sought to distinguish it as an attempt to import substantive, rather than procedural provisions:

The Tribunal will observe that in this [*Ambatielos*] case, Greece *invoked* the most-favored-nation clause with a view to securing, for one of its nationals, not the application of a dispute settlement clause, but the application of substantive provisions in treaties between the United Kingdom and several other countries under which their nationals were to be treated 'in accordance with' 'justice', 'right' and 'equity'.²¹⁵

This description of *Ambatielos* ignores the fact that the Commission of Arbitration did not acknowledge any substance/procedure distinction but simply held that "the administration of justice," when viewed in connection with the protection of the rights of traders, was within the scope of the MFN clause. It is not clear that there is any meaningful distinction between a "dispute settlement" provision and a provision concerning the "administration

213. *Ambatielos* Arbitration (Greece v. U.K.), 12 R.I.A.A. 83, 107 (Comm'n of Arb. 1956).

214. *Salini*, para. 115, 44 I.L.M. at 592

215. *Salini Costruttori S.p.A. v. Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, para. 112, 44 I.L.M. 569, 592 (2004), available at <http://www.worldbank.org/icsid/cases/salini-decision.pdf>.

of justice concerning the rights of investors.” Moreover, the basis of the claim in *Ambatielos* was that the *procedures* followed in the British court proceedings had violated justice, right and equity,²¹⁶ so it would be difficult to sustain a distinction premised on the difference between “substantive” and “procedural” provisions.

Next, the Tribunal incorrectly asserted that the Tribunal in *Maffezini* had “found that, by operation of the most-favored-nation clause, the claimant could avoid having first to exhaust domestic remedies.”²¹⁷ In fact, the Tribunal in *Maffezini* rejected the possibility that an MFN clause could enable a claimant to avoid a requirement to exhaust domestic remedies.²¹⁸ The question, however, did not arise in *Maffezini*, because the Spain-Argentina BIT “does not require the exhaustion of domestic remedies as that concept is understood in international law,” but merely envisions a first bite at the apple for domestic courts.²¹⁹ This mischaracterization may be the result of mere sloppy drafting, but it certainly has the effect of making *Maffezini* appear to have more far-reaching consequences than it actually does.

G. *Plama v. Bulgaria*²²⁰

If *Salini* applied the brakes to the idea that MFN clauses should be interpreted as being presumptively applicable to dispute settlement provisions, then the Tribunal in *Plama* sought to reverse course, arguing in favor of a presumptively narrow interpretation of MFN clauses.

The dispute in *Plama* concerned Bulgarian authorities’ treatment of an oil refinery in Bulgaria that was owned by a Cyprus corporation. The claimant sought to resolve the dispute through international arbitration rather than through the Bulgarian courts, but the Cyprus-Bulgaria BIT was negotiated in 1987, when Bulgaria was still under communist rule, and did not generally provide for disputes to be resolved through international arbitration. The BIT allowed for arbitration (a) only after the domestic legal system had concluded that an expropriation had occurred and (b) only to resolve a dispute as to the amount of compensation due to the claimant. Such disputes about the amount of compensation could be brought either before a domestic court or an “international ‘Ad Hoc’ Arbitration Court.”²²¹ The claimant nevertheless sought access to ICSID arbitration by way of the MFN clause.

216. In particular, *Ambatielos* objected to the fact that the trial court had permitted the U.K. government to withhold certain evidence and that, when the evidence later became available, the appellate court refused to allow *Ambatielos* to submit the evidence. See *Ambatielos Arbitration (Greece v. U.K.)*, 12 R.I.A.A. 83, 100 (Comm’n of Arb. 1956).

217. *Salini* para. 113, 44 I.L.M. at 592.

218. *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, para. 63, 5 ICSID (W. Bank) 396, 410 (2000), available at http://www.worldbank.org/icsid/cases/emilio_DecisiononJurisdiction.pdf.

219. *Id.* para. 28, at 401-02.

220. *Plama Consortium v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 44 I.L.M. 721 (2005), available at <http://www.worldbank.org/icsid/cases/plama-decision.pdf>.

221. *Id.* para. 26 (quoting Agreement on Mutual Encouragement and Protection of Investments, Bulg.-Cyprus, art. 4.1, Nov. 12, 1987, available at http://www.unctad.org/sections/dite/ia/docs/bits/bulgaria_cyprus.pdf). In full, the BIT provides:

The legality of the expropriation shall be checked at the request of the concerned investor through the regular administrative and legal procedure of the contracting party that had taken the

The MFN clause, similar to those at issue in *Siemens* and *Salini*, provided that, “Each Contracting Party shall apply to the investments in its territory by investors of the other Contracting Party a treatment which is not less favorable than that accorded to investments by investors of third states.”²²² The Tribunal, after accepting jurisdiction over claims based on the Energy Charter Treaty, rejected jurisdiction over claims based on the BIT, concluding that “the MFN provision of the Bulgaria-Cyprus BIT cannot be interpreted as providing consent to submit a dispute . . . to ICSID arbitration and that the Claimant cannot rely on dispute settlement provisions in other BITs to which Bulgaria is a Contracting Party in the present case.”²²³ In light of the extreme, if not unusual provisions of the BIT,²²⁴ this outcome is not surprising; however, the Tribunal couched its decision in unnecessarily sweeping terms, including a wholesale denunciation of *Maffezini*.

Before turning to more general principles, the Tribunal first engaged in the task of interpreting the treaty itself, invoking Article 31 of the Vienna Convention. As to the ordinary meaning of the MFN clause, the Tribunal acknowledged that:

It is not clear whether the ordinary meaning of the term ‘treatment’ in the MFN provision of the BIT includes or excludes dispute settlement provisions contained in other BITs to which Bulgaria is a Contracting Party. Inclusion or exclusion may or may not satisfy the *ejusdem generis* principle . . . , but as it will be seen below, it is not relevant to address that question.²²⁵

The Tribunal found the context to be similarly un-illuminating:

The ‘context’ may support the Claimant’s interpretation since the MFN provision is set forth amongst the Treaty’s provisions relating to substantive investment protection. However, the context alone, in light of the other elements of interpretation considered herein, does not persuade the Tribunal that the parties intended such an interpretation. And the Tribunal has no evidence before it of the negotiating history of the BIT to convince it otherwise.²²⁶

Finally, the Tribunal considered the object and purpose:

The object and purpose of the Bulgaria-Cyprus BIT are: “the creation of favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party.” . . . The Claimant also points to the *Maffezini* decision in which it is observed: “*dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights of traders under treaties of commerce.*” Such statements are as such undeniable in their generality, but

expropriation steps. In cases of dispute with regard to the amount of the compensation, which disputes were not settled in an administrative order, the concerned investor and the legal representatives of the other Contracting Party shall hold consultations for fixing this value. If within 3 months after the beginning of the consultations no agreement is reached, the amount of the compensation at the request of the concerned investor shall be checked either in a legal regular procedure of the Contracting Party which had taken the measure on expropriation or by an international ‘Ad Hoc’ Arbitration Court.

