

Most Favoured Nation Treatment Application in International Investment Arbitration

A Study on Conflicting Precedence in International Dispute Settlement
Procedure



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Abstract

In the past decade there has been a series of conflicting arbitration awards regarding the interpretation of the Most-Favoured-Nation standard and if it can be extended to dispute settlement procedure. The analysis suggests that there is an imperative difference of the outcomes between a teleological interpretation of MFN treatment and an objective interpretation of the respective MFN clauses. While there are many aspects to consider regarding an expansion of the MFN scope, it is the contention of this thesis that in the context of procedural predictability and article 32 of the Vienna Convention on the Law of Treaties, that the benefits of a teleological interpretation against an extension of the MFN standard into procedural provisions outweighs the benefits of an objective allowing an extensive interpretation. Furthermore, an analogy to how the MFN clause is interpreted in international trade law suggests that it would not be reasonable to expect that an MFN clause should be extended to dispute settlement provisions if the clause does not explicitly state that it does extend to such provisions.

Abbreviations

BIT – Bilateral Investment Treaty

DSU – Understanding on Rules and Procedure Governing the Settlement of Disputes

EU – European Union

FET – Fair and Equitable Treatment

GATT – General Agreement on Tariffs and Trade

GATS – General Agreement on Trade in Services

ICJ – International Court of Justice

ICSID – International Centre for the Settlement of Investment Disputes

IIA – International Investment Agreement

ILC – International Law Commission

NT – National Treatment

MAI – Multilateral Agreement on Investment

MFN – Most Favoured Nation

OECD – Organization for Economic Cooperation and Development

VCLT – The 1969 Vienna Convention of the Law of Treaties

TRIPS - Agreement on Trade-related Aspects of Intellectual Property Rights

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Chapter 1

Introduction

The Most-Favoured-Nation (MFN) treatment standard is a core element of modern BIT's.¹ Like many standards of investment protection offered under BIT's, it is designed to avoid discrimination.² The objective is simply put to provide a mechanism to ensure that the relevant parties do not treat each other less favourable than the treatment offer by them to third parties.

The increase of investments disputes settled by international arbitration in the last ten to fifteen years has had a strong influence on the meaning of substantive standards offered by Bilateral Investment Treaties (BIT's). From the practice it can be noted that some standards have evolved to gain in importance while others have diminished. Some standards have grown in complexity, appearing to interact with others while some have shown to have gained or proved an autonomous nature.³

¹ Dolzer, Rudolf; Schreuer, Christoph; 2008; *Principles of International Investment Law*; page 186.

² Such as the National Treatment (NT) standard and the Fair and Equitable Treatment (FET) standard.

³ See: Schreuer, Christoph; 2007; *Standards of Investment Protection*; page 1-8, for a good digest of the evolution of BIT standards.

Up to a decade ago the academic debate concerning MFN clauses in international investment arbitration largely centred on its substantive application.⁴ The legal practice surrounding formulations, violations or breaches of MFN clauses was not controversial⁵ and the debate mainly constituted of discussions concerning host state limitations in investment policy formation and definitions of investment.

However, since the year 2000 there has been a shift in the discussion, starting with the decision of the International Centre for Settlement of Investment Disputes (ICSID) arbitration court in the case of *Maffezini versus Spain*.⁶ In it, it was found that the function of the standard could be extended far further than what had been conceivable before. One interesting aspect of this decision is that the arbitrary tribunal went against the general norm, which at the time had a very restrictive interpretation of MFN treatment in respect to importing substantive provisions from other treaties, particularly when the provision was absent from the original treaty and altered the specifically negotiated application scope of the treaty.⁷

With the finding of the arbitration tribunal, the scope of the MFN standard appeared to have evolved from concerning strictly substantive interactions, to reaching into the procedure of international dispute settlement. Since the *Maffezini* judgement, a number of cases have dealt with the relationship between international arbitration procedure and the scope of the MFN standard and the results are inconclusive. The

⁴ Banifatemi, Yas; 2009; *The Emerging Jurisprudence on the Most-Favoured-Nation Treatment in Investment Arbitration*; page 242.

⁵ United Nations Conference on Trade and Development; 2010; *Most-Favoured-Nation Treatment*; UNCTAD Series on Issues in International Investment Agreements II; page XIV.

⁶ Stern, Brigitte; 2011; *Impregilo S.p.A. v. Argentine Republic (ICSID Case No. ARB/07/17)*; Concurring and Dissenting Opinion; page 2.

⁷ United Nations Conference on Trade and Development; 2010; *Most-Favoured-Nation Treatment*; UNCTAD Series on Issues in International Investment Agreements II; page XV.

reasons for the conflicting outcomes are many, complex and debated. Suffice to say, the contradictory verdicts seems to point to a lack of a defined *stare decisis*.⁸

The question of whether the MFN clause can be extended to procedural provisions has now crystallized into three schools, where one is saying yes it can, one is saying no it cannot and a third is saying that it is impossible to say.⁹ With this development, it is feasible to perceive that the possibility to predict with any certitude what obligations a contracting party takes on when incorporating the MFN standard in an IIA, has decreased substantially within the field of international investment law.

At the same time, the field has experienced a 57 per cent increase of treaty-based investor-state dispute settlement in five years.¹⁰ In the end of 2009 States had concluded 5,939 IIA's and during the same year, international arbitration had rendered decisions in favour of the claimant producing almost 170 million US dollar in damages.¹¹

It is the contention of this thesis that this development¹² is not desirable and that judicial predictability is an important aspect of international investment law. In the context of arbitration, both States and investors would have reason for concern when they see the same argument succeed one day and fail the next.¹³ For investors, the

⁸ For the purpose of this thesis the term *Stare Decisis* is defined as the legal principle of determining points in litigation according to precedent.

⁹ Douglas, Zachary; 2011; *The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails*; page 98.

¹⁰ United Nations Conference on Trade and Development; Latest Developments in Investor-State Dispute Settlement; IIA ISSUES NOT No. 1 (2010); UNCTAD/WEB/DIAE/IA/2010/3; page 2.

¹¹ *Idem*. Page 11.

¹² Meaning the development of IIA expansion in combination with obligations uncertainty.

¹³ United Nations Conference on Trade and Development; Latest Developments in Investor-State Dispute Settlement; IIA ISSUES NOT No. 1 (2010); UNCTAD/WEB/DIAE/IA/2010/3; page 6.

legal uncertainty creates an inability to assess accurately commercial risks¹⁴, where as States may experience inability to exercise their legislative and regulatory powers without being exposed to litigation risks.¹⁵

To remedy the uncertainty about the how to interpret the MFN standard in IIA's, this paper proposes that one have to investigate the teleological meaning of the standard. The hypothesis of this thesis is that the MFN standard is an explicit obligation and therefore has a precise scope of application, which either incorporates procedural provisions or does not. It is also the hypothesis of this paper that parties to a treaty are aware of this and have this intention when drafting an agreement. Indeed, the very notion of a MFN "standard" seems to point to such a conclusion.

1.1. Aim and Research Questions

With this as a point of departure I seek to answer four principal questions:

- Can the standard of Most-Favoured-Nation treatment be applied to international investment arbitration procedural provisions?
- Does an extension to procedural provisions defeat the object and purpose of the MFN standard?
- Where does the point of litigation truly lie according to the precedence?
- Should a tribunal use presentence to substantiate the point of litigation?

I believe that these questions need answers in order for parties of IIA's to predict the consequences of the obligations that the MFN standard brings with it. Even though the case sources are not in large numbers the aim of this thesis is still to give a

¹⁴ This brings with it difficulties to know what type of political risk insurance to purchase for instance.

¹⁵ United Nations Conference on Trade and Development, *Research Note: Recent Developments in International Investment Agreements*, UNCTAD/WEB/ITE/IIT/2005/1 at 15 (Aug. 30, 2005), page 15.

comprehensive understanding of the application of the MFN standard to dispute resolution, through qualitative analysis of the issue at hand.

1.2. Structure

The thesis is divided in three distinct parts. The first part seeks to provide a good understanding for the meaning of the standard ascertained from an historical background.

Part two then applies the standard in the context of the arbitration tribunal's decisions in order to investigate the reason for the conflicting outcomes.

Part three concludes the findings and establishes a final statement for the benefit of this discussion.

1.3. Methodology and Method

To find the answer to the stated questions and validation of the hypothesis this thesis embraces a legal positivist approach. What I mean by that is that in the international legal system, the fundamental nature and structure of international law can be derived from a hierarchy of norms. Through a hierarchy of norms one can differentiate between norms that are legally binding and norms that are not. When searching for affirmation of a legally tenable interpretation I will use the hierarchy of legal sources codified under article 38 of The Statute of the International Court of Justice. It establishes that the sources of international law are:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;*
- b. international custom, as evidence of a general practice accepted as law;*
- c. the general principles of law recognized by civilized nations;*
- d. subject to the provisions of Article 59, judicial decisions and the teachings*

*of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.*¹⁶

By addressing a hierarchy of norms I argue that there is a need to focus on process of legal norms in order to ascertain the correct interpretation of a rule. To do this I will be analysing the origin and practice of the MFN standard through the lens of the Vienna Convention on the Law of Treaties.

It is widely recognized that the use of other disciplines such as economics, history, political science, feminism and psychology as aids to legal research holds both relevance and merit.¹⁷ However for the benefit of the analysis, the method of this paper follows traditional legal doctrinal criticism.

I seek to deduce the true *ratio decidendi* of an outcome and what factual consideration influenced the decision. I further look at:

- If there is an implication overruling a preceding decision.
- If the outcome is truly in line with established authority.
- If the reasoning is subjected to criticism in formal, deductive or inductive logical terms.¹⁸

¹⁶ Statute of the International Court of Justice Article 38(1).

¹⁷ McConville, Mike; 2007; Research Methods for Law; page 5.

¹⁸ Idem. Page 162.

Within traditional legal doctrinal criticism there are three distinct interpretation models. These are the core analytical tools for this thesis.

- Objective Interpretation – Finding the meaning through plain reading of the text itself. This is also called grammatical interpretation.
- Subjective Interpretation – Finding the meaning by reviewing preparatory works of a rule or provision.
- Teleological Interpretation – Finding the meaning by looking at the purpose a given rule is meant to serve

1.4. Limitations

As the issue is very complex and there are several delimitations to the scope of this thesis that I feel is necessary to point out. First of all I feel the need to state that legal interpretation is not an exact science, something that the diverging views of the various arbitral tribunals in this thesis bears testament to. Secondly this thesis only concerns cases where the MFN clause does not explicitly state if the standard applies to dispute settlement procedure.

There are several sub-questions that this thesis touches upon, but does not analyse in depth. This has mainly to do with issues of space limitations, but moreover it is hard to generalize when even similar factual circumstances give very different outcomes. For instance if the basic treaty contains a dispute settlement clause, but no choice is given to the investor as regards the type of arbitration, can the most-favoured-nation clause be invoked to seek the benefit of the options offered in a third-party treaty? Another example would be if the basic treaty provides for particular conditions before an international arbitration proceeding can be initiated, can a MFN clause be invoked to benefit from the more favourable conditions of a third party treaty? I believe however that the answer to the diverging outcomes is connected to the general question of whether there should be limitations to the operations to the operation of the MFN clause in the context of dispute settlement procedure.

Another limitation that needs to be pointed out is that the case material analysed stems from ICSID arbitration. The merit of limiting the scope of the thesis in this respect is that the ICSID tribunals are governed by international treaties. As such they are subjected to interpretation under the Vienna Convention on the Law of Treaties and the hierarchy of international legal sources. Still, this is not a characteristic that ICSID tribunals are sole proprietor of. As an example many BIT tribunals are governed by the UNCITRAL arbitration rules. However, since information from ICSID is publicly accessible, the valuation of the accuracy of case facts and arguments becomes more reliable than information from other institutions. In spite of this, in the case of *RosInvest v. Russia I* I have made an exception to this limitation, due to the reasoning in the case, which made it highly relevant to add this to the list of cases analysed. Due to space limitations I have been forced to only use a handful of the background cases that deal with the issue of the scope of the MFN standard. Therefore there will be arguments from several cases that are not accounted for in the background chapter.

Chapter 2

Origin and History of the MFN Standard

It is difficult to define a general MFN standard in the context of international investment law. All efforts to formulate a universal standard in a multilateral treaty, much like the instruments that apply to trade¹⁹, have failed.²⁰ A review of how the MFN standard is expressed in IIA's does not yield a uniform picture. What is important to illuminate is the apparent distinction between MFN treatment and the codification of the MFN treatment in a contractual clause. Some clauses are narrow in its scope and definition where as others are very general. This makes it hard to draw any general parallels between the sources as to the real scope and purpose of such treatment. However with the legal positivist approach of this thesis, the customary law codified in article 31-33 of the Vienna Convention on the Law of Treaties and article 38 of the ICJ Statute offers some guidance.

With this in mind, this chapter will start of with investigating the origin and history of the MFN standard in order to ascertain the process of its legal norm. In the context of this thesis this is important to investigate what a parties can reasonably expect from an MFN clause and more profoundly if an MFN clause can be extended to dispute settlement provisions even when the clause does not explicitly permit this. Since the

¹⁹ Read: GATT, GATS, TRIMS.

²⁰ See: The Havana Charter which will be discussed further below.

MFN standard originally stems from international trade law this chapter will explore how it has been interpreted in the context of international trade law in order to draw an analogy to what can be expected in the context of international investment law. From the investigation in this chapter it seems that the mere fact that there is a difference in treatment in regards to the dispute settlement provisions in two BIT's would not be enough to constitute a breach of the MFN standard, but instead that there needs to be a competitive disadvantage associated with such difference in treatment.

2.1. Origin

Even though International Investment Law is a fairly new concept, the MFN standard is a product of international trade policy conducted over several hundred years. As the decision by the International Court of Justice (ICJ) in the case of *Anglo Iranian Oil Company v. Iran* suggests²¹ the lack of a consistent precedence might be a symptom that there is no clear uniform understanding to the meaning and purpose of an MFN, therefore for the benefit of this investigation the original meaning and intent of the clause will be explored.

MFN Treatment has been central pillar of commercial treaties for centuries. The standard is originally found in international trade agreements. While it is debated how far back you can trace the origin of the standard²², the earliest structure resembling the

²¹ The *Anglo-Iranian Oil Company* case was one of the first considerations by the ICJ on the subject of MFN treatment. In the case the U.K. tried to apply the MFN clause in its' treaty with Iran to invoke a later treaty between Iran and Denmark. The court rejected the U.K. claim by stating that the court lacked jurisdiction on the grounds that the treaty between Iran and U.K. pre-dated the Iranian ratification of the courts jurisdiction. However what is interesting for the analysis of this thesis is that the court did not consider the meaning and scope of the MFN clause before declaring its' decision. See: *Anglo-Iranian Oil Co. (U.K. v. Iran)*; 1952 I.C.J. 93 (July 22) (preliminary Objection) paragraph 109.

²² Some sources such as the UNCTAD Series on Issues in International Investment Agreements, *Most-Favoured-Nation Treatment* 13, 1999, cites a 1417 Treaty for Mercantile Intercourse between England and Flanders, while other sources place the date of origin in the eleventh century such as Ustor, Endre; 1969; *First report on the most-favoured-nation clause*; document A/CN.4/213; page 159. However, even though these texts strike some resemblance with functions of the modern clause, such as reciprocity of trade terms, these favours were only given to a few select nations. Moreover, due to the flaws in trade practice of this time, being both sporadic and monopoly orientated, (See: Vesel, Scott;

form we see today is found in the fifteenth century.²³ However, due to principal reasons²⁴ it is first in the eighteenth century that we find the modern understanding of the standard as a policy of equal treatment for all trading partners. Even though the form of wording varied significantly the intent to reciprocate any advantage granted to one party to other parties, remained the same.

