

# Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses

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## I.

### INTRODUCTION

One principal aspect of globalization is the emergence of a global economy in which goods, services and capital progressively cast off territorial ties and circulate increasingly freely across borders. As a corollary, economic activities in a global market bring about the need for legal regulation beyond national borders in order to structure and protect cross-border economic exchange and enhance cooperation. This accounts for the emergence of a growing body of international economic law that encompasses international trade law, international monetary law and international investment law and thereby provides a legal backbone for the global economy.<sup>1</sup>

While international trade and monetary law have found expression in multilateral regimes through the establishment of the General Agreement on Tariffs and Trade (GATT), and later the World Trade Organization (WTO), and

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1. See generally ANDREAS F. LOWENFELD *INTERNATIONAL ECONOMIC LAW* (2d ed. 2008).

the International Monetary Fund (IMF), several attempts to establish a multilateral investment treaty have failed.<sup>2</sup> Instead, international investment law is enshrined in currently over 2,500 bilateral, regional and sectoral investment treaties (collectively BITs).<sup>3</sup> Historically, these treaties first have been concluded between traditional capital-exporting countries in Europe and North America, and capital-importing countries in South and Central America, Eastern Europe, Africa and Asia. Nowadays, however, BITs are increasingly also concluded between developing and transitioning economies and therefore cover a growing range of international investment activities worldwide.<sup>4</sup>

BITs aim at protecting and promoting foreign investment between the contracting States Parties by granting a number of rights to foreign investors.<sup>5</sup> Among the most common standards or treatment thus guaranteed are national treatment, most-favored-nation treatment, fair and equitable treatment and full protection and security, the prohibition of direct and indirect expropriations without compensation, the protection of investor-State contracts and the free transfer of capital. Furthermore, most of these treaties contain the consent of the host States to submit to investor-State arbitration. An investor therefore can directly initiate arbitration proceedings against the host State and invoke a violation of the provisions of the governing investment treaty.<sup>6</sup>

While the original focus of these guarantees was the protection and promotion of investments in developing and transitioning economies,<sup>7</sup> BITs more generally aim at implementing structures that are essential for the functioning of a market economy. Thus, national and most-favored-nation

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2. See Kenneth J. Vandeveld, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157 (2005); Riyaz Dattu, *A Journey from Havana to Paris: The Fifty-Year Quest for the Elusive Multilateral Agreement on Investment*, 24 FORDHAM INT'L L. J. 275 (2000).

3. See UNITED NATIONS CONFERENCE ON TRADE & DEVELOPMENT (UNCTAD), RECENT DEVELOPMENTS IN INTERNATIONAL INVESTMENT AGREEMENTS (2006-JUNE 2007) 2 (2007), available at [http://www.unctad.org/en/docs/webiteia20076\\_en.pdf](http://www.unctad.org/en/docs/webiteia20076_en.pdf) (recording an aggregate of 2,573 bilateral investment treaties at the end of 2006).

4. See UNCTAD, SOUTH-SOUTH COOPERATION IN INTERNATIONAL INVESTMENT AGREEMENTS (2005), available at [http://www.unctad.org/en/docs/iteiit20053\\_en.pdf](http://www.unctad.org/en/docs/iteiit20053_en.pdf).

5. On the object and purpose of investment treaties and the statements contained in their preambles, see RUDOLF DOLZER & MARGARET STEVENS, *BILATERAL INVESTMENT TREATIES* 11-13, 20-25 (1995).

6. On investment treaties and related instruments of investment protection, see generally DOLZER & STEVENS, *supra* note 5; RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* (2008); ANDREAS LOWENFELD, *INTERNATIONAL ECONOMIC LAW* 467-591 (2d ed. 2008); CAMPBELL MCLACHLAN, LAWRENCE SHORE & MATTHEW WEINIGER, *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* (2007); OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW (Peter Muchlinski, Federico Ortino, & Christoph Schreuer eds., 2008); M. SORNARAJAH, *THE INTERNATIONAL LAW OF FOREIGN INVESTMENT* 204-314 (2d ed. 2004); Giorgio Sacerdoti, *Bilateral Treaties and Multilateral Instruments on Investment Protection*, 269 RECUEIL DES COURS 251 (1997).

7. Cf. Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?*, 46 HARV. INT'L L. J. 67, 78 (2005).

treatment aim at ensuring a level playing field for the economic activity of foreign and domestic economic actors and are a prerequisite for competition. The protection against expropriation guarantees the respect for property rights as an essential institution for market transactions; capital transfer guarantees ensure the free flow of capital and contribute to the efficient allocation of resources in a global market. The protection of investor-State contracts backs up private ordering between foreign investors and the host State. Fair and equitable treatment and full protection and security ensure basic due process rights for foreign investors and require adequate police protection, features that are equally essential for the functioning of market economies. Finally, the possibility of recourse to international arbitration represents a mechanism that allows foreign investors to enforce compliance with the host States' BIT obligations. In sum, these institutions help to generate economic growth in both the capital-exporting country as well as the capital-importing country and thereby increase global welfare.<sup>8</sup>

However, the development of international investment law on the basis of bilateral treaties seems to be at odds with the vision of a global economy in which capital can flow wherever it is allocated most efficiently. Instead, the bilateral form of investment treaties suggests a chaotic and unsystematic aggregate of the law governing international investment relations, with different standards of protection depending on the national origin of a foreign investor and on the host State the investor invests in. Rather than constituting a consistent and coherent system of law, this area of international law should be expected to show extreme divergence and fragmentation. In particular, the fragmentation into bilateral treaties would make it impossible to understand international investment law as a system of law or perceive it as part of an overarching order for international economic relations or a legal framework of a global market economy that is based on competition between different market actors and on the interplay between supply and demand.

However, unlike genuinely bilateral treaties that order two-party relationships only, BITs do not stand isolated in governing the relation between two States. Rather, they develop multiple overlaps and structural interconnections that result in a relatively uniform and treaty-overarching regime for international investments. Instead of being prone to almost infinite fragmentation, international investment protection is developing into a uniform governing structure for foreign investment based on uniform principles with little room for insular deviation. The emergence of such uniform principles

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8. On the connection between economic institutions and economic growth, see, e.g., Daron Acemoglu, Simon Johnson, & James Robinson, *Institutions as the Fundamental Cause of Long-Run Growth*, in 1A HANDBOOK OF ECONOMIC GROWTH 385 (Philippe Aghion & Steven N. Durlauf eds., 2005); Agnès Bénassy-Quéré, Miles Coupet & Thierry Mayer, *Institutional Determinants of Foreign Direct Investment*, 30 WORLD ECON. 764 (2007); Dani Rodrik, Arvind Subramanian, & Francesco Trebbi, *Institutions Rule*, 9 J. ECON. GROWTH 131 (2004). *But see* Edward L. Glaeser et al., *Do Institutions Cause Growth?*, 9 J. ECON. GROWTH 271 (2004).

constitutes a form of substantive rather than deliberative multilateralism in international relations when multilateralism is understood as “an institutional form that coordinates relations among three or more states on the basis of generalized principles . . . which specify appropriate conduct for a class of actions, without regard to the particularistic interests of the parties or the strategic exigencies that may exist in any specific occurrence.”<sup>9</sup> International investment law is thus multilateralizing on the basis of bilateral treaties, that is, developing increasingly uniform standards of investment protection that shed their ties to specific bilateral relationships between a host State and an investor’s home State. Thus, BITs can create a legal framework for international investment relations based on uniform standards of investment protection which, in turn, allow investors from different national origins to compete under equal competitive conditions.

The development of multilateral structures of investment protection on bilateral grounds is all the more important for a truly global economy, as there are specific reasons why uniform rules on investment protection are preferable to a conglomerate of fragmented and diverging bilateral rules. Thus, multilateral rules on investment protection are in the interest of States because the rules create a framework for equal competition among foreign investors and require the same treatment independent from the source or the target of the investment. This enables capital to flow to wherever it is allocated most efficiently and allows various national economies to specialize in areas where they dispose of comparative advantages over other economies.<sup>10</sup> Enhanced competition, in turn, enhances innovation and technological change which, again, leads to economic growth and development.<sup>11</sup> While resources may

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9. John Ruggie, *Multilateralism: The Anatomy of an Institution*, in MULTILATERALISM MATTERS 3, 11 (John Ruggie ed. 1993). It is thus primarily the quality of rules and principles of international law as governing international relations independently of the specific interests, situation and power of the States subject to it that is characteristic for multilateralism as it is understood in this Article, rather than the number of States involved in the process of generating international norms or cooperating directly on the international level.

10. On the theory of comparative advantage that was developed in the international trade context, see PETER B. KENEN, *THE INTERNATIONAL ECONOMY* 19-62 (4th ed. 2000); BO SÖDERSTEN & GEOFFREY REED, *INTERNATIONAL ECONOMICS* 3-71, 467-93 (3d ed. 1994) (containing a framework explaining foreign investment activities); see also KIYOSHI KOJIMA, *DIRECT FOREIGN INVESTMENT* 107 (1978) (arguing that “direct foreign investment should follow the direction indicated by comparative investment profitabilities, which in turn are a reflection of comparative advantage under competitive conditions”); MICHAEL E. PORTER, *THE COMPETITIVE ADVANTAGE OF NATIONS* 18-21 (1990) (arguing for a more comprehensive model that takes into account that trade and investment are both strategies for economic success of companies and that focuses on the potential of nations for innovation and other country-specific advantages); Kenneth J. Vandavelde, *The Economics of Bilateral Investment Treaties*, 41 HARV. INT’L L. J. 469, 472-87 (2000).

11. See BILL EASTERLY, *THE ELUSIVE QUEST FOR GROWTH* 47-69 (2002); Robert Solow, *Technical Change and the Aggregate Production Function*, 39 REV. ECON. STAT. 312 (1957) (explaining that the source of growth lies in technological change). On competition as the central factor that stimulates innovation and economic development, see Wolfgang Kerber & Ulrich Schwalbe, *Economic Foundations of Competition Law*, in COMPETITION LAW: EUROPEAN

already be allocated more efficiently if two States benefit from their respective competitive advantage, the larger an investment space is for investors, and the more participants there are with different specializations, the more efficient will resources be allocated, and the greater will the benefits be that derive from international economic cooperation. The more national economies participate in a common investment area, the greater international competition, the greater the potential for specialization, innovation and economic efficiency will be. In this respect, multilateral rules have long-term benefits compared to ordering investment relations bilaterally because they can effectively implement the legal infrastructure necessary for the functioning of a competitive market with a broader geographic coverage and a larger number of participants.<sup>12</sup>

Beyond purely economic reasons, multilateral investment rules also prevent States from discriminating based on nationality and from engaging in bloc-building behavior, thereby isolating themselves from the rest of the world.<sup>13</sup> In this respect, multilateral investment rules, much like multilateral trade rules, contribute to an international relations structure that increases international security and peace through economic interdependence.<sup>14</sup> Thus, uniform and non-discriminatory investment rules do not only form part of stabilizing the global economy, but also contribute to reducing international conflicts and tensions.

One factor in creating uniformity in international investment relations and in implementing multilateralism despite the apparent fragmentation of investment treaties into a myriad number of bilateral treaties are most-favored-nation (MFN) clauses that are regularly incorporated in BITs. These MFN clauses are generally reciprocal, unconditional and indeterminate in nature.<sup>15</sup> A

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COMMUNITY PRACTICE AND PROCEDURE 202-393, paras. 66-72 (G. Hirsch et al. eds., 2007); PORTER, *supra* note 10, at 45-49.

12. That multilateralism is economically more beneficial in terms of overall welfare is also the claim of the parallel discussion in the context of international trade about the potentially negative impact of increasing regionalism. See JAGWISH BHAGWATI, *THE WORLD TRADING SYSTEM AT RISK* 58-79 (1991); John Baldwin, *Multilateralising Regionalism*, 29 *WORLD ECON.* 1451 (2006); Jagwish Bhagwati, *Regionalism and Multilateralism*, in *NEW DIMENSIONS IN REGIONAL INTEGRATION* 22-25, 40-46 (Jaime de Melo & Arvinid Panagariya eds., 1993).

13. That discriminatory economic treatment, in fact, has the potential to generate or aggravate international conflicts is illustrated, for example, by the development of international economic relations in the inter-War period. During that era, systems of preferential economic treatment not only have aggravated international conflicts, but were used to prepare military alliances. See KENNETH OYE, *ECONOMIC DISCRIMINATION AND POLITICAL EXCHANGE* 71-133 (1992); RICHARD POMFRET, *UNEQUAL TRADE: THE ECONOMICS OF DISCRIMINATORY INTERNATIONAL TRADE POLICIES* 29-59 (1988); Hans Kindleberger, *Commercial Policy Between the Wars*, in 8 *CAMBRIDGE ECONOMIC HISTORY OF EUROPE* 161 (Peter Mathias & Sidney Pollard eds., 1989) (discussing changes in the post-World War I trading schemes which developed traces of preferential trading).

14. On the claim that international economic relations and trade further peace between nations, see John Oneal & Bruce Russett, *The Classical Liberals Were Rights*, 41 *INT'L STUD. Q.* 267 (1997); see also *ECONOMIC INTERDEPENDENCE AND INTERNATIONAL CONFLICT* (Edward D. Mansfield & Brian M. Pollins eds., 2003).

15. Pia Acconci, *The Most Favoured Nation Treatment and the International Law on Foreign*

typical MFN clause in a BIT thus provides:

- (1) Neither Contracting Party shall subject investments in its territory owned or controlled by nationals or companies of the other Contracting Party to treatment less favourable than it accords . . . to investments of nationals or companies of any third State.
- (2) Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their activity in connection with investments, to treatment less favourable than it accords . . . to nationals or companies of any third State.<sup>16</sup>

MFN clauses oblige the State granting MFN treatment to extend to the beneficiary State the treatment accorded to third States in case this treatment is more favorable than the treatment under the treaty between the granting State and the beneficiary State.<sup>17</sup> The clauses break with general international law and its bilateralist rationale that, in principle, permits States to accord differential treatment to different States and their nationals<sup>18</sup> and instead ensure equal treatment between the State benefiting from MFN treatment and any third State.<sup>19</sup> MFN clauses thus disable States from entering into bilateral *quid pro quo* bargains that extend preferential treatment to certain States and exclude it

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*Investment*, 2 TRANSNAT'L DISP. MGMT. 5 (2005). For further discussion on the different types of MFN clauses, that is, reciprocal versus unilateral and conditional versus unconditional, and their different formulations, that is, determinate versus indeterminate, see PETER ROESNER, DIE MEISTBEGÜNSTIGUNGSKLAUSEL IN DEN BILATERALEN HANDELSVERTRÄGEN DER BUNDESREPUBLIK DEUTSCHLAND 33-41 (1964); Stefan Kramer, *Die Meistbegünstigung*, 35 RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW] 473, 474 (1989).

16. Agreement Concerning the Promotion and Reciprocal Protection of Investments art. 2, F.R.G.-Bangl., May 6, 1981 [all bilateral investment treaties can be found, unless stated otherwise, on the UNCTAD International Investment Instruments – Bilateral Investment Treaties website at [http://www.unctadxi.org/templates/DocSearch\\_\\_\\_779.aspx](http://www.unctadxi.org/templates/DocSearch___779.aspx)].

17. See Endre Ustor, *Most-Favoured-Nation Clause*, in 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 468 (Rudolf Bernhardt & Peter Macalister-Smith eds., 1997) [hereinafter Ustor, *Most-Favoured-Nation Clause*].

18. See *Report of the International Law Commission on the Work of Its Thirtieth Session 8 May-28 July*, [1978] 2 Y.B. Int'l L. Comm'n (pt. 2) 5, para. 50, at 11-12, U.N. Doc. A/CN.4/SER.A/1978/Add.1 (Part 2) [hereinafter *ILC Report of 30th Session*] ("While States are bound by the duty arising from the principle of non-discrimination, they are nevertheless free to grant special favours to other States on the ground of some special relationship of a geographic, economic, political or other nature."). In particular, entering into specifically advantageous treaty relations in the economic realm constitutes a special favor and does not have to be extended to third States under the duty of non-discrimination under general international law. Cf. Georg Schwarzenberger, *Equality and Discrimination in International Economic Law*, 25 Y.B. WORLD AFF. 163, 164 (1971) [hereinafter Schwarzenberger, *Equality and Discrimination*] ("Freedom of commerce is a purely optional pattern of international economic law.").

19. See *Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.)*, Judgment, Aug. 27, 1952 I.C.J. 192 (Aug. 27) (considering that the rationale of MFN clauses is to "maintain at all times fundamental equality without discrimination among all of the countries concerned"). MFN treatment thus goes beyond the more general duty arising from the principle of non-discrimination connected to the sovereign equality of States under general international law and also extends special benefits granted between States to the State benefitting from MFN treatment.

with respect to others, a behavior which is entirely permissible under customary international law.

Although not all MFN clauses are worded identically, existing differences do not affect the clauses' overall efficacy.<sup>20</sup> Unless the contracting parties made clear that they intended to give an MFN clause in their investment treaty a special and particular meaning, it is widely accepted that slight differences in the wording of the clauses do not alter their function.<sup>21</sup> Rather, MFN treatment emerges as an overarching principle of international investment law by means of the MFN clauses included in the treaties.<sup>22</sup>

Complemented by national treatment, the economic rationale of MFN treatment is to create a level playing field for all foreign investors by prohibiting discrimination between investors from different home States.<sup>23</sup> It aims at enabling equal competition among investors by prohibiting the imposition of different transaction costs based on the national origin of investors.<sup>24</sup> Equal competition, in turn, is essential for the functioning of a market economy that helps to allocate resources efficiently. Thus, MFN treatment reflects the crucial importance competitive structures play for efficient investment and an efficient allocation of resources.

Although MFN clauses constitute inter-State obligations, they directly

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20. On varying formulations of MFN clauses in investment treaties and related instruments as well as the various exceptions they contain, see Acconci, *supra* note 15, at 6-16 (2005); Marie-France Houde & Fabrizio Pagani, *Most-Favoured-Nation Treatment in International Investment Law* 3-8 (OECD, Working Papers on International Investment No. 2004/2, 2004), available at <http://www.oecd.org/dataoecd/21/37/33773085.pdf>.

21. UNCTAD, MOST FAVOURED-NATION TREATMENT 6 (1999) [hereinafter MFN TREATMENT]; Alejandro Faya Rodriguez, *The Most-Favored-Nation Clause in International Investment Agreements*, 25 J. INT'L ARB. 89, 92 (2008).

22. Cf. GEORG SCHWARZENBERGER, 1 INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 241 (3d ed. 1957) (pointing out that "[t]he difference between the most-favoured-nation standard and any particular most-favoured-nation clause corresponds to that between principles and rules of international law"). Accordingly, issues surrounding MFN clauses are generally regarded as issues of general international law, in particular the law of treaties. See also ILC Report of 30th Session, *supra* note 18, at 59-61 (describing the general scope of the Draft Articles).

23. Houde & Pagani, *supra* note 20, at 2 (explaining that "by giving the investors of all the parties benefiting from a country's MFN clause the right, in similar circumstances, to treatment no less favourable than a country's closest or most influential partners can negotiate on the matters the clause covers, MFN avoids economic distortions that would occur through more selective country-by-country liberalisation"); Chukwumerije, *Interpreting Most-Favoured-Nation Clauses in Investment Treaty Arbitrations*, 8 J. WORLD INV. & TRADE 597, 608 (2007); Faya Rodriguez, *supra* note 21, at 89, 91 (2008).

24. Cf. UNCTAD, MFN TREATMENT, *supra* note 21, at 8-9; Jürgen Kurtz, *The MFN Standard and Foreign Investment: An Uneasy Fit?*, 6 J. WORLD INV. & TRADE 861, 873 (2004); see also Nat'l Grid PLC v. Argentina, Decision on Jurisdiction, para. 92 (UNCITRAL June 20, 2006) ("The MFN clause is an important element to ensure that foreign investors are treated on a basis of parity with other foreign investors and with national investors when they invest abroad.") [all arbitral awards cited in this Article can be found at the Investment Treaty Arbitration website at <http://ita.law.uvic.ca> or the Investmentclaims website at <http://www.investmentclaims.com>].

extend the more favorable treatment to covered investors in the context of investment treaties. An investor covered by a BIT with an MFN clause can therefore invoke the benefits granted to third-party nationals by another BIT of the host State and import them into its relationship with the host State.<sup>25</sup> Consequently, MFN clauses multilateralize the bilateral inter-State treaty relationships and harmonize the protection of foreign investments in a specific host State.<sup>26</sup> MFN clauses thus level differences in the standard of protection offered by varying investment treaties.

Apart from their impact on investor-State relations, and beyond their economic rationale, MFN clauses also help to reorder inter-State relations. This was expressed, for example, by the International Court of Justice (ICJ) in *Rights of Nationals of the United States of America in Morocco* when it stated that the purpose of MFN clauses was to “maintain at all times fundamental equality without discrimination among all of the countries concerned.”<sup>27</sup> Thus, MFN clauses affect the structure of the international economic order and impact the system of international investment protection by supporting the emergence of a uniform international investment regime. MFN clauses multilateralize and harmonize the level of investment protection by international law in any given host State that orders its international investment relations based on MFN treatment. MFN provisions in BITs thus tend to reduce leeway for specificities in bilateral investment relations. They undermine the understanding of BITs as an expression of *quid pro quo* bargains. Instead of limiting BITs to instruments of bilateralism, MFN clauses transform them into instruments of multilateralism in international investment relations. MFN clauses can therefore serve as a basis for multilateralizing bilateral investment relations.

Yet, while MFN clauses have been used in international commercial treaties for centuries,<sup>28</sup> legal theory has long struggled with their application and interpretation. Thus, literature and decisions by national courts and international tribunals on MFN clauses convey a certain discomfort with the effects of the clauses’ scope and effect. This discomfort stems from the tension the clauses create between multilateralism and bilateralism as conflicting ordering

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25. See Draft Articles on Most-Favored-Nation Clauses, art. 9, para. 1, in *ILC Report of 30th Session*, *supra* note 18, at 16 [hereinafter MFN Draft Articles] (clarifying that “the beneficiary State acquires, for itself or for the benefit of persons or things in a determined relationship with it, only those rights which fall within the limits of the subject matter of the clause”). *But see* Faya Rodriguez, *supra* note 21, at 99 (arguing that an importation of more favorable rights could not operate automatically in investment treaties as investment tribunals would only hear claims for breaches of MFN clauses).

26. See Houde & Pagani, *supra* note 20, at 2 (describing MFN clauses as “the ‘multilateralization’ instrument *par excellence*”); see also Anne van Aaken, *To Do Away with International Law?* 17 EUR. J. INT’L L. 289, 299 (2006) (designating MFN clauses in international trade law as “multilateralization devices in substantive law”).

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

28. For a closer account of the history of MFN clauses, see *infra* Part II.B.

paradigms for international relations. While enshrined in a bilateral treaty, MFN clauses prevent States from shielding future bilateral bargains from multilateralization and from making preferential concessions in order to achieve a desired counter-concession. MFN clauses thus prevent States from assuming certain bargaining positions and from making exclusive promises within the scope of application of an MFN clause in another treaty with a third country. In consequence, they lock States into a framework of multilateralism that is adverse to bilateral alliances.

Reflecting the general discomfort mentioned above, investment tribunals struggle with the application and interpretation of MFN clauses in investment treaties. Difficulties in the practice of investment treaty arbitration, above all, relate to the question whether MFN clauses apply to issues of procedure and jurisdiction in investor-State dispute settlement.<sup>29</sup> While one line of argument supports a broad interpretation of MFN clauses and consequently a comprehensive multilateralization, the opposing view favors a restrictive construction and a narrower function of MFN treatment in international investment law. The more restrictive position particularly denies that MFN clauses can be used to broaden the jurisdiction of treaty-based tribunals.

While this debate is exclusively framed as a doctrinal debate about the scope and the proper interpretation of MFN clauses in investment treaties, the debate has larger implications for the nature of international investment law. It reveals the broader ideological divide between multilateralism and bilateralism as concepts of ordering the relations between States in the economic sector. While expansive approaches to the interpretation of MFN clauses lend support to stronger tendencies of multilateralism, restrictive approaches ideologically align themselves with counter-developments that stress the bilateral elements in international investment relations and view investment treaties as expressions of *quid pro quo* bargains rather than as elements of an emerging international economic order that is based on uniform principles of investment protection. Thus, the bilateralism-multilateralism dichotomy informs the debate over the scope of MFN clauses in international investment law and can serve as an explanatory framework for the development of the arbitral jurisprudence on them.

Yet, as will be argued in this Article, the restrictive interpretation employed by some tribunals denies giving MFN clauses their proper effect and disregards the firm stance they take for multilateralism as an ordering principle of international relations that subjects States to equal and non-discriminatory rules. Accordingly, this Article proposes a broad understanding of MFN clauses, save express language to the contrary, as multilateralizing not only substantive investment protection but also the procedural implementation of investment treaties through investment treaty arbitration. After outlining the historical and doctrinal background of MFN clauses more generally, this Article will address

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29. See *infra* Parts IV and V.

their application in investment treaties with regard to substantive investor rights and will discuss to which extent they apply to issues of investor-State dispute settlement. In this context, this Article criticizes that arbitral jurisprudence regularly applies MFN clauses to circumvent admissibility-related restrictions regarding investor-State dispute settlement, while declining to apply them as a basis of jurisdiction by incorporating the host State's more favorable consent from third-country investment treaties. In making the case that the more convincing arguments militate for a broad application of MFN clauses, this paper suggests a (rebuttable) presumption that the clauses incorporate more favorable treatment concerning procedure and jurisdiction relating to investor-State dispute settlement just as they apply to substantive standards. MFN clauses are therefore portrayed as comprehensively multilateralizing investment treaties in spite of their bilateral form. In conclusion, this paper argues that MFN clauses do not only multilateralize international investment relations as of today, but help to project multilateralism into the future.