222. *Id.* para. 26, at 726.

223. *Id.* para. 227, at 756.

224. Apparently a similar provision is routinely included in China’s BITs. See Gaillard 2005, *supra* note 63, at 159-60.

225. *Plama Consortium v. Bulgaria*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, para. 189, 44 I.L.M. 721, 750 (2005), available at <http://www.worldbank.org/icsid/cases/plama-decision.pdf>.

226. *Id.* Para. 192, at 750-51.

they are legally insufficient to conclude that the Contracting Parties to the Bulgaria-Cyprus BIT intended to cover by the MFN provision agreements to arbitrate in other treaties to which Bulgaria (and Cyprus for that matter) is a Contracting Party. Here, the Tribunal is mindful of Sir Ian Sinclair's warning of the '*risk that the placing of undue emphasis on the 'object and purpose' of a treaty will encourage teleological methods of interpretation [which], in some of its more extreme forms, will even deny the relevance of the intentions of the parties.*'²²⁷

The Tribunal thus found the Treaty itself to be inconclusive as to the intention of the parties, so it looked to circumstantial evidence for support for its conclusion that the parties did not intend the MFN clause to apply to dispute settlement provisions. In particular, it relied on two pieces of evidence. First, at the time of the original BIT, communist Bulgaria had a policy of favoring "bilateral investment treaties with limited protections for foreign investors and with very limited dispute resolution provisions."²²⁸ This is correct, but it does not tell us anything about the parties' intentions regarding the MFN clause. As discussed, *supra*, one of the benefits of an MFN clause is that it allows a given state to effect a general change in policy without needing to renegotiate all of its BITs.

Next, the Tribunal referred to negotiations between Bulgaria and Cyprus aimed at revising the BIT:

Bulgaria and Cyprus negotiated a revision of their BIT in 1998. The negotiations failed but specifically contemplated a revision of the dispute settlement provisions . . . It can be inferred from these negotiations that the Contracting Parties to the BIT themselves did not consider that the MFN provision extends to dispute settlement provisions in other BITs.²²⁹

This inference seems entirely unwarranted. There is, to be sure, something peculiar about negotiating treaty revisions in the shadow of MFN clauses, and the Tribunal here fails to grasp the nature of the undertaking. The states are essentially negotiating about a predictable, clearly enforceable, minimum standard of treatment applicable in their bilateral relations, a standard that does not depend on the existence of any third-party treaty.

If the Tribunal's inference were correct, states whose BITs contained MFN clauses would revise them in only two circumstances: (1) to negotiate terms more favorable than any previously granted by the host state, or (2) to modify provisions to which the MFN clause does not apply. In the real world, however, states do periodically renegotiate BITs. In fact, no fewer than 85 BITs had been renegotiated by the end of 2004.²³⁰ The UNCTAD *World Investment Report* for 2005 indicated a number of reasons for such renegotiations. Many BITs are limited in time and therefore expire after a given period of years. In other cases, states wish to clarify or expand existing commitments in light of intervening practice. The report noted in particular that:

227. *Id.* para. 193, at 751 (quoting IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 131 (2d ed., 1984)) (italics in original).

228. *Id.* para. 196, at 751.

229. *Id.* para. 195, at 751.

230. UNCTAD, *World Investment Report*, *supra* note 37, at 26.

[S]ome recent BITs have made significant innovations regarding investor-State dispute settlement procedures, in an effort to secure greater transparency in arbitral proceedings, including open hearings, publication of related legal documents and the possibility for representatives of civil society to submit '*amicus curiae*' (i.e. 'friends of the court') briefs to arbitral tribunals. In addition, other very detailed provisions on investor-state dispute settlement are included in order to provide for more legally oriented, predictable and orderly conduct at the different stages of the ISDS process.²³¹

Investors undertaking risky investments no doubt value the clarity and predictability that an updated BIT can provide, and states may also value these features. In addition, as demonstrated in *Rights of U.S. Nationals in Morocco*, relying solely on provisions in a third-party treaty makes one's rights vulnerable to an abrogation or renegotiation of a third-party treaty. In any event, contrary to the Tribunal's inference here, the mere fact that negotiations occurred does not permit us to draw any clear inferences about the parties' beliefs as to the scope and meaning of their existing MFN clause.

The Tribunal also addresses the question of intent from another direction. In the Tribunal's view, the *Maffezini* "interpretation went beyond what State Parties to BITs generally intended to achieve by an MFN provision in a bilateral or multilateral investment treaty."²³² As evidence for this proposition, the Tribunal refers to the specific exclusion of the *Maffezini* view in a footnote the United States proposed to the draft of the Free Trade Area of the Americas.²³³ The Tribunal also notes the contrary British practice, but does not explain why a provision sought by the United States better represents "what State Parties to BITs generally intended to achieve" than does an exactly opposite provision sought by the United Kingdom. If anything, the British clause's emphasis on the fact that the specificity of its provision is included "for the avoidance of doubt" does not suggest that the United Kingdom believes it is derogating from the normal rule, but rather that it wants to ensure that the provision will be interpreted correctly. Likewise, the footnote in question emphasized that the MFN clause in the FTAA was more narrowly worded than the one at issue in *Maffezini* and therefore "could not reasonably lead to a conclusion similar to that of the *Maffezini* case."²³⁴ Thus, rather than supporting any presumption, both the United States and the United Kingdom seek to ensure that the interpretation which they believe naturally follows from the wording of their MFN clauses be given effect by a Tribunal.