In the 1882 Treaty of Commerce and Navigation between Great Britain and France the standard is phrased:

*Each of the High Contracting Parties engages to give the other immediately and unconditionally the benefit of every favor, immunity, or privilege in matters of commerce or industry which may have been or may be conceded by one of the High Contracting Powers to any third nation whatsoever, whether within or beyond Europe.*²⁵

In the 1887 British Treaty of Commerce with Honduras the standard is found in:

The High Contracting Parties agree, that in all matters relating to commerce and navigation, any privilege, favor, or immunity whatever which either contracting party has actually granted or may hereafter grant to the subjects or citizens of any other State shall be extended immediately and unconditionally to the subjects or citizens of the other contracting party; it

2007; Clearing a path through tangled jurisprudence: most-favoured-nation clauses and dispute settlement provisions in bilateral investment treaties; page 129), it is hard to imagine that a fully developed MFN standard would have contributed to international competition.

²³ Ustor, Endre; 1969; *First report on the most-favoured-nation clause*; document A/CN.4/213; page 160.

²⁴ The reason being that the MFN standard found here functioned not as a guarantee of equal opportunity of competition, but was basically a pledge to discriminate in favour of a certain party. Kurtz, Jürgen; 2005; The delicate extension of most-favoured-nation treatment to foreign investors: *Maffezini v kingdom of Spain*; In: *International investment law and arbitration: leading cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*; Weiler Todd(Ed); page 525.

²⁵ Barclay, Thomas; 1907; *Effects of "Most-Favoured-Nation" Clause in Commercial Treaties*; In: *The Yale Law Journal*, Vol. 17, No. 1 (Nov., 1907); page 26.

*being their 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.*²⁶

While the Anglo-Roumanian Treaty of 1892 it is phrased:

*The subjects, vessels and goods, produce of the soil and industry of each of the two High Contracting Parties shall enjoy in the Dominions of the other all privileges, immunities, or advantages granted to the most favoured nation.*²⁷

From these provisions one can draw two conclusions. First, all of them share the unconditional phrasing of the privileges, favours and immunities that the treaties are intended to cover.²⁸ The second conclusion to make is that this interpretation goes against the United States position at the time, which distinguished between general reductions and reductions conditioned by counter reductions by the other contracting party, such as reciprocity.²⁹ Historically there has been a division between countries adopting policies favouring a conditional form and countries favouring an unconditional form. This division was traditionally seen as a division between net importers and net exporters where the net importers favoured a restrictive conditional interpretation of the standard and net exporters promoted an expansive unconditional interpretation.³⁰

It is only after the Second World War we start to see a unified definition of the meaning of the MFN Standard with the creation of the General Agreement of Tariffs and Trade (GATT). The GATT was very much a reaction to the protectionist trade

²⁶ Idem.

²⁷ Idem.

²⁸ It should be noted that even though these contracts are all issued through negotiations with Britain, they still reflect the overall European practice at the time. Idem.

²⁹ Idem.

³⁰ Ustor, Endre; 1973; Fourth report on the Most-Favoured-Nation Clause; page 101.

policies of the inter-war period, which had, only between 1929 and 1934 lead to a 66% decline in world trade.³¹ This decline had severe economic consequences and has been attributed to trade protectionist measures that the mercantile policies were characterized by, such as high increases in tariff levels.³² As a reaction to this development the League of Nations International Economic Conference of 1927 advocated a very extensive MFN interpretation in order to bypass these trade barriers.

The mutual grant of unconditional most-favoured-nation treatment as regards Customs duties and conditions of trading is an essential condition of free and healthy development of commerce between states” and therefore “strongly recommend 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.”³³

However, this promotion was heavily criticized by the Committee of Experts for the Progressive Codification of International Law, which stated 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.³⁴

³¹ Winham, Gilbert R.; 1992; The evolution of international trade agreements; page 30.

³² Kurtz, Jürgen; 2005; The delicate extension of most-favoured-nation treatment to foreign investors: Maffezini v kingdom of Spain; In: International investment law and arbitration: leading cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law; Weiler Todd(Ed); page 529.

³³ Scott Vesel; 2007; Clearing a path through a tangled jurisprudence: most-favoured-nation clauses and dispute settlement provisions in bilateral investment treaties; page 134.

³⁴ Scott Vesel; 2007; Clearing a path through a tangled jurisprudence: most-favoured-nation clauses and dispute settlement provisions in bilateral investment treaties; page 134 (quoting The world economic conference: final report 34, League of national Doc. C.356.M.129.1927.II (C.E.I.46)(1927)).

This suggests that a more liberal interpretation of the MFN standard in international trade law was politically motivated. When experts in international law dealt with the question however, it was deemed that the consequences of a liberal interpretation were undesirable.

The GATT was also a consequence of the policies based on the economic theories of trade liberalism such as the theories of free trade and global specialization by Adam Smith, David Ricardo and Thomas Friedman. In Riccardo's book *The Principles of Political Economy and Taxation* he suggest that in order to maximise global welfare, international trade needs to be free of barriers and nations need to specialize in areas of production that is most beneficial to them in terms of use of capital and labour. He argued this by stating that:

*The pursuit of individual advantage is admirably connected with the universal good of the whole.*³⁵

When reviewing the GATT the relationship between the economic theories of free trade is evident in the introduction of the treaty with:

*Recognizing that their (the parties) relations in the field of trade and economic endeavour should be conducted with the view to raise standards of living, ensure full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods.*³⁶

The MFN standard is found in article I:1 of the GATT. It states:

³⁵ Ricardo, David; 2004; *The Principles of Political Economy and Taxation*; page 81.

³⁶ GATT preamble.

With respect to customs duties and charges of any kind imposed on or in connection with importing or exporting or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.³⁷*

This means that in respect to market access, any advantage given to any product originating in or destined for one country shall be accorded immediately and unconditionally to like products originating in or destined for all other members.

However, it should be pointed out that even though the formation of the GATT is seen as a start to a uniform approach to a unconditional application of the MFN standard, article I:1 does not prohibit all forms of tariff discrimination between foreign parties. Basically we can talk about four different categories of lawful discrimination. Firstly we have the discrimination that is allowed under article XX and XXI, which lists exceptions to the treaty.

Secondly discrimination is allowed under the 1979 GATT Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries paragraph 1 and Article XXXVI:8 of GATT, which allows for positive discrimination towards less-developed members in trade negotiations.

³⁷ GATT article I:1.

Thirdly discrimination is allowed on the basis on defence against unfair competition under the agreement on Anti-Dumping³⁸ respective the Subsidies and Countervailing Measures Agreement.³⁹

Fourthly there is discrimination under the concept of like product. Due to the stipulation of the clause that the standard should be afforded as long as the products are like, the article “manages to tolerate a form of reciprocity”⁴⁰ fundamentally at odds with the MFN principle since the function of the standard is to avoid behaviour of trade protection.⁴¹

These exceptions to MFN treatment in GATT represent the norm that the MFN standard’s purpose is to prevent distortion in competition between otherwise competitive goods.⁴²

After the formation of the GATT we find today that the MFN standard has been extended beyond its original application to trade in goods to the fields of trade in services and trade-related aspects of intellectual property rights through the WTO Agreement.⁴³ A second observation to make is the incorporation of the Understanding on Rules and Procedure Governing the Settlement of Disputes (DSU) into the WTO. The mechanisms provided in the DSU guarantees states to bring disputes concerning trade agreements before an international panel empowered to issue binding decisions

³⁸ See: Agreement on the implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

³⁹ See: Agreement on Subsidies and Countervailing Measures.

⁴⁰ Kurtz, Jürgen; 2005; The delicate extension of most-favoured-nation treatment to foreign investors: *Maffezini v kingdom of Spain*; In: *International investment law and arbitration: leading cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*; Weiler Todd(Ed); page 529.

⁴¹ *Idem*.

⁴² Hudec, Robert E.; 2000; “Like Product”: The Differences in Meaning in GATT Articles I and III; page 4.

⁴³ See: Article II GATS and Article 4 TRIPS.

on the parties.⁴⁴ From this it seems that substantive and procedural provisions are separated within the WTO convention.

With much of the success associated with the codification of international trade law, several tries have been made to transfer the same multilateral legal structures to international investment law, though the formation of a Multilateral Agreement on Investment (MAI). Yet, none of the efforts have been successful. The first effort towards forming an MAI was during the negotiations for the proposed International Trade Organization. During the negotiations, articles of investment protection were introduced with provisions covering MFN treatment.⁴⁵ The negotiating parties were unable to agree to this however, resulting in the final draft, the Havana Charter for the International Trade Organization, only covering issues of investment protection under a prohibition on unreasonable or unjustifiable action.⁴⁶ A second attempt was made during the Uruguay Round trade negotiations, with the majority of the GATT members rejecting the proposal in favour of focusing on clarification on measures that were breaching already existing GATT obligation.⁴⁷

Following the failed efforts for investment protection during the Uruguay Round, the United States promoted negotiations for a MAI within the Organization for Economic Cooperation and Development (OECD)⁴⁸. Again the negotiations failed, mostly due to several high public profile investment claims within the North American Free Trade Agreement (NAFTA) and raised concerns by non-governmental organizations

⁴⁴ See: article 2 and article 16 paragraph 4 of DSU.

⁴⁵ Brewer, T.L., Young, S.; 1998; *The Multilateral Investment System and Multinational Enterprises*; page 70-73.

⁴⁶ Havana Charter for the International Trade Organization; Article 11:1(b).

⁴⁷ Civello, P.; 1999; the TRIMS Agreement: A Failed Attempt at Investment Liberalization; page 97.

⁴⁸ Newcombe, Andrew, Paradell Lluís; 2009; *Law and Practice of Investment Treaties: Standards of Treatment*; page 55.

(NGO's) regarding procedural and substantive protections given under investment treaties.⁴⁹

Still, even though all efforts to form an MAI have been unsuccessful, the standard has effectively been transferred to BIT treaties. However, where the MFN treatment in international trade agreements only applies to boarder measures, the application of MFN treatment to investment issues is more complex since an investment is conducted within the territory of the host-state and under a longer period of time.⁵⁰

To sum up, historically the scope and definition of the MFN standard has varied up until the formation of the GATT and the later WTO. In order to side step legal barriers to trade that produced economically damaging effects it has been suggested that a liberal interpretation to the scope of the standard should be practiced. However, it seems that such interpretation policies were politically motivated and when analysed by legal experts, liberal interpretations of the standard were deemed undesirable. Even though the idea of the GATT and the WTO seems to be to promote free trade and to reduce the same barriers to international trade, within the WTO substantive and procedural provisions appears separated and the scope of the MFN clause seems to be restricted in many ways.

In the following sub-chapters it will be discussed what type of implications the transfer of the MFN standard from issues relating to international trade law to international investment law.

⁴⁹ Idem.

⁵⁰ For a definition of investment and differentiation from trade see: *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Morocco* (Decision on Jurisdiction, 23 July; 2001) paragraph 52.

2.2. The ILC Articles

MFN treatment is defined by the International Law Commission (ILC) Draft articles on MFN as:

*... treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favourable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State.*⁵¹

And an MFN clause as:

*... a treaty provision whereby a State undertakes an obligation towards another State to accord most-favoured-nation treatment in an agreed sphere of relations.*⁵²

These expressions are based on the ILC's interpretation of the general practice by states in the context of the Vienna Convention on the Law of Treaties and are not legally precise entities.⁵³ However, in the context of international investment, MFN treatment guarantees that a host state extends to a foreign investor and investment that is covered by the MFN clause in question, relevant treatment that is no less favourable than that which it accords to foreign investors of any third country.⁵⁴ Therefore these expressions serve as a good starting point for analysis of the concept of a MFN standard.

⁵¹ International Law Commission; 1978; Draft Articles on Most-Favoured-Nation Clauses with Commentaries; page 21.

⁵² Idem. Page 18.

⁵³ Idem.

⁵⁴ United Nations Conference on Trade and Development; 2010; Most-Favoured-Nation Treatment; UNCTAD Series on Issues in International Investment Agreements II; page 13.

Two comments should be made to the definition of MFN. Firstly, in the commentaries to the draft articles the ILC affirms the hypothesis of the thesis that the MFN standard is an explicit obligation.

Speaking strictly, there is no such thing as the most-favoured-nation clause: every treaty requires independent examination... There are innumerable m.f.n. clauses, but there is only one m.f.n. standard". These considerations were taken into account in drafting article 4 [which codefies the MFN standard].⁵⁵

Secondly it should be noted that under article 4 of the Draft articles is it striking that there is no formal requirement for an MFN clause.⁵⁶ This means that a MFN clause can be formulated in many different ways and that there are no requirements as to the structure and word use when drafting it. An MFN clause is simply an expression of a granting state undertakes the obligation of providing MFN treatment to a beneficiary state.

2.3. Scope and Structure

Much like the purpose of the MFN standard in the context of international trade, MFN treatment in international investment law ensures the equality of competitive conditions between foreign investors of different nationalities. However, where the scope of application in international trade law is restricted to border measures regarding market access, most international investments are conducted within the territories of state, meaning behind state borders. Due to this the MFN standard has a different scope of application.

The standard has three fundamental legal features in regard to its scope of application:

⁵⁵ International Law Commission; 1978; Draft Articles on Most-Favoured-Nation Clauses with Commentaries; page 20.

⁵⁶ Idem. Page 18-20.

I. It is a treaty-based obligation. Even though there is no *pro forma* requirement and it can be argued that the inclusion of MFN protection in IIA's is an almost universal treaty practice, it is clear from article 7 of the ILC's draft articles on MFN that states grant this benefit and gains this obligation from a specific clause contained in a binding treaty.⁵⁷

*Nothing in the present articles shall imply that a State is entitled to be accorded most-favoured-nation treatment by another State otherwise than on the basis of an international obligation undertaken by the latter State.*⁵⁸

From the commentaries to the article it is apparent the *opinio juris* of the matter has crystallized to the same position.

*In practice, such an obligation cannot normally be proved otherwise than by means of a most-favoured-nation clause, i.e. a conventional undertaking by the granting State to that effect.*⁵⁹

*Although the grant of most-favoured-nation treatment is frequent in commercial treaties, there is no evidence that it has developed into a rule of customary international law.*⁶⁰

This means that states are not bound by customary international law to extend or receive this obligation.⁶¹ The claim to be given access to the same rights as a state that

⁵⁷ International Law Commission; 1978; Draft Articles on Most-Favoured-Nation Clauses with Commentaries; page 24.

⁵⁸ *Idem.*

⁵⁹ *Idem.*

⁶⁰ *Idem.*

is placed in a favoured position can only be made on the basis of an explicit commitment of the state granting the favours in the form of a conventional stipulation, that being a most-favoured-nation clause.⁶² This is in terms with the recognized principle of freedom of contract.⁶³ From the ILC work it is however striking that such commitment does not possess a requirement to be in written form.

*While most-favoured-nation clauses, i.e. treaty provisions, constitute in most cases the basis for a claim to most-favoured-nation treatment, it is not impossible even at present that such claims might be based on oral agreements.*⁶⁴

II. It is restrained by the principle of *Ejusdem Generis*.⁶⁵ This means that the MFN standard can only be applied to the like subject-matters and/or class that the basic treaty in question describes and questions of interpretation of the meaning of ambiguous words or phrases may only be done within the sphere of these categories. Within IIA's, the MFN standard refers to investors and investments as subjects. Depending on the substantive scope of an MFN clause, the MFN treatment can be applied extensively to all matters of the investment or just to an individual stage of the investment such as investment access or investment protection.

