

**The most-favoured-nation clause in international investment
law**

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Abbreviations

BIT	Bilateral Investment Treaty
DSU	Dispute Settlement Understanding
EC	European Community
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States
ICJ	International Court of Justice
ILC	International Law Commission
MAI	Multilateral Agreement on Trade (Draft)
MFN	Most-Favoured-Nation
PCIJ	Permanent Court of International Justice
UNCITRAL	United Nations Commission on International Trade Law
VCLT	Vienna Convention on the Law of Treaties

Introduction

The most-favoured-nation principle is omnipresent in contemporary international economic relations.¹ It has long been considered “the corner-stone of all modern commercial treaties”² and is a central principle in the General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects on International Property Rights (TRIPs). Accordingly, the Appellate Body described the principle as “a cornerstone of the GATT and [...] one of the pillars of the WTO trading system”.³ The desirability of conducting international trade on the basis of most-favoured-nation treatment has been pointed out ever since, *inter alia* in the 1974 Charter of Economic Rights and Duties of States⁴ and the 1975 Final Act of the Helsinki Conference on Security and Cooperation in Europe⁵. During the second half of the twentieth century, it has become a “core element of international investment agreements”⁶ and was included in almost all of the now more than 3000⁷ bilateral investment treaties (BITs) and regional and multilateral investment treaties. It is the object of most-favoured-nation clauses to avoid discrimination and establish equal competitive opportunities. Since there is no obligation of economic non-discrimination in customary international law, such obligation only exists when a treaty creates it.⁸ Lacking a treaty, nations have the sovereign right to discriminate against foreign nations in economic affairs. In contrast to the multilateral GATT, where one MFN clause is applicable to all member States, international investment law presents a variety of differently worded MFN clauses

¹ The clause is however not limited to the field of international economic law, but can also be found in non-economic conventions, such as the Convention relating to the status of refugees (see Articles 13, 15, 17 (1), 18, 19 (1), 21, 22 (2)) and the Convention relating to the status of stateless persons (Articles 13, 15, 17 (1), 18, 19, 21, 22 (2)).

² Hornbeck, *The Most-Favored-Nation Clause*, p. 395.

³ Appellate Body Report, *Canada-Autos*, 31 May 2000, WT/DS139/AB/R, WT/DS142/AB/R, para. 69.

⁴ Article 26 of the Charter.

⁵ Co-operation in the Field of Economics, of Science and Technology and of the Environment, (1) Commercial Exchanges, General provisions, para. 5.

⁶ UNCTAD, *Most-Favored-Nation Treatment*, p. 1.

⁷ UNCTAD, *Investor-State-Disputes: Prevention and Alternatives to Arbitration* (2010), p. 3.

⁸ Jackson, *The World Trading System*, 158; Hilf/ Geiß, *Most-Favoured-Nation Clause*, in: Wolfrum, Rüdiger (ed.), *Encyclopedia of Public International Law*, para. 20; DiMascio/Pauwelyn, *Nondiscrimination in Trade and Investment Treaties*, p. 53.

embedded in different treaties. The large number of treaties also leads to variations with regard to the standards of protection accorded to investors from different home countries. The provisions in bilateral investment treaties are not uniform both concerning the substantive protection of investors and investors' possibilities to settle disputes with the host State. More favourable treatment granted to third-State investors can therefore not only derive from unilateral measures taken by a State, but also from agreements concluded with a third State.⁹ This means that investors may invoke more favourable provisions from bilateral investment treaties concluded with a third State if their home States have concluded a bilateral investment treaty including a most-favoured-nation clause with the investor's home State.

This possibility has given rise to the question about the scope of the various MFN clauses. The question arises as regards the applicability of the clause to substantive treaty standards, but it has gained particular significance as regards its application to dispute settlement provisions. By now a significant number of investment cases has dealt with the application of MFN clauses to procedural or jurisdictional dispute settlement provisions. The decisions are however highly contradictory. Views range from the application of MFN clauses to all dispute settlement provisions over a distinction between procedural and jurisdictional dispute settlement provisions to a complete negation of applicability. The issue is still by no means settled. In regard of the great amount of conflicting decisions, it is the objective of the thesis to seek to contribute to a greater coherence in the approaches adopted in the view of this question. The finding of a coherent approach is of vital importance in order to work against the fragmentation of international law and to increase the legitimacy of international investment law, which is necessarily threatened by the unpredictability deriving from conflicting decisions.¹⁰ At the same time, it is essential to give States enough room to pursue self-determined public policies, given that invest-

⁹ Nolde, *La clause de la nation la plus favorisée et les tarifs préférentiels*, p. 48; Sacerdoti, *Bilateral Treaties and Multilateral Instruments on Investment Protection*, p. 350.

¹⁰ See Schill, *Internationales Investitionsschutzrecht und Vergleichendes Öffentliches Recht*, p. 255.

ments may be beneficial or detrimental to the host States economy, environment or development.¹¹

Against this background, Part I of the thesis deals with the basic principles governing most-favoured-nation clauses, including an elucidation of the notion (A). and functions (B.) and an examination of the impact most-favoured-nation clauses have in trade and investment law (C.). It is argued that most-favoured-nation clauses in investment law potentially have a stronger impact on the regulatory autonomy of the host State than in trade law, a finding which becomes particularly relevant when ascertaining the comparators relevant for the determination of like circumstances. Part II deals with the historical development of most-favoured-nation clauses. Part III contains an overview of most-favoured-nation clauses in various agreements. A survey of most-favoured-nation clauses necessarily constitutes a limited selection. It is the aim of Part III to examine the language of some most-favoured-nation clauses in order to demonstrate that arbitral tribunals may come to different results depending on the wording of the relevant clause. Part IV deals with the application of most-favoured-nation clauses to substantive provisions by examining and systematising existing case law. Investment tribunals have homogenously accepted application of most-favoured-nation clauses to substantive treatment standards. They have so far dealt with the invocation of an allegedly more favourable fair and equitable treatment standard, with the invalidation of a non-precluded measures clause and the obligation to grant necessary permits. The thesis then turns towards further substantive treatment standards which have not yet been relevant in investment cases, but which might be invoked by means of a most-favoured-nation clause in the future. It concludes that application of the most-favoured-nation standard to substantive provisions may have a far-reaching impact on the substantive treatment owed to an investor. Part V discusses the application of most-favoured-nation clauses to the conditions *ratione temporis*, *ratione materiae* and *ratione personae*. It is demonstrated that these conditions cannot be circumvented via a most-favoured-nation clause, given that they restrict the scope and applicability of the entire treaty, including the most-favoured-nation clause. Part VI deals

¹¹ For examples, see Schill, Investitionsschutzrecht als Entwicklungsvölkerrecht, ZaoRV 72 (2012), pp. 266, 267.

with the application of most-favoured-nation clauses to dispute settlement provisions. In the view of several tribunals that have distinguished between the application of MFN clauses to jurisdictional and procedural provisions, Part VI.A. sets forth the distinction between jurisdictional and admissibility-related provisions, while recognizing that this distinction does not entail the non-mandatory nature of admissibility-related provisions. Part VI.B contains the arguments relating to the application of most-favoured-nation clauses to procedural dispute settlement provisions. In this respect, the interpretation of MFN clauses according to the Vienna Convention is of paramount importance. It is argued in Part VI.B.I. that depending on the wording of each clause, this interpretation generally suggests application of MFN clauses to procedural and jurisdictional dispute settlement provisions. Part VI.B.II and III. examines domestic case law and ICJ jurisprudence, which does not offer unequivocal guidance on the issue. As a further argument to affirm application of MFN clauses to jurisdictional provisions in addition to procedural provisions, Part VI.C. stresses the importance of consent both to substantive and jurisdictional provisions and rejects the restrictive interpretation of jurisdictional clauses. Part VI.D. contains an overview of rulings by investment tribunals. While Part VI.D.I. deals with rulings concerning the circumvention of procedural requirements, and more specifically with the requirement of submitting a dispute to domestic courts for a certain period of time before commencing arbitration, Part VI.D.II examines cases dealing with the importation of jurisdictional provisions. The cases are assessed against the background of the argumentation in Parts VI.B and C. After an overview of further potential fields of application to dispute settlement matters, it is concluded that the outcome of the cases affirming an MFN clause's application to dispute settlement provisions should be endorsed, while the reasoning is sometimes subject to critique. Part VII deals with the question whether it should be possible to invoke by means of a most-favoured-nation clause beneficial provisions without having to import at the same time disadvantageous provisions that may have been inserted in the basic treaty as a balance or trade-off for the relevant beneficial provisions. This would involve the possibility to create a combination of beneficial treaty provisions that the host State never intended to guarantee to investors from any State. It is argued that "cherry picking" is the natural effect of MFN clauses, which implies that only beneficial provisions must be imported. However, as a limiting principle

to this approach, some features of a BIT which are closely related only allow conjoint incorporation. Part VIII deals with the concept of like circumstances, which is the prerequisite for a comparison whether there is in fact less favourable treatment. First the thesis gives an outline of the concept of like products and like services in trade law. These concepts can however not be easily transferred to the investment context. Then the comparators relevant to the determination of like circumstances in investment law are identified, taking into account that the like circumstances analysis in investment law should give more room to the consideration of regulatory objectives of the host State than the corresponding concepts in trade law. Part VIII is followed by the Final Conclusion.

Part I: Basic Principles

A. Notion and Substance of the Most-Favoured-Nation Clause

I. Definition

The most-favoured-nation clause is a treaty provision which obliges a State (the granting/conceding State) to extend to another State (the beneficiary State) or to persons or things in a certain relationship with that State all the benefits which it accords to third States (favoured States) or to persons or things in the same relationship in an agreed sphere of relations.¹² In the field of investment law, the standard obliges host states to treat investors from one foreign country no less favourably than investors from any other foreign country. The rights enjoyed under the most-favoured-nation standard are thus not absolute, but dependent on the rights granted by the promisor to third States or persons or things in a determined relationship with that State. As a contingent standard, its content is ascertained by reference and dependent on an exterior set of rules. Thus, the most-favoured-nation standard has been described as a “shell with variable – and continuously

¹² Ustor, *Most-Favoured-Nation clause*, p. 468. See also the definition in the ILC Draft Articles, at p. 21, which states that the most-favoured-nation clause guarantees “treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favourable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State.”

varying – contents”.¹³ To determine the field of application for the most-favoured-nation clause, reference is often made to the *ejusdem generis* principle, which stipulates that rights are acquired only in respect of matters which are specified in the clause or implied from its subject-matter.¹⁴

With regard to the scope of the prohibition of discrimination, the difference in treatment may be specifically provided for in a law or regulation of the host state or may be the consequence of a measure ostensibly non-discriminatory, but resulting in different treatment in fact.¹⁵ *De jure* discrimination involves a law or regulation that openly links a difference in treatment to the origin of investors or investments. The term *de facto* discrimination refers to regulatory measures which are formally origin-neutral and do not explicitly distinguish between various investors but which impose an illegitimate burden on a certain category of investors while sparing others, thus modifying the conditions of competition. With regard to Article I:1 GATT, the WTO Appellate Body ruled that Article I:1 GATT does not only cover *de jure* discrimination, but also *de facto* discrimination and thus also measures which, on their face, do not depend on the origin of the relevant product.¹⁶ The Appellate Body in *EC-Bananas* found that the same was true for the most-favoured-nation obligation of the GATS in Article II:1.¹⁷ Similarly, under the non-discrimination standards of investment treaties, both direct and formal *de jure* discrimination and indirect *de facto* discrimination are prohibited.¹⁸

¹³ Schwarzenberger, *The Most-Favoured-Nation Standard in British State Practice*, p. 96.

¹⁴ See below Part VI B.I.2.

¹⁵ UNCTAD, *Bilateral Investment Treaties 1995-2006*, p. 39.

¹⁶ Appellate Body Report, *Canada-Autos*, 31 May 2000, WT/DS139/AB/R, WT/DS142/AB/R, para. 78; *EC-Bananas*, WT/DS27/AB/R, para. 234.

¹⁷ Appellate Body Report, *EC-Bananas*, 9 September 1997, WT/DS27/AB/R, para. 233.

¹⁸ *ADF v. U.S.*, Award, 9 January 2003, ICSID Case No. ARB(AF)/00/1, paras 156-157; *Feldman v. Mexico*, Award, 16 December 2002, ICSID CASE No. ARB(AF)/99/1, para. 169; *Pope and Talbot v. Canada*, Award on the Merits of Phase 2, 10 April 2001, para. 78. In *ADF v. US*, the Canadian investor had argued that US investors were privileged by the requirement that steel of investors had to be fabricated in the US. While the United States argued that this requirement was equally applicable to U.S. investors and thus did not constitute discrimination, the tribunal found that the regulation could in principle constitute *de facto* discrimination since it could be more “natural for US investors to carry out the fabricating operations in the US”. Eventually, the tribunal denied a violation of the national treatment obligation since the investor had failed to meet the burden of proving that the competitive situation of Canadian investors was equal to that of U.S. investors.

II. Relationship between Most-Favoured-Nation Treatment and the *Pacta Tertiis* Principle

The relationship between treaties and third parties is defined by the principle of customary international law *pacta tertiis nec nocent nec prosunt*. According to this principle, which is codified in Article 34 of the Vienna Convention on the Law of Treaties (VCLT), treaties generally only have an effect between the parties to the treaty; for States not party to a treaty, the treaty is *res inter alios acta*.¹⁹ The underlying principle of the *pacta tertiis* rule is the principle that no rights or duties can be conferred on a third State without its consent, which is the result of the sovereign equality of States.²⁰

Before the ICJ judgment in the *Anglo-American Oil Co.* case, part of legal doctrine took the view that most-favoured-nation treatment in connection with the beneficiary third-party treaty was an exception to the *pacta tertiis* rule in that it lay in the nature of most-favoured-nation treatment that treaties concluded between two States had an effect on all States that were not party to the treaty but had agreed on most-favoured-nation treatment with one of the parties.²¹ It was argued that the legal obligations of the granting State towards the beneficiary State derived from the third-party treaty and not from the treaty stipulating the most-favoured-nation clause. The same view was held by the United Kingdom as Claimant in the *Anglo-Iranian Oil Company Case*.²² The ICJ had concluded from the Iranian Declaration made under Article 36 (2) of the ICJ Statute that Iran had accepted the jurisdiction of the ICJ only with regard to disputes relating to treaties ratified subsequent to the aforementioned Declaration.²³ While Iran and the United Kingdom had agreed upon most-favoured-nation treatment in treaties concluded before the crucial date,

¹⁹ Vukas, *Treaties, Third-party Effect*, para. 2; Dahm/ Delbrück/ Wolfrum, *Völkerrecht*, vol. I/3, p. 613; McNair, *The Law of Treaties*, p. 309; Rozakis, *Treaties and Third States*, pp. 1-41. On the effect of treaties on third States see Roxburgh, *International Conventions and Third States*.

²⁰ Tomuschat, *Obligations for States*, p. 242-244.

²¹ Fauchille, *Traité de Droit International Public*, p. 359; Oppenheim, *International Law: A Treatise*, vol. I, para. 522. See also the Dissenting Opinions of Judges Hackworth and Levi Carneiro in *Anglo-Iranian Oil Co. Case*, pp. 138 and 157. For the contrary view see Sibert, *Traité de Droit International Public*, vol. II, p. 255; Rousseau, *Principes généraux du droit international public*, vol. I, p. 465.

²² *Anglo-Iranian Oil Co. Case*, Pleadings, at 648-649.

²³ *Anglo-Iranian Oil Co. Case*, ICJ Judgment of 22 July 1952, pp. 103-107. This was disputed since the wording of the Iranian Declaration could also be interpreted as encompassing treaties ratified before the Declaration. However, the Court concluded that this was contrary to the manifest intention of Iran.

the third-party treaties that the United Kingdom intended to invoke by virtue of the most-favoured-nation clause were ratified subsequent to the Declaration.²⁴ In order to establish the Court's jurisdiction, the Government of the United Kingdom argued that the decisive treaties to which the dispute related were the third-party treaties invoked by means of the most-favoured-nation clause.²⁵ Since the dispute concerned the new substance of the treaty deriving from the rights accorded in the third-party treaties and these rights had become part and parcel of the most-favoured-nation clause only after the ratification of the Declaration, the ICJ had jurisdiction.²⁶

The ICJ rejected the argumentation that the most-favoured-nation clause represented an exception to the relative effect of treaties stipulated by the *pacta tertiis* rule. It held that the third-party treaty itself did not create a legal relation between Iran and the United Kingdom.²⁷ The beneficiary state did not derive rights and benefits from the third-party treaty, but was entitled to claim these rights only by virtue of the most-favoured-nation clause.²⁸ Therefore the treaty containing the most-favoured-nation clause was to be considered the basic treaty that established the legal connection between the beneficiary State and the third state.²⁹ The Court's argument basically was that the *scope* of the benefits that the United Kingdom could require was determined by the third-party treaty. Howev-

²⁴ The Treaty mainly relied upon was a Treaty of Friendship, Establishment and Commerce between Iran and Denmark, signed on 20 February 1934, which provided in Article IV that "The nationals of each of the High Contracting Parties shall, in the territory of the other, be received and treated, as regards their persons and property, in accordance with the principles and practice of ordinary international law. They shall enjoy therein the most constant protection of the laws and authorities of the territory for their persons, property, rights and interests." (See *Anglo-Iranian Oil Company Case*, ICJ Judgment of 22 July 1952, p. 108.) Additionally, the Claimant relied on a treaty between Iran and Switzerland of April 25th, 1934 and a treaty between Iran and Turkey of March 14th, 1937.

²⁵ *Anglo-Iranian Oil Company Case*, Pleadings, at 533: "A most-favoured-nation clause is in essence by itself a clause without content; it is a contingent clause. It acquires its content only when the grantor State enters into relations with a third State [...]" This argumentation was supported by several judges in their dissenting opinions, namely Judge Hackworth, at pp. 137-138, and Judge Levi Carneiro, at p. 157. The dissenting Judge Read strongly relied on the formulation of the Iranian Declaration that jurisdiction was accepted with regard to situations relating "directly or indirectly" to treaties ratified by Iran – indicating that the Declaration should cover disputes based indirectly on the third-party treaties, while accepting that the *direct* basis of the claim was the most-favoured-nation clause, see pp. 144-147.

²⁶ *Anglo-Iranian Oil Company Case*, Pleadings, p. 649.

²⁷ *Anglo-Iranian Oil Company Case*, Judgment of 22 July 1952, ICJ Reports, p. 109.

²⁸ *Anglo-Iranian Oil Company Case*, Judgment of 22 July 1952, ICJ Reports, p. 109.

²⁹ *Anglo-Iranian Oil Company Case*, Judgment of 22 July 1952, ICJ Reports, p. 109. Since the relevant basic treaty was the one containing the most-favoured-nation clause, the Court declared itself incompetent *ratione temporis*.

er, the *title* on which the United Kingdom could base her claim could only be derived from the treaty stipulating the most-favoured-nation clause. The assumption made by the Claimant and in the dissenting opinions that the most-favoured-nation clause itself had no substance was therefore based on a confusion of the concrete content of the right, which is indeed only contained in the third-party treaty, and the entitlement to enjoy that treatment, which is stipulated by the clause.³⁰ There is thus no legal relation between the beneficiary State and the third State, but only material equal treatment.³¹

This view was confirmed by the ICJ in the Case concerning the rights of United States nationals in Morocco³², where again the substance of the most-favoured-nation clause was controversial. The Claimant sought to profit from consular provisions in third-party treaties that the third States had already waived.³³ The question was whether the reference to the treatment accorded to third States could still be relevant in cases where the treatment was no longer accorded to these States. According to the United States, the most-favoured-nation clause had a consolidating effect in Moroccan treaties by leading to a permanent incorporation of rights even after the abrogation of treaty provisions from which these rights had been derived.³⁴ Inversely, the ICJ held that the beneficiary enjoyed rights only as long as the promisor actually granted these rights to third states, corroborating the finding established in the Anglo-Iranian Oil Case that the benefits accorded to the

³⁰ Rossilion, *La clause de la nation la plus favorisée dans la jurisprudence de la Cour internationale de Justice*, p. 91; Ito, *La Clause de la Nation la plus favorisée*, p. 43; Vignes, *La clause de la nation la plus favorisée et ses problèmes contemporains*, p. 213.

³¹ In addition, it is very doubtful whether the United Kingdom's interpretation was in line with the intention of Iran since it is unlikely that its consent under article 36 II of the ICJ Statute covered disputes about subsequent treaties with third States. For details see the individual opinion of Judge McNair, *Anglo-Iranian Oil Company Case*, ICJ Reports, pp. 116 et seq.

³² For an overview of the historical background and the judgment, see de Soto, *Judgment of the International Court of Justice of 27 August 1952*.

³³ The US based its claim on the most favoured nation clause stipulated in Art. 17 of Madrid of 1880 and relied on treaty rights granted to Great Britain in 1856 and to Spain in 1861, which these States had however renounced in 1937 and 1914 respectively. The US argued that given that the most-favoured-nation clause had been concluded with a Muslim State and that there was a common legal policy of European and American States towards Muslim States based on stability, the clause had the effect of incorporating the beneficiary provisions permanently in the treaty containing it. The Court rejected this argument of incorporation with a reference to the aim of the most-favoured-nation clause to ensure equality among States (Case concerning the rights of nationals of the United States of America in Morocco, Judgment of 27 August 1952 (ICJ Reports, pp. 192, 204).

³⁴ *Rights of nationals of the United States of America in Morocco*, Judgment of 27 August 1952, ICJ Reports, p. 191.

beneficiary State on the basis of the third-party treaty did not form the clause's legal substance and remained apart from the title. Thus, when the reference disappeared, the operation of the clause ceased in this effect (*cessante causa cessat effectus*³⁵).

This interpretation is also reflected in Article 8 § 1 of the ILC-Draft Articles on most-favoured-nation clauses,³⁶ which confirms that the basic act (*acte règle*) is the agreement between the granting State and the beneficiary State. The third-party treaty is only an element which gives effect to the most-favoured-nation clause (*acte condition*).³⁷

Neither could a renouncement of the distinction between the entitlement to most-favoured-nation treatment and the actual content of the right be justified in the light of Article 36 (1) VCLT, which deals with rights emerging from a treaty for third States and provides that

“A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.”

Both the cases of Article 36 (1) VCLT and of the most-favoured-nation clause concern a State which is favoured by a clause of a treaty to which it is not a party. However, the legal bases for this right differ. In the case of Article 36, the basis of the right is the treaty conferring it and the intention of the parties to that effect. It is thus only when the parties have an intention to grant a legal right to a third State that such right arises from a treaty

³⁵ Visser, La clause de “la nation la plus favorisée” dans les traités de commerce, p. 84; Anzilotti, Cours de droit international, vol. I, p. 437; Sibert, Traité de Droit International Public, vol. II, p. 255; Ito, La Clause de la Nation la plus favorisée, p. 38.

³⁶ Yearbook of the International Law Commission 30 (1978), Vol II, Part 2, Report of the Commission to the General Assembly on the work of its thirtieth session, Document A/33/10, The most-favoured-nation clause, p. 25.

³⁷ Yearbook of the International Law Commission 30 (1978), Vol II, Part 2, Report of the Commission to the General Assembly on the work of its thirtieth session, Document A/33/10, The most-favoured-nation clause, Draft Articles on most-favoured-nation clauses with commentaries, Yearbook 26, para (5) of the Commentary; Sibert, Traité de Droit International Public, vol. II, p. 255.

provision.³⁸ Such intention can however not be presumed. As the PCIJ held in the *Case concerning certain German interests in Polish Upper Silesia*,

“A treaty only creates law as between the States which are parties to it; in case of doubt, no rights can be deduced from it in favour of third States.”³⁹

In the case of a State enjoying a benefit from a treaty on the basis of the most-favoured-nation clause, the parties to that treaty may sometimes be aware of such an effect, but they do not have such intent.⁴⁰

Summing up, the legal foundation of that benefit is the agreement to grant most-favoured-nation treatment but not the third-party treaty providing for better treatment.⁴¹ Most-favoured-nation treatment is therefore not an exception to the *pacta tertiis* rule.⁴²

B. Functions of the Most-Favoured-Nation Principle

MFN clauses combine several legal, political and economic functions. First, it is an essential function of MFN clauses to effect a general equalisation of the legal conditions of competition and thus protect the individual rights of investors. Second, they serve to multilateralise benefits and thus contribute to a liberalisation of the investment area. Moreover, due to the insertion of MFN clauses, treaties can easily be adapted to changing legal

³⁸ See the Commentary of the International Law Commission to Art. 32 of the 1966 Draft of the Vienna Convention on the Law of Treaties (which later became Art. 36 of the Convention), UN Yearbook of the International Law Commission 1966, vol. II (Doc. A/6309/Rev. 1) Article 32, p. 229, para (7) of the Commentary, which states that “The intention to accord the right [to a third state] is of cardinal importance, since it is only when the parties have such an intention that a legal right, as distinct from a mere benefit, may arise from the provision.”

³⁹ *Case concerning certain German interests in Polish Upper Silesia*, Judgment of 25 May 1926, p. 29. In the *Case of the free zones of Upper Savoy and the district of Gex*, pp. 147, 148, the Court ruled that “It cannot be lightly presumed that stipulations favourable to a third State have been adopted with the object of creating an actual right in its favour.” This rule was also confirmed by international arbitral tribunals, e.g. in the case of *Ungarische Erdgas A.G. v. Rumanian State*, Annual Digest of Public International Law Cases 5 (1929/1930), 383, 386.

⁴⁰ Yearbook of the International Law Commission 30 (1978), Vol II, Part 2, Report of the Commission to the General Assembly on the work of its thirtieth session, Document A/33/10, The most-favoured-nation clause, Draft Articles on most-favoured-nation clauses with commentaries, Yearbook at 26, para (3) of the Commentary.

⁴¹ Rozakis, *Treaties and Third States*, p. 21.

⁴² See also *Suez and Vivendi v. Argentina*, Decision on Jurisdiction, 3 August 2006, para. 60.

circumstances without the need to formally amend legal provisions. And finally, (unconditional) MFN clauses uphold formal reciprocity, granting both treaty parties the right to MFN treatment.

I. Non-Discrimination and Establishment of Equal Competitive Opportunities

As the ICJ stated in the *US Nationals in Morocco* case, the object of the most-favoured-nation clause is to

“establish and to maintain at all times fundamental equality without discrimination among all of the countries concerned”⁴³.

The essential function of the clause is to guard against present or future discrimination and to guarantee equality among the relevant States or actors.⁴⁴ In the investment field, it sets limits upon host countries with regard to their present and future investment policies by prohibiting them from favouring investors of one foreign nation over those of another foreign nation.

The most-favoured-nation clause is at once a political and an economic instrument. On the political plane, the avoidance of discrimination helps to suppress international tensions among States since the more special advantages are created, the more disputes can be expected.⁴⁵ As regards the economic function of MFN treatment, both States and private investors seek an assurance that they do not fall into a position of competitive disadvantage on the world market. The object of granting unconditional most-favoured-nation treatment is to enable the beneficiary to automatically acquire the rights granted by the

⁴³ *Rights of nationals of the United States of America in Morocco*, Judgment of 27 August 1952, ICJ Reports, p. 192.

⁴⁴ Vignes, *La clause de la nation la plus favorisée et ses problèmes contemporains*, p. 214; Visser, *La clause de “la nation la plus favorisée” dans les traités de commerce*, p. 78; Nolde, *La clause de la nation la plus favorisée et les tarifs préférentiels*, p. 5; Schwarzenberger, *The Most-Favoured-Nation Standard in British State Practice*, p. 99; Rossillon, *La clause de la nation la plus favorisée dans la jurisprudence de la Cour internationale de Justice*, pp. 76-107; Basdevant *Clause de la nation la plus favorisée*, in: de Lapradelle/ Niboyet (eds), *Répertoire de droit international*, vol III, p 467, para. 1; Hornbeck, *The Most-Favored-Nation Clause*, p. 398.

⁴⁵ Davey/ Pauwelyn, *MFN-Unconditionality*, in: Cottier/Mavroidis, *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law*, p. 15; Jackson/ Davey/ Sykes, *Legal Problems of International Economic Relations*, p. 416; Jackson, *The World Trading System*, p. 159.

promisor to any third State or actor. In the context of the WTO, the Appellate Body has numerous stated that the goal of non-discrimination obligations was to provide effective equality of competitive opportunities – either between national and foreign competitors in the case of national treatment or between foreign states in the case of most-favoured-nation treatment.⁴⁶ In the context of trade, the Appellate Body stated in *Canada-Autos*:

"Th[e] object and purpose [of the most-favoured-nation obligation] is to prohibit discrimination among like products originating in or destined for different countries. The prohibition of discrimination in Article I:1 also serves as an incentive for concessions, negotiated reciprocally, to be extended to all other Members on an MFN basis."⁴⁷

In the context of investment law, the purpose of the most-favoured-nation clause is to “give investors a guarantee against certain forms of discrimination by host countries, and establish equality of competitive opportunities between investors from different foreign countries”⁴⁸. The aim of including most-favoured-nation clauses in bilateral investment treaties is to harmonise the conditions applicable to investors and investments irrespective of their nationality, to ensure uniformity and equality and to thereby create a “level playing field” for business participants and allow them to compete on an equal footing. Thus, the value of negotiated bilateral trade concessions will not be eliminated by a later and more favourable trade concession to a third country. This has the effect of stabilising investors’ expectations since they are reassured that they will not be denied the benefits of their home State’s bargain if a third country achieves more favourable conditions.

⁴⁶ See, e.g., Panel Report, *US – Section 337*, adopted on 7 November 1989, L/6439 - 36S/345, para. 5.11; Appellate Body Report, *Japan - Alcohol*, 4 October 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 16; Appellate Body Report, *Korea - Alcohol*, 18 January 1999, WT/DS75/AB/R, WT/DS84/AB/R, paras 119, 127; Panel Report, *Canada – Autos*, 31 May 2000, WT/DS139/AB/R, WT/DS142/AB/R, para. 10.78 (all concerning the national treatment obligation).

⁴⁷ Appellate Body Report, *Canada-Autos*, 31 May 2000, WT/DS139/AB/R, WT/DS142/AB/R para. 84. In *Canada - Autos*, the Appellate Body reviewed the Panel's finding that the Canadian import duty exemptions granted to motor vehicles originating in certain countries were inconsistent with Article I:1.

⁴⁸ UNCTAD, Most-Favoured-Nation Treatment, at 1.

In world trade law, while one side of the economic rationale for the most-favoured-nation clause is the protection of competitive opportunities, the other is the avoidance of trade distortion. The economic background for this rationale is the theory of comparative advantage that was developed by *David Ricardo*⁴⁹ and was at the time of its development a renunciation of the then dominant doctrine of mercantilism. The theory of comparative advantage offers a rationale for the welfare-enhancing effect of international trade and, more specifically, of the most-favoured-nation principle. The basis for the theory is the perception that all countries (or rather private economic actors) are endowed with different abilities and opportunities for the production of certain commodities. It is for the common benefit if every actor specializes in the production of those commodities for which it is specifically adapted due to its geographical conditions, climate and other advantages. A country has a comparative advantage in the production of a good if it can produce it at a lower opportunity cost than another country. The opportunity cost of a product is defined as the amount of another product that must be given up in order to produce more of the first good. Therefore a country has a comparative advantage in the production of a certain good relative to another country if it must give up less of a second good to produce another unit of the first good than the amount of the second good that the other country would have to give up to produce another unit of the first good.⁵⁰ International trade thus enables countries to exchange these commodities with foreign commodities that could only be produced at higher cost in the home country. These trade relations are advantageous for the participating States, even if one country can produce all products at lower cost than other countries, i.e. has an absolute advantage in the production of all goods. Even in that case it is beneficial for the State to concentrate on the production of those goods in which it has the greatest absolute advantages, compared to its other commodities, and exchange them against those goods in whose production it has the least ab-

⁴⁹ Ricardo, *On the Principles of Political Economy and Taxation*, Chapter VII. See also Trebilcock/Howse, *The Regulation of International Trade*, pp. 3, 4; Sykes, *Comparative Advantage*, JIEL 1 (1998) 49-82.

⁵⁰ Trebilcock/Howse, *The Regulation of International Trade*, p. 3; Mankiw/Taylor, *Grundzüge der Volkswirtschaftslehre*, p. 69.

solute advantage.⁵¹ Summing up, the theory of comparative advantage says that States should specialize in the production of commodities in which they have the greatest comparative advantage and import such goods that they can only produce with a comparative disadvantage. This way, due to international trade, States can benefit from specialization and division of labour on the international plane.