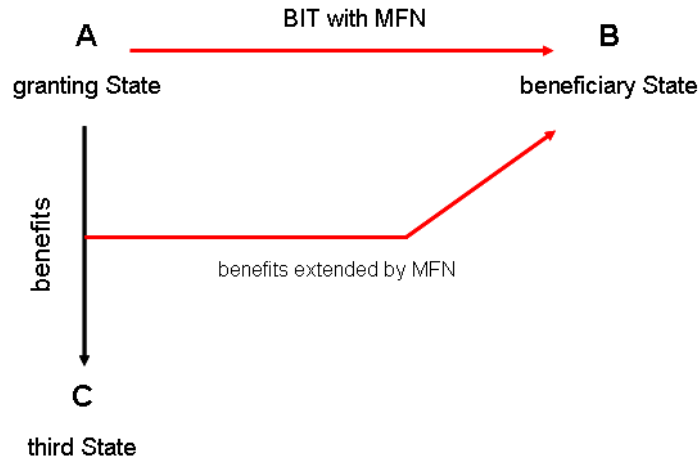
## II.

### HISTORICAL AND DOCTRINAL BACKGROUND OF MFN CLAUSES

In order to understand the debate about the scope and interpretation of MFN clauses in international investment treaties, it is necessary to shed light on the structure, history and applicable principles of interpretation relating to MFN clauses in general. This background also clarifies that MFN clauses are not particular to international investment law, but rather constitute a traditional instrument for structuring international cooperation in a variety of areas.

#### *A. The Structure of MFN Clauses*

The operation of MFN clauses in international law presupposes a relationship of at least three States (see Diagram 1): State A (the granting State) enters into an obligation vis-à-vis State B (the beneficiary State) to extend rights and benefits granted in a specific context to any third State C. The consequence of the MFN clause in the treaty between A and B is that State B can invoke and rely on all benefits State A grants with vis-à-vis State C as long as the granted benefit is within the scope of application of the MFN clause in the relationship between A and B. The treaty containing the MFN clause between A and B is designated as the "basic treaty" because it contains the basis for incorporating more favorable conditions granted in a third-party treaty into the treaty relationship between A and B.



**Diagram 1: General Function of MFN Clauses**

The third-party treaty (between A and C), however, does not modify the relationship between A and B, the parties to the basic treaty. It does not govern the relationship between the parties of the basic treaty as the applicable international treaty. Rather, the content of the third-party treaty becomes operative by means of the basic treaty's MFN clause. MFN clauses therefore do not break with the *inter partes* effect of international treaties. As the ICJ in *Anglo-Iranian Oil Company* stated:

It is this [*that is*, the basic] treaty which establishes the juridical link between the [beneficiary State] and a third-party treaty and confers upon that State the rights enjoyed by the third party. A third-party treaty, independent of and isolated from the basic treaty, cannot produce any legal effect as between the [beneficiary State] and [the granting State]: it is *res inter alios acta*.<sup>30</sup>

The third-party treaty is thus incorporated by reference and *ipso iure* into the relationship between the State parties to the basic treaty without any additional act of transformation.<sup>31</sup> For this reason, MFN clauses also have been characterized as "drafting by reference."<sup>32</sup> They effectuate automatic treaty adaptation without the need for the State parties to the basic treaty to negotiate anew in order to incorporate benefits granted to third countries. The MFN

30. *Anglo-Iranian Oil Company (U.K. v. Iran)*, Judgment, 1952 I.C.J. 109 (July 22); *see also Suez S.A. & InterAguas S.A. v. Argentina*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, May 16, 2006, para. 58 (W. Bank 2006) ("The principle of *res inter alios acta* has no application, because the Tribunal is not applying the Argentina-France BIT (presumably the alleged act between third parties) to this case. Rather it is applying the Argentina-Spain BIT's provisions on equality of treatment.").

31. *Cf. supra* note 25.

32. SCHWARZENBERGER, *supra* note 22, at 243.

clause thus prevents the granting State from entering into bilateral treaty relations that are more preferential to a third State and put the beneficiary State at a relative disadvantage.<sup>33</sup>

The benefits flowing from MFN clauses are closely connected to the benefits from multilateral ordering.<sup>34</sup> First, MFN treatment prevents market distortions stemming from the imposition of unequal transaction costs that result from unequal standards of protection offered to investors from different States. Second, MFN treatment protects the value of concessions made between the contracting parties to the basic treaty. It upholds the bargain States struck by preventing either one of them from hollowing out the content of the basic treaty by granting more favorable protection to a third State and thereby making investments from the original treaty partner comparably less attractive. Third, MFN treatment allows for a more transparent framework for international investment relations because it dispenses with the necessity to adhere to complicated, and thus costly, rules on the origin of capital in order to ascertain the applicable standard of protection.

Fourth, apart from these primarily economic aspects, MFN treatment also has broader implications for the structure of international relations in implementing equal treatment among nations. It prevents States from forming economic alliances to the detriment and to the exclusion of other States, which, in turn, might increase the potential for tension or even military conflict.<sup>35</sup> In this context, MFN treatment also protects smaller States against the influence of larger and more powerful States, as it precludes hegemonic State behavior in imposing patterns of preferential treatment to the exclusion of other States.<sup>36</sup>

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33. Conversely, once benefits from a third-country treaty cease, they also cease with respect to the basic treaty. See *Rights of Nationals of the United States of America in Morocco* (Fr. v. U.S.), Judgment, 1952 I.C.J. at 190-92, 204-05 (Aug. 27). In this case, the United States attempted to rely on more favorable rights Morocco had granted to the United Kingdom and Spain concerning fiscal immunity and consular jurisdiction. Since these more favorable conditions had ceased to exist, the United States was prevented from incorporating them into their relationship with Morocco based on an MFN clause.

34. See *supra* notes 10-14 and accompanying text.

35. Some investment treaties explicitly draw a connection between furthering economic relations between States in order to contribute to peaceful and friendly relations among nations. See, e.g., Agreement on Encouragement and Reciprocal Protection of Investments pmb., Neth.-Czech-Slovk., Apr. 29, 1991 (stating the objective "to extend and intensify the economic relations" between the Contracting Parties and "[t]aking note of the Final Act of the Conference on Security and Cooperation in Europe, signed on August 1st 1975 in Helsinki"). The Helsinki Final Act, *inter alia*, had the objective of "promoting better relations among the [State Parties]," of ensuring "true and lasting peace free from any threat or attempt against their security," of making "détente both a continuing and increasingly viable and comprehensive process, universal in scope" and of "[r]ecognizing the close link between peace and security in Europe and in the world as a whole and conscious of the need for each of them to make its contribution to . . . the promotion of fundamental rights, economic and social progress and well-being for all peoples." Conference on Security and Cooperation in Europe, Final Act, 14 I.L.M. 1292 (1975). See also *infra* notes 59-64 and accompanying text.

36. Cf. Moritz Bileski, *Der Grundsatz der wirtschaftlichen Gleichberechtigung in den*

MFN treatment thus breaks with bilateralism as an ordering paradigm for international relations by extending rights and benefits from a third-party relationship to the treaty relationship containing the MFN clause. Finally, MFN treatment has a constitutional function, because it locks States into a multilateral framework and makes abandoning standards of protection adopted previously more difficult. MFN clauses therefore are an instrument to push towards an order that is multilateral in substance even though it is based on bilateral treaties.

### *B. The Historical Development of MFN Clauses*

The use and the scope of MFN clauses have varied over time depending on the prevailing ideologies in international economic and political relations.<sup>37</sup> Originally, MFN clauses primarily operated in matters related to trade. In this area, they have a long history and have appeared in bilateral commercial treaties since at least the twelfth century.<sup>38</sup> Until approximately the early eighteenth century, these clauses were worded broadly and generally applied to “all privileges, liberties, immunities and concessions . . . already granted to foreigners or being granted in the future.”<sup>39</sup> The purpose of these early treaties was to put the terms of trade between different nations on an equal footing and to allow in principle for equal competition.

However, the function of MFN clauses changed under the influence of mercantilist ideology in the course of the Seventeenth and Eighteenth Centuries.<sup>40</sup> During that period, MFN clauses were included in commercial treaties in order to safeguard preferential treatments accorded in a bilateral relationship.<sup>41</sup> The automatic extension of more favorable third-party benefits

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*Mandatsgebieten*, 16 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT [ZöR] 214, 228-29 (1936).

37. See generally HELMUT BRANDT, *DIE DURCHBRECHUNG DER MEISTBEGÜNSTIGUNG* (1933) (discussing the dialog between State-centered theories of foreign trade and liberal theories of foreign trade and their relation to and influence on the diffusion of MFN clauses).

38. See Georg Schwarzenberger, *The Most-Favoured-Nation Standard in British State Practice*, 22 BRIT. Y.B. INT'L L. 96, 97 (1945) [hereinafter Schwarzenberger, *British MFN Standard*]. Unilateral grants of MFN treatment can even be traced back to the Eleventh Century. See Endre Ustor, *First Report on the Most-Favoured-Nation Clause*, [1969] 2 Y.B. Int'l L. Comm'n 157, paras. 10-12, U.N. Doc. A/CN.4/SER. A/1969/Add. 1 [hereinafter *First Report on the Most-Favoured-Nation Clause*].

39. See, e.g., Baron Boris Noldé, *Droits et Technique des Traités de Commerce*, 3 RECUEIL DES COURS 295, 307-08 (1924 - II) (trans. by Author) (quoting the Latin text of an MFN provision in a 1679 treaty between the Netherlands and Sweden). Only during the course of the Eighteenth Century, treaties started differentiating more clearly between political and commercial aspects relating to the presence of foreign merchants. See Ustor, *First Report on the Most-Favoured-Nation Clause*, *supra* note 38, para. 17.

40. Mercantilist economics assumed that the wealth of a nation depended upon its supply of capital. It further believed that the volume of trade was unchangeable. Accordingly, mercantilism posited that the wealth of a nation was best furthered by a positive external trade balance where exports outbalanced imports. Accordingly, protectionist measures and high tariffs that discouraged imports were among the instruments of choice of mercantilist politics.

41. See BRANDT, *supra* note 37, at 2 *et seq.*; HELMUT HOCK, *WAS HAT MAN MIT DER*

under the MFN clause was thus understood not as an instrument to secure equal competition, but as a punishment for not having adhered to the preferential concession originally made. In aiming to protect an originally discriminatory trade policy, the function of MFN clauses thus differed fundamentally from modern MFN clauses, even though they were similarly formulated as unconditional clauses. Ideologically, MFN clauses during the mercantilist age were not instruments of multilateralism, but an expression of a bilateral and protectionist view on international economic relations.

Yet, the view underlying mercantilist economics changed over time. Starting with the Treaty of Amity and Commerce concluded between the United States and France in 1778, conditional MFN clauses were introduced and subsequently became dominant in international treaty practice.<sup>42</sup> Conditional MFN treatment required that rights and privileges be extended to the beneficiary State under the condition that the beneficiary State grant the same concessions offered by the most favored nation in return for the more favorable rights in question. While the conditional form of MFN clauses ensured that the beneficiary State could not benefit from more favorable treatment accorded to third parties without concurrently assuming potential disadvantages incumbent upon the third State,<sup>43</sup> the purpose of conditional MFN clauses was ultimately to arrive at lower tariffs.

The idea behind conditional MFN treatment was to induce the beneficiary State to lower those tariffs that the third party had lowered, as a concession, in order to receive the treatment that was relatively more favorable compared to the treatment originally granted by the granting State to the beneficiary State.<sup>44</sup> The purpose of conditional MFN clauses, therefore, was not to secure a preferential bilateral bargain, but to eventually arrive at a more liberal system of international trade based on equality of treatment and non-discrimination coupled with increasingly lower tariffs. Conditional MFN treatment was above

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MEISTBEGÜNSTIGUNG GEWOLLT? 8-10 (1931); *see also* IGNAZ JASTROW, *DIE MITTELEUROPAISCHE ZOLLANNÄHERUNG UND DIE MEISTBEGÜNSTIGUNG* (1915); H. LUEDICKE, *DIE ENTWICKLUNG DES MEISTBEGÜNSTIGUNGSPRINZIPS: VERSUCH DER THEORETISCHEN BEHANDLUNG DER MEISTBEGÜNSTIGUNGSFRAGE* (1925).

42. Article Two of the Treaty stipulated:

The Most Christian King and the United States engage mutually not to grant any particular favour to other nations, in respect of commerce and navigation, which shall not immediately become common to the other party, who shall enjoy the same favour, freely, if the concession was freely made, or on allowing the same compensation, if the concession was conditional.

*See* WILLIAM MALLOY, *I TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS: 1776 – 1909* 468, 469 (1910).

43. The conditional clause therefore attempts to solve a free-rider problem. *See* Warren F. Schwartz & Alan O. Sykes, *The Economics of the Most Favored Nation Clause*, in *ECONOMIC DIMENSIONS IN INTERNATIONAL LAW* 43, 59-61 (Jagdeep S. Bhandari & Alan O. Sykes eds., 1997).

44. *See* FRANZ LUSENSKY, *UNBESCHRÄNKTE GEGEN BESCHRÄNKTE MEISTBEGÜNSTIGUNG (REZIPROZITÄT) 12 et seq., 20 et seq.* (1918).

all supported by the United States, as a then newly independent State, in order to participate more actively in international trade.<sup>45</sup> It formed part of the U.S. foreign economic policy until 1923,<sup>46</sup> but also prevailed in Europe until 1860.<sup>47</sup>

The policy of conditional MFN treatment was ultimately abandoned, because it was too complicated and economically inefficient. Secretary of State Hughes, for example, explained the reasons of the United States for abandoning conditional MFN treatment:

[T]he ascertaining of what might constitute equivalent compensation in the applications of the conditional most-favored-nation principle was found to be difficult or impracticable. Reciprocal commercial arrangements were but temporary makeshifts; they caused constant negotiation and created uncertainty. Under present conditions, the expanding foreign commerce of the United States needs a guarantee of equality of treatment which cannot be furnished by the conditional form of the most-favored-nation clause.<sup>48</sup>

In addition, conditional MFN treatment also required a complicated system for traders to record the country of origin of a certain product in order to classify it correctly under the proper country-specific tariff. Depending on the product, this could impose significant additional costs by requiring complicated methods to track the country of origin of certain products or separating the same product originating from different countries. Additional problems arose when products were put together from components produced in different countries. This required rules of origin that were more difficult to handle than non-discriminatory tariffs.<sup>49</sup>

For this reason, the unconditional MFN clause developed to become the prevailing model governing international economic relations. The archetype of such an MFN clause in modern times was Article Nineteen of the Treaty of Commerce between Great Britain and France of January 23, 1860, also called the Cobden or Chevalier-Cobden Treaty. It stipulated:

Each of the two High Contracting Powers engages to confer on the other any favour, privilege, or reduction in the tariff of duties of importation on the articles mentioned in the present Treaty, which the said Power may concede to any third Power. They further engage not to enforce one against the other any prohibition of importation or exportation which shall not at the same time be applicable to all

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45. Economically, the conditional clause was in the interest of the United States as long as it was a net importer of products, as the conditional form ensured that the beneficiary State that imported products into the United States had to grant, in return, lower tariffs to exported U.S. products in order to benefit from more favorable tariffs for imports into the United States. See RICHARD SNYDER, *THE MOST-FAVORED-NATION CLAUSE* 243 (1948). Conversely, the conditionality of MFN treatment in practice hardly mattered for the United States, compared to unconditional MFN treatment, because the United States usually did not grant tariff reductions against compensation. See LUSENSKY, *supra* note 44, at 18 *et seq.*

46. Ustor, *First Report on the Most-Favoured-Nation Clause*, *supra* note 38, para. 26.

47. *Id.* para. 28.

48. See RICHARD HACKWORTH, *5 DIGEST OF INTERNATIONAL LAW* 273 (1943).

49. On the drawbacks of conditional MFN clauses, see LUSENSKY, *supra* note 44, at 20 *et seq.*

other nations.<sup>50</sup>

Unlike conditional MFN clauses, this clause did not require the beneficiary State to make the same concessions vis-à-vis the granting State as the most favored nation. Up to World War I, the unconditional clause became “the almost universal basis of a vast system of commercial treaties”<sup>51</sup> and developed into the “corner-stone” of international commercial relations.<sup>52</sup> Notwithstanding a temporary chill in the aftermath of World War I,<sup>53</sup> unconditional MFN treatment remained the ordering paradigm for international trade relations until the world economic crisis broke out in 1929. The conclusion of unconditional MFN clauses was recommended, for instance, at several inter-governmental conferences and by organs of the then newly-created League of Nations.<sup>54</sup> Furthermore, the United States abandoned its support for conditional MFN clauses after World War I and henceforth based its commercial treaties on unconditional MFN treatment.<sup>55</sup> The abandonment of the conditional clause was closely connected to the free trade movement in the Nineteenth and early Twentieth Centuries.<sup>56</sup> Ideologically, this reflected liberal ideas about the equality of States and the clauses’ contribution to liberalizing international trade by fostering equal competition.

The movement to base international economic relations on multilateral and therefore general and non-discriminatory rules of conduct, however, was not restricted to international trade relations. Instead, the idea of economic equality and equal competition among nations also spurred other areas of international economic cooperation more similar to the context of modern foreign investment.

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50. 50 BRITISH AND FOREIGN STATE PAPERS 13, 24-25 (1860).

51. Snyder, *supra* note 45, at 239.

52. Stanley Hornbeck, *The Most-Favored-Nation Clause*, 3 AM. J. INT’L L. 395 (1909).

53. See Ustor, *First Report on the Most-Favoured-Nation Clause*, *supra* note 38, paras. 30-37.

54. In 1922, the International Economic Conference recommended that “commercial relations should be resumed upon the basis of commercial treaties, resting on the one hand upon the system of reciprocity adapted to special circumstances, and containing on the other hand, so far as possible, the most-favoured-nation clause.” In 1927, the Conference reiterated its position that it “considers that the mutual grant of unconditional most-favoured-nation treatment as regards custom duties and conditions of trading is an essential condition of the free and healthy development of commerce between States.” It went on to emphasize “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.” This position was upheld by the Committee of the League of Nations Assembly throughout the 1930s. In addition, various attempts were made to codify the law on MFN clauses at the time, thus illustrating the importance that was accorded to the concept of unconditional MFN treatment. These attempts encompassed one project under the auspices of the Economic Committee of the League of Nations in the 1930s, the work of the Committee of Experts for the Progressive Codification of International Law and a codification by the Institute of International Law. See Ustor, *First Report on the Most-Favoured-Nation Clause*, *supra* note 38, paras. 65-106.

55. Overall, only nine out of 607 treaties in the inter-War period contained a conditional clause. See SNYDER, *supra* note 45, at 41.

56. LUSENSKY, *supra* note 44, at 11; Ustor, *First Report on the Most-Favoured-Nation Clause*, *supra* note 38, paras. 28-29.

Thus, the mandate system established under the auspices of the League of Nations for former colonies enshrined “equal opportunities for the trade and commerce of other Members of the League” as one of its fundamental principles.<sup>57</sup> Similarly, there were other international treaty regimes that endorsed equality of opportunity as an ordering principle before and after World War I.<sup>58</sup>

The positive attitude towards multilateralism and free trade, however, changed drastically after the world economic crisis broke out in 1929. As a reaction, bilateral trade relations and discriminatory trade surged.<sup>59</sup> The United Kingdom, for instance, abandoned its free trade policy in 1932; the United States raised tariffs; Germany switched to a system of discriminatory trade based on bilateral relations. International economic relations were no longer based on multilateral ideas and equality of treatment, but instead characterized by discriminatory trade and investment policies.<sup>60</sup> The surging bilateralism in the years before World War II did not only yield to economic considerations, but already foreshadowed the preparation of States for the upcoming war.<sup>61</sup> This is particularly true for Germany whose web of bilateralist economic arrangements created dependencies that could easily be transformed into military alliances.<sup>62</sup> Discriminatory trade policies, in turn, required abandoning MFN clauses as the basis for international economic relations.

After the end of World War II, however, multilateralism reemerged as an instrument for ordering international relations, both politically as well as economically.<sup>63</sup> Accordingly, MFN clauses reappeared and became the basis for ordering international trade and investment relations. In view of the fatal

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57. See League of Nations Covenant, art. 22, para. 5 (governing the so-called B mandates). For other mandates, the so-called A mandates governed by Article 22(4) of the Covenant, the same principle was endorsed in the respective mandates that required the relevant mandatory to accord equal opportunities for trade and commerce to the other League of Nation Member States. See Bileski, *supra* note 36, at 221-22.

58. See Schwarzenberger, *Equality and Discrimination*, *supra* note 18, at 174-80.

59. Ustor, *First Report on the Most-Favoured-Nation Clause*, *supra* note 38, paras. 38-39; see also POMFRET, *supra* note 13, at 29-59.

60. See Louise Sommer, *Die Voraussetzungen des staatsideologischen Kampfes gegen die Meistbegünstigungsklausel*, 16 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT [ZöR] 265, 268-70 (1936); see also RUGGIE, *supra* note 9, at 3, 8-9 (1993). The change in Germany's foreign economic policy can be aligned with the emerging economic ideology of the Nazi regime that defined itself pronouncedly against the ideology of liberalism. See STEPHAN SCHILL, *DER EINFLUSS DER WETTBEWERBSIDEOLOGIE DES NATIONALSOZIALISMUS AUF DEN SCHUTZZWECK DES UWG 7-14* (2004).

61. See Gilbert Verbit, *Preferences and the Public Law of International Trade*, in COLLOQUIUM 1968: INTERNATIONAL TRADE AGREEMENTS 27 (1969) (Hague Academy of International Law); see also MICHAEL BARNHART, *JAPAN PREPARES FOR TOTAL WAR, THE SEARCH FOR ECONOMIC SECURITY 1919-1941* (1987).

62. See RUGGIE, *supra* note 9, at 3, 8-9 (citing ALBERT HIRSCHMANN, *NATIONAL POWER AND THE STRUCTURE OF FOREIGN TRADE* [1945]).

63. See *id.* at 3, 24-31.

consequences of World War II, MFN treatment was now held as a way to prevent international conflicts and to further world peace by prohibiting bilateral alliances and bloc-building in an economic context prone to spill over into military conflicts.<sup>64</sup>

*C. Codification on MFN Clauses by the International Law Commission*

Parallel to the newly emerging receptiveness towards multilateralism and MFN treatment, there was also renewed interest in further studying and codifying the use and interpretation of MFN clauses. For this purpose, the International Law Commission (ILC) began work on the function and interpretation of MFN clauses in 1967. In 1978, it submitted Draft Articles on Most-Favored-Nation Clauses to the U.N. General Assembly and recommended them as a basis for a multilateral convention.<sup>65</sup>

The Draft Articles intended to “apply to most-favoured-nation clauses contained in treaties between States” (Article One).<sup>66</sup> MFN clauses, in turn, are defined as “treaty provision[s] whereby a State undertakes an obligation towards another State to accord most-favoured-nation treatment in an agreed sphere of relations” (Article Four),<sup>67</sup> that is, “treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favorable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State” (Article Five).<sup>68</sup>

In line with the decision of the ICJ in *Anglo-Iranian Oil Company*,<sup>69</sup> the Draft Articles clarify that the legal basis for most-favored-nation treatment “arises only from the most-favoured-nation clause . . . in force between the granting State and the beneficiary” and that “[t]he most-favoured-nation treatment to which the beneficiary State, for itself or for the benefit of persons or things in determined relationship with it, is entitled under a clause . . . is determined by the treatment extended by the granting State to a third State or persons or things in the same relationship with that third State” (Article Eight).<sup>70</sup> The right arises at the moment the more favorable treatment is

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64. In fact, national protectionism and bilateral isolation of markets in the inter-War period was viewed as a supporting factor, if not one of the reasons, for the economic depression in the 1930s and subsequently World War II. See Verbit, *supra* note 61, at 25-31; see also GERALD CURZON, MULTILATERAL COMMERCIAL DIPLOMACY 20-33 (1965). Some States already regarded economic discrimination to be among the factors having caused World War I. See Verbit, *supra* note 61, at 19, 26.

65. See MFN Draft Articles, *supra* note 25, para. 73, at 16.

66. MFN Draft Articles, *supra* note 25, at 16.

67. *Id.* at 18.

68. *Id.* at 21.

69. See *supra* note 30 and accompanying text.

70. MFN Draft Articles, *supra* note 25, at 25.

extended to the third State (Article Twenty).<sup>71</sup>

Articles Nine and Ten set out the rules of interpretation for determining whether certain treatment by the granting State falls under the scope of application of the MFN clause. Article 9(1) clarifies that “the beneficiary State acquires, for itself or for the benefit of persons or things in a determined relationship with it, only those rights which fall within the limits of the subject matter of the clause.”<sup>72</sup> Article 10(1) reiterates that “only if the granting State extends to the third State treatment within the limits of the subject matter of the clause” does the beneficiary State acquire the more favorable treatment under the MFN clause.<sup>73</sup>

Both articles endorse the *ejusdem generis* rule,<sup>74</sup> according to which “the most-favoured-nation clause can only attract matters belonging to the same category of subject as that to which the clause itself relates.”<sup>75</sup> For instance, an MFN clause applying to more favorable treatment concerning tariff concessions will not entitle the beneficiary State to more favorable treatment with respect to the extradition of persons accused of crimes.<sup>76</sup> Determining the exact scope of the subject matter of a clause, therefore, will require the interpretation of the scope of the MFN clause contained in the basic treaty.