III. It is a relative standard. This means that it is not standard with an *a priori* definition and therefore requires a two-tier test of comparison of treatments between two foreign investors in like circumstances. To ascertain a claimed violation of the obligation, the investigation must affirm an objective difference in treatment between

⁶¹ *Idem*. It should also be noted that the MFN standard is separated from the principle of non-discrimination under international law.

⁶² *Idem.*, page 12.

⁶³ See: VCLT preamble paragraph 3.

⁶⁴ International Law Commission; 1978; Draft Articles on Most-Favoured-Nation Clauses with Commentaries; Page 25.

⁶⁵ *Idem*. Page 27.

two foreign investors, but also that this difference in treatment has led to a direct competitive disadvantage.⁶⁶

This raises two questions regarding the application namely, whether the investments or investors in question are comparable (in the same relationship) and whether there has been less favourable treatment.⁶⁷ However before applying MFN treatment there is a crucial threshold question to be addressed, namely, what is the subject matter of the MFN clause – to what rights does the clause apply?⁶⁸ As seen above in the ILC’s draft articles, the beneficiary of the MFN clause acquires “only those rights which fall within the limits of the subject matter of the clause”⁶⁹.

An MFN clause in a basic treaty does not technically incorporate by reference the provisions of the third-party treaty.⁷⁰ The ICJ noted in *Anglo-Iranian Oil Co.* that the MFN clause extends the rights enjoyed by the third party on the beneficiary.⁷¹ The MFN clause can grant no benefit if the third party’s rights come to an end, such as where the third-party treaty has been terminated.⁷² An MFN clause does not when it becomes applicable, crystallize or incorporate by reference the more favourable treatment afforded by a third-party treaty.⁷³ Access to more favourable treatment is only available as long as the party is able to obtain the advantage in question⁷⁴

⁶⁶ *Idem.* Page 19 and 27.

⁶⁷ Newcombe, Andrew, Paradell, Lluís; 2009; *Law and Practice of Investment Treaties: Standards of Treatment*; page 196.

⁶⁸ *Idem.* Page 197.

⁶⁹ International Law Commission; 1978; *Draft Articles on Most-Favoured-Nation Clauses with Commentaries*; page 27.

⁷⁰ Newcombe, Andrew, Paradell, Lluís; 2009; *Law and Practice of Investment Treaties: Standards of Treatment*; page 197.

⁷¹ *Anglo-Iranian Oil Co. Case (UK v. Iran) (1952) ICJ Rep 93 paragraph 109.*

⁷² Newcombe, Andrew, Paradell, Lluís; 2009; *Law and Practice of Investment Treaties: Standards of Treatment*; page 197.

⁷³ *Idem.*

⁷⁴ *Idem.*

To sum up the scope of a specific MFN clause is all depends on the explicit wording and substantive scope of application. Within IIA's the maximum extension is however matters of investment. Still, for a breach of obligation under the MFN clause the claim must pass a two-tier test that affirms that there is just not a difference in treatment between two foreign investors, but that the difference in treatment is a direct competitive disadvantage.⁷⁵

2.4. Purpose

Georg Schwarzenberger argued regarding the standards purpose that:

*...it is clear that MFN clauses serve as insurance against incompetent draftmanship and lack of imagination on the part of those who are responsible for the conclusion of international treaties*⁷⁶

This explanation of the purpose of the MFN standard seems too simplistic however. First of all, state intend to write what they write. Therefore it would seem odd and not intended to apply 'an insurance against incompetent draftmanship'. Secondly, as stated above, the purpose of the MFN standard seems to prevent discrimination against foreign investors based on their nationality.⁷⁷ This does not mean that a host state is obligated to grant identical treatment to investors operating within its borders. Instead it is adequate for the host state to extend a treatment that is not 'less favourable' than the treatment afforded to the most favoured foreign investor.⁷⁸ When the standard is incorporated applying the same standard to IIA's the clause thereby

⁷⁵Gerber, Jean-Daniel; *Preferential Trade Agreements and the Most Favoured Nation Principle*; 2007; Page 12.

⁷⁶ Schwarzenberger, Georg; 1945; *The Most-Favoured-Nation Standard in British State Practice*; page 100.

⁷⁷ UNCTAD, *International Investment Agreements: Key Issues*, p. 191.

⁷⁸ UNCTAD, *Trends in international investment agreements*, p. 60.

seeks to guarantee equal competitive opportunities for foreign investors in a host state.

To conclude this chapter the MFN standard provides that foreign investors and investments are entitled to the same or no less favourable treatment than the host state provides to foreign investors and investments from third-party states. Claims regarding IIA's and violations of the MFN standard will therefore circulate around the issue of whether the host state, the granting state, has provided less favourable treatment to investments or investors from the beneficiary state, than what is afforded to third state parties.⁷⁹ What is important to assess when investigating a claimed violation of the standard is that there is just not a difference in treatment but that is actually less favourable.

From the history of the MFN standard in the context of international trade law it would seem that the standard was variably interpreted and applied, until the formation of a multilateral legal system in form of the GATT and WTO. In the context of international investment law an analogy suggests that the inconsistency of the interpretation of the MFN standard will remain until a equivalent legal system to the GATT and WTO is implement in order to create uniformity of the wording and meaning of the MFN standard.

Furthermore, an analogy to international trade law would suggest that the mere fact that there is a difference in treatment in regards to the dispute settlement provisions in two BIT's would not be enough to constitute at breach of the MFN standard. Instead there needs to be a competitive disadvantage associated with a difference in treatment.

⁷⁹ Newcombe, Andrew, Paradell, Lluís; 2009; Law and Practice of Investment Treaties: Standards of Treatment; page 197.

Chapter 3

Interpretation of the MFN Clause in Practice

Up until ten years ago the accepted opinion appears to be that the MFN standard only applied to substantive provisions unless the language of the clause explicitly stated the contrary. As Arbitrator Brigitte Stern comments:

It cannot be contested that until the decision in Maffezini, “the ordinary meaning to be given” – to use the terms of Article 31 of the Vienna Convention on the Law of Treaties – to the term “treatment” concerned the protection of substantial rights, and did not encompass any access to specific procedures of settlement of disputes concerning these rights, which are always an exception in international law.⁸⁰

However, the groundbreaking interpretation in Maffezini can be seen as the starting point to the concept that the scope of the MFN standard may be extended to incorporate dispute settlement provisions and questions of jurisdiction. Since then a number of ICSID Tribunals have interpreted and evaluated the Maffezini position with varying outcomes. In this chapter some of these cases will be accounted for in order to provide a brief background of the presented arguments for and against an MFN extension into procedural provisions.

⁸⁰ Stern, Brigitte; 2011; Impregilo S.p.A. v. Argentine Republic (ICSID Case No. ARB/07/17); Concurring and Dissenting Opinion; paragraph 27.

3.1. The Maffezini Interpretation

Maffezini v. Spain⁸¹ was not unique in its subject matter or legal issue. In the past fifty years there have been a number of claims submitted for international arbitration regarding the interpretation of the standard in IIA's.⁸² What made Maffezini so unique that some sources speak of a doctrine is this:

The Maffezini case dealt with the legal issue as to whether an investor (Argentina) could avoid a provision in a BIT that required the claimant to bring proceedings in a domestic court and continue those proceedings for eighteen months before resorting the dispute to international arbitration.

The claimant, Emilio Agustin Maffezini (a national of Argentine), brought a claim before ICSID in January of 2000 against the Kingdom of Spain. The claim consisted of that the provision of a third party BIT between Spain and Chile of 1991 was more beneficial to the claimant and thereby the claimant had a right to be extended the same right. This claim was backed by the invocation of the provisions in the basic treaty between Argentina and Spain, *the 1991 Argentine-Spain Bilateral Investment Treaty*, which contained an MFN clause formulated in broad terms.

*“In all matters subject to this Agreement, this treatment shall be not less favourable than that extended by each Party to the investments made in its territory by investors of a third country”*⁸³

⁸¹ Emilio Agustin Maffezini v. Kingdom of Spain (Decision of the Tribunal on Objections to Jurisdiction), ICSID Case No. ARB 97/7, 25 January 2000. (2002) 5 ICSID Rep. P.396.

⁸² See: *Ambiatelos claim (Greece v. united kingdom)*, 1956 and *Anglo-Iranian Oil Co. (U.K. v. Iran)*; 1952.

⁸³ Emilio Agustin Maffezini v. Kingdom of Spain (Decision of the Tribunal on Objections to Jurisdiction), ICSID Case No. ARB 97/7, 25 January 2000. (2002) 5 ICSID Rep. P.396. Paragraph 38.

The Argentine-Spain BIT required that the dispute had to be addressed by the domestic court for a period of eighteen months before the dispute could be submitted to international arbitration. The Chile-Spain BIT imposed no such conditions, but instead enabled investors to submit its claims for international arbitrations after only six months.⁸⁴

The claimant argued that investors of Chilean nationality were treated more favourably than investors of Argentine nationality and that the MFN clause in the Argentine-Spain BIT gave him the right to be accorded the benefits extended to investors under the Chile-Spain BIT.

The respondent, the Kingdom of Spain, contended that the claimant could not invoke third party treaties on the grounds of the *res inter alios acta* doctrine, meaning that the claim is irrelevant since it did not regard the same subject matter, and that under the *ejusdem generis* principle the MFN clause could only be applied to the same subject matter of the basic treaty.⁸⁵ Spain further argued that the purpose of the MFN clause is to avoid discrimination and that such discrimination can only take place in connection with material economic treatment, thereby it could not be extended to procedural matters. To make such an extension it had to be proven that the resort to the Spanish domestic court would have a negative material effect and less advantageous to the investor than submitting the claim directly to ICSID arbitration⁸⁶

The tribunal rejected this argument and held in favour of the claimant. Since the MFN clause in the basic treaty was drafted in broad terms and explicitly referred to “...all matters subject to this Agreement”⁸⁷, the Tribunal took the position that the claimant

⁸⁴ Idem. Paragraph 39.

⁸⁵ Idem. Paragraph 41.

⁸⁶ Idem. Paragraph 42.

⁸⁷ Idem. Paragraph 49.

had convincingly demonstrated that the scope of the MFN clause in Argentine-Spain BIT extended to the dispute settlement provisions of the treaty and that the claimant was able to rely on, in their view, the more favourable dispute settlement provisions contained in the Chile-Spain BIT.⁸⁸

In arriving at this conclusion the Tribunal placed special emphasis on several factors:

- The need to identify the intention of the contracting parties.⁸⁹
- The importance of assessing the past practice of States regarding the inclusion of the MFN clause in other BIT's.⁹⁰
- The importance to take into deliberation public policy considerations.⁹¹

Regarding the *ejusdem generis* principle, the principal question that was contemplated was whether dispute settlement provisions of a third-party treaty were reasonably related to the treatment accorded under the MFN clause of the basic treaty. In order to answer such a question the Tribunal stated that it was important to deduce the intention of the contracting parties. In this regard, the Tribunal reviewed prior international jurisprudence, and specially referred to the *Ambatielos* case. In that case the Commission of Arbitration had confirmed the relevance of the *ejusdem generis* principle, verifying that the MFN clause could only attract matters belonging to the same category of subject matter. However the commission of arbitration stipulated that “the question can only be determined in accordance with the intention of the Contracting Parties as deduced from a reasonable interpretation of the Treaty”⁹²

⁸⁸ Idem. Paragraph 50, 61.

⁸⁹ Idem. Paragraph 49.

⁹⁰ Idem. Paragraph 57-58.

⁹¹ Idem. Paragraph 56.

⁹² Idem. Paragraph 49.

Following this way of reasoning the Tribunal investigated the specific formulations of the MFN provisions in other BIT's and found a distinction between BIT's which contained a MFN clause which expressly granted that the MFN treatment extended to provisions on dispute settlement, and BIT's which contained a MFN clause that did not expressly provide that dispute settlement was covered by the clause. In the latter case the clauses examined contained phrases such as "all rights contained in the present Agreement" or "all matters subjects to this Agreement".⁹³

Since the MFN clause in the Maffezini case belonged to the latter category the Tribunal noted that: "it must be established whether the omission was intended by the parties or can reasonably be inferred from the practice followed by the parties in their treatment of foreign investors and their own investors"⁹⁴

The Tribunal expanded on this logic and concluded that in the current economic context it is reasonable to assume that settlement procedure is inextricably to the protection of investors, as the MFN standard relate to protection of traders under commercial treaties. It stated that in the past, extraterritorial jurisdiction were considered essential for the protection of traders rights and should not be regarded as a mere procedural device, but as mechanisms designed to increase the protection of rights for these persons. Therefore:

*...if a third party treaty contains provisions for the settlement of disputes that are more favourable 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 favoured nation clause as they are fully compatible with the ejusdem generis principle.*⁹⁵

⁹³ Idem. Paragraph 52-53.

⁹⁴ Idem. Paragraph 53.

⁹⁵ Idem. Paragraph 56.

From this it seems the Tribunal endorsed an extension of a broadly formulated MFN clause to settlement dispute provisions. However it should be noted that the Tribunal emphasised that such extension could only be done if the third party treaty related to the same subject matter as the basic treaty, in accordance with the *ejusdem generis* principle. The Tribunal made the conclusion that the subject matter of the MFN clause was “investment protection” and therefore the scope of the basic treaty, formulated as “all matters”, could be extended without an apparent breach of the *ejusdem generis* principle.

The Tribunal noted that the application of the MFN standard to dispute settlement provisions would result in the harmonisation and enlargement of the scope of application of such provisions.⁹⁶ However the Tribunal seemed to be aware of the potential problems associated with a broad interpretation of the standard and underlined that:

*As a matter of principle, the beneficiary of the clause should not be able to override public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in question, particularly if the beneficiary is a private investor, as will often be the case. The scope of the clause might thus be narrower than it appears at first sight.*⁹⁷

The Tribunal also pointed out that the Maffezini interpretation could not bypass requirements such as:

- Where the contracting parties have conditioned its consent to arbitration on the exhaustion of local remedies. This requirement could not be circumvent

⁹⁶ Idem. Paragraph 62.

⁹⁷ Idem.

because the stipulated condition reflects a fundamental rule of international law⁹⁸

- Dispute settlement provisions, which include “the fork in the road”. Such requirement stipulates that there has to be a choice between submission to domestic courts or to international arbitration and that this choice once made becomes final and irreversible. This cannot be bypassed because such action would violate the principle of ‘finality of arrangements’, which is considered an important principle of public policy.⁹⁹
- Disputes being brought up for settlement at a particular forum.¹⁰⁰
- Agreements to use a “highly institutionalised system of arbitration that incorporates précis rules of procedure (e.g. NAFTA)”. Such arrangements could not be altered though the interpretation of the standard since such provisions reflect the precise will of the contracting parties.¹⁰¹

As a final reflection of the use of the Maffezini interpretation the Tribunal stressed the distinction “...between the legitimate extension of rights and benefits by means of the operation of the clause, on the one hand, and disruptive treaty-shopping that would play havoc with the policy objectives underlying specific treaty provisions, on the other.”¹⁰²

From this it appears that the Tribunal was aware of some of the possible difficulties arising out of this interpretation. It however left many questions unanswered such as what would qualify as disruptive treaty-shopping and what principles these exceptions were based on. On the same note it would have been helpful if the Tribunal had

⁹⁸ Idem. Paragraph 63.