Whatever the merits of the Tribunal's attempts to discern—or impute—the parties' intent, the question of intent does not seem central to the outcome. The Tribunal found another consideration to be "equally, if not more important,"²³⁵ to wit, the "well-established principle, both in domestic and international law, that such an agreement [to arbitrate] should be clear and unambiguous" and that "[d]oubts as to the parties' clear and unambiguous

231. *Id.* at 27 (italics in original).

232. *Plama Consortium Ltd v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, para. 203, 44 I.L.M. 721, 753 (2005), available at <http://www.worldbank.org/icsid/cases/plama-decision.pdf>.

233. *See id.* para. 202, at 752.

234. *Id.*

235. *Id.* para. 198, at 751.

intention can arise if the agreement to arbitrate is to be reached by incorporation by reference” through an MFN provision.²³⁶

The Tribunal is here on a more promising track, but it has not identified the precise principle at stake. At least as a matter of domestic law, the doctrine that an agreement to arbitrate must be clear and unambiguous stems from the fact that such an agreement amounts to a waiver of the right the parties would otherwise enjoy of bringing any claims before a court.²³⁷ This doctrine obviously does not transpose easily to the context of an international investment arbitration, where arbitration is typically included as an additional option available to claimants who, at least until the moment when they initiate an arbitration and thereby trigger a fork-in-the-road provision, retain their right to pursue the claim in domestic courts.

From the point of view of the host state, however, an agreement to arbitrate in a BIT constitutes a waiver of sovereign immunity and consent to the jurisdiction of a forum that would otherwise be without power to issue a judgment binding on the host state. Moreover, since claimants’ consent to jurisdiction is given by the filing of a claim, the crucial question in determining a tribunal’s jurisdiction is whether the dispute falls within the host state’s consent to the jurisdiction of the tribunal. The question is similar to, but narrower than, the question of whether an agreement to arbitrate is clear and unambiguous, and it makes *Plama* an easy case: Bulgaria never consented to the jurisdiction of an ICSID tribunal over disputes with investors from Cyprus.

This conclusion is supported by the *Chorzow* case, where the Permanent Court held that:

[Since its jurisdiction was based on consent, the Court could] only affirm its jurisdiction provided that the force of the arguments militating in favour of it is preponderant. The fact that weighty arguments can be advanced to support the contention that it has no jurisdiction cannot of itself create a doubt calculated to upset its jurisdiction. When considering whether it has jurisdiction or not, the Court’s aim is always to ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it.²³⁸

A comparison of *Siemens* and *Maffezini* on the one hand with *Plama* and *Salini* on the other is instructive. In the former cases, there was no doubt about the host country’s consent to ICSID jurisdiction; the question was whether or not a complainant had to comply with the 18-month domestic litigation requirement prior to initiating arbitral proceedings. In *Salini*, Jordan had consented to ICSID jurisdiction over treaty claims, but expressly excluded contractual claims from the scope of its consent; in *Plama*, Bulgaria never consented to ICSID jurisdiction for any dispute with Cyprus investors.

236. *Id.* paras. 198-99, at 752.

237. *See, e.g.*, *Leodori v. CIGNA Corp.*, 814 A.2d 1098, 1104, 1106 (N.J. 2003) (noting that “to be enforceable . . . in New Jersey, a waiver-of-rights provision must reflect that an employee has agreed clearly and unambiguously to arbitrate the disputed claim” and concluding that “the record as a whole does not demonstrate that plaintiff had surrendered his statutory rights [to sue] knowingly and voluntarily, which remains the critical inquiry”).

238. *Factory at Chorzów (Ger. v. Pol.)*, 1928 P.C.I.J. (ser. A), No. 9, at 32 (July 29), available at http://www.worldcourts.com/pcij/eng/decisions/1927.07.26_chorzow/.

A further problem with the Tribunal's approach is its use of "incorporate by reference" analysis. Such analysis is inapposite, because—as its name suggests—it applies to circumstances in which one treaty or contract makes *reference* to a specific treaty or contract, as was the case in *Ceskoslovenska Obchodni Banka A.S. v. The Slovak Republic*.²³⁹ As the Tribunal correctly points out, in *Rights of U.S. Nationals in Morocco*, the I.C.J. had expressly ruled out this sort of incorporation by reference analysis for MFN clauses as being manifestly inconsistent with the intent of the parties.²⁴⁰ The purpose of an MFN clause is not to incorporate by reference any specific provision of any other treaty. Rather, "the intention of the most-favoured-nation clauses was to establish and to maintain at all times fundamental equality without discrimination among all of the countries concerned."²⁴¹ Instead of resting its opinion in large part on this inapposite analysis, the Tribunal would have been on much surer ground had it focused instead on the issue of consent.

The Tribunal also raised a number of other objections to the application of MFN clauses to dispute settlement provisions. First, the Tribunal noted:

[T]he difficulty of applying an objective test to the issue of what is more favorable. The Claimant argues that it is obviously more favorable for the investor to have a choice among different dispute resolution mechanisms, and to have the entire dispute resolved by arbitration as provided in the Bulgaria-Finland BIT, than to be confined to *ad hoc* arbitration limited to the quantum of compensation for expropriation. The Tribunal is inclined to agree with the Claimant that in this particular case, a choice is better than no choice. But what if one BIT provides for UNCITRAL arbitration and another provides for ICSID? Which is more favorable?²⁴²

One wonders, however, whether this dilemma is not more apparent than real. Claimants will inevitably have some reason for seeking to import provisions from another treaty—for example, the answer to the Tribunal's rhetorical question might be that in most cases ICSID arbitration is more favorable, because an ICSID award is more easily enforced. However, as suggested above, a better approach to that particular hypothetical case would be to determine whether the host state had consented to arbitrate with investors from that state in the forum sought by the claimant. This also answers the second difficulty raised by the Tribunal, that is, whether or not one dispute settlement mechanism (*ad hoc* arbitration) could be replaced with an entirely different one.²⁴³

The Tribunal also contested the assertion by the Tribunal in *Maffezini* that giving a broad scope to the MFN clause would facilitate the "harmonization" of such arrangements, noting that:

239. *Ceskoslovenska Obchodni Banka v. Slovakia*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, 5 ICSID (W. Bank) 330 (1999), available at http://www.worldbank.org/icsid/cases/csob_decision.pdf, discussed in *Plama Consortium v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, para. 211, 44 I.L.M. 721, 753-54 (2005), available at <http://www.worldbank.org/icsid/cases/plama-decision.pdf>.