The crux of this rule is that the more favorable treatment accorded to the third State concerns the subject matter of the MFN clause in the basic treaty. By contrast, whether the relationship between the third State and the granting State differs from the relationship between the granting and the beneficiary State is irrelevant:

The granting State cannot evade its obligations, unless an express reservation so provides, on the ground that the relations between itself and the third country are friendlier than or ‘not similar’ to those existing between it and the beneficiary. It is only the subject-matter of the clause that must belong to the same category, the *idem genus*, and not the relation between the granting State and the third State on the one hand and the relation between the granting State and the beneficiary State on the other.<sup>77</sup>

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71. *Id.* at 52-53.

72. *Id.* at 27.

73. *Id.*

74. *Commentary to Articles 9 and 10, in MFN Draft Articles, supra* note 25, para. 1, at 27.

75. *Ambatielos Claim (Greece v. U.K.)*, 12 R.I.A.A. 83, 107 (1963); *Maffezini v. Spain*, Decision on Objections to Jurisdiction, Jan. 25, 2000, paras. 46-56, 5 ICSID Rep. 396 (W. Bank 2000). The origins of the principle lie in a common law doctrine of interpretation according to which “general words when following (and sometimes when preceding) special words are limited to the *genus*, if any, indicated by the special words.” See LORD MCNAIR, *THE LAW OF TREATIES* 393 (1961).

76. See, e.g., MCNAIR, *supra* note 75, at 287.

77. *Commentary to Articles 9 and 10, in MFN Draft Articles, supra* note 25, para. 12, at 30. Cf. Appellate Body Report, *EC-Regime for the Importation, Sale and Distribution of Bananas*, ¶¶ 189-191, WT/DS27/AB/R (WTO) (Sept. 25, 1997) (emphasizing that it was not upon the Member States of the WTO to create different classes of products by using different regimes for banana imports depending on whether the bananas came from ACP countries or other foreign countries). In

In particular, as Article Eleven clarifies, the fact that the third State made certain concessions in order to be granted more favorable treatment is normally irrelevant, unless the MFN clause in the basic treaty is expressly formulated as a conditional clause.<sup>78</sup> Article Eleven therefore establishes a presumption in favor of the unconditional character of an MFN clause. Consequently, making MFN treatment conditional upon granting either reciprocity or the same concession as those made by the third State therefore has to be stipulated expressly in the MFN clause in question.<sup>79</sup>

Articles Fifteen to Eighteen contain clarifications of factors that are irrelevant for the operation of MFN clauses. Thus, Article Fifteen reiterates that the making of concessions or compensation by the third party is irrelevant for the operation of an unconditional MFN clause. Article Sixteen, in turn, clarifies that the third State and the granting State cannot exclude the extension of rights under the basic treaty between the granting State and the beneficiary State. It thus confirms the general rule under Article Thirty-Four of the Vienna Convention on the Law of Treaties that international treaties do “not create either obligations or rights for a third State without its consent.” Article Seventeen further stipulates that it is irrelevant whether the more favorable treatment results from a bilateral or a multilateral agreement. Likewise, under Article Eighteen, the granting State cannot avoid the multilateralizing effect of an MFN clause if the more favorable treatment is extended as national treatment to a third State.<sup>80</sup>

After the ILC recommended the adoption of the Draft Articles as a multilateral convention to the U.N. General Assembly, the latter only adopted a decision on December 9, 1991 bringing the Draft Articles “to the attention of Member States and of intergovernmental organizations for their consideration in such cases and to such extent as they deem appropriate,”<sup>81</sup> without, however, following through and transforming them into a binding legal instrument. Notwithstanding, the ILC Draft Articles retain their value as an interpretative aid for MFN clauses, including those included in investment treaties. The Draft Articles were understood by the ILC as applying to MFN clauses in general. Thus, the Commission’s study understood “the clause as a legal institution” that

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the Appellate Body Report, the *tertium comparationis* for determining discrimination is therefore established from the perspective of international law and through the relevant dispute settlement mechanism, not by the State concerned. *See id.*

78. *See* MFN Draft Articles, *supra* note 18, at 33 (“If a most-favoured-nation clause is not made subject to a condition of compensation, the beneficiary State acquires the right to most-favoured-nation treatment without the obligation to accord any compensation to the granting State.”).

79. *See id.* at 33.

80. Apart from that, Draft Articles Twenty-One to Thirty contain ancillary or specific aspects of MFN clauses, such as specific regimes for developing countries (Draft Articles Twenty-Three and Twenty-Four), exceptions for frontier trade (Draft Article Twenty-Five) and provisions on the relationship between the Draft Articles and other international agreements.

81. *See* Ustor, *Most-Favoured-Nation Clause*, *supra* note 17, at 473.

extended beyond the sphere of international trade “to the operation of the clause in as many spheres as possible.”<sup>82</sup> Furthermore, the Draft Articles were always considered to constitute guidelines for the interpretation of MFN clauses. Thus, even if the Draft Articles had been formally adopted by States as an international treaty, this treaty mainly would have established rules for the interpretation of MFN clauses in order to contribute, in this context, to more legal stability and predictability.<sup>83</sup>

Finally, the main reasons why the Draft Articles have never been taken further related to disagreements not about the general interpretative principles the Draft Articles set out, but about two rather narrow issues. These disagreements concerned, on the one hand, the relationship between MFN clauses and customs unions, respectively regional trade agreements,<sup>84</sup> and, on the other hand, the relationship between MFN clauses and general systems of preferences for developing countries.<sup>85</sup> In view of the fact that both of these trade-related issues today are being addressed within the WTO framework, the ILC decided in 2007 to establish a Working Group in order to examine the possibility of reconsidering the topic, in particular in view of the problems concerning the interpretation of MFN clauses in investment treaties.

The Working Group, in turn, concluded that “the Commission could play a useful role in providing clarification on the meaning and effect of the most-favoured-nation clause in the field of investment agreements . . . building on the past work of the Commission on the most-favoured-nation clause.”<sup>86</sup> It “therefore recommend[ed] that the topic of the most-favoured-nation clause be included in the long-term programme of work of the Commission”<sup>87</sup> through the establishment of a working group that would study, *inter alia*, State practice and jurisprudence on MFN clauses since 1978 and “a full articulation of the issues arising out of the inclusion of most-favoured-nation clauses in investment

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82. See *ILC Report of 30th Session*, *supra* note 18, para. 61, at 14.

83. This was, for example, the express view of Luxemburg, which stated that “the sole purpose of the provision of the draft is the establishment of rules of interpretation or presumptions, intended to establish the meaning of the most-favoured-nation clause in default of stipulations to the contrary.” See Nikolai Ushakov, *Report on the Most-Favoured-Nation Clause*, [1978] 2 Y.B. Int’l L. Comm’n (pt. 1) 30, para. 328, U.N. Doc. A/CN.4/SER.A 1978/Add.1 (Part 1). This view was also shared by the ILC’s Special Rapporteur himself. *Id.* paras. 330-31. It was also enshrined in the final recommendation of the Commission’s Draft Articles to the U.N. General Assembly. See *ILC Report of 30th Session*, *supra* note 18, at 8, 14 (“The draft articles on most-favoured-nation clauses, which contain particular rules applicable to certain types of treaty provisions, namely most-favoured-nation clauses, should be interpreted in the light of the provisions of that Convention . . . Nevertheless, the draft articles are intended to constitute an autonomous set of legal rules relating to most-favoured-nation clauses.”).

84. See INT’L LAW COMM’N [ILC], 59th session, *Report of the Working Group: Most-Favoured-Nation Clause*, Annex, para. 14, U.N. DOC. A/CN.4/L.719 (July 20, 2007), available at [http://untreaty.un.org/ilc/documentation/english/a\\_cn4\\_l719.pdf](http://untreaty.un.org/ilc/documentation/english/a_cn4_l719.pdf).

85. *Id.* Annex para. 15.

86. *Id.* para. 4.

87. *Id.* para. 5.

agreements.”<sup>88</sup> The necessary continuity that the Working Group emphasized with the earlier work of the ILC on MFN clauses, which had resulted in the submission of the Draft Articles in 1978, thus reinforces the general value of the Draft Articles as authoritatively informing the understanding and interpretation of MFN clauses, including those in international investment treaties.

As a consequence, the Draft Articles generally remain valuable as an indication of State practice and *opinio juris* on the general understanding and interpretation of MFN clauses in international treaties. They enshrine what can be considered as the ordinary meaning of an MFN clause in the sense of Article Thirty-One of the Vienna Convention on the Law of Treaties. In sum, the Draft Articles favor the understanding of MFN clauses as normally encompassing unconditional MFN treatment, they set out their general function in directly incorporating more favorable treatment into the basic treaty and they discard several arguments, often invoked against the operation of an MFN clause, that do not play a role in the clauses’ operation and interpretation. Furthermore, as the development of MFN clauses in State practice as well as the Draft Articles show, they are generally understood broadly and endorse multilateralism as an ordering paradigm for international relations. This thrust is also material for the application and interpretation of MFN clauses in international investment treaties.

### III.

#### MULTILATERALIZING SUBSTANTIVE INVESTMENT PROTECTION

In accordance with their economic rationale to create a level playing field for foreign investors from different home countries and to allow for equal competition among them, MFN clauses, first and foremost, extend the scope of more favorable substantive rights and protections that host States offer to nationals of third countries. This encompasses not only provisions in domestic laws and regulations or pure administrative practice,<sup>89</sup> but also more favorable conditions offered in third-country investment treaties. For investors, MFN clauses thus harmonize the legal framework governing their economic activity and create uniform standards of investment protection in any given host State that grounds its investment treaties on MFN treatment. For purposes of illustrating the multilateralization of international investment law, however, the conferral of more favorable conditions in third-country BITs plays the most significant role.

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88. *Id.* para. 6.

89. *Cf. Commentary to Article 8, in MFN Draft Articles, supra* note 25, para. 1, at 25. MFN treatment under investment treaties therefore applies to a broad array of more favorable treatment, whether *de jure* and *de facto*. *See also* Faya Rodriguez, *supra* note 21, at 92. For the parallel situation in international trade law, see Appellate Body Report, *Canada—Certain Measures Affecting the Automotive Industry*, para. 78, WT/DS139/AB/R, WT/DS142/AB/R (WTO) (May 31, 2000).

*A. Importing More Favorable Investor Rights*

The use of MFN clauses to import more favorable conditions from third-country BITs is largely uncontested.<sup>90</sup> In fact, several tribunals have held that MFN clauses in the BITs governing the disputes at hand directly incorporated into the basic treaty more favorable substantive investment protection from BITs between the host State and third countries. They therefore accepted that investors covered under the basic treaty could directly rely on the more favorable treatment granted to other foreign investors under their respective BITs.

In the first known investment treaty arbitration, *Asian Agricultural Products v. Republic of Sri Lanka*, the Tribunal accepted the principle that an investor covered by the basic treaty could rely on more favorable substantive conditions granted under another BIT of the host State.<sup>91</sup> In that case, however, the investor did not prevail on the more favorable conditions because the investor could not show that the Swiss-Sri Lankan BIT provided for a stricter liability standard of the host State than the British-Sri Lankan BIT.<sup>92</sup>

The incorporation of substantive rights from third-country BITs through an MFN clause was also accepted in *Pope & Talbot v. Canada*. When discussing the scope of Article 1105(1) NAFTA, the Tribunal faced two possibilities in interpreting the fair and equitable treatment standard. The first and more restrictive position, invoked by the respondent host State, asserted that the standard was equivalent to the customary international law minimum standard as expressed in the 1920s *Neer* case.<sup>93</sup> The second position supported a free-standing and arguably broader interpretation of fair and equitable treatment as an independent treaty standard.<sup>94</sup>

The Tribunal concluded that the MFN clause in Article 1103 NAFTA would entitle investors to the broader interpretation of fair and equitable treatment, as this was the standard adopted in the Respondent's BITs with third

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90. See *Berschader v. Russia*, SCC Case No. 080/2004, Award, Apr. 21, 2006, para. 179 (SCC 2006) ("It is universally agreed that the very essence of an MFN provision in a BIT is to afford to investors all material protection provided by subsequent treaties.")

91. *Asian Agric. Prods. v. Sri Lanka*, Final Award, June 27, 1990, para. 54, 4 ICSID Rep. 250 (W. Bank, 1990).

92. *Id.*

93. See *Pope & Talbot Inc. v. Canada*, Award on the Merits of Phase 2, Apr. 10, 2001, paras. 108-09, 7 ICSID Rep. 102 (UNCITRAL 2001); Award in Respect of Damages, May 31, 2002, para. 57, 7 ICSID Rep. 148 (UNCITRAL 2002). The international minimum standard protected foreigners against treatment that, according to the formula adopted in the famous *Neer* case, amounted "to an outrage, to bad faith, to willful [*sic*] neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency." See *Neer (United States) v. Mexico*, 4 R.I.A.A. 61, 62 (1926). On the international minimum standard, see generally Edwin Borchard, *The "Minimum Standard" of Treatment of Aliens*, 38 MICH. L. REV. 445, 446 (1940).

94. *Pope & Talbot*, Award on the Merits of Phase 2, paras. 110-11.

countries.<sup>95</sup> Although NAFTA's Free Trade Commission (FTC) had interpreted Article 1105 as an expression of the international minimum standard,<sup>96</sup> the Tribunal in *Pope & Talbot* reaffirmed its position that NAFTA's MFN clause could import a more favorable fair and equitable treatment standard from other Canadian BITs.<sup>97</sup> However, the decision turned on other grounds because the Tribunal held that the Respondent State's conduct violated even the more restrictive interpretation of fair and equitable treatment.<sup>98</sup>

Furthermore, in *MTD v. Chile* the Tribunal allowed the investor to incorporate by means of the MFN clause in the Chilean-Malaysian BIT more favorable rights contained in the Chilean-Croatian and the Chilean-Danish BITs.<sup>99</sup> The more favorable rights concerned the obligation under the third-country BITs to grant necessary permits once an investment has been approved under the host State's foreign investment legislation. Finally, in *Rumeli Telekom v. Kazakhstan*, the Tribunal *inter alia* held the host State liable for a violation of fair and equitable treatment that was incorporated into the Turkish-Kazakh BIT based on an MFN clause in that treaty from third-party treaties, in particular the U.K.-Kazakh BIT.<sup>100</sup>

The cases above highlight the role of MFN clauses in harmonizing and in raising the standards of investment protection. Importing more favorable substantive conditions granted in third-country BITs comports with the economic rationale of MFN clauses, as equal investment conditions and standards of treatment for investors of different nationalities are essential to equal competition and to an efficient allocation of resources. Furthermore, the incorporation of more favorable substantive rights based on MFN clauses shows

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95. *Id.* para. 117 (observing that "NAFTA investors and investments that would be denied access to the fairness elements untrammelled by the 'egregious' conduct threshold that Canada would graft onto Article 1105 would simply turn to Articles 1102 and 1103 for relief"). Notably, the Tribunal used the argument that third-party BITs contained more favorable expressions of fair and equitable treatment directly in order to interpret Article 1105(1) NAFTA. *Cf.* Stephen Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, 70 BRIT. Y.B. INT'L L. 99, 149 (1999) (observing that "one effect of the growing network of bilateral investment treaties incorporating the most-favourable-nation standard has been to generalize the applicability of the fair and equitable standard among States").

96. NAFTA FREE TRADE COMMISSION, NOTES OF INTERPRETATION OF CERTAIN CHAPTER 11 PROVISIONS (July 31, 2001), available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/NAFTA-Interpr.aspx?lang=en>.

97. *See Pope & Talbot v. Canada*, Award in Respect of Damages, para. 12 ("The Tribunal's view is well known – the Commission's interpretation would, because of Article 1103 . . . produce the absurd result of relief denied under Article 1105 but restored under Article 1103.").

98. *Id.* para. 66.

99. *MTD Equity Sdn. Bhd. v. Chile*, Award, May 25, 2004, paras. 100-04., 197-206, 12 ICSID Rep. 6 (W. Bank 2004). *See also MTD*, Decision on Annulment, Mar. 21, 2007, para. 64, 13 ICSID Rep. 500 (W. Bank 2007).

100. *Rumeli Telekom A.S. v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, July 29, 2008, paras. 572, 575 (observing that Kazakhstan had conceded that the MFN clause in question applied to incorporate more favorable substantive investor rights granted under the host State's third-country BITs).

that the clauses are a tool for the multilateralization and harmonization of substantive standards of investment protection. The clauses not only extend and multilateralize more favorable conditions from third-country BITs, but also deter future efforts to contain inter-State investment relations on a bilateral basis. As the episode surrounding the FTC's interpretation of fair and equitable treatment under Article 1105 NAFTA and the reaction of the Tribunal in *Pope & Talbot* illustrate, MFN clauses elevate the level of protection in any given host State to the maximum level granted in any one of that State's investment treaties. MFN clauses therefore harmonize investment protection at the most elevated level available.

### *B. Limits to the Operation of MFN Clauses*

While acknowledging that MFN clauses enable investors to invoke more favorable conditions offered under third-country BITs, several arbitral awards have also dealt with the limits of MFN clauses. Limitations on the operation of MFN clauses either flow from explicit restrictions of the clause itself or are implied from limitations in the application of the basic treaty containing the clause.

#### *1. Explicit Restrictions of the Scope of Application of MFN Clauses*

Explicit exceptions to MFN clauses are generally an effective means of shielding bilateral bargains against the clauses' multilateralizing effect. In the NAFTA case *ADF v. United States*, for example, the investor took up the position of the Tribunal in *Pope & Talbot* and invoked the more favorable provisions on fair and equitable treatment in the U.S.-Albanian and the U.S.-Estonian BITs. This would have allowed the investor to circumvent the more restrictive interpretation of Article 1105(1) NAFTA pursuant to the FTC Note of Interpretation.<sup>101</sup> The Tribunal, however, rejected the Claimant's argument because the dispute related to a procurement decision, a subject matter explicitly excluded from the scope of operation of the MFN clause in Article 1103 NAFTA.<sup>102</sup>

Furthermore, MFN clauses cannot override clauses included in the basic treaty which absolve a party of the obligations under the treaty as a whole. For example, Article Eleven of the U.S.-Argentine BIT provides that the "Treaty

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101. Cf. *ADF Group, Inc. v. United States*, Final Award, Jan. 9, 2003, paras. 76-87, 104-07, 6 ICSID Rep. 470 (W. Bank 2003).

102. *Id.* para. 196 (applying Article 1108(7)(a) NAFTA pursuant to which Article 1103 NAFTA does not apply to procurement by a Party or a state enterprise). Notwithstanding, the decision is noteworthy because the Tribunal confirmed, in line with *Pope & Talbot*, *supra* notes 93-98 and accompanying text, the general possibility of circumventing the restrictive interpretation the FTC Note has given to Article 1105(1) NAFTA based on NAFTA's MFN clause, provided that the investor is able to show that other host State BITs are actually more favorable. See *ADF*, Final Award, Jan. 9, 2003, para. 196.

shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.”<sup>103</sup> These clauses not only restrict the scope of application of specific substantive provisions, but directly limit, within their scope of application, the application of the entire BIT, including the treaty’s MFN clause. Such exceptions therefore cannot be bypassed despite more favorable treatment accorded to investor’s from third-party States.

In *CMS Gas Transmission v. Argentina*, the Claimant argued that the MFN clause in the U.S.-Argentine BIT would override the emergency clause mentioned above, because other Argentine BITs did not contain comparable clauses. While the Tribunal rightly rejected the Claimant’s argument, it chose a problematic justification. It concluded that the emergency clause could be bypassed only if the third-country BIT contained a more favorable emergency clause.<sup>104</sup> This justification, which draws on the *ejusdem generis* rule, however, is mistaken in its premise that an MFN clause could only attract more favorable clauses that have the same subject matter as the clause in the basic treaty that is supposed to be overridden.

Instead, the *ejusdem generis* rule limits the operation of MFN clauses to importing more favorable treatment relating to the same subject matter as the clause itself, that is, in the case at hand, the equal treatment of foreign investors with different nationalities. The *ejusdem generis* rule, by contrast, does not require that the more favorable clause concerns the same subject matter as the treaty provision in the basic treaty that is supposed to be overridden.<sup>105</sup> The Tribunal in *CMS* therefore misrepresented the *ejusdem generis* rule. Although it ultimately reached the correct result, the Tribunal should have relied, in justifying its result, on the limitation of the MFN clause through the treaty’s emergency clause. Consequently, exceptions to the scope of application of a BIT as a whole cannot be overridden by the operation of an MFN clause in the same treaty.

## 2. Restrictions to MFN Clauses Based on the Scope of Application of the Basic Treaty

While the *ejusdem generis* rule limits the operation of MFN clauses to

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103. See Treaty concerning the Reciprocal Encouragement and Protection of Investment art. 11, U.S.-Arg. Nov. 14, 1991, S. TREATY DOC. NO. 103-2 (1993).

104. In the Tribunal’s view, this rule of interpretation would only incorporate more favorable treatment of other investors by a more favorable emergency clause. See *CMS Gas Transm. Co. v. Argentina*, ICSID Case No. ARB/01/8, Award, May 12, 2005, para. 377 (W. Bank 2005).

105. See also *Commentary to Articles 9 and 10*, in MFN Draft Articles, *supra* note 25, para. 12, at 30 (stating that it is incorrect “to say that the *treaty* or *agreement* including the clause must be of the same category (*ejusdem generis*) as that of the benefits that are claimed under the clause”). See also *MTD Equity Sdn. Bhd. v. Chile*, Decision on Annulment, Mar. 21, 2007, para. 64, 13 ICSID Rep. 500 (W. Bank 2007).

incorporating more favorable treatment concerning the subject matter of the clause itself, the scope of application of MFN clauses is regularly also restricted indirectly by the scope of application of the basic treaty itself. Thus, a treaty's scope of application, as regards its subject matter (*ratione materiae*), its temporal dimension (*ratione temporis*) and its personal applicability (*ratione personae*), can delimit the scope of application of an MFN clause contained in that treaty. As a result, MFN clauses in BITs will usually not operate as procuring more favorable treatment, for example, relating to diplomatic immunities. Being outside of the subject matter applicability of the basic treaty, these or similarly unrelated subject matters will usually also be outside the subject matter of the treaty's MFN clause and thus complement the *ejusdem generis* rule.<sup>106</sup> The scope of application of the basic treaty therefore will limit the scope of application of its MFN clause, unless the clause is exceptionally broad and explicitly goes beyond the treaty's subject matter. In other words, an MFN clause, in principle, cannot extend the scope of application of the basic treaty. Likewise, an investor will not be able to extend the meaning of "investor" or "investment" by means of the basic treaty's MFN clause, even if third-country BITs provide for a broader scope of protection *ratione personae* or *ratione materiae*.<sup>107</sup>

The same reasoning also holds true with respect to the basic treaty's temporal applicability. In *Tecmed v. Mexico*, the Tribunal declined to extend the temporal applicability of the Spanish-Mexican BIT based on the treaty's MFN clause. Thus, the Claimant could not rely on more favorable provisions in one of Mexico's third-country BITs that arguably protected against governmental acts before that BIT came into force. In the Tribunal's view, the MFN clause could not lead to an extension of the treaty's application over time, since this would "go to the core matter that must be deemed to be specifically negotiated between the Contracting Parties."<sup>108</sup>

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106. Cf. *Maffezini v. Spain*, Decision on Objections to Jurisdiction, Jan. 25, 2000, para 56, 5 ICSID Rep. 396 (W. Bank 2000) (clarifying with respect to the *ejusdem generis* principle) ("[T]he third-party treaty has to relate to the same subject matter as the basic treaty, be it the protection of foreign investments or the promotion of trade, since the dispute settlement provisions will operate in the context of these matters; otherwise there would be a contravention of that principle."). See also *id.* para. 45 ("[T]he subject matter to which the clause applies is indeed established by the basic treaty, it follows that if these matters are more favorably treated in a third-party treaty then, by operation of the clause, that treatment is extended to the beneficiary under the basic treaty. If the third-party treaty refers to a matter not dealt with in the basic treaty, that matter is *res inter alios acta* in respect of the beneficiary of the clause.").

107. See *Société Générale v. Dominican Republic*, LCIA Case No. U.N. 7927, Award on Preliminary Objections to Jurisdiction, paras. 40-41 (UNCITRAL, Sept. 19, 2008). Cf. *Yaung Chi Oo Trading v. Myanmar*, Final Award, Mar. 31, 2003, para. 83, 8 ICSID Rep. 463 (ASEAN 2003) (where the non-application of MFN treatment to extending the subject matter application of the basic treaty, i.e., with respect to the definition of the covered investment, should have been the *ratio decidendi*). See also *infra* note 230.

108. *Técnicas Medioambientales Tecmed, S.A. v. Mexico*, Award, May 29, 2003, para. 69, 10 ICSID Rep. 134 (W. Bank 2003).

While the Tribunal decided correctly in view of the basic treaty serving as a framework delimiting the operation of the MFN clause in question, the reference to a “specifically negotiated” bargain between the State parties is problematic. If this is meant to imply that any specifically negotiated provision in a BIT could not be overridden by more favorable clauses in third-party treaties, the Tribunal’s reasoning cannot be supported. This would defeat the object of MFN clauses to establish a level playing field for the economic activities of investors from different home States and would run counter to their basic role of multilateralizing bilateral investment relations.