⁹⁹ Idem.

¹⁰⁰ Idem.

¹⁰¹ Idem.

¹⁰² Idem.

developed its reasoning concerning the division between the condition of exhaustion of local remedies and the condition of exhaustion of local remedies under a certain period of time. This does not seem to be a straightforward conclusion to make.

3.2. Post-Maffezini Cases Speaking in Favour of the Maffezini Interpretation

The jurisprudence consistent with the Maffezini interpretation seems to reflect a disposition by the Tribunals in these cases, to hold a strong association between accesses to international dispute settlement procedures and fundamental elements of investor protection.

3.2.1. Siemens v. Argentina

One of the prominent cases belonging to this category is *Siemens v. Argentina*.¹⁰³ In it the claimant, Siemens, tried to avoid a six-months negotiation period in domestic court required by the basic treaty, the Germany-Argentina BIT of 1991, with the use of its MFN clause. The third party treaty, Chile-Argentina BIT, did not possess such requirement and was therefore said to hold a more favourable treatment than the Germany-Argentina BIT.

The arguments put forward by both the claimant and the respondent holds high resemblance with the ones in the Maffezini case. The respondent argued that the claimant lacked standing to bring the claim to international arbitration since it had not performed the six months requirement of domestic negotiations provided by in the basic treaty. The claimant argued that the requirement should be bypassed due to the fact that the Chile-Argentina BIT did not contain such requirement and that this was

¹⁰³ *Siemens A.G. v. The Argentine Republic (Decision on Jurisdiction)*, ICSID Case No. ARB/02/8, 3 August 2004.

more favourable treatment, which the MFN clause of the basic treaty was designed to neutralize.

The respondent argued against such interpretation by claiming that the MFN clause only covered like subject matters and that the dispute settlement provisions were therefore not covered by the clause since it belonged to a different ‘genus’. “Unless expressly provided for, the MFN clause does not implicitly extend to procedural matters”¹⁰⁴

The Tribunal followed the logic of the Maffezini Tribunal and found that there was no reason to make a distinction between substantive and procedural matters as the dispute settlement mechanisms of the treaty is part of the protection of investors offered under the treaty and therefore qualify as treatment of foreign investors and investments. Therefore the MFN clause is applicable to procedure provisions.¹⁰⁵

What distinguishes Siemens from Maffezini however is that the Tribunal in Siemens took this view even though the MFN clause did only apply to ‘treatment’ and not to ‘all matters’ which is broader in its definition. Tribunal takes on a reasoning regarding the purpose of the MFN clause, which appears to override the intention of the parties regarding the specially negotiated narrow formulation of the MFN clause.

...the purpose of the MFN Clause is to eliminate the effects of specially negotiated provisions, unless they have been excepted. It complements the undertaking of each State party to the treaty, not to apply measures discriminatory to investments under Article 2¹⁰⁶

¹⁰⁴ Idem. Paragraph 46.

¹⁰⁵ Idem. Paragraph 102.

¹⁰⁶ Idem. Paragraph 106.

This means that the purpose of the MFN clause in their view is not to offer equal competitive opportunities for foreign investors, but to abolish any type of discrimination. Through the reasoning of the Siemens Tribunal, it would seem that there would be no reason to do a two-tier comparison test in order to ascertain if there has been a violation of the standard as explained in chapter 2.3. In the Tribunal's eyes the mere fact that there is a difference in treatment, even though no competitive disadvantage is a result from such difference, would be grounds for a violation.

A second distinction to be made between the two cases is that the Tribunal in Siemens seemed to have taken a position away from one of the restrictions set out by the Maffezini tribunal regarding the application of the Maffezini approach in that the MFN clause should not be used as a 'treaty shopping' tool. The Siemens Tribunal ruled that the more favourable treatment guaranteed by the MFN clause could only be extended to more advantageous provisions to the beneficiary and not the whole treaty.¹⁰⁷ A consequence of this approach, it has been argued, is that it offsets the balancing of interests and rights and duties between the parties that a contract actually represents.¹⁰⁸ Judging from the wording of the award it does seem possible to draw that logic to that end, but the Tribunal points out¹⁰⁹ that in the end it depends on the wording of the individual clause.

Another interesting feature is that the Tribunal appeared to have explicitly rejected arguments based on the *expressio unius*¹¹⁰ principle by stating:

¹⁰⁷ Idem. Paragraph 108-109.

¹⁰⁸ Perera, Rohan; The Most-Favoured-Nation Clause and the Maffezini case; ILC Study Group on the MFN Clause; Paragraph 40.

¹⁰⁹ Siemens A.G. v. The Argentine Republic (Decision on Jurisdiction), ICSID Case No. ARB/02/8, 3 August 2004. Paragraph 108.

¹¹⁰ An argument that is based on the mention of one item or a list of items in a provision excludes the relevance of other items. Schreuer, Christoph; 2006; *Diversity and Harmonization of Treaty Interpretation in Investment Arbitration*; Page 6-7.

*If a matter is dealt with in a provision of the Treaty and not specifically mentioned under other provisions, it does not necessarily follow that the other provisions should be considered to exclude the matter especially covered.*¹¹¹

This is a very liberal position that only two more Tribunal adopted between 1998 and 2006.¹¹²

An interesting observation in this case is also that Argentina's view changed when it was the respondent. In the Maffezini trial the Argentine claimant argued that the MFN clause did extend to dispute settlement procedure and was not restricted to substantive matters.¹¹³ In the Siemens case, Argentina was the respondent and took the position that such extension is wrong and that the Tribunal in the Maffezini case:

*...did not take adequate note of the significant differences between the substantive issues raised in that case and the issues of a jurisdictional nature.*¹¹⁴

3.2.2. Gas Natural SDG v. Argentine¹¹⁵

In the case Gas Natural SDG v. Argentine the arguments presented by the parties were also very similar compared to Maffezini. The Claimant invoked the MFN clause in the basic treaty in order to avoid an eighteen months domestic negotiation requirement by pointing to the Argentina-US BIT of 1991, which did not contain such

¹¹¹ Siemens A.G. v. The Argentine Republic (Decision on Jurisdiction), ICSID Case No. ARB/02/8, 3 August 2004. Paragraph 140.

¹¹² Fauchald, Ole Kristian; 2008; *The Legal Reasoning of ICSID Tribunals – An Empirical Analysis*; Page 327.

¹¹³ Emilio Agustin Maffezini v. Kingdom of Spain (Decision of the Tribunal on Objections to Jurisdiction), ICSID Case No. ARB 97/7, 25 January 2000. (2002) 5 ICSID Rep. Paragraph 40.

¹¹⁴ Siemens A.G. v. The Argentine Republic (Decision on Jurisdiction), ICSID Case No. ARB/02/8, 3 August 2004. Paragraph 53.

¹¹⁵ Gas Natural SDG, S.A: v. The Argentine Republic (Decision of the Tribunal on the Preliminary Questions of Jurisdiction), ICSID Case No. ARB/03/10, 17 June 2005.

requirement. The Respondent argued against and held that the MFN clause only related to substantive matters and procedural matters, such as dispute settlement.¹¹⁶ The Tribunal reasoned that the claimant was able to take advantage of the dispute settlement provisions in the Argentina-US BIT since:

...access to such arbitration only after resort to national courts and an eighteen-month waiting period is a less favourable degree of protection than access to arbitration immediately upon expiration of the negotiation period¹¹⁷

The Tribunal also made a statement considering the issue of whether dispute settlement provisions of BIT's constitute the package of protection granted to investors by the host state. From a review of the history of the ICSID convention and its jurisprudence to the development of BIT creation, it stated that one of the most crucial elements of this evolution has been the provision connected to independent international arbitration between host-state and investor and an essential part of foreign direct investment protection.¹¹⁸

3.2.3. RosInvest v. Russia

RosInvest v. Russia¹¹⁹ is another example of an arbitration tribunal taking a very liberal interpretation of the MFN clause in regards to the importation of third party treaties dispute settlement procedure. In the award the Tribunal broadened the jurisdictional scope of the basic treaty, beyond disputes relating to expropriation

¹¹⁶ Perera, Rohan; The Most-Favoured-Nation Clause and the Maffezini case; ILC Study Group on the MFN Clause; Paragraph 42.

¹¹⁷ Gas Natural SDG, S.A: v. The Argentine Republic (Decision of the Tribunal on the Preliminary Questions of Jurisdiction), ICSID Case No. ARB/03/10, 17 June 2005; Paragraph 31.

¹¹⁸ Idem. Paragraph 29.

¹¹⁹ RosInvestCo UK Ltd. V. The Russian Federation (award on Jurisdiction), Arbitration Institute of the Stockholm Chamber of Commerce, October, 2007.

compensation. It followed the ruling that submission to international arbitration was an important part of investor protection and that even though:

...the application of the MFN clause of Article 3 widens the scope of Article 8¹²⁰ and thus is in conflict to its limitation, this is a normal result of the application of MFN clauses, the very character and intention of which is that protection not accepted in one treaty is widened by transferring the protection accorded in another treaty.¹²¹

Following this logic the tribunal contemplated the distinction between substantive and procedural provisions regarding application to the MFN clause and found that it did not.

if it applies to substantive protection, then it should apply even more to “only” procedural protection.¹²²

3.2.4. Conclusion

To sum up this sub-chapter, there are many similarities in the facts and arguments referred to in these cases. First of all, many of them refer to claims that a negotiation period before referring the case to international arbitration is a violation of MFN treatment. The Respondents view is also that the MFN clause does not cover procedural rights if it does not explicitly say so.

¹²⁰ The article of dispute settlement.

¹²¹ RosInvestCo UK Ltd. V. The Russian Federation (award on Jurisdiction), Arbitration Institute of the Stockholm Chamber of Commerce, October, 2007. Paragraph 131.

¹²² Idem. Paragraph 132.

3.3. Post-Maffezini Cases Speaking Against the Maffezini Interpretation

The liberal interpretation was however not unchallenged. A couple of prominent cases took a more restrictive approach to MFN extensions. One was *Salini v. Jordan*.¹²³ The *Salini* case was one of the early cases, which could be seen marking the beginning of a trend in the restrictive application of the Maffezini doctrine.¹²⁴

3.3.1. *Salini v. Jordan*

It concerned a dispute that occurred during the construction of a dam in Jordan and dealt with the amount credit payable by the respondent, the Kingdom of Jordan, and the investment loss that resulted in the failure to repay those credits. The dispute was sent to ICSID arbitration, by the claimant, incorporated under Italian law, under the Italy-Jordan BIT.¹²⁵

The dispute settlement provisions in the basic treaty required the parties to negotiate an amicable solution to the dispute for six months where after, if no solution to the dispute could be found, the dispute could either go to domestic court or ICSID arbitration.¹²⁶

However, the basic treaty also stipulated that: “In case the investor and an entity of the Contracting Parties have stipulated an investment Agreement, the procedure

¹²³ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan* (Decision on Jurisdiction), ICSID Case No. ARB/02/13, 29 November 2004.

¹²⁴ Perera, Rohan; *The Most-Favoured-Nation Clause and the Maffezini case*; ILC Study Group on the MFN Clause; Paragraph 52.

¹²⁵ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan* (Decision on Jurisdiction), ICSID Case No. ARB/02/13, 29 November 2004; Paragraph 14-19.

¹²⁶ *Idem*. Paragraph 66.

foreseen in such investment Agreement shall apply.”¹²⁷ The investment agreement between the parties stated that any contractual dispute would be settled through amicable negotiation, which, if necessary, would be followed settlement in domestic court or if the parties agreed to it, the dispute would be referred to arbitration.¹²⁸

The Claimant submitted that they could rely on the MFN clause in the basic treaty to invoke the dispute settlement provisions in the US-Jordan BIT, which gave the investors the right to refer a dispute to ICSID arbitration “regardless of any clause in the investment agreement providing for a different dispute settlement mechanism.”¹²⁹

The claimant argued that under the MFN clause of the basic treaty stipulated that Italian investors were entitled to treatment no less favourable than the treatment extended to third States and added that the procedural provisions of a BIT are essential part of the protection of the rights of the investor.¹³⁰

Even though the Tribunal did not expressly disagree with the Maffezini doctrine, it voiced concerns regarding the extensive MFN interpretation held by the Maffezini Tribunal.¹³¹ It declined jurisdiction over the dispute based on the MFN clause and stated that:

*...the Claimants have submitted nothing from which it might be established that the common intention of the Parties was to have the most-favoured-nation clause apply to dispute settlement.*¹³²

¹²⁷ Idem.

¹²⁸ Idem. Paragraph 71.

¹²⁹ Idem. Paragraph 21.

¹³⁰ Idem. Paragraph 36.

¹³¹ Idem. Paragraph 114-115.

¹³² Idem. Paragraph 119.

It also stressed that its' case differed in the circumstances to Maffezini as the clause in question did not refer to *all matters*¹³³

3.3.2. Plama v. Bulgaria

The Plama case¹³⁴ stands in stark contrast to the Maffezini interpretation. It dealt with a dispute between a Cypriot investor and the Bulgarian government, concerning the claimed Bulgarian efforts to cause obstacles and material damages to a company owned by the investor.¹³⁵

The claimant argued jurisdiction to ICSID by invoking the MFN clause of the basic treaty, The Cyprus-Bulgaria BIT of 1987, and part V of the Energy Charter Treaty. The Bulgaria-Cyprus BIT was limited to ICSID arbitration of disputes concerning fixing the amount of compensation after Bulgarian courts had ruled on the merits of the underlying dispute. By relying on the MFN clause in the basic treaty, the claimant sought to overcome the limitations, by importing the dispute resolution provisions of the Bulgaria-Finland BIT, which provided for a wider jurisdiction.

The tribunal rejected the claimants requests and stated that judging from the history of Bulgarias trade negotiations, Bulgaria had favoured BIT's with limited protections for foreign investors and limited dispute settlement provisions.¹³⁶ From this the tribunal concluded that the contracting states had not intended the MFN provisions to incorporate more generous dispute settlement procedures from more recent Bulgarian

¹³³ Idem. Paragraphs 117-118.

¹³⁴ Plama Consortium Ltd v. Republic of Bulgaria, ICSID Case ARB/03/24, Decision on Jurisdiction, 8 February 2005.

¹³⁵ Idem. Paragraph 21.

¹³⁶ Idem. Paragraph 192 and 196.

BIT's.¹³⁷ It further declared that an agreement to arbitrate must be “clear and unambiguous”¹³⁸ and therefore, if an MFN clause was to be used to encompass an agreement to arbitrate found in another BIT, the parties’ intention to do so must also be clear and unambiguous.¹³⁹ Since it was not clear in the Bulgaria-Cyprus BIT as to what the intention of the parties was in this matter, the tribunal ruled that this requirement was not met. The Plama Tribunal also presented a sceptical view of arguments based on the principle of *expressio unius* by stating that it:

*...shows that in NAFTA and probably in the FTAA the incorporation by reference of the dispute settlement provisions set forth in other BITs is explicitly excluded. Yet, if such language is lacking in an MFN provision, one cannot reason a contrario that the dispute resolution provisions must be deemed to be incorporated. The specific exclusion in the draft FTAA is the result of a reaction by States to the expansive interpretation made in the Maffezini case. That interpretation went beyond what State Parties to BITs generally intended to achieve by an MFN provision in a bilateral or multilateral investment treaty.*¹⁴⁰

However the tribunal reasoned that even though the *expressio unius* principle may not apply, there is still a natural division between substantive rights and procedural rights, which might restrict the extension of the MFN standard into dispute settlement provisions.