If however discriminatory tariffs are imposed these may enable relatively high-cost producers in the States that benefit from lower tariffs to outcompete lower-cost producers in the States subject to higher tariffs. Discrimination will induce a shift of resources towards relatively less efficient producers who are favoured and away from more efficient producers who are disfavoured. This phenomenon, known as “trade diversion”, creates losses that do not occur when all suppliers are subject to the same tariffs. It is the economic function of the MFN principle to ensure that more efficient producers have equal access to markets as less efficient producers and thus to guarantee the most efficient allocation of resources. This way a country’s imports will be supplied by the most efficient international supplier.⁵² The prevention of trade diversion lowers the costs of production and services, increases consumer choices and promotes world economic growth.⁵³ Usually therefore, a non-discriminatory policy enhances global welfare by ensuring that imports are supplied by the countries that can produce them most cheaply, at least given otherwise equal circumstances.^{54 55} The aim to exchange trading opportunities not only to assure benefits for individual exporters, but rather to enable free and efficient trade policies and prevent trade diversion shows that trade law focuses on the improvement of the overall

⁵¹ Trebilcock/ Howse, *The Regulation of International Trade*, p. 3.

⁵² Davey/ Pauwelyn, MFN-Unconditionality, in: Cottier/ Mavroidis (eds), *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law*, p. 14.

⁵³ Kennedy, GATT 1994, in: Macrory/ Appleton/ Plummer (eds), *The World Trade Organization* p. 100; Jackson, *The World Trading System*, p. 159.

⁵⁴ Sykes, *Comparative Advantage*, in *JIEL* 1 (1998), 78; Schwartz/ Sykes, *The economics of the most favoured nation clause*, in Bhandari/ Sykes (eds.), *Economic dimensions in international law* pp. 53, 54.

⁵⁵ Under certain circumstances, discrimination between different foreign States may also be efficient, the reason being that discriminatory tariff reductions at the same time reduce the difference in treatment between the favoured foreign and national producers. This will not only create trade diversion through the differential treatment of foreign producers, but also produce an efficiency gain to the extent it allows more efficient foreign producers to substitute less efficient domestic producers (Hudec, *Tiger tiger*, in: Hudec (ed.), *Essays*, p. 171) This rationale is often given for the formation of regional trading blocks (Trebilcock/ Howse, *The Regulation of International Trade*, p. 52)

welfare of nations, economic efficiency and trade liberalization.⁵⁶ In contrast, BITs are concluded for the protection of individual foreign investments that are usually already present in the host countries.⁵⁷ Non-discrimination in investment law originates and remains embedded in the idea of individual fairness.⁵⁸ Investors' competitive opportunities are therefore protected not for the enhancement of economic efficiency and overall welfare, but for the protection of individual rights. According to *DiMascio/Pauwelyn*,

“[...] the traditional investment regime is about fairness grounded in customary rules on treatment of aliens, not efficiency. It is about protection, not liberalization, and about individual rights, not state-to-state exchanges of market opportunities.”⁵⁹

II. Instrument of Economic Multilateralisation and Liberalisation

Although the drafting of most investment treaties takes place in bilateral negotiations, the results of these negotiations are extended to States or enterprises from States that played no role in the negotiations. This mechanism to a certain extent prevents the fragmentation of the worldwide investment relationships into bilateral special relations. The generalisation of the standards of international law as formulated in bilateral treaties leads to the unification of the legal situation of investors from different countries. Leading to harmonisation and universalisation of investors' rights, the most-favoured-nation clause is an instrument of multilateralisation of the benefits accorded to foreign investors and their investments. While this effect was limited when the number of investment treaties was limited, the attack on bilateralism came to the surface with the explosion of the number of bilateral investment treaties. Yet the concepts of most-favoured-nation treatment and multilateralism can be distinguished. Multilateralism is an approach to international trade and other relations that recognizes and values the interaction of a number of nation-states. It recognizes the dangers of organizing relations with foreign nations on bilateral grounds,

⁵⁶ *DiMascio/Pauwelyn*, *Nondiscrimination in Trade and Investment Treaties*, p. 54.

⁵⁷ For BITs that aim at investment liberalization by granting the right to market access, see NAFTA Chapter 11 and the US Model BIT (see below Part III.B and C)

⁵⁸ *DiMascio/Pauwelyn*, *Nondiscrimination in Trade and Investment Treaties*, p. 70.

⁵⁹ *DiMascio/Pauwelyn*, *Nondiscrimination in Trade and Investment Treaties*, p. 56 (footnotes omitted).

dealing with them one by one. In contrast, the most-favoured-nation principle is a standard of equal treatment of foreign nations based on bilateral action with multilateral implications.

Moreover, the most-favoured-nation clause can be considered a significant motor of economic liberalisation in the trade and investment area since once economic advantages are conceded bilaterally, the MFN clause accomplishes equality of opportunities for other actors on the highest possible plane. Trade and investment barriers thus move to the lowest existing threshold and the scope of the standards granted in bilateral investment treaties is significantly enlarged.

However, while the automatic extension of concessions by operation of the most-favoured-nation clause generally contributes to the generalization of liberalising trade and investment policies, in some situations the opportunities for free-riding generated by the unconditional clause may even result in less liberalization.⁶⁰ This phenomenon is characterised by the fact that in a system governed by the MFN obligation, any concession negotiated with a single trading partner must be extended without condition to all treaty partners, whether or not these treaty partners also make concessions or not. If certain nations liberalize their investment policy and others do not, these latter countries can nonetheless benefit from unreciprocated benefits. As a result, the negotiating position of the granting state is weakened with respect to the third state since that state has already received the concessions granted to the first state through the MFN principle. Fear of what they consider excessive free-riding may cause countries to agree to less liberalisation than they would if reciprocity were required. The free-riding situation may thus also attenuate incentives for countries to exchange concessions and may deter two countries from agreeing on mutual concessions even if they are advantageous to them.

⁶⁰ Trebilcock/ Howse, *The Regulation of International Trade*, p. 52; Schwartz/ Sykes, *The economics of the most favoured nation clause*, in Bhandari/ Sykes (eds.), *Economic dimensions in international law*, p. 59.

III. Flexibility and Rationalisation

A further function of the clause is the adaption of treaties to changing circumstances.⁶¹ A negotiated clause which was formerly beneficiary may develop into a disadvantage if the party to the treaty negotiates a more favourable clause with a third party. Given the time and effort necessary for treaty negotiations, it is not practical for States to constantly re-negotiate their investment treaties. Rather than renegotiating a large number of bilateral investment treaties to incorporate a change towards more investor-friendly policies, States can agree to a single treaty with the more favourable conditions, knowing that this new treatment standard will be extended to investors from any country by operation of the most-favoured-nation clause. Moreover, it is unlikely that governments agree to negotiate benefits unless they can be assured of most-favoured-nation treatment in the future. Governments can therefore not conduct a successful policy of trade and investment liberalization outside the framework of most-favoured-nation treatment. Thus, the clause contributes to a rationalization and simplification of international affairs.⁶²

By operation of the most-favoured-nation clause, States can also benefit from the achievements of more skilful negotiators, thus being insured against incompetent draftsmanship.⁶³ From this perspective, the most-favoured-nation standard can be a tool that smaller developing countries have at their disposal to benefit from the stronger bargaining power of more powerful countries, especially in light of the fact that the former situation that only developed countries were capital-exporting countries and developing countries were merely importers of capital has changed.⁶⁴ Since the 1990s the outward flow of foreign direct investment from developing countries has increased.⁶⁵ While the amount of foreign direct investment flowing from developing to developed countries is still small,

⁶¹ Schwarzenberger, *The Most-Favoured-Nation Standard in British State Practice*, pp. 99, 100.

⁶² Scelle, 631; Schwarzenberger, *The Most-Favoured-Nation Standard in British State Practice*, p. 100.

⁶³ Schwarzenberger, *The Most-Favoured-Nation Standard in British State Practice*, p. 99.

⁶⁴ Congyan, *Outward Foreign Direct Investment Protection and the Effectiveness of Chinese BIT Practice*, p. 829.

⁶⁵ From 1990 until 2005, the foreign direct investment stock of developing countries increased from \$ US 15 billion to \$ US 133 billion (UNCTAD, *World Investment Report 2006*, pp. 105, 107).

South-South investment is increasingly more common.⁶⁶ Due to this trend, developing countries may become more interested in higher standards of protection for outward investors. Since most-favoured-nation clause can provide their investors with higher standards of protection from third-party BITs, it may gain in importance for developing countries.⁶⁷

IV. Reciprocity

It is to be examined whether most-favoured-nation treatment creates a relationship that is based on reciprocity. Reciprocity can be defined as the relationship between two or more States under which a certain conduct by one party is juridically dependent upon that of the other party. Such conduct will in most instances amount to identical or equivalent treatment.⁶⁸ With regard to the relationship between reciprocity and the most-favoured-nation principle, one can distinguish between formal and material reciprocity.⁶⁹ This distinction becomes manifest in the distinction between the conditional and the unconditional form of the most-favoured-nation clause. Under the conditional clause, States are only entitled to claim for their nationals the more favourable treatment offered to a third State on condition that they give an equivalent to what is given by the third State in return.⁷⁰ The conditional form typically establishes the obligation to extend without compensation only concessions made to third countries without compensation, and to extend for equivalent compensation any concessions made to third countries against compensation.⁷¹ This means that the beneficiary state is not entitled *ipso jure* to benefit from the advantages granted to third States, but has to pay an equivalent compensation for the beneficiary treatment that has to be agreed upon with the granting state. Since the content of the compensation has to be agreed upon by the Parties, the conditional clause reduces the right of the benefi-

⁶⁶ UNCTAD, World Investment Report 2006, p. 120; UNCTAD, Background Paper prepared by the UNCTAD Secretariat, South-South Investment Flows – A Potential for Developing Country Governments to Tap for Supply Capacity Building, 2004, p. 2.

⁶⁷ UNCTAD, World Investment Report 2006, p. 229.

⁶⁸ Simma, Reciprocity, in Wolfrum, Rüdiger (ed.), Max Planck Encyclopedia of Public International Law, para. 2. For a detailed definition see Simma, Das Reziprozitätselement, pp. 43-49.

⁶⁹ Virally speaks of *réciprocité formelle* and *réciprocité réelle* (Virally, Le principe de réciprocité, pp. 72, 73).

⁷⁰ McNair, The Law of Treaties, p. 275.

⁷¹ Viner, International Economics, p. 103.

ciary to that of a *pactum de contrahendo*.⁷² The background for this form of the clause, which was introduced by the United States at the end of the 18th century and only abandoned at the beginning of the 20th century, is the idea of material reciprocity. Reciprocity in that sense is understood as referring to substantive equality, which means that a treaty is negotiated by a country to give and gain equal concessions.

In contrast, under the unconditional form of the most-favoured-nation clause, the beneficiary is granted the benefit granted to a third party automatically without any condition of reciprocal concessions.⁷³ Referring to a wider meaning of reciprocity, the unconditional form of MFN clauses is reciprocal insofar as all involved States make the same promise to grant each other most-favoured-nation treatment. The acceptance of such identical obligations can be described as formal reciprocity.⁷⁴ The concrete advantages that can result from unconditional MFN treatment may not be evenly distributed since they are dependent on the treatment that the Contracting Parties grant to third states. One party may benefit from beneficial treatment offered to third states while at the same time not having to offer anything in return. Therefore, although the Contracting Parties' relationship is characterized by formal reciprocity, material reciprocity is not guaranteed.⁷⁵ A disadvantage that comes along with the imposition of the unconditional MFN principle is the free-rider situation.⁷⁶ The gravity of the free-rider issue depends on the extent to which it creates asymmetrical situations, which means that free-riding becomes less tolerable the more the obligations in the treaties concerned differ.

In the GATT, an element of conditionality can be retained due to the GATT's multilateral institutional structure and the centralized nature of the tariff negotiations, which allow governments to establish complex arrangements for assuring a certain level of material

⁷² Ito, *La Clause de la Nation la plus favorisée*, p. 35; Nolde, *La clause de la nation la plus favorisée et les tarifs préférentiels*, p. 90; Schwarzenberger, *The Most-Favoured-Nation Standard in British State Practice*, p. 102.

⁷³ Schwarzenberger, *The Most-Favoured-Nation Standard in British State Practice*, p. 101; Basdevant, *Clause de la nation la plus favorisée*, in: de Lapradelle/ Niboyet (eds), *Répertoire de droit international*, vol III, p. 478, para. 70; Benedek, *Die Rechtsordnung des GATT*, p. 62; Jackson, *The World Trading System*, p. 161.

⁷⁴ Virally, *Le principe de réciprocité*, pp. 72, 73.

⁷⁵ Virally, *Le principe de réciprocité*, p. 73 (who speaks of *réciprocité réelle*).

⁷⁶ See above Part I B.II.

reciprocity and minimizing the negative effects of free-riding.⁷⁷ According to GATT Articles XXVIII:2 and XXVIII*bis* (1), the modification of schedules and tariff negotiations shall take place „on a reciprocal and mutually advantageous basis“, which means that tariff reductions offered and requested must be equivalent in value.⁷⁸ The reference to “mutually advantageous” negotiations indicates that purely formal reciprocity is not sufficient. The GATT rather involves a combination of formal and material reciprocity, since the attempt is made in negotiating rounds to obtain a balance of concessions.⁷⁹ Tariff negotiations usually do not proceed until there is a general political agreement that the important parties will make a roughly equal contribution, thereby eliminating the largest part of the free-rider problem by advance agreement.⁸⁰ Since tariff negotiations take place in a series of multilateral negotiating rounds at which all member countries negotiate with each other at the same time, the risk of unforeseen discrimination is reduced. In multilateral negotiations involving many countries, commitment can always be withheld until the final offers of all participants are known; which may preserve some aspects of conditionality and reciprocity.⁸¹ As long as governments can see what kinds of discrimination are being agreed to, they can calculate the value of concessions accordingly and negotiate on that basis.⁸² The multilateral character of the negotiations thus removes the uncertainty connected with bilateral negotiations.⁸³ Tariff reductions can proceed via bargaining that reflects a balance of perceived advantages. For example, in five negotiating rounds under the GATT prior to the Kennedy Round (1964-1967), a balance between the concessions that participants made and the concessions they received was achieved by negotiating tariff concessions on a product-by-product basis under the Principal Supplier Rule⁸⁴. These product-

⁷⁷ Hilf/ Oeter, WTO-Recht, § 7, para. 43 (neue Auflage 2010). On the effects of simultaneous (“clustered”) negotiations see Pahre, Most-Favored-Nation Clauses and Clustered Negotiations.

⁷⁸ Fabbriotti, in: Wolfrum/ Stoll/ Hestermeyer, WTO Commentary – Trade in Goods, Article XXVIII*bis*, para. 17.

⁷⁹ Virally, Le principe de réciprocité, p. 75.

⁸⁰ Hudec, “Like Product“, in: Cottier/ Mavroidis, Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law, p. 109.

⁸¹ Trebilcock/ Howse, The Regulation of International Trade, p. 53.

⁸² Hudec, Tiger tiger, p. 307.

⁸³ Hudec, Tiger tiger, p. 309.

⁸⁴ Under the principal supplier rule, trade barriers are reduced on the basis of concessions on particular goods exchanged between their principal suppliers. This rule limits free-riding as the concessions grant-

by-product negotiations had the effect that the benefits of trade concessions were confined to a very large extent to parties offering countervailing concessions. One can thus find in the results of negotiations many reflections of material reciprocity.

While mutual advantage is the incentive of all trade negotiations, non-discrimination is the other major component. Tariff negotiations are held on a non-discriminatory basis by virtue of the most-favoured-nation clause envisaged in GATT Article I. As a result, a Contracting Party that conducts negotiations only with a limited number of other Contracting Parties cannot limit the effects of the negotiations to the parties to the negotiation. The effects of tariff reductions and other benefits on all Member States must be taken into account.⁸⁵ Through the combination of most-favoured-nation treatment, reciprocity and mutual advantage, governments can preserve a strong element of conditionality in GATT tariff negotiations.

The preservation of some form of conditionality and material reciprocity can also be observed under the auspices of the General Agreement on Trade in Services (GATS), whose MFN obligation is a general obligation subject to exceptions.⁸⁶ In the negotiating rounds, the abolition of MFN exceptions can be used as a tool in the negotiations in that trade benefits will only be extended to trading partners if they make concessions in return.⁸⁷ The abolition of exceptions from most-favoured-nation treatment and the extension of trade liberalization can be made dependent on equivalent concessions from the negotiating partners. The annex on MFN exceptions thus prevents competitors located in countries with relatively restrictive policies from benefitting from their sheltered markets while enjoying a free ride in less restrictive export markets.⁸⁸ Especially concerning fi-

ed by an importing country to the principal supplier of a specific product must be balanced by concessions from that principal supplier on products for which the importing country is in turn a principal supplier. Since the principal supplier benefits the most from a concession, it is generally prepared to offer more reciprocal trade liberalization than a smaller supplier. Granting a concession to a small supplier would automatically entail that the principal supplier benefits from the concession due to the unconditional most-favoured-nation principle. The role of smaller suppliers in multilateral negotiations is thus reduced (Hoekman/ Kostecki, *The Political Economy of the World Trading System*, pp. 126, 127).

⁸⁵ Brößkamp, *Meistbegünstigung und Gegenseitigkeit im GATT*, p. 69; Fabbricotti, in: Wolfrum/ Stoll/ Hestermeyer, *WTO Commentary – Trade in Goods, Article XXVIIIbis*, para. 4.

⁸⁶ See also Part III A.

⁸⁷ Köhler, *Das Allgemeine Übereinkommen über den Handel mit Dienstleistungen*, pp. 108, 109; Warren/ Findlay, *Measuring Impediments to Trade in Services*, in: Sauv / Stern, *GATS 2000*, p. 61.

⁸⁸ Hoekman/ Kostecki, *The Political Economy of the World Trading System*, p. 252.

nancial services and telecommunications, the United States made clear that it would not remove its reservation on MFN treatment until enough countries had made substantial commitments in their national schedules in these sectors.⁸⁹

Moreover, there is no multilateral relationship between the beneficiaries of the MFN clause, but bilateral negotiations are the basis for concessions made in investment treaties. There is thus no possibility to include a certain element of material reciprocity on a multilateral basis. Once an advantage is granted in a bilateral investment treaty, third States can profit from it by virtue of the operation of the MFN clause as long as the advantage is within the clause's scope, and the granting State is deprived of the possibility to demand a concession in return. There is thus the possibility for investors from capital-exporting States to profit from more favourable provisions in third-party treaties although the capital-exporting State does not grant an equivalent to the capital-importing State, not being subject to a mechanism of correction that multilateral negotiations can offer.

C. Different Impact of Most-Favoured-Nation Treatment in Trade and Investment Law⁹⁰

I. Different Scope of Application

The MFN clause became a central pillar of international trade relations since 1860 and was constantly included in treaties of friendship, commerce and navigation. The main objective of these treaties was to reduce the relatively high tariff rates that were applied to trade in goods.⁹¹ Since the typical duration of these treaties was only about ten years, constant negotiations were necessary to agree on new tariff levels. The negotiations all took place on a bilateral level, and there was therefore always the risk that an agreement would be devaluated by lower tariff levels negotiated with third countries. Therefore countries entered into an agreement only on condition of including a most-favoured-nation clause in

⁸⁹ Feketekuty, Assessing and Improving the Architecture of GATS, in Sauvé/ Stern, GATS 2000, p. 88.

⁹⁰ For an overview see Kurtz, The MFN Standard and Foreign Investment, pp. 866-872; Kurtz, The Delicate Extension of MFN Treatment to Foreign Investors, in: Weiler (ed.) International Investment Law and Arbitration, pp. 529-536.

⁹¹ Hudec, Tiger Tiger, pp. 306-307.

the treaty which ensured that subsequent concessions granted to third countries would equally be extended to them.⁹² The MFN clause thus had a substantial importance in tariff bargaining.

The GATT is also principally concerned with the treatment of goods at the border,⁹³ which means that the most-favoured-nation obligation in the GATT essentially concerns tariffs and quantitative restrictions, although it reaches beyond border measures to the fields of taxation and regulation through its cross-reference to Article III. As regards tariffs, the core meaning of the principle is that the same tariff rate must be charged for a given product regardless of the country of origin. With respect to quantitative restrictions, the most-favoured-nation clause basically requires that in case a quantitative restriction is imposed on imports of a given product, some similar quantitative restriction must also be imposed on imports of that product originating from all other countries.⁹⁴

Unlike in trade in goods, where products are produced in jurisdictions different from the Respondent state, in the case of foreign investment production facilities operate within the jurisdiction of the Respondent host country. The activities of foreign investors in their host countries encompass a wide array of operations involved in the creation and administration of a business enterprise, including local production and distribution, international trade in products and components, the use of know-how and technology, raising of capital, employment, the request of permits, import and export licenses and the necessary entry and stay visas for foreign personnel. The foreign investor is thus deeply involved in the host country's economy. His activity in the host state directly affects the environment and other social rights such as human rights, labour standards and development policies in that state. With not only the product, but also the producer crossing the border, the host country may on the one hand benefit from economic growth, employment, or transfer of technology and knowledge, but on the other may also suffer serious environmental harm or labour exploitation.⁹⁵ Due to the intrusive nature of foreign investment, which takes

⁹² Kurtz, *The MFN Standard and Foreign Investment*, p. 863.

⁹³ Ruggiero, *Foreign Direct Investment and the Multilateral Trading System*, p. 2.

⁹⁴ See Article XIII GATT. For details as regards discriminatory quantitative restrictions, see Hudec, *Tiger tiger*, pp. 292-297.

⁹⁵ One example is the chemical disaster in Bhopal in 1984.

place within the host state, investors are subject to the full range of regulatory measures a host state may take, not only those specifically aimed at the regulation of trade or investment. While the non-discrimination provisions in trade law are limited to the treatment of products or services, non-discrimination obligations in BITs apply to the entire range of laws, rules and regulations that may affect any aspect of an investor's business. Investors are thus potentially affected by a much broader array of national regulation than goods, such as for example building laws, urban planning law, environmental law, commercial and corporation law, capital market law and intellectual property rights.⁹⁶ Since foreign investment is subject to more regulation, differential treatment can take place in very different fields. The most-favoured-nation clause thus has a potentially greater impact in investment law than in trade law to infringe on the regulatory autonomy of host states.

The difficulties concerning the impact of the obligation to accord most-favoured-nation treatment on a broad range of regulatory measures can be seen from the experience with the GATS. While the GATT has meanwhile also become relevant for some sensitive domestic policy issues such as subsidies or technical standards, the GATS must necessarily be applied to internal policy issues that are inherent in the commercial presence of foreign service providers. Since a large share of trade in services takes place *inside* national economies, services are much more regulation-intensive than goods.⁹⁷ The requirements of GATS will thus from the beginning necessarily influence national domestic laws and regulations.⁹⁸ Due to the potentially broad reach of the most-favoured-nation standard, the WTO Members were not inclined to accord unconditional most-favoured-nation treatment in the services sector.⁹⁹ Instead they included Article II:2 in the GATS, providing that members may maintain measures inconsistent with the most-favoured-nation principle as

⁹⁶ Krajewski/ Ceyssens, *Internationaler Investitionsschutz und innerstaatliche Regulierung*, p. 187. Judge Oda stated in his separate opinion in the *ELSI* case: "It is a great privilege to be able to engage in business in a country other than one's own. By being permitted to undertake commercial or manufacturing activities or transactions through businesses incorporated in another country, nationals of a foreign country will obtain further benefits. Yet these local companies, as legal entities of that country, are subject to local laws and regulations; so that foreigners may have to accept a number of restrictions in return for the advantages of doing business through such local companies." (*ELSI case*, Judgment of 20 July 1989, ICJ reports 1989, p. 79)

⁹⁷ Hoekman/ Messerlin, *Liberalizing Trade in Services*, in: Sauvé/ Stern, *GATS 2000*, p. 493.

⁹⁸ WTO, *Guide to the Uruguay Round Agreements*, p. 161.

⁹⁹ Kurtz, *The MFN Standard and Foreign Investment*, p. 872.

long as these measures are listed in the Annex on Article II exemptions. Moreover, the preamble of the GATS explicitly recognizes the need of WTO members, and particularly of developing countries, to regulate the supply of services to meet national policy objectives.¹⁰⁰

II. Government Discretion to Initiate Dispute Settlement

There is another fundamental systemic difference between the WTO and the investment sphere. Under WTO law, only States have the right to initiate a dispute before the Dispute Settlement Body of the WTO. Their decision to submit a dispute will be influenced by various political considerations and involve an evaluation of political or economic interests such as the risk of being threatened themselves by an objection against their own regulatory behaviour. States therefore act as a natural “filter” against the initiation of certain types of disputes.¹⁰¹ Although States are also influenced by the lobbying efforts of private interest groups, they will not easily initiate a dispute for a foreign investor and raise the resentment of other States unless there are heavy policy implications involved.¹⁰² In contrast, investment tribunals are endowed with general jurisdiction over disputes that may arise in the future from the States’ exercise of public authority.¹⁰³ The vast majority of investment treaties allows private investors to directly bring cases against the host state before arbitral tribunals without the approval or support of the investor’s home State. The consent of States under investment treaties is not limited to a particular investor, investment project, or dispute, but States give a general consent to the initiation of investment

¹⁰⁰ The preamble stipulates: „*Recognizing* the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right [...]”

¹⁰¹ Kurtz, *The MFN Standard and Foreign Investment*, pp. 869-870.

¹⁰² However, powerful states like the United States have brought disputes before the WTO dispute settlement mechanism in order to protect the interests of transnational corporations which involved no general high policy issue. Sornarajah cites as an example the *Japan – Film* case, which was initiated to protect the interests of the multinational corporation Kodak (Sornarajah, *The international law on foreign investment*, p. 311).

¹⁰³ van Harten/ Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, p. 128. With one exception, no international tribunal has been given general jurisdiction over disputes between states and foreign nationals. The exception was the Central American Court of Justice, which was active from 1907 to 1918. This Court was the first permanent international tribunal and afforded individuals the possibility of bringing actions directly against foreign states. For further information see Hill, in *EPIL* I, 2, pp. 551-554.

arbitration by any member of an indeterminate group of potential Claimants in relation to a very wide range of disputes. Moreover, consent is not given retrospectively, i.e. in the aftermath of certain events, as was for example the case with the Iran-United States Claims Tribunal, but is given in advance, which means that States cannot fully anticipate the significance of their acceptance of compulsory arbitration and the effects it will have on their regulatory powers. When bringing a case to arbitration, the investor will not consider any political implications, but his decision will only depend upon whether there is a chance to obtain compensation for economic losses suffered due to alleged government misconduct.¹⁰⁴ The result of this investor-State dispute settlement system is the potential for a considerably larger number of actions against regulatory State action.¹⁰⁵

III. Different Negotiating Power for Developing Countries

The essence of GATT is a concept of symmetric rights and obligations for member states. This concept theoretically reflects full reciprocity, i.e. a broad balance of obligations by the contracting parties. In practice, however, powerful developed States often try to evade this reciprocal structure, which is exemplified in the extremely difficult negotiations concerning market access in sectors where it would be beneficial for developing States, such as textiles and agricultural goods.¹⁰⁶ In the WTO, most developing members do not have the power to individually influence negotiations, but need to act in groups or coalitions to further their agenda in the multilateral trade negotiations.¹⁰⁷ Yet in investment law, the negotiating power of weaker states is much more restricted since they usually negotiate with a stronger State on a bilateral basis and therefore have no opportunity to join forces with other States in a similar position. This weak negotiating position is accompanied by the fact that the benefits of investment treaties are not equally distributed between devel-

¹⁰⁴ This is in line with the goal of the framers of the ICSID Convention to attain a depoliticization of disputes. On the one hand, the sovereign states can distance themselves from certain investment disputes, on the other hand, investors are not dependent on the political will of their home states (Daniel M Price, *Some Observations on Chapter Eleven of NAFTA*, p. 427).

¹⁰⁵ Kurtz, *The MFN Standard and Foreign Investment*, pp. 869, 870.

¹⁰⁶ See Irish, *The Most-Favoured-Nation Principle and Developing Countries*, in: Irish/ Carasco (eds), *The Legal Framework for Canada-United States Trade*, p. 262.

¹⁰⁷ Achievements like the TRIPS amendment on public health and the Cotton Four's proposal for the elimination of cotton subsidies have been the result of coordinated action by groups of developing countries.

oped and developing states, since the interests of capital-exporting and capital-importing countries diverge. Thus, the formal reciprocity of BIT obligations does not go along with material reciprocity, given that developing countries, which typically rather occupy the position of a host country than that of a home country, are less likely to profit from MFN treatment.¹⁰⁸ Therefore the threat of a developing country to be brought before investment arbitration is much higher than the threat of a developed country to be brought to arbitration. The weakness of the negotiating position of developing States thus engenders rules that predominantly favour developed States. It is then by operation of the most-favoured-nation clause that far-reaching treatment standards agreed upon in BITs have to be extended by virtue of the MFN clause.

IV. Non-trade Related Objectives in Investment Law

In trade law, the most-favoured-nation principle can be abrogated in favour of developing countries and of certain other non-trade related objectives. The principle of special and differential treatment of developing countries is an integral part of the WTO Agreements.¹⁰⁹ Special treatment can be granted to developing States in order to permit developing countries to protect their domestic markets and to give industries a chance to grow.¹¹⁰ Moreover, under the waiver clause States could be freed from the duty to guarantee MFN treatment and other GATT obligations.¹¹¹ In 1971, the General System of Preferences (GSP) was introduced under the waiver procedure, which allowed a deviation from the most-favoured-nation principle for the purpose of lowering tariffs for the least developing countries without also doing so for developed countries. The GSP granted developing states non-reciprocal preferences in deviation from the most-favoured-nation

¹⁰⁸ However, it must be stressed that although the majority of foreign direct investment still originates within OECD countries, there has been a significant expansion of the relative share of non-OECD countries in global investment flows, not only as recipient, but also as FDI-originating countries (UNCTAD, World Investment Report 2012, p. 4)

¹⁰⁹ Doha Ministerial Declaration, adopted on November 14th, 2001, WT/MIN (01)/DEC/1, paras 13, 44.

¹¹⁰ See Articles XVIII GATT, XXVIII^{bis}:3(b) GATT, part IV of the GATT including particularly Article XXXVI:8. GATT. For a detailed interpretation of these provisions see Jessen, WTO-Recht und „Entwicklungsländer“, pp. 230-316.

¹¹¹ Article XXV:5 GATT; replaced by Article IX:3-4 WTO.

principle and was first limited to a duration of ten years.¹¹² It was supplemented in 1979 by the Enabling Clause.¹¹³ The Enabling Clause was enacted as a permanent exemption from most-favoured-nation treatment, enabling developed countries to treat goods from developing countries more favourably and allowing for closer cooperation among developing countries.¹¹⁴ Provisions concerning special and differential treatment of developing countries are also included in specialized agreements on trade in goods¹¹⁵, in the GATS¹¹⁶, and in the DSU¹¹⁷. In contrast, there are generally no exceptions in investment treaties in favour of developing countries.¹¹⁸ Moreover, Articles XX GATT and XIV GATS embody certain non-trade related concerns which provide an exception to the treatment standards including the most-favoured-nation principle, which means that the affirmation of discrimination is followed by an enquiry into whether the different treatment is justified by legitimate public policy measures. Investment treaties usually do not integrate comprehensive lists of exceptions. For example, NAFTA Article 2101 (1) provides that GATT Article XX is incorporated into certain chapters of the NAFTA without however referring to the investment chapter. Moreover, although Article XX is incorporated into the chapters governing trade in goods in Part 2 of the agreement, its application

¹¹² Protocol Relating to Trade Negotiations Among Developing Countries, Decisions of the CONTRACTING PARTIES to the GATT, GATT Doc. L/3545 (Decision of June 1971) For details see Jessen, WTO-Recht und „Entwicklungsländer“, pp. 328-330.

¹¹³ Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing countries, GATT Doc. L/4903 of December 3rd, 1979.

¹¹⁴ For details see Yusuf, Differential and More Favourable Treatment – The GATT Enabling Clause, p. 506; Schmahl, “Enabling-Clause versus Meistbegünstigungsprinzip”.