240. *Rights of Nationals of the United States of America in Morocco* (U.S. v. Fr.), 1952 I.C.J. 176, 191-92 (Aug. 27).

241. *Id.* at 192.

242. *Plama*, para. 208, 44 I.L.M. at 753.

243. *Id.* para. 209, at 753.

[A]n investor has the option to pick and choose provisions from the various BITs. . . . [A] host state which has not specifically agreed thereto can be confronted with a large number of permutations of dispute settlement provisions from the various BITs which it has concluded. Such a chaotic situation—actually counterproductive to harmonization—cannot be the presumed intent of Contracting Parties.²⁴⁴

Such difficulties, it seems, will indeed arise if claimants are allowed to mix and match dispute settlement provisions as would be allowed under *Siemens*. If claimants are allowed to borrow a filing deadline from one treaty, an evidentiary rule from another, and a statute of limitations from a third, the result will be chaotic and unworkable. Such difficulties could be mitigated, however, by application of the jurisdictional requirement of consent, as well as the requirement that the entire dispute settlement mechanism be imported.²⁴⁵ This would generally preclude forum shopping as well as the disruptive “provision shopping” of concern to the Tribunal in *Plama*, but it would allow claimants such as Maffezini and Siemens to benefit from more favorable provisions concerning the terms of access to or treatment within a given arbitral forum.

The Tribunal was also critical of *Maffezini*’s reference to public policy considerations as exceptions to the broad application of MFN clauses to dispute settlement provisions:

The present Tribunal was puzzled as to what the origin of these “public policy considerations” is. When asked by the Tribunal at the Hearing, counsel for the Claimant responded: “They just made it up.” The present Tribunal does not wish to go that far in its appraisal of the *Maffezini* decision. Rather, it seems that the effect of the “public policy considerations” is that they take away much of the breadth of the preceding observations made by the tribunal in *Maffezini*.²⁴⁶

On this last point, the Tribunal referred to *Siemens* in still more scathing terms, as “illustrat[ing] the danger caused by the manner in which the *Maffezini* decision has approached the question: the principle is retained in the form of a string citation of principle and the exceptions are relegated to a brief examination, prone to falling soon into oblivion.”²⁴⁷

One might counter the Tribunal with a query as to the origin of its own alternative “principle” that “an 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.”²⁴⁸ One group of commentators has cautioned that:

244. *Id.* para. 219, at 775, discussing *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, para. 62, 5 ICSID (W. Bank) 396, 406 (2000), available at http://www.worldbank.org/icsid/cases/emilio_DecisiononJurisdiction.pdf.

245. This is also consistent with what the *Plama* tribunal referred to as “the nowadays generally accepted principle of the separability (autonomy) of the arbitration clause.” *Plama Consortium v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, para. 212, 44 I.L.M. 721, 754 (2005), available at <http://www.worldbank.org/icsid/cases/plama-decision.pdf>.

246. *Id.* para. 221, at 755 (citation omitted).

247. *Id.* para. 226, at 755 (citing *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, paras. 105, 109, 120 (2004), <http://www.worldbank.org/icsid/cases/siemens-decision-en.pdf>).

248. *Id.* para. 223, at 755.

The primary aim of a process of interpretation . . . [is to] discover the shared expectations that the parties to the relevant communication succeeded in creating in each other. . . . [I]t would be an obvious travesty on interpretation for a community decision-maker to disregard the shared subjectivities of the parties and to substitute arbitrary assumptions of his own.²⁴⁹

While it would be unfair to characterize the assumptions of the Tribunal in *Plama* as arbitrary, they are nevertheless rooted much more in the arbitrators' pragmatic concerns than in an attempt to discern the parties' actual intent as embodied in the words they used.

Finally, in an attempt at magnanimity toward the Tribunal in *Maffezini*, which it had criticized so vehemently, the Tribunal in *Plama* acknowledged that:

[T]he decision in *Maffezini* is perhaps understandable. The case concerned a curious requirement that during the first 18 months the dispute be tried in the local courts. The present Tribunal sympathizes with a tribunal that attempts to neutralize such a provision that is nonsensical from a practical point of view. However, such exceptional circumstances should not be treated as a statement of general principle guiding future tribunals in other cases where exceptional circumstances are not present.²⁵⁰

The Tribunal is surely correct that exceptional circumstances should not guide the formulation of general principles to guide future tribunals. It is certainly arguable, however, whether the waiting period at issue in *Maffezini* is more or less "exceptional" than the very limited dispute settlement provisions at issue in *Plama*. The Tribunal in *Plama* would have done better to heed its own advice and, rather than seeking to announce a general principle, to rest its decision on the narrower ground that Bulgaria had not consented to ICSID jurisdiction over disputes concerning the Bulgaria-Cyprus BIT.

It is worth noting that two subsequent arbitral tribunals have addressed MFN clauses similar to the one at issue in *Plama*, and both have come to the same result. In an unpublished award of April 2006 a tribunal of the Stockholm Arbitration Institute rejected, by a majority of 2 to 1, a claim by Belgian investors who sought to use the MFN clause to expand the scope of Russia's consent to jurisdiction in a Soviet-era treaty similar to that at issue in *Plama*. Similarly, in the just published award in *Telenor v. Republic of Hungary*,²⁵¹ an ICSID tribunal considering a dispute under a BIT between Norway and Hungary which limited access to arbitration to expropriation cases stated that it "wholeheartedly endorse[d] the analysis and statement of principle furnished by the *Plama* tribunal."²⁵² Nevertheless, the *Telenor* tribunal understood *Plama* as standing for a narrower principle than the one in fact announced in *Plama* and thus its endorsement of *Plama* is limited to the principle expressed in *Telenor* that:

249. MYRES S. MCDUGAL ET AL., *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER: PRINCIPLES OF CONTENT AND PROCEDURE* xvi-xvii (1967).

250. *Plama*, para. 224, 44 I.L.M. at 755.

251. See *Telenor Mobile Communications v. Hungary*, ICSID Case No. ARB/04/15, Decision on Jurisdiction, Sept. 13, 2006, http://www.worldbank.org/icsid/cases/pdf/ARB0415_telenor-v-hungary-award.pdf.