Dispute resolution provisions in a specific treaty have been negotiated with a view to resolving disputes under that treaty. Contracting states cannot be presumed to have agreed that those provisions can be enlarged by

¹³⁷ Idem. Paragraph 193.

¹³⁸ Idem. Paragraph 198.

¹³⁹ Idem. Paragraph 200.

¹⁴⁰ Idem. Paragraph 203.

*incorporating dispute resolution provisions from other treaties negotiated in an entirely different context.*¹⁴¹

From this quote it seems also that the tribunal shared the view with many other ICSID tribunals that there are specially negotiated provisions in a treaty that can not be affected by the use of an MFN clause.

Based on this it would also seem that the tribunal did not agree with the decision of the Maffezini tribunal. However, the Plama tribunal agreed with the Maffezini court in that there is a need to make a distinction between a legitimate extension of rights and benefits through the operation of the MFN clause and disruptive treaty-shopping that would be disastrous for policy objectives reflected in specific treaty provisions.¹⁴²

The tribunal went further in this rationale and stated that instead of having many exceptions to the extension of the MFN standard there should only be one, mainly:

*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.*¹⁴³

The tribunal sympathized with the Maffezini court; in that the circumstances were unique and unprecedented, but clarified that because of this uniqueness the exceptions stated in Maffezini should not be treated as a statement of general principle guiding future tribunals in other cases where these special circumstances are not present.¹⁴⁴

¹⁴¹ Idem. Paragraph 207.

¹⁴² Idem. Paragraph 222-223.

¹⁴³ Idem. Paragraph 223.

¹⁴⁴ Idem. Paragraph 224.

3.3.3. Wintershall v. Argentine¹⁴⁵

Wintershall v. Argentine differs itself to the ruling in Siemens v. Argentina. In this case the claimant also sought to override a local remedies requirement before applying for arbitration, just as in Maffezini. However, the Tribunal in Wintershall concluded that unless clearly stated, the MFN clause did not apply to the treaty's dispute settlement provisions. In support of its decision the following arguments were made.

Firstly, the Tribunal argued that procedural provisions of a treaty were considered an offer made by the state concerning dispute resolution, which the investor is not forced to accept. If the investor decides to accept the offer, this acceptance can only be made for the entire agreement and not just individual elements. Since the local remedies requirement constituted a key component of the offer, it could not be bypassed.¹⁴⁶

*[The local remedies requirement] becomes a condition of Argentina's "consent" – which is, in effect, Argentina's "offer" to arbitrate disputes under the BIT, but only upon acceptance and compliance by an investor of the provisions inter alia of Article 10(2); an investor (like the Claimant) can accept the "offer" only as so conditioned.*¹⁴⁷

Secondly, the argument was made, much like in Plama, that the state's consent to resolve a specific dispute through arbitration must be explicit and could therefore not be inferred. The Tribunal concluded that this requirement is not met if the MFN

¹⁴⁵ Wintershall Aktiengesellschaft v. Argentine Republic, Award, ICSID Case No. ARB/04/14, December 8, 2008.

¹⁴⁶ Idem. Paragraph 160.

¹⁴⁷ Idem. Paragraph 116.

clause does not ‘unequivocally’ mention procedural provisions.¹⁴⁸ There is a distinction between making use of the best treatment provided for in another treaty and relying on an MFN clause in order to avoid procedural requirement, if this action was not explicitly provided for in the basic treaty.¹⁴⁹

Thirdly the tribunal referred to the third exception specified in the Maffezini verdict, stating that an investor cannot, on the basis of an MFN clause, demand to refer a dispute to a forum that is different than that provided for in the basic treaty.¹⁵⁰ Therefore the tribunal reasoned that replacing a jurisdiction provisions contained in the Germany-Argentina treaty with a provision in the USA-Argentina treaty specifying other dispute resolution for a was inadmissible.¹⁵¹

Fourthly, the tribunal seemed to uphold the *expressio unius* principle, when stating that the MFN clause was to be applied solely to the issues listed in the clause, and as a jurisdiction provision was absent therein, the MFN clause was not applicable to dispute settlement.¹⁵²

3.3.4. Conclusion

To conclude the Maffezini interpretation does not stand unchallenged. Many of the Tribunal in these cases have taken restrictive views on the scope of the MFN standard and stated general comments as to how the scope should be interpreted. It would seem that the arguments presented here are in conflict with the tribunals concurring with the Maffezini interpretation.

¹⁴⁸ Idem.

¹⁴⁹ Idem. Paragraph 168.

¹⁵⁰ Idem. Paragraph 173.

¹⁵¹ Idem. Paragraph 174.

¹⁵² Idem. Paragraph 163-164.

However, recently it has been suggested that this is an illusion. Looking at the cases *Plama v. Bulgaria* and *Maffezini v. Argentine* it would appear that they conflict. The *Maffezini* cases says that an MFN clause can be applied to overcome waiting periods and similar admissibility requirements.¹⁵³ In the *Plama* case the Tribunal stated that an MFN clause does not extend to dispute settlement provisions, except when the contracting parties have expressed a contrary interest. From this it has been suggested that a rule has emerged stating that an MFN clause can be used to overcome waiting periods and similar admissibility requirements, but not replace, in whole or in part, the dispute resolution mechanism provided in the treaty from which jurisdiction is based.¹⁵⁴ However as will be explained in chapter 4 this does not seem like a plausible assumption since this would bypass state parties consent to arbitration. In the following chapter the conflicting arguments seen in chapter 3 will be analysed in order to shed some light to the merits of them.

¹⁵³ *Emilio Agustin Maffezini v. Kingdom of Spain* (Decision of the Tribunal on Objections to Jurisdiction), ICSID Case No. ARB 97/7, 25 January 2000. (2002) 5 ICSID Rep. Paragraph 63.

¹⁵⁴ Kaufmann-Kohler, Gabrielle; 2006; *Arbitral Precedent: Dream, Necessity or Excuse?*; page 371.

Chapter 4

Conflicting Arguments

From the background chapter it seems that there are many conflicting arguments as to the real scope of the MFN standard. As noted by the UNCTAD:

*...There are strong arguments both for and against applying the MFN clause to dispute settlement. In the end, this issue may need further clarification by international investment jurisprudence.*¹⁵⁵

However, the jurisprudence concerning the application of the MFN clause to dispute settlement is not consistent,¹⁵⁶ and it might not be sure that a harmonization of this matter will be done quickly. In the subchapters below, the principal arguments will be analysed in order to attempt a clarification on the merits of them under international law.

¹⁵⁵ BILATERAL INVESTMENT TREATIES 1995-2006: TRENDS IN INVESTMENT RULEMAKING, UNCTAD/ITE/IIA/2006/5, UN Pub. New-York, Geneva, 2007; page 42.

¹⁵⁶ Rodriguez, Alejandro Faya; 2008; The Most-Favored-Nation Clause in International Investment Agreements A Tool for Treaty Shopping?; Page 101

4.1. Distinction Between Substantive and Procedural Matters

In *RosInvest v. Russia* the Respondent put forward the argument that there is a distinction between substantive and procedural matters in international contracts.¹⁵⁷ Therefore provisions that regulate substantive matters cannot be seen as similar to matters of procedural law. The argument is based on the idea that substantive questions are of a different legal nature than procedural questions. This means that the *ejusdem generis* principle prevents the two to be compared, thereby excluding MFN clauses referring to treatment to be applied to dispute settlement procedure.

“In the absence of language or context to suggest the contrary, the ordinary meaning of investment shall be accorded treatment no less favourable than that accorded to investments made by investors of any third state is that the investors substantive rights in respect of the investments are to be treated no less favourably than under a BIT between the host State and a third State, and there is no warrant for construing the above phrase as importing procedural rights as well”¹⁵⁸

This argument seems to be derived from the principle of severability of arbitration clauses in private international law, connoting that such clauses are of a different and separate legal quality than other obligations of a contract.¹⁵⁹ This principle is represented in Rome II.¹⁶⁰ Another example such division is found in the Convention on the Prevention and Punishment of the Crime of Genocide. In it, there is no possibility to make a reservation against a substantive obligation, such action would defeat the object and purpose of the convention. However there is a possibility to

¹⁵⁷ *RosInvestCo UK Ltd. V. The Russian Federation* (award on Jurisdiction), Arbitration Institute of the Stockholm Chamber of Commerce, October, 2007. Paragraph Paragraph 88.

¹⁵⁸ *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006, paragraph 92.

¹⁵⁹ Stern, Brigitte; 2011; *Impregilo S.p.A. v. Argentine Republic* (ICSID Case No. ARB/07/17); Concurring and Dissenting Opinion; page 8.

¹⁶⁰ Rome II Article 1 Paragraph 3.

make a reservation against the jurisdiction of the ICJ to decide on the responsibility of states for the violation of a substantive rule under article 9.¹⁶¹

Never the less, even though this approach has been given emphasis in some awards, there seem to be little authority upholding such division.¹⁶² Arguing that MFN clauses should not apply to dispute settlement mechanisms in general by just distinguish between substantive aspects and procedural aspects seems not completely satisfactory.

The tribunal in *Renta v. Russia* explained this predicament quite well:

“It may be that some international lawyers reflexively adopt the dichotomy of primary/secondary obligations made familiar by the international law commission. This might explain the temptation to consider “treatment” a matter of primary or substantive rules and thus distinct from “secondary” rules – such as remedies – in the event of a breach. ...There is no authority for the proposition that MFN is limited to “primary” rules. The established proper criterion is rather ejusdem generis.”¹⁶³

Moreover, it is recognized in several decisions that availability of arbitration is one of the more important parts of the “treatment” a foreign investor is looking for. Access to arbitration has been considered a jurisdictional protection “inextricably related”¹⁶⁴ to substantive treatment¹⁶⁵, “part of the treatment of foreign investors and

¹⁶¹ *Idem*. Page 9.

¹⁶² *Idem*. Page 8.

¹⁶³ *Renta 4 S.V.S.A et al. V. Russian Federation*, SCC No. 24/2007, Award on Preliminary Objection, 20 March 2009. Paragraph 99-100.

¹⁶⁴ *Emilio Agustin Maffezini v. Kingdom of Spain* (Decision of the Tribunal on Objections to Jurisdiction), ICSID Case No. ARB 97/7, 25 January 2000. (2002) 5 ICSID Rep. Paragraph 54.

¹⁶⁵ Stern, Brigitte; 2011; *Impregilo S.p.A. v. Argentine Republic* (ICSID Case No. ARB/07/17); Concurring and Dissenting Opinion; page 9.

investments”¹⁶⁶, “an integral part of the investment protection regime” or in itself “a substantive protection”.¹⁶⁷ As the Maffezini Tribunal reasoned “...dispute settlement arrangements ... [are] closely linked to material aspects of the treatment accorded.”¹⁶⁸

However, awards favouring the extension of dispute settlement provisions by an MFN clause, based on the comparability of substantive and procedural rights, have in most cases founded this conclusion on the jurisprudence from the *Ambatielos* claim.¹⁶⁹ Among the literature, it is disputed whether this case is a relevant reference.

In *Ambatielos*, The Commission of Arbitration affirmed that there is no general principle preventing an MFN clause from being applied to matters relating to the ‘administration of justice’¹⁷⁰. However in the context of the case the administration of justice was a procedural obligation to provide foreign nationals with ‘free access’ to the national courts of each contracting state.¹⁷¹ The MFN clause in the treaty was invoked to found a claim of denial of justice for prejudice in the English courts. The MFN clause was not invoked in respect of the jurisdiction of the international tribunal.¹⁷² “The jurisdiction of the Commission of Arbitration was simply not in issue”¹⁷³

¹⁶⁶ *Siemens A.G. v. The Argentine Republic* (Decision on Jurisdiction), ICSID Case No. ARB/02/8, 3 August 2004. Paragraph 102.

¹⁶⁷ *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, Separate Opinion of Arbitrator Pedro Nikken. Paragraph 57.

¹⁶⁸ *Gas Natural SDG, S.A. v. The Argentine Republic* (Decision of the Tribunal on the Preliminary Questions of Jurisdiction), ICSID Case No. ARB/03/10, 17 June 2005. Paragraph 31.

¹⁶⁹ *The Ambatielos Claim* (Greece v. United Kingdom of Great Britain and Northern Ireland), Award, Mar. 6, 1956, UNRIIAA, Vol. XII.

¹⁷⁰ *Idem*. Page 109.

¹⁷¹ Douglas, Zachary; 2010; *The MFN Clause in Investment Treaty Arbitration: Treaty Interpretation off The Rails*; page 102.

¹⁷² *Idem*.

¹⁷³ *Idem*.

This has been underscored by the tribunal in *Salini v. Jordan*, which stated that:

*“The Tribunal will observe that in this 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.” The solution adopted by the Arbitration Commission cannot therefore be directly transposed in this specific instance.”*¹⁷⁴

The Tribunal in *Plama v. Bulgaria* took the same standpoint and maintained that the *Ambatielos* “ruling relates to provisions concerning substantive protection in the sense of denial of justice in the domestic courts. It does not relate to the import of dispute resolution provisions of another treaty into the basic treaty.”¹⁷⁵

Therefore it seems that the assimilation of substantive and procedural provisions in *Maffezini v. Spain* and later concurring awards, based on the findings in *Ambatielos* is not reliable. However, the question still remains: if the term ‘treatment’ is in itself wide enough to be applicable to procedural matters such as dispute settlement, which seems to be a perception by many tribunals, can substantive and procedural provisions still be considered to be incomparable in the application of the principle of *ejusdem generis* principle?

Maybe an approach to answer this question is found in *RosInvest v. Russia*. In that case the Tribunal asked whether the term ‘treatment’ included the protection by an arbitration clause. The Tribunal found that while protection by an arbitration clause

¹⁷⁴ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan* (Decision on Jurisdiction), ICSID Case No. ARB/02/13, 29 November 2004. Paragraph 112.

¹⁷⁵ *Plama Consortium Ltd v. Republic of Bulgaria*, ICSID Case ARB/03/24, Decision on jurisdiction, 8 February 2005. Paragraph 215.

was a highly relevant aspect of treatment, it does not directly affect investments.¹⁷⁶ The Tribunal further stipulated that the interpretation in regards to investors is inverted, stressing on the other hand that this interpretation only applied to unspecified MFN clauses and that enumerations of investor's situations in an MFN clause rendered the dispute settlement mechanism absent.¹⁷⁷

This means that in the Tribunals view, when an MFN clause only refers to investments it should not cover dispute settlement mechanisms, because procedural rights can only benefit investors. However, this distinction was rejected in *Siemens v. Argentine*, which stated that:

“For purpose of applying the MFN clause, there is no special significance to the differential use of the term investors or investments in the treaty... [since] ... treatment of the investment includes treatment of the investors.”¹⁷⁸

The Tribunal in *Plama v. Bulgaria* concurred and asserted that it did “...not attach a particular significance to the use of the different terms”¹⁷⁹ This is also the view of the ILC which made no substantive distinction between the two in its draft articles.¹⁸⁰ This seems to point towards the assumption that such distinction is irrelevant from a legal standpoint.

¹⁷⁶ *RosInvestCo UK Ltd. V. The Russian Federation* (award on Jurisdiction), Arbitration Institute of the Stockholm Chamber of Commerce, October, 2007. Paragraph 128.

¹⁷⁷ Stern, Brigitte; 2011; *Impregilo S.p.A. v. Argentine Republic* (ICSID Case No. ARB/07/17); Concurring and Dissenting Opinion. Paragraph 41.