¹¹⁵ For details concerning the SPS Agreement see Seibert-Fohr, Article 10 SPS, in: Wolfrum/ Stoll/ Seibert-Fohr (eds), Max Planck Commentaries on World Trade Law, vol. III; concerning the TBT Agreement see Krajewski, in: Wolfrum/ Stoll/ Seibert-Fohr (eds), Max Planck Commentaries on World Trade Law, vol. III, Articles 11 and 12.

¹¹⁶ There is no generalized system of preferences in the GATS. The conflict between developed and developing countries in the GATS rather becomes evident in its structure which differentiates between general obligations and specific commitments.

¹¹⁷ See for example Article 3.12 DSU and 24 DSU.

¹¹⁸ However, Annex IV of NAFTA provides that “[The most-favoured-nation obligation] does not apply to any current or future foreign aid program to promote economic development”. Moreover, in contrast to hitherto existing multilateral investment agreements, the Draft FTAA Agreement allows for an exception to the most-favoured-nation principle in favour of smaller economies. This can be derived from Article 5.2, which provides: “[While recognizing the generality of the MFN principle, a smaller economy may be exempted from same in those circumstances where it extends more favourable treatment to investors/investments from other smaller economies in the Hemisphere.]”

is specifically excluded “to the extent that a provision of that Part applies to [...] investment”.

V. Conclusion

The most-favoured-nation principle has potentially stronger implications in investment law than in trade law. First, the scope of the most-favoured-nation clause inserted in an investment treaty is potentially much broader since it covers a wide range of domestic regulations. Moreover, host governments face a larger number of disputes, given that investors directly initiate disputes without the filter of home government discretion. In addition, the negotiating position of developing States is weaker on the bilateral plane, given that they cannot join forces with other developing states. Due to their weak negotiating position, they may agree on far-reaching standards which then have to be extended by means of the most-favoured-nation clause. Moreover, BITs usually do not include a comprehensive list of exceptions to MFN treatment comparable to Article XX GATT and Article XIV GATS, which could mitigate the effect on domestic regulation, and no provisions benefitting developing countries. These factors imply that the most-favoured-nation clause in investment disputes has a potentially stronger impact on the regulatory autonomy of the host State than in trade law.

Part II: Historical Overview¹¹⁹

I. Origins of the Most-Favoured-Nation Clause

The most-favoured-nation principle has been part of international economic relations for centuries. The origins of the principle can be traced back to the eleventh century.¹²⁰ In mediaeval times it was mostly Mediterranean, especially Italian towns that engaged in international commerce. Mediaeval merchants first concluded contracts with foreign sovereigns assuring them the right to trade in these countries and to assure them and their

¹¹⁹ For an overview see Ito, *La Clause de la Nation la plus favorisée*, pp. 75-93; Visser, *La clause de “la nation la plus favorisée” dans les traités de commerce*, pp. 70-77; Nolde, *La clause de la nation la plus favorisée et les tarifs préférentiels*, pp. 23-31; Ustor, *History of the most-favoured-nation clause*, pp. 157-175; McRae/ Thomas, *The Development of the Most-Favoured-Nation Principle*, pp. 225-233.

¹²⁰ Nolde, *La clause de la nation la plus favorisée et les tarifs préférentiels*, p. 26.

commodities the necessary protection. They also aspired to obtain monopolies and exclusive privileges on the foreign markets in these contracts.¹²¹ In the fifteenth century, particularly Portuguese, Spanish and Dutch traders began to compete for foreign markets.¹²² This was also the time when modern absolute States emerged which used their power to assure for their nationals the right to trade in foreign countries.¹²³ Contracts between individual merchants and a State were therefore increasingly replaced by treaties concluded between States. With the expansion of commerce and competition, the merchants realised that they could not secure monopolies any more. It was therefore vital for them to at least establish equal opportunities with their competitors.¹²⁴

The first commercial treaties usually contained unilateral grants of most-favoured-nation treatment. The treatment standard was for example granted to French and Spanish cities by the Arab princes of western Africa, ensuring the same treatment as that granted to citizens of Venice and other Italian towns; by the Byzantine Emperors to Venice to ensure treatment equal to that granted to Genoans and Pisans; by the French princes of the Kingdom of Jerusalem to several trading cities of the Mediterranean; and within the Holy Roman Empire.¹²⁵ These promises related to the personal rights of and jurisdictional favours for the merchants rather than to concessions in respect of customs duties.¹²⁶ Probably the first example of the clause can be found in the treaty between the Holy Roman Emperor Henry III and the town of Mantua of 1055. In this treaty, the Emperor granted to the merchants of the town of Mantua to enjoy all privileges including customs privileges that were obtained by any other town.¹²⁷

Since the fifteenth century the clause also appeared in the bilateral form.¹²⁸ In the Treaty between Henry V of England and the Duke of Burgundy and Count of Flanders of 1417, the Duke of Burgundy granted to subjects of the English King the same right of free navi-

¹²¹ Martens, *Traité de droit international*, vol. II, pp. 299-300.

¹²² Ito, *La Clause de la Nation la plus favorisée*, p. 79.

¹²³ Martens, *Traité de droit international*, vol. II, p. 303.

¹²⁴ Ustor, *History of the most-favoured-nation clause*, p. 159.

¹²⁵ Ustor, *History of the most-favoured-nation clause*, p. 159.

¹²⁶ Ustor, *History of the most-favoured-nation clause*, p. 159.

¹²⁷ Cited by Nolde, *La clause de la nation la plus favorisée*, RdC 39, p. 25.

¹²⁸ Ustor, *History of the most-favoured-nation clause*, p. 159.

gation as that granted to nationals of certain other States and vice versa.¹²⁹ Although in that treaty both treaty parties granted each other most-favoured-nation treatment, the reciprocal favours were limited to concessions granted to subjects from specifically enumerated nations. This indicates that the idea of equality underlying the most-favoured-nation clause was not yet entirely developed.

By the end of the fifteenth century the restriction to certain nationalities was lifted, and the same advantages were granted to merchants as those accorded to merchants of any third State. One can cite as examples of this modern type of treaty the commercial treaty between England and Brittany of 1486¹³⁰ and the Anglo-Danish treaty of 1490.¹³¹ Since both commercial activities and navigation increased since the fifteenth century, both aspects were the basic field of application for the clause. Another evolution of the clause was its increasing application not only to advantages accorded in the past, but also to treatment accorded to third States in the future.¹³² These two development lines marked the beginning of the modern type of the most-favoured-nation clause, whose application was neither limited to advantages granted to certain states only nor to past advantages. It

¹²⁹ Potestates ad Tractandum, cum Duce Burgundiae (24 April 1417), reprinted in Thomas Rymer, *Foedera*, vol. IV, part. III, p. 12. The treaty contained the following clause: “[L]es Maistres de Neifs et Maronniers de la Partie d’Engleterre, a leur venue es Ports et Havres de nostre dit Pays de Flandres, porront faire Licitement lier leurs Neifs, es dis Ports et Havres, par la Manière que feront Francois, Hollandois, Zelandois, Escossois, sans encourir pour ce en aucune Fourfaiture ou Amende: Et semblablement, porront faire les Maistres de Neifs et Maronniers de Flandres es Ports et Havres de la Partie d’Engleterre.”

¹³⁰ This treaty provided: “[L]es Marchans d’Angleterre auront et pourront avoir et tenir es villes de Saint-Malo, Brest et Toucq [...] et Joyront Illecques de toutes telles et pareilles Franchises, comme les autres marchans estrangiers qui ont Entrecours et Communication de Marchans en Bretagne, et seront tractez aussi doucement et gracieusement comme les autres Nations fréchantans en icellui Pairs, Villes et Lieux d’icellui; Et pareillement les Marchans de Bretagne auront et pourront avoir et tenir es villes du dit Royaume d’Angleterre, Yrland, Ville et Marche de Calays (sauf les places exceptées par lettres royales) et Joyront des dites Franchises et aussi seront traités comme dessus est dit des dites Marchans d’Angleterre.” *Conventiones cum Duce Britanniae* (22 July 1486), reprinted in Thomas Rymer, *Foedera*, vol. V, part III, 176.

¹³¹ This treaty provided that English merchants „Regna Daciae et Norwegiae et alia Dominia sub Parte nostra existentia intrantes, in suis Personis Bonis Mercantiis et aliis Rebus quibuscumque, Veniendo et Redeundo, Stando et Conversando, Emendo et Vendendo, Piscando, ac etiam mercandizando, habeantur et sint ita liberi et Quietis Privilegiati et Immunes sicut aliqui alii Mercatores seu Homines Extranei, quacumque seu qualiacumque Libertates seu Privilegia de Gratia Usu vel Consuetudine infra Regna vel Dominia praedicta habentes vel obtinentes, cujuscumque fuerint status, Conditionis, Linguae seu Nationis, absque Molestatione, Exactione, Onere seu Impedimento aliquo.” Cited by Schwarzenberger, *The Most-Favoured-Nation Standard in British State Practice*, p. 97.

¹³² Ito, *La Clause de la Nation la plus favorisée*, pp. 80, 81.

was towards the close of the seventeenth century that the term “most-favoured-nation” emerged.¹³³

The use of the clause became common practice in the period of mercantilism, which formed the basis of economic policy in almost all European states between 1650 and 1750. Mercantilism was *inter alia* marked by the encouragement of export and the thought that the economic system was a zero-sum game, where a gain by one party required a loss by another.¹³⁴ It was therefore considered vital by all States to obtain exclusive privileges or, if that was impossible, at least to prevent other States from obtaining privileges that were not accorded to them.¹³⁵ With the rapid expansion of commerce and the increased frequency of commercial treaties, this could most conveniently be ensured by the use of most-favoured-nation clauses, which were a suitable means to avoid a permanent revision of treaties.

Since European States tended to impose very differing tariffs on goods depending on their origin, an explicit reference to most-favoured-nation treatment in regard of tariffary treatment was not included in treaties until the seventeenth and eighteenth century, when most-favoured-nation treatment was first granted with regard to tariffary treatment. Early examples were the 1642 treaty between Portugal and Great Britain¹³⁶ and the 1713 Treaty of Utrecht between France and Great Britain.¹³⁷

¹³³ Hornbeck, *The Most-Favored-Nation Clause*, p. 395. Hornbeck notes that the notion appears in a treaty between Denmark and the Hanse cities of 1692 (p. 400).

¹³⁴ For details see Tilly, *Geschichte der Wirtschaftspolitik*, pp. 8 et seq.

¹³⁵ Ito, *La clause de la nation la plus favorisée*, pp. 81, 82.

¹³⁶ This treaty stated that the subjects of Great Britain “ne seront pas tenus de payer de plus grands droits de douane, impositions et autres taxes, que les habitants et sujets des dits pays (royaumes, provinces, territoires et îles du Roi du Portugal en Europe) ou les sujets de quelque nation que ce soit qui sera en alliance avec le Portugal [...]” (Cited by Nolde, *La clause de la nation la plus favorisée et les tarifs préférentiels*, p. 27).

¹³⁷ This treaty provided that “chacun des sujets du sérénissime Roi très chrétien et de la sérénissime Reyne de la Grande Bretagne useront et jouiront respectivement dans toutes les terres et lieux de leur obéissance des mêmes privilèges, libertez, immunités, sans aucune exception, dont jouit et use, ou pourra jouir et user et être en possession à l’avenir la nation la plus amie, par rapport aux droits, douane et impositions quels qu’ils soient à l’égard des personnes, marchandises, effets, navires, fret, matelots, enfin en tout ce qui regarde la navigation et le commerce, et qu’ils auront la même faveur en toutes choses, tant dans les cours de justice que dans tout ce qui concerne le commerce out tous autres droits.” (Cited by Nolde, *La clause de la nation la plus favorisée et les tarifs préférentiels*, p. 27) The treaty was however finally rejected by the British Parliament (for details see Ustor, *History of the most-favoured-nation clause*, p. 160).

A broad field of application of the clause, albeit in a unilateral form, was opened with the capitulation agreements concluded by European powers with certain non-European States since the sixteenth century.¹³⁸ Such clauses typically benefited European powers without giving reciprocal benefits to their non-European counterparts. For example, the 1740 capitulation between France and the Ottoman Empire stated that the privileges and honours accorded to the other European nations should also be accorded to the subjects of the Emperor of France.¹³⁹ The abandonment of the unilateral type of the clause can be explained with its incompatibility with the sovereign equality of states.¹⁴⁰

II. The Conditional Form of the Most-Favoured-Nation Clause

When the most favoured nation clause first appeared, it was granted unconditionally.¹⁴¹ However at the end of the eighteenth century, the conditional form of the most-favoured-nation clause appeared and found its way particularly into the commercial treaties concluded by the United States.¹⁴² The 1778 Treaty between the United States and France constitutes the first example of such a conditional clause. Article II of this treaty stated:

“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

¹³⁸ Capitulations can be defined as the sum of rights, privileges and immunities that enabled foreigners in certain countries, such as Morocco or the Ottoman Empire, to almost entirely avoid actions of the administration, of the fiscus and the jurisdiction of domestic tribunals, see Carabiber, *Capitulations dans l’Empire Ottoman et au Maroc*, in: de Lapradelle/ Niboyet (eds), *Répertoire de droit international*, vol III, p. 39, para. 1.

¹³⁹ Article 83 of the French Capitulation of 1740 provided that “les privilèges et les honneurs pratiqués envers les autres nations franques auront aussi lieu à l’égard des sujets de l’Empereur de France.” Cited by Basdevant, *Clause de la nation la plus favorisée*, in: Lapradelle/ Niboyet (eds), *Répertoire de droit international*, vol III, p. 468, para. 7.

¹⁴⁰ The question whether a unilateral most-favoured-nation clause is consistent with the principle of the sovereign equality of States was discussed in a conflict between Belgium and China in the 1920s. The Belgian-Chinese commercial treaty of 1865 contained a unilateral most-favoured-nation clause at the detriment of China. China argued that international relations not founded on equality and mutuality could not be justified in the era of the League of Nations. When the Chinese government terminated the treaty unilaterally against the will of the Belgian government, Belgium brought the case before the Permanent Court of International Justice, but ultimately withdrew its request. See PCIJ Series C No. 16-I (Denunciation of the Treaty of November 2nd, 1865, between China and Belgium), pp 271-276 (Statement of the Chinese Government), PCIJ Series A, No. 18-19, (Denunciation of the Treaty of November 2nd, 1865, between China and Belgium), pp 5-8 (Termination of proceedings).

¹⁴¹ Ito, *La clause de la nation la plus favorisée*, pp. 81, 83.

¹⁴² For the distinction between conditional and unconditional MFN treatment see Part I B.IV.

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 compensation was conditional.”¹⁴³

The basis for the conditional form of the clause was the idea of material reciprocity; if a State extended to a state benefits that it had only granted to a third state against compensation, it should also be afforded some compensation by the beneficiary state.¹⁴⁴ Under the conditional form, it was argued, all are treated equally since they can obtain the same advantages under the same conditions. This view was succinctly voiced in the statement by the American Secretary of State John Sherman who wrote:

“But the allowance of the same privileges [...] to a nation which makes no compensation, that have been conceded to another nation for an adequate compensation, instead of maintaining destroys that equality [...] which ‘the most-favored-nation’ clause was intended to secure. It concedes for nothing to one friendly nation what the other gets only for a price. It would thus become the source of international inequality and provoke international hostility.”¹⁴⁵

Even when a commercial treaty concluded by the United States contained the clause in its general form, with no explicit reference to conditional application, the United States insisted that it should be interpreted as though it explicitly required reciprocity.¹⁴⁶ It was

¹⁴³ Cited by Ustor, History of the most-favoured-nation clause, p. 161.

¹⁴⁴ Ito, La clause de la nation la plus favorisée, p. 85.

¹⁴⁵ Letter from Secretary of State John Sherman to William I. Buchanan (January 11, 1898), in: Moore, A Digest of International Law, vol. 5 (1906), 278.

¹⁴⁶ One such treaty was the 1803 treaty between France and the United States, by which France ceded Louisiana to the United States, which stated in article 8 that “les navires Français seront traités sur le pied de la nation la plus favorisée” in the ports of Louisiana. *Traité entre la République Française et les Etats-Unis d’Amérique concernant la cession de la Louisiane* (1803), printed in Martens, *Recueil des Traités*, Supplément, vol. III, No. 35, 464.

An American act of Congress of 1815 provided that vessels of a foreign country should not be subject to discriminating duties in ports of the United States if American vessels as well were not subject to such duties in the ports of this foreign country. Since United States vessels did not have to pay duties in the ports of Great Britain, British vessels were according to this act not subject to such duties in the United States. France claimed that like Great Britain, it did not have to pay such duties, relying on the most favoured na-

until the beginning of the twentieth century that the United States typically resorted to a conditional form of most-favoured-nation treatment.¹⁴⁷ In Latin America and Europe as well, coming along with an era of protectionism, the conditional form of the clause became dominant between 1830 and 1860.¹⁴⁸ Only Switzerland and Great Britain stuck to the unconditional form of the clause.¹⁴⁹

III. Liberalisation and the 1860 Chevalier-Cobden Treaty

The era of protectionism was followed by a period marked by a surge of liberal economic perceptions.¹⁵⁰ It was recognized that the unconditional most-favoured-nation clause can help spread liberalisation faster than the conditional clause, given that any concession is generalized to apply to beneficiaries automatically. The disadvantage of the conditional conception is that since countries rarely make concessions freely, the beneficiary regularly has to give some kind of compensation equivalent to the compensation offered by the favoured country. As the mere promise that the terms of any deal would be equally available to any country benefiting from an MFN clause, the conditional clause does not fulfil

tion clause in the 1803 treaty. The United States rejected this unconditional interpretation, stating that “if French vessels should be admitted into the ports of Louisiana upon the payment of the same duties as the vessels of the United States, they would be treated, not upon the footing of the most-favoured-nation, according to the article in question, but upon a footing more favoured than any other nation; since other nations, with the exception of England, pay higher tonnage duties, and the exemption of English vessels is not a free gift, but a purchase at a fair and equal price.” Cited by Ustor, *History of the most-favoured-nation clause*, p. 162.

¹⁴⁷ Ustor, *History of the most-favoured-nation clause*, p. 161; Nolde, *La clause de la nation la plus favorisée et les tarifs préférentiels*, pp. 29-31.

¹⁴⁸ Ito, *La Clause de la Nation la plus favorisée*, pp. 84, 85. One example is Article 8 of the treaty of commerce and navigation concluded between Austria and Greece in 1835. It provided: “Die [...] Produkte der Staaten eines jeden der hohen kontrahirenden Theile, deren Einfuhr in die Staaten des andern gesetzlich gestattet ist, sollen keinen höheren [...] Abgaben unterliegen, als von den Erzeugnissen der nämlichen Gattung, welche aus einem andern Lande kommen, gegenwärtig oder künftig gefordert werden, den Fall ausgenommen, wo in den Staaten der einen beider Regierungen die Abgaben von den [...] Erzeugnissen eines andern Landes in Folge eines formellen Traktats, und nach Zusicherung besonderer Handelsvortheile oder einer gegenseitigen Verminderung der Abgaben herabgesetzt würden; in diesem Falle wird die andere Regierung nur dann die gleiche Verminderung der Abgaben ansprechen können, wenn sie gleiche Vortheile anbietet, und erst in dem Augenblicke in den Genuss derselben treten, als sie diese Gegenvortheile oder ein angemessenes Aequivalent zugesichert hätte, sofern sie keine vom nämlichen Umfange oder von gleicher Art anbieten könnte. In jedem Falle werden dann die beiden Regierungen ein besonderes Uebereinkommen in dieser Hinsicht treffen müssen.“ *Traité de commerce et de navigation entre S.M. l’Empereur d’Autriche et S.M. le Roi de la Grèce* (1835), printed in Martens, *Recueil des Traités, Supplément*, vol. XVI, No. 40, p. 744.

¹⁴⁹ Ito, *La Clause de la Nation la plus favorisée*, p. 85.

¹⁵⁰ The system of liberalism was comprehensively set forth in Adam Smith’s „*Wealth of Nations*“.

the functions of a most-favoured-nation clause to eliminate discrimination and promote equality since equality is tied to reciprocal concessions.¹⁵¹ Moreover, it is hardly possible to say what amounts to a reciprocal compensation of the same or equal value¹⁵²; for a concession which is valuable when made by one state may be of less value or even valueless if made by another. The clause in its conditional form thus also loses its effects of unification and simplification. Moreover, it bears disadvantages for countries with a liberal commercial policy, since these countries are less favourably situated for negotiating than those which possess heavier restrictions. In the course of liberalisation, the conditional most-favoured-nation clause was therefore largely abandoned in favour of unconditional most-favoured-nation treatment. This development was initiated by the Chevalier-Cobden Treaty concluded between France and Great Britain in 1860, which is named after the main British negotiator Richard Cobden, an advocate of free trade, and Michel Chevalier, who was the economic adviser to Napoleon III.¹⁵³ In this treaty Great Britain and France substantially reduced their tariffs, abolished import prohibitions and granted each other the status of the most favoured nation on an unconditional basis. In the 1800s and 1900s, the unconditional form of the clause gradually became the cornerstone of commercial treaties in all of Europe and almost all countries and was often included in Friendship, Commerce and Navigation treaties.¹⁵⁴

IV. The First World War and the Post-War Period

During the First World War, economic nationalism spread among almost all countries, which led to a widespread abrogation of treaties containing the most-favoured-nation clause. The destruction of the economy by the war led to trade restrictions, widespread discrimination and a temporary overall decline of the clause.¹⁵⁵ In 1918, France, Italy,

¹⁵¹ Ito, *La clause de la Nation la plus favorisée*, p. 35; Nolde, *La clause de la nation la plus favorisée et les tarifs préférentiels*, p. 91; Rousseau, *Principes Généraux*, p. 467; Virally, *Le principe de réciprocité*, p. 74.

¹⁵² Jackson, *The World Trading System*, p. 161.

¹⁵³ *British and Foreign State Papers*, vol. 50, p. 13.

¹⁵⁴ Ito, *La clause de la Nation la plus favorisée*, p. 86. These treaties focused on trade and navigation and included provisions for the protection of the property of the other party's nationals.

¹⁵⁵ Ito, *La clause de la Nation la plus favorisée*, p. 90; Ustor, *History of the most-favoured-nation clause*, p. 162.

Romania, Spain and Greece abrogated all treaties of commerce containing a most-favoured-nation clause.¹⁵⁶ The Allied countries agreed at their Economic Conference in 1916 that enemy nations should be subjected to “systematic discrimination in economic matters”¹⁵⁷. The insertion of unilateral clauses to the detriment of the defeated countries was typical for the peace treaties.¹⁵⁸ However, with the resumption of economic relations after the war and growing dissatisfaction with protectionism, commercial treaties based on the principle of most-favoured-nation treatment became again more and more common.¹⁵⁹

V. Attempts of Codification Under the Auspices of the League of Nations

Already during the war, there were perceptions recognising the dangers for peace involved in tariff discriminations and economic hostilities. Woodrow Wilson attempted in the third of his Fourteen Points to obtain general acceptance of the principle of “equality of trade conditions”¹⁶⁰. This Third Point was the basis for Article 23 (e) of the Covenant of the League of Nations, granting “equitable treatment for the commerce of all Members of the League”. However, Wilson’s proposal was watered down in the Covenant, equal treatment being granted only subject to international conventions and the “special necessities of the regions devastated during the war”.

After the entry into force of the Covenant, a series of International Economic Conferences was initiated under the auspices of the League of Nations in order to reorganize the world economy. One such conference took place in Genoa in 1922. This conference established as a goal the use of most-favoured-nation clauses, however, temporary difficulties in the

¹⁵⁶ Ito, *La clause de la Nation la plus favorisée*, p. 90.

¹⁵⁷ Viner, *International Economics*, p. 95.

¹⁵⁸ One of the latest manifestations of the unilateral clause was Article 267 of the Treaty of Versailles, which imposed the obligation on Germany to extend to the Allies every favour, immunity or privilege concerning the importation, exportation or transit of goods granted to third States, without granting Germany a reciprocal right to most-favoured-nation treatment (Treaty of Versailles, British and Foreign State papers 1919, vol. 62).

¹⁵⁹ Ito, *La clause de la Nation la plus favorisée*, p. 91; Ustor, *History of the most-favoured-nation clause*, p. 163.

¹⁶⁰ Wilson reproduced the Fourteen Points in an Address to a Joint Session of the United States Congress on the Conditions of Peace on January 8, 1918 (see The Woodrow Wilson Presidential Library, at: <http://wwl2.dataformat.com/Document.aspx?doc=30716>, last time accessed on 16 November 2014)

application of the clause were recognised and its general application was not explicitly recommended. The report of the Economic Commission provided:

“The Conference recalls the principle of the equitable treatment of commerce set out in article 23 of the Covenant of the League of Nations, and earnestly recommends 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.”¹⁶¹

The use of the most-favoured-nation clause was strongly recommended as highly desirable and necessary for the stability of trade relations at the International Economic Conference in Geneva which took place in 1927. The recommendations of the Conference stated:

“(1) The Conference therefore considers that the mutual grant of unconditional most-favoured-nation treatment as regards customs duties and conditions of trading is an essential condition of the free and healthy development of commerce between States, and that it is highly desirable in the interest of stability and security for trade that this treatment should be guaranteed for a sufficient period by means of commercial treaties.

(2) While recognizing that each State must judge in what cases and to what extent this fundamental guarantee should be embodied in any particular treaty, the conference strongly recommends 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.”¹⁶²

¹⁶¹ Report of the Third Economic Commission of the Genoa Conference, Chapter 1, Article 9, quoted by Ustor, *History of the most-favoured-nation clause*, p. 168.

¹⁶² League of Nations, *The World Economic Conference*, Document C.356.M.129.1927.II (C.E.I.46) (1927), quoted by Ustor, *History of the most-favoured-nation clause*, p. 169.

After that conference, the Economic Committee of the League of Nations followed the task of carrying out the commercial policy advocated by the International Economic Conference of 1927. In particular, it thoroughly examined the general principles governing most-favoured-nation treatment and drafted a model clause. This clause was focused exclusively on customs matters. It contained a promise of unconditional and unrestricted most-favoured-nation treatment in all matters concerning customs duties, subsidiary duties and the rules, formalities and charges imposed in connexion with the clearing of goods through the customs.¹⁶³ The efforts of the World Economic Conference however ended without result due to the onset of the depression in 1929.¹⁶⁴

The Committee of Experts for the Progressive Codification of International Law operating under the auspices of the League of Nations also dealt with the effects of the most-favoured-nation clause. It stated in its report:

“Bearing in mind that any favour which a State may grant as a public right may be claimed under an unlimited most-favoured-nation clause, it would be idle to attempt a list of subjects which are or may be subject to most-favoured-nation treatment.”¹⁶⁵

Emphasizing the need for Contracting Parties to formulate the clause in such a way as to leave no doubt to their intention, the report concluded that it was not necessary to endeavour to frame a general convention to establish the principal means of determining and interpreting the effects of the most-favoured-nation clause in treaties.¹⁶⁶ The efforts of the Committee of Experts therefore did not lead to a codification concerning the effects of the clause.

Neither did the World Monetary and Economic Conference which took place in London in 1933 and which particularly dealt with possible exceptions to the most-favoured-nation

¹⁶³ Ustor, *History of the most-favoured-nation clause*, p. 168.

¹⁶⁴ Kurtz, *The MFN Standard and Foreign Investment*, p. 864.

¹⁶⁵ Publications of the League of Nations, 1927.V.10 (C.205.M.79.1927.V), p. 6.

¹⁶⁶ Publications of the League of Nations, 1927.V.10 (C.205.M.79.1927.V), p. 14.

clause lead to substantial progress due to widespread disagreement between the participating parties.¹⁶⁷

VI. Codification Efforts by the Institut de Droit International

The *Institut de Droit International* adopted a resolution concerning the effects of the most-favoured-nation clause in matters of commerce and navigation in 1936.¹⁶⁸ The resolution established that the clause should unless otherwise stated be unconditional (para. 1). Its effects should be limited by the duration of the third party treaty (para. 3).¹⁶⁹ The resolution focused on equal treatment as regards customs duties and the rules, formalities and charges that are applied to customs clearance operations (para. 4). It provided for several exceptions to most-favoured-nation treatment, *inter alia* concerning treatment granted to adjacent states and treatment resulting from a customs union (para. 7). Disputes concerning the interpretation and the application of the clause should be settled by courts or by arbitration (para. 10). In 1969 the *Institut de Droit International* issued another brief resolution on the most-favoured-nation clause in multilateral conventions, which emphasized the need for preferential treatment for developing countries and recognized regional agreements as exception to most-favoured-nation treatment.¹⁷⁰

VII. Codification Efforts by the International Law Commission

Codification efforts gained new momentum when in 1978 the ILC submitted thirty draft articles on most-favoured-nation clauses to the General Assembly.¹⁷¹ Those articles deal, *inter alia*, with the definition of the clause, rules for interpretation, its structure and effects and the distinction between the conditional and the unconditional approach. With regard to the determination of its scope, the articles endorsed the *ejusdem generis* princi-

¹⁶⁷ Ustor, History of the most-favoured-nation clause, pp. 173, 174.

¹⁶⁸ Les effets de la clause de la nation la plus favorisée en matière de commerce et de navigation, Resolution of the Institute of International Law, *Annuaire de l'Institut de Droit International* 1936, vol. II, pp. 289-292.

¹⁶⁹ This interpretation was later confirmed by the ICJ in the *Anglo-Iranian Oil Company Case* (jurisdiction), Judgment of 22 July 1952, ICJ Reports 1952, p. 93.

¹⁷⁰ La clause de la nation la plus favorisée dans les conventions multilatérales, Resolution of the Institute of International Law, *Annuaire de l'Institut de Droit International* 1969, pp. 1-291.

¹⁷¹ Text adopted by the International Law Commission at its thirtieth session (1978), *Yearbook of the International Law Commission*, 1978, vol. II, Part 2.

ple. Namely, Article 9 (1) of the Draft Articles clarified 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”. The General Assembly gave consideration to the topic at its forty-sixth session in 1991 and decided to “bring the draft articles on most-favoured-nations clauses to the attention of Member States and interested intergovernmental organizations for their consideration in such cases and to the extent as they deem appropriate”¹⁷², without, however, transforming them into a binding instrument.

VIII. Integration of Most-Favoured-Nation Treatment in WTO Agreements

During the world economic crisis which started in 1929 and World War II, States again resorted to discriminatory policies. In the aftermath of the war, multiple attempts were made to restore the economic order and to create instruments for the liberalisation and multilateralisation of trade. One outcome was the formation of the General Agreement on Tariffs and Trade (GATT) in 1947. The most-favoured-nation standard played a central remedial role in the international efforts to establish a system of guarantees against trade discrimination, which was considered one of the causes of both world wars.¹⁷³ In the GATT framework, the principle of most-favoured-nation treatment, which was traditionally used in bilateral trade agreements, was multilateralised, which put an end to policies based on bilateral reciprocity and established a general principle of non-discrimination. The general and unconditional most-favoured-nation clause was established in GATT Article I:1. It is applicable to customs duties, methods of levying such duties, rules and formalities in connection with importation and exportation, and matters referred to in III:2 and III:4, i.e. internal taxes and regulatory laws.¹⁷⁴ Apart from Article I:1, the GATT con-

¹⁷² General Assembly, Provisional Verbatim Record of the 67th meeting of 23 December 1991, A/46/PV.67, p. 31.

¹⁷³ For example, Cordell Hull formulated that “unhampered peace dovetail[s] with peace; high tariffs, trade barriers and unfair economic competition, with war” (Hull, *The memoirs of Cordell Hull*, p. 81).