252. *Id.* at ¶ 90.

an MFN clause in a BIT providing for most favoured nation treatment of investment should not be construed as extending the jurisdiction of the arbitral tribunal to categories of dispute beyond those set out in the BIT itself in the absence of clear language that this is the intention of the parties.²⁵³

This formulation accounts for the outcomes in both *Plama* and *Salini*, but without the potentially mischievous consequences of the more sweeping principle advocated in *Plama*. Furthermore, this principle is not inconsistent with the decisions in the *Maffezini* line of cases.

Properly understood, therefore, these decisions lend further support to the notion that the decisive issue in *Plama* was not whether an MFN clause could apply to dispute settlement provisions, but rather whether it could substitute for—or expand the scope of—a host country’s consent to jurisdiction.

H. *Cases After Maffezini and Siemens Involving Argentina’s 18-Month Domestic Litigation Waiting Period*²⁵⁴

A number of decisions since *Siemens* have addressed the question of whether an MFN clause entitled a claimant to circumvent the eighteen-month domestic litigation period formerly favored by Argentina. In each case, the outcome was the same as in *Maffezini*. For the most part, these decisions do little more than confirm that the Tribunal in *Maffezini* was correct in its central holding. Nevertheless, some aspects of the decisions merit closer inspection.

1. *Camuzzi v. Argentina*

The *Camuzzi* decision was the first of these cases to be released, and it is noteworthy primarily for the fact that Argentina did not even bother to contest the Claimant’s reliance on the MFN clause to avoid the domestic litigation waiting period.²⁵⁵ Consequently, the Tribunal had little to say on the MFN issue.

2. *Gas Natural v. Argentina*

The dispute in *Gas Natural* was a mirror image of *Maffezini* in that it involved a Spanish investor in Argentina invoking the MFN clause of the Spain-Argentina BIT and a third-party BIT. That the outcome was the same is not surprising, but the Tribunal’s statement on the MFN issue in *Gas Natural* provides perhaps the strongest affirmation yet of the notion that access to arbitration constitutes an important substantive protection for investors. As the

253. *Id.* at ¶ 91.

254. See *Camuzzi Int’l v. Argentina*, ICSID Case No. ARB/03/7, Decision on Jurisdiction, June 10, 2005, <http://www.worldbank.org/icsid/cases/camuzzi-en.pdf>; *Gas Natural SDG v. Argentina*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, June 17, 2005, <http://www.asil.org/pdfs/GasNat.v.Argentina.pdf>; *Suez, et al. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, May 16, 2006, http://www.worldbank.org/icsid/cases/pdf/ARB0317_DecisiononJurisdiction03-17.pdf; *In re National Grid v. Argentina*, UNCITRAL Arbitration, Decision on Jurisdiction, June 20, 2006, <http://ita.law.uvic.ca/documents/NationalGrid-Jurisdiction-En.pdf>.

255. *Camuzzi*, ICSID Case No. ARB/03/7, para. 17.

Tribunal put it, “the critical issue is whether or not the dispute settlement provisions of bilateral investment treaties constitute part of the bundle of protections granted to foreign investors by host states.”²⁵⁶ The Tribunal resolved this issue by unambiguously asserting that “such provisions are universally regarded – by opponents as well as by proponents – as essential to a régime of protection of foreign direct investment.”²⁵⁷ The Tribunal then went a step further and, after reviewing the decisions in *Maffezini*, *Siemens*, and *Salini*,²⁵⁸ concluded the following:

[A]ssurance of independent international arbitration is an important – perhaps the most important – element in investor protection. Unless it appears clearly that the state parties to a BIT or the parties to a particular investment agreement [as in *Salini*] 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.²⁵⁹

As this Article has argued, such blanket statements must be viewed with caution. *Maffezini*, *Siemens*, *Gas Natural*, and *Camuzzi* all involved the same question, i.e., whether or not a domestic litigation waiting period not amounting to a requirement to exhaust domestic remedies could be avoided through an MFN clause and a third-party treaty not including such a requirement. As Gaillard has argued, this narrow question has now been definitively resolved.²⁶⁰ However, it does not necessarily follow that these cases can be read for the broader proposition advanced by the Tribunal here, particularly in light of the contrary result in *Salini* and especially in light of the strong advocacy of the exact opposite point of view by the Tribunal in *Plama* at approximately the same time.

3. *National Grid v. Argentina*

The UNCITRAL tribunal in *National Grid* also followed an approach similar to that advocated in this Article, in that it engaged in an extensive review of previous I.C.J. and ICSID cases, and went on to couch its decision in appropriately narrow terms:

[I]n the context in which the Respondent has consented to arbitration for the resolution of the type of disputes raised by the Claimant, ‘treatment’ under the MFN clause of the Treaty makes it possible for UK investors in Argentina to resort to arbitration without first resorting to Argentine courts, as is permitted under the US-Argentina Treaty.²⁶¹

The wording of this conclusion reflected the distinction the Tribunal drew between the circumstances in *National Grid* and those in *Plama*. The Tribunal correctly noted that “the situation in *Plama* involv[ed] an attempt to create consent to ICSID arbitration when none existed. . . .”²⁶² The Tribunal thus

256. *Gas Natural*, ICSID Case No. ARB/03/10, para. 29.

257. *Id.*

258. *Id.* paras. 41-49.

259. *Id.* para. 49.

260. Emmanuel Gaillard, *Chronique des sentences arbitrales*, 133 JOURNAL DE DROIT INTERNATIONAL 221, 285 (2006) [hereinafter Gaillard 2006].

261. *In re National Grid v. Argentina*, UNCITRAL Arbitration, Decision on Jurisdiction, para. 93, June 20, 2006, <http://ita.law.uvic.ca/documents/NationalGrid-Jurisdiction-En.pdf>.

262. *Id.* para. 92.

accepted the outcome in *Plama*, but rejected *Plama*'s advocacy of a narrowing construction of MFN clauses, because "cases like *Plama* do not justify depriving the MFN clause of its legitimate meaning or purpose in a particular case."²⁶³

4. *Suez et al. v. Argentina*

The *Suez* decision is noteworthy not because of the outcome, which is identical to that reached in all of the other cases, but because of the process by which the Tribunal reached that outcome. The Tribunal rejected the notion that any broad principle or presumption should govern the applicability of MFN clauses to dispute settlement provisions and instead argued that each case must be decided on its own terms by way of an ordinary process of treaty interpretation.