¹⁷⁸ *Siemens A.G. v. The Argentine Republic* (Decision on Jurisdiction), ICSID Case No. ARB/02/8, 3 August 2004. Paragraph 92.

¹⁷⁹ *Plama Consortium Ltd v. Republic of Bulgaria*, ICSID Case ARB/03/24, Decision on jurisdiction, 8 February 2005. Paragraph 190.

¹⁸⁰ International Law Commission; 1978; Draft Articles on Most-Favoured-Nation Clauses with Commentaries; article 5.

4.2. Distinction Between Objective and Teleological Interpretation

In the cases summarised above there is one striking feature that is present in all of them. The parties' intention concerning the MFN clause applicability to dispute settlement provision is not specifically stated or clearly determined. However in many BIT's this is not the case. Taking the UK Model BIT as an example, the MFN clause found under article 3(3) states that:

*For avoidance of doubt MFN treatment shall apply to certain specified provisions of the BIT including the dispute settlement provision.*¹⁸¹

Other states have taking the opposite position such as the Free Trade of the Americas draft explicitly stating that:

*The parties note the recent decision of the arbitral tribunal in the Maffezini (Arg.) v. Kingdom of Spain, which found an unusually broad most favoured nation clause in an Argentina-Spain agreement to encompass international dispute resolution procedures. ... By contrast, the Most-Favoured-Nation Article of this Agreement is expressly limited in its scope to matters "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments" The Parties share the understanding and intent that this clause does not encompass international dispute resolution mechanisms...*¹⁸²

Another example is found in the Norweigan Model BIT which points out that the MFN clause:

¹⁸¹ Dolzer, Rudolf, Schreuer Christoph; 2008; Principles of International Investment Law; page 378.

¹⁸² Free Trade of the Americas draft of 21 November 2003, footnote 13.

*...does not encompass dispute resolution mechanisms provided for in this Agreement or other International Agreements.*¹⁸³

Due to the lack of these explicit provisions in the above-mentioned cases there is a need to interpret the meaning and scope of the MFN clause. As the cases stand testament to, this interpretation is difficult. To quote Richard Gardiner, “treaty interpretation is an art.”¹⁸⁴ This means that there is no universal tool for interpretation, only guidelines. To aid in such effort the International Law Commission created the draft articles on MFN in 1978. However, the draft articles provide limited guidance on the question of the application of the MFN standard in investment law. Under draft article 9, a beneficiary State acquires only those rights, which fall within the subject matter of the MFN clause. However determining the subject matter is the question that often breaks the line of the application of the standard.

In order to find the meaning of a treaty, the interpreter has to find the terms of the treaty, the context of those terms, and the object and purpose of the treaty. The Vienna Convention defines context as “any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty”¹⁸⁵ as well as “any instrument made by one or more parties...and accepted by the other parties...” Furthermore, the interpreter has to take into account any relevant subsequent agreement and practice of the parties as well as relevant principles of international law.¹⁸⁶

Within traditional legal doctrinal criticism there is customary a distinction between teleological, subjective and objective interpretation. These schools are all represented under article 31 of the 1969 Vienna Convention of the Law of Treaties. Therefore

¹⁸³ Norway Model BIT 2007. Paragraph 4(3).

¹⁸⁴ Gardiner, Richard; 2008; *Treaty Interpretation*; page 5.

¹⁸⁵ VCLT Article 31(2).

¹⁸⁶ VCLT Article 31(3).

from the perspective of VCLT there is no reason to criticize tribunals for relying on any of these schools when interpreting the scope of the MFN clause. Under article 42 of the ICSID Convention, a tribunal shall decide a dispute in accordance with the rules that the parties of the dispute has agreed on. This general statement does not give the tribunals much guidance on how to approach interpretive issues.

4.2.1. Objective Interpretation

Looking at the ordinary meaning of the term *in all matters governed by the present Agreement*¹⁸⁷ in the Maffezini MFN clause, the perception is that all of the matters that the BIT deals with are included and that the application is not restricted by limitations. This is the interpretation that the Maffezini made. The phrase *all matters* do not seem ambiguous. *All matters* would suggest that it does incorporate dispute settlement provisions. Still, when the tribunal in Wintershall was faced with the same expression it stated that:

*Even words like ‘all matters relating to [...]’ in an MFN clause may not be sufficient to extend such clause to the dispute resolution provisions of the BIT.*¹⁸⁸

From an objective standpoint the actual wording used in an MFN treatment clause matters and a broad wording cannot be simply discarded by an arbitral tribunal. As supported by the VCLT the parties have the freedom to contract¹⁸⁹ and the text of the treaty must be taken at its ”face value”.¹⁹⁰

¹⁸⁷ Emilio Agustin Maffezini v. Kingdom of Spain (Decision of the Tribunal on Objections to Jurisdiction), ICSID Case No. ARB 97/7, 25 January 2000. (2002) 5 ICSID Rep. Paragraph 38.

¹⁸⁸ Wintershall Aktiengesellschaft v. Argentine Republic, Award, ICSID Case No. ARB/04/14, December 8, 2008. Paragraph 186.

¹⁸⁹ VCLT Preamble, Paragraph 3.

¹⁹⁰ Wintershall Aktiengesellschaft v. Argentine Republic, Award, ICSID Case No. ARB/04/14, December 8, 2008. Paragraph 85.

Never the less, even though an objective interpretation would allow you to extend an MFN clause to dispute settlement, there is still an issue that many of the tribunal seemed to have missed to assess, namely if the treatment is more favourable. Surely one could make the assumption that having the choice to refer your case to arbitration is better than not having it referred and instead having to resort to domestic courts. Still, as seen in Wintershall:

*A less favourable provision in a basic treaty as compared to a provision in a third party treaty is not to be assumed or presumed. It must be proved.*¹⁹¹

Furthermore, considerations have to be made, which both the tribunals in Maffezini and Plama pointed out, when an interpretation leads to a result, which is manifestly absurd or unreasonable.¹⁹² Under the Maffezini interpretation the conditioned consent to arbitration on an exhaustion of local remedies requirement, which is allowed under the ICSID Convention,¹⁹³ could not be bypassed¹⁹⁴. However a condition of local remedies during a certain time period could under the same interpretation be bypassed. It would seem that such interpretation would be categorized as absurd and unreasonable. As Zachary Douglas puts it: “The Maffezini decision represents a point of departure from the existing conception of the function of MFN clauses in international law.”¹⁹⁵

¹⁹¹ Wintershall Aktiengesellschaft v. Argentine Republic, Award, ICSID Case No. ARB/04/14, December 8, 2008. Paragraph 61.

¹⁹² VCLT Article 32.

¹⁹³ ICSID Convention Article 26.

¹⁹⁴ Emilio Agustin Maffezini v. Kingdom of Spain (Decision of the Tribunal on Objections to Jurisdiction), ICSID Case No. ARB 97/7, 25 January 2000. (2002) 5 ICSID Rep. Paragraph 64.

¹⁹⁵ Douglas, Zachary; 2010; The MFN Clause in Investment Treaty Arbitration: Treaty Interpretation off The Rails; page 102.

4.2.2. Teleological Interpretation

As previously stated above, from the perspective of VCLT there is no reason to criticize tribunals for relying on any of the three basic methods of interpretation, when interpreting the scope of the MFN clause. However, as Sir Ian Sinclair declares:

*There can be no common intentions of the parties aside or apart from the text they have agreed upon.*¹⁹⁶

Still, treaty interpretation does not take place in a vacuum.¹⁹⁷ Strict textual interpretation as is problematic, especially in pluralistic legal systems. This is an observed fact in the legal order of the European Union (EU),¹⁹⁸ where “...pluralism tends to increase the textual ambiguity of legal provisions and to enhance the potential for conflicting legal norms.”¹⁹⁹

In the context of the European Union, the plurality stems from the different official languages and legal traditions of the individual member states.²⁰⁰ This is in correlation to what international investment law also faces. Since the official languages of the European Union all carry the same legal value and the textual interpretation may produce different results depending on the linguistic version of a rule, a teleological interpretation is a more suitable form of guaranteeing a uniform application of EU law.²⁰¹ A teleological approach may also create more value in the context of

¹⁹⁶ Ian Sinclair; 1984; *The Vienna Convention on the Law of Treaties*; page 324 130.

¹⁹⁷ International Law Commission, Report of the Working Group, A/CN.4/L.719 (20 July 2007); page 12.

¹⁹⁸ Maduro, Miguel Poiares; 2007; *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism*; page 8.

¹⁹⁹ *Idem.*

²⁰⁰ *Idem.*

²⁰¹ *Idem.*

jurisprudence, since it not only provides a specific legal outcome for the case at hand, but also offers a wider normative guidance or understanding for future cases.²⁰²

Another relationship between international investment law and EU law is the normative pluralism, which creates textual ambiguity.²⁰³ What is meant by that is that agreements might be reached on the basis of different normative assumptions. Even though this criticises the results a textual analysis might result in, this criticism can equally be applied to a teleological approach. This was emphasised by the Plama Tribunal, which stated that:

[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 parties²⁰⁴

Nothing is to say that a teleological approach in general will not give an ambiguous result, also in a pluralistic legal system. However, a teleological approach is still bound by legal reasoning and the limits imposed by the text, but are prevented from a textual manipulation of a legal rule, since a teleological interpretation looks for the goal of a provision.²⁰⁵

The Advocate General of Court of Justice of the European Communities argued that when a court is investigating the meaning of an ambiguous provision, the court must

²⁰² Idem.

²⁰³ Idem. Page 9.

²⁰⁴ Plama Consortium Ltd v. Republic of Bulgaria, ICSID Case ARB/03/24, DEcision on jurisdiction, 8 February 2005. Paragraph 193.

²⁰⁵ Idem.

decide the case on what it perceives as the underlying normative foundation and that this is the only way these questions could be legally solved.²⁰⁶ To put it to the point:

*In the context of ambiguous or conflicting provisions, telos signifies an higher constrain than pure reference to wording or intent. It binds courts to a consistent normative reading of those provisions.*²⁰⁷

Within treaty interpretation one can distinguish between an effective interpretation and a restrictive interpretation. An effective interpretation can be associated with a teleological approach since an effective interpretation looks for the understanding that would fulfil the objectives of a provision or a treaty.²⁰⁸ In contrast a restrictive interpretation favours the interpretation the best protects the sovereignty of the parties to a treaty.²⁰⁹ In the case *Berschader v. Russia* the Tribunal reasoned whether a restrictive or an effective interpretation would provide the most accurate outcome and stated that:

*“...while it may be true that no general principle exists, according to which arbitration agreements should be construed restrictively, particular care should nevertheless be exercised in ascertaining the intentions of the parties with regard to an arbitration agreement which is to be reached by incorporation by reference in an MFN clause”*²¹⁰

²⁰⁶ Maduro, Miguel Poiares; 2007; *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism*; page 10.

²⁰⁷ *Idem*.

²⁰⁸ Fauchald, Ole Kristian; 2008; *The Legal Reasoning of ICSID Tribunals – An Empirical Analysis*; page 317.

²⁰⁹ *Idem*.

²¹⁰ *Vladimir Berschader and Moise Berschader v. Russian Federation*, SCC Case No. 080/2004, Award of April 12, 2006. Paragraph 178.

When exploring the goal of the MFN standard, the argument can be made that the MFN standard is an explicit obligation with an explicit scope. As stated above it seems that this statement is supported in the ILC's draft articles as well as many Tribunals. From article 31:4 of VCLT:

*A special meaning shall be given to a term if it is established that the parties so intended.*²¹¹

As affirmed by the Tribunal in *Berschader*, “the expression ‘all matters covered by the present Treaty’ certainly cannot be understood literally.”²¹² In *Tecmed*, the tribunal declared that matters relating to “the access of foreign investor to the substantive provisions ... cannot ... be impaired by the principle contained in the most favored nation clause.”²¹³ From this it would seem that a teleological method of interpretation would provide a better instrument for the investigation of the special meaning and scope of the MFN standard.

Within the reach of this thesis, two different contentions can be made from a teleological interpretation of the MFN standard and its applicability to procedural provisions. Firstly, the argument can be made that there is a distinction between procedural law and substantive law, based on the argument that there is a distinction between rights and fundamental conditions for access to the rights under international law. Secondly, the argument can be made that the jurisprudence from international trade law, suggests that the intention of the MFN standard is only to afford more favourable treatment if there is a material disadvantage from not being extended the same treatment. These contentions will be discussed in chapter 4.4.2.

²¹¹ VCLT Article 31 Paragraph 4.

²¹² Vladimir Berschader and Moise Berschader v. Russian Federation, SCC Case No. 080/2004, Award of April 12, 2006. Paragraph 192.

²¹³ *Tecnicas Mediorubientales Tecmed SA v The United Mexican States*, ICSID case NO. ARB(AF)/00/2, Award of May 29, 2003. Paragraph 69.

4.3. Consideration Regarding Specially Negotiated Provisions

Does the MFN rule alter arrangements specifically made by the parties? This was the question that the Tribunal in *Plama v. Bulgaria* contemplated. The argument was made that the MFN clause was a specially negotiated provision and therefore could not be fit for an extensive interpretation. The Tribunal laid great emphasis on this. The rationale behind the argument is the idea that there are some matters in a contract that are more important to the parties than other such as dispute resolution provisions, and that there is a ‘giving and taking’ situation taking part during the negotiations of the contract. The end results, being an agreement of the terms, are therefore a result of weighing and balancing these special provisions until an agreeable equilibrium is reached. By interpreting the MFN clause extensively, the argument is made that this equilibrium is disturb, thereby acting against the wishes and intentions of the parties. This was one of the main principles that the Maffezini tribunal set out in its award.

*As a matter of principle, the beneficiary of the clause should not be able to override public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in question, particularly if the beneficiary is a private investor, as is often the case.*²¹⁴

This statement was affirmed in *Tecmed v. Mexico*. In that case, the Tribunal reasoned that there are provisions in a treaty, which have a decisive role in the acceptance of a treaty. These provisions should be seen as specially negotiated by the contracting parties. Altering or replacing these provisions through the MFN clause would affect the ‘general equilibrium’ of the treaty, and would manifest contrary to the intention of the parties.²¹⁵

²¹⁴ Emilio Agustin Maffezini v. Kingdom of Spain (Decision of the Tribunal on Objections to Jurisdiction), ICSID Case No. ARB 97/7, 25 January 2000. (2002) 5 ICSID Rep. Paragraph 62.

²¹⁵ *Tecnicas Mediorubientales Tecmed SA v The United Mexican States*, ICSID case NO. ARB(AF)/00/2, Award of May 29, 2003. Paragraph 69.

However, while this argument seems plausible, it lacks several important aspects for it to endure serious empirical scrutiny. First of all, such logic presents severe interpretative difficulties, such as how to deduce which provisions of a contract that actually holds this status. In the cases summarized, the MFN clauses have all been generally or vaguely formulated, whereby the main difficulty has been to interpret the wishes and intentions of the parties. While many of the Tribunals have stated that there is a need to establish the ‘true intention of the parties’, the approach these Tribunal have taken to ascertain this intention seems mixed and subjective.²¹⁶ The problem becomes even more complex, when reasoning as to whether the parties at the time of the agreement to the terms had foreseen the question of the expansion of jurisdiction through the invocation of the MFN clause. Therefore this argument holds little scrutiny when arguing that dispute resolution provisions are more important than other matters of a contract since such ideas have not been explicated in any of the case analysed for this paper.