¹⁷⁴ Art. I:1 GATT provides: “With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting

tains various other subject-specific non-discrimination clauses.¹⁷⁵ Moreover, several other multilateral trade agreements covering trade in goods contain special most-favoured-nation clauses.¹⁷⁶

Various exceptions are applicable to the most-favoured-nation principle, *inter alia* general public policy exceptions (Article XX), exceptions as regards emergency action (Article XIX), security interests (Article XXI), national interests (Article XXIII), and customs unions and free trade areas (Article XXIV:4-10). Moreover, there are numerous provisions in WTO agreements that permit to grant more favourable treatment to be given to developing countries. Of particular importance in the context of development is the so-called “Enabling Clause”, which was decided by the Contracting States in 1979 in the course of the Tokyo Round and which allows developed countries to accord preferential treatment to developing countries in departure from the most-favoured-nation clause.¹⁷⁷

A most-favoured-nation clause is also included in Art. II:1 of the GATS, and repetitions of the principle can be found in other provisions of the GATS.¹⁷⁸ GATS Article II:1 is structured similarly to GATT Article I:1, however, deviant from the unconditional most-favoured-nation principle, GATS Article II:2 permits members to maintain measures that are inconsistent with the most-favoured-nation principle provided that such measures are listed in the Annex on Article II Exemptions.¹⁷⁹ Furthermore, the GATS provides a catalogue of general exceptions in Article XIV and of security exceptions in Article XIV bis, which are virtually identical with GATT Articles XX and XXI, and an exception concerning regional integration in Article V, which is analogous to GATT Article XXIV.

party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”

¹⁷⁵ These are integrated in GATT Articles III:7, IV (b), V:2, V:5, V:6; IX:1, XIII:1, XVII:1 (a), XVIII:20 and XX (j). For details see Kennedy, GATT 1994, in: Macrory/ Appleton/ Plummer (eds), *The World Trade Organization*, p. 106, and Senti, WTO, pp. 164, 165.

¹⁷⁶ Eg Article 2.3 of the SPS Agreement and Article 7:1 (c) of the Agreement on Textiles and Clothing. For details see Kennedy, GATT 1994, pp. 106, 107.

¹⁷⁷ Decision of 28 November 1979 of the Contracting Parties on “Differential and More Favorable Treatment, Reciprocity, and Fuller Participation of Developing Countries”, L/ 4903. For details see Jessen, *WTO-Recht und „Entwicklungsländer“*, pp. 331-358; Kennedy, *Special and Differential Treatment of Developing Countries*, pp. 1523-1570.

¹⁷⁸ GATS Articles VII:3, VIII, X, XII:1, XIV, XV:1, XVI, XXI. For details see Senti, WTO, pp. 166, 167.

¹⁷⁹ Although the Annex provides that such exemptions shall only be valid for at most ten years, it is very unlikely that states will accept this request in the near future.

The TRIPS Agreement deals with the protection of the intellectual property of foreign companies and individuals investing in, producing and trading intellectual property-intensive goods and services. Since the protection of intellectual property is an important factor for the creation of a legal environment that is attractive to foreign investors, the agreement constitutes an important source of investment protection. Article 4 TRIPS sets out the principle of unconditional most-favoured-nation treatment in the field of intellectual property rights. It follows from the clause that unilateral practices, bilateral agreements affording greater protection (“TRIPS-plus”) or the improvement of registration procedures have to be extended to all Members.¹⁸⁰ The most-favoured-nation clause of TRIPS is linked with standards provided in bilateral investment treaties insofar as these treaties define investment as encompassing intellectual property rights. If a WTO member grants more favourable treatment in a BIT with regard to intellectual property rights, this standard can be extended to other WTO Members by means of Article 4 TRIPS.

Article 4 TRIPS also lists various exceptions to most-favoured-nation treatment. Despite proposals by the (former) European Communities¹⁸¹ and the United States¹⁸² to incorporate an exception for regional agreements as an equivalent to GATT Article XXIV and GATS Article V, such exception was not included in the final TRIPS agreement. Thus, if a regional agreement provides for more privileges than the TRIPS Agreement, these privileges can be imported via the most-favoured-nation clause of the TRIPS Agreement.

IX. The Use of Most-Favoured-Nation Clauses in Investment Treaties

The first bilateral investment treaty, which was concluded in 1959 between the Federal Republic of Germany and Pakistan, did not contain a general most favoured nation clause, but only a specific one concerning most-favoured-nation treatment in cause of war¹⁸³ and a general prohibition of discriminatory treatment¹⁸⁴. A general most-favoured-nation

¹⁸⁰ Cottier, *The Agreement on Trade-Related Aspects of Intellectual Property Rights*, in: Macrory/Appleton/Plummer (eds), *The World Trade Organization*, p. 1068.

¹⁸¹ Communication from the European Communities, *Draft Agreement on TRIPS Article 4*, MTN.GNG/NG11/W/68, March 29, 1990.

¹⁸² Communication from the United States, *Draft Agreement on TRIPS Article 3*, MTN.GNG/NG11/W/70, May 11, 1990.

¹⁸³ See Article 3 III of the BIT.

¹⁸⁴ See Article 2 of the BIT.

clause was however included in subsequent treaties. While the 1960 Germany-Malaysia BIT¹⁸⁵ and the 1961 Germany-Greece BIT¹⁸⁶ grant most-favoured-nation treatment only “unless specific stipulations made in the document of admission provide otherwise”, thus leaving governments the possibility to decide on the validity of the standard as regards every individual investment, the following BITs provided for unreserved most-favoured-nation treatment.¹⁸⁷ Most-favoured-nation clauses have since been continuously included in virtually all investment treaties.¹⁸⁸

Part III: The Most-Favoured-Nation Clause in Various Agreements

Due to the large number of investment agreements and the different formulations of the most-favoured-nation principle in various bilateral and multilateral agreements, there is not one single most-favoured-nation clause. It is the aim of this part to examine the language of some most-favoured-nation clauses in order to demonstrate that arbitral tribunals may come to different results depending on the wording of the relevant clause. The following analysis will be based on GATS, the North American Free Trade Agreement, the Energy Charter Treaty, the ASEAN Framework Agreement, the Colonia and the Buenos Aires Protocols of MERCOSUR, and the Draft Multilateral Agreement on Investment as multilateral instruments, and on the model BITs of Germany and the United States as models for bilateral instruments. Although model BITs *per se* have no legal relevance, it is useful to examine them instead of single BITs since many capital-exporting States negotiate investment treaties on the basis of a model treaty. Although treaties may deviate from these model BITs, model BITs are an object of imitation or at least an important source of inspiration for a large number of BITs. This makes it possible to make general statements about a considerable number of investment treaties without evaluating every single treaty text.

¹⁸⁵ See Articles 2 II and 3 of the BIT.

¹⁸⁶ See Articles 1 II and 2 of the BIT.

¹⁸⁷ Examples are Article 2 I and II of the 1961 Germany-Togo BIT, 2 of the 1961 Germany-Liberia BIT, Article 3 I of the 1961 Germany-Thailand BIT, Article 2 of the 1962 Niger-Switzerland BIT and art. 3 II of the 1963 Netherlands-Tunisia BIT.

¹⁸⁸ One of the rare exceptions is the 1998 Dominican Republic-Ecuador BIT, which does not contain a general most-favoured-nation clause.

A. GATS

The GATS is a set of multilateral rules governing international trade in services. Article I GATS defines trade in services as the supply of a service through four possible modes of supply, one of which is the supply of a service “by a service supplier of one Member, through commercial presence in the territory of any other Member”¹⁸⁹. Article XXVIII (d) GATS defines commercial presence as „any type of business or professional establishment, including through (i) the constitution, acquisition or maintenance of a juridical person; or (ii) the creation or maintenance of a branch or a representative office, within the territory of a Member for the purpose of supplying a service”. The presence on the market of foreign juridical persons, branches or representative offices through local “commercial presence” is thus protected as a form of trade in services within the meaning of Article I GATS. Given that a foreign affiliate is usually established as a result of capital flows taking the form of foreign direct investment,¹⁹⁰ the GATS can be considered a multilateral agreement on foreign investment which is however limited to the service sector and does not refer explicitly to investors but to juridical persons. Moreover, the enterprise-based definition of commercial presence in the GATS is narrower than the asset-based definition of investment usually encountered in bilateral and multilateral investment treaties. Whereas investment treaties define investment using an asset-based approach which covers a wide range of direct and portfolio investment,¹⁹¹ the narrower definition adopted in the GATS suggests that the term commercial presence covers foreign direct investment, but does not cover bonds, portfolio investments or other categories of assets typically protected by investment treaties.¹⁹² The protection that GATS affords to investors is further limited by the fact that commitments are binding solely in sectors and modes of supply listed in the Members’ schedules. In addition to the supply of services through commercial presence, the supply of services “by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member”¹⁹³ is relevant

¹⁸⁹ GATS Article I:2 (c).

¹⁹⁰ Karsenty, *Assessing Trade in Services by Mode of Supply*, in: Sauvé/ Stern, GATS 2000, p. 45.

¹⁹¹ See Part V II.

¹⁹² Sauvé/ Wilkie, *Investment Liberalization in GATS*, in: Sauvé/ Stern, GATS 2000, pp. 348-349.

¹⁹³ GATS Article I (2) (d).

in the context of investment protection since commitments of Members concerning that mode of supply provide entry privileges to intra-company transferees and key personnel that are essential to the establishment and operation of a commercial presence.¹⁹⁴

The most-favoured-nation principle is a general obligation under the GATS.¹⁹⁵ It is constitutive for this agreement to differentiate between general obligations and specific commitments. With regard to the latter, Members have chosen to adopt a positive list or bottom-up approach, which means that specific commitments are only valid if WTO Members have specifically committed a particular service sector to these obligations. The most important specific commitments are market access and national treatment. Through the schedules of specific commitments for market access and national treatment, states can also control the establishment of foreign investors. In contrast, the most-favoured-nation principle is a general obligation and thus applies to all measures in all sectors, unless a Member explicitly exempts a certain measure from its scope. This approach is referred to as negative list or top-down approach and is a result of the Uruguay Round, where it became clear that liberalization could only take place subject to temporary MFN exceptions.¹⁹⁶

The most-favoured-nation provision in Article II:1 GATS provides:

“With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.”

While Article I:1 GATT enlists certain fields of application of the clause, Article II:1 GATS applies to “any measure covered by this Agreement”, which is equivalent to all

¹⁹⁴ Sauv , JWT 31, 64.

¹⁹⁵ For details regarding most-favoured-nation treatment in the GATS, see Wolfrum, Most-Favoured-Nation Treatment, in: Wolfrum/ Stoll/ Fein ugle (eds), Max Planck Commentaries on World Trade Law, vol. VI, p.; Mattoo, MFN and the GATS, in: Cottier/ Mavroidis (eds), Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law; Wang, Most-Favoured-Nation Treatment under the General Agreement on Trade in Services.

¹⁹⁶ WTO, Guide to the Uruguay Round Agreements, pp. 165-166.

measures affecting trade in services.¹⁹⁷ Since trade in services covers commercial presence by a service supplier, basically any measure affecting the competitive opportunities of foreign investors can be a measure affecting trade in services and thus a measure covered by the most-favoured-nation standard of the GATS. The most-favoured-nation standard in the GATS prohibits discrimination between services and service suppliers. The background is that many regulations in the services sector, such as qualification requirements, are not coupled with the service, but with the service supplier.¹⁹⁸ Like Article I:1 GATT, Article II GATS prohibits *de jure* as well as *de facto* discrimination in order not to frustrate the basic purpose of the GATS,¹⁹⁹ namely to ensure equality of competitive opportunities. Article II GATS is not necessarily applicable in the pre-establishment phase since juridical persons only have a right to establish a commercial presence if the respective Member has made a specific commitment for market access in the relevant sector. If however the respective Member has entered into such a specific commitment the most-favoured-nation clause also covers the pre-establishment phase.

Exceptions from the most-favoured-nation standard are either of a general and permanent or of a self-selected nature.²⁰⁰ There are permanent exceptions *inter alia* permitting the accordances of advantages to adjacent countries (Article II:3), the membership in economic integration agreements (Article V), labour markets integration agreements (Article V bis), government procurement (Art. XIII), and measures necessary to protect public morals or maintain public order, to protect human, animal or plant life or health, to secure compliance with certain laws and regulations and to maintain security (Articles XIV and XIV bis).²⁰¹ In addition to these permanent derogations to the application of the most-favoured-nation clause, GATS Article II:2 together with the Annex on Article II Exemptions provide for the possibility to derogate from most-favoured-nation treatment by list-

¹⁹⁷ According to Article I:1 GATS, “[t]his Agreement applies to measures by Members affecting trade in services.”

¹⁹⁸ Köhler, Das Allgemeine Übereinkommen über den Handel mit Dienstleistungen (GATS), p. 104; Krajewski, National Regulation and Trade Liberalization in Services, para. 443.

¹⁹⁹ Appellate Body Report, *EC - Bananas*, 9 September 1997, WT/DS27/AB/R, para. 233; with a partly different reasoning see also Panel Report, *EC - Bananas*, 22 May 1997, WT/DS27/R, para. 7.301.

²⁰⁰ See for details OECD, Working Paper of the Trade Committee, Trade in Services: Roadmap to GATS MFN exemptions (2001), TD/TC/WP(2001)25/FINAL.

²⁰¹ For details see Wang, Yi, Most-Favoured-Nation Treatment under the General Agreement on Trade in Services – And Its Application in Financial Services, pp. 91-124.

ing self-selected exemptions.²⁰² Although the GATS was adopted with the intention of progressive liberalization and exemptions were thus supposed to be temporary²⁰³, the overwhelming majority of exemptions is characterised by the Member States as unlimited.²⁰⁴ The broad possibility to make exemptions to the MFN obligation can be seen in the light of the broadness of the scope of the GATS, which covers any measure of a member country affecting trade in services. The possibility to submit exemptions and the resulting limited scope of the most-favoured-nation clause reveals that Members were not willing to completely eliminate discrimination in services trade and considered the submission of exemptions necessary due to the potentially broad reach of the most-favoured-nation standard in the normally heavily regulated services sector. One reason why members list exemptions is their aim to ensure that certain treatment only has to be granted on the basis of reciprocity.²⁰⁵ Without the possibility to submit exemptions, unconditional most-favoured-nation treatment would allow competitors located in countries with relatively restrictive policies to benefit from their sheltered markets while enjoying a free ride in less restrictive export markets.²⁰⁶ Exempted measures must have been specified in a list of MFN exemptions submitted by the end of the Uruguay Round of Multilateral Trade Negotiations or by the conclusion of extended negotiations on certain sectors for which the delayed submission of related exceptions was expressly authorized. Subsequently, no new exemptions can be granted except under the conditions of the waiver procedures of the WTO Agreement.²⁰⁷ A study by the OECD counted 424 exemptions listed by 79 WTO members (counting the then European Communities as one).²⁰⁸ Exemptions have

²⁰² For details concerning state practice with regard to the submission of exemptions see OECD, *Trade in Services: A Roadmap to GATS MFN Exemptions*, TD/TC/WP (2001) 23 (2001).

²⁰³ The Annex provides in para. 6 that exemptions should in principle not exceed a period of ten years.

²⁰⁴ OECD Working Paper of the Trade Committee, *Trade in Services: Roadmap to GATS MFN exemptions* (2001), TD/TC/WP(2001)25/FINAL, 19. For example, 26 of the 28 exceptions submitted by the EU are marked as “indefinite” and do not have a fixed termination date (See European Communities and their Member States, Final List of Article II (MFN) Exemptions of 15 April 1994, GATS/EL/31).

²⁰⁵ OECD, Working Paper of the Trade Committee, *Trade in Services: Roadmap to GATS MFN exemptions* (2001), TD/TC/WP(2001)25/FINAL, 3.

²⁰⁶ Hoekman/ Kostecki, *The Political Economy of the World Trading System*, p. 252. See also Part I B.IV.

²⁰⁷ Para. 2 of the Annex on Article II Exemptions refers to Article IX:3 of the WTO Agreement.

²⁰⁸ OECD, Working Paper of the Trade Committee, *Trade in Services: Roadmap to GATS MFN exemptions* (2001), TD/TC/WP(2001)25/FINAL, p. 6.

been used to a large extent in order to uphold discriminating measures particularly in the sectors of audiovisual services, air, maritime and road transport services and financial services.²⁰⁹ Another important category of MFN exemptions relates to international agreements.²¹⁰ These exemptions must often be applied horizontally, which means that they affect all sectors. Since the GATS covers foreign investment in services, the relationship between the GATS and other international investment agreements is of potentially far-reaching effect. Especially, the most-favoured-nation clause of the GATS could be used to extend to all Members of the WTO higher treatment standards which are provided in investment agreements, such as expropriation standards, investor-state dispute resolution provisions, or market access and national treatment standards in cases where Members have not made specific commitments under the GATS. In the multilateral context of most-favoured-nation relations in the GATS, which has a wide membership, the number of potentially beneficiary parties may be immense. As a result, several WTO members have taken exemptions from the most-favoured-nation requirement of the GATS with respect to bilateral investment treaties.²¹¹ This is consistent with the GATS' focus, which is not on investment protection *per se* in the same way as in the context of bilateral investment treaties.²¹² A number of exemptions even make specific reference to the dispute settlement procedures in BITs, excluding the application of the most-favoured-nation clause in the GATS to dispute settlement provisions in BITs.²¹³ This way Members make sure that there is no direct recourse to arbitration for GATS violations.²¹⁴

²⁰⁹ OECD, Working Paper of the Trade Committee, Trade in Services: Roadmap to GATS MFN exemptions (2001), TD/TC/WP(2001)25/FINAL, pp. 11, 13.

²¹⁰ These exemptions usually refer to agreements that do not meet the criteria of GATS Article V, since otherwise they would not have to be listed.

²¹¹ Koulen, Foreign Investment in the WTO, in Nieuwenhuys/ Brus (eds), Multilateral Regulation of Investment, p. 188.

²¹² UNCTAD, Most-Favoured-Nation Treatment, p. 25.

²¹³ See e.g. Canada's Final List of Article II (MFN) Exemptions, which describes as a measure inconsistent with GATS Article II for which an exemption is submitted that "Canada accepts compulsory arbitration of investor/state investment disputes brought by or in respect of service suppliers of countries with which Canada may have agreements providing for such a procedure".

²¹⁴ OECD, Working Paper of the Trade Committee, Trade in Services: Roadmap to GATS MFN exemptions (2001), TD/TC/WP(2001)25/FINAL, p. 29.

B. North American Free Trade Agreement (NAFTA)

The North American Free Trade Agreement, which entered into force on 1 January 1994, is an agreement between the governments of the United States, Canada and Mexico concluded with the intention to implement a free trade area. It contains in its Chapter 11 substantive obligations and dispute settlement provisions for the protection of investments. NAFTA Chapter 11 submits all economic sectors to its substantive commitments unless they are specifically exempted by the submission of a negative list of non-conforming measures. Among its substantive obligations is the requirement to grant most-favoured-nation treatment to both investors and their investments. NAFTA Article 1103 provides:

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

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

In contrast to GATS, the clause enumerates certain fields of application for the MFN principle. As can be derived from the references to establishment and acquisition, the clause covers both the post- and the pre-establishment phase, which separates the agreement from most other multilateral agreements like for example the Energy Charter Treaty, and from most bilateral investment treaties. Contrary to the GATS, the NAFTA adopts a negative-list approach as regards market access, which means that the obligation to grant market access is only restricted if the State has specifically made exceptions for certain areas.

The investment provisions including most-favoured-nation treatment are subject to a number of reservations and exceptions set out in Article 1108 and the schedules established in Annexes I-IV. According to Article 1108 (1), the most-favoured-nation standard

does not apply to existing non-conforming measures that are maintained by the Parties in the schedules in Annex I. This standstill agreement is intended to avoid relapses into greater protectionism. Article 1108 (3) provides that certain substantive obligations including the most-favoured-nation standard do not apply to measures that a Party adopts with respect to sectors set out in Annex II. This Annex contains exceptions with respect to specific sectors in which Parties may maintain or adopt measures that are inconsistent with the enumerated obligations. Article 1108 (6) specifically deals with the most-favoured-nation requirement, which according to this norm does not apply to treatment with respect to sectors set out in the Parties' schedules to Annex IV. The Annex IV schedules of Canada, Mexico and the United States are identical and exempt treatment accorded under all bilateral or multilateral international agreements which were in force or signed prior to the date of entry into force of the NAFTA. Further, they exempt treatment accorded under agreements concerning aviation, fisheries, maritime matters, telecommunications transport networks and telecommunications transport services. Neither does the most-favoured-nation obligation apply to current or future foreign aid programmes to promote economic development. Apart from the annexes, Article 1108 (7) provides that the most-favoured-nation standard does not apply to procurement by a Party or a State enterprise or subsidies or grants provided by a Party or a State enterprise.

C. U.S. Model BIT

The U.S. model bilateral investment treaty of 2012 contains a most-favoured-nation clause that is almost identical with that of the NAFTA.²¹⁵ It provides in Article 4:

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

²¹⁵ Moreover, it is virtually identical with the most-favoured-nation clause in Article 4 of the Canadian Model BIT.

(2) Each Party shall accord to investments of the other Party treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any non-party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”²¹⁶

In contrast to early U.S. Model BITs, the most-favoured-nation obligation is now uncoupled from the national treatment obligation. It now contains not only a reference to investments, but also an obligation to treat investors on a most-favoured-nation basis. The reference to “like situations” has been changed into “like circumstances”, which does not however entail a change of the meaning²¹⁷. Moreover, the list of covered activities is now exhaustive. It is less detailed than in early model treaties; yet the definition of “investment” contained in Article 1 of the 2012 model BIT covers all activities that were additionally mentioned in the most-favoured-nation clause in prior model BITs. The most-favoured-nation obligation in the U.S. model BIT does not apply to government procurement and to subsidies or grants provided by a Party (Article 14 (5)). Most United States bilateral investment treaties adopt a negative-list approach for market access, which means that the obligation to grant market access is only restricted if the State has specifically made exceptions for the respective sector. Moreover, the most-favoured-nation clause of the U.S. model BIT refers to the establishment and acquisition of investments. Thus, like NAFTA’s most-favoured-nation clause, the most-favoured-nation obligation in the U.S. model BIT is also applicable in the pre-entry phase.

D. 2008 German Model BIT

The general most-favoured-nation clause in Article 3 of the German Model BIT provides:

(1) Neither Contracting State shall in its territory subject investments owned or controlled by investors of the other Contracting State to treatment less favourable than

²¹⁶ A virtually identical formulation is used in Article 4 (1) of the 2004 Canadian Model BIT.

²¹⁷ See Part VIII A.

it accords to investments of its own investors or to investments of investors of any third State.

(2) Neither Contracting State shall in its territory subject investors of the other Contracting State, as regards their activity in connection with investments, to treatment less favourable than it accords to its own investors or to investors of any third State. The following shall, in particular, be deemed treatment less favourable within the meaning of this Article:

1. different treatment in the event of restrictions on the procurement of raw or auxiliary materials, of energy and fuels, and of all types of means of production and operation;
2. different treatment in the event of impediments to the sale of products at home and abroad;
3. other measures of similar effect.”

The provision provides that less favourable treatment is given in certain enumerated cases, however, the list is not exhaustive. The clause only covers the post-establishment phase and is thus not applicable to the market access of an enterprise. This can be inferred from the formulation of Article 2 (1) of the German model BIT, which obliges the Contracting States to admit investments in accordance with their legislation. One can follow from this provision that the BIT does not prohibit restrictions to the admission of an investment if they are provided in the national legal system. Moreover, the most-favoured-nation clause of the German model BIT refers to investments “in [the Contracting States’] territory”, thus indicating that most-favoured-nation treatment shall only be applied to investments that have already been established within the jurisdiction of the respective host State. The lack of a right to market access is in conformity with the rights protected in most bilateral investment treaties except those of the United States and Canada, which usually do not grant a right to establish a foreign investment in a certain country, but only comprehend the protection of enterprises that are already operating on the market. Accordingly, the predominant part of bilateral investment treaties grants most-favoured-nation treatment only with respect to the phase following the establishment of the enterprise.

Article 3 (3) of the model BIT provides for an exception from the duty to accord most-favoured-nation treatment with regard to privileges granted due to membership in a customs or economic union, a common market or a free trade area or a State's association with such union. This norm is particularly relevant as regards Germany's membership in the European Union. Article 3 (4) provides that most-favoured-nation treatment shall not relate to favours granted to third states on account of an agreement concerning the payment of taxes, especially double taxation agreements. Article 3 (2) third sentence clarifies that measures that are taken for reasons of public security and order are not classified as less favourable treatment.²¹⁸

E. Energy Charter Treaty (ECT)²¹⁹

The Energy Charter Treaty is a multilateral treaty which entered into force on 16 April 1998 and has currently been signed by fifty-three and ratified by forty-eight Contracting Parties. One of its aims is the protection of investments in the energy sector. Part III of the treaty (Articles 10-17) contains the substantive provisions for the protection of investments. Article 10 (7) ECT provides:

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

In its binding form, the clause only covers the post-entry phase. With regard to the pre-establishment phase, the Contracting Parties are only subject to the soft-law obligation

²¹⁸ The original wording of Art. 3 (a), 3rd sentence of the Protocol is: “Maßnahmen, die aus Gründen der öffentlichen Sicherheit und Ordnung, der Volksgesundheit oder Sittlichkeit zu treffen sind, gelten nicht als “weniger günstige” Behandlung im Sinne des Artikel 3.”

²¹⁹ For an overview of the investment provisions of the ECT see Happ, *Dispute Settlement Under the Energy Charter Treaty*, pp. 331-362.

under Article 10 (2) and (3) to “endeavour to accord to Investors of other Contracting Parties, as regards the Making of Investments in [their] Area” most-favoured-nation treatment. However, as announced in the preamble and in Article 10 (4), most-favoured-nation treatment shall be applied to the pre-establishment phase pursuant to a supplementary treaty. This construction is an example for a compromise between those parties that wish to suppress national control in the field of the admission of investments and those intending to ensure it. The most-favoured-nation standard is subject to a number of exceptions. According to Article 21, the provisions of the ECT including the most-favoured-nation standard shall not be applicable to taxation matters. Article 24 enlists further general exceptions, which are mostly inspired by concepts developed in international trade law, namely by the catalogue of exceptions stated in Article XX GATT, including measures necessary to protect human, animal or plant life or health (Art. 24 (2) (b) (i)), measures essential to the acquisition or distribution of energy materials in conditions of short supply arising from causes outside the control of the Contracting Party (Art. 24 (2) (b) (ii)), measures designed to benefit investors who are aboriginal people or socially or economically disadvantaged individuals or groups (Art. 24 (2) (b) (iii)), measures for the protection of essential security interests (Art. 24 (3) (a)), measures relating to the implementation of national policies respecting the non-proliferation of nuclear weapons (Article 24 (3) (b)), or measures which the State considers necessary for the maintenance of public order (Article 24 (3) (c)). The most-favoured-nation obligation is also submitted to an exception in Article 24 (4), which states that the requirement shall not oblige the Contracting Parties to extend to investors of another Contracting Party preferential treatment resulting from the State’s membership in a free trade area or customs union or from an international agreement “concerning economic cooperation between states that were constituent parts of the former Union of Soviet Socialist Republics pending the establishment of their mutual economic relations on a definitive basis”. According to Article 10 (10), the most-favoured-nation obligation and the national treatment obligation shall not apply to the protection of intellectual property. This leaves the Contracting States the possibility to maintain existing exemptions to most-favoured-nation and national treatment under existing intellectual property rights agreements.

F. Framework Agreement on the ASEAN Investment Area

The Association of Southeast Asian Nations (ASEAN) is an association for cooperation particularly in the economic sphere among the countries of the South-East Asian region.²²⁰ Its aim is to foster good relations among Member States and within the region, especially in the field of economic development. It was founded on 8 August 1967 by Indonesia, Malaysia, Singapore, Thailand and the Philippines. Members that have hitherto joined the ASEAN are Brunei Darussalam (1984), Vietnam (1992), Myanmar (1997), Laos (1997) and Cambodia (1999). The members of the ASEAN concluded the ASEAN Investment Agreement in 1987, which states in its preamble the goal to stimulate the flow of private investments.²²¹ This agreement was supplemented by the Framework Agreement on the ASEAN Investment Area (AIA), which was signed on 7 October 1998 by all ASEAN members as a free-standing agreement that was not intended to amend the 1987 Agreement. The AIA was the outcome of concerns by ASEAN member states about significantly reduced investments since the Asian financial crisis, which started in 1997. It was implemented in order to promote the inflow of foreign direct investment from ASEAN and non-ASEAN sources by making the region a competitive, open and liberal investment area.²²² It was of particular concern to the Contracting parties to supplement the obligations of the 1987 agreement with further obligations in the field of national treatment and market access.²²³

The most-favoured-nation clause in Article 8 of the Framework Agreement provides:

“(1) Subject to Articles 7 and 9 of this Agreement, each Member State shall accord immediately and unconditionally to investors and investments of another Member State, treatment no less favourable than that it accords to investors and investments

²²⁰ For details on ASEAN see Sucharitkul, *ASEAN Society*, pp. 113 et seq.

²²¹ Agreement among the Governments of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments, 15 Dec 1987, reprinted in 27 ILM 612 (1988). With the accession of further member states, the Agreement was renamed as “ASEAN agreement for the Promotion and Protection of Investments”, see Article 1 of the Protocol of 12 September 1996.

²²² See Art. 3 of the ASEAN Framework Agreement.

²²³ See Art. 7 of the ASEAN Framework Agreement.

of any other Member State with respect to all measures affecting investment including but not limited to the admission, establishment, acquisition, expansion, management, operation and disposition of investments.

(2) In relation to investments falling within the scope of this Agreement, any preferential treatment granted under any existing or future agreements or arrangements to which a Member State is a party shall be extended on the most favoured nation basis to all other Member States.”

Unlike NAFTA and the United States Model BIT, this clause provides no exclusive list of fields of application of the most-favoured-nation clause, but an open definition. It covers both the pre-establishment and the post-establishment phase, referring to the admission, establishment and acquisition of investments. Article 7, which is mentioned in Article 8 (1), deals with the right to entry of investors and the obligation of the State to grant national treatment to investors. However, according to Article 7 (2), Member States are allowed to make exceptions to the obligation to grant market access and national treatment to investments, a right which shall eventually be phased out. Article 9 (1), in departure from the general obligation to accord most-favoured-nation treatment “unconditionally”, introduces an element of reciprocity by providing that in case a member has not made concessions in the field of market access and national treatment according to Article 7, it shall waive its right to such concessions vis-à-vis members that have made such concessions. This requirement of reciprocity ensures that investors cannot rely on the most-favoured-nation clause to claim market access or national treatment.

Article 13 contains general exceptions, which are also applicable to the MFN obligation. According to this provision, measures necessary to protect national security and public morals (a), to protect human, animal or plant life or health (b), to secure compliance with laws or regulations which are not inconsistent with the provisions of the agreement (c) or measures aimed at ensuring the equitable or effective imposition or collection of direct taxes (d) are exempted from the obligations under the agreement.

G. MERCOSUR Investment Protocols

Argentina, Brazil, Paraguay and Uruguay established with the signature of the Treaty of Asunción on 26 March 1991 the “common market of the southern cone” (MERCOSUR). Venezuela acceded to the MERCOSUR in 2006, Bolivia became an accessing member in 2012. The Colonia Protocol for the Promotion and Reciprocal Protection of Investments within MERCOSUR was enacted on 17 January 1994 in order to intensify cooperation and economic integration within the member States. It deals with the treatment of investments originating from the member States of MERCOSUR. In contrast, the Buenos Aires Protocol for the Promotion and Protection of Investments in MERCOSUR from Non-Member Countries, which was enacted on 5 August 1994, aims at the harmonization of legal principles to be applied by the Member States to investment originating from non-Member countries. The Colonia Protocol contains a most-favoured-nation clause in Article 3 (2).²²⁴ Article 3 (3) provides for the non-application of the principle to treatment accorded as the result of an international tax agreement. According to Article 2 (1), the most-favoured-nation standard is also applicable to the admission phase. This approach was not adopted in the Buenos Aires Protocol, where most-favoured-nation treatment is only granted with regard to established investments.²²⁵ The standard is not applicable to treatment granted on account of regional or tax agreements.²²⁶

H. The Draft Multinational Agreement on Investment (MAI)²²⁷

The negotiations on the adoption of a multinational agreement on investment were initiated under the auspices of the OECD in 1995. The aim was to draw for the first time a comprehensive global agreement on foreign investment. Since the standards that were set up in the draft MAI were generally higher than the standards in former agreements, the

²²⁴ Article 3 (2) provides: “Cada Parte Contratante concederá plena protección legal a [las inversiones de inversores de otra Parte Contratante] y les acordará un tratamiento no menos favorable que el otorgado a las inversiones de sus propios inversores nacionales o de inversores de terceros Estados.”

²²⁵ See B-1 together with C-2 of the Buenos Aires Protocol.

²²⁶ C-3 (a) and (b) of the Buenos Aires Protocol.