In addition, such a result would be difficult to justify under accepted rules of treaty interpretation.<sup>109</sup> The effect of MFN clauses does not depend on whether the more favorable treatment would override a specifically negotiated provision or any other provision of the basic treaty. The sole relevant factor is whether MFN treatment applies or whether it is subject to an explicit or implicit exception. Furthermore, distinguishing between specifically negotiated provisions and other provisions would introduce different classes of provisions within the same treaty. Yet, every provision in a BIT emanates from the treaty-making power and consensus of the contracting States Parties and has an equally binding force. Treaty provisions do not possess different degrees of validity depending on how difficult it was for the parties to agree on them.<sup>110</sup>

Unless the basic treaty specifies that a certain provision cannot be bypassed by means of an MFN clause, it will be difficult for a tribunal to ascertain whether a certain provision was intended to be immune from circumvention by MFN treatment. Therefore, the relationship between the MFN clause and any other clause in the treaty will have to be resolved based on accepted principles of treaty interpretation. Such interpretative resolution could allow for implied exceptions to the general MFN clause. There is, however, no room for creating a specific class of “specifically negotiated” provisions of the basic treaty that is *per se* immune from circumvention by more favorable treatment in third-party BITs, unless these provisions can be read as constituting an exception to MFN treatment.

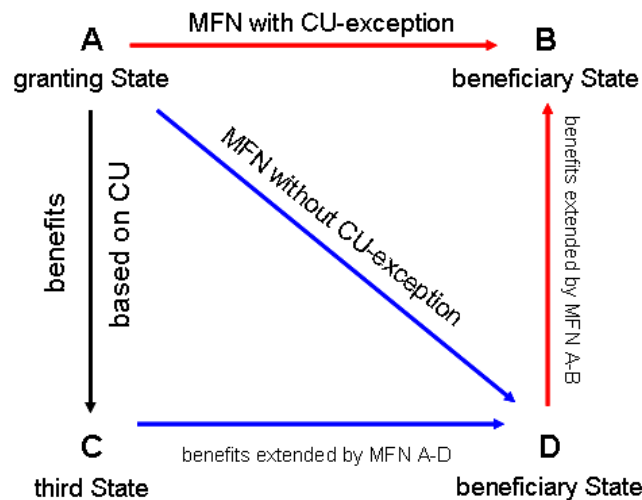
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109. See Yannick Radi, *The Application of the Most-Favoured-Nation Clause to the Dispute Settlement Provisions of Bilateral Investment Treaties*, 18 EUR. J. INT’L L. 757, 773 (2007) (considering that “this criterion appears to provide little guidance on the determination of the provisions of the basic BIT that cannot be replaced”); see also Chukwumerije, *supra* note 23, at 624.

110. See *Siemens A.G. v. Argentina*, Decision on Jurisdiction, Aug. 3, 2004, para. 106, 12 ICSID Rep. 174 (W. Bank 2004) (“The acceptance of a clause from a model text does not invest this clause with either more or less legal force than other clauses which may have been more difficult to negotiate. The end result of the negotiations is an agreed text and the legal significance of each clause is not affected by how arduous was the negotiating path to arrive there . . . The Tribunal finds that when the intention of the parties has been clearly expressed, it is not in its power to second-guess their intentions by attributing special meaning to phrases based on whether they were or were not part of a model draft.”).

### C. Circumventing Restrictions of MFN Treatment

While exceptions to MFN clauses *prima facie* appear to curtail the clauses' multilateralizing effect, the exceptions will have to figure consistently in the host State's BITs to have full effect. Otherwise, MFN clauses might allow investors to circumvent such exceptions and rely on more favorable treatment in third-country BITs, even though the basic treaty contains an explicit exception for MFN treatment in this respect. Hypothetically, such a situation can arise under the circumstances depicted in Diagram 2:



**Diagram 2: Circumvention of Exceptions to MFN Clauses by Double-Derivation**  
(CU = Customs Union)

If State A grants more favorable treatment to State C, such treatment will not extend to State B, if the MFN clause in the basic treaty between A and B contains an exception covering the more favorable treatment extended to C. However, State B will be able to incorporate the benefits granted to C, despite the existence of an exception to MFN treatment, if State A is obliged to extend the benefits it has granted to C based to a fourth State D based on an MFN clause in a treaty with State D that does not contain a comparable exception. State B can thus incorporate the more favorable treatment to C based on a double incorporation (or double derivation) via the MFN clause in the treaty between A and B together with the more favorable treatment granted to D which is extended to D based on the MFN clause in the treaty between A and D.

A practical example of such a constellation relates to benefits granted in relation to investments in Germany to investors from other EU Member States based on the EC Treaty. In general, the multilateralization of such benefits

under Germany's investment treaties to investors from third-party countries is excluded by explicit customs union exceptions to the MFN clauses contained in Germany's BITs.<sup>111</sup> Based on these exceptions, foreign investors from non-EU Member States thus generally cannot rely on benefits arising under the EC Treaty. However, some of these benefits are in fact extended to U.S. investors based on the MFN clause in the Treaty of Friendship, Commerce and Navigation ("FCN") between Germany and the United States.<sup>112</sup> Thus in a number of decisions, Germany's highest court in civil matters, the *Bundesgerichtshof*, has accepted that U.S. corporations headquartered in Germany were to be recognized as corporations governed by U.S. law, with respect to their internal organization and liability limitation, even though German law traditionally did not recognize limitations of liability of foreign corporate entities with their corporate seat in Germany.<sup>113</sup> Yet, in the disputes at hand, the *Bundesgerichtshof* accepted the recognition of U.S. corporations, *inter alia* based on MFN treatment granted under the U.S.-German FCN in connection with the benefit of recognition granted to corporate entities from other EU Member States pursuant to Articles Forty-Three and Forty-Eight of the

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111. See, e.g., Treaty concerning Encouragement and Reciprocal Protection of Investments art. 3, para. 3, Thail.-F.R.G., June 24, 2002, 2286 U.N.T.S. 159. These exceptions are common not only in BITs of Member States of the European Union, but also in BITs of the United States and various other countries. See, e.g., Treaty for the Encouragement and Reciprocal Protection of Investment art. 2, para. 10, U.S.-Est. Apr. 19, 1994, 1987 U.N.T.S. 131. Several commentators consider that exceptions from MFN treatment for customs unions are an exception that has risen to the status of customary international law and does therefore not have to be mentioned explicitly. See JOSEF GRUNTZEL, *DAS SYSTEM DER HANDELSPOLITIK* 480 (3d ed. 1928); RICHARD RIEDL, *AUSNAHMEN VON DER MEISTBEGÜNSTIGUNG* 7-8 (1931.); KARL STRUPP, *WÖRTERBUCH DES VÖLKERRECHTS* 501 (Hans-Jürgen Schlochauer ed., 2d ed. 1961); Kramer, *supra* note 15, at 477; Daniel Vignes, *La Clause de la Nation la Plus Favorisée et sa Pratique*, 130 *RECUEIL DES COURS* 207, 264-85 (1970 - II). But see *infra* note 117.

112. See Treaty of Friendship, Commerce and Navigation art. 7, para. 4, U.S.-F.R.G., Oct. 29, 1954, T.I.A.S. No. 3062 [hereinafter FCN]. On the debate whether benefits stemming from membership in the EU and EC can be extended by means of the MFN clause in the U.S.-German FCN, although the FCN does not contain an explicit exception in this respect, see Florian Drinhausen & Astrid Keinath, *Die grenzüberschreitende Verschmelzung inländischer Gesellschaften nach Erlass der Richtlinie zur grenzüberschreitenden Verschmelzung von Kapitalgesellschaften in Europa*, 52 *RIW* 81, 87 (2006); Roger Kiem, *Die Regelung der grenzüberschreitenden Verschmelzung im deutschen Umwandlungsgesetz*, 60 *ZEITSCHRIFT FÜR WIRTSCHAFTS- UND BANKRECHT* [WM] 1091 (2006) (both supporting an extension of such benefits). Differently, Ralf Frenzel & Georg Axer, *EG-Mitgliedstaat durch die Hintertür?*, 53 *RIW* 47, 52-54 (2007) (each with further references). See also Jens C. Dammann, *Amerikanische Gesellschaften mit Sitz in Deutschland*, 68 *RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT* [RabelsZ] 607, 629-31 (2004); Sebastian Lach & Stephan Schill, *Anmerkung*, 2005 *MITTEILUNGEN DER BAYERISCHEN NOTARVEREINS* [MittBayNot] 243, 244-45 (2005); Peter Sester & José Luis Cárdenas, *The Extra-Communitarian Effects of Centros, Überseering and Inspire Art with Regard to Fourth Generation Association Agreements*, 2 *EUR. CO. FIN. L. REV.* 398 (2005) (making a similar argument with respect to companies from Chile).

113. See *Bundesgerichtshof* [BGH] [Federal Court of Justice] July 5, 2004, 153 *Entscheidungen des Bundesgerichtshofes in Zivilsachen* [BGHZ] 353; BGH Oct. 13, 2004, 42 *Deutsches Steuerrecht* [DStR] 2113. For a discussion of these decisions, see generally Dammann, *supra* note 112; Lach & Schill, *supra* note 112.

EC Treaty.

These provisions, as interpreted by the European Court of Justice (“ECJ”), require Germany to accept that companies incorporated under the laws of another EU Member State are able to transfer their principal place of business to Germany without having to conform to German company law which often imposes, for example, a higher minimum capital for limited liability companies and may prescribe different rules for director liability. Instead, Articles Forty-Three and Forty-Eight of the EC Treaty require Germany to recognize the internal organization and director liability under the law of the corporate entity’s place of incorporation, provided that place of incorporation was within the EU.<sup>114</sup> In effect, Germany therefore had to refrain from applying German company law to companies from other EU Member States.<sup>115</sup>

Based on the MFN clause in the U.S.-German FCN, these benefits also have to be extended to companies incorporated in the United States based on the FCN’s MFN clause, because this treaty, unlike most BITs, does not contain an explicit customs union exception. Although several commentators support that MFN clauses contain an implicit customs union exception as a matter of customary international law,<sup>116</sup> the ILC, during its deliberations on the Draft Articles on MFN clauses, was less adamant in this respect.<sup>117</sup> In addition, there is evidence from the negotiating history of the U.S.-German FCN suggesting that the Contracting Parties did not envisage that the treaty’s MFN provision should be subject to a customs union exception.<sup>118</sup> Under the MFN clause in

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114. Case C-167/01, *Inspire Art*, 2003 E.C.R. I-10155; Case C-208/00, *Überseering*, C-208/00, 2002 E.C.R. I-9919; Case C-212/97, *Centros*, 1999 E.C.R. I-1459.

115. For the competing theories on the law applicable to the company statute under German conflict of laws rules, see Peter Kindler, *Internationales Handels- und Gesellschaftsrecht*, in 11 MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH, paras. 331-405 (Kurt Rebmann, Franz Jürgen Säcker & Roland Rixecker eds., 4th ed. 2006).

116. See *supra* note 111.

117. See *Report of the International Law Commission on the Work of Its Twenty-Eights Session 3 May-23 July*, [1976] 2 Y.B. Int’l L. Comm’n (pt. 2) 1, *Commentary to Article 15*, para. 27, at 45, U.N. Doc. No. A/31/10 (“Most of the members [of the ILC] . . . admitted that there is no rule of customary international rule which would relieve States upon their entering into a customs union or other association from their obligations under a most-favoured-nation clause.”). See also L. Gordon Jahnke, *The European Economic Community and the Most-Favoured-Nation Clause*, 1 CAN. Y.B. INT’L L. 252, 253-71. (1963); Schwarzenberger, *British MFN Standard*, *supra* note 38, at 109 n.5; Endre Ustor, *Most-Favored-Nation Clauses in Treaties of Commerce*, in 3 QUESTIONS OF INTERNATIONAL LAW 225 (Hanna Bokor-Szegö ed., 1986); Endre Ustor, *Die Zollunionsausnahme*, in VÖLKERRECHT UND RECHTSPHILOSOPHIE 371, 374-78 (Peter Fischer, Heribert Franz Köck & Alfred Verdross eds., 1980); Endre Ustor, *The MFN Customs Union Exception*, 15 J. WORLD TRADE L. 377 (1981). Although the International Law Commission stated in the final report that the situation was “inconclusive,” it found that “the silence of the draft articles could not be interpreted as an implicit recognition of the existence or non-existence of such a rule, but should rather be interpreted to mean that the ultimate decision was one to be taken by the States to which that draft was submitted, at the final stage of the codification of the topic.” *ILC Report of 30th Session*, *supra* note 18, para. 58, at 13-14.

118. Cf. Dammann, *supra* note 112, at 629-31.

the U.S.-German FCN, U.S. investors in Germany, therefore, have to be accorded treatment as favorable as investors from EU Member States.

While investors from other States that have entered into a BIT with Germany cannot directly rely on the more favorable treatment accorded to EU investors because of explicit customs union exceptions in the respective BITs, such investors could avail themselves of their right to MFN treatment in connection with the more favorable conditions granted to U.S. investors in Germany. Compared to U.S. investors, the MFN exception for benefits arising under a customs union cannot apply since the more favorable conditions for U.S. investors are only indirectly related to the benefits stemming from EU membership. In particular, the argument that an exception from MFN treatment would also exclude such an indirect multilateralization is not convincing since the rationale of the customs union exception is to exclude the multilateralization of customs union benefits in order to allow for closer economic integration. If such benefits are, however, extended to parties outside the economic union in question, there is no reason why a customs union exceptions to MFN treatment should be operative. After all, this would not meet the exception's purpose to shield closer economic integration against multilateralization. Instead, to the extent competitive advantages are granted to third-country investors, these advantages should equally be multilateralized in view of the economic rationale of MFN clauses.

As this example shows, MFN clauses are a powerful instrument of multilateralism even in the presence of exceptions to their scope of application. An incorporation of more favorable conditions by double derivation enables investors to circumvent exceptions to MFN treatment contained in the basic treaty. Conversely, isolating *quid pro quo* bargains from multilateralization will only be effective if all relevant treaties contain consistent exceptions to MFN treatment.

#### IV.

##### MULTILATERALIZING PROCEDURAL INVESTMENT PROTECTION

Unlike the multilateralization of substantive investment protection, the application of MFN clauses to dispute settlement provisions has generated a vibrant debate in academic scholarship and produced seemingly divergent decisions in investment jurisprudence.<sup>119</sup> The general tenor of the arbitral

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119. For this jurisprudence, see *infra* notes 127-220 and accompanying text. See generally Pia Acconci, *Most Favoured Nation Treatment*, in OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 361, 387-401 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008); Walid Ben Hamida, *MFN Clauses and Procedural Rights*, in INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW 231 (Todd Weiler ed., 2008) [hereinafter Ben Hamida, *Procedural Rights*]; Walid Ben Hamida, *Clause de la Nation la Plus Favorisée et Mécanismes de Règlement des Différends: Que Dit l'Histoire?*, 134 J. DROIT INT'L [JDI] 1127 (2007) [hereinafter Ben Hamida, *Clause*]; Chukwumerije, *supra* note 23, at 597 (2007); Rudolf Dolzer,

jurisprudence is that MFN clauses allow for the incorporation of more favorable treatment concerning the admissibility of an investor-State claim, but do not allow investors to establish or to expand the jurisdictional basis for investor-State arbitration based on the host State's broader consent to arbitration in third-country BITs.<sup>120</sup> In addition, recent BIT practice, specifically that of the United States, has reacted partly with disapproval to the application of MFN clauses to dispute settlement.<sup>121</sup> The following section examines the multilateralizing effect arbitral jurisprudence has accorded to MFN clauses as regards admissibility-related access restrictions to investor-State arbitration, and contrasts it with the resistance arbitral jurisprudence has displayed toward the application of MFN clauses as a basis of jurisdiction.

#### A. Circumventing Admissibility-Related Access Restrictions to Investor-State Dispute Settlement

Access to investor-State arbitration under international investment agreements often requires the fulfillment of certain preconditions. Most BITs, for example, require negotiations between investor and host State prior to

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*Meistbegünstigungsklauseln*, in INTERNATIONALE GEMEINSCHAFT UND MENSCHENRECHTE 47 (Jürgen Bröhmer et al. eds., 2005); Rudolf Dolzer & Terry Myers, *After Tecmed: Most-Favoured-Nation Clauses in International Investment Protection Agreements*, 19 ICSID REV.-FOR. INV. L. J. 49 (2004); Holger Essig, *Balancing Investors' Interests and State Sovereignty*, 4 TRANSNAT'L DISP. MGMT. 14-28 (2007); Faya Rodriguez, *supra* note 21, at 89; Stephen Fietta, *Most Favoured Nation Treatment and Dispute Resolution Under Bilateral Investment Treaties: A Turning Point?*, 8 INT'L ARB. L. REV. 131 (2005); Dana Freyer & David Herlihy, *Most-Favored-Nation Treatment and Dispute Settlement in Investment Arbitration*, 20 ICSID REV.-FOR. INV. L. J. 58 (2005); Emmanuel Gaillard, *Establishing Jurisdiction Through a Most-Favored-Nation Clause*, 233 N.Y. L. J. 2 (June 2, 2005); Lochnie Hsu, *MFN and Dispute Settlement – When the Twain Meet*, 7 J. WORLD INV. & TRADE 25 (2006); Jürgen Kurtz, *The Delicate Extension of Most-Favoured-Nation Treatment to Foreign Investors*, in INTERNATIONAL INVESTMENT LAW AND ARBITRATION 523 (Todd Weiler ed., 2005); Kurtz, *supra* note 24, at 861; Chris Newmark & Edward Poulton, *Siemens –v– Argentina: Most Favoured Nation Clause (Re)visited*, 3 SCHIEDSVZ 30 (2005); Ruth Teitelbaum, *Who's Afraid of Maffezini?*, 22 J. INT'L ARB. 225 (2005); Radi, *supra* note 109, at 757; Mara Valenti, *The Most Favoured Nation Clause in BITs as a Basis for Jurisdiction in Foreign Investor–Host State Arbitration*, 24 ARB. INT'L 447 (2008); Scott Vesel, *Clearing a Path Through a Tangled Jurisprudence*, 32 YALE J. INT'L L. 125 (2007); Jarrod Wong, *The Application of Most-Favored-Nation Clauses to Dispute Resolution Provisions in Bilateral Investment Treaties*, 3 ASIAN J. WTO INT'L HEALTH L. POL'Y 171 (2008); Martins Paporinskas, *MFN Clauses in Investment Arbitration between Maffezini and Plama: The Third Way?*, ICSID REV.-FOR. INV. L. J. (forthcoming 2009).

120. See Chukwumerije, *supra* note 23, at 626-46; Freyer & Herlihy, *supra* note 119, at 82-83.

121. See Houde & Pagani, *supra* note 20, at 4-5, 18-19 n.8. Recent U.S. and Canadian BIT practice concerning MFN treatment in BITs and Free Trade Agreements (FTAs) now includes attempts to deliberately limit MFN treatment to substantive investment protection. Thus, the United States introduced a clause in some recent negotiations that specifically intended to exclude the application of MFN clauses to investor-State dispute settlement. See Draft of the Central America–United States Free Trade Agreement art. 10.4, para. 2 n.1, Jan. 28, 2004, available at [http://www.sice.oas.org/TPD/USA\\_CAFTA/Jan28draft/Chap10\\_e.pdf](http://www.sice.oas.org/TPD/USA_CAFTA/Jan28draft/Chap10_e.pdf) [hereinafter Draft CAFTA] (stating that the parties agree that the MFN clause they include in their treaty “does not encompass international dispute resolution mechanisms such as those contained in Section C of this Chapter, and therefore could not reasonably lead to a conclusion similar to that of the Maffezini case”).

submitting the dispute to arbitration.<sup>122</sup> Other treaties require the expiration of waiting periods prior to arbitration, sometimes as long as eighteen months,<sup>123</sup> or the exhaustion of local remedies.<sup>124</sup> While these restrictions may serve to facilitate the amicable settlement of disputes and to allow the host State's judicial system to redress wrongful conduct,<sup>125</sup> local remedies and waiting periods can also impede the enforcement of rights granted under a BIT and delay efficient dispute settlement. In particular, local remedies may be ill-suited to further the enforcement of obligations under investment treaties, either because the treaties are not directly applicable in the host State's domestic legal order or because the domestic court system lacks the necessary independence to effectively enforce these obligations against its own government. Thus, to the extent that the different BITs of one host State contain different "filters" for access to investment treaty arbitration, the question arises whether an investor can rely on more favorable provisions in third-country BITs based on an MFN clause in the basic treaty, just as it is able to benefit from the more favorable substantive treatment granted under the host State's third-party BITs.

In this context, investment tribunals have been faced mostly with the question of whether MFN clauses allow an investor to rely on shorter waiting periods contained in third-country BITs or to do away with the requirement to pursue local remedies for a limited time before initiating investor-State arbitration. To date, arbitral jurisprudence has rather consistently accepted that investors may circumvent such admissibility-related requirements by relying on more favorable access provisions regarding investor-State dispute settlement under the host State's third-country BITs.<sup>126</sup> In this respect, MFN clauses have been held to multilateralize access to investment treaty arbitration. Furthermore, this effect has been accorded even despite differences in the wording of the MFN clauses in question. Rather, MFN treatment in the disputes at issue has

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122. See, e.g., Agreement for the Encouragement and Reciprocal Protection of Investments art. 101, para. 1, June 25, 1992, P.R.C.-Greece.

123. See, e.g., Treaty Concerning the Encourage and Reciprocal Protection of Investments art. 10, para. 3, Apr. 9, 1991, F.R.G.-Arg., 1910 U.N.T.S. 171.

124. While the exhaustion of local remedies is generally required before a State espouses a claim of its national by means of diplomatic protection, BITs only rarely, if at all, contain this requirement. See CHITTHARANJAN AMERASINGHE, DIPLOMATIC PROTECTION 334-41 (2008).

125. See CHITTHARANJAN AMERASINGHE, LOCAL REMEDIES IN INTERNATIONAL LAW 59-61 (2d. ed. 2004); CANÇADO TRINDADE, THE APPLICATION OF THE RULE OF EXHAUSTION OF LOCAL REMEDIES IN INTERNATIONAL LAW 11 (1983).

126. Only the recent award in *Wintershall Aktiengesellschaft v. Argentina*, ICSID Case No. ARB/04/14, Award, Dec. 8, 2008, paras. 158-97 (W. Bank 2008), declined to accept that the investor could shorten an eighteen-months period during which it was to pursue local remedies before initiating investor-State arbitration under the BIT. However, the Tribunal qualified this requirement as a jurisdictional condition to the host State's consent to arbitration, rather than as an admissibility-related question. See *id.* paras. 108-57. It therefore did not contradict the general tenor of arbitral jurisprudence that admissibility-related access restrictions could be circumvented based on an MFN clause. For a more detailed discussion of the decision, see also *infra* notes 211-220 and accompanying text.

been applied like a principle of international investment law that has been incorporated in the pertinent BITs and is independent of the exact wording of the MFN clause in question.

*1. Shortening Waiting Periods: Maffezini v. Spain*

*Maffezini v. Spain* was the first ICSID award to apply an MFN clause to circumvent pre-arbitration restrictions by allowing the investor to rely on a shorter waiting period from one of the host State's third-country BITs. The Tribunal was faced with the question of whether an Argentine investor in Spain was bound by an eighteen-months waiting period before initiating investor-State arbitration under the Spanish-Argentine BIT or whether it could rely, based on the BIT's MFN clause, on more favorable access conditions under the Spanish-Chilean BIT, which required only a six-months waiting period.<sup>127</sup> The Tribunal resorted to first principles in its interpretation of Article 4(2) of the Spanish-Argentine BIT:

In all matters subject to this Agreement, this treatment shall not be less favorable than that extended by each Party to the investments made in its territory by investors of a third country.<sup>128</sup>

Spain as Respondent objected to the circumvention on the grounds that more favorable BITs with third countries constituted *res inter alios acta* and could therefore not be invoked by the investor. In addition, it argued that, according to the *ejusdem generis* principle, the reference to "all matters" in Article 4(2) only referred to "substantive matters or material aspects of the treatment granted to investors and not to procedural or jurisdictional questions."<sup>129</sup>

The Tribunal, however, declined to limit the MFN clause to matters of substantive investment protection. Instead, it clarified that the MFN clause linked the basic treaty with Spain's third-country BITs and allowed the investor to circumvent the less favorable conditions in the basic treaty under two conditions. First, in order for the third-country BIT not to constitute *res inter alios acta*, the third-party treaty and the basic treaty had to deal with the same subject matter.<sup>130</sup> This proved unproblematic as both treaties concerned the mutual promotion and protection of foreign investment. Second, within the framework of the same subject matter of the treaties in question, the *ejusdem*

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127. See *Maffezini v. Spain*, Decision on Objections to Jurisdiction, Jan. 25, 2000, paras 38-64, 5 ICSID Rep. 396 (W. Bank 2000).

128. *Id.* para. 38.

129. *Id.* para. 41. With respect to the object and purpose of MFN clauses to avoid discrimination, Spain added that "such discrimination can only take place in connection with material economic treatment and not with regard to procedural matters. Only if it could be established that resort to domestic tribunals would produce objective disadvantages for the investor would it be possible to argue material effects on the treatment owed." *Id.* para. 42.