First, the Tribunal rejected an argument based on the *ejusdem generis* principle, noting that:

[A]fter an analysis of the substantive provisions of the BITs in question, the Tribunal finds no basis for distinguishing dispute settlement matters from any other matters covered by a bilateral investment treaty. From the point of view of the promotion and protection of investments, the stated purposes of the Argentina-Spain BIT, dispute settlement is as important as other matters governed by the BIT and is an integral part of the investment protection regime that two sovereign states²⁶⁴

In other words, the Tribunal did not consider that dispute settlement provisions should be treated differently than other treaty provisions for MFN purposes.

Next, the Tribunal specifically rejected Argentina's argument that MFN clauses should be construed narrowly with respect to dispute settlement provisions:

[T]he Respondent seems to argue that the Tribunal should interpret a most-favored-nation provision strictly. Here too, the Tribunal finds no rule and no reason for interpreting the most-favored-nation treatment clause any differently from any other clause in the Argentina-Spain BIT. The language of the treaty is clear. Applying the normal interpretational methodology to Article IV of the Argentina-Spain BIT, the Tribunal finds that the ordinary meaning of that provision is that matters relating to dispute settlement are included within the term "all matters"²⁶⁵

The Tribunal went on to distinguish the *Suez* case from *Plama* on several grounds, including the narrow scope of the MFN clause in *Plama*, the apparent intention of communist Bulgaria to limit access to arbitration, and the fact that a contrary decision in *Plama* would have had the "radical effect" of substituting an entirely different dispute settlement mechanism (i.e. ICSID arbitration instead of arbitration under UNCITRAL rules).²⁶⁶

263. *Id.*

264. *Suez et al. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, para. 57, May 16, 2006, http://www.worldbank.org/icsid/cases/pdf/ARB0317_DecisiononJurisdiction03-17.pdf.

265. *Id.* para. 59.

266. *Id.* para. 63.

Moreover, the *Suez* Tribunal specifically rejected the *Plama* Tribunal's insistence that an intent to incorporate dispute settlement provisions within the scope of an MFN clause must be clearly expressed. Instead, the Tribunal affirmed that "dispute resolution provisions are subject to interpretation like any other provisions of a treaty, neither more restrictive nor more liberal."²⁶⁷

The Tribunal in *Suez* is thus the first tribunal to explicitly follow the approach to MFN issues advocated in this article, and, in the author's view, represents a model for future tribunals to follow. The Tribunal correctly notes that there is no justification for a tribunal to impose a rebuttable presumption in favor of applicability or non-applicability of MFN clauses to dispute settlement provisions as advocated by the tribunals in *Plama* and *Gas Natural*. Instead, as this Article has stressed, tribunals should approach MFN issues as matters of treaty interpretation in which a tribunal's task is to interpret the text in light of the specific context and the purposes of the parties in agreeing to the treaty as a whole and the MFN clause in particular. There is little to be gained—and a potential for results that are inconsistent with the parties' intentions—in the application of a presumption in either direction.

V. CONCLUSION

A. *Reconciling Policy and Purposes with Practice*

These decisions illustrate the numerous difficulties of applying MFN clauses to dispute settlement provisions in practice. While these practical concerns do not put in question the general interpretive position outlined in Part III, they do place limits on how and when dispute settlement provisions can be invoked through an MFN clause, and these limits should do much to alleviate the concerns that have been raised about the *Maffezini* and *Siemens* decisions. Unless the BIT limits the scope of the MFN clause, the pledge of equal treatment in an MFN clause applies broadly to all aspects of the legal regime applicable to foreign investors, including the dispute settlement mechanism. Such application is more consistent with the aim of establishing an environment for foreign investment that is marked by mutual confidence, stability of expectations, and equality among investors. However, the MFN clause cannot be applied in a way that would violate basic principles of international law, impose results that could not have been intended by the parties, or otherwise disrupt the predictability and stability of the international investment law system.

On the practical level, it is worth distinguishing four different types of MFN provisions:

1. MFN clauses that expressly provide that they apply to dispute settlement mechanisms (e.g., U.K. Model BIT);
2. Broadly worded MFN clauses covering 'all matters,' 'all rights,' or simply 'treatment,' which make no specific reference to dispute settlement mechanisms (e.g., *Maffezini*, *Plama*, *Salini*, *Siemens*);

267. *Id.* para. 64.

3. Limited MFN clauses that do not expressly include dispute settlement mechanisms (e.g., NAFTA); and
4. MFN clauses that expressly do not apply to dispute settlement provisions (e.g., CAFTA, FTAA).

The first and fourth categories are unproblematic: The clearly expressed intent of the parties must be respected. The third category, meanwhile, is not susceptible to much by way of general analysis, since all will depend on an interpretation of the specific wording of the clause in the context of a specific BIT. The most frequent formulation of this version of the clause, however, modeled on NAFTA Article 1103, would seem to preclude its application to dispute settlement.²⁶⁸ As the cases discussed above illustrate, the most difficult disputes will arise concerning clauses falling in the second category. What follows are some considerations that may help future tribunals to find their way out of the thicket into which the recent decisions have led.

B. *Specific Recommendations*

1. *An MFN Clause Cannot Substitute for Actual Consent*

The I.C.J. has stated that “an important principle of customary international law should [not] be held to have been tacitly dispensed, in the absence of any words making clear an intention to do so.”²⁶⁹ The principle that an international tribunal lacks jurisdiction absent the parties’ consent is just such a principle, and as the Permanent Court held in the *Chorzow Factory Case*, consent must be affirmatively established by a preponderance of evidence.²⁷⁰ Article 25(1) of the ICSID Convention requires that “the parties to the dispute consent in writing to submit [the dispute] to the Centre,”²⁷¹ and as the Report of the Executive Directors on the Convention put it, “Consent of the parties is the cornerstone of the jurisdiction of the Centre.”²⁷² Against this backdrop, and in light of the vigorous debate over whether MFN clauses apply to dispute settlement provisions at all, it would be difficult—if not impossible—to establish a preponderance of evidence in favor of jurisdiction on the basis of an MFN clause combined with consent with regards to a third party.²⁷³

From the perspective of a tribunal, therefore, the host state’s consent to its jurisdiction must be established as a threshold matter. A state’s consent is both forum-specific and party-specific, so that consent to arbitration under UNCITRAL rules does not constitute consent to ICSID arbitration, nor does consent to ICSID arbitration of disputes with Finnish nationals constitute

268. See *supra* notes 8, 95 and accompanying text.

269. *Elettronica Sicula, S.p.A. (U.S. v. Italy)*, 1989 I.C.J. 15, 42 (July 20).