²²⁷ Art. III (2) of the Draft Consolidated Text for the Multilateral Agreement on Investment, DAF/MAI(98)7/REV1, 22 April 1998.

MAI was not simply a multilateralisation of bilateral investment treaties.²²⁸ It was *inter alia* due to these high standards that were focused on investor protection that in the end of 1998, the OECD announced that negotiations would cease without any final agreement.²²⁹ The most-favoured-nation clause in the draft agreement provided:

“Each Contracting Party shall accord to investors of another Contracting Party and to their investments, treatment no less favourable than the treatment it accords in like circumstances to investors of any other Contracting Party or of a non-Contracting Party, and to the investments of investors of any other Contracting Party or of a non-Contracting Party, with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment, and sale or other disposition of investments.”²³⁰

Like NAFTA and the US model BIT, the draft provides for an exhaustive list of fields of application for the most-favoured-nation clause. Referring *inter alia* to the “establishment” and “acquisition” of an investment, the draft MAI envisaged the applicability of the most-favoured-nation obligation to the pre-admission phase, although this topic had been highly controversial during the negotiations.²³¹ Another controversial topic was the inclusion of exceptions to the substantive standards of the MAI as regards *inter alia* cultural policy, regional agreements, labour and environmental standards.²³²

²²⁸ For example, the Draft MAI contains a very wide definition of investment, extends its protection to the pre-entry phase, contains extensive prohibitions on performance requirements, prohibits direct and indirect expropriation and contains extensive investor-state dispute settlement provisions.

²²⁹ One can name a number of factors that contributed to the failure of the MAI negotiations, *inter alia* the broadness of the substantive standards for investor protection and controversies about exceptions for cultural industries and regional economic integration organizations and about the inclusion of labour and environmental standards. For details see Muchlinski, *The Rise and Fall of the Multilateral Agreement on Investment*, pp. 1039-1048.

²³⁰ Consolidated Text of the MAI, Part III.

²³¹ Muchlinski, *The Rise and Fall of the Multilateral Agreement on Investment*, p. 1043.

²³² Muchlinski, *The Rise and Fall of the Multilateral Agreement on Investment*, pp 1047, 1048.

I. Conclusion

The overview demonstrates that most-favoured-nation clauses in the different bilateral and multilateral investment treaties do not use identical language. Therefore they offer potentially different interpretative options for arbitral tribunals.²³³ One difference between the clauses relates to the broadness of the language used to define the scope of the clause. Some clauses are formulated in a very general way, either without referring to certain fields of application as is the case in the MERCOSUR Protocols or referring broadly to “any measure covered by this Agreement”, like GATS Article II:1. Another category of clauses, like the ones in NAFTA and the U.S. model BIT, contain a closed list of fields of application, while others, like the German Model BIT, the ECT and the ASEAN Framework Agreement, contain a non-exhaustive list. Treaties also differ as to their applicability to the pre-establishment phase. While NAFTA and the U.S. model BIT reflect an approach which aims at investment liberalisation by granting investors the right to market access, most BITs restrict their protection to established investments, following an investment control approach in order to regulate the entry of foreign investors in accordance with national laws and regulations. In case BITs do not grant the right to market access, neither does the relevant most-favoured-nation clause extend to the pre-establishment phase. A third difference is the scope of exceptions applicable to the most-favoured-nation standard. Virtually all bilateral investment treaties include exceptions from most-favoured-nation treatment which are either of a general nature, applying to all provisions of the BIT, or applicable specifically to the most-favoured-nation standard. Most-favoured-nation clauses applicable only in the post-establishment phase are usually subject to at least two exceptions, one relating to membership in regional economic integration organizations, and the other relating to advantages offered to a third country under a double taxation agreement. Under the latter treaties, the contracting parties waive their right to tax investors located in their territory on condition that the other party undertakes the same commitment. Taxation agreements are therefore concluded in order to avoid

²³³ See Anzilotti, Cours de droit international, vol. I, p. 438: “[...] il n’existe pas *une clause* de la nation la plus favorisée; il existe autant de stipulations distinctes qu’il y a de traités qui la contiennent, de sorte que toute question relative à la nature et aux effets de la clause est avant tout une question d’interprétation d’une clause donnée dans un traité détermine.”

double taxation on a reciprocal basis. Exceptions relating to membership in customs and economic unions, common markets and free trade areas provide a relatively large gateway for preferential treatment.²³⁴ Some U.S. and Canadian BITs also contain limitations that preclude coverage of the advantages accorded by virtue of multilateral agreements or negotiations such as the GATT framework.²³⁵ The purpose of these exceptions is to allow members of a regional economic integration organization to advance with their internal investment liberalization at a faster pace than that to which non-members have agreed and are included in order to avoid free-riding behaviour. MFN clauses which are also applicable in the pre-entry phase usually additionally contain an annex in which whole sectors or economic activities may be exempted from the protection of the BIT.²³⁶ Examples for this technique are provided in the GATS and the NAFTA. However, while in the GATS, no further exceptions can be added after the entry into force of the agreement, NAFTA is based on the consideration that there may be a need to make an MFN exception for possible measures in the future which cannot be foreseen at the moment. Thus, countries are allowed to take any kind of discriminatory measure in the future in the sectors that are set out in a specific schedule.²³⁷ Moreover, BITs contain various general exceptions concerning different national public policy matters, whose rationale is to release a contracting party from the obligations of the BIT in cases where compliance would be incompatible with key policy objectives explicitly identified in the treaty. What all clauses have in common, however, is their reference to “treatment” that shall be no less favourable than

²³⁴ Art. 7 of the 1992 Netherlands-Hong Kong BIT; Art. IV of the 1990 Canada-Poland BIT; Art. IV of the 1994 France-Vietnam BIT; Art. 4 (3) of the 2000 Ghana-India BIT; Art. 3 (3) of the 2005 German Model BIT;

²³⁵ The Protocol to the US-Russia BIT provides in Article 6 that “the exclusion from the most-favored-nation treatment obligation shall apply also to advantages accorded by the United States by virtue of its binding obligations under any multilateral international agreement concluded under the framework of the GATT after the signature of this Treaty.” See also Art. XII (2b) US-Poland BIT (1990); Article G-8 Canada-Chile FTA.

²³⁶ In Article 2 of the Annex to the 1997 US-Jordan BIT, the United States reserved their right to exclude from most-favoured-nation treatment “fisheries; air and maritime transports, and related activities; banking, insurance, securities, and other financial services; and minerals leases on government land”. Similar provisions can be found in other BITs concluded by the United States, for example in Article 4 of the Protocol to the 1991 US-Argentina BIT; Articles 2 and 3 of the Annex to the 1995 US-Nicaragua BIT; Articles 2 and 4 of the Annex to the 1999 US-El Salvador BIT (1999); Annex 8 A of the US-Singapore FTA.

²³⁷ NAFTA Article 1108 (3) provides: “Articles 1102, 1103, 1106 and 1107 do not apply to any measure that a Party *adopts or maintains* with respect to sectors, subsectors or activities, as set out in its Schedule to Annex II.” (Italics added by author)

that accorded to third-State investors. Interpretation of that term is therefore crucial for the determination of the scope of MFN clauses.

Part IV: Application of the Most-Favoured-Nation Clause to Substantive Treaty Standards

In accordance with their economic rationale to establish equal conditions of competition among investors from different home countries, MFN clauses extend more favourable substantive rights that host States offer to investors of third country nationals to those investors benefitting from the MFN clause. These substantive rights encompass on the one hand unilateral State measures, policies or legislation and on the other substantive treatment standards agreed upon in third-party treaties on a bilateral or multilateral basis. BITs typically contain several substantive treatment standards, most prominently a provision regulating expropriation, an obligation to accord fair and equitable treatment and the prohibition of discrimination.²³⁸ The use of MFN clauses to import more favourable substantive provisions from third-country BITs has continuously been endorsed by investment tribunals. Although BITs concluded by one State are often based on a model BIT and therefore do not differ to a great extent, there are instances where treaties are not completely alike due to the possibility of a change in policy or different negotiating positions.²³⁹ This is even more so with regard to BITs concluded by mainly capital-importing countries since these States conclude treaties on the basis of different model BITs, depending on the treaty partner. The differences in the substantive provisions of treaties open up a field of application for MFN clauses.

This chapter contains an overview of the case law of investment tribunals dealing with the applicability of MFN clauses to substantive treaty provisions. It demonstrates that tribunals have uniformly affirmed the application of MFN clauses to such provisions. This outcome is endorsed by the wording and the functions of MFN clauses. Moreover, the chapter gives an overview of substantive treaty standards which may also potentially be

²³⁸ For details about the content of BITs see Jacob, BITs, in: Wolfrum (ed.), *Encyclopedia of Public International Law*, vol. , pp..

²³⁹ See Part VI B.I.3.f.

incorporated by MFN clauses, thus illustrating a considerable potential of harmonisation of substantive investment protection on the highest possible level.

A. Jurisprudence by Investment Arbitration Tribunals

I. Invocation of a more Favourable Fair and Equitable Treatment Clause

1. Introduction to the Fair and Equitable Treatment Standard

The obligation of host countries to accord fair and equitable treatment is a widespread principle in investment treaties. Tribunals have identified numerous elements encompassed in the fair and equitable treatment standard including transparency²⁴⁰, the protection of legitimate expectations²⁴¹, stability and predictability of the legal and business environment²⁴², procedural propriety and due process requirements prohibiting *inter alia* denial of justice²⁴³, arbitrariness²⁴⁴, good faith²⁴⁵ and freedom from coercion and harassment^{246 247}.

²⁴⁰ *Tecmed S.A. v. Mexico*, Award, 29 May 2003, ICSID Case No. ARB (AF)/00/2, para. 154; *MTD v. Chile*, Award, 25 May 2004, ICSID Case No. ARB/01/7, paras 114, 115; *Metalclad v. Mexico*, Award, 30 August 2000, ICSID Case No. ARB(AF)/97/1, para. 99.

²⁴¹ See eg *Saluka v. The Czech Republic*, Partial Award, 17 March 2006, UNCITRAL arbitration (Permanent Court of Arbitration), para. 302; *Metalclad v. Mexico*, Award, 30 August 2000, ICSID Case No. ARB(AF)/97/1, paras 76, 99; *Maffezini v. Argentina*, Award, para. 83; *Tecmed S.A. v. Mexico*, Award, 29 May 2003, ICSID Case No. ARB (AF)/00/2, para 154; *MTD v. Chile*, Award, 25 May 2004, ICSID Case No. ARB/01/7, paras 114, 115.

²⁴² *CMS v. Argentina*, Award, 12 May 2005, ICSID Case No. ARB/01/8, para. 274.

²⁴³ *Mondev v. United States of America*, Award, 11 October 2002, ICSID Case No. ARB(AF)/99/2, para. 126; *Waste Management v. Mexico*, Award, 30 April 2004, ICSID Case No. ARB(AF)/00/3, para. 98.

²⁴⁴ *Loewen v. United States of America*, Award, 26 June 2003, ICSID Case No. ARB(AF)/98/3, para. 132; *Waste Management v. Mexico*, Award, 30 April 2004, ICSID Case No. ARB(AF)/00/3, para. 98.

²⁴⁵ *Tecmed S.A. v. Mexico*, Award, 29 May 2003, ICSID Case No. ARB (AF)/00/2, para. 153; *Genin v. Estonia*, Award, 25 June 2001, Case No. ARB/99/2, para. 371.

²⁴⁶ *Pope and Talbot Inc. v. Canada*, Award on the Merits of Phase 2, 10 April 2001, para. 181; *Tecmed S.A. v. Mexico*, Award, 29 May 2003, ICSID Case No. ARB (AF)/00/2, para. 163.

²⁴⁷ For details on the fair and equitable treatment standard see UNCTAD, Fair and equitable treatment; Mayeda, Playing Fair: The Meaning of Fair and Equitable Treatment in Bilateral Investment Treaties; Schreuer, Fair and Equitable Treatment in Arbitral Practice; Westcott, Recent Practice on Fair and Equitable Treatment; Behrens, Towards the Constitutionalization of International Investment Protection, pp. 169-176; Schill, „Fair and Equitable Treatment“ as an Embodiment of the Rule of Law, in Hofmann/ Tams (eds), The International Convention on the Settlement of Investment Disputes, pp. 41-55. According to Schill, the fair and equitable treatment standard can be interpreted as an embodiment of the rule of law encompassing the requirement of stability, predictability and consistency of the legal framework, the principle of legality, the protection of investor confidence or legitimate expectations, procedural due process and de-

Discussion on the fair and equitable treatment standard has mainly focused on whether the treatment required should be measured against the customary international law minimum standard or whether the standard is an autonomous self-contained concept.²⁴⁸ Depending on whether one accepts that certain fair and equitable treatment clauses may contain elements going beyond what is required by the customary international law minimum standard, there may or may not be room for the invocation of more favourable fair and equitable treatment clauses in conjunction with MFN clauses. The possibility to construe the fair and equitable treatment standard as going beyond the international minimum standard of treatment depends on the formulation of the standard²⁴⁹, which differs in particular with regard to the inclusion or non-inclusion of a reference to international law, and in case there is such a reference, with regard to the relationship between the fair and equitable treatment clause and international law as expressed in the wording of the clause. For disputes arising under NAFTA, the issue whether the fair and equitable treatment standard is independent from the minimum standard of customary international law has been resolved in the binding interpretation of the Free Trade Commission (FTC)²⁵⁰ of July 21, 2001. The note clarified that the fair and equitable treatment standard of NAFTA

nial of justice, substantive due process or protection against discrimination and arbitrariness, the requirement of transparency and the requirement of reasonableness and proportionality.

²⁴⁸ Equating the fair and equitable treatment standard with the minimum standard required by international law means that its scope depends on the existing body of customary international law. The content of that minimum standard was first described in a ruling of the Mexico-United States General Claims Commission in the case of *Neer v. Mexico*. According to this decision, a violation of the minimum standard of treatment of aliens under international customary law occurs only in cases where the treatment amounts to gross misconduct, *i.e.* “to an outrage, to bad faith, to wilful 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 v. Mexico*, R.I.A.A., vol. IV, pp. 61, 62. However, it has been recognised by arbitral tribunals that the content of the minimum standard is not limited to the interpretation given to it in the early 20th century in the context of the *Neer case* but is constantly in a process of development. See *Pope & Talbot v. Canada*, Award on Damages, paras 58–61; *Mondev v. United States of America*, Award, 11 October 2002, ICSID Case No. ARB(AF)/99/2, paras 116, 123; *ADF v. U.S.*, Award, 9 January 2003, ICSID Case No. ARB(AF)/00/1, para. 179.

²⁴⁹ See *Saluka v. The Czech Republic*, Partial Award, 17 March 2006, UNCITRAL arbitration (Permanent Court of Arbitration), para. 294.

²⁵⁰ The Free Trade Commission is established under NAFTA Article 2001 (1) and consists of the cabinet-level representatives of the three Contracting Parties of NAFTA. Its interpretations of NAFTA Chapter 11 provisions are binding on NAFTA tribunals, NAFTA Article 1131 (2).

did not go beyond the international minimum standard²⁵¹, rejecting the interpretation given by the *Pope & Talbot* Tribunal, which had interpreted the clause as covering a fairness requirement going beyond the international law minimum standard²⁵².

While the interpretation of the FTC is binding on the NAFTA Contracting Parties, it is not necessarily valid for other investment treaties. Moreover, there are two features in which NAFTA Article 1105 deviates from most other investment treaties. First its heading is not “Fair and Equitable Treatment” but “Minimum Standard of Treatment”, which explicitly refers to the minimum standard of customary international law, and second it requires to accord to investments treatment “in accordance with international law, including fair and equitable treatment”, which suggests that the fair and equitable treatment standard is a subsidiary element of customary international law.²⁵³ In reaction to the *Pope & Talbot* case and the FTC’s Note on Interpretation, several recent BITs have adopted a more precise approach to the fair and equitable treatment standard, explicitly linking the fair and equitable treatment standard to the minimum standard which is part of customary international law.²⁵⁴ In contrast, the majority of fair and equitable treatment clauses does not make reference to the minimum standard of international law.²⁵⁵ In that case, the content of the standard leaves room for autonomous interpretation, leaving the possibility to pro-

²⁵¹ According to the FTC interpretation, “Article 1105 (1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another party. The [concept] of ‘fair and equitable treatment’ [...] do[es] not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105 (1).” NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 provisions of July 31, 2001, available at < <http://www.worldtradelaw.net/nafta/chap11interp.pdf>>.

²⁵² *Pope and Talbot Inc. v. Canada*, Award on the Merits of Phase 2, 10 April 2001, para. 113.

²⁵³ Article 1105 NAFTA provides that “Each party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.”

²⁵⁴ For example, the Canadian Model BIT provides in Article 5 (2): “The concepts of ‘fair and equitable treatment’ and ‘full protection and security’ [...] do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.” Similarly, the US Model BIT in its Article 5 (2), second sentence and the AUSFTA in its Article 11.5 (2), first sentence provide: “The concepts of ‘fair and equitable treatment’ and ‘full protection and security’ [...] do not require treatment in addition to or beyond that which is required by [the customary international law minimum standard] and do not create additional substantive rights.” Compare in contrast the 1994 US Model BIT and the 1991 Argentina-US BIT, which contain broader formulations.

²⁵⁵ Coe, Fair and equitable treatment under NAFTA’s investment chapter, p. 18.

hibit administrative measures that would not necessarily be illegal under customary international law.²⁵⁶

Whether fair and equitable treatment clauses which do not make reference to international law can be interpreted autonomously, i.e. independently from the international minimum standard, is highly disputed. While some affirm the possibility and thus an opportunity to apply the principle of most-favoured-nation treatment to import more favourable fair and equitable treatment clauses,²⁵⁷ other tribunals have rejected the inclusion of fairness requirements beyond the international minimum standard despite variations in the language.²⁵⁸ Under the narrower interpretation of the fair and equitable treatment standard, there is no room for application of the MFN principle.

Comparable to the fair and equitable treatment standard, the full protection and security standard, which is a common standard in bilateral investment treaties and dates back to Treaties of Friendship, Commerce and Navigation, raises the question whether it only provides an obligation for the host state to comply with the customary international law minimum standard, or whether it imposes an obligation going beyond the minimum standard. Some BITs expressly provide that full protection and security shall be enjoyed

²⁵⁶ The *Saluka* tribunal came to that conclusion with regard to a clause that did not contain a reference to international law (*Saluka v. The Czech Republic*, Partial Award, 17 March 2006, UNCITRAL arbitration (Permanent Court of Arbitration), para. 292). With regard to a series of British BITs that contained a fair and equitable treatment clause (with no reference to international law), Mann wrote: “[U]nfair and inequitable treatment is a much wider conception [than customary international law] which may readily include such administrative measures [...] as are not plainly illegal in the accepted sense of international law. [...] The terms “fair and equitable treatment” envisage conduct which goes far beyond the minimum standard and afford protection to a greater extent and according to a much more objective standard than any previously employed form of words. [...] The terms are to be understood and applied independently and autonomously.” (Mann in 52 BYIL, 243, 244) See also Dolzer/ Stevens, *Bilateral Investment Treaties*, p. 60; Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, p. 144; Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, p. 364; Westcott, *Recent Practice on Fair and Equitable Treatment*, p. 429.

²⁵⁷ *Pope and Talbot Inc. v. Canada*, Award on the Merits of Phase 2, 10 April 2001, para. 113. See also Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, p. 149; Westcott, *Recent Practice on Fair and Equitable Treatment*, p. 430.

²⁵⁸ *ADF v. U.S.*, Award, 9 January 2003, ICSID Case No. ARB(AF)/00/1, para. 194; *Rumeli v. Kazakhstan*, Award, 29 July 2008, ICSID Case No. ARB/05/16, para. 611; *Azurix v. Argentina*, Award, 14 July 2006, ICSID Case No. ARB/01/12, para. 361; *CMS v. Argentina*, Award, 12 May 2005, ICSID Case No. ARB/01/8, para. 284. See also Orakhelashvili, *The normative basis of “fair and equitable treatment”*, p. 105.

in a manner consistent with international law.²⁵⁹ A number of BITs combine the full protection and security standard with the fair and equitable treatment standard, which suggests that both expressions contemplate compatible standards of treatment.²⁶⁰ The full protection and security standard has been interpreted by the tribunal in *AAPL v. Sri Lanka* as adopting the customary international law standard²⁶¹, according to which State responsibility generally arises when a State has failed to apply due diligence in the protection of foreigners against violation of their rights and interests²⁶², as opposed to creating strict liability, under which States are under an absolute obligation to guarantee that no damages will be suffered²⁶³. Yet the tribunal left open the possibility that the full protection and security standard could refer to a standard higher than the international law minimum standard.²⁶⁴

2. Case Law

a. Pope & Talbot, Inc. v. Canada

In *Pope & Talbot v. Canada*, the issue of the scope of NAFTA's MFN clause became relevant within the Tribunal's determination whether there was a violation of the fair and equitable treatment clause of the agreement.²⁶⁵ The Tribunal rejected the Canadian ap-

²⁵⁹ See, e.g., Article 2 (2) of the United States-Panama BIT.

²⁶⁰ See, e.g., Article 2 (2) of the United Kingdom-Sri Lanka BIT.

²⁶¹ *AAPL v. Sri Lanka*, Award, 27 June 1990, ICSID Case No. ARB/87/3, paras 48-53. See also *ELSI case*, Judgment of 20 July 1989, ICJ reports 1989, para. 108 (referring however to a "constant protection and security" standard, which emphasizes rather the absence of change in the level of protection rather than the extent of protection). See also Dolzer/ Stevens, *Bilateral Investment Treaties*, p. 61; Park, *NAFTA Chapter 11*, in: Kaufmann-Kohler/ Stucki (eds), *Investment Treaties and Arbitration*, p. 19; Vasciannie, *Bilateral Investment Treaties and Civil Strife*, p. 342.

²⁶² Dahm/Delbrück/Wolfrum, *Völkerrecht*, vol. I/3, p. 911; Brownlie, *System of the Law of Nations: State Responsibility*, Part I, pp. 161, 162.

²⁶³ *ELSI case*, Judgment of 20 July 1989, ICJ reports 1989, para. 108.

²⁶⁴ *AAPL v. Sri Lanka*, Award, 27 June 1990, ICSID Case No. ARB/87/3, para. 50.

²⁶⁵ The case concerned the US investor Pope & Talbot Inc. that operated softwood lumber mills in British Columbia. On March 25, 1999, Pope & Talbot filed a claim alleging that Canada's implementation of the United States-Canada Softwood Lumber Agreement regulating Canadian exports of lumber violated Canada's obligations under Chapter Eleven of the NAFTA. The NAFTA tribunal dismissed a series of the company's claims, but found that Canada had violated Pope & Talbot's right to fair and equitable treatment under NAFTA Article 1105 by its use of the so-called verification review episode. The case consists of a series of awards, with the principal award for the MFN question being *Pope and Talbot Inc. v. Canada*, Award on the Merits of Phase 2, 10 April 2001. For an overview of the awards see Gantz, *Pope & Talbot Inc. v. Canada*, pp. 937-950.

proach according to which the fair and equitable treatment standard did not go beyond traditional customary international law principles but adopted an additive approach, interpreting the clause so as to cover certain fairness requirements in addition to the international law minimum standard.²⁶⁶ In order to support its view, the Tribunal cited NAFTA's MFN clause, arguing that in light of the fact that certain BITs concluded by the parties to NAFTA included in their fair and equitable treatment clauses fairness elements going beyond the international law minimum standard²⁶⁷, a right under NAFTA to object to laws, regulations and administrative measures which would be more limited than that of third-state nationals that have concluded an investment treaty with a NAFTA party would lead to a violation of the most-favoured-nation standard.²⁶⁸ Assuming that NAFTA investors could only claim a violation of NAFTA's fair and equitable treatment standard in the case of an "egregious" violation, they could simply claim a violation of the most-favoured-nation standard, which would lead to the "absurd result" that what was denied under Article 1105 could be claimed under Article 1103.²⁶⁹ The decision was in the end based on the tribunal's finding that the host State's conduct had already violated the more restrictive interpretation of fair and equitable treatment.²⁷⁰ However, the Tribunal's argumentation indicates that the arbitrators took for granted the applicability of the MFN clause to the fair and equitable treatment standard.

b. *ADF Group Inc. v. United States*²⁷¹

²⁶⁶ *Pope and Talbot Inc. v. Canada*, Award on the Merits of Phase 2, 10 April 2001, paras 105-118. This approach was rejected by the NAFTA Free Trade Commission in its Notes of Interpretation of Certain Chapter 11 Provisions (part B) of 31 July 2001.

²⁶⁷ The Tribunal cited as an example the fair and equitable treatment clause of the 1987 United States Model BIT which provided in Art. II.2 that "Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law."

²⁶⁸ *Pope and Talbot Inc. v. Canada*, Award on the Merits of Phase 2, 10 April 2001, para. 117.

²⁶⁹ *Pope and Talbot Inc. v. Canada*, Award on the Merits of Phase 2, 10 April 2001, para. 118.

²⁷⁰ *Pope and Talbot Inc. v. Canada*, Award in Respect of Damages, 31 May 2002, para. 66.

²⁷¹ The facts of the case related to the reconstruction project of a heavily-used highway junction. The investor, a Canadian company, was the supplier of "structural steel components" for the bridges. The Virginia Department of Transportation informed the investor that its intention to use US steel, but to undertake the fabrication in Canada, was not in compliance with the contract, which provided that "[...] all iron and steel products [...] shall be produced in the United States of America [...]". According to federal law, federal aid for the project would therefore be denied. As a consequence, the investor had the fabricating work

In this case, the Claimant contended that it could invoke by virtue of NAFTA's MFN clause fair and equitable treatment clauses from third-party BITs that allegedly contained a more favourable fair and equitable treatment standard. The Claimant originally claimed a violation of the national treatment and the fair and equitable treatment and full protection and security standards. However, when the NAFTA Free Trade Commission issued its narrow interpretation of Article 1105, stating that the fair and equitable treatment standard only prohibits treatment that is not in accordance with customary international law, the Claimant focused on the most-favoured-nation standard.²⁷² The investor relied on Article II (3) of the United States-Albania BIT, which allegedly incorporated a fair and equitable treatment standard going beyond the customary international law minimum standard.²⁷³ The Tribunal dismissed the claim for three reasons. First it held that the investor had not persuasively shown the existence of an autonomous fair and equitable treatment standard independent and distinct from customary international law. Second, even if there was such a standard, the investor had not shown that it had been breached. And lastly, according to NAFTA Article 1108 (7) (a) the case did not fall under the most-favoured-nation standard since the case involved government procurement.²⁷⁴ The tribu-

done by United States sub-contractors, which significantly increased the project's costs. The investor initiated proceedings and challenged the US statute which provided that no aids by the federal government were to be granted unless the used materials were produced in the US, the US interpretation of the statute and the state contract.

²⁷² The MFN argument was not included in the notice of arbitration of 19 July 2000, but was only added in the investor's submission concerning the FTC note on interpretation of 10 September 2001, after the Merits Award in *Pope and Talbot* of 10 April 2001 and the FTC interpretation of 31 July 2001.

²⁷³ Article II (3) provided:

"(a) Each party shall at all times accord to covered investments fair and equitable treatment and full protection and security and shall in no case accord treatment less favorable than that required by international law. (b) Neither party shall in any way impair by unreasonable and discriminatory measures the management, conduct, operation, and sale or other disposition of covered investments."

The Claimant also relied on Article II (3) (b) of the United States-Estonia BIT, which contained a similar provision as Article II (3) (b) of the United States-Albania BIT.

In contrast, the Respondent government held that the third-party treaties did not contain a more favourable treatment standard since the fair and equitable treatment standard in these treaties was also based on the customary international law minimum standard for the treatment of aliens. It referred in this respect to the Department of State's letters of submittal of the US-Albania and US Estonia BITs, which provided that the relevant paragraphs set out a minimum standard of treatment based on customary international law (See *ADF v. U.S.*, US Rejoinder Memorial of 29 March 2002, ICSID Case No. ARB(AF)/00/1).

²⁷⁴ The Tribunal argued in *ADF v. U.S.*, Award, 9 January 2003, ICSID Case No. ARB(AF)/00/1, paras 194 and 196: "[The investor's reading of the relevant clauses of the treaties with Albania and Estonia] is that the 'fair and equitable treatment' and 'full protection and security' clauses of the two treaties estab-

nal did however not express any doubts as regards the general applicability of the most-favoured-nation clause to fair and equitable treatment standards in BITs which offer different levels of protection.

c. *Rumeli Telekom A.S. v. Republic of Kazakhstan*

In this case, the Tribunal held Kazakhstan liable for a violation of the fair and equitable treatment standard, basing its finding on the MFN clause of the basic treaty in conjunction with the fair and equitable treatment clause that it incorporated from the UK-Kazakhstan BIT.²⁷⁵ This importation of the fair and equitable treatment clause was not disputed by the parties, even though the BIT between Turkey and Kazakhstan did not at all contain such a standard. The Tribunal thus acquiesced application of the MFN clause to treatment standards to all forms of substantive benefits as long as they are connected with investment protection.

3. Assessment

These cases show that tribunals have accepted the applicability of most-favoured-nation clauses to fair and equitable treatment clauses. While the *Rumeli* case dealt with the incorporation of a fair and equitable treatment clause where the basic BIT did not contain such clause at all, the *Pope and Talbot* and *ADF* cases concerned the invocation of allegedly more favourable MFN standards. The Tribunal in *Rumeli Telekom A.S. v. Republic of Kazakhstan* based its decision on the operation of the MFN clause in the relevant BIT. It held that Kazakhstan was bound by the fair and equitable treatment clause from a third-party BIT, which it incorporated through the MFN clause. Both the *Pope and Talbot* and the *ADF* Tribunals did not finally base their decision on the application of the clause.

lish broad, normative standards of treatment distinct and separate from the specific requirements of the customary international law minimum standard of treatment. We have, however, already concluded that the Investor has not been able persuasively to document the existence of such autonomous standards, and that even if the Tribunal assumes hypothetically the existence thereof, the Investor has not shown that the U.S. measures are reasonably characterized as in breach of such standards. [...] [I]n any event, the Respondent is entitled to the defense provided by NAFTA Article 1108 (7) (a) which [...] excludes the application of Article 1103 in a case (like the instant one) involving governmental procurement by a Party.”

²⁷⁵ *Rumeli v. Kazakhstan*, Award, 29 July 2008, ICSID Case No. ARB/05/16, paras 575, 609-619.

Moreover, it seems questionable whether there is in fact a fair and equitable treatment standard going beyond what is required by customary international law.

The *Pope and Talbot* and *ADF* cases also bring to the fore the issue of applicability of the most-favoured-nation principle to a certain treaty provision where the State parties have given a clear and detailed expression of their intention about the scope of that provision. In the *Pope & Talbot* and the *ADF* cases, the notes on interpretation of the Free Trade Commission give a clear indication of the parties' intention to exclude from the NAFTA's fair and equitable treatment standard the protection of standards going beyond the customary international law minimum standard. However, the FTC interpretation only states that the breach of a standard going beyond the customary international law minimum standard does not constitute a violation of NAFTA's fair and equitable treatment standard. It does however not express an intention to limit the scope of the most-favoured-nation clause so as to exclude its application to a more favourable fair and equitable treatment clause. The decisions thus underline that the fact that specific provisions embody a specific party intention does not exclude the operation of the most-favoured-nation clause.²⁷⁶ This result is not changed by the fact that a certain provision is subject to interpretation by the Contracting parties subsequent to the ratification of the treaty. It can be said of all provisions in an investment treaty that they are the expression of a certain party intention, and it is the function of a most-favoured-nation clause to eliminate specifically negotiated provisions that are discriminatory towards certain investors. Therefore investors protected by NAFTA can rely on more favourable fair and equitable treatment standards in third-party investment treaties in spite of the FTC interpretation. In case the parties to the NAFTA want to evade this result, they would have to issue a note on interpretation concerning NAFTA's MFN clause, or to assure not to grant a more favourable standard to other treaty partners, for example by agreeing on notes of interpretation concerning the relevant fair and equitable treatment clauses with these treaty partners as well.

²⁷⁶ See above, Part VI B.I.3.e. The applicability of the most-favoured-nation principle to the fair and equitable treatment standard in spite of the NAFTA FTC interpretation was asserted by the Claimants in *ADF v. U.S.*, Investor's reply to the U.S. counter-memorial on competence and liability, 28 January 2002, ICSID Case No. ARB(AF)/00/1, para. 221, and not rejected by the tribunal.