130. *Id.* para. 45.

*generis* rule would serve the purpose of limiting the scope of MFN clauses. Under this rule, an MFN clause only attracts preferential treatment that relates to the subject matter of the clause itself which, depending on the wording of the MFN clause, may be narrower than the subject matter of the basic treaty.<sup>131</sup>

On this basis, the Tribunal stressed the importance of investor-State dispute settlement in the protection against undue government interference, highlighted its perceived advantages over dispute resolution in domestic courts and emphasized that procedural enforcement and substantive rights granted under modern BITs were “inextricably related.”<sup>132</sup> The Tribunal thus concluded, despite the lack of an express reference to dispute settlement in the MFN clause, that the *ejusdem generis* rule was satisfied:

[I]f a third-party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor’s rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause as they are fully compatible with the *ejusdem generis* principle.<sup>133</sup>

The Tribunal, however, qualified its analysis with some exceptions and held:

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.<sup>134</sup>

In a non-exhaustive list, the Tribunal recognized possible public policy exceptions to the application of MFN clauses to questions of investor-State dispute settlement and determined that the following access-restrictions and modalities of investor-State arbitration could not be bypassed:

- The exhaustion of local remedies (as this constitutes a fundamental rule of international law);
- “Fork in the road”-clauses, which prevent investors from initiating international arbitration where the same cause of action already had been advanced in domestic proceedings or vice versa (as this would upset the finality of settled disputes);
- The consent to a particular arbitration forum; and
- The establishment of a highly institutionalized system of arbitration.<sup>135</sup>

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131. *Id.* paras. 46-56. *See also* *Ambatielos Claim (Greece v. U.K.)*, 12 R.I.A.A. 83, 107 (1963) (stressing that “the most-favoured-nation clause can only attract matters belonging to the same category of subject as that to which *the clause* itself relates”) (emphasis added).

132. *Maffezini*, paras. 54-55.

133. *Id.* para. 56.

134. *Id.* para. 62 (emphasis added).

135. *Id.* para. 63.

The Tribunal introduced these exceptions in order to avoid perceived negative effects of a broad application of MFN clauses to investor-State dispute settlement, namely “disruptive treaty-shopping that would play havoc with the policy objectives of underlying specific treaty provisions.”<sup>136</sup> Regrettably, the Tribunal did not provide a normative basis for these public policy considerations and did not clarify whether they followed from the primacy of specific domestic policy concerns vis-à-vis investor-State dispute settlement or whether they should be seen as an implicit limitation of MFN clauses.<sup>137</sup>

Notwithstanding these exceptions, the decision of the *Maffezini* tribunal to allow, in principle, the circumvention of waiting clauses is convincing. It is not only supported by the wording of the MFN clause in question, but also in conformity with the economic rationale of MFN clauses to create a level playing field for foreign investors from different home States. Certainly, being able to enforce certain obligations under an investment treaty more easily, or more quickly, puts other investors at a competitive advantage. Differences in the enforcement mechanisms thus impose different transaction costs upon investors based on their nationality and should, just like differences in the substantive protection of foreign investments, be multilateralized by an MFN clause.

## 2. Multilateralizing Benefits Without Extending Disadvantages: *Cherry-Picking in Siemens v. Argentina*

*Siemens v. Argentina* built further on the *Maffezini* decision and bolstered the application of MFN clauses by allowing the investor to incorporate benefits from third-country BITs without being bound by more restrictive provisions contained in the third-country treaty.<sup>138</sup> The Tribunal thus allowed the investor to “cherry-pick” more favorable provisions from third-country BITs without being bound to any less favorable conditions contained in those treaties.

After pursuing local remedies, the Claimant initiated investor-State arbitration before an eighteen-months waiting period required by the German-Argentine BIT had elapsed. In order to overcome this requirement, the investor invoked the treaty’s MFN clause in order to benefit from the six-months waiting period in the Argentine-Chilean BIT.<sup>139</sup> In addition to challenging the applicability of MFN clauses to matters relating to investor-State dispute

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136. *Id.*

137. For criticism concerning the lack of a normative basis for the “public policy considerations” proclaimed by the Tribunal in *Maffezini*, see Chukwumerije, *supra* note 23, at 35-36; Dolzer & Myers, *supra* note 119, at 52-54; Freyer & Herlihy, *supra* note 119, at 67; Gaillard, *supra* note 119, at 7; Hsu, *supra* note 119, at 29; Radi, *supra* note 109, at 771-73. Cf. *Plama Consortium Ltd. v. Bulgaria*, Decision on Jurisdiction, Feb. 8, 2005, para. 221, 13 ICSID Rep. 272 (W. Bank 2005).

138. *Siemens A.G. v. Argentina*, Decision on Jurisdiction, Aug. 3, 2004, paras. 32-110, 12 ICSID Rep. 174 (W. Bank 2004).

139. On the Claimant’s position, *see id.* paras. 60-78.

settlement,<sup>140</sup> Argentina also pointed to the, as compared to *Maffezini*, allegedly more restrictive wording of Article Three of the German-Argentine BIT:

- (1) None of the Contracting Parties shall accord in its territory to the investments of nationals or companies of the other Contracting Party or to investments in which they hold shares, a less favorable treatment than the treatment granted to the investments . . . of nationals or companies of third States.
- (2) None of the Contracting Parties shall accord in its territory to nationals or companies of the other Contracting Party a less favorable treatment of activities related to investments than granted . . . to the nationals and companies of third States.<sup>141</sup>

Argentina added that the dispute settlement provisions were “specifically negotiated case by case” and thus could not be overridden by an MFN clause.<sup>142</sup> In addition, the requirement to submit the dispute to domestic courts during the waiting period constituted “an essential element of the exceptional jurisdictional offer made in investment treaties”<sup>143</sup> and was therefore immune from circumvention by MFN treatment. Finally, Argentina argued that if the Claimant could rely on the shorter waiting period in the Chilean-Argentine BIT, it also should be bound by that treaty’s “fork in the road”-provision which requires Chilean investors to make a final and binding choice between domestic proceedings or international arbitration.<sup>144</sup> Benefits from third-country treaties should thus not be operative under MFN treatment without their limits and disadvantages.<sup>145</sup>

The Tribunal rejected all of Argentina’s arguments. First, it pointed out that the MFN clause in question covered any “treatment” of foreign investors and thus included access to investor-State dispute settlement.<sup>146</sup> Second, the Tribunal turned to the treaty’s structure and stressed that the Contracting Parties had expressly provided for certain exceptions to MFN treatment, without including dispute settlement. *E contrario*, the MFN clause should extend to matters of dispute settlement.<sup>147</sup> Finally, the Tribunal invoked the treaty’s object and purpose in order to clarify that the intention of the Contracting Parties was “to create favorable conditions for investments and to stimulate private

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140. On the Respondent’s position, *see id.* paras. 46-59.

141. *Id.* para. 82.

142. *Id.* para. 50 (referring to *Técnicas Medioambientales Tecmed, S.A. v. Mexico*, Award, May 29, 2003, para. 69, 10 ICSID Rep. 134 [W. Bank 2003]).

143. *Siemens*, para. 57.

144. On “fork in the road”-clauses, *see DOLZER & SCHREUER, supra* note 6, at 216-17; Christoph Schreuer, *Travelling the BIT Route*, 5 J. WORLD INV. & TRADE 231, 239-49 (2004).

145. *Siemens*, paras. 110, 119.

146. *Id.* paras. 82-86.

147. *Id.*

initiative.”<sup>148</sup> The Tribunal therefore concluded:

[The BIT] . . . ha[d] as a distinctive feature special dispute settlement mechanisms not normally open to investors. Access to these mechanisms is part of the protection offered under the Treaty. It is part of the treatment of foreign investors and investments and of the advantages accessible through an MFN clause.<sup>149</sup>

The Tribunal relied particularly on the decisions in *Rights of Nationals of the United States of America in Morocco* and the *Ambatielos* case in order to support its finding that there is no categorical prohibition in international law against applying MFN clauses to issues concerning access to dispute resolution, nor that there is a specific presumption in favor of a restrictive interpretation of broadly worded MFN clauses.<sup>150</sup> The Tribunal therefore followed the reasoning in the *Maffezini* case and allowed the Claimant to rely on more favorable dispute settlement provisions in other BITs.<sup>151</sup>

The Tribunal in *Siemens* also stressed that “the purpose of the MFN clause is to eliminate the effect of specially negotiated provisions unless they have been excepted [from the operation of the MFN clause].”<sup>152</sup> In doing so, it was responding to the argument in the *Tecmed* award that every “specifically negotiated” clause in the basic treaty could not be circumvented by MFN treatment.<sup>153</sup> The Tribunal in *Siemens* thus clarified that MFN clauses operate independently of the generality or specificity of the provision that should be overridden.

Addressing Argentina’s argument that the investor would also have to accept less beneficial treatment connected to dispute resolution under the Chilean-Argentine BIT, in particular its “fork in the road”-clause, the Tribunal in *Siemens* went beyond the *Maffezini* decision and held that MFN treatment had the effect of selectively importing benefits without concurrently incorporating the limitations of the third-party BIT. It concluded:

[The Respondent’s] understanding of the operation of the MFN clause would defeat the intended result of the clause which is to harmonize benefits agreed with a party with those considered more favorable granted to another party. It would oblige the party claiming a benefit under a treaty to consider the advantages and disadvantages of that treaty as a whole rather than just the benefits. The Tribunal recognizes that there may be merit in the proposition that, since a treaty has been negotiated as a package, for other parties to benefit from it, they also should be subject to its disadvantages. The disadvantages may have been a trade-off for the claimed advantages. However, this is not the meaning of an MFN clause. As its

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148. *Id.* para. 81.

149. *Id.* para. 102.

150. *Id.* paras. 97-99.

151. Without providing any further justification, the Tribunal also accepted, in line with *Maffezini*, that “the MFN clause may not override public policy considerations judged by the parties to a treaty essential to their agreement.” *Id.* para. 109.

152. *Id.* para. 106.

153. *See supra* note 108.

own name indicates, it relates only to more favorable treatment.<sup>154</sup>

As a consequence, the Tribunal viewed the imported more favorable rules as independent from the rest of the third-party BIT. In its view, MFN treatment did not require engaging in a comparison of whether the third-party BIT as a package was more favorable than the basic treaty. Instead, it sufficed that individual clauses were more favorable.

The Tribunal's "cherry-picking" approach has attracted criticism. In particular, some have found it difficult to reconcile the decision with the rationale that MFN treatment ensures equal competition among foreign investors with different nationalities, as the German investor ultimately seemed to have been put in a more advantageous position compared to Chilean investors in Argentina.<sup>155</sup> On the other hand, what appears to be a selective multilateralization of certain benefits without extending connected disadvantages can also be understood as a stringent application of the unconditional character of MFN clauses that both the historical development<sup>156</sup> and the ILC's attempts at codification support.<sup>157</sup> Consequently, the possibility to cherry-pick from third-party treaties is not a novel and ground-breaking construction by the *Siemens* tribunal, but rather reflects both the ordinary meaning as well as the predominant State practice concerning MFN clauses.

The critique that German investors in Argentina would ultimately receive better treatment than Chilean investors is presumably also the background to a somewhat ambiguous paragraph in the *Siemens* decision. In it, the Tribunal pointed out that its understanding of the MFN clause "does not mean that the investor in Argentina will enjoy a more favorable treatment than the investor in Chile. The MFN clause works both ways. The investor in Chile will be able to claim similar benefits under the Chile BIT."<sup>158</sup> Read verbatim, this would mean that a German investor in Chile would be treated as favorably as a German investor in Argentina. Such a conclusion would mistakenly assume that the MFN clause in the German-Argentine BIT affected the position of investors *in* Chile; this would have violated the *inter-partes* effect of the treaty. However, the paragraph makes sense if read as referring to an "investor *from* Chile as being able to claim similar benefits under the Chile BIT." This understanding would merely clarify that the Chilean investor in Argentina could rely on the MFN clause in the Argentine-Chilean BIT and, by its operation, also on the more favorable treatment granted to German investors in Argentina. Chilean investors could thus circumvent the "fork in the road"-clause in the Argentine-Chilean BIT based on the more favorable treatment granted under the German-Argentine BIT, even though this treatment is based on a selective

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154. *Id.* paras. 108, 120.

155. Chukwumerije, *supra* note 23, at 621.

156. *See supra* Part II.B.

157. *See* MFN Draft Article Eleven, *supra* note 25, at 30.

158. *Siemens*, para. 108.

multilateralization of benefits stemming from the Argentine-Chilean BIT.

In sum, the Tribunal's holding illustrates that MFN clauses not only can foster equal competition, but might also have an independent multilateralizing effect. Ultimately, the Tribunal augmented the potential of MFN clauses as an instrument of multilateralism by allowing the importation of benefits from third-country BITs independently of the concessions the host State made in those third-country treaties. It allowed the investor to cherry-pick benefits from third-country treaties without taking into account that these treaties constitute a bilateral bargain. The MFN clause in the *Siemens* case therefore functioned as a tool of multilateralism that selectively expanded benefits and illustrated a strong decline of the significance of bilateral bargaining under investment treaties.

### 3. Subsequent Arbitral Jurisprudence

Although the decisions in *Maffezini v. Spain* and *Siemens v. Argentina* have attracted criticism in international law scholarship, arbitral jurisprudence, and State practice,<sup>159</sup> several tribunals have affirmed the reasoning and result of these two landmark cases regarding the shortening of waiting periods under Argentine BITs.<sup>160</sup> Furthermore, the criticism of both decisions focuses on the far-reaching consequences the reasoning and rationale of the tribunals might have on what is termed "disruptive treaty-shopping" by foreign investors.<sup>161</sup>

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159. See, e.g., Draft CAFTA, *supra* note 121, art. 10.4, para. 2 n.1 (stating that the parties agree that the MFN clause they include in their treaty "does not encompass international dispute resolution mechanisms such as those contained in Section C of this Chapter, and therefore could not reasonably lead to a conclusion similar to that of the Maffezini case"). Furthermore Argentina and Panama "exchanged diplomatic notes" after the jurisdictional decision in *Siemens v. Argentina* in order to clarify that the MFN clause in the investment treaty between both countries did not extend to dispute resolution provisions. See *Nat'l Grid PLC v. Argentina*, Decision on Jurisdiction, June 20, 2006, para. 85 (UNCITRAL 2006).

160. See *AWG Group Ltd. v. Argentina*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, Aug. 3, 2006, paras. 52-68 (UNCITRAL 2006); *Suez S.A. & Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, Aug. 3, 2006, paras. 52-68 (W. Bank 2006); *Nat'l Grid*, paras. 79-94; *Suez S.A. & InterAgua S.A. v. Argentina*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, May 16, 2006, paras. 52-66 (W. Bank 2006); *Gas Natural SDG v. Argentina*, ICSID Case No. ARB/03/10, Decision on Preliminary Questions on Jurisdiction, June 17, 2005, paras. 26-31 (W. Bank 2005); *Camuzzi Int'l S.A. v. Argentina*, ICSID Case No. ARB/03/2, Decision on Objections to Jurisdiction, May 11, 2005, para. 121 (W. Bank 2005). See also *Camuzzi Int'l S.A. v. Argentina*, ICSID Case No. ARB/03/7, Decisión sobre Excepciones a la Jurisdicción, June 10, 2005, para. 28 (W. Bank 2005) (noting that Argentina has not objected in this case to extending MFN treatment to circumventing the eighteen-months waiting period in its BIT with the Belgo-Luxemburgian Economic Union).

161. See *Telenor Mobile Commc'ns A.S. v. Hungary*, ICSID Case No. ARB/04/15, Award, Sept. 13, 2006, para. 93 (W. Bank 2006); *Plama Consortium Ltd. v. Bulgaria*, Decision on Jurisdiction, Feb. 8, 2005, paras. 222-23, 13 ICSID Rep. 272 (W. Bank 2005); *Salini Costruttori S.p.A. v. Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, Nov. 15, 2004, para. 115 (W. Bank 2004); *Maffezini v. Spain*, Decision on Objections to Jurisdiction, Jan. 25, 2000, para. 63, 5 ICSID Rep. 396 (W. Bank 2000); see also *Radi*, *supra* note 109, at 771-74 (2007) (criticizing the negative effects of treaty shopping).

Their outcome, by contrast, remains largely uncontested even by tribunals and commentators that take a different and more restrictive approach on the interpretation of MFN clause in investment treaties.<sup>162</sup> It is thus possible to speak of a generally accepted arbitral jurisprudence holding that MFN clauses are capable of circumventing admissibility-related restrictions, which do not concern the consent to arbitrate, but rather other procedural access-restrictions to arbitration, provided, of course, that the clause in question does not expressly exclude such an effect.

A few later decisions do merit attention for reinforcing the multilateralizing effect of MFN clauses and for clarifying points of interpretation. The jurisdictional award in *Gas Natural v. Argentina* not only confirmed the result of the decisions in *Maffezini* and *Siemens*,<sup>163</sup> but established a presumption for the interpretation of MFN clauses in investment treaties:

Unless it appears clearly that the state parties to a BIT or the parties to a particular investment agreement settled on a different method for resolution of disputes that may arise, most-favored-nation provisions in BITs should be understood to be applicable to dispute settlement.<sup>164</sup>

The Tribunal adopted such a presumption because of the importance of the right to have recourse to independent investor-State arbitration. It considered this right to be “perhaps the most crucial element”<sup>165</sup> of the ICSID Convention and of the wave of BITs and one that is, “universally regarded – by opponents as well as by proponents – as essential to a regime of protection of foreign direct investment.”<sup>166</sup> Consequently, the Tribunal considered that doubts in the interpretation of MFN clauses as regards their application to dispute resolution should be resolved in favor of investor protection. This further reinforces the potential of MFN clauses as a tool of multilateralism.

Finally, two features stand out in three related cases, *Suez and Interaguas v. Argentina*,<sup>167</sup> *AWG v. Argentina*<sup>168</sup> and *Suez and Vivendi v. Argentina*,<sup>169</sup> that confirmed that MFN treatment generally also applies to circumventing less

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162. *But see* *Wintershall Aktiengesellschaft v. Argentina*, ICSID Case No. ARB/04/14, Award, Dec. 8, 2008, paras. 108-97 (W. Bank 2008) (disagreeing with the classification of the requirement to pursue local remedies for a specified amount of time as an admissibility-related question that could be circumvented by means of an MFN clauses as was done in *Maffezini* and *Siemens*).

163. *Gas Natural SDG v. Argentina*, ICSID Case No. ARB/03/10, Decision on Preliminary Questions on Jurisdiction, June 17, 2005, paras. 26-31, 41-49 (W. Bank 2005) (affirming expressly the jurisdictional decisions in *Siemens* and *Maffezini*).

164. *Id.* para. 49; *see also* Radi, *supra* note 109, at 764-68.

165. *Id.* para. 29.

166. *Id.*

167. *Suez S.A. & InterAgua S.A. v. Argentina*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, May 16, 2006, paras. 52-66 (W. Bank 2006).

168. *AWG Group Ltd. v. Argentina*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, Aug. 3, 2006, paras. 52-68 (UNCITRAL 2006).

169. *Suez S.A. & Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, Aug. 3, 2006, paras. 52-68 (W. Bank 2006).

favorable pre-arbitration requirements. First, the Tribunals emphasized that under the Vienna Convention on the Law of Treaties, the textual interpretation, supplemented by the object and purpose of the treaty in question, should prevail over those intentions of the parties that did not find textual support.<sup>170</sup> Thus, as the Tribunals emphasized, MFN clauses were not subject to special rules of treaty interpretation under international law, but are to be interpreted objectively like any other treaty provision, whether substantive or procedural. Neither the *ejusdem generis* rule nor the principle of *res inter alios acta* would alter this approach.<sup>171</sup> Thus, no specifically restrictive interpretation of MFN clauses was justified.<sup>172</sup>

Second, as the Tribunals stressed, treatment concerning the scope of MFN clauses did not only comprise substantive investment protection, but also access to investor-State dispute settlement, as necessary aspects for equal treatment of investors from different home States.<sup>173</sup> In all cases, the Tribunals observed:

After an analysis of the substantive provisions of the BITs in question, the Tribunal finds no basis for distinguishing dispute settlement matters from any other matters covered by a bilateral investment treaty. From the point of view of the promotion and protection of investments, the stated purposes of the [BIT in question], dispute settlement is as important as other matters governed by the BIT and is an integral part of the investment protection regime that two sovereign states . . . have agreed upon.<sup>174</sup>

In affirming the results in *Maffezini* and *Siemens*,<sup>175</sup> these decisions have articulated interpretive principles and economic policies that broaden the reach of MFN clauses to more favorable provisions concerning the admissibility of investor-State arbitration. They particularly stressed the importance of investor-State dispute settlement for the effective protection of foreign investors and thus deny that a valid categorical distinction could be drawn between the grant of substantive rights, to which MFN clauses undoubtedly apply, and their procedural implementation. Accordingly, the Tribunals observe that there is no reason why MFN clauses that are not expressly limited to incorporating more favorable substantive investment protection should be interpreted narrowly. On the contrary, their open wording merits the presumption that they were intended to multilateralize matters of investment protection more generally, including the investors' dispute settlement options.

#### *B. Struggling to Base Jurisdiction on Most-Favored-Nation Clauses*

While arbitral tribunals have generally accepted applying MFN clauses to

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170. AWG, paras. 53-57; *Suez & Vivendi*, paras. 53-57; *Suez & InterAguas*, paras. 53-55.

171. AWG, paras. 59-60; *Suez & Vivendi*, paras. 59-60; *Suez & InterAguas*, paras. 57-58.

172. AWG, para. 61; *Suez & Vivendi*, para. 61; *Suez & InterAguas*, para. 59.

173. AWG, para. 55; *Suez & Vivendi*, para. 55; *Suez & InterAguas*, para. 55.

174. AWG, para. 59; *Suez & Vivendi*, para. 59; *Suez & InterAguas*, para. 57.

175. AWG, paras. 62-63.; *Suez & Vivendi*, paras. 62-63; *Suez & InterAguas*, paras. 60-61.

circumvent procedural restrictions regarding the admissibility of investor-State arbitration, it is debated whether the same reasoning can be applied to broaden the jurisdiction of a treaty-based tribunal. This concerns the question of whether MFN clauses can be used to incorporate more favorable consent to arbitration given by the host State in third-country BITs. It arises, above all, in situations where some BITs of a host State do not contain consent to investor-State dispute resolution at all,<sup>176</sup> while others allow such recourse, where some BITs of a host State limit recourse to investor-State arbitration to certain causes of action, while others encompass a broader range of causes of action,<sup>177</sup> and where different BITs of a host State provide for recourse to different dispute settlement fora.<sup>178</sup>

Arbitral practice has generated diverging decisions. So far, only one decision has applied the reasoning in *Siemens* and *Maffezini* to extend its jurisdictional basis in view of the host State's broader consent to arbitration under its third-country BITs. The majority of cases, however, has refused to accept such an extension. This leads to the seemingly inconsistent result that MFN clauses are applied to some procedural issues but not to others. Yet, the circumvention of pre-arbitration requirements and the incorporation of a host State's broader consent to jurisdiction are distinct issues. While admissibility relates to conditions under which a court or tribunal can render a certain decision, jurisdiction concerns the power that a court or tribunal has over the parties with respect to a specific case.<sup>179</sup> This section analyzes the arbitral jurisprudence denying that MFN clauses can serve as a basis of jurisdiction before arguing, in Part V, that a more expansive application of MFN clauses is

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176. See, e.g., Treaty for the Promotion and Protection of Investments, F.R.G.-Pak., Nov. 25, 1959, 6575 U.N.T.S. 24.

177. Older BITs of formerly socialist countries, in particular, regularly only provide for recourse to investor-State arbitration for disputes concerning the amount of compensation for expropriation, not however for the violation of other investor rights, such as fair and equitable treatment. See Stephan W. Schill, *Tearing Down the Great Wall - The New Generation Investment Treaties of the People's Republic of China*, 15 CARDOZO J. INT'L & COMP. L. 73, 89-91 (2007) (discussing dispute settlement provisions in older BITs of the PRC).

178. BITs may allow for a wide range of dispute settlement fora, including ICSID Arbitration, UNCITRAL Arbitration, LCIA Arbitration, SCC Arbitration, and others. Depending on which dispute settlement forum is chosen, the rules on procedure, on control by domestic courts, and on effect and enforcement of awards may differ. On the differences between ICSID and UNCITRAL Arbitration, see, e.g., Giorgio Sacerdoti, *Investment Arbitration under ICSID and UNCITRAL Rules*, 19 ICSID REV.-FOR. INV. L. J. 1 (2004).

179. Cf. Chukwumerije, *supra* note 23, at 627. On the distinction between admissibility and jurisdiction, see *Military and Paramilitary Activities (Nicar. v. U.S.)*, para. 84, 1984 I.C.J. 392, 429 (Nov. 26); *Interhandel (Switz. v. U.S.)*, 1959 I.C.J. 6, 26 (Mar. 21); *Rompel Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Jurisdiction and Admissibility, Apr. 18, 2008, para. 112 (W. Bank 2008); *SGS Société Générale de Surveillance S.A. v. Philippines*, Decision on Objections to Jurisdiction, Jan. 29, 2004, para. 154, 8 ICSID Rep. 518 (W. Bank 2004); *Enron Corp. v. Argentina*, Decision on Jurisdiction, Jan. 14, 2004, 11 ICSID Rep. 273 (W. Bank 2004); *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction, July 17, 2003, para. 41, 42 I.L.M. 788 (2003) (W. Bank 2003); *Mondev Int'l Ltd. v. United States*, Award, Oct. 11, 2002, para. 42, 6 ICSID Rep. 181, 203 (W. Bank 2002).

backed by more convincing arguments.