270. See *Chorzów Factory Case (Ger. v. Pol.)*, Jurisdiction, 1928 P.C.I.J. (ser. B), No. 3, at 32, available at <http://www.worldcounts.com/pcij/eng/decisions/1927.07.26/chorzow/>.

271. ICSID, CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES, reprinted in CONVENTION, REGULATIONS AND RULES, 7, 18 (2003).

272. ICSID, *Report of the Executive Directors*, *supra* note 54, at 43, para. 23.

273. For an opposing view, see Gaillard 2006, *supra* note 260, at 286-87 (arguing that when a state consents to arbitration with one state’s nationals, it is presumed to be aware of its previous engagements to grant MFN treatment to nationals of other states and therefore has implicitly consented to arbitration with those third state nationals).

consent to arbitration with nationals of Cyprus. In order to cross the consent threshold, a claimant must establish a consensual link among (1) the host state, (2) the investor's home state, (3) the forum, and (4) the specific dispute. The claimants in *Salini*, *Plama*, and *Telenor* would all have foundered at this stage of the inquiry, whereas the claimants in *Maffezini* and *Siemens* would have succeeded.

It may well be argued that applying this threshold test weakens the MFN clause by allowing for a situation to exist in which one state's nationals enjoy more favorable dispute settlement provisions than those of another state. The problem is a real one, but it cannot be remedied through the inappropriate exercise of jurisdiction by arbitral tribunals. As President McNair emphasized in his separate opinion in *Anglo-Iranian Oil*, the fact that U.K. nationals were entitled by virtue of their MFN clause to the same treatment as Danish nationals did not confer upon the Court the power to enforce that right.²⁷⁴ The same result was reached in *Plama* and *Telenor*.

A more difficult question arises when a claimant seeks to expand the scope of the host state's consent to arbitration through an MFN clause. Even BITs envisioning arbitration in the same forum (e.g., ICSID) may be materially different in terms of their scope. As *Salini* illustrated, contractual claims were included within the scope of Jordan's consent for some countries' investors but excluded for others. Since the exclusion of contract claims from the Italy-Jordan BIT was explicit in *Salini*, it was a simple matter for the Tribunal to conclude that it lacked jurisdiction over the Italian claimant's contract claims. In other cases, the BITs in question may have broader or narrower definitions of "investment," or they may differ in whether they apply to "pre-entry" activities of the investor. In such cases, or others where the parties' intent is less clear from the text than in *Salini*, respect for the principle that jurisdiction depends on consent requires that the scope of consent be determined with reference to the basic treaty. This is another way of reading the *Plama* case: Not only did Bulgaria never consent to the jurisdiction of ICSID over disputes with Cypriot investors, but its consent to (ad hoc) arbitration was limited in scope to the amount of compensation due for an expropriation and therefore did not extend to the merits of an investment dispute.

2. *Where Consent Exists, Ordinary Rules of Treaty Interpretation Apply*

When all these elements are present, it becomes a matter of treaty interpretation whether an MFN clause applies to the other aspects of the dispute settlement mechanism, such as the waiting period at issue in *Maffezini* and *Siemens*. As discussed in Part III, it would seem that giving to an unlimited MFN clause (e.g., Category 2) will usually require allowing dispute settlement provisions to be imported from a third-party treaty. After all, as Gaillard has argued, access to arbitration is one of the principal benefits that

274. See *Anglo-Iranian Oil Co. (U.K. v. Iran)*, Judgment on Jurisdiction, 1952 I.C.J. 93, 122 (July 22) (McNair, Pres., concurring).

such treaties provide to investors, so the choice of a broad MFN clause implies an intent by the parties to accord this benefit to all investors on equal terms.²⁷⁵ However, as the Tribunal in *Plama* warned, one must be “mindful of Sir Ian Sinclair’s warning of the ‘risk that the placing of undue emphasis on the “object and purpose” of a treaty will encourage teleological methods of interpretation [which], in some of its more extreme forms, will even deny the relevance of the intentions of the parties.’”²⁷⁶

There is therefore no substitute for a case-by-case basis interpretation of the specific BIT provisions in question. There may well be many cases in which careful scrutiny of the text, context, negotiating history, or other considerations will persuade a tribunal that the parties’ intent was that the MFN clause should not apply to dispute settlement provisions.²⁷⁷ In other cases, as in *Salini* and *Plama*, examination of the BIT will call into question the state’s consent to jurisdiction. This is also arguably the case of all four of the “public policy” exceptions identified in *Maffezini*.

3. *Dispute Settlement Mechanisms Are a Package and Cannot Be Mixed and Matched*

As the discussion of the *Siemens* case illustrated, allowing investors to mix and match dispute settlement provisions may require states to apply configurations of dispute settlement provisions to which they have never actually consented. Requiring that dispute settlement provisions be imported as a package or not at all better fulfils the aim of maintaining a stable and predictable legal environment for investments as well as the aim of ensuring equality of treatment for investors of whatever nationality. As in the *Siemens* example, an MFN clause should entitle German investors to the same treatment as Chilean investors, but it ought not to entitle Germans to *better* treatment than provided in the Chile-Argentina BIT, nor ought it to entitle the Chileans and Germans to fuse their treaties to extract an even more favorable treatment from Argentina. To be sure, there may be difficult questions as to which provisions constitute part of the “package” which must be taken together or not at all, but such difficulties appear relatively minor relative to the problems associated with unrestrained, provision-by-provision treaty shopping.

To be sure, allowing the import of the entire package of dispute settlement provisions does allow for some treaty shopping, but this form of treaty shopping—as opposed to provision shopping—already exists to a large

275. See Gaillard 2005, *supra* note 63, at 163 (“Lorsque la clause est rédigée en des termes très généraux, tout laisse à penser que l’intention des rédacteurs du traité était bien de lui permettre de jouer à l’égard de tous les bénéficiaires que l’Etat d’accueil serait susceptible d’accorder aux ressortissants d’Etats tiers. Or force est de constater que l’accès à un mécanisme efficace et neutre de règlement des différends . . . est bien l’un des bénéficiaires les plus importants, sinon le plus important, susceptible de résulter du droit contemporain de la protection des investissements.”).