II. Invalidation of a Non-Precluded Measures Clause

1. Introduction to Non-Precluded Measures Provisions

Non-precluded measures provisions exempt measures adopted for the specified permissible objectives in exceptional circumstances from some or all obligations under the BIT.²⁷⁷ Such objectives include security interests, international peace and security, public order, public health and public morality. Precluding the applicability of the specified obligations of the BIT to acts that fall within its scope, a non-precluded measures clause provides States with a legal mechanism to regulate and control the risk of investment tribunals reviewing core State policies in exceptional circumstances and times of crisis.²⁷⁸ In case of lack of such legal mechanism in a treaty, States only have the option to refer to the necessity exception recognized under customary international law,²⁷⁹ which is subject to conditions not necessarily congruent with those established in a necessity clause included in a treaty.²⁸⁰ Apart from the varying conditions for the applicability of either an emergency

²⁷⁷ A prominent non-precluded measures clause is Article XXI (b) of the GATT, which provides that “[n]othing in this Agreement shall be construed [...] to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests.” The wording of the clause leaves no doubt that the state has the right to determine whether its essential security interests require protection (WTO Commentary).

²⁷⁸ The term of essential security interests within the meaning of Article XI of the Argentina-United States BIT covers also economic emergencies (*CMS v. Argentina*, Award, 12 May 2005, ICSID Case No. ARB/01/8, paras 359, 360; *LG&E v. Argentina*, Decision on Liability, 3 October 2006, ICSID Case No. ARB/02/1, paras 226, 229). The applicability of the customary international law principle of necessity to extreme financial distress was not accepted in *Enron v. Argentina*, Award, 22 May 2007, ICSID Case No. ARB/01/3, paras 341, 342.

²⁷⁹ Necessity has been recognized as part of customary international law in the *Gabčíkovo-Nagymaros case* (Judgment of 25 September 1997, ICJ Reports 1997, p. 40, para. 51), and in the Advisory Opinion on *the legal consequences of the construction of a wall in the occupied palestinian territory* (9 July 2004, ICJ Reports 2004, pp. 194, 195, para. 140). Article 25 of the ILC Articles on State Responsibility provides:

“(1) Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) is the only means for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

(2) In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if (a) the international obligation in question excludes the possibility of invoking necessity, or (b) the State has contributed to the situation of necessity.”

²⁸⁰ Such congruence was suggested in *CMS v. Argentina*, where the tribunal used the criteria of customary international law to decide on a violation of the emergency clause of the treaty (Award, 12 May 2005, ICSID Case No. ARB/01/8, paras 353, 357) and in *Sempra v. Argentina*, Award, 28 September 2007, ICSID Case No. ARB/02/16, para. 376. For the rejection of this position see *CMS v. Argentina*, Decision

clause or the customary international law necessity principle, the consequences as regards the payment of compensation are different. If emergency clauses such as Article XI of the United States-Argentina BIT, which as a primary rule of responsibility exclude the applicability of substantive provisions of a BIT, are applicable, there is no violation of the treaty and therefore no right to compensation. In contrast, in case of necessity under customary international law, compensation is at least not excluded.²⁸¹ Thus, the existence of a non-precluded measures clause in a BIT can create less favourable conditions for the investor.

Moreover, among the BITs containing non-precluded measures clauses, there are differences as to the question whether the clause is self-judging or not. While in the case of non-self-judging clauses, it is for tribunals to determine whether the conditions of the clause are fulfilled, in the case of self-judging clauses the question of whether the clause's invocation is legally justified is removed from review by other treaty parties as well as third-party dispute settlers. In that case, the State's independent and unilateral evaluation only remains subject to a good faith review²⁸², while the standard of review as regards non-self-judging non-precluded measures clauses is higher.²⁸³ As an example for a self-judging clause, the Protocol to the US-Russia BIT declares that the necessity clause of the BIT shall be considered self-judging.²⁸⁴ In contrast, the Argentina-U.S. BIT, which was at issue in the CMS case, contains a non-self-judging non-precluded measures clause in Article XI.²⁸⁵

on Annulment, 25 September 2007, ICSID Case No. ARB/01/8 (Annulment Proceedings), paras 128-135. The tribunal referred to the emergency clause in Article XI of the Argentina-US BIT, which it distinguished from the customary law principle *inter alia* on the ground that necessity under customary international law as described by ILC Article 25 was not a primary but a secondary rule of responsibility and which it regarded as *lex specialis* to the customary international law necessity principle. For the distinction between primary and secondary rules of responsibility see the Gabčíkovo-Nagymaros case, Judgment of 25 September 1997, ICJ Reports 1997, pp. 38, 39, para. 47.

²⁸¹ See Article 27 of the ILC Draft Articles on State Responsibility.

²⁸² Burke-White/ von Staden, Investment Protection in Extraordinary Times, pp. 376-381.

²⁸³ For the suggestion to adopt the margin of appreciation doctrine from the ECtHR, Burke-White/ von Staden, Investment Protection in Extraordinary Times, pp. 370-376.

²⁸⁴ The Protocol to the US-Russia BIT, para. 8 provides: With respect to Article X, paragraph 1, the Parties confirm their mutual understanding that whether a measure is undertaken by a Party to protect its essential security interests is self-judging.

²⁸⁵ *CMS v. Argentina*, Award, 12 May 2005, ICSID Case No. ARB/01/8, para. 373; *Sempra v. Argentina*, Award, 28 September 2007, ICSID Case No. ARB/02/16, para. 374; *Enron v. Argentina*, Award, 22

2. Case Law

The issue of a non-precluded measures clause was dealt with in the case of *CMS v. Argentina*²⁸⁶, where the Tribunal was confronted with the question whether an MFN clause can serve to invalidate a necessity clause in the basic treaty which is disadvantageous for the investor. Article XI of the Argentina-U.S. investment treaty contained a necessity clause providing that

“This treaty shall not preclude the application by either party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.”

The Claimant argued that since there were third-party BITs that were not subject to an emergency clause comparable to Article XI, the Claimant was entitled to the better treatment resulting from the absence of such provisions by operation of the MFN clauses in Articles II (1)²⁸⁷ and IV (3)²⁸⁸ of the BIT. Since the tribunal did not qualify the situation prevailing in Argentina between 2001 and 2003 as one envisaged under Article XI and rejected the claim of necessity²⁸⁹, the invocation of allegedly more favourable provisions

May 2007, ICSID Case No. ARB/01/3, para. 337; *LG&E v. Argentina*, Decision on Liability, 3 October 2006, ICSID Case No. ARB/02/1, para. 212.

²⁸⁶ In 2001 and 2002, Argentina adopted a series of emergency measures as a response to a severe economic crisis. CMS argued that it had suffered severe losses attributable to these actions of the Argentine government. The Tribunal dismissed the investor’s claim for expropriation. However, it affirmed a violation of the fair and equitable treatment standard, given that Argentina had frustrated the legitimate expectations of the investor and that it could not invoke the state of necessity. It awarded \$ 133 million of compensation.

²⁸⁷ Art. II (1) of the United-States-Argentina BIT provides: “Each party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the more favorable [...]”

²⁸⁸ Art. IV (3) of the United-States-Argentina BIT provides: “Nationals or companies of either party whose investments suffer losses in the territory of the other party owing to [...] state of national emergency [...] shall be accorded treatment by such other party no less favorable than that accorded to its own nationals or companies or to nationals or companies of any third country [...]”

²⁸⁹ *CMS v. Argentina*, Award, 12 May 2005, ICSID Case No. ARB/01/8, para. 356. In contrast, the tribunal in *LG&E v. Argentina* affirmed that the situation in Argentina from 2001 to 2003 amounted to a state of necessity under customary international law and qualified it as an economic emergency under Arti-

from third-party BITs was not relevant. Nevertheless, the tribunal rejected the application of the most-favoured-nation clause on the ground that beneficiary silence in third-party treaties could not be invoked. It held:

“Although the MFNC contained in the treaty has also been invoked by the Claimant because other treaties done by Argentina do not contain a provision similar to that of Article XI, the Tribunal is not convinced that the clause has any role to play in this case. Thus, had other Article XI type clauses envisioned in those treaties a treatment more favorable to the investor, the argument about the operation of the MFNC might have been made. However, the mere absence of such provision in other treaties does not lend support to this argument, which would in any event fail under the *ejusdem generis* rule [...]”.²⁹⁰

3. Assessment

The Tribunal accepted that the relevant MFN clause could in principle be applied to invoke a more favourable substantive liability regime on condition that such regime was explicitly exposed in the third-party BIT. Yet it objected to the application of the clause to beneficiary silence in a third-party treaty, stating that the application of the MFN clause would fail under the *ejusdem generis* rule on account of the mere absence of a disadvantageous clause in third-party treaties. However, this reasoning is mistaken. The Tribunal required for the MFN clause a complete identity of subject-matters provided for in the basic treaty and in the third-party treaty, which means that the applicability of the most-favoured-nation principle is excluded in such cases where the third-party BIT does not contain a comparable provision.²⁹¹ Yet the *ejusdem generis* principle does not exert such complete identity of matters included in the basic treaty and in the third-party treaty. It is not necessary that the subject-matters dealt with in basic treaty correspond completely to the subject-matters dealt with in the third-party treaty. What is rather decisive is the sub-

cle XI of the Argentina-US BIT (Decision on Liability, 3 October 2006, ICSID Case No. ARB/02/1, paras 226, 251, 257, 258).

²⁹⁰ *CMS v. Argentina*, Award, 12 May 2005, ICSID Case No. ARB/01/8, para. 377.

²⁹¹ See also Labidi, Où va la clause de la nation la plus favorisée en droit international des investissements?, in: Horchani (ed.), Où va le droit de l'investissement?, p. 43.

ject-matter of the relevant MFN clause, which means that MFN clauses can only import provisions relating to the same subject-matter as the MFN clause itself.²⁹² In the case of beneficiary silence in the third-party treaty, the right claimed under the most-favoured-nation clause relates to a subject-matter that is explicitly regulated in the basic treaty. The invocation of beneficiary silence is therefore not prevented by the application of the *ejusdem generis* principle.

The outcome of the case can be endorsed for a different reason, however, which is also based on the necessity clause in question. Notably, this clause limits the application of the entire BIT, including its MFN clause. Since the MFN clause is not applicable, it cannot be applied to invoke beneficiary provisions or absence of provisions in a third-party treaty. The case thus illustrates that MFN clauses cannot abrogate clauses included in the basic treaty which acquit a party of the obligations under the entire treaty, since such clauses acquit the respective party of the most-favoured-nation obligation.

III. Incorporation of the Obligation to Grant Necessary Permits and of the Prohibition to Impair Through Unreasonable and Discriminatory Measures the Use and Enjoyment of the Investment

1. Case Law

In *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile*²⁹³, The Malaysian company MTD based part of its claims on provisions of the bilateral investment treaties concluded be-

²⁹² See Part VI.B.I.2.

²⁹³ The foreign investment at issue related to the design of a real estate project to be built in an area in Santiago de Chile. MTD Equity, a Malaysian company, entered into a foreign investment contract that provided for the development of land and for the creation of a Chilean corporation, MTD Chile S.A., which would be majority-owned by MTD Equity. After the foreign investment contract had been signed, and after the Claimant had already committed substantial capital to the project, the Chilean Ministry of Housing and Urban Development rejected the project on the grounds that it conflicted with urban development policy. In October 1999, the investor brought a claim against Chile before ICSID, arguing that Chile had breached its obligation to grant fair and equitable treatment by encouraging strong expectations that the investment project could be built in a specific location and subsequently disapproving of the location after it had entered into a contract with MTD and after MTD had already committed substantial resources to the project. Chile denied the alleged violations and submitted that MTD had received several warnings from architects, urban planners and government officials that a permit might not be granted and that Chile acted in accordance with its national laws in refusing to grant the permit. The tribunal agreed with MTD and held that Chile “has an obligation to act coherently and to apply its policies consistently, independently of how diligent an

tween Chile and Denmark and Chile and Croatia respectively and contended that these provisions applied by operation of the MFN clause established in Article 3 (1) of the Chile-Malaysia BIT. It invoked the obligation to grant the necessary permits to carry out the investment as stipulated in Article 3 (2) of the Chile-Croatia BIT²⁹⁴, and the prohibition to impair through unreasonable and discriminatory measures the use and enjoyment of the investment as stipulated in Article 3 (3) of the Chile-Croatia BIT²⁹⁵.²⁹⁶ The Tribunal upheld the Claimant's request to incorporate the treatment clauses from the Chile-Denmark and the Chile-Croatia BIT by means of the MFN clause in the Chile-Malaysia BIT.²⁹⁷ It came to this conclusion in the light of the general nature of the most-favoured-nation clause and the narrow possibilities to exclude most-favoured-nation treatment only in matters of taxation and regional cooperation and the objective of the BIT to create conditions favourable to investments.²⁹⁸ The Tribunal upheld the claim with regard to the obligation not to treat the investment in an unreasonable way.²⁹⁹ It denied a failure to grant permits under Article 3 (2) of the Croatia BIT.³⁰⁰

2. Assessment

The MTD case concerned several substantive standards invoked by virtue of the most-favoured-nation clause. The tribunal was ready to apply the most-favoured-nation clause

investor is" and held that Chile had breached its obligations under the fair and equitable treatment provisions of the 1992 Malaysia-Chile BIT.

²⁹⁴ Article 3 (2) of the Chile-Croatia BIT provides: "When a Contracting Party have admitted an investment in its territory, it shall grant the necessary permits in accordance with its laws and regulations. [...]"

²⁹⁵ Article 3 (3) of the Chile-Croatia BIT provides: "Each Contracting Party [...] shall not impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, sale and liquidation of such investment."

²⁹⁶ Moreover, the Claimant invoked the umbrella clause in Article 3 (1) of the Chile-Denmark BIT.

²⁹⁷ *MTD v. Chile*, Award, 25 May 2004, ICSID Case No. ARB/01/7, para. 190 (with regard to the unreasonable and discriminatory treatment clause) and para. 204 (with regard to the obligation to grant the necessary permits).

²⁹⁸ *MTD v. Chile*, Award, 25 May 2004, ICSID Case No. ARB/01/7, para. 104.

²⁹⁹ *MTD v. Chile*, Award, 25 May 2004, ICSID Case No. ARB/01/7, para. 166. The Tribunal considered unreasonable the approval of the investment by the Chilean Foreign Investment Commission for a project that was contrary to governmental urban policy.

³⁰⁰ *MTD v. Chile*, Award, 25 May 2004, ICSID Case No. ARB/01/7, para 206. According to the Tribunal, the obligation to grant permits was only an assurance that existing laws would be applied and did not give a right to a change in the normative framework of the host country. However, the carrying out of the investment would have required a change in the Chilean norms that regulated the urban sector.

to the obligation not to impose unreasonable or discriminatory measures and to grant the necessary permits once an investment has been approved under the host State's foreign investment legislation. It was thus ready to apply the most-favoured-nation clause to provisions for which no (less favourable) equivalent could be found in the basic treaty. The situation can thus be distinguished from the situation in which it is the third-party treaty that does not contain a disadvantageous provision, as was the case in *CMS v. Argentina*.³⁰¹ The tribunal referred to the relevant most-favoured-nation clause, which combined the fair and equitable and the most-favoured-nation standard. The clause in Article 3 (1) of the Chile-Malaysia BIT provided:

“Investments made by investors of either contracting party in the territory of the other contracting party shall receive treatment which is fair and equitable, and not less favourable than that accorded to investments made by investors of any third state.”

The Tribunal viewed the obligations to award permits and not to impose unreasonable or discriminatory measures as part of the requirement to accord fair and equitable treatment as referred to in Article 3 (1) of the Malaysia BIT.³⁰² This interpretation can be supported in the light of the fact that the fair and equitable treatment standard protects legitimate expectations and requires reasonable and non-discriminatory behaviour.³⁰³ Moreover, the fair and equitable treatment standard and the most-favoured-nation standard are combined in a single clause of the BIT. With this inclusion of the imported standards in the fair and equitable treatment standard, the Tribunal could assume that there was a provision in the basic treaty which corresponded to the more favourable provision in the third-party treaty and that the *ejusdem generis* rule was therefore observed.

³⁰¹ See Part IV A.II.2.

³⁰² *MTD v. Chile*, Award, 25 May 2004, ICSID Case No. ARB/01/7, para. 104.

³⁰³ See Part IV A.I.1.

B. Further Potential Fields of Application

This Chapter examines the applicability of MFN clauses to a number of further substantive investment treaty provisions. Among the provisions that can be invoked are more favourable national treatment standards and applicable law provisions. It may also be possible to circumvent performance requirements. It is however generally not possible to extend market access by means of MFN clauses. Neither is it possible to rely on contractual benefits if the investor is not a party to the contract.

I. Invocation of a More Favourable National Treatment Standard

The application of a most-favoured-nation clause to the national treatment standard is another option of potentially far-reaching impact of MFN treatment, given that the denial of national treatment leaves a possibility for States to protect domestic infant industries and entrepreneurship and can therefore be regarded as a key interest in its investment policy. National treatment standards differ as to the levels of protection granted. Some BITs do not include a national treatment clause at all or merely include a best-efforts obligation. There are more than fifty BITs which do not include a national treatment clause,³⁰⁴ including most Chinese BITs from the 1980s and 1990s³⁰⁵, the treaties between Germany and Bulgaria³⁰⁶ and Germany and Russia³⁰⁷. The ASEAN investment agreement (1987) provides that the Contracting parties may negotiate to accord national treatment to investors of the other party respectively; it does not contain a binding national treatment obligation.³⁰⁸ Other BITs only guarantee that the host state shall accord national treatment “in accordance with the stipulations of its laws and regulations”³⁰⁹ or provide for a national treatment obligation “to the extent possible”³¹⁰, which means that the Contracting States are only under a best-efforts obligation. Such restrictions were typical for earlier Chinese

³⁰⁴ UNCTAD, *Bilateral Investment Treaties 1995-2006*, note 44.

³⁰⁵ Xiao, *Das neue deutsch-chinesische Investitionsschutzabkommen*, p. 448. See, e.g., the 1985 China-Kuwait BIT, the 1986 China-Switzerland BIT and the 1994 China-Egypt BIT.

³⁰⁶ Germany-Bulgaria BIT of 12 April 1986.

³⁰⁷ Germany-USSR BIT of 13 June 1989.

³⁰⁸ Article 4 (4), first sentence of the ASEAN investment agreement (1987). The ASEAN Framework agreement aims at the extension of national treatment to ASEAN investors by 2010 and to all, including non-ASEAN, by 2020.

³⁰⁹ Article 3 (2) of the China-Slovenia BIT; Article 3 (3) of the Sino-British BIT.

³¹⁰ Article 3 (2) of the China-Slovenia BIT; Article 3 (3) of the Sino-British BIT.

BITs.³¹¹ Moreover, some BITs only refer to national treatment in the post-establishment-phase, and others extend national treatment also to the pre-establishment phase.

In case a third-party BIT contains a broader national treatment standard than the basic treaty, that standard may, unless explicitly exempted, be incorporated in the basic treaty via the relevant MFN clause.³¹² The relevance of this possibility becomes apparent especially as regards the new generation of Chinese BITs, which in contrast to earlier BITs abstain from restrictions on the national treatment standard³¹³, such as the treaties concluded by China with Germany and the Netherlands.³¹⁴ This finding is corroborated by the fact that treaties concluded prior to the mid-seventies often contain a reciprocity clause according to which a contracting party grants national treatment only to the extent that the other party provides national treatment as well. This clause was included in order to exclude free riders who could otherwise have claimed national treatment via MFN clauses.³¹⁵ The ASEAN investment agreement (1987) even explicitly provides that “[n]othing herein shall entitle any other party to claim national treatment under the most-favoured-nation principle.”³¹⁶

An allegedly more favourable national treatment standard was invoked by the Claimant in *Occidental v. Ecuador*³¹⁷. The U.S. investor argued that it could benefit from the national treatment provisions in several of Ecuador’s third-party BITs, which allegedly contained a broader national treatment obligation since they did not explicitly limit national treatment to “like situations”. Ultimately, the Tribunal refrained from discussing the argument because it agreed with the investor’s argument that the “in like situations” requirement

³¹¹ Congyan, *Outward Foreign Direct Investment Protection*, p. 637.

³¹² Snyder, *The Most-Favored-Nation Clause*, p. 12; UNCTAD, *Most-Favoured-Nation Treatment*, p. 31; Congyan, *Outward Foreign Direct Investment Protection*, p. 641; Schill, *Tearing Down The Great Wall*, pp. 100, 101.

³¹³ This development is the result of a changing attitude of China towards international investment protection, due to its growing aim to attract foreign investment and to its increasing role as a capital-exporting country (see Schill, *Tearing Down the Great Wall*, pp. 77-83).

³¹⁴ Article 3 (3) of the China-Netherlands BIT and Article 3 (3) of the China-Germany BIT. However, the right to maintain existing non-conforming measures is upheld in these cases, see para. 3 (ad Article 2 and 3) of the Protocol of the China-Germany BIT and the Protocol (ad Article 3, paragraph 2 and 3) of the China-Netherlands BIT.

³¹⁵ Karl, *The Promotion and Protection of German Foreign Investment Abroad*, p.

³¹⁶ Article IV (4), 2nd sentence of the ASEAN investment agreement (1987).

³¹⁷ *Occidental v. Ecuador*, Final Award, 1 July 2004, UNCITRAL Arbitration, London Court of International Arbitration, Case No. UN 3467.

could not be interpreted in a narrow sense by addressing only the industry sector in which the investor's activities were undertaken and that there was therefore already a violation of the national treatment obligation under the basic BIT.³¹⁸

II. Extension of Market Access

Most countries refrain from granting foreign nationals and companies an unrestricted right to invest in their economies.³¹⁹ They merely require that host States admit foreign investment in accordance with their national legislation.³²⁰ This allows States to preserve initial screening mechanisms and even discriminatory legislation affecting the establishment of foreign investment. Such screening procedures regulating market access leave the possibility not to admit those types of investments that are considered welfare-reducing and deleterious to domestic economy. The main purpose of restricting the admission of investment in certain industries is to promote indigenous capacities, or to specifically attract those foreign investors that are particularly conducive to the upgrading of the domestic economy and the deepening of the country's technological infrastructure.

Under another approach which aims at liberalizing market access and is mostly pursued in BITs concluded by Canada and the United States, the Contracting States grant investors certain rights of entry, which may however be subject to reservations. To grant those rights of entry, investors are endowed with national and most-favoured-nation treatment also with respect to the pre-establishment phase so as to ensure market access for foreign investors on terms equal to those enjoyed by domestic and other foreign investors. Depending on whether they conclude a BIT with the United States or Canada or with another country, treaty partners are therefore usually confronted with different model clauses, with some leaving the establishment phase under the control of the laws of the host state, and others additionally liberalizing the pre-entry phase. In comparison with investors from European states, investors from the United States thus enjoy more favourable treat-

³¹⁸ *Occidental v. Ecuador*, Final Award, 1 July 2004, UNCITRAL Arbitration, London Court of International Arbitration, Case No. UN 3467, paras 173, 178. For details regarding the like circumstances requirement, see Part VIII.

³¹⁹ UNCTAD, *Bilateral Investment Treaties 1995-2006*, p. 21.

³²⁰ For example, the 2003 China-Germany BIT provides in Article 2 (1) that: "Each Contracting Party shall [...] admit [...] investments in accordance with its laws and regulations."

ment as to the opening of the market.³²¹ However, in case the admission or establishment is not an enumerated field of application of a particular MFN clause, the clause is not applicable to market access. MFN clauses are only applicable to investments or investors, therefore in case no investment has yet been established, the clause is not pertinent. Some clauses are even more explicit, referring to „investments within [the state’s] jurisdiction“³²² or investments „in [the state’s] territory“ which have already been „admitted“ in accordance with domestic law.³²³

Sometimes an intermediate approach is pursued, which does not grant investors a right to entry, but the right to most-favoured-nation treatment in the pre-entry phase. This approach was taken in Article 2 of the BIT between Japan and Bangladesh.³²⁴ Given that Japan has also concluded BITs providing for most-favoured-nation and for national treatment in the pre-entry phase³²⁵, Bangladeshi investors in Japan are also entitled to national treatment in the pre-entry phase on account of the most-favoured-nation clause in Article 2 (2) of the Bangladesh-Japan BIT.³²⁶

III. Invalidation of Performance Requirements

There is also the possibility for investors to circumvent performance requirements by virtue of MFN clauses in case more favourable treatment is granted to a third party. Performance requirements are stipulations, imposed by host countries on investors, requiring

³²¹ Article II (3) of the Argentina-US BIT.

³²² See, e.g., Article 3 (1) of the German Model BIT.

³²³ See, e.g., Article 3 (1) UK-Sri Lanka BIT provides: Neither Contracting Party shall *in its territory* subject investments *admitted in accordance with the provisions of Article 2* or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or investments or returns of nationals or companies of any third State.

³²⁴ Article 2 of that BIT provides:

(1) Each Contracting Party shall, subject to its rights to exercise powers in accordance with the applicable laws and regulations, encourage and create favorable conditions for investors of the other contracting Party to make investment in its territory, and, subject to the same rights, shall admit such investments.

(2) Investors of either Contracting Party shall within the territory of the other Contracting Party be accorded treatment no less favorable than that accorded to investors of any third country in respect of matters relating to the admission of investment.

³²⁵ See e.g. Article 2 (1) and (2) of the Japan-Korea BIT.

³²⁶ UNCTAD, *Bilateral Investment Treaties 1995-2006*, p. 26.

them to meet certain goals with regard to their operation in the host country.³²⁷ They are instruments implemented with the aim of influencing the investor's behaviour and the character, costs and benefits of the investment. Host States use them in order to enhance the development benefits of foreign direct investment, for example to generate employment, increase the demand for local products, or stimulate exports.³²⁸ They are adopted in order to deal with concerns related to the political and economic consequences of the presence of transnational corporations, notably in order to strengthen the industrial basis of the country, to generate employment opportunities and export, to promote technological progress and various non-economic objectives, such as political independence and distribution of political power.³²⁹ Such measures aim at the direct or indirect control of the investment by the host State; moreover they have the effect that a smaller part of benefits will be repatriated abroad and promote the emergence of a local entrepreneurial class. Examples are requirements to establish a joint venture with domestic participation or requirements for a minimum level of domestic equity participation, employment and training requirements, export requirements, research and development requirements and requirements to transfer technology, production processes or other proprietary knowledge.³³⁰ Other performance requirements are implemented with regard to environmental or social goals; for example, Chilean investment legislation provides since 1997 that projects susceptible to having an impact on the environment must be subjected to an environmental impact assessment.³³¹ An increasing number of BITs contains prohibitions of performance requirements which in contrast to those in the TRIMs Agreement³³² are not restricted to trade in goods and often go beyond the obligations assumed in the con-

³²⁷ UNCTAD, *Foreign Direct Investment and Performance Requirements*, p. 2.

³²⁸ UNCTAD, *Bilateral Investment Treaties in the Mid-1990s*, p. 81.

³²⁹ UNCTAD, *Foreign Direct Investment and Performance Requirements*, p. 7.

³³⁰ UNCTAD, *Foreign Direct Investment and Performance Requirements*, p. 3.

³³¹ UNCTAD, *Foreign Direct Investment and Performance Requirements*, p. 64.

³³² The WTO Agreement on Trade-Related Investment Measures contains a prohibition of certain performance requirements inconsistent with the obligations of the GATT to accord national treatment and to eliminate quantitative restrictions. However, it applies only to performance requirements affecting trade in goods. The list in the Annex of the TRIMs Agreement provides examples of inconsistent measures, such as measures which require a particular level of local procurement by an enterprise or to otherwise give preference to domestic products or services ("local content requirements") and measures which restrict the volume of imports an enterprise can purchase or use in relation to the amount of products it exports ("trade balancing requirements").

text of that agreement.³³³ In case the basic treaty contains the obligation to observe performance requirements which are not included in or prohibited by a third-party BIT, the investor can invoke the absence of performance requirements by means of the MFN clause in the basic BIT.³³⁴

IV. Invocation of More Favourable Applicable Law Provisions

Another possible field of application for the most-favoured-nation principle is the choice by the parties to the investment treaty of the law which shall be applicable to the substance of the investment dispute.³³⁵ The ICSID Convention grants autonomy to the parties in choosing the law that ought to be applied to solve their dispute, providing in Article 42 (1) first sentence:

“The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties.”

Apart from national legislation and direct agreements between the parties, choice of law clauses can be included in investment treaties. In many cases, the choice of law clause provides for the settlement of the dispute in accordance with the provisions of the investment treaty itself in conjunction with the “applicable rules of international law”³³⁶. The application of rules of international law may have a major impact on the result of the arbitration, for example as regards the amount of interests to be paid by the Respondent in case an expropriation has occurred.³³⁷ The choice of law clause may also include a refer-

³³³ UNCTAD, *Bilateral Investment Treaties 1995-2006*, p. 65. See for example Article 8 of the 1995 US-Uruguay BIT; Article 1106 (1) NAFTA; Article 9 (1) of the 2002 Japan-Korea BIT.

³³⁴ For the possibility to invoke beneficiary silence in a third-party BIT, see Part VI D.II.1.b.cc.

³³⁵ A general overview of choice of law clauses is given in Gaillard, *The Extent of Review of the Applicable Law in Investment Treaty Arbitration*, in: Gaillard/ Banifatemi (eds), *Annulment of ICSID Awards*, pp. 225-228.

³³⁶ Article 30 (1) US Model BIT; Article 40 (1) Canada Model BIT; Article 1131 (1) NAFTA; Article 26 (6) ECT.

³³⁷ See *Wena v. Egypt*, Annulment Proceeding, 5 February 2002, ICSID Case No. ARB/98/4, paras 50-53 (dealing with the granting of compound interest as required by international law as opposed to simple interest).

ence to agreements relating to the particular investment³³⁸ and to the law of the host State³³⁹. Other treaties do not refer to the law of the host State.³⁴⁰

However, the majority of investment treaties does not contain a choice of law clause.³⁴¹ For that case, the ICSID Convention provides in Article 42 (1) second sentence:

“In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute [...] and such rules of international law as may be applicable.”

This provision justifies the supplemental and the corrective effect of international law: International law is applied in order to complement national law when it is presumed to contain *lacunae* on particular issues or in case national law is not in conformity with the rules of international law.³⁴² By now the clause has been interpreted as allowing for application of the law of the host State in conjunction with international law.³⁴³ Investment treaties may thus, depending on whether they contain a choice of law clause and on its content, differ on whether principles of international law or the law of the host state can be applied, which gives rise to the possibility to apply the most-favoured-nation principle in order to incorporate a more favourable choice of law clause. However, as regards the question whether more favourable treatment is actually granted under the third-party BIT,

³³⁸ Article 10 (7) of the Argentina-Netherlands BIT; Article X (4) of the Argentina-Canada BIT; Article 9 (5) of the Colonia Investment Protocol of MERCOSUR.

³³⁹ See, eg, Article IX (2) (b) of the Chile-Costa Rica BIT and Article 9 (7) of the China-Egypt BIT. In case the parties choose the host state's domestic legal system, the foreign investor runs the risk of subsequent changes in that law, such as changes in taxation, environmental standards, or minimum wages, which may have a severe impact on the investment. A means chosen in some contracts to shield the investor from the adverse effects of subsequent changes in domestic legislation is the introduction of a stabilization clause in the treaty which establishes a promise not to apply any adverse changes to the investor's operations or to at least compensate the investor for any adverse consequences of such a change.

³⁴⁰ See for example Article XIII (7) of the Canada-Egypt BIT and Article XIII (7) of the Canada-Romania BIT.

³⁴¹ See, eg, the German Model BIT.

³⁴² *Amco v. Indonesia*, Decision on Annulment, 16 May 1986, 1 ICSID Reports 509, para. 20; Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, p. 392; Shihata/ Parra, *Applicable Substantive Law in Disputes Between States and Private Foreign Parties*, p. 192.