### *I. Salini v. Jordan*

In *Salini v. Jordan*, the Tribunal declined to extend its subject-matter jurisdiction to entertain purely contractual claims<sup>180</sup> and rejected the investor's argument that the MFN clause in the Italian-Jordanian BIT would import the host State's broader consent to arbitration from the British-Jordanian and U.S.-Jordanian BITs. These treaties arguably allowed investors to not only bring claims for the violation of the respective BIT, but also contractual claims for the breach of an investor-State contract.<sup>181</sup> The Italian-Jordanian BIT, by contrast, contained a specific provision in Article 9(2) referring contractual disputes to the contractually selected forum.<sup>182</sup>

After an intensive review of prior decisions by international courts and tribunals, the Tribunal declined that the MFN clause in question could incorporate the host State's broader consent to arbitration from the more favorable third-country BITs at issue.<sup>183</sup> It particularly focused on the intentions of the contracting parties to the BIT and observed:

[T]he circumstances of this case are different [from *Maffezini*]. Indeed, Article 3 of the BIT between Italy and Jordan [that is, the MFN clause] does not include any provision extending its scope of application to dispute settlement. It does not envisage 'all rights or all matters covered by the agreement'. Furthermore, the Claimants have submitted nothing from which it *might* be established that the common intention of the Parties was to have the most-favored-nation clause apply to dispute settlement. Quite on the contrary, the intention as expressed in Article 9(2) of the BIT was to exclude from ICSID jurisdiction contractual disputes between an investor and *an* entity of a State Party in order that such disputes might be settled in accordance with the procedures set forth in the investment agreements.<sup>184</sup>

In addition, the Tribunal mentioned the "risk of 'treaty shopping'" as a further argument for denying the application of MFN clauses to incorporate a broader basis of jurisdiction from the host State's third-country BITs.<sup>185</sup>

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180. On the differences between contract claims and treaty claims, see Bernardo M. Cremades & David J. A. Cairns, *Contract and Treaty Claims and Choice of Forum in Foreign Investment Disputes*, in *ARBITRATING FOREIGN INVESTMENT DISPUTES* 325, 327-32 (Norbert Horn & Stefan Kröll eds., 2004).

181. *Salini Costruttori S.p.A. v. Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, Nov. 15, 2004, paras. 102-19 (W. Bank 2004).

182. *Id.* para. 66.

183. *Id.* para. 119. The MFN clause in question provided that "[b]oth Contracting Parties, within the bounds of their own territory, shall grant investments effected by, and the income accruing to, investors of the Contracting Party no less favourable treatment than that accorded to investments effected by, and income accruing to, its own nationals or investors of Third States." *See id.* para. 66.

184. *Id.* para. 118 (emphasis in the original).

185. *Id.* para. 115.

While the Tribunal therefore did not assert that MFN clauses could not, as a matter of principle, broaden the jurisdiction of treaty-based tribunals, it reasoned that such an effect could only be considered if the investor could show and prove that the States Parties intended to extend an MFN clause to questions of dispute settlement. For the Tribunal, however, an indication that such an intention was missing was the specific provision in Article 9(2) of the treaty that relegated contractual disputes to the respective contractual forum.<sup>186</sup>

## 2. *Plama v. Bulgaria*

Adopting the approach in *Salini v. Jordan*, the Tribunal in *Plama v. Bulgaria* also declined to extend its jurisdiction based on the MFN clause in the Bulgarian-Cypriot BIT.<sup>187</sup> This treaty limited claimants to arbitrating disputes concerning the amount of compensation for expropriation,<sup>188</sup> while other Bulgarian BITs allowed investors to initiate investor-State arbitration for any treaty breaches. While agreeing with the result, the reasoning and the caveat in the *Maffezini* decision that MFN clauses should not allow for “disruptive treaty-shopping,”<sup>189</sup> the Tribunal diverged from *Maffezini* in basing its analysis on the presumption that the basic treaty must make it sufficiently clear that the MFN clause was intended to apply to issues of investor-State dispute settlement.

While the extent of the intention of the Contracting Parties as regards the interpretation of the MFN clause was only a side issue, the Tribunal emphasized that exercising jurisdiction required the host State’s consent to arbitration. After taking note of the widespread emergence of investor-State arbitration, the Tribunal observed:

[This development] does not take away the basic prerequisite for arbitration: an agreement of the parties to arbitrate. It is a well-established principle, both in domestic and international law, that *such an agreement should be clear and unambiguous*. In the framework of a BIT, the agreement to arbitrate is arrived at by the consent to arbitration that a state gives in advance in respect of investment disputes falling under the BIT, and the acceptance thereof by an investor if the latter so desires.<sup>190</sup>

In determining whether the host State’s consent to arbitrate could be incorporated via the treaty’s MFN clause, the Tribunal analogized the situation it faced with one familiar in commercial arbitration, namely, whether non-

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186. *Id.* para. 118.

187. *Plama Consortium Ltd. v. Bulgaria*, Decision on Jurisdiction, Feb. 8, 2005, paras. 183-227, 13 ICSID Rep. 272 (W. Bank 2005). The clause in question provided that “[e]ach Contracting Party shall apply to the investments in its territory by investors of the other Contracting Party a treatment which is not less favourable than that accorded to investments by investors of third states.” *Id.* para. 187.

188. See Agreement on Mutual Encouragement and Protection of Investments art. 4, Bulg.-Cyprus, Nov. 12, 1987 (cited in *Plama*, para. 26).

189. *Plama*, paras. 222-23.

190. *Id.* para. 198 (emphasis added).

signatory parties can be bound to arbitrate based on the incorporation of an agreement to arbitrate by reference.<sup>191</sup> The Tribunal held:

[A] clause reading ‘a treatment which is not less favourable than that accorded to investments by investors of third states’ as appears in Article 3(1) of the Bulgaria-Cyprus BIT, cannot be said to be a typical incorporation by reference clause as appearing in ordinary contracts. It creates doubt whether the reference to the other document (in this case the other BITs concluded by Bulgaria) clearly and unambiguously includes a reference to the dispute settlement provisions contained in those BITs.<sup>192</sup>

In the Tribunal’s view, MFN clauses would usually not fulfil the “clear and unambiguous” requirement to affirm jurisdiction, unless there was specific language to the contrary.

To add support, the Tribunal invoked the difference between substantive rights and their procedural implementation. In this context, it asserted not only a conceptual difference between substance and procedure,<sup>193</sup> but also pointed to the principle of separability of arbitration clauses in order to justify the non-application of MFN clauses to dispute settlement provisions.<sup>194</sup> Finally, the Tribunal stressed, in specifically taking issue with the decision in *Siemens v. Argentina*,<sup>195</sup> that an application of MFN clauses to matters of dispute settlement would lead to a peculiar effect:

[A]n investor has the option to pick and choose provisions from the various BITs. If that were true, a host state which has not specifically agreed thereto can be confronted with a large number of permutations of dispute settlement provisions from the various BITs which it has concluded. Such a chaotic situation – actually counterproductive to harmonization – cannot be the presumed intent of Contracting Parties.<sup>196</sup>

Overall, the Tribunal’s primary reason for declining to extend its jurisdiction based on the MFN clause in the governing BIT was the requirement

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191. *Id.* paras. 200-18. On binding non-signatories, see TIBOR VÁRADY, JOHN J. BARCELÓ III & ARTHUR T. VON MEHREN, *INTERNATIONAL COMMERCIAL ARBITRATION* 197-99 (3d ed. 2006) (concerning theories of binding non-signatories recognized under U.S. law); BERNARD HANOTIAU, *COMPLEX ARBITRATIONS: MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS* (2005) (discussing various theories of binding non-signatories). Cf. Hosking, *The Third Party Non-Signatory’s Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent*, 4 PEPP. DISP. RESOL. L. J. 469 (2004).

192. *Plama* para. 200.

193. *Id.* para. 209 (“It is one thing to add to the treatment provided in one treaty more favorable treatment provided elsewhere. It is quite another thing to replace a procedure specifically negotiated by parties with an entirely different mechanism.”). In addition, the Tribunal pointed to subsequent inter-State negotiations between Cyprus and Bulgaria that concerned a revision of the BIT in question. These negotiations had also concerned an explicit expansion of investor-State dispute settlement provisions, a fact that suggested, in the Tribunal’s view, that the State parties themselves had never considered an application of the MFN clause in their BIT as applying to investor-State dispute resolution. *See id.* para. 195.

194. *Id.* para. 212.

195. *Id.* para. 226.

196. *Id.* para. 219.

that the host State's consent needed to be "clear and unambiguous."<sup>197</sup> *Plama* thus formulated a conceptual approach to the interpretation of MFN clauses in opposition to the jurisprudence in *Maffezini*, *Gas Natural* and *Suez*:

[T]he principle with multiple exceptions as stated by the tribunal in the *Maffezini* case should instead be a different principle with one, single exception: an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.<sup>198</sup>

### 3. Subsequent Jurisprudence

The decision in *Plama v. Bulgaria* was later affirmed by three other tribunals that refined, but mainly repeated, previous arguments. In *Telenor v. Hungary*, the Tribunal faced the issue of whether the Claimant could incorporate the host State's broader consent to arbitration under its third-country BITs based on the MFN clause in the Norwegian-Hungarian BIT.<sup>199</sup> The Tribunal "wholeheartedly endorse[d] the analysis and statement of principle furnished by the *Plama* tribunal."<sup>200</sup> It considered the four main arguments against applying MFN clauses as a basis of jurisdiction.<sup>201</sup> First, in its view, the wording of many MFN clauses did not suggest that they applied to dispute settlement; second, treaty-shopping as a consequence of a broad interpretation was undesirable; third, uncertainty and instability would develop because certain limitations of BIT would be overridden; and fourth, the Contracting States' practice and their intention would not point to an expansive interpretation. Instead, the Tribunal suggested that the investor either had to have recourse to the host State's domestic courts or ask its home State to grant diplomatic protection.<sup>202</sup>

Similarly, the Tribunal's majority in *Berschader v. Russia* declined to incorporate the Respondent's broader consent to arbitration under third-party BITs based on an MFN clause in the BIT between the Belgo-Luxemburgian Economic Union and Russia. The investor was therefore limited to arbitrating disputes concerning the amount or mode of compensation for expropriation.<sup>203</sup>

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197. *Id.* para. 200.

198. *Id.* para. 223.

199. The MFN clause in question provided that "[i]nvestments made by Investors of one Contracting Party in the territory of the other Contracting Party, as also the returns therefrom, shall be accorded treatment no less favorable than that accorded to investments made by Investors of any third State." See *Telenor Mobile Commc'ns A.S. v. Hungary*, ICSID Case No. ARB/04/15, Award, Sept. 13, 2006, para. 84 (W. Bank 2006).

200. *Id.* para. 90.

201. *Id.* paras. 91-95.

202. *Id.* para. 81.

203. *Berschader v. Russia*, SCC Case No. 080/2004, Award, Apr. 21, 2006 paras. 151-208 (SCC 2006). The MFN clause in question provided that "[e]ach Contracting Party guarantees that

In interpreting the MFN clause in question, the Tribunal, however, observed that “no general principle exist[ed], according to which arbitration agreements should be construed restrictively.”<sup>204</sup> It stressed, however, that “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.”<sup>205</sup> In view of a “fundamental difference [between] material benefits afforded by a BIT, on the one hand, and in relation to dispute resolution clauses, on the other hand”<sup>206</sup> the Tribunal, similar to *Plama*, endorsed the following principle:

[A]n MFN provision in a BIT will only incorporate by reference an arbitration clause from another BIT where the terms of the original BIT clearly and unambiguously so provide or where it can otherwise be clearly inferred that this was the intention of the contracting parties.<sup>207</sup>

In a separate opinion, Todd Weiler disagreed with the reasoning of the *Berschader* majority. In contrast to the majority’s focus on the parties’ intentions,<sup>208</sup> he emphasized the primacy of the textual interpretation of international treaties under Article Thirty-One of the Vienna Convention on the Law of Treaties. He further criticized that the majority’s narrow application of the MFN clause in question had no basis in the clause and was incompatible with accepted principles of treaty interpretation.<sup>209</sup> He concluded:

The MFN standard is a tried-and-true expression of the international economic law principle of non-discrimination. In application, its breadth and depth are limited primarily by restrictive language found in the text of a treaty (such as general exception clauses and reservation schedules) and by the requirement that most favorable treatment be accorded only to those who stand in like circumstances. There is simply no reason to suppose that – absent some specific treaty language – any given MFN provision should be more or less narrowly defined. In other words, MFN clauses apply to all aspects of the regulatory environment governed by an investment protection treaty, including availability of all means of dispute settlement.<sup>210</sup>

Finally, the Tribunal in *Wintershall v. Argentina* rejected the investor’s argument to base its jurisdiction on an MFN clause in the German-Argentine BIT in order to incorporate the host State’s more favorable consent to arbitration under the U.S.-Argentine BIT.<sup>211</sup> Unlike in *Plama*, *Telenor* or *Berschader*,

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the most-favored-nation clause be applied to investors of the other Contracting Party in respect of all matters covered by the present Agreement, and in particular its articles four, five and six” (translation by the Author). *Id.* para. 160.

204. *Id.* para. 178.

205. *Id.* (emphasis added).

206. *Id.* para. 179.

207. *Id.* paras. 179-82.

208. *Id.* para 4 (Weiler, Separate Opinion).

209. *Id.* para 19 (Weiler, Separate Opinion).

210. *Id.* para 20 (Weiler, Separate Opinion).

211. *Wintershall Aktiengesellschaft v. Argentina*, ICSID Case No. ARB/04/14, Award, Dec. 8, 2008, paras. 158-97 (W. Bank 2008).

however, the issue at hand was not whether the Tribunal could expand its jurisdiction to encompass a broader range of substantive causes of action. Instead the issue was, much like in *Maffezini*, whether the investor could circumvent, in view of the quicker access to investor-State arbitration under the U.S.-Argentine BIT, the requirement to pursue local remedies in Argentine courts for eighteen months before commencing international arbitration. Yet, the Tribunal in *Wintershall* qualified this requirement as a condition to the host State's consent to arbitration, not as an admissibility-related obstacle,<sup>212</sup> and consequently adopted an approach mirroring that in *Plama*.

Unlike the Tribunal in *Plama*, however, the Tribunal posited that the interpretation of international treaties under the Vienna Convention had to start with "the elucidation of the meaning of the text, not an independent investigation into the intention of the parties from other sources"<sup>213</sup> and therefore left "no room for any presumed intention of the Contracting Parties to a bilateral treaty."<sup>214</sup> Second, it stressed that "international courts and tribunals can exercise jurisdiction over a State only with its consent"<sup>215</sup> and added that "[a] *presumed* consent is not regarded as sufficient, because any restriction upon the independence of a State (not agreed to) cannot be presumed by courts."<sup>216</sup>

On this basis, the Tribunal criticized the interpretative approach to MFN clauses in *Maffezini*, and in cases that endorsed the same approach, which, in its view "proceed[s] on a *presumption*: that dispute-resolution provisions do invariably fall within the scope of an MFN provision."<sup>217</sup> In view of the requirement that actual consent to arbitration is crucial, the Tribunal required that Contracting Parties, if they intended MFN clauses to serve as a basis of jurisdiction, had to "cho[ose] language in the MFN clause showing an intention to do this."<sup>218</sup> This could only be the case, if the MFN clause "expressly so provide[s]."<sup>219</sup> In line with *Plama*, the Tribunal therefore considered:

[O]rdinarily and without more, the prospect of an investor selecting at will from an assorted variety of options provided in other treaties negotiated with other parties under different circumstances, dislodges the dispute resolution provision in the basic treaty itself – *unless of course the MFN Clause in the basic treaty clearly and unambiguously indicates that it should be so interpreted.*<sup>220</sup>

Despite certain nuances the decisions in *Telenor*, *Berschader* and

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212. *Id.* paras. 108-57.

213. *Id.* para. 78.

214. *Id.* para. 88.

215. *Id.* para. 160(3).

216. *Id.* (emphasis in the original) (citing to Case of the S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7)).

217. *Wintershall*, para. 179(i) (emphasis in the original).

218. *Id.* para. 168 (citing *Telenor Mobile Commc'ns A.S. v. Hungary*, ICSID Case No. ARB/04/15, Award, Sept. 13, 2006, para. 92 (Sept. 13, 2006) [W. Bank 2006]).

219. *Wintershall*, para. 187.

220. *Id.* para. 167 (emphasis in the original).

*Wintershall* all accepted the principled approach of the jurisdictional award in *Plama*, namely that MFN clauses regularly would not incorporate the host State's broader consent to arbitration under its third-country BITs.

*4. Accepting to Base Jurisdiction on a Most-Favored-Nation Clause:  
RosInvestCo v. Russia*

In stark contrast with the preceding cases, the recent decision in *RosInvestCo v. Russia* accepted the multilateralization of the host State's broader consent to arbitration given under a third-country BIT by means of an MFN clause.<sup>221</sup> Faced with an arbitration clause in the basic treaty that was limited to disputes concerning the amount or payment of compensation for expropriation,<sup>222</sup> the Tribunal asserted jurisdiction in regard of disputes concerning other causes of actions based on the operation of the MFN clause in the British-Russian BIT.<sup>223</sup> The MFN clause in question provided:

- (1) Neither Contracting Party shall in its territory subject investments or returns of investors of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of investors of any third State.
- (2) Neither Contracting Party shall in its territory subject investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to investors of any third State.<sup>224</sup>

In interpreting this provision and stressing the crucial importance Article Thirty-One of the Vienna Convention on the Law of Treaties attaches to the clause's wording, the Tribunal first decided that it could not incorporate Russia's broader consent under the Danish-Russian BIT by means of Article 3(1) of the British-Russian BIT because, in its view, the possibility of recourse to international arbitration as compared to dispute settlement in domestic courts "does not directly affect the 'investment.'"<sup>225</sup> In a second step, however, the Tribunal considered that broader consent vis-à-vis third-country nationals to arbitrate disputes about the lawfulness of expropriations related to the Claimant's use and enjoyment of its investment and could therefore be incorporated as more favorable treatment afforded to investors under Article 3(2) of the British-Russian BIT.<sup>226</sup> Furthermore, the Tribunal noted that if the effect

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221. *RosInvestCo U.K. v. Russia*, SCC Case No. Arb. V079/2005, Award on Jurisdiction, Oct. 2007, paras. 124-39 (SCC 2007).

222. *See id.* paras. 105-23.

223. The BIT applied in *RosInvestCo v. Russia* was the BIT that was concluded between the U.K. and the USSR, to which Russia, as a successor State of the USSR, is bound.

224. *See id.* paras. 23, 126 (text of the British-Russian BIT art. 3).

225. *Id.* para. 128.

226. *Id.* para. 130.

of MFN clauses was to extend the protection offered by an investment treaty “by transferring the protection accorded in another treaty,”<sup>227</sup> it would “se[e] no reason not to accept it in the context of procedural clauses such as arbitration clauses. Quite on the contrary, it could be argued that, if it applies to substantive protection, then it should apply even more to ‘only’ procedural protection.”<sup>228</sup>

Finally, the Tribunal took the existence of explicit exceptions to MFN treatment in Article Seven of the BIT as an indication that the MFN clause was understood broadly by the Contracting Parties and thus included all subject matters of the basic treaty, unless they were explicitly excluded.<sup>229</sup>

The Tribunal in *RosInvestCo v. Russia* therefore accepted that MFN clauses, in connection with broader consent to arbitration in third-country BITs, could form the basis of jurisdiction of an investment tribunal under the basic treaty<sup>230</sup> and, in doing so, accorded a comprehensive multilateralizing effect to MFN clauses encompassing both substantive investment protection and investor-State arbitration. It thereby contradicted the thus far prevailing approach of the tribunals in *Salini*, *Plama*, *Telenor* and *Berschader* that declined the extension of their jurisdiction on the basis of MFN treatment. Overall, the current situation in the practice of arbitral decision-making supports the conclusion that the procedural protection of foreign investors is only partly multilateralized by means of MFN treatment, even though tendencies are visible to apply MFN clauses also in order to function as a basis of jurisdiction.

## V.

### MULTILATERALIZING ARBITRAL JURISDICTION

As discussed in the previous section, arbitral jurisprudence concerning the application of MFN clauses differs on whether matters of dispute resolution can be incorporated as more favorable treatment from third-country BITs. While one line of jurisprudence supports a broad application of MFN clauses, such as the decisions in *Maffezini*, *Siemens*, *Gas Natural*, *RosInvestCo* and others, another line of decisions, namely the ones in *Salini* and *Plama*, takes a more restrictive stance. Notwithstanding the current split, MFN clauses, their

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227. *Id.* para. 131.

228. *Id.* para. 132.

229. *Id.* para. 135.

230. *Contra* *Yaung Chi Oo Trading v. Myanmar*, Final Award, Mar. 31, 2003, para. 83, 8 ICSID Rep. 463 (ASEAN 2003) (declining jurisdiction under the basic treaty’s MFN clause in connection with broader consent to arbitration in the host State’s third-country BITs) (“If a party wishes to rely on the jurisdictional possibility affirmed by an ICSID Tribunal in *Maffezini v. Spain*, it would normally be incumbent on it to rely on that possibility, and on the other treaty in question, at the time of instituting the arbitral proceedings. That was not done in this case. In any event, in the Tribunal’s view there is no indication that there would be arbitral jurisdiction on these facts under any BIT entered into by Myanmar which was in force at the relevant time. Correspondingly, there is no possible basis for such jurisdiction under Article 8 of the Framework Agreement [i.e. the basic treaty’s MFN clause].”).

wording permitting, need to be understood broadly as multilateralizing not only substantive investor rights and applying to admissibility-related issues, but equally multilateralizing arbitral jurisdiction by incorporating the host State's broader consent from its third-country investment treaties. The broad wording of the MFN clauses, their economic rationale of establishing equal competition, the object and purpose of BITs to promote and protect foreign investment, and the positive impact of a broad interpretation of MFN treatment on the compliance of host States with their substantive investment treaty obligations, support a broad application of MFN clauses. By contrast, the arguments against such an application of MFN clauses, in particular by the tribunal in *Plama*, are problematic, in particular because they disregard accepted methods of interpretation of BITs as international treaties and, instead, import concepts from commercial arbitration into the BIT context without ensuring that such analogies are tenable. Therefore, the reasoning in *Maffezini* and *Siemens* and their underlying rationale should be extended to matters of jurisdiction, as done by the Tribunal in *RosInvestCo*, while the restrictive approach in *Salini*, *Plama* and others should be discarded.

#### A. MFN Clauses and Treaty Interpretation

Whether MFN clauses can be extended further to consent to arbitration is first and foremost a question of interpretation of the specific MFN clause in the basic treaty. Since the clauses may differ, their wording deserves a close look. Several scenarios are possible. When an MFN clause expressly applies to dispute settlement provisions, or is expressly limited to substantive investor rights, their interpretation is straightforward. Difficulties arise, however, when an MFN clause is worded openly, that is, without explicitly excluding or including matters of dispute resolution or the host State's consent to arbitration. Notably, such openly worded MFN clauses are the ones most frequently found in investment treaties.

While aimed at ascertaining the common intention of the Contracting Parties, the rules of treaty interpretation under Articles Thirty-One and Thirty-Two of the Vienna Convention on the Law of Treaties attribute preponderant weight to the "ordinary meaning" of the terms of a treaty in its context and in light of its object and purpose, instead of engaging in an endeavor to second-guess the parties' mutual intentions.<sup>231</sup> Thus, openly worded MFN clauses,

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231. See PAUL REUTER, *INTRODUCTION TO THE LAW OF TREATIES* 96 (2d ed. 1995) ("The primacy of the text, especially in international law, is the cardinal rule of any interpretation."); IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 114-31 (2d. 1984); Christopher Schreuer, *The Interpretation of Treaties by Domestic Courts*, 45 BRIT. Y.B. INT'L L. 255, 274 (1971); Ian Sinclair, *Vienna Convention on the Law of Treaties*, 19 INT'L COMP. L. Q. 47, 65 (1970); Jean-Marc Sorel, *Article 31*, in 2 LES CONVENTIONS DE VIENNE SUR LE DROIT DES TRAITÉS, para. 48 (Oliver Corten & Pierre Klein eds., 2006) ("La Convention de Vienne donne priorité à l'interprétation textuelle."); see also *Siemens A.G. v. Argentina*, Decision on Jurisdiction, Aug. 3, 2004, para. 106, 12 ICSID Rep. 174 (W. Bank 2004). This also becomes clear from the interplay

including the ones examined in *Plama*, *Salini*, *Telenor*, *Berschader*, and *Wintershall*, are usually broad enough to apply not only to more favorable substantive treatment but also to more favorable procedural rights and the host State's broader consent to arbitration. Their ordinary meaning allows extension to investor-State dispute settlement provisions. If their scope of application covers "all matters" or simply refers to "treatment of investors" or "treatment of investments" by the host State, their ordinary meaning can be understood, without any terminological contortion, as incorporating more favorable dispute settlement provisions from the host State's third-country BITs, including the State's broader consent to arbitration.<sup>232</sup> Furthermore, the method of interpretation applicable to MFN clauses remains the same independent of whether the incorporation of substantive investor rights or procedural matters is at issue.<sup>233</sup> The plain wording of such clauses therefore does not mandate a restrictive application.