276. *Plama Consortium v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, para. 193, 44 I.L.M. 721, 751 (2005), available at <http://www.worldbank.org/icsid/cases/plama-decision.pdf> (quoting IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 13 (2d ed. 1984)).

277. See *supra* note 108 and accompanying text.

extent as a result of the globalization of investment activities.²⁷⁸ An investor wishing to take advantage of the most favorable dispute settlement provisions could simply have the case brought by an affiliate or entity within the corporate chain that is based in the appropriate country, or, absent such an entity, incorporate an investment vehicle for the purpose of assuming the most favorable nationality.²⁷⁹ Since the treaty shopping would be limited to the selection of an entire BIT or an entire dispute settlement mechanism rather than the selection of individual provisions, it does not create the sort of disruption that both the *Maffezini* and *Plama* tribunals feared. In addition, treating dispute settlement provisions as a package will better serve the secondary function of MFN clauses in contributing to the harmonization of the law of international investment protection.²⁸⁰ As the Tribunal in *Plama* correctly pointed out, the pick-and-choose solution adopted in *Maffezini* is particularly ill-suited to this goal.²⁸¹

4. *Claimants Must Show Treatment To Be Different and "More Favorable"*

The MFN principle can be described alternatively as a requirement of equality of treatment or as one of non-discrimination. In most cases, there is no difference between the two norms, since differential treatment will necessarily disadvantage one party, hence the nearly universal rejection of the notion "separate but equal." As with any treaty provision, however, MFN clauses must be understood first in terms of the words actually used. The most common formulation requires "treatment not less favorable" than that accorded to a third party. This wording places the burden on a claimant to show that the third-party treatment is, in fact, more favorable.

As a first step, the claimant must show that the treatment under the two BITs is *different*. While the Tribunal in *Asian Agricultural Products* stated as the basis of its decision on the MFN issue that the claimant had "not proven that the Sri Lanka/Switzerland Treaty contains rules more favorable than those provided for under the Sri Lanka/U.K. Treaty,"²⁸² the point of the Tribunal's

278. See UNCTAD, *Most-Favored-Nation Treatment*, *supra* note 2, at 10-11 (noting that "with the emergence of new forms of integrated production, and with management and decision-making possibly spread among several parts of a corporation, it becomes increasingly difficult to identify the nationality of the parent company. . . . Furthermore, if the units are incorporated and administered in different countries, especially if they are owned by shareholders of different nationalities or linked to one another by contractual arrangements, it may become difficult in practice to attribute nationality to a particular affiliate").

279. This may seem far-fetched, but the nationality of investors has proven slippery indeed. For example, in *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 2004 WL 3392064 (2004), an ICSID tribunal upheld jurisdiction based on the Lithuania-Ukraine BIT for a corporation incorporated in Lithuania but owned and managed almost entirely by Ukrainian nationals.

280. *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, para. 62, 5 ICSID (W. Bank) 396, 410 (2000), available at http://www.worldbank.org/icsid/cases/emilio_DecisiononJurisdiction.pdf; see also Gaillard 2005, *supra* note 63, at 158 (noting the "double function" of MFN clauses in ensuring nondiscrimination and contributing to the harmonization of international investment law).

281. *Plama*, para. 219, 44 I.L.M. at 755.

282. *Asian Agricultural Products v. Sri Lanka*, ICSID Case No. ARB/87/3 30, para. 54, 30, I.L.M. 580, 603 (1991).

analysis was that the claimant had failed to show that the Swiss treaty contained a *different* rule than the U.K. treaty.

If the provisions are in fact different, the claimant must show that it would suffer some disadvantage by not being able to invoke the provisions of the third-party treaty. It might be argued that a host state is presumed to be aware of its own MFN commitments and that when it agrees to certain provisions in a BIT, it agrees to apply those provisions to investors from any other state as well. According to this view, therefore, it should be enough to show that the provisions are different. However, the terms of the typical MFN clause and the overall aims of stability and predictability argue against allowing provisions to be imported that do not result in treatment that is objectively more favorable. Thus if one treaty provides for arbitration to take place in Geneva and another in London, this is not the sort of difference that would appear to disadvantage one party or the other. In contrast, exempting some investors but not others from an eighteen-month domestic litigation waiting period suggests a number of possible disadvantages.²⁸³ In either case, however, the burden is on the claimant to show that the treatment sought is, in fact, more favorable.²⁸⁴

5. *Parties Should Express the Intended Scope of Their MFN Clauses As Clearly As Possible*

The disputes over MFN in recent case law stem from the fact that the BITs in question did not evince any intent on the part of the contracting parties as to whether the MFN clause applied to dispute settlement. The simplest solution to this problem is for governments negotiating BITs to make their intentions known. While the issue may simply not have occurred to the parties negotiating BITs in the past, these decisions have placed states on notice that they ignore the question at their peril. This Article has suggested that where the MFN clause does not contain any limits it will be interpreted as applying broadly, including to dispute settlement mechanisms. As Vattel cautions, "If he who could and ought to have explained himself clearly and fully has not done it, it is the worse for him; he cannot be allowed to introduce subsequent restrictions which he has not expressed."²⁸⁵ The FTAA negotiations, discussed in *Plama*, illustrate that some states have drawn lessons from these cases for future practice.²⁸⁶ It remains to be seen whether other countries will follow suit.²⁸⁷

283. See *supra* note 99 and accompanying text.

284. The essence of the burden on the claimant is to show that a third-party investor in like circumstances would enjoy treatment that is different and objectively more favorable. In practice, this MFN analysis may require an intensive examination of the facts in order to determine, for example, whether the claimant is in fact similarly situated to a real or hypothetical third-party investor.

285. VATTEL, *supra* note 68, § 264.2d at 244 (emphasis omitted).

286. See *supra* note 2344 and accompanying text.

287. Argentina, the country most intimately involved in the recent arbitrations, recently ratified a BIT with Panama that contained an MFN clause identical to the one at issue in *Siemens*. See *Convenio Para la Promoción y Protección Recíproca de las Inversiones* [Agreement for the Promotion and Protection of Reciprocal Investments], Arg.-Pan., May 10, 1996, http://www.unctad.org/sections/dite/ii/docs/bits/argentina_panama_sp.pdf (entered into force Sept. 15, 2004).