Secondly, the custom of Model BIT indicates that there is not any extensive negotiation taking place when forming a BIT.²¹⁷ As Christoph Schreuer testified in *Wintershall v. Argentine*:

*[BIT's] are very often not negotiated at all, they are just being put on the table, and I have heard several representatives who have actually been active in this Treaty-making process, if you can call it that, say that, 'We had no idea that this would have real consequences in the real world'.*²¹⁸

²¹⁶ Perera, Rohan; ;The Most-Favoured-Nation Clause and the *Maffezini case*; Paragraph 104.

²¹⁷ *Wintershall Aktiengesellschaft v. Argentine Republic*, Award, ICSID Case No. ARB/04/14, December 8, 2008. Paragraph 85.

²¹⁸ *Idem*.

Thirdly, State parties intend to write what they write. What is meant by that is that states are doubtfully careless when incorporating international arbitration mechanisms and negotiating the scope of them. The principle of interdependency of provisions within a treaty²¹⁹, would suggest that there is no normative hierarchy within a treaty.²²⁰ Therefore it would seem that the negotiations prior to arriving at an agreed text does not affect the legal significance of each clause. This was further affirmed by the Siemens v. Argentine tribunal.²²¹

4.3.1. Considerations Regarding State's Consent to Arbitration

Even though the general argument concerning specially negotiated provisions seems implausible from a legal standpoint, one aspect of this argument needs to be addressed, namely a states consent to arbitration.

Under article 25, paragraph 1 of the ICSID convention the parties need to consent to arbitration in order for the arbitration tribunal to have jurisdiction to decide the dispute. This originates in the principle of *ratione voluntatis*. It is one of the four cornerstones²²² of assessing jurisdiction in international law and states that a contracting party must consent to a jurisdiction.²²³ In international law there is not inherent *locus standi* droit.²²⁴ This means that no actor on has an innate right to access dispute settlement recourse on the international level.

²¹⁹ *AAPL v. Government of Sri Lanka* (Award), ICSID Case No. ARB/87/3. Paragraph 41.

²²⁰ Perera, Rohan; ;The Most-Favoured-Nation Clause and the *Maffezini case*; Paragraph 104.

²²¹ *Siemens A.G. v. The Argentine Republic* (Decision on Jurisdiction), ICSID Case No. ARB/02/8, 3 August 2004. Paragraph 106.

²²² The others being *ratione personae* (subject jurisdiction, in international investment law this is usually states or investors), *ratione materiae* (subject matter jurisdiction) and *ratione temporis* (jurisdiction within the time limits of a certain litigation on an action) See: *Phoenix Action v. Czech Republic*, ICSID Case No. ARB/06/5. Paragraph 54 and Amr, Mohamed Sameh M.; 2003; *The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations*; page 196-197.

²²³ *Phoenix Action v. Czech Republic*, ICSID Case No. ARB/06/5. Paragraph 54.

²²⁴ Stern, Brigitte; 2011; *Impregilo S.p.A. v. Argentine Republic* (ICSID Case No. ARB/07/17); Concurring and Dissenting Opinion. Paragraph 45.

The ICJ in Portugal v. Austria recognized this principle in the case concerning East Timor where it stated that: “the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things”²²⁵ A few years later the ICJ clarified this statement in Democratic Republic of Congo v. Rwanda

*The Court observes, however, as it has already had occasion to emphasize, that “the erga omnes character of a norm and the rule of consent to jurisdiction are two different things” (East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995, p. 102, para. 29), and that the mere fact that rights and obligations erga omnes may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute. The same applies to the relationship between peremptory norms of general international law (jus cogens) and the establishment of the Court’s jurisdiction: the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court’s Statute that jurisdiction is always based on the consent of the parties.*²²⁶

Within ICSID arbitration this consent may be expressed broadly or restrictively such as incorporating conditions of exhaustion of local remedies or waiting periods, and allowing for all claim or certain claims.²²⁷ This means that consent is given under certain conditions. This view is represented in the commentaries to the Draft Articles on Most-Favoured-Nation Clauses, which state that:

²²⁵ Case Concerning East Timor (Portugal v. Austria), ICJ Reports 1995, Judgement of June 30 1995. Paragraph 29.

²²⁶ *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, ICJ Reports 2006, Judgment of 3 February 2006. Paragraph 60-61.*

²²⁷ See: ICSID Convention Article 25.

*The essence of the rule is that the beneficiary of a most-favoured-nation clause cannot claim from the granting State advantages of a kind other than that stipulated in the clause. For instance, if the most-favoured nation clause promises most-favoured-nation treatment solely for fish, such treatment cannot be claimed under the same clause for meat.*²²⁸

However, even though consent to ICSID arbitration can be expressed broadly or restrictively the tribunal in *Plama v. Argentine* reasoned that if the qualifying conditions expressed by the state for it to give its consent, are not fulfilled there is no consent.²²⁹ To quote Arbitrator Brigitte Stern:

*An MFN clause cannot enlarge the scope of the basic treaty's right to international arbitration, it cannot be used to grant access to international arbitration when this is not possible under the conditions provided for in the basic treaty.*²³⁰

When the tribunal in *Wintershall v. Argentine* was presented by the question if MFN treatment could be applied to dispute settlement provisions in order to bypass an 18-month local remedies requirement, they declared that it could not.²³¹ It argued that even though the word 'treatment' possibly could involve protection of an investment be the investor through ICSID arbitration, the primary concern was whether this requirement was part of Argentina's offer for ICSID arbitration.²³² The tribunal

²²⁸ This was stated for example in the Commentary on Article 9 of the Draft Articles on Most-Favoured- Nation Clauses with commentaries, 1978, *ILC Report* Vol. II, Part 2, A/CN.4/SER.A/1978/Add.1 (Part 2), p. 30:

²²⁹ *Plama Consortium Ltd v. Republic of Bulgaria*, ICSID Case ARB/03/24, DEcision on jurisdiction, 8 February 2005. Paragraph 227.

²³⁰ Stern, Brigitte; 2011; *Impregilo S.p.A. v. Argentine Republic* (ICSID Case No. ARB/07/17); Concurring and Dissenting Opinion; Paragraph 80.

²³¹ *Wintershall Aktiengesellschaft v. Argentine Republic*, Award, ICSID Case No. ARB/04/14, December 8, 2008. Paragraph 162.

²³² *Idem*.

concluded that it was and that this offer must be accepted by the investor with the terms intact.²³³ It stated that the principle of state consent was a fundamental principle of international law and as such state consent could not be presumed.²³⁴ This was further laid down in the Lotus case in which the tribunal stated that a presumed consent would not be regarded as sufficient because any restriction upon the independence of a state not previously agreed to cannot be presumed by the courts.²³⁵

It would seem that a jurisdictional clause is often a complex arrangement, with various requirements and interests being contemplated and balanced. As underscored by the legal doctrinal literature:

...It is essential when applying an MFN clause to be satisfied that the provisions relied upon as constituting more favourable treatment in the other treaty are properly applicable, and will not have the effect of fundamentally subverting the carefully negotiated balance of the BIT in question. It is submitted that this is precisely the effect of the heretical decision of the Tribunal on objections to jurisdiction in Maffezini v Spain.

...

*It is not to be presumed that this can be disrupted by an investor selecting at will from an assorted menu of other options provided in other treaties, negotiated with other State parties and in other circumstances.*²³⁶

Therefore it would seem that extending the scope of the MFN clause into dispute settlement provisions would offset this complex arrangement and produce an award

²³³ Idem.

²³⁴ Idem. 160(3).

²³⁵ Permanent Court of International Justice; The Case of the S.S. "Lotus" (France v. Turkey), Series A, No. 10 (1927), Paragraph 18.

²³⁶ Stern, Brigitte; 2011; Impregilo S.p.A. v. Argentine Republic (ICSID Case No. ARB/07/17); Concurring and Dissenting Opinion; Paragraph 107.

that constitutes an unreasonable result. Under VCLT article 32(b) it appears that such interpretation would violate international law.

4.3.2. Consideration Regarding Legal Certainty

One of the profound concerns listed in the Maffezini award to the extension of the MFN clause into dispute settlement provisions was the risk of treaty shopping. In the decision in *Siemens v. Argentine* the tribunal rejected the respondents argument that, if the claimant was entitled to import the advantageous aspects of the dispute resolution provisions of the Argentine-Chile BIT, then it should be required to import the disadvantageous aspects of those provisions as well. In that case the disadvantageous provisions included a ‘fork-in-the-road’ provision, which was absent in the basic treaty. The tribunal reasoned that even though the disadvantages may have been a trade-off for the claimed advantages, an MFN clause could only attract more favourable treatment. This means that the more favourable jurisdictional clause as a whole will not be incorporated in the basic treaty, but an investor can pick and choose aspects of a jurisdictional clause, which appears more favourable.²³⁷ It appears that this decision opened the door for an investor to combine different dispute resolutions to suit the individual circumstances of each case. What this means is that the legal predictability to know what obligations a party takes on when signing a BIT with an MFN clause could be greatly reduced.

Add to this the conflicting arbitral decisions, with different awards being rendered for some times very like factual circumstances²³⁸, the legal predictability that would be required in international business transaction appears seriously threatened.

²³⁷ Stephen Fietta, *Most Favoured Nation Treatment and Dispute Resolution under Bilateral Investment Treaties: a Turning Point?*, *Int.A.L.R.*, 2005, page 135.

²³⁸ *Wintershall Aktiengesellschaft v. Argentine Republic*, Award, ICSID Case No. ARB/04/14, December 8, 2008. Paragraph 177.

From the ILC it can be denoted that how an interpreter approaches an MFN clause will depend in part on how the interpreter views the nature of MFN clauses. If MFN clauses are seen as having the objective of promoting non-discrimination and harmonization, then a treaty interpreter may consider that the very purpose of the clause is to permit and indeed encourage treaty shopping. An interpreter, who sees an MFN clause as having the economic purpose of allowing competition to proceed on the basis of equality of opportunity, might be more inclined to favour a substantive/procedural distinction in the interpretation of an MFN provision.²³⁹

Under the ICSID system there is no mechanism for promoting certainty and predictability.²⁴⁰ Still, past decisions are cited by parties and even though tribunals are not bound by these decisions²⁴¹, many use them as guidance when analysing legal questions. However, even though it would be hard to argue that any dispute settlement does not involve risk and there is always an element of uncertainty in an answer to a legal question, the central question one might ask is whether arbitration is risky for the parties?

Frank Spoorenberg and Jorge E. Viñuales suggest that the risk might be associated with what the parties of an IIA expect from international arbitration. The main utilizers of international arbitration do not value legal certainty and predictability as much as other aspects that this form of dispute settlement has to offer. As Spoorenberg and Viñuales puts it:

The main users of international arbitration proceedings may not be willing to enhance legal certainty and the predictability of the procedures' outcomes if

²³⁹ International Law Commission; Most-Favoured-Nation Clause, Report of the Working Group; A/CN.4/L.719; 20 July 2007; page 12.

²⁴⁰ Wintershall Aktiengesellschaft v. Argentine Republic, Award, ICSID Case No. ARB/04/14, December 8, 2008. Paragraph 177.

²⁴¹ ICSID Convention Article 42.

*that considerably impairs the confidentiality, flexibility and expediency which the international arbitration system is expected to provide.*²⁴²

Today there are different techniques to counteract an unwanted arbitration decision such as annulment proceedings under article 52 of ICSID or challenges under domestic law to name a few.²⁴³

Never the less, even though legal certainty appears not to be valued higher than other aspects of international arbitration, it can not be a desirable situation to not be able to predict your legal obligations when incorporating an MFN clause in your BIT. With the formation of the New York Convention, an arbitral award has basically become universally enforced. Adding to this the continued development of BIT agreements between nations, it could be perceived that the core values for using international arbitration would change.

However, in a discussion paper presented by the ICSID Secretariat in 2004 the institution stated that one of its goals is to foster coherence and consistency in its case law.²⁴⁴ As stated in *M.C.I. v. Ecuador*:

*The responsibility for ensuring consistency in the jurisprudence and for building a coherent body of law rests primarily with the investment tribunals.*²⁴⁵

In the end consistency in international arbitration awards is important in two aspects. Firstly, it is argued that a rule of law is only a rule of law if it is consistently applied

²⁴² Spoorenberg, Frank and Viñuales, Jorge E.; 2009; *Conflicting Decisions in International Arbitration*; page 109.

²⁴³ *Idem*. Page 111.

²⁴⁴ ICSID; 2004; POSSIBLE IMPROVEMENTS OF THE FRAMEWORK FOR ICSID ARBITRATION; Paragraph 21.

²⁴⁵ *M.C.I. v. Ecuador*, Decision on the Application for Annulment, Paragraph 24.

in order to be predictable.²⁴⁶ This might not be a plausible assumption in international arbitration law though, since the very structure of arbitration tribunal is *ad hoc*, meaning that the tribunal itself is only formed to deal with one particular case. A second argument that seems to stand more ground is of a political nature. Inconsistency in arbitration awards creates uncertainty and damages legitimate expectations of investors and states.²⁴⁷ Investors might find that the structures they have made to their investment in a manner to take advantage of coverage's afforded under investment treaties, does not suddenly provide the expected benefits. In the same manner, might states find themselves in a position to explain to taxpayers why they are subject to damage awards for several hundreds of million of dollars in one case, but not in another.²⁴⁸

²⁴⁶ Kaufmann-Kohler, Gabrielle; 2006; *Arbitral Precedent: Dream, Necessity or Excuse?*; page 374.

²⁴⁷ Franck, Susan D; 2005; *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*; page 1558

²⁴⁸ *Idem*.

Chapter 5

Conclusion

To conclude it is hard to give a general statement as to how far the extent of the MFN standard reaches in international investment agreements. The cases analysed in this thesis demonstrate the difficulty to ascertain the true intention of the parties. Partly the reasons for the inconclusiveness are mainly rooted into the division of right where on one hand the parties have a freedom to contract which means the parties are free to draft and contract MFN clauses in almost endless ways. On the other hand there are principles of international law that cannot be ignored and that may conflict with this freedom.

The sources available however are inconclusive. The ILC's draft articles on the MFN standard were written before the problem of the application of the standard to dispute settlement provisions presented.

The provisions in bilateral investment treaties are not uniform both concerning the substantive protection of investors and investors' possibilities to settle disputes with the host state. The large number of treaties with varying substantive and procedural standards has created a particular challenge to the question of the scope of MFN clauses. Especially the applicability of MFN clauses to dispute settlement mechanisms has recently given rise to interpretative problems since the diversity of

provisions concerning dispute settlement conflicts with the MFN principle, which generally requires that all investors be treated equally.

As mentioned earlier, legal interpretation is not an exact science. This might seem obvious but it reflects that the diverging outcomes witnessed in this thesis could not be a systematic error but only a diverging interpretation. However in this thesis I have an analogy to how the MFN standard is interpreted in international trade law in order to see if it is reasonable to expect an MFN clause to be interpreted as liberal as to extend to dispute settlement provisions. It would seem that it is not if the clause does not explicitly state that it in fact does extend to dispute settlement provisions as in the case of the United Kingdom model BIT. An analogy suggests that, even though the intentions of the parties might be interpreted to have the MFN standard to extend to dispute settlement provisions, it is not reasonable to expect this. The reasons for this are firstly, that an extension would violate a state party's consent to arbitration. Secondly, within international trade law, there exists a separation between substantive and procedural provisions, which seems to form a norm that the MFN standard only applies to substantive matters. Thirdly, a two-tier comparison must be successful in order for a violation of MFN treatment to occur. This means that the mere fact of a difference in treatment does not seem to be enough in order for a violation to occur. Instead the difference in treatment must result in a competitive disadvantage for a breach of the MFN standard to occur.