In light of the existence of BITs that expressly apply MFN treatment to questions of investor-State dispute settlement, it also makes little sense to draw an *e contrario* argument to the effect that MFN clauses ordinarily do not apply to matters of procedure and jurisdiction.<sup>234</sup> This argument disregards that the inclusion of an express reference to dispute settlement in an MFN clause cannot only have the effect of extending the clause's scope of application as compared to the default understanding, but can equally have a declaratory or clarifying function.<sup>235</sup> Thus, one cannot infer from other States' express inclusion of dispute settlement among the subject matters of MFN clauses that such inclusion is in fact necessary. On the contrary, it is limitations of MFN clauses, as general

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between Article 31(1) of Vienna Convention on the Law of Treaties, which sets down that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose," and Article 31(4), which stipulates that "[a] special meaning shall be given to a term if it is established that the parties so intended." See *infra* note 256. On the different approaches to treaty interpretation, see generally MCNAIR, *supra* note 75, 364-82; Gerald G. Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-4*, 33 BRIT. Y.B. INT'L L. 203 (1957); Gerald G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, 28 BRIT. Y.B. INT'L L. 1, 7-8 (1951); Francis G. Jacobs, *Varieties of Approach to Treaty Interpretation*, 18 INT'L COMP. L. Q. 318 (1969).

232. See also RADI, *supra* note 109, at 764-68.

233. See *Suez S.A. & Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, Aug. 3, 2006, paras. 61 and 66 (W. Bank 2006) ("Dispute resolution provisions are subject to interpretation like any other provisions of a treaty, neither more restrictive nor more liberal."); *AWG Group Ltd. v. Argentina*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, Aug. 3, 2006, paras. 61 and 66 (UNCITRAL 2006); *Suez S.A. & InterAguas S.A. v. Argentina*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, May 16, 2006, paras. 59 and 64 (W. Bank 2006).

234. See *Plama Consortium Ltd. v. Bulgaria*, Decision on Jurisdiction, Feb. 8, 2005, para. 204, 13 ICSID Rep. 272 (W. Bank 2005).

235. In fact, Article 3(3) of the U.K. Model BIT expressly stipulates that MFN treatment applies, "for the avoidance of doubt," to all provisions of the model treaty, including investor-State dispute settlement. See 2005 U.K. Model BIT, reprinted in INTERNATIONAL INVESTMENT ARBITRATION 379-85 (Campbell McLachlan et al. eds., 2007).

State practice shows, that are usually expressly mentioned.<sup>236</sup> Hence, whenever States wanted to restrict the scope of application of MFN clauses, they explicitly did so.

Tribunals that read MFN clauses restrictively, by contrast, zoom in on the presumed intentions of the Contracting Parties by asking whether, at the time of conclusion, they positively intended the application of an MFN clause to import more favorable dispute settlement provisions.<sup>237</sup> This emphasis on the subjective intention of States with regard to the interpretation of international treaties, however, is questionable under the approach to treaty interpretation mandated by Articles Thirty-One and Thirty-Two of the Vienna Convention. Thus, as the Tribunal in *Wintershall v. Argentina* stressed, the Vienna Convention has to start from “the elucidation of the meaning of the text, not an independent investigation into the intention of the parties from other sources,”<sup>238</sup> and therefore leaves “no room for any presumed intention of the Contracting Parties to a bilateral treaty.”<sup>239</sup>

Furthermore, arguments that require investors to show that the State parties intended a broad application of MFN treatment to dispute settlement apply a doubtful concept of the burden of proof, when in fact determining whether an MFN clause can import more favorable consent to arbitration is a question of jurisdiction and thus of interpreting the text of the treaty in question, not a question of proving the intention of the State parties. Accordingly, international courts have frequently stressed that issues of jurisdiction had to be observed by courts *ex officio*.<sup>240</sup> Equally, the ICJ stressed in *Border and Transborder Armed Actions* that “[t]he existence of jurisdiction of the Court in a given case is however not a question of fact, but a question of law.”<sup>241</sup> As a consequence, as

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236. See *RosInvestCo U.K. v. Russia*, SCC Case No. Arb. V079/2005, Award on Jurisdiction, Oct. 2007, para. 135 (SCC 2007); *Gas Natural SDG v. Argentina*, ICSID Case No. ARB/03/10, Decision on Preliminary Questions on Jurisdiction, June 17, 2005, para. 30 (W. Bank 2005). This is also reinforced in view of the strictly limited exceptions to MFN clauses recognized by customary international law as implied restrictions. Cf. *supra* note 111.

237. See, e.g., *Telenor Mobile Commc'ns A.S. v. Hungary*, ICSID Case No. ARB/04/15, Award, Sept. 13, 2006, para. 92 (W. Bank 2006); *Berschader v. Russia*, SCC Case No. 080/2004, Award, Apr. 21, 2006, para. 175 (SCC 2006); *Plama*, paras. 198-224; *Salini Costruttori S.p.A. v. Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, Nov. 15, 2004, para. 118 (W. Bank 2004). This also holds true in regards to the decision in *Wintershall v. Argentina*. Even though the Tribunal in that case stressed the objective method of treaty interpretation, it nevertheless considered that the intention of the State was decisive as regards the question of whether it has given consent to arbitration. See *Wintershall Aktiengesellschaft v. Argentina*, ICSID Case No. ARB/04/14, Award, Dec. 8, 2008, para. 168 (W. Bank 2008).

238. *Wintershall*, para. 78.

239. *Id.* para. 88.

240. See *Rights of Minorities in Upper Silesia (Minority Schools) (Germ. v. Pol.)*, 1928 P.C.I.J. (ser. A) No. 15, at 23 (Apr. 26).

241. *Border and Transborder Armed Actions (Nicar. v. Hond.)*, 1988 I.C.J. 76, para. 16 (Dec. 20); see also *Fisheries Jurisdiction (Spain v. Can.)*, 1998 I.C.J. 450-51, para. 38 (Dec. 4) (upholding the same principle).

regards interpretative methodology, it is more convincing to take openly worded MFN clauses at face value and interpret them as encompassing more favorable provisions on dispute settlement, including the host State's consent to arbitration.

*B. International Jurisprudence Supporting a Broad Application of MFN Clauses*

The approach to focus on the plain meaning of MFN clauses and to conclude on that basis that the clauses can serve as a basis of jurisdiction has also received support in jurisprudence beyond the investment treaty arbitration context. Considerable jurisprudence from national courts and international tribunals supports that MFN clauses can incorporate more favorable dispute resolution provisions and thus can serve as a basis of jurisdiction.<sup>242</sup>

For example, in *Rights of Nationals of the United States of America in Morocco* the ICJ was to interpret a provision in a treaty between the United States and Morocco that provided for MFN treatment with respect to commerce in Morocco.<sup>243</sup> Under third-country treaties with Great Britain, Morocco, *inter alia*, had granted "consular jurisdiction in all cases, civil and criminal, when British nationals were defendants."<sup>244</sup> The ICJ concluded that "[a]ccordingly, the United States acquired by virtue of the most-favoured-nation clauses, civil and criminal consular jurisdiction in all cases in which United States nationals were defendants."<sup>245</sup> Even though MFN treatment in this context referred to the grant of jurisdiction to the authorities of a foreign State, the ICJ's reasoning indicates no general prohibition against extending MFN clauses to cover matters of jurisdiction.<sup>246</sup> Furthermore, the ICJ's decision in this regard is in line with a significant number of decisions by domestic courts, including the highest courts in France, Italy, Argentina and the United States, that all accepted that consular jurisdiction could be extended based on MFN clauses contained in commercial treaties.<sup>247</sup>

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242. See Ben Hamida, *Clause*, *supra* note 119, at 1151-59.

243. See *Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.)*, 1952 I.C.J. 190 (Aug. 27). Article Fourteen of the Treaty provided:

The commerce with the United States shall be on the same footing as is the commerce with Spain, or as that with the most favored nation for the time being; and their citizens shall be respected and esteemed, and have full liberty to pass and repass our country and seaports whenever they please, without interruption.

Article Twenty-Four provided in part that "it is further declared, that whatever indulgence, in trade or otherwise, shall be granted to any of the Christian powers, the citizens of the United States shall be equally entitled to them." See *id.*

244. *Id.*

245. *Id.*

246. Cf. *Siemens A.G. v. Argentina*, Decision on Jurisdiction, Aug. 3, 2004, para. 99, 12 ICSID Rep. 174 (W. Bank 2004).

247. Ben Hamida, *Clause*, *supra* note 119, at 1151-53. Similarly, domestic courts have accepted the application of MFN clauses in respect of other matters relating to procedure and

Similarly, a Commission of Arbitration in the *Ambatielos Case* affirmed that the MFN clause in a treaty between the United Kingdom and Greece could incorporate more favorable treatment accorded to third-party nationals in domestic court proceedings. In the case at hand, the Greek Government alleged that the non-production of evidence by the United Kingdom—as a party to court proceedings before her own courts for breach of a contract for the sale of ships between a Greek national and a U.K. Ministry— as well as threats to prosecute the Greek national for tax claims in order to hinder him to initiate judicial proceedings against the government violated international law. In particular, Greece argued that, based on MFN treatment, her nationals would have been entitled to more favorable treatment accorded under third-party treaties the United Kingdom had concluded.<sup>248</sup> In accepting this proposition, the Commission observed:

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

Therefore it cannot be said that the administration of justice, in so far as it is concerned with the protection of these rights, must necessarily be excluded from the field of application of the most-favoured-nation clause, when the latter includes “all matters relating to commerce and navigation”.<sup>249</sup>

Although the Commission ultimately found that no better treatment had been accorded to other foreign traders in third-country treaties,<sup>250</sup> it considered that the MFN clause would apply with respect to access to courts and the procedure they apply even without an explicit reference to cover such issues. While the issue concerned the treatment of foreign nationals in domestic courts, the decision confirms that the application of MFN clauses to matters of dispute settlement holds true as a general matter.<sup>251</sup>

Finally, the dispute resolution mechanism under the General Agreement on Tariffs and Trade (GATT) offers an analogous example of how differences in dispute settlement procedures were considered to constitute a violation of the principle of non-discrimination. Although the decision in *United States-Section 337* concerned a violation of the national treatment standard under Article 3(4)

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jurisdiction. *See id.* at 1153-54.

248. *Cf. Ambatielos Claim (Greece v. U.K.)*, 12 R.I.A.A. 83, 101 (1963).

249. *Id.* at 107.

250. *Id.* at 108-09.

251. *Cf. Maffezini v. Spain*, Decision on Objections to Jurisdiction, Jan. 25, 2000, para 50, 5 ICSID Rep. 396 (W. Bank 2000). Likewise, the decision in *Suez & InterAguas*, para. 63, uttered fundamental criticism with respect to the reasoning in *Plama*, without, however, passing onto evaluating the decision’s result (“Having duly considered the reasons set forth in the *Plama* decision, this Tribunal comes to the conclusion that, *whatever its merits*, it is in any event clearly distinguishable from the present case on a number of grounds.”) (emphasis added). *See also Suez S.A. & Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, Aug. 3, 2006, para. 65.

GATT, because the United States provided different dispute settlement procedures in patent violations cases for non-domestic products, the *ratio decidendi* of the decision equally can be applied to MFN treatment:

The Panel first addressed the issue of whether only substantive laws, regulations and requirements or also procedural laws, regulations and requirements can be regarded as “affecting” the internal sale of imported products. . . . The Panel noted that the text of Article III:4 makes no distinction between substantive and procedural laws, regulations or requirements and it was not aware of anything in the drafting history that suggests that such a distinction should be made . . . . In the Panel’s view, enforcement procedures cannot be separated from the substantive provisions they serve to enforce. If the procedural provisions of internal law were not covered by Article III:4, contracting parties could escape the national treatment standard by enforcing substantive law, itself meeting the national treatment standard, through procedures less favourable to imported products than to like products of national origin.<sup>252</sup>

In sum, the jurisprudence of national and international courts and tribunals supports the argument that MFN clauses generally have a broad scope of application and encompass aspects of dispute settlement and jurisdiction under more favorable third-party treaties. Consequently, the jurisprudence outside the investment treaty context provides no reason to approach the application and interpretation of MFN clauses restrictively and limit the clauses to the incorporation of more favorable substantive rights.

### *C. The Object and Purpose of Investment Treaties*

The policies underlying investment treaties further justify the broadening of MFN treatment to include the host State’s broader consent to investor-State dispute settlement. Their object and purpose consist in promoting and protecting foreign investment, often with a particular focus on directing investment flows into developing countries. A crucial factor to this objective is the protection of foreign investors by ensuring the stability and predictability of their investment activities and their investment-related rights. Above all, the enforcement of BITs’ substantive obligations helps to transform mere statements of political intent into enforceable rights. Giving foreign investors recourse to investor-State arbitration therefore adds to promoting foreign investment flows and achieving the purpose of investment treaties. Against this background, it would be surprising if States, without providing for an explicit exception, had understood MFN clauses as inapplicable to that part of investment treaties that gives muscle to the treaties’ purpose. The object and purpose of investment treaties therefore militates for incorporating more favorable dispute settlement provisions from the host States’ third party BITs by means of MFN clauses.

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252. Report of the Panel, *United States-Section 337 of the Tariff Act of 1930*, ¶ 5.10, L/6439 (Nov. 7, 1989), GATT B.I.S.D. (36th Supp.) at 345 (1990).

*D. Equal Competition and Investor-State Dispute Settlement*

Furthermore, the rationale of MFN clauses to create a level playing field for foreign investors independent of their nationality militates for an expansive application. Applying MFN clauses to questions of investor-State dispute settlement, including admissibility and jurisdiction, helps to level the playing field for foreign investors, because it makes no difference whether two foreign investors face differences as regards their substantive or procedural protection. Thus, an investor who has easier or broader recourse to arbitration has a competitive advantage over other investors who cannot initiate investor-State arbitration on comparable terms. Absent other equally effective means of enforcing BIT obligations, for example, before domestic courts, the latter's transaction costs, here in the form of enforcement costs, will be higher. If worse comes to worse, the investor will have to bear the full costs resulting from the host State's violation of its BIT obligations, while competitors covered by a different BIT can enforce such obligations. Consequently, investors who cannot enforce rights under their BIT cannot offer services and goods at the same price as investors with broader recourse options to investor-State arbitration.

Thus, substantive investment protection is inseparable from its procedural implementation, which is essential to the conferral of a right.<sup>253</sup> Moreover, it is even questionable whether access to arbitration is a matter of procedural law. Instead, having recourse to law enforcement mechanisms also can be understood as a substantive right of an investor protected under an investment treaty.<sup>254</sup> The investor's right to initiate arbitration, therefore, should not be separated from other substantive treatment standards as regards the operation of an MFN clause. Instead, the broader consent to arbitration in subsequent third-country BITs can be construed as an offer by the host State that—although under the more favorable third-country treaty it only extends to investors covered by that treaty—can also be accepted by investors under the basic treaty because the MFN clause in that treaty has the effect of broadening the scope of offerees *ratione personae*. Consent to arbitration given under the more favorable third-party BIT therefore extends, by means of the MFN clause in the basic treaty, to the investors covered under that treaty.

Using MFN clauses to incorporate the host State's broader consent to arbitrate under third-party BITs also dampens externalities arising from imperfect enforcement of the host State's BIT obligations. Instead, being able to make host States comply with their BIT obligations results in States seeing the

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253. See *RosInvestCo U.K. v. Russia*, SCC Case No. Arb. V079/2005, Award on Jurisdiction, Oct. 2007, para. 132 (SCC 2007); *Gas Natural SDG v. Argentina*, ICSID Case No. ARB/03/10, Decision on Preliminary Questions on Jurisdiction, June 17, 2005, para. 29 (W. Bank 2005); *Siemens A.G. v. Argentina*, Decision on Jurisdiction, Aug. 3, 2004, para. 102, 12 ICSID Rep. 174 (W. Bank 2004); see also Radi, *supra* note 109, at 763-64.

254. See *RosInvestCo*, para. 132; *Gas Natural*, para. 29; *Ambatielos Claim (Greece v. U.K.)*, 12 R.I.A.A. 83, 107 (1963).

full consequences of a breach of an investment treaty. A broad construction of MFN treatment, therefore, forces the host State to internalize the costs of violating its treaty obligations. This will limit government breaches of investment treaties to those cases in which the advantage a State derives from the breach outweighs the full costs to affected foreign investors. Denying MFN treatment in the context of investor-State dispute settlement, by contrast, would enable a government to shift consequences of its breach selectively to procedurally less protected investors. An interpretation of MFN clauses that encompasses dispute settlement provisions thus requires host States to internalize the costs stemming from a violation of investment treaties with respect to investors from any home State.

#### *E. Jurisdiction and Compliance with Treaty Obligations*

The internalization of costs due to a broader jurisdictional basis additionally benefits the compliance of host States with their obligations under investment treaties. The prospect of being ordered by an arbitral tribunal to pay damages for the violation of BIT obligations not only increases the costs of a violation, but should also lead to fewer violations of investment treaties in the future.<sup>255</sup> Broader jurisdiction of investment tribunals thus goes along with an additional compliance pull regarding the primary BIT obligations. A broad interpretation of MFN clauses, in particular with respect to jurisdictional issues, therefore, makes BITs more efficient and effective in governing international investment relations.

Construing MFN treatment as broadening the jurisdiction of investment tribunals also accords with the structure of international law and the duty it imposes on States to comply with international obligations. In fact, compliance with international law in general and international treaties in particular is central to the fabric of international law. It not only follows from the principle of *pacta sunt servanda* that governs the law of international treaties,<sup>256</sup> but also informs the object and purpose of State responsibility. Thus, resuming compliance with its primary obligations is the principal duty of a State that has committed an internationally wrongful act.<sup>257</sup> In view of the general interest of States to effectuate compliance with international law, MFN clauses should be interpreted as broadening the basis of jurisdiction of investment tribunals as investor-State arbitration does not only help to settle disputes, but also functions as a mechanisms to make States comply with their investment treaty obligations.

However, if the basic treaty does not provide for investor-State dispute settlement at all, the situation will be different. In such cases, the interpretation

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255. Cf. Keith N. Hylton, *Fee Shifting and Incentives to Comply with the Law*, 46 VAND. L. REV. 1069 (1993).

256. See Vienna Convention on the Law of Treaties, art. 26, May 23, 1969, 1155 U.N.T.S. 331.

257. See *Responsibility of States for Internationally Wrongful Acts*, [2001] 2 Y.B. Int'l L. Comm'n (pt. 2), art. 29, G.A. res. 56/83, Annex, U.N. Doc. A/RES/56/83/Annex (Dec. 12, 2001).

of an MFN clause in the treaty will more likely than not bar the incorporation of the consent to dispute settlement from third-party BITs, since it will be difficult to establish that the MFN clause covered issues of dispute settlement as part of the clause's subject matter. That the subject matter of the basic treaty does not encompass matters of dispute settlement militates against the presumption that the subject matter of the MFN clause is broad enough so as to cover matters that are outside the scope of application of the basic treaty. Instead, under the *ejusdem generis* rule, the basic treaty's MFN clause usually would be limited to importing more favorable substantive investment protection. Likewise, if the basic treaty does not contain provisions on investor-State dispute settlement at all, one would not expect the Contracting Parties to limit the scope of application of an MFN clause accordingly. By contrast, treaties allowing for limited recourse to investor-State arbitration already account for the possibility that investors are entitled to enforce obligations contained in an investment treaty. Broader consent to arbitration in such cases thus directly relates to the type of protection of foreign investors that was already envisaged in the basic treaty.

Finally, State practice suggests that an MFN clause included in a treaty that does not provide for investor-State dispute settlement at all cannot incorporate more favorable dispute settlement mechanisms that a State has consented to under third-party treaties. Thus, under Article 2(1) GATS, which enshrines MFN treatment for the trade in services, the issue arose whether that Article could introduce into the GATS more favorable rights from third-country investment treaties, in particular an investor's right to initiate investor-State dispute settlement, and thus extend any more favorable treatment that a State extended under its BITs to all GATS signatories and their investors.<sup>258</sup> While three States have in fact excluded, in exemptions they made to Article Two of GATS, the incorporation of investor-State dispute settlement provisions established under investment treaties, the vast majority of States did not adopt any position on such an effect of the MFN clause in GATS. Although it is arguable that, by accepting Article 2(1) without exceptions, all these States have incorporated their consent to investor-State arbitration from third-country BITs into the GATS, it is more convincing to conclude that these States believed from the outset that Article 2(1) would not have such an effect, since investor-State dispute settlement has to be regarded as clearly outside the scope of application of GATS. It, therefore, is not covered by the subject matter of that provision.

*F. Must the State's Consent to Arbitrate Be "Clear and Unambiguous"?*

The main argument against incorporating more favorable consent to investor-State arbitration based on MFN treatment is that consent to arbitration

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258. See Ben Hamida, *Clause*, *supra* note 119, at 1159-62; Ben Hamida, *Procedural Rights*, *supra* note 119, at 242-46.

must be—similar to the position adopted by domestic courts concerning commercial agreements to arbitrate—“clear and unambiguous.”<sup>259</sup> Thus, the U.S. Supreme Court, for example, considers in a long-standing jurisprudence that consent to commercial arbitration has to be “clear and unmistakable.”<sup>260</sup> This requirement is, however, not germane to dispute settlement under public international law. While it is true under public international law that States must equally consent to arbitration in order to come under the jurisdiction of an arbitral tribunal, the forms in which such consent can be expressed cannot be measured by the standards that are applicable in the commercial arbitration context. Instead, analogies to commercial arbitration are questionable.

First, if the argument that consent to arbitration must be “clear and unambiguous” was a resounding requirement of State consent to jurisdiction under international law, international courts and tribunals would be required to interpret jurisdictional requirements restrictively and resolve doubts in favor of State sovereignty. They would always have to decline jurisdiction in cases of ambiguity or a lack of clarity. However, neither investment treaty arbitration nor international law dispute resolution generally shows this to be the case. Thus, the Tribunal in *Amco Asia v. Indonesia* emphasized:

[L]ike any other conventions, a convention to arbitrate is not to be construed *restrictively*, nor, as a matter of fact, *broadly* or *liberally*. It is to be construed in a way which leads to find out and to respect the common will of the parties: such a method of interpretation is but the application of the fundamental principle *pacta sunt servanda*, a principle common, indeed, to all systems of internal law and to international law.<sup>261</sup>

Following *Amco Asia*, the Tribunal in *Mondev v. United States* held that matters of jurisdiction had to be interpreted neither extensively nor restrictively, but objectively according to the accepted rules of treaty interpretation: “[T]here is no principle either of extensive or restrictive interpretation of jurisdictional provisions in treaties. In the end the question is what the relevant provisions mean, interpreted in accordance with the applicable rules of interpretation of treaties.”<sup>262</sup>

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259. See *Wintershall Aktiengesellschaft v. Argentina*, ICSID Case No. ARB/04/14, Award, Dec. 8, 2008, paras. 167, 187-89 (W. Bank 2008); *Telenor Mobile Commc'ns A.S. v. Hungary*, ICSID Case No. ARB/04/15, Award, Sept. 13, 2006, para. 90 (W. Bank 2006); *Berschader v. Russia*, SCC Case No. 080/2004, Award, Apr. 21, 2006, para. 181 (SCC 2006); *Plama Consortium Ltd. v. Bulgaria*, Decision on Jurisdiction, Feb. 8, 2005, paras. 198-200, 204, 212, 218, 223, 13 ICSID Rep. 272 (W. Bank 2005).

260. See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Courts in the United Kingdom “have struggled with conflicting views on whether or not there must be ‘distinct and specific words’ specifically referring to the arbitration clause in order for it to be incorporated by reference.” James M. Hosking, *Non-Signatories and International Arbitration in the United States: The Quest for Consent*, 20 ARB. INT’L 289, 292 (2004). See also *Plama*, para. 198 (stating that this requirement “is a well-established principle, both in domestic and international law”).

261. *Amco Asia Corp. v. Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, Sept. 25, 1983, para. 14(i), 1 ICSID Rep. 389 (W. Bank 1983) (emphasis in the original).

262. *Mondev Int’l Ltd. v. United States*, Award, Oct. 11, 2002, para. 43, 6 ICSID Rep. 181, 203

Furthermore, the Permanent Court of International Justice already acknowledged that “there is no rule laying down that consent [to jurisdiction] must take the form of an express declaration rather than that of acts conclusively establishing it.”<sup>263</sup> Likewise, the ICJ has never been restrictive in interpreting jurisdictional issues. Instead, the Court clarified that it will “have to consider whether the force of the arguments militating in favour of jurisdiction is preponderant, and to ‘ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it.’”<sup>264</sup> At the same time, it cited the PCIJ in *The Factory at Chorzów* to support that “[t]he fact that weighty arguments can be advanced to support the contention that it has no jurisdiction cannot in itself create a doubt calculated to upset jurisdiction.”<sup>265</sup> Hence, “it is for the Court to determine [its jurisdiction] from all the facts and taking into account all the arguments advanced by the Parties”<sup>266</sup> on the basis of an objective interpretation without any presumption of either restrictive or expansive interpretation.<sup>267</sup> Judge Higgins thus concluded in her Separate Opinion in *Oil Platforms*:

It is clear from the jurisprudence of the Permanent Court and of the International Court that there is no rule that requires a restrictive interpretation of compromissory clauses. But equally, there is no evidence that the various exercises of jurisdiction by the two Courts really indicate a jurisdictional presumption in favour of the plaintiff . . . . The Court has no judicial policy of being either liberal or strict in deciding the scope of compromissory clauses: they are judicial decisions like any other.<sup>268</sup>

A State’s consent to arbitration under investment treaties is no different from a State’s consent to the jurisdiction of international courts and tribunals in all of these cases. Requiring “clear and unambiguous” consent to arbitration by States therefore would depart from the test generally applied to determine the jurisdiction of international courts and tribunals. Accordingly, the Tribunal in *Suez v. Argentina* rejected the requirement that the State’s consent had to be “clear and unambiguous” in order for MFN treatment to incorporate broader consent to arbitration in third-party treaties. It emphasized instead “that dispute resolution provisions are subject to interpretation like any other provisions of a

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(W. Bank 2002); *see also* Ethyl Corp. v. Canada, Award on Jurisdiction, June 24, 1998, para. 55, 7 ICSID Rep. 12 (W. Bank 1998).