³⁴³ See *Wena v. Egypt*, Annulment Proceeding, 5 February 2002, ICSID Case No. ARB/98/4, para. 40; *CMS v. Argentina*, Award, 12 May 2005, ICSID Case No. ARB/01/8, paras 116, 117.

it has to be taken into account that the application of international law is not necessarily more favourable to the investor than the application of national law.³⁴⁴

V. Invocation of Contractual Benefits

The notion of State contracts refers to contracts between a State government and a foreign investor. They often take the form of licences or concession agreements whereby the host country authorizes the foreign investor to explore natural resources such as oil, gas, coal and other minerals.³⁴⁵ The possibility to rely on an MFN clause in order to request the re-negotiation of investment contracts if a subsequent contract with another investor contains more favourable provisions could only be given if a bargain offered by a State in a contract negotiated with the investor could be defined as “treatment” within the meaning of the relevant most-favoured-nation clause. However, it is the object and purpose of investment treaties to protect the investor from abuse by the State of its sovereign powers, not against purely commercial risks.³⁴⁶ Thus, “treatment” of investors by States refers to the behaviour of a State towards investors from its legally superior position as a regulatory and administrative power.³⁴⁷ MFN clauses can therefore only be applied to the behaviour of a State acting in its public capacity. In contrast, State contracts are the result of equal-level negotiations between the State and the investor. Since the favours embraced in MFN clauses are those which a State may grant in its governmental, as distinguished from its business activities, the invocation of contractual benefits by means of a most-favoured-nation clause is not possible. Therefore, if a host State grants special privileges or incentives to an individual investor in an investment contract, there can be no obligation for him under the most-favoured-nation clause of the relevant BIT to treat other foreign investors equally by entering into an investment contract with the same content.

³⁴⁴ Accordingly, the ICJ held in the *ELSI* case, Judgment of 20 July 1989, ICJ reports 1989, p. 74, para. 124: “[...] the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law [...]”

³⁴⁵ Leung/ Wang, *State Contracts in a Globalized World*, p. 829.

³⁴⁶ *Salini v. Jordan*, Decision on Jurisdiction, 15 November 2004, ICSID Case No. ARB/02/13, para. 155 (in the context of fair and equitable treatment); *Azurix v. Argentina*, Award, 14 July 2006, ICSID Case No. ARB/01/12, para. 315 (in the context of expropriation).

³⁴⁷ Ustor, Report of Committee of Experts, p. 171; Wälde, *International Investment Under the 1994 Energy Charter Treaty*, in: Wälde (ed.), *The Energy Charter Treaty*, p. 294.

C. Conclusion

The applicability of MFN clauses to substantive treaty standards is undisputed among investment Tribunals. However, only the MTD tribunal actually applied the MFN clause in question to a substantive treaty standard, with the other tribunals not being convinced that the third-party treaty offered more favourable treatment. Nevertheless, the survey over substantive provisions that can potentially be affected by an MFN clause demonstrates that application of the most-favoured-nation standard to substantive provisions may have a far-reaching impact on the treatment owed to an investor. The most-favoured-nation clause can be applied to a wide range of substantive treaty standards, including the fair and equitable treatment standard, non-precluded measures clauses, national treatment clauses, performance requirements and the choice of applicable law. Being only applicable to investments already existing within the territory of the host state, most-favoured-nation clauses cannot be applied to provisions granting market access. Neither can most-favoured-nation clauses be invoked in order to import contractual benefits due to their limitation to treatment granted by a State in its sovereign function. Beneficiary silence in the third-party treaty can be invoked, while the invocation of a more favourable provision in the third-party treaty without an equivalent provision in the basic treaty depends upon the question whether it can be defined as “treatment” within the meaning of the most-favoured-nation clause, taking into account the *ejusdem generis* principle.

The possibility to apply MFN clauses to a wide range of substantive provisions as suggested by the examined cases and further substantive treatment standards highlights the role of these clauses in both harmonizing and raising the standards of investment protection. As a tool to multilateralize substantive treatment standards, MFN clauses elevate the level of protection in host States to the maximum level granted in any of that host State’s investment treaties. This result can only be evaded if the parties offer no more favourable treatment to third parties or agree on a restrictive interpretation of the most-favoured-nation clause. Thus, explicit exceptions to MFN clauses are an effective means of shield-

ing bilateral bargains against the multilateralizing effect of the clauses.³⁴⁸ Another possibility would be the insertion of a clause which limits the application of the entire BIT, including its MFN clause.³⁴⁹

Part V: Application of Most-Favoured-Nation Clauses to conditions *ratione materiae*, *ratione temporis* and *ratione personae*

Investment tribunals have so far only dealt with a condition *ratione temporis*. In this respect, the Tecmed tribunal has come to the conclusion that the relevant most-favoured-nation clause was not applicable. Although the outcome of the ruling must be endorsed, the reasoning of the tribunal is flawed.

A. Extension of the Application of a Treaty Ratione Temporis

I. Introduction into the Application of Treaties Ratione Temporis

All BITs are applicable to investments established after their entry into force, but they differ as to the question of application to investments already existing at the time of their entry into force. It is however more common for BITs to protect both future investments and investments already established at the date of entry into force of the BIT, which is either laid down in a special provision³⁵⁰ or can be derived from the definition of investment in the treaty.³⁵¹ In contrast, BITs which are only applicable to future investment are rare.³⁵² However, the fact that treaties apply to investments already existing at the time of

³⁴⁸ See *ADF v. U.S.*, Award, 9 January 2003, ICSID Case No. ARB(AF)/00/1, para. 196. Accordingly, some states resort to a clear exclusion of procedural provisions to MFN treatment, see Ziegler, *The Nascent International Law on Most-Favoured-Nation (MFN) Clauses*, p. 98.

³⁴⁹ See e.g. Article XI of the US-Argentine BIT, which provides that the treaty “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.”

³⁵⁰ See, e.g., Article 2 of the Chile-Peru BIT.

³⁵¹ Eg. Article 1 (1) of the Italy-Jordan BIT provides: “The term “investment” shall be construed to mean any kind of property invested, before or, after the entry into force of this Agreement [...]” Moreover, Article 9 (1) of the same BIT provides that “Any dispute which may arise between one of the Contracting Parties and the investors of the other Contracting party [...]”, indicating that jurisdiction *ratione temporis* is only given for disputes that arose after the entry into force of the treaty.

³⁵² For example, the 1998 Cyprus-Egypt BIT provides in Article 12: “This Agreement shall apply to all investments made by investors of either Contracting Party [...] after its entry into force.” (Emphasis add-

their entry into force does not mean that they may be applied retroactively. The general rule for the application of a treaty *ratione temporis* is laid down in Article 28 of the Vienna Convention on the Law of Treaties, which provides:

“Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.”

One can derive from this provision that the scope of treaties *ratione temporis* generally does not encompass the retrospective application of treaty provisions. This principle precludes the possibility of litigation arising out of situations or facts dating from a period when a State could not have foreseen that the circumstances might give rise to legal proceedings.³⁵³ However, the prohibition of retrospective application of treaties is rebuttable and subject to the disposition of the parties.³⁵⁴ In accordance with the Vienna Convention, BITs generally do not have retroactive effect, which means that the rights and obligations derived from a BIT apply only after the treaty has entered into force and with respect to acts or facts occurring thereafter. The fact that a treaty may be applicable to investments already existing at the time of its entry into force, but may not be applied retroactively can be explained by the fact that the dispute has to be distinguished from the facts or situations which have led to the dispute. Thus, if the competence of a tribunal is excluded for disputes that occurred prior to a certain date, the tribunal is competent as soon as the dis-

ed) The 1987 ASEAN Agreement also generally does not apply to pre-existing investments (see Article 2 (3) of the Agreement).

³⁵³ *Phosphates in Morocco Case (Italy v. France)*, Preliminary Objections, PCIJ Series A/B, No. 74 (1938), p. 24: The French limitation *ratione temporis* was inserted “to preclude the possibility of the submission to the Court [...] of situations and facts dating from a period when the state whose action was impugned was not in a position to foresee the legal proceedings to which these facts and situations might give rise”.

³⁵⁴ This principle was enounced by the ICJ in the *Ambatielos case*, Preliminary Objection, Judgment of 1 July 1952, ICJ Reports 1952, p. 40. See also Dahm/ Delbrück/ Wolfrum, *Völkerrecht*, § 150, pp. 589, 590.

pute arises after that date, no matter whether the facts or the situation which provoked the dispute occurred before or after that date.³⁵⁵

II. Case Law

In *Tecmed v. Mexico*, the arbitral tribunal denied the extension of its jurisdiction *ratione temporis* by operation of the relevant MFN clause. The Claimant was a Spanish company which had acquired a landfill of hazardous industrial waste from a Mexican municipal agency in a public auction. While the municipal agency had operated the landfill on the basis of an unlimited authorisation, *Tecmed* was only granted temporary one year-licenses by the competent Mexican agency. In November 1998, this agency denied the renewal of the license for the operation of the landfill. As a consequence, the company brought a claim for alleged violations by Mexico of the provisions in the Spanish-Mexican investment treaty concerning expropriation, fair and equitable treatment and full protection and security. They argued that the issue of a temporary instead of an unlimited license violated the investment treaty since the landfill had been acquired in the public auction together with the unlimited license on the basis of which the municipal agency had operated it. Regarding the jurisdiction *ratione temporis* of the Tribunal, the Respondent argued that while covering investments that existed prior to the entry into force of the treaty³⁵⁶, the bilateral investment treaty did not apply to the conduct of the Respondent in the public auction, which predated the entry into force of the treaty. The Tribunal agreed, pointing out that the substantive obligations were drafted as projected into the future³⁵⁷ and that the general rule of Article 28 VCLT was the preclusion of retrospective application of a treaty.³⁵⁸ The Claimant therefore sought to extend the applicability of the investment treaty *ratione temporis* to the time when the investment treaty had not yet entered into force.

³⁵⁵ Santulli, *Droit du contentieux international*, para. 306; In the *Interhandel Case* (Switzerland v. United States), Preliminary Objections, Judgment of 21 March 1959, ICJ Reports 1959, p. 22, the ICJ stated that “the facts and situations which have led to a dispute must not be confused with the dispute itself”.

³⁵⁶ Article 2 (2) of the Spain-Mexico BIT provided that the Agreement “shall also apply to investments made prior to its entry into force by the investors of a Contracting Party” (Translation of the Tribunal).

³⁵⁷ The state obligations in the treaty are formulated in the future tense, see for example Article 3 (1): „Cada Parte Contratante otorgará plena protección y seguridad [...]“ (emphasis by author).

³⁵⁸ *Tecmed S.A. v. Mexico*, Award, 29 May 2003, ICSID Case No. ARB (AF)/00/2, paras 64, 65.

Relying on the *Maffezini* decision³⁵⁹ and a provision in the Austria-Mexico bilateral investment treaty which allegedly allowed the retrospective application of certain treaty provisions³⁶⁰, the investor argued that the temporal scope of application of the Spain-Mexico BIT could be extended by operation of its MFN clause.³⁶¹

The tribunal did not examine the wording of the most-favoured-nation standard and refused to consider whether investors were granted further protection under the Austria-Mexico treaty, but made a determination of principle to deny the standard's applicability, holding that the present case dealt with the temporal applicability of substantive provisions of the investment treaty and could therefore be distinguished from the situation in *Maffezini*, which involved dispute settlement questions.³⁶² The tribunal considered the application of a treaty *ratione temporis* and the access of an investor to a substantive protection regime to be within the core of matters that had to be regarded as specifically negotiated party agreements. There was therefore a presumption that agreements concerning the temporal applicability of a treaty were a decisive factor for the acceptance by the parties of the treaty. Since the party would presumably not have entered the Agreement in the absence of such provisions, such provisions fell outside the scope of the most-favoured-nation clause. In the words of the tribunal,

“ [...] matters relating to the application over time of the Agreement, which involve more the time dimension of application of its substantive provisions rather than matters of procedure or jurisdiction, due to their significance and importance, go to the core of matters that must be deemed to be specifically negotiated by the Contracting Parties. These are determining factors for their acceptance of the Agreement, as they are directly linked to the identification of the substantive protection regime applicable to the foreign investor and, particularly, to the general (national or international) legal context within which such regime operates, as well as to the

³⁵⁹ See Part VI D.I.2.a.

³⁶⁰ There is actually no indication in the Austria-Mexico BIT that it should apply retroactively. However, since the tribunal rejected the application of the most-favoured-nation clause in principle, it did not have to examine this question.

³⁶¹ Article VIII (1) of the Spain-Mexico BIT.

³⁶² *Tecmed S.A. v. Mexico*, Award, 29 May 2003, ICSID Case No. ARB (AF)/00/2, para. 69.

access of the foreign investor to the substantive provisions of such regime. Their application cannot therefore be impaired by the principle contained in the most favoured nation clause.”³⁶³

III. Assessment

The tribunal did not generally put into question the applicability of the most-favoured-nation clause to substantive or dispute settlement questions. Instead it held that application of the most-favoured-nation clause is precluded when the respective provisions are “part of the essential core of negotiations” and must be deemed to be “specifically negotiated”, and when the Parties would presumably not have entered into the treaty without the respective provisions.³⁶⁴ Thus, the tribunal distinguished *Tecmed* from *Maffezini v. Spain*, arguing that the lack of possibility to apply the BIT retroactively was a determining factor for the parties’ acceptance of the agreement.³⁶⁵ In addition to the assumption established in *Maffezini* that provisions envisaged as fundamental conditions for the acceptance of the treaty by the parties could not be overcome by means of the most-favoured-nation clause, the tribunal introduced the notion of “core of matters that must be deemed to be specifically negotiated”, which was developed further in the *Plama* case³⁶⁶.

This reasoning suggests that parties can specifically negotiate benefits without having to grant them to third States. Moreover, the tribunal’s argumentation that certain matters have to be *deemed* to be specifically negotiated indicates that the investor bears the burden of proof to prove the contrary.³⁶⁷ However, this would be contrary to the very purpose of most-favoured-nation clauses to eliminate discrimination. As discussed above,³⁶⁸ it is inappropriate to limit the scope of the MFN clause due to the specificity of BIT provisions since it is exactly the purpose of the MFN clause to do away with specifically negotiated provisions in order to further non-discrimination. Applying this principle would

³⁶³ *Tecmed S.A. v. Mexico*, Award, 29 May 2003, ICSID Case No. ARB (AF)/00/2, para. 69.

³⁶⁴ *Tecmed S.A. v. Mexico*, Award, 29 May 2003, ICSID Case No. ARB (AF)/00/2, paras 69, 74.

³⁶⁵ *Tecmed S.A. v. Mexico*, Award, 29 May 2003, ICSID Case No. ARB (AF)/00/2, para. 69.

³⁶⁶ *Plama v. Bulgaria*, Decision on Jurisdiction, 8 February 2005, ICSID Case No. ARB/03/24.

³⁶⁷ This is underlined by the tribunal’s argument that “it should therefore be presumed that they would not have entered into the Agreement in the absence of such provisions” (para. 74).

³⁶⁸ See Part VI B.I.3.e.

make MFN clauses virtually redundant since all provisions in BITs are the outcome of negotiations. Moreover, the specific negotiation of provisions does not necessarily imply that it was the parties' intention to exempt the respective provisions from change by means of the most-favoured-nation clause and does not give any information about the scope of that clause. It is the object of MFN clauses to eliminate discrimination stemming from specifically negotiated provisions. Moreover, the introduction of two different types of treaty clauses – one which consists of specifically negotiated provisions and one which consists of provisions which were not specifically negotiated – would suggest that treaty provisions possess different degrees of validity. However, all treaty provisions are based on the consensus of the contracting State parties and have an equally binding force.³⁶⁹

The outcome of the reasoning has to be endorsed, however, for different reasons. The analysis of the Tribunal dealing with the question whether the treaty is applicable *ratione temporis* is, as the Tribunal points out, actually not a question of jurisdiction or admissibility, but concerns the question whether the claim can be founded on the text of the treaty at all. The question whether a treaty is applicable temporally does not involve a situation of a possibly well-founded right which can however not be implemented for lack of jurisdiction, but involves the question whether there is actually a right which can be founded on the treaty.³⁷⁰ Since the treaty cannot be applied to State conduct which took place before its entry into force, neither can the most-favoured-nation clause be applied retroac-

³⁶⁹ Schill, *The Multilateralization of International Investment Law*, p. 146.

³⁷⁰ Santulli, *Droit du contentieux international*, para. 303, states: "En réalité, si la jurisprudence analyse opportunément à titre préliminaire l'applicabilité de la convention au moment des faits litigieux, il n'y a là ni une question de compétence, ni de recevabilité. Du point de vue technique, la juridiction peut connaître du litige, et la requête est recevable, mais tous les moyens invoqués sont inopérants car ils s'appuient tous sur un texte qui n'était pas en vigueur au moment des faits. Ce n'est pas que la juridiction ne peut pas faire droit à une requête qui pourrait être fondée (comme pour la recevabilité et la compétence qui sont précisément sans préjudice du fond), elle établit tout au contraire que la demande ne peut pas être fondée car le texte sur lequel elle se base n'est pas applicable aux faits litigieux." However, since the BIT provided the only normative framework within which the tribunal could exercise its jurisdictional authority, the tribunal in *Marvin Roy Feldman Karpa v. Mexico*, Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000, ICSID Case No. ARB(AF)/99/1, para. 62, argued that the scope of application in terms of time also defined the tribunal's jurisdiction *ratione temporis*: "Since NAFTA delivers the only normative framework within which the tribunal may exercise its jurisdictional authority, the scope of application in terms of time defines also the tribunal's jurisdiction *ratione temporis*. Given that NAFTA came into force on January 1, 1994, no obligations adopted under NAFTA existed, and the tribunal's jurisdiction does not extend, before that date. NAFTA itself did not purport to have any retroactive effect. Accordingly, this tribunal may not deal with acts or omissions which occurred before January 1, 1994. [...] Any activity prior to that date is not subject to the tribunal's jurisdiction in terms of time."

tively. It was therefore not possible to base the claim on the standard with regard to acts that took place before the entry into force of the treaty. When the treaty is not applicable *ratione temporis*, neither is the MFN clause included in that treaty applicable. Hence, the clause cannot be invoked to extend the application of a treaty *ratione temporis*.

B. Extension of Jurisdiction *Ratione Materiae* and *Ratione Personae*

For the condition *ratione materiae* to be fulfilled, the dispute must concern an investment. According to Article 25 (1) ICSID Convention, ICSID tribunals only have jurisdiction to arbitrate legal disputes “arising directly out of an investment”. The drafters of the ICSID Convention refrained from including a definition of the term “investment” due to “the essential requirement of consent by the parties” in the relevant investment agreements.³⁷¹ The definition of investments in bilateral investment treaties is usually very broad.³⁷² They apply to “every kind of investment” or “every kind of asset” invested in the host country. Other BITs have included certain limitations on the scope of investments covered. A number of BITs adopt a closed-list definition of “investment”, which means that they include an ample but finite list of assets to be covered by the treaty. An example for such a closed-list approach is NAFTA Article 1139. Some treaties explicitly exclude certain categories of investments, such as portfolio investment.³⁷³ Portfolio investment is usually characterised as “a movement of money for the purpose of buying shares in a company formed or functioning in another country”³⁷⁴. The distinguishing element is that in portfolio investment, the investor is typically not interested in exercising influence on the economic activity of the enterprise, but in gains achieved through shareholding. Due to its short-term nature and volatility there is a special need to regulate portfolio investment in countries with unstable financial markets.³⁷⁵ In contrast, foreign direct investment is defined as “the category of international investment that reflects the objective of a resi-

³⁷¹ Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of other States, para. 27.

³⁷² Parra, Provisions on the Settlement of Investment Disputes, p. 294; Sornarajah, The international law on foreign investment, p. 9.

³⁷³ Article 2 (a) of the 1998 Framework Agreement on the ASEAN Investment Area.

³⁷⁴ Sornarajah, The international law on foreign investment, p. 7.

³⁷⁵ UNCTAD, World Investment Report 2003, p. 100.

dent entity in one economy obtaining a lasting interest in an enterprise resident in another economy”³⁷⁶. It is characterized by the influence of the investor on the economic activity of the enterprise and by a certain duration. For example, the German Model BIT does not contain any restriction to investments. However, the BIT with China restricts the term of investments to those investments “made for the purpose of establishing lasting economic relations in connection with an enterprise, especially those which allow to exercise effective influence on its management”³⁷⁷. This formulation explicitly excludes portfolio investment. Even when no such explicit exclusion takes place in an investment treaty, the broad definitions of investment do not necessarily encompass portfolio and other investments in addition to direct investment.³⁷⁸

The condition *ratione personae* is fulfilled when the dispute exists between the host State and an investor. Regarding the definition of who is an investor under the BIT, the essential criterion is its nationality, as can be derived from Article 25 (2) of the ICSID Convention.³⁷⁹ The exact criteria for establishing the nationality of an individual investor or of a corporation are not laid down in the ICSID Convention, but can be derived from the various BITs.³⁸⁰ According to the majority of BITs, whether a particular individual has the

³⁷⁶ International Monetary Fund, *Balance of Payments Manual* (5th ed. 1993), 86, para. 359.

³⁷⁷ China-Germany BIT 2005, Protocol Ad Article 1.

³⁷⁸ Sornarajah argues that portfolio investment should only be protected in case it is explicitly covered by the definition of foreign investment in the treaty (Sornarajah, *The international law on foreign investment*, p. 9). Krajewski/ Ceysens restrict the term “investment” in the German Model BIT as requiring the criteria of a certain duration, scope and the assumption of risk (Krajewski/ Ceysens, *Internationaler Investitionsschutz und innerstaatliche Regulierung*, p. 189). For the contrary view see Parra, *Provisions on the Settlement of Investment Disputes*, p. 294.

³⁷⁹ Art. 25 (2) of the ICSID Convention provides:
“National of another Contracting State” means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

³⁸⁰ As stated by the tribunal in *Tokios Tokelés*, “Contracting Parties are free to define their consent to jurisdiction in terms that are broad or narrow; they may employ a control-test or reserve the right to deny

nationality of a particular state depends on the national legislation of that state.³⁸¹ As a variation of this standard, some BITs combine the standard requirement with that of residence in the territory of the state concerned.³⁸² BITs concluded with former socialist states used to exclude natural persons from the scope of the BIT and covered only economic organisations of the Contracting States.³⁸³ However, the transition from socialist economies to market economies is reflected in more recent BITs with such countries.³⁸⁴ With regard to corporations, one criterion to establish corporate nationality refers to incorporation.³⁸⁵ Other BITs refer to the *siège social*.³⁸⁶ These two criteria do not allow a piercing of the corporate veil since they do not require examining the nationality of the controlling shareholders.³⁸⁷ Other treaties establish the control of the company by nationals of the contracting state as the decisive element.³⁸⁸ There are also BITs which combine several criteria.³⁸⁹

Even if third-country BITs provide for a broader scope of application *ratione personae* or *ratione materiae*, the most-favoured-nation clause cannot be used to invoke a broader definition of investment or investor since it offers most-favoured-nation treatment only to

treaty protection to Claimants who otherwise would have recourse under the BIT” (*Tokios Tokelés v. Ukraine*, Decision on Jurisdiction, 29 April 2004, ICSID Case No. ARB/02/18, para. 39).

³⁸¹ Dolzer/Stevens, *Bilateral Investment Treaties*, p. 31.

³⁸² For example, the 1976 Germany-Israel BIT is applicable to “Israeli nationals being permanent residents of the State of Israel”, see Art. 1 (3) (b).

³⁸³ See eg Art. 2 (3) of the 1976 UK-Romania BIT, with respect to both Romania and the United Kingdom.

³⁸⁴ Eg Art. 1 (2) (a) of the 1994 Romania-China BIT; Art. 1 (2) (a) of the 1993 Czech Republic-Hungary BIT.

³⁸⁵ Eg Art. 1 (d) of the 1993 UK-Barbados BIT; Art. I (1) (b) of the 1993 US-Ecuador BIT; Art. VII (8) of the 1992 United States-Argentina BIT. However, some of these BITs exclude the protection by the BIT if nationals of a third country control such company, for example, Article II of the 1993 US-Ecuador BIT provides: “Each Party reserves the right to deny to any company the advantages of this Treaty if nationals of any third country control such company and, in the case of a company of the other Party, that company has no substantial business activities in the territory of the other Party or is controlled by nationals of a third country with which the denying Party does not maintain normal economic relations.”

³⁸⁶ This is the general German treaty practice. See eg Art 1 (4) (b) of the 1994 Germany-Barbados BIT and Art. 1 (3) of the German Model BIT.

³⁸⁷ Schreuer, *The ICSID Convention: A Commentary*, Art. 25, para. 460.

³⁸⁸ Eg Art. 1 (b) of the 1990 Jamaica-Switzerland BIT defines: “Sont des ‘sociétés’ (i) en ce qui concerne la Confédération suisse, les personnes morales ou sociétés de personnes effectivement contrôlées par des nationaux suisses qui en possèdent une part substantielle en propriété.”

³⁸⁹ Art. 1 (3) (B) (a) of the 1988 treaty between the Belgo-Luxembourg Economic Union (BLEU) and Bulgaria require either incorporation or the fulfillment of the *siège social* requirement. According to Art. 1 (b) of the 1992 Netherlands-Paraguay BIT, either incorporation or control is required.

investments and investors covered by the basic treaty.³⁹⁰ For the same reason, the requirement of acceptance or certification of the asset cannot be overridden if it is a precondition for the existence of the investment.³⁹¹

C. Conclusion

The conditions *ratione personae*, *ratione materiae* and *ratione temporis* are conditions which have to be satisfied in order to establish jurisdiction. The right to invoke MFN is only bestowed upon investments of investors within the meaning of the treaty. In case there is no investment or investor under the basic treaty, the most-favoured-nation clause is not applicable. The definition of investment or investor is thus not a form of treatment covered by the most-favoured-nation clause, but the existence of an investment as defined in the basic BIT is a necessary prerequisite for the applicability of the most-favoured-nation clause. Neither is the MFN clause applicable when the condition *ratione temporis* is not fulfilled since non-fulfilment of that requirement bars the application of the entire treaty.

³⁹⁰ *Société Générale v. Dominican Republic*, Award on Preliminary Objections to Jurisdiction, 19 September 2008, UNCITRAL arbitration, LCIA Case No. UN 7927, para. 41.

³⁹¹ For example, Article 1 (1) of the Oman-Yemen BIT provides: „The term ‘investment’ shall mean every kind of asset that is accepted, by the host Party, as an investment according to its laws and regulations, and for which an investment certificate is issued.“ Applicability of the MFN clause to broaden the scope of „investment“ was therefore wrongly suggested as a subsidiary argument by the Claimants in *Desert Line Projects v. Yemen* (*Desert Line Projects v. Yemen*, Award, 6 February 2008, ICSID Case No. ARB/05/17, para. 96 (b)). The tribunal did not have to decide on the issue since it wrongly found the requirements of Article 1 (1) to be satisfied (paras 97-123). In contrast, the tribunal in the *Yaung Chi Oo Case* declined jurisdiction under the 1987 ASEAN Framework Agreement due to an unratified approval (*Yaung Chi Oo v. Myanmar*, Award, 31 March 2003, ASEAN Case No. ARB/01/1, paras 53-63).

It is also possible to connect an investment with its approval by a competent national authority by conditioning the applicability of the treaty to this requirement. For example, Art. 2 (1) of the 2002 Thailand-Republic of Korea BIT provides: “The benefits of this Agreement shall apply only in case where the investment of capital by the nationals and companies of one Contracting Party in the territory of the other Contracting Party has been specifically approved in writing by the competent authority of the latter Contracting Party.” A similar provision is included in Art. II of the 1987 ASEAN Agreement, which provides in Article 2 (1): “This Agreement shall apply only to investments brought into, derived from or directly connected with investments brought into the territory of any Contracting Party by nationals or companies of any other Contracting Party and which are specifically approved in writing and registered by the host country and upon such conditions as it deems fit for the purposes of this Agreement.” Such regulations exclude the applicability of the treaty provisions and make clear that the asset is not under the ambit of the BIT. They therefore also exclude the applicability of the most-favoured-nation provision in order to invoke the absence of the requirement of certification in a third-party BIT.

Part VI: Application of Most-Favoured-Nation Clauses to Dispute Settlement Provisions

This Part deals with the applicability of most-favoured-nation clauses to dispute settlement provisions. It first outlines the distinction between procedural and jurisdictional dispute settlement provisions. It follows in Part B an examination of the arguments that can be brought forward in favour or against the application of MFN clauses to dispute settlement provisions. The thesis does not undertake to find a conclusion which may seem wisest in the view of potential treaty shopping or „cherry picking“ by means of MFN clauses. It rather engages in the interpretation of MFN clauses and argues that according to the principles of the Vienna Convention, Tribunals should not differentiate between the application of MFN clauses to admissibility and jurisdictional requirements. Rather, the possibility to achieve uniformity by means of applying most-favoured-nation clauses should be affirmed both as regards the importation of procedural and jurisdictional provisions. Part C contains an overview and assessment of the jurisprudence of arbitral tribunals regarding the importation of dispute settlement provisions.

A. Distinction between Procedural and Jurisdictional Provisions

The jurisprudence of arbitral Tribunals concerning the importation of dispute settlement provisions through the MFN clause is heterogeneous. The interpretation of MFN clauses particularly differs with regard to its applicability to admissibility and to jurisdictional questions. Several Tribunals particularly in the earlier cases following the *Maffezini* case have distinguished between procedural and jurisdictional dispute settlement provisions, affirming the application of MFN clauses to procedural provisions and rejecting its application to jurisdictional provisions.

Indeed a distinction can be made between jurisdictional and admissibility requirements. The concept of jurisdiction refers to “the power vested in a court by law to adjudicate upon, determine and dispose of a matter” upon which its decision is sought.³⁹² As stated by the ICTY, jurisdiction

³⁹² Rosenne, *The Law of Treaties*, vol. II, p. 524; Amerasinghe, *Jurisdiction of International Tribunals*, p. 52.

“is basically – as is visible from the Latin origin of the word itself, *jurisdictio* – a legal power [...] ‘to state the law’ (*dire le droit*) within this ambit, in an authoritative and final matter.”³⁹³

Objections to the jurisdiction of a tribunal strike at the authority of a court or tribunal to hear and determine the dispute involved. If successful, they stop all proceedings in the case, since they strike at the competence of the tribunal to give rulings as to the merits or admissibility of the claim.³⁹⁴ In contrast, the non-fulfilment of procedural provisions is not an obstacle to jurisdiction, but can be a bar to the admissibility of a claim.³⁹⁵

In the practice of the PCIJ and the ICJ, the two conceptions of jurisdiction and admissibility have never been clearly defined. Nevertheless, the ICJ has recognized that objections to jurisdiction form a category distinct from objections to admissibility.³⁹⁶ The criterion by which issues of jurisdiction and admissibility can be distinguished is whether the success of the preliminary objection negates consent to the forum, i.e. whether the objecting party is targeting at the tribunal or at the claim.³⁹⁷ An objection to the admissibility of a claim involves a challenge to the validity of a claim distinct from issues as to jurisdiction

³⁹³ Prosecutor v. Duško Tadić, Decision on the defence motion for interlocutory appeal on jurisdiction (2 October 1995), p. 365, para. 10.

³⁹⁴ Crawford, Brownlie’s Principles of Public International Law, p. 693.

³⁹⁵ Santulli, Droit du contentieux international, pp. 264, 265.

³⁹⁶ For example, in the *Case concerning certain German Interests in Polish Upper Silesia*, PCIJ Series A No. 6, p. 13, where separate objections were made against the jurisdiction of the court and the admissibility of the suit, the PCIJ dealt with each of these categories separately, but took one of the objections to its jurisdiction together with the objections to admissibility because it considered that “it rather affects the question whether the suit can be entertained”. In the *Anglo-Iranian Oil Co. Case*, Judgment of 22 July 1952, ICJ Reports 1952, p. 114, after declining its jurisdiction, the ICJ found that “it need not examine any arguments put forward by the Iranian government against the admissibility of the claims of the United Kingdom Government”. In the *Nottebohm Case (Preliminary Objection)*, Judgment of 18 November 1953, ICJ Reports 1953, p. 123, after rejecting the objection against its jurisdiction, the court distinguished admissibility as a matter independent from both jurisdiction and merits. See also *Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility*, Judgment of 26 November 1984, ICJ Reports 1984, p. 429, para. 84. This has been affirmed in *SGS v Philippines*, Decision on Objections to Jurisdiction, 29 January 2004, ICSID Case No. ARB/02/6, para. 154. In contrast, the arbitral tribunal in *Enron v. Argentina*, Decision on Jurisdiction, 2 August 2004, ICSID Case No. ARB/01/3, para. 33 found that “[t]he distinction between jurisdiction and admissibility does not appear to be necessary in the context of the ICSID Convention, which deals only with jurisdiction and competence ()

³⁹⁷ Paulsson, Jurisdiction and Admissibility, p. 616.

or merits. It does not question the existence of the tribunal's power but challenges the right of the applicant to invoke it in the circumstances of the case.³⁹⁸ Non-admissibility means that the court or tribunal cannot hear a case now, but could do so in the future. Once the defect is cured, the application may be successfully brought before the tribunal at a later date.³⁹⁹ On the other hand, when a tribunal has no jurisdiction in a dispute, the defect cannot be cured in relation to that particular dispute as framed and presented to the tribunal.