In the beginning of this paper I set out four research questions, namely:

- Can the standard of Most-Favoured-Nation treatment be applied to international investment arbitration procedural provisions?

The jurisprudence partly shows that it can be extended to procedural provisions. It is however far from conclusive. In the cases where this has been possible an objective interpretation of the individual clause seems to have been the method for reaching such a result. In the cases where it has not been possible to extend the MFN clause to dispute settlement provisions a teleological interpretation seems to have been the main guiding tool. However a more important question dealt with in this thesis is:

- Does an extension to procedural provisions defeat the object and purpose of the MFN standard?

This question is of course very much connected to the first question. The analysis of this paper argues that an extension does not seem to conclusively suggest that it does defeat the object and purpose of the MFN standard since the purpose of the standard seems to be to prevent discrimination against foreign investors and since a difference in treatment, in regards to different dispute settlement provisions, might be a sign of discrimination between foreign investors, an mfn application to neutralize this might be within the object and purpose of the standard.

However, a more important question rising out of the investigation of this question might instead be if it is reasonable for the parties to expect that an MFN clause does extend to dispute settlement provisions if it does not explicitly say so. An analogy to international trade law suggests that it is not reasonable to expect this. This position was affirmed in *Plama v. Bulgaria* for instance.

- Where does the point of litigation truly lie according to the precedence?

From the analysis of the jurisprudence this question is impossible to answer. However it has been suggested in analysis that it is possible to harmonize the conflicting outcomes. Never the less a harmonization of the conflicting awards does not seem plausible out of an international law perspective since it would seem that an extension to dispute settlement provisions even in minor adjustments as in *Maffezini* would constitute a violation of state's sovereign right to consent to arbitration.

- Should a tribunal use presentence to substantiate the point of litigation?

Arbitration tribunals are under no obligation to do so. However an analysis of the reasoning of individual tribunals show that it is not irrelevant to do so and that the practice is there. However with the apparent conflicting outcomes it would seem that there are more merits using other sources of interpretation.

Can the precedence analysed in this paper tell us something? Are there any general statements to be made concerning the scope of application of the MFN standard? Well first of all, it would seem that BIT's and IIA's are not self-containing regimes. What I mean by this is that BIT's and IIA's are affected by various matters that are not found in the specific treaty. As an example, almost all the tribunals looked at other cases in order to interpret a provision in the specific treaty.

In the context of predictability and article 32 of the Vienna Convention, a final remark is that the approach to the interpretation of the MFN standard taken by the Tribunal in *Plama v. Bulgaria*, seems like a fitting choice. As the tribunal stated, instead of the multiple exceptions to the extension of the MFN standard to procedural provisions, one single exception should stand.

An MFN provision in a basic treaty should 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.

6. Bibliography

Treaties:

GATT 1994: General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 17 (1999), 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994).

Decision on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries, GATT Document L/4903, 28 November 1979, BISD 26S/203.

REGULATION (EC) No 864/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

Vienna Convention on the Law of Treaties, opened for signature on May 23, 1969, United Nations Treaty Series, Vol. 1155, p. 331 ff.

Charter of the United Nations and Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1031 [the Charter], 1055 [ICJ Statute], T.S. No. 993 [I.C.J. Statute at 25], 3 Bevans 1153 [I.C.J. Statute at 1179].

United Nations Conference on Trade and Employment (1947-1948 : Havana, Cuba) Havana charter for an International Trade Organization and Final act and related documents. Washington, Dept. of State [Division of Publications, Office of Public Affairs, 1948](OCoLC)622819916.

Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature March 18, 1965, United Nations Treaty Series, Vol. 575, p. 159 ff.

Norway Draft Model BIT - Draft version 191207.

FTAA Third Draft Agreement; FTAA.TNC/w/133/Rev.3
November 21, 2003; available at: http://www.ftaa-alca.org/FTAADraft03/ChapterXVII_e.asp (last assessed: October 12, 2011).

Cases:

Gas Natural v. Argentina (Gas Natural SDG, SA v. Argentine Republic), ICSID Case ARB/03/10. BIT Argentina–Spain Decision on jurisdiction 2005. Available at: <http://www.asil.org/pdfs/GasNat.v.Argentina.pdf>. (last assessed November 23, 2011).

Plama v. Bulgaria (Plama Consortium Ltd v. Republic of Bulgaria), ICSID Case ARB/03/24. Energy Charter Treaty and BIT Bulgaria–Cyprus Decision on jurisdiction 2005, 44 ILM (2005) 721;

Provisional measures 2005. Available at: <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtIsRH&actionVal=ListPending> (last assessed November 23, 2011).

Salini v. Jordan (Salini Costruttori SpA and Italstrade SpA v. The Hashemite Kingdom of Jordan), ICSID Case ARB/02/13. BIT Jordan–Italy Decision on jurisdiction 2004, 44 ILM (2005) 573; Award 2006. Available at: <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtIsRH&actionVal=ListConcluded> (last assessed November 23, 2011).

Siemens v. Argentina (Siemens AG v. Argentine Republic), ICSID Case ARB/02/8. BIT Argentina–Germany Decision on jurisdiction 2004, 44 ILM (2005) 138. Available at: <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtIsRH&actionVal=ListConcluded> (last assessed November 23, 2011).

Ambatielos Case (Greece v. United Kingdom), Preliminary Objection, Judgement of July 1, 1952, *ICJ Reports* 1952, p. 28 ff. Available at: untreaty.un.org/cod/riaa/cases/vol_XII/83-153_Ambatielos.pdf (last assessed November 23, 2011).

Anglo-Iranian Oil Co. Case (United Kingdom v. Iran), Preliminary Objection, Judgement of July 22, 1952, *ICJ Reports* 1952, p. 20 ff. available at: untreaty.un.org/.../rep_orig_vol5-art94_e.pdf (last assessed November 23, 2011).

AAPL v. Government of Sri Lanka (Award), ICSID Case No. ARB/87/3. Available at: <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtIsRH&actionVal=ListConcluded> (last assessed November 23, 2011).

Emilio Agustin Maffezini v. Kingdom of Spain (Decision of the Tribunal on Objections to Jurisdiction), ICSID Case No. ARB 97/7, 25 January 2000. (2002) 5 ICSID Rep. Available at: <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtIsRH&actionVal=ListConcluded> (last assessed November 23, 2011).

Tecnicas Mediorarubientales Tecmed SA v The United Mexican States, ICSID case NO. ARB(AF)/00/2, Award of May 29, 2003. Available at: <http://icsid.worldbank.org/ICSID/FrontServlet> (last assessed November 23, 2011).

Telenor Mobile Communications A.S. v. Republic of Hungary, ICSID Case No. ARB/04/15, Award, 13 September 2006. Available at: <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtIsRH&actionVal=ListConcluded> (last assessed November 23, 2011).

Renta 4 S.V.S.A et al. V. Russian Federation, SCC No. 24/2007, Award on Preliminary Objection, 20 March 2009. Available at: italaw.com/documents/Renta.pdf (last assessed November 23, 2011).

Case Concerning East Timor (Portugal v. Austria), *ICJ Reports* 1995, Judgement of June 30 1995. Available at: www.icj-cij.org/docket/files/84/6951.pdf (last assessed November 23, 2011).

Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, *ICJ Reports* 2006, Judgment of 3 February 2006. Available at: www.icj-cij.org/docket/files/116/10455.pdf (last assessed November 23, 2011).

Wintershall Aktiengesellschaft v. Argentine Republic, Award, ICSID Case No. ARB/04/14, December 8, 2008. Available at: <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtIsRH&actionVal=ListConcluded> (last assessed November 23, 2011).

Phoenix Action, LTD. V. The Czech Republic; ICSID Case No. ARB/06/5 Available at: <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtIsRH&actionVal=ListConcluded> (last assessed November 23, 2011).

Permanent Court of International Justice; The Case of the S.S. "Lotus" (France v. Turkey), Series A, No. 10 (1927), Available at: http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm(last assessed November 23, 2011).

M.C.I. v. Ecuador, Decision on the Application for Annulment Available at: <http://www.investmentclaims.com/decisions/MCI-Ecuador-Award.pdf>.(last assessed November 23, 2011).

Vladimir Berschader and Moise Berschader v. Russian Federation, SCC Case No. 080/2004, Award of April 12, 2006. Available at: <http://pipl.com/directory/name/Berschader/Vladimir>(last assessed November 23, 2011).

Siemens A.G. v. The Argentine Republic (Decision on Jurisdiction), ICSID Case No. ARB/02/8, 3 August 2004. Available at: <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded>(last assessed November 23, 2011).

RosInvestCo UK Ltd. V. The Russian Federation (award on Jurisdiction), Arbitration Institute of the Stockholm Chamber of Commerce, October, 2007. Available at: http://www.investmentclaims.com/subscriber_awards_by_investor?letter=R&pageno=2(last assessed November 23, 2011).

Literature:

- Banifatemi, Yas *The Emerging Jurisprudence on the Most-Favoured-Nation Treatment in Investment Arbitration*, In: *Investment Treaty Law: Current Issues III*, at 241 (A. Bjorklund, I. Laird, S. Ripinsky eds., BIICL, 2009).
- Barclay, Thomas *Effects of "Most-Favoured-Nation" Clause in Commercial Treaties*; In: *The Yale Law Journal*, Vol. 17, No. 1 (Nov., 1907).
- Brewer, T.L., Young, S. *The Multilateral Investment System and Multinational Enterprises*; Oxford University Press, 15 okt 1998 – pp. 301.
- Civello, P. *The TRIMS Agreement: A Failed Attempt at Investment Liberalization*; In: *Minnesota journal of global trade* (1999), volume 8 , p. 97-126 1999.

- Dolzer, Rudolf and Schreuer, Christoph *Principles of International Investment Law*; 2008; New York: Oxford University Press, 2008. Pp. xliii, 433.
- Douglas, Zachary *The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails?*; In: Journal of International Dispute Settlement, Vol. 2, No. 1 (2011), pp. 97-113.
- Fauchald, Ole Kristian *The Legal Reasoning of ICSID Tribunals – An Empirical Analysis*; In: The European Journal of International Law Vol. 19 no. 2 © EJIL 2008.
- Franck, Susan D *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 Fordham L. Rev. 1521 (2005).
- Gardiner, Richard *Treaty Interpretation*; Oxford University Press; pp. 400; 2008.
- Gerber, Jean-Daniel *Preferential Trade Agreements and the Most Favoured Nation Principle*; 2007; Eidgenössisches Volkswirtschaftsdepartement EVD Staatssekretariat für Wirtschaft SECO
- Hudec, Robert E. *“Like Product”: The Differences in Meaning in GATT Articles I and III*; In: THOMAS COTTIER & PETROS MAVROIDIS, eds., REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW (University of Michigan Press 2000) pages 101-123.
- ICSID *POSSIBLE IMPROVEMENTS OF THE FRAMEWORK FOR ICSID ARBITRATION* ; 2004; available at: <http://www.worldbank.org/icsid>; (last assessed: November 21, 2011).

- ILC International Law Commission, Report of the Working Group, A/CN.4/L.719 (20 July 2007).
- ILC *Draft Articles on Most-Favoured-Nation Clauses with Commentaries*; Document A/33/10; Report of the International Law Commission on the work of its Thirtieth session, 8 May - 28 July 1978, Official Records of the General Assembly, Thirty-third session, Supplement No. 10.
- Kaufmann-Kohler, G. *Arbitral Precedent: Dream, Necessity or Excuse?*; ARBITRATION INTERNATIONAL, Vol. 23, No. 3 © LCIA, 2007.
- Kurtz, Jürgen *The delicate extension of most-favoured-nation treatment to foreign investors: Maffezini v kingdom of Spain; In: International investment law and arbitration: leading cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*; Weiler Todd (Ed); Cameron May, 2005 pp.850.
- Maduro, Miguel Poiaras *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism*; 2007; Working Paper IE Law School WPLS08-02 05-02-2008.
- McConville, Mike *Research Methods for Law*; 2007; Edinburgh University Press, 1 sep 2007 – pp.239.
- Newcombe, A., Paradell L. *Law and Practice of Investment Treaties: Standards of Treatment*; February 2009 by Kluwer Law International. Pp. 648.
- Nikken, Pedro Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, Separate Opinion.

- Perera, Rohan The Most-Favoured-Nation Clause and the Maffezini case; ILC Study Group on the MFN Clause; available at: www.commonlaw.uottawa.ca/index.php?option=com_docman&task=doc_download&gid=4197 (last assessed October 18, 2011).
- Ricardo, David *The Principles of Political Economy and Taxation*; Courier Dover Publications, 11 jun 2004 – pp.300.
- Rodriguez, Alejandro Faya *The Most-Favored-Nation Clause in International Investment Agreements: A Tool for Treaty Shopping?* *Journal of International Arbitration* 25(1): 89–102, 2008.
- Schreuer, Christoph *Standards of Investment Protection Introduction: Interrelationship of Standards* 21. September 2007; available at: www.univie.ac.at/intlaw/wordpress/pdf/92.pdf (last assessed October 23, 2011).
- Scott Vesel *Clearing a path through a tangled jurisprudence: most-favoured-nation clauses and dispute settlement provisions in bilateral investment treaties*; 2007; 32 *Yale J. Int'l L.* 125.
- Schreuer, Christoph *Diversity and Harmonization of Treaty Interpretation in Investment Arbitration*; 2006; available at: www.univie.ac.at/intlaw/pdf/cspubl_85.pdf (last assessed November 12, 2011).
- Schwarzenberger, Georg *The Most-Favoured-Nation Standard in British State Practice*; 1945; 22 *BRIT. Y.B. INT'L L.* 96, 97.
- Sinclair, Ian *The Vienna Convention on the Law of Treaties*; 1984; Manchester University Press ND; pp. 270.

Spoorenberg, F.& Viñuales, J.E.	<i>Conflicting Decisions in International Arbitration; The Law and Practice of International Courts and Tribunals</i> 8 (2009) 91-113.
Stephen Fietta	Most Favoured Nation Treatment and Dispute Resolution under Bilateral Investment Treaties: a Turning Point?, <i>Int.A.L.R.</i> , 2005.
Stern, Brigitte	Impregilo S.p.A. v. Argentine Republic (ICSID Case No. ARB/07/17); Concurring and Dissenting Opinion.
UNCTAD	Most-Favoured-Nation Treatment; UNCTAD Series on Issues in International Investment Agreements II, 2010; New York and Geneva, United Nations.
UNCTAD	Latest Developments in Investor-State Dispute Settlement; IIA ISSUES NOT No. 1 (2010); UNCTAD/WEB/DIAE/IA/2010/3.
UNCTAD	<i>Research Note: Recent Developments in International Investment Agreements</i> , UNCTAD/WEB/ITE/IIT/2005/1 at 15 (Aug. 30, 2005).
UNCTAD	The UNCTAD Series on Issues in International Investment Agreements, Most-Favoured-Nation Treatment 13, 1999; UNCTAD/ITE/IIT/10(Vol. III).
UNCTAD	<i>International Investment Agreements: Key Issues</i> ; UNCTAD/ITE/IIT/2004/10 (Vol. III).
UNCTAD	<i>Trends in international investment agreements</i> , 1999, UNCTAD/ITE/IIT/13.
Ustor, Endre	<i>First report on the most-favoured-nation clause</i> ; Document A/CN.4/213; 1969.

Ustor, Endre

Fourth report on the Most-Favoured-Nation Clause;
Document A/CN.4/266; 1973.

Winham, Gilbert R.

The evolution of international trade agreements;
University of Toronto Press, 1992 – pp.155.