263. Rights of Minorities in Upper Silesia (Minority Schools) (Germ. v. Pol.), 1928 P.C.I.J. (ser. A) No. 15, at 25 (Apr. 26).

264. Border and Transborder Armed Actions (Nicar. v. Hond.), 1988 I.C.J. 76, para. 16 (Dec. 20) (making reference to *The Factory at Chorzów* (Claim for Indemnity) (Germ. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9, at 32 [July 26]).

265. *Id.*

266. Fisheries Jurisdiction (Spain v. Can.), 1998, I.C.J. 450, para. 38 (Dec. 4).

267. *See id.* para. 44.

268. Oil Platforms (Iran v. U.S.), 1996 I.C.J. 857, para. 35 (Dec. 12) (Rosalyn Higgins, Separate Opinion).

treaty, neither more restrictive nor more liberal.”<sup>269</sup>

Second, the analogy tribunals in cases such as *Plama v. Bulgaria* draw between investment treaty arbitration and commercial arbitration mischaracterizes the nature of BITs. BITs are not ordinary contracts between private parties, but international treaties to be interpreted according to rules and rationales that differ from those in the interpretation and application of commercial contracts. Above all, the distributions of interests in both situations are different. BITs do not constitute private law instruments that solely govern the relations between private and theoretically equal parties. Rather, investment treaties order the investment relations between States. Above all, the rationale for requiring “clear and unambiguous” consent to arbitrate in commercial settings is not applicable to the investor-State context.

Requiring “clear and unambiguous” consent has different ramifications for commercial and investment arbitrations. In commercial arbitration, this requirement ensures not only that “commercial arbitration agreements, like other contracts, ‘are enforced to their terms’ . . . and according to the intentions of the parties.”<sup>270</sup> It also protects private parties against forgoing their right to dispute settlement in a state court absent their clear consent. Host States, by contrast, do not need comparable protection. Indeed, requiring the host State’s consent to be “clear and unambiguous” might deny the investors access to efficient, independent and neutral dispute settlement by arbitration and leave them with often less efficient and neutral means, especially in developing countries. Ultimately, a restrictive interpretation of MFN clauses that shields host States from dispute settlement and enforcement mechanisms under investment treaty arbitration, even though the host State’s consent to such mechanisms can readily be construed, is also questionable from a policy perspective.

### G. MFN Clauses and Treaty-Shopping

The second major argument against a broad application of MFN treatment is to avoid “undesirable” or “disruptive treaty-shopping”.<sup>271</sup> Reflecting the

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269. *AWG Group Ltd. v. Argentina*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, Aug. 3, 2006, para. 66 (UNCITRAL 2006); *Suez S.A. & Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, Aug. 3, 2006, para. 66 (W. Bank 2006); *Suez S.A. & InterAguas S.A. v. Argentina*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, May 16, 2006, para. 64 (W. Bank 2006).

270. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947 (1995).

271. See *Maffezini v. Spain*, Decision on Objections to Jurisdiction, Jan. 25, 2000, para 63, 5 ICSID Rep. 396 (W. Bank 2000); *Salini Costruttori S.p.A. v. Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, Nov. 15, 2004, para. 115 (W. Bank 2004); *Plama Consortium Ltd. v. Bulgaria*, Decision on Jurisdiction, Feb. 8, 2005, paras. 222-23, 13 ICSID Rep. 272 (W. Bank 2005); *Telenor Mobile Comm’ns A.S. v. Hungary*, ICSID Case No. ARB/04/15, Award, Sept. 13, 2006, para. 93 (W. Bank 2006); cf. *Wintershall Aktiengesellschaft v. Argentina*, ICSID Case No. ARB/04/14, Award, Dec. 8, 2008, paras. 167-68, 173-76 (W. Bank 2008). See also *Radi*, *supra* note 109, at 771-74 (likewise critical on the negative effects of treaty-shopping).

bilateralism paradigm in investment treaty arbitration, this argument contravenes the object and purpose of MFN treatment to prevent States from shielding rights and benefits in bilateral relations from their extension to third-country investors. MFN clauses decisively target such discriminatory behavior and aim at creating a level playing field with equal conditions in order to allow for uncontorted competition between foreign investors. Seeking the most favorable protection offered by the BITs of a specific host State is therefore not a shopping for unwarranted advantages, but the core objective of MFN clauses. Moreover, the term “treaty-shopping” misrepresents investors as co-opting third-party treaties to their relationship with the host State. This, however, is not the case: the treaty governing the investor-State relations always remains the basic treaty, not any more favorable third-party treaties.

Furthermore, the application of MFN clauses to matters of jurisdiction does not harm the investment relations of States. Quite on the contrary, such application of MFN clauses harmonizes compliance procedures for the host State’s obligations under investment treaties. Arguments about disharmonizing effects of MFN clauses or complaints of “treaty-shopping” as a problem are thus incompatible with the very rationale of MFN treatment. These arguments express no more than mere unease with MFN treatment as a principle governing international investment relations and disregard the benefits stemming from uniform and non-discriminatory rules. Criticizing “treaty-shopping” is thus merely a cover for policy arguments against the desirability of MFN treatment as such, rather than an independent argument to guide the interpretation of MFN clauses.

#### *H. MFN Treatment and Public Policy Restrictions*

The Tribunal in *Maffezini* attempted to distinguish between the “legitimate extension of rights and benefits by means of the operation of the [MFN] clause . . . and disruptive treaty-shopping that would play havoc with the policy objectives of underlying specific treaty provision . . . .”<sup>272</sup> To this end, it introduced a number of “public policy considerations” to prevent circumventing certain restrictions on investor-State dispute settlement.<sup>273</sup> The Tribunal, however, has never explained the legal basis of these exceptions to satisfaction. Yet, two explanations for the Tribunal’s reasoning seem possible. Either public policy exceptions to MFN treatment stem from the domestic legal order of the host State or from the consent of the contracting States Parties to the BIT and therefore form part of international law.

The term “public policy consideration,” as used by the Tribunal, evokes a parallel to exceptions to the enforcement of agreements to arbitrate in

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272. *Maffezini*, para. 63.

273. *See id.* paras. 62-63; *see also* Nat’l Grid v. Argentina, Decision on Jurisdiction, June 20, 2006, para. 92 (UNCITRAL 2006); Siemens A.G. v. Argentina, Decision on Jurisdiction, Aug. 3, 2004, para. 106, 12 ICSID Rep. 174 (W. Bank 2004).

commercial arbitration. In fact, the formulation in the *Maffezini* decision resembles the conclusion of the U.S. Supreme Court in *Bremen v. Zapata Off-Shore Co.* that “[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or judicial decision.”<sup>274</sup> “Public policy” in this context is used as an exception to the enforceability of arbitration clauses.

Yet, such exceptions in commercial arbitration serve a purpose that is at odds with the basic framework of investment treaty arbitration as an instrument of public international law. In commercial arbitration, public policy exceptions aim at upholding specific interests of the forum State in preventing private parties from settling disputes outside the forum State’s court system. The interests protected by public policy exceptions are either specific interests of the State that insists on public enforcement of certain non-arbitrable matters, such as status-related proceedings in family matters, or aims at protecting one of the private parties from foregoing its right to recourse to the State’s own courts.

The situation in investment treaty arbitration, by contrast, is fundamentally different. States, unlike private parties, do not have to be protected against the enforcement of obligations under international law. On the contrary, one of the major deficiencies in traditional investor-State relations is the lack of effective enforcement mechanisms under general international law.<sup>275</sup> Similarly, in the BIT context, the consequences of not enforcing an arbitration agreement between the State and the investor are fundamentally different from the commercial arbitration context. Instead of being able to have recourse to State courts that—at least in most developed countries—effectively and efficiently render justice, an investor would face the courts in the host State that, in many developing and transitioning economies, are not sufficiently independent and impartial, or do not settle disputes efficiently.<sup>276</sup> Furthermore, if the public policy considerations proclaimed by the *Maffezini* tribunal originated from the host State’s domestic legal order, their recognition would allow the host State to unilaterally invoke exceptions to the operation of an MFN clause and thus contravene the primacy of international over national law.<sup>277</sup>

Consequently, the only defensible basis for the Tribunal’s “public policy considerations” can be the consent of the States Parties to a BIT.<sup>278</sup> As such, the “public policy considerations” could be explained as constituting implicit exceptions to the scope of application of MFN clauses. Whether this is properly called a “public policy exception” may be doubted as no independent public

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274. *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972).

275. Cf. Stephan Schill, *Enabling Private Ordering—Function, Scope and Effect of Umbrella Clauses in International Investment Treaties*, 18 MINN. J. INT’L L. 1, 23-26 (2009).

276. *Id.* at 21-22.

277. Cf. Vienna Convention on the Law of Treaties, *supra* note 256, art. 27.

278. See Dolzer & Myers, *supra* note 119, at 52-54.

policy concerns would be involved that override the host State's consent.

Apart from semantics, such implicit exceptions are hardly necessary as regards the application of MFN clauses to matters of investor-State dispute settlement. Instead, the existing limits to the operation of MFN clauses, in particular the *ejusdem generis* rule, arguably constitute sufficient barriers against what can be considered a “disruptive” effect of the clauses. If the Contracting Parties had mutually agreed to limit the scope of application MFN clauses, they can always spell out exceptions in the text of the respective BIT (as is frequently done, for example, for customs union or concerning benefits stemming from double taxation treaties). In contrast, implicit exceptions to MFN clauses have traditionally only been accepted under limited circumstances.<sup>279</sup> *A fortiori*, there is no place for unilateral public policy considerations, as this would enable one State to escape from its obligations under international law.<sup>280</sup> Last but not least, invoking that certain considerations relate to public policy is implausible if the host State does not address them uniformly in its investment treaties.<sup>281</sup>

Instead, principles of treaty interpretation suffice to determine the scope and the limits of MFN clauses in investment treaties. Thus, one will have to go through accepted modes of treaty interpretation, primarily the text of the instrument, in order to reach a conclusion on whether, for example, Article 1103 NAFTA incorporates more favorable treatment regarding dispute settlement. In this context, one will also have to weigh the consideration that bypassing procedural limitations in a multilateral and “highly institutionalized system of arbitration” may differ from the effect MFN clauses have in a bilateral treaty framework that handles matters of dispute settlement in a less institutional fashion. There is, however, no need and no normative basis for the conclusion that MFN clauses in a multilateral and highly institutionalized framework should have *per se* different effects and a different scope from MFN clauses in bilateral treaties.

The remaining examples of “public policy considerations” introduced in *Maffezini*, however, should be discarded as exceptions to the application of MFN clauses. First, the exhaustion of local remedies prior to investor-State arbitration is not a limitation on the jurisdiction of investment tribunals, but a restriction concerning the admissibility of a claim.<sup>282</sup> It should therefore be

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279. See *supra* notes 111 and 117.

280. This would be contrary to the principle that the domestic legal order cannot serve as an exception from or excuse for not complying with international treaty obligations. See Vienna Convention on the Law of Treaties, *supra* note 256, art. 27

281. Cf. Siemens A.G. v. Argentina, Decision on Jurisdiction, Aug. 3, 2004, para. 105, 12 ICSID Rep. 174 (W. Bank 2004) (“The Tribunal would consider an indication of the existence of a policy of the Respondent if a certain requirement has been consistently included in similar treaties executed by the Respondent.”).

282. See *Interhandel (Switz. v. U.S.)*, 1959 I.C.J. 26 (Mar. 21) (stating that the objection that local remedies have not been exhausted “must be regarded as directed against the admissibility of the Application of the Swiss Government”); see also *SGS Société Générale de Surveillance S.A. v. Philippines*, Decision on Objections to Jurisdiction, Jan. 29, 2004, para. 154, 8 ICSID Rep. 518 (W.

treated no differently than waiting clauses. Moreover, the contracting parties to BITs usually waive the requirement to exhaust local remedies. This shows that this access requirement to investor-State arbitration is not important enough in general State practice to be covered by an implicit, and thus mutually agreed, exception to MFN treatment. Furthermore, an openly worded MFN clause can hardly be understood to contain an implied exception to an instrument that is as suited to distort enforcement opportunities for investors with different nationalities and to negatively affect equal competition as the exhaustion of local remedies.

Second, the general proposition that MFN clauses could not bypass “fork in the road”-clauses seems equally unconvincing. Although the finality of dispute settlement mechanisms is a legitimate concern of the contracting parties,<sup>283</sup> “fork in the road”-clauses can distort competition between investors covered under different BITs significantly. In view of the rationale of MFN treatment it is thus difficult to justify why investors from some home States should be allowed to bring claims both in the domestic legal system and on the international level, while investors from other home States are restricted to one forum. Depending on the circumstances, concepts such as estoppel or *abus de droit* would better prevent multiple proceedings against the host State in its domestic courts and in investor-State arbitration, in particular those brought in bad faith. Nonetheless, such precaution does not justify treating “fork in the road” clauses as immune from being circumvented by the operation of MFN clauses.

Finally, under certain circumstances an investor will even be able to replace the dispute settlement provisions in the basic treaty with those from the host State’s third-country BITs based on an openly worded MFN clause. This, however, will require scrutiny over whether the latter are indeed more favorable and, furthermore, accept jurisdiction over the claim between an investor and the host State in question. For example, there is no reason why an investor should not be able to invoke the consent to ICSID arbitration under one of the host State’s third-party treaties, even though the basic treaty provides for arbitration under UNCITRAL rules, or conversely, invoke the consent to UNCITRAL arbitration, even though the basic treaty only provides for ICSID arbitration. Depending on the circumstances of the case, ICSID or UNCITRAL arbitration may be more favorable for an investor in initiating investment treaty arbitration.<sup>284</sup> While ICSID arbitration, for example, is more favorable than UNCITRAL arbitration regarding recognition and enforcement, UNCITRAL arbitration can be more favorable than ICSID arbitration as the former does not

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Bank 2004) (with further references).

283. See *Maffezini v. Spain*, Decision on Objections to Jurisdiction, Jan. 25, 2000, para 63, 5 ICSID Rep. 396 (W. Bank 2000).

284. On relevant differences between ICSID and UNCITRAL Arbitration, see Giorgio Sacerdoti, *Investment Arbitration under ICSID and UNCITRAL Rules*, 19 ICSID REV.-FOR. INV. L. J. 1 (2004).

require that the jurisdictional requirements of Article Twenty-Five ICSID Convention are met, which excludes, for example, claims by dual nationals and may have a stricter scope *ratione materiae* as regards the notion of investment than some investment treaties.

At the same time, however, the more favorable forum under the third-country BIT has to be open to the investor's claim under the basic treaty and accept jurisdiction. For example, an investor whose home State has not ratified the ICSID Convention cannot conduct arbitration under the ICSID Convention based on the MFN clause in the basic treaty, even though the host State may have consented to ICSID arbitration in third-country BITs because the Convention is only applicable when both States concerned have adhered to it.<sup>285</sup> Similarly, when the United Kingdom invoked MFN treatment vis-à-vis Iran in the *Anglo-Iranian Oil Company* case to establish the jurisdiction of the ICJ, based on the argument that Iran had submitted to such jurisdiction in relation to comparable treaties, the Court pointed out that its basis for jurisdiction over Iran was limited pursuant to Iran's declaration under Article 36(2) of the Court's Statute to disputes relating to the application of treaties or conventions accepted by Iran after the ratification of said declaration.<sup>286</sup> The Court therefore declined jurisdiction in the case at hand:

[The] most-favoured-nation clause [the United Kingdom invoked] . . . is contained in the Treaties of 1857 and 1903 between Iran and the United Kingdom, which are not subsequent to the ratification of the Iranian Declaration. While Iran is bound by her obligations under these Treaties as long as they are in force, the United Kingdom is not entitled to rely upon them for the purpose of establishing the jurisdiction of the Court, since they are excluded by the terms of the Declaration.<sup>287</sup>

The Court therefore declined jurisdiction in the case at hand not because it considered that an MFN clause could not incorporate more favorable jurisdiction under third-party treaties, but because the jurisdiction of the ICJ itself was limited by the Court's Statute in connection with the Iranian declaration. The Court, therefore, did not reject the proposition that MFN clauses could incorporate broader consent to jurisdiction.<sup>288</sup>

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285. However, one needs to consider in such cases whether recourse to arbitration under the ICSID Additional Facility rules is possible.

286. See *Anglo-Iranian Oil Company (U.K. v. Iran)*, 1952 I.C.J. 107-10 (July 22).

287. *Id.* at 109.

288. Cf. *Leupold-Praesent v. Germany*, 25 I.L.R. 540 (1958). Concerning the recourse of a Swiss national, invoking MFN treatment granted in a treaty between Switzerland and Germany before the Arbitral Commission on Property, Rights and Interests in Germany, access to which was restricted to nationals of U.N. Member States, the Commission held:

It is true that, by agreement with a country which, like the Swiss Confederation, is not a member of the United Nations, the Federal Republic of Germany could grant the nationals of such a country the same concessions as those granted under Article 6 of Chapter Ten, but has no power to extend the jurisdiction of the Commission to disputes with such nationals without the consent of the other Signatory States. The Commission was established by the Convention and its jurisdiction is defined therein

## VI.

## CONCLUSION: MFN TREATMENT - SECURING THE FUTURE OF MULTILATERALISM

MFN clauses in investment treaties influence the multilateralization of bilateral investment relations between States. Parallel to international trade law, MFN treatment in the investment context aims at creating non-discriminatory conditions for investors from different home States as a prerequisite for equal competition among them. They aim at preventing a distortion of the market by prohibiting competitive disadvantages for certain investors based on differences in the scope of investment protection their respective home State BITs offer. MFN clauses thus recognize the value competitive structures bring to an efficient allocation of investment in a market environment. They are thus also in line with the more general thrust of BITs to implement institutions that support economic efficiency, reduce transaction costs in international investment relations and enable host States to attract investment into economic sectors where they have a competitive advantage over other economies.

Against this backdrop, arbitral practice has accepted that MFN clauses incorporate more favorable substantive investment protection from third-country BITs and thus create a uniform level of investment protection for all investors to whom MFN treatment applies. Similarly, investment tribunals have uniformly accepted that MFN clauses allow circumventing access restrictions to investor-State arbitration, in particular less favorable waiting periods, if third-country BITs offer more favorable conditions. By contrast, the operation of MFN clauses to incorporate broader consent to arbitration from third-country BITs has met considerable resistance. Relying on analogies to commercial arbitration that require “clear and unambiguous” consent, arbitral jurisprudence has, so far with one exception, declined to apply MFN clauses as a basis of jurisdiction for investment tribunals.

This Article, however, argues that absent any clear indications to the contrary, MFN clauses should be applied broadly to incorporate any more favorable treatment, independent of whether it concerns substantive or procedural matters. Not only are analogies with regard to the interpretation of the consent to arbitrate in commercial matters, on the one hand, and investment treaty arbitration, on the other, misplaced. Restrictive interpretations of either MFN clauses in investment treaties or of the host State’s consent to arbitration are also not compatible with accepted modes of treaty interpretation under international law. Rather “dispute resolution provisions are subject to interpretation like any other provisions of a treaty, neither more restrictive nor

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and in the Charter annexed thereto. Any extension of that jurisdiction would constitute a modification of the Convention and of the Charter and, as in the case of any modification of an agreement, may be made only with the consent of all the Parties thereto.

*Id.* at 542

more liberal.”<sup>289</sup> Excluding MFN clauses from applying to questions of jurisdiction also contravenes the rationale of MFN treatment to create a level playing field for investors from different home States and creates tensions with the object and purpose of investment treaties. Rather, the importance of investor-State arbitration as a dispute settlement and compliance mechanism for the promotion and protection of foreign investment militates for the broad application of MFN clauses to encompass matters of jurisdiction. This does also not remove the fundamental requirement that States must consent to arbitration or any other dispute resolution mechanism under international law. Instead, the consent they have given under one treaty will be extended, based on the operation of an MFN clause, to the beneficiaries of that clause.

As a consequence, good arguments exist for the proposition that MFN clauses can import the broader consent to arbitration from third-country treaties. Thus, the offer to arbitrate in the third-country BIT does not only extend to the investors covered by the third party treaty, but also to investors covered under the basic treaty containing the MFN clause. Consent in third-party BITs can include more causes of action. Consent can also include more favorable arbitral fora the host State consented to under its third party BITs, for example, because those other fora produce more easily recognizable and enforceable awards, or offer fewer or less stringent jurisdictional access restrictions to investor-State arbitration.

The situation may be different, however, if the basic treaty does not provide for investor-State dispute settlement at all. Then the basic treaty does not encompass investor-State arbitration among its subject matters. This would limit the scope of the treaty’s MFN clause to importing more favorable treatment regarding matters of substantive investment protection. Provisions concerning investor-State dispute settlement in that case, by contrast, would relate to a subject matter that is outside the scope of application of the basic treaty.

The debate about the scope of MFN clauses and its application to questions of jurisdiction also illustrates the struggle between bilateralism and multilateralism as an ordering paradigm for international investment relations. While the restrictive interpretation of MFN clauses understands BITs as expressions of bilateral *quid pro quo* bargains, the broader approach is closer in line with creating a multilateral order for a single global economy that is based on non-discriminatory and uniform rules for investors in every investment-related aspect. For the broader approach, BITs are committed to non-discrimination and liberalization and form elements of a multilateral international order for foreign investment relations with uniform standards of

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289. AWG Group Ltd. v. Argentina, ICSID Case No. ARB/03/19, Decision on Jurisdiction, Aug. 3, 2006, para. 66 (UNCITRAL 2006); Suez S.A. & Vivendi Universal S.A. v. Argentina, ICSID Case No. ARB/03/19, Aug. 3, 2006, Decision on Jurisdiction, para. 66 (W. Bank 2006); Suez S.A. & InterAguas S.A. v. Argentina, ICSID Case No. ARB/03/17, Decision on Jurisdiction, May 16, 2006, para. 64 (W. Bank 2006).

protection.

Yet, MFN clauses do not only have effects on the relationship between investors and States. They also level the inter-State relations between the host State and different home States and advance the system of international investment protection towards multilateralism. In particular, MFN clauses have the effect of reducing leeway for specificities in bilateral investment relations and undermine the possibilities for bilateral *quid pro quo* bargaining. In doing so, MFN clauses do not only affect international economic relations, but more generally transform the idea of ordering international relations on a multilateral basis into actual practice.<sup>290</sup> Thus, similar to the context of international trade, the inclusion of MFN clauses in investment treaties can be seen as yielding to non-economic objectives in suppressing the type of protectionism and bilateral isolation that was considered to have constituted at least a supporting factor for the economic depression in the 1930s and subsequently World War II.<sup>291</sup>

Finally, MFN clauses do not only multilateralize existing international investment treaties. By securing the multilateralization of specific bilateral advantages, they also make it harder for States to shift their future international economic policy-making to genuine bilateralism that includes granting preferential treatment on the basis of *quid pro quo* bargains. Instead, MFN clauses secure that a certain level of investment protection that was reached in earlier investment treaties will be more difficult to change by introducing more restrictive BITs in future investment treaties. MFN clauses impede attempts to withdraw from the level of investment protection once granted by a host State in its investment treaties, as the clauses enable investors to incorporate possibly broader standards of investment protection from older investment treaties the same State has concluded. Only changes in a State's investment treaty practice that are accompanied by restrictions in MFN clauses themselves will enable States to isolate new investment treaties from a multilateralization of earlier agreements. To a certain extent, MFN clauses therefore lock States into the most favorable level of investment protection reached at one point of time and project this level into the future.<sup>292</sup> In sum, MFN clauses therefore form part of

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290. See Verbit, *supra* note 61, at 25-31.

291. See *id.*; see also CURZON, *supra* note 64, at 20-63.

292. States, therefore, are only gradually able to change the principles of international investment law enshrined in their BITs, in particular since most BITs are concluded for substantial periods of time of usually at least ten years and also provide for long periods of protection for existing investment after a possible termination (often up to twenty years). See, e.g., Agreement on the Encouragement and Reciprocal Protection of Investments art. 15, P.R.C.-F.R.G., Dec. 1, 2003, 2362 U.N.T.S. 253. Changes to the overall treaty system will, therefore, unless the Contracting States Parties agree on the changes, require that newly concluded BITs contain limitations of MFN treatment for more favorable treaty provision from earlier treaties. Canada has therefore amended its Model BIT in this direction. It now includes an Annex that exempts MFN treatment with respect to prior BIT obligations and thus gives it more leeway to gradually change the level of investment protection due under its investment treaties. See Canadian Model BIT, Annex III para. 1 (2004), available at <http://ita.law.uvic.ca/documents/Canadian2004-FIPA-model-en.pdf>.

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the ongoing process of multilateralizing international investment relations and constitute one of the explicit normative bases of this development.