The distinction between jurisdictional and procedural provisions also becomes apparent as regards the possibility to annul a ruling under the ICSID Convention. Annulment within the context of the ICSID system is the primary avenue the Convention provides to challenge an award. The possibility to annul an award is limited to five specific grounds. According to Article 52 (1) (b) of the ICSID Convention, an award can be annulled if the tribunal has manifestly exceeded its powers. A manifest excess of powers will be found *inter alia* where an ICSID tribunal adjudicates a case without having jurisdiction.⁴⁰⁰ In contrast, disputes as to the correct application of procedural provisions are not subject to annulment.

Procedural and jurisdictional dispute settlement provisions thus present different obstacles to the determination of a claim. While the criterion of jurisdiction determines the limits of the power of the tribunal as defined by the consent of the parties, admissibility conditions determine the possibility of the tribunal to exercise given jurisdictional power. This does however not mean that jurisdictional provisions are mandatory, while admissibility criteria are permissive and may therefore be neglected. The effect of non-compliance is a lack of jurisdiction in one case and non-admissibility in the other. Thus, compliance is required both as regards jurisdictional and admissibility requirements listed in a BIT.

³⁹⁸ Shihata, *The Power of the International Court to Determine its Own Jurisdiction*, p. 107. See also Markert, *Streitschlichtungsklauseln in Investitionsschutzabkommen*, p. 117.

³⁹⁹ Amerasinghe, *Jurisdiction of International Tribunals*, p. 243.

⁴⁰⁰ *Vivendi v. Argentina*, Decision on Annulment, 3 July 2002, ICSID Case No. ARB/97/3, para. 72.

B. Arguments Relating to the Application of Most-Favoured-Nation Clauses to Procedural Dispute Settlement Provisions

This Chapter highlights the role of dispute settlement in BITs and demonstrates that this role combined with the function of MFN clauses to establish equal competitive opportunities argues in favour of applying MFN clauses to procedural provisions. It follows an interpretation of MFN clauses according to the Vienna Convention on the Law of Treaties, which leads to the same result. Next, the chapter gives an overview of domestic and ICJ jurisprudence dealing with MFN clauses.

I. Interpretation of Most-Favoured-Nation Clauses According to the Vienna Convention

Bilateral investment treaties are subject to the rules of interpretation codified in the Vienna Convention on the Law of Treaties. The principal rule for treaty interpretation is framed in Article 31 (1) VCLT, which states:

“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.”

Article 31 (1) names as primary means of interpretation the plain meaning, the context and the object and purpose of the treaty. There is no hierarchical structure between the means of interpretation mentioned in that article, the interpretation of treaties by applying the methods of interpretation enumerated in Article 31 (1) being intended to be a “single combined operation”⁴⁰¹. Yet Article 31 (1) establishes as the basis of interpretation the ordinary meaning rule, which means that the starting point for treaty interpretation is the determination of the meaning of the treaty text.⁴⁰² Notably, it is not possible to give an interpretation valid for all existing most-favoured-nation clauses, rather it is necessary to

⁴⁰¹ Yearbook of the International Law Commission 1966, vol. II, pp. 219, 220.

⁴⁰² Yearbook of the International Law Commission 1966, vol. II, p. 220, Herdegen, Interpretation in International Law, Law, in: Wolfrum, Rüdiger (ed.), Max Planck Encyclopedia of Public International Law, para. 11. This has been held continuously by the ICJ – see for example the *Territorial Dispute (Libyan Arab Jamahiriya/ Chad)*, Judgment of 3 February 1994, ICJ Reports 1994, p. 22, para. 41: “Interpretation must be based above all upon the text of the treaty.”

interpret each clause separately. Nevertheless, it is possible to make some general statements which are valid for the majority of clauses.

1. The Wording of Most-Favoured-Nation Clauses

Concerning their relationship to dispute settlement provisions, MFN clauses can be divided into three major groups. There is one category of clauses that explicitly excludes dispute settlement from their scope. The 2006 Canada-Peru BIT provides in Annex B.4 that most-favoured-nation treatment shall not encompass dispute resolution mechanisms, providing that:

„For greater clarity, treatment ‘with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments’ referred to in paragraphs 1 and 2 of Article 4 does not encompass dispute resolution mechanisms [...] that are provided for in international treaties or trade agreements.”

In addition, the MFN clause is situated in Section B of the Canada-Peru BIT titled “Substantive Obligations” and thus clearly separated from Section C, which deals with dispute settlement. Another example is the interpretative statement on the scope of application of the MFN clause in the final draft text of the Central America Free Trade Agreement (CAFTA-DR), which expressly provides that international dispute resolution procedures shall not be encompassed by the clause. The parties to the CAFTA-DR, referring explicitly to the *Maffezini case*, included a footnote providing that the MFN clause included in the investment chapter did not encompass international dispute resolution mechanisms.⁴⁰³

⁴⁰³

Footnote 1 of the draft text of the CAFTA-DR provided: “The Parties agree that the following footnote is to be included in the negotiating history as a reflection of the Parties’ shared understanding of the Most-Favored-Nation Treatment Article and the Maffezini case. This footnote would be deleted in the final text of the Agreement. The Parties note the recent decision of the arbitral tribunal in *Maffezini v. Kingdom of Spain*, which found an unusually broad most-favored-nation clause in an Argentina-Spain agreement to encompass international dispute resolution procedures. [...] By contrast, the Most-Favored-Nation Treatment Article of this Agreement is expressly limited in its scope to matters “with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.” The Parties share the understanding and intent that this clause does not encompass international dispute resolution mechanisms such as those contained in Section C of

A similar footnote was included by the negotiators of the draft Free Trade Agreement of the Americas (FTAA).⁴⁰⁴

A second category of clauses explicitly extends its scope to dispute settlement provisions. In that respect, two approaches can be distinguished. According to one approach, the implementation of rights is explicitly enumerated as a field of application of the clause. This approach has been chosen in the 2001 Austria-Saudi Arabia BIT, which provides in Article 3 (3):

“Each Contracting Party shall accord the investors of the other Contracting Party in connection with the management, operations, maintenance, use, enjoyment or disposal of investments *or with the means to assure their rights to such investments* like transfers or indemnifications or with any other activity associated with this in its territory, treatment not less favourable than the treatment it accords to its investors or to the investors of a third State, whichever is more favourable.”⁴⁰⁵

An alternative model is to explicitly make reference to those articles in the BIT to which most-favoured-nation treatment shall apply, thus also referring to the dispute settlement provisions of the BIT. This approach has been chosen in the 1991 UK Model BIT, the MFN clause of which provides:

- (1) “Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State.
- (2) Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it

this Chapter, and therefore could not reasonably lead to a conclusion similar to that of the Maffezini case” (see <http://www.asil.org/ilib/ilib0703.htm#t1>).

⁴⁰⁴ Third Draft FTAA Agreement, November 21, 2003, note 13.

⁴⁰⁵ Emphasis added by the author.

accords to its own nationals or companies or to nationals or companies of any third State.

(3) For the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement.⁴⁰⁶

The peculiarity which distinguishes this model clause from others is its paragraph 3, according to which the MFN clause is applicable to Articles 1 to 11 of the BIT. These Articles include definitions, substantive treatment standards and provisions on State-State and investor-State dispute settlement. The Articles to which the MFN clause cannot be applied (Articles 12 to 14) are the final treaty provisions concerning the treaty's territorial extension, its entry into force, duration and termination. This formulation clarifies the scope of the clause in a way which leaves no doubt that it shall be applicable to substantive as well as procedural treatment standards as guaranteed in Articles 1 to 11. The enumeration of fields of application in paragraph 2 can therefore not serve as a restriction of the clause's scope.

It has been argued that one can infer from paragraph 3 by an *argumentum e contrario* that in case such a clause is not inserted in a BIT, the clause cannot be applied to dispute settlement provisions.⁴⁰⁷ Yet the formulation "for the avoidance of doubt" implies that the United Kingdom did not necessarily believe that it was departing from a general rule but only inserted paragraph 3 to ensure a correct interpretation.⁴⁰⁸

However, most BITs remain silent on the issue whether dispute settlement provisions fall within the scope of provisions which can be incorporated through the MFN clause. The question whether dispute settlement provisions shall be covered by the clause only arises with regard to this third group, which does not make explicit reference to dispute settlement provisions. This category can further be divided into clauses that enumerate specific

⁴⁰⁶ Article 3 of the United Kingdom Model BIT. For further examples see Article 3 of the UK-Albania BIT, Article 3 of the UK-Venezuela BIT, Art. 3 of the Ethiopia-UK BIT and Article 3 of the Armenia-Egypt BIT.

⁴⁰⁷ This was an argument of the Respondent Spain in the *Maffezini* case.

⁴⁰⁸ *Maffezini v. Spain*, Decision on Jurisdiction, 25 January 2000, ICSID Case No. ARB/97/7, para. 52.

fields of application, with the list being either exhaustive or non-exhaustive, and others that are worded in a general manner. Some of these general clauses, one of which was at issue in the Maffezini case, contain a reference to “all matters subject to this Agreement”.⁴⁰⁹ In case a BIT contains a dispute settlement mechanism, the relevant provisions are also a matter governed by the agreement.⁴¹⁰ However, this does not necessarily suggest that clauses not making reference to “all matters subject to this agreement” can be interpreted as excluding dispute settlement provisions from their scope. Basically, these treaties contain the general standard that treatment granted to investors and investments from third states must be extended to the beneficiary. For example, the ASEAN Framework Agreement provides: „In relation to investments falling within the scope of this Agreement, any preferential treatment granted under any existing or future agreements or arrangements to which a Member State is a party shall be extended on the most favoured nation basis to all other Member States.”⁴¹¹ The crucial issue is therefore the definition of the term “treatment” that is used consistently in these clauses. Treatment can be defined as the “(mode of) dealing with or behaving towards a person or thing”⁴¹². Similarly, the tribunal in *Siemens v. Argentina* held that

“‘Treatment’ in its ordinary meaning refers to behavior in respect of an entity or a person.”⁴¹³

⁴⁰⁹ Article IV (2) of the Spain-Argentina BIT provides: “In all matters subject to this agreement, such treatment shall be no less favourable than that accorded by each Party to investment made in its territory by investors of a third country.”

⁴¹⁰ *Gas Natural v. Argentina*, Decision on Jurisdiction, 17 June 2005, ICSID Case No. ARB 03/10, para. 30; *Suez and Vivendi v. Argentina*, Decision on Jurisdiction, 3 August 2006, ICSID Case No. ARB/03/19, para. 58.

⁴¹¹ Article 8 (2) of the ASEAN Framework Agreement. In Article 8 (1), the agreement contains a most-favoured-nation clause with a non-exhaustive list of fields of application, which is however only applicable to “all measures affecting investment including but not limited to the admission, establishment, acquisition, expansion, management, operation and disposition of investments”. While this provision is applicable to measures of the host State, Article 8 (2) specifically deals with treatment granted in third-party treaties.

⁴¹² The Concise Oxford Dictionary, p. 1142.

⁴¹³ *Siemens v. Argentina*, Decision on Jurisdiction, 3 August 2004, ICSID Case No. ARB/02/8, para. 85.

Within the context of investment, the term includes the rights and privileges granted and the obligations and burdens imposed by a Contracting State on investments.⁴¹⁴ Treatment therefore broadly refers to the way host States act and to standards they apply in relation to investments and investors, i.e. to the entire legal regime that applies to investments and investors.⁴¹⁵ It can refer to unilateral measures including domestic legislation as well as to standards of investor protection set out in bilateral or multilateral investment agreements concluded with third States. There is therefore no textual basis to say that ‘treatment’ does not encompass the host state’s acceptance of international arbitration.⁴¹⁶ Referring to the entire legal regime that an investor is exposed to, the term cannot be understood as limiting the scope of a most-favoured-nation clause to substantive provisions of a BIT.⁴¹⁷

Other bilateral investment treaties contain a narrower formulation of the most-favoured-nation clause, limiting the application of the clause to specified matters. These clauses enumerate certain fields of application of the most-favoured-nation clause in a closed list and are typical for U.S. and Canadian bilateral investment treaties and the NAFTA.⁴¹⁸ The scope of this category of most-favoured-nation clauses is limited to, for example, treatment with respect to the “establishment, acquisition, expansion, management, conduct, operation and sale or other disposition”⁴¹⁹ of an investment. It has been held by the *Plama* tribunal that such formulation implies that the MFN clause only applies to substantive rights and excludes dispute settlement from its scope.⁴²⁰ On the other hand, the closed list in the MAI which referred to the “establishment, acquisition, expansion, maintenance, use, enjoyment and sale or other disposition of investments” was considered by several

⁴¹⁴ *Suez and Vivendi v. Argentina*, Decision on Jurisdiction, 3 August 2006, ICSID Case No. ARB/03/19, para. 55.

⁴¹⁵ Dolzer/ Stevens, *Bilateral Investment Treaties*, p. 58.

⁴¹⁶ *Renta 4 v. Russian Federation*, Award on Preliminary Objections, 20 March 2009, SCC Case No. 24/2007, para. 101.

⁴¹⁷ See also Chukwumerije, p. 632; Schill, *Most-Favored-Nation Clauses as a Basis of Jurisdiction*, JWIT 10 (2009), p. 206; Schill, *Multilateralizing Investment Treaties*, BJIL 27 (2009), p. 550; *Siemens v. Argentina*, Decision on Jurisdiction, 3 August 2004, ICSID Case No. ARB/02/8, para. 85.

⁴¹⁸ Some recent examples of US and Canadian treaties containing such a narrower clause are the US-Chile FTA (2003), the US-Singapore FTA (2003) and the Canada-Chile FTA (1997).

⁴¹⁹ See Article 4 of the 2004 US Model BIT and Article 4 of the 2004 Canadian Model BIT.

⁴²⁰ *Plama v. Bulgaria*, Decision on Jurisdiction, 8 February 2005, ICSID Case No. ARB/03/24, paras 201, 203. See also UNCTAD, *Bilateral Investment Treaties 1995-2006*, p. 41; Radi, *The application of the most-favoured-nation clause*, p. 767.

delegations to be a comprehensive one whose terms were designed to cover all activities of investors and their investments for both the pre-and post-establishment phases.⁴²¹ Moreover, the *Suez-AWG* tribunal found that the right to have recourse to international arbitration was “very much related to investors’ ‘management, maintenance, use, enjoyment, or disposal of their investments.’” The *Suez-AWG* tribunal found the clause to be “particularly related to the maintenance of an investment”, since that term included the protection of an investment.⁴²² Another option is to subsume dispute settlement under the “management” of an investment. Since the possibility to have recourse to a dispute settlement mechanism is vital for the effective administration of corporate concerns and “management” can be defined as the administration of business concerns,⁴²³ the notion of “management” of investments should also be interpreted as encompassing dispute settlement.

There is also a category of MFN clauses which contain a merely illustrative list of fields of application. For example, the MFN clause of the Energy Charter Treaty is applicable to investment activities *including* certain enumerated activities. The German model BIT states that MFN treatment applies to covered investments and investment activities of investors and specifies in paragraph 3 of the Protocol that investment “activities” within the meaning of Article 3 (2) of the treaty means “particularly, but not exclusively,” the management, maintenance, use, enjoyment and disposal of an investment. Given that dispute settlement is related to the management and maintenance of an investment, such open definition must *a fortiori* be interpreted as covering dispute settlement provisions.

Summing up, although the specific wording of an MFN clause has to be taken into account, as a rule, the language of MFN clauses can be interpreted as encompassing procedural dispute settlement provisions. Clauses referring to the possibility to invoke dispute settlement provisions are unambiguous in this regard. However, those clauses that do not make such reference can as well be applied to dispute settlement since the notion of treatment covers the legal rules that govern dispute settlement proceedings. The terms of

⁴²¹ Muchlinski, *The Rise and Fall of the Multilateral Agreement on Investment*, p. 1043.

⁴²² *Suez and Vivendi v. Argentina*, Decision on Jurisdiction, 3 August 2006, ICSID Case No. ARB/03/19, para. 57 (referring to Article 3 (2) of the Argentina-UK BIT).

⁴²³ Oxford Concise Dictionary, p. 614.

“management” or “maintenance” of an investment also encompasses its protection through dispute settlement. However, States have the possibility to explicitly exempt dispute settlement provisions from the application of the MFN clause, which has been done in a number of recent treaties. This demonstrates that reservations are a key technique to preserve flexibility in the pursuit of national policy objectives or to preserve the reciprocal nature of an agreement.⁴²⁴

2. The *Ejusdem Generis* Principle

Concerning most-favoured-nation clauses, the *ejusdem generis* principle is another important device of interpretation. According to the ILC Draft Articles on MFN clauses, the *ejusdem generis* principle implies that

“The beneficiary State acquires the rights only in respect of persons or things which are specified in the clause or implied from its subject-matter.”⁴²⁵

It follows from this principle that in case a most-favoured-nation clause contains an enumeration of specific fields of application, such as NAFTA or the U.S. Model BIT, the clause can only be applied to matters of the same kind as indicated by the specifically enumerated matters, *ejusdem generis* meaning “of the same kind” or “of the same category”. In the words of the *Plama* tribunal,

“when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same type as those listed.”⁴²⁶

⁴²⁴ For details see UNCTAD, Preserving Flexibility in IIAs: The Use of Reservations.

⁴²⁵ Article 9 (2) of the ILC Draft Articles. This can also be inferred from the *Ambatielos* case, in which the Arbitral Commission stated that the most-favoured-nation clause could only be applied to “matters belonging to the same category of subject as that to which the clause itself relates” (107).

⁴²⁶ *Plama v. Bulgaria*, Decision on Jurisdiction, 8 February 2005, ICSID Case No. ARB/03/24, para. 189. See also McNair, 393: “general words when following (and sometimes when preceding) special words are limited to the *genus*, if any, indicated by the special words.”

If the most-favoured-nation clause does not indicate specific fields of application, its application must be limited to matters governed by the basic treaty. While a clause granting most-favoured-nation treatment “in all matters subject to this Agreement” clearly requires that the basic treaty contains a provision concerning the subject-matter of the invoked benefit, a formulation only referring to “treatment” as for example in the German and the United States Model BIT is less unequivocal. However, most-favoured-nation clauses can only operate in the context of the treaty in which they were inserted. Therefore the scope of most-favoured-nation clauses is limited *ratione materiae* to the subject-matter of the relevant treaty.⁴²⁷ A most-favoured-nation clause can therefore not be applied if the right claimed under it does not relate to the same subject-matter as the treaty containing the clause. For example, if a most-favoured-nation clause is included in a commercial treaty, a State cannot claim the extradition of a criminal on the grounds that the treaty partner has agreed in a third-party treaty to extradite criminals.⁴²⁸

The *ejusdem generis* principle is not an isolated principle of interpretation, but is rather a tool that can be employed in order to discern the common intention of the parties as regards the intended fields of application of the clause, as expressed in the treaty text.⁴²⁹ It is therefore not an additional method of treaty interpretation detached from the methods laid down in the Vienna Convention, but can in fact only be applied within the analysis of the wording of the relevant most-favoured-nation clause.

3. The Context

The context of a treaty comprises, *inter alia*, the treaty text including its preamble and annexes, and any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty.⁴³⁰ Together with the context, other factors including any subsequent agreement between the parties regarding the interpretation of

⁴²⁷ Dolzer/Stevens, *Bilateral Investment Treaties*, p. 66; *Braunkohlen Briket Verkaufsverein Gesellschaft v. Goffart ès qual.*, Cour de Cassation Civile, judgment of 22 december 1913, *Recueil Dalloz* 1915, 1-4, 4; *d’Oldenbourg v. Serebriakoff*, Cour de Paris, 8 june 1935, in *Revue Internationale de Droit International Public* 1937, 475-476, 476.

⁴²⁸ See McNair, *The Law of Treaties*, p. 287.

⁴²⁹ McNair, *The Law of Treaties*, p. 287.

⁴³⁰ Article 31 II VCLT.

the treaty or the application of its provisions shall be taken into account.⁴³¹ As an example of such a subsequent agreement which was agreed upon after the decision in the Siemens case, Argentina and Panama exchanged diplomatic notes with an interpretative declaration on the MFN clause included in their 1996 investment treaty stating that the MFN clause shall not be applicable to dispute settlement clauses.⁴³²

In investment arbitration cases, contextual arguments have been brought forward with regard to the inclusion of specific MFN clauses, specifically negotiated provisions, treaty practice and exceptions.

a. Specific Most-Favoured-Nation Clauses

In addition to the general most-favoured-nation clause, many bilateral investment treaties include most-favoured-nation clauses in relation to specific matters, especially as regards the determination of the consequences of war, armed conflict, revolution, state of national emergency or similar events which may occur in the host state. These clauses may include conditions of restitution, indemnification, compensation or other settlement. For example, Article 4 (4) of the 2004 German Model BIT contains a specific most-favoured-nation clause which is applicable to investors suffering damages in case of war, military conflict or revolution, requiring that in such cases, any restitution, indemnity or compensation shall be based on the most-favoured-nation standard.⁴³³ It has been argued that the inclusion of specific most-favoured-nation clauses has the effect of excluding from the scope of the general clause those sectors which are not covered by the specific clause, the argument being that otherwise the specific clauses would be deprived of effect and therefore be superfluous.⁴³⁴ In *Siemens v Argentina*, Argentina argued that the principle of effective interpretation required giving an effect to the specific most-favoured-nation clauses of

⁴³¹ Article 31 III VCLT.

⁴³² See *National Grid v. Argentina*, Decision on Jurisdiction, 20 June 2006, UNCITRAL arbitration, para. 85.

⁴³³ See also, *inter alia*, Article 7 of the 1993 Bolivia-Peru BIT; Art. IV (1) of the 1995 US-Nicaragua BIT; Art. 8 of the 1991 Australia-Vietnam BIT; Art. 5 of the 1993 China-Uruguay BIT; Art. 4 (1) of the 1993 Hungary-Czech Republic BIT; Art. 4 (1) of the 1993 UK-Honduras BIT; Art. 7 of the 1993 Argentina-Venezuela BIT; Art. 4 (1) of the 1999 US-Bahrain BIT; Art. 5 (3) of the 1993 France-Algeria BIT; Art. 12 (1) of the 2004 Canada Model BIT; Article 12 (1) ECT.

⁴³⁴ See Argentina's argumentation in *Siemens v. Argentina*, Decision on Jurisdiction, 3 August 2004, ICSID Case No. ARB/02/8, para. 87.

BITs, which would be superfluous if the general most-favoured-nation clause was considered applicable for all fields covered by the treaty. However, the specific fields of application of the most-favoured-nation clause do not serve to exclude any other fields of application from the scope of the general clause. The fact that all treaties, in addition to the clauses applying in a specific context, contain a general most-favoured-nation clause indicates that the specific most-favoured-nation clauses are rather meant as a clarification that the most-favoured-nation treatment standard is also applicable in certain domains, not as an exclusion of most-favoured-nation treatment in other not specifically mentioned areas.⁴³⁵ For example, as regards the clauses governing compensation for losses from armed conflict, which often refer to compensation not less favourable than that granted to nationals or other foreign investors, this formulation serves to clarify that there is no absolute right to compensation. Moreover, the consequences of violent disturbances and strife in the host country are a matter of special interest to investors, which explains the inclusion of a specific provision granting certain treatment standards applicable under such circumstances. Specific most-favoured-nation clauses are thus rather intended to place emphasis on most-favoured-nation treatment in specifically important matters than to exclude the application of the general clause in other fields.⁴³⁶ This becomes even more evident in the formulation used in some specific most-favoured-nation clauses, which explicitly refer only to “matters covered in this Article”⁴³⁷.

b. Specifically Negotiated Provisions

Some tribunals have indicated that certain treatment standards must be deemed to be specifically negotiated by the contracting parties.⁴³⁸ The specific negotiation and detailed regulation of certain treatment standards could be assumed to provide the context against which a most-favoured-nation clause should be interpreted. The specific negotiation of

⁴³⁵ Accordingly, the *Siemens* tribunal dismissed Argentina’s argument, arguing that while the specific clause at issue contained a reference to “matters covered in this article”, the general clause did not contain such reference (*Siemens v. Argentina*, Decision on Jurisdiction, 3 August 2004, ICSID Case No. ARB/02/8, para. 89).

⁴³⁶ *Siemens v. Argentina*, Decision on Jurisdiction, 3 August 2004, ICSID Case No. ARB/02/8, paras 89, 90.

⁴³⁷ See Article 4 (4) of the Argentina-Germany BIT.

⁴³⁸ *Tecmed S.A. v. Mexico*, Award, 29 May 2003, ICSID Case No. ARB (AF)/00/2, para. 69.

provisions could be viewed as indicating that the parties to the treaty did not intend these standards, which embody a specific party intention, to be overridden by the relevant most-favoured-nation clause. However, the less favourable treaty provisions in the basic treaty are not the context against which an MFN clause should be read.⁴³⁹ Applying this principle would make the most-favoured-nation clause virtually redundant since all provisions of a treaty embody a certain party intention. The MFN clause could therefore only be applied with respect to unilateral behaviour, but not to treatment standards granted in treaties, which are always the result of negotiations. One can however not follow from the fact that a certain provision was negotiated by the parties that it was the parties' intention to exempt the respective provisions from change by means of the most-favoured-nation clause. It is rather exactly the object of a most-favoured-nation clause to level the advantages of specific negotiation. This is underlined by the decisions in the *Pope & Talbot* and the *ADF* cases, where the State parties had given a clear and detailed expression of their intention about the scope of the fair and equitable treatment clause in a note on interpretation of the Free Trade Commission. The tribunals did not argue that this note indicated that the scope of the most-favoured-nation clause should be limited so as to exclude its application to more favourable fair and equitable treatment clauses.⁴⁴⁰ In consequence, the scope of the dispute settlement provisions of the basic treaty is irrelevant for the interpretation of the scope of the MFN clause. It is rather the scope of the MFN clause itself that has to be examined.

c. Treaty Practice

In its broader sense, systematic treaty interpretation comprises the consideration of texts and events outside the framework of a treaty.⁴⁴¹ Thus, arbitral tribunals have sometimes referred to the practice of the contracting States in treaties different from the treaty con-

⁴³⁹ See also dissenting opinion of Charles N. Brower, *Austrian Airlines v. The Slovak Republic*, 9 October 2009, UNCITRAL ad hoc arbitration, para. 7.

⁴⁴⁰ See below Part IV A.I.3.

⁴⁴¹ Herdegen, *Interpretation in International Law*, in: Wolfrum, Rüdiger (ed.), *Max Planck Encyclopedia of Public International Law*, para. 12.

taining the most-favoured-nation clause in question.⁴⁴² Their analysis was based on the inconsistency that can be observed in treaty practice as regards the content of investment treaty provisions, which they interpreted as a sign that there was no public policy on the side of the host State. They interpreted this lack of public policy as an indication for the applicability of the most-favoured-nation clause. One can however generally not follow from variations in the BITs concluded by one State how that State interpreted the scope of the most-favoured-nation clause.

One explanation for inconsistent treaty practice is a change in policy.⁴⁴³ When varying treatment standards can be explained with policy change, the application of the most-favoured-nation clause is an efficient instrument providing the granting State with the possibility to extend its change in policy to all treaty partners without having to renegotiate all treaties. However, the varying content of BITs does not necessarily signify a turn away from a certain policy. The reason for different standards may also be that BIT negotiations often do not take place on an equal footing, especially when the treaty is concluded between a mainly capital-exporting and a mainly capital-importing country. The starting point of negotiations is usually the respective model BIT of the capital-exporting country, which capital-importing countries try to modify according to their interests in the negotiations.⁴⁴⁴ Capital-importing countries may be able to assert more of their interests in negotiations with one treaty partner than with the other. Another reason for different standards is that it may depend on the treaty partner which clauses are considered necessary elements of a BIT. States may also be willing to make concessions to different degrees in order to attract investments depending on the nature and scope of investments emanating from the relevant treaty partners, *i.e.* on the number of investors that are already present from the respective countries and the type of investments made by these

⁴⁴² *Maffezini v. Spain*, Decision on Jurisdiction, 25 January 2000, ICSID Case No. ARB/97/7, paras 58, 59; *Siemens v. Argentina*, Decision on Jurisdiction, 3 August 2004, ICSID Case No. ARB/02/8, para. 105.

⁴⁴³ For example, the Maffezini tribunal concluded that Argentina had abandoned its prior policy of requiring an eighteen-month waiting period and had begun to accept dispute settlement mechanisms requiring no such waiting period Maffezini (*Maffezini v. Spain*, Decision on Jurisdiction, 25 January 2000, ICSID Case No. ARB/97/7, para. 57).

⁴⁴⁴ Vandevelde, *The Bilateral Investment Treaty Program of the United States*, p. 211.

investors.⁴⁴⁵ Different State practice can thus be ascribed to various reasons, *inter alia* the different starting points for negotiations resulting from differences in the used model BITs, the negotiating power of the respective treaty partners, and the number and type of involved investors. Thus, different provisions generally do not allow an inference on the parties' interpretation of the scope of the relevant most-favoured-nation clause. Moreover, the reasoning of the tribunals in *Maffezini* and *Siemens* as regards the implications of State practice is contradictory since a public policy could only be affirmed in case a State had a totally uniform treaty practice, which can hardly ever occur since the most-favoured-nation standard only becomes relevant in cases where the BITs concluded by one country contain varying standards; there must therefore be at least one treaty which contains a more favourable provision. Since in the view of both tribunals, the State is precluded from relying on the public policy exception in case of inconsistent treaty practice, it will hardly ever be possible for a State to rely on public policy. Thus, the reliance on State practice in order to decide whether the State pursues a sensitive issue of public policy can hardly be regarded as fertile.

d. Exceptions to Most-Favoured-Nation Treatment

The inclusion of exceptions to most-favoured-nation treatment can serve as a contextual argument to extend the application of the clause to all fields that are not explicitly covered by those exceptions. MFN clauses are usually subject to at least two exceptions, one relating to more favourable treatment accorded due to membership in a regional economic integration organizations, and the other relating to advantages offered to a third country under a double taxation agreement. Some BITs also exempt dispute settlement provisions from the application of the most-favoured-nation clause. The existence of exceptions to MFN treatment is an indication that the standard can be applied to all fields covered by the treaty that are not listed as an exception.⁴⁴⁶

⁴⁴⁵ This can be demonstrated by comparing the dispute settlement clauses that were relevant in the *Siemens* case. Although both treaties were concluded in 1991, the Argentina-Chile BIT did not include a domestic litigation waiting period, while the Argentina-Germany BIT did contain such a requirement.

⁴⁴⁶ *Siemens v. Argentina*, Decision on Jurisdiction, 3 August 2004, ICSID Case No. ARB/02/8, para. 85; *RosInvestCo v. Russia*, Award on Jurisdiction, October 2007, Arbitration Institute of the Stockholm Chamber of Commerce, Case No. V 079/2005, para. 135; *National Grid v. Argentina*, Decision on Jurisdiction,

4. The Object and Purpose

The aim of teleological interpretation is to find out whether the object and purpose of the treaty or of a treaty provision suggests anything for the meaning of that provision. Accordingly, both the object and purpose of a given treaty in its entirety as well as of the individual treaty clause play a role in treaty interpretation. Teleological interpretation involves first the identification of the object and purpose of the treaty and its provisions and in a second step the assessment how the object and purpose of the treaty influences the understanding of the meaning of the relevant provision and the choice of a meaning that best promotes this object.⁴⁴⁷ It is to be assumed that the single treaty norm has an object of its own which contributes to the attainment of the overall object of the treaty.⁴⁴⁸ As far as the object and purpose of a treaty is clearly indicated in the treaty text, an interpretation of a treaty provision which contributes to the achievement of the overall aim of the treaty is to be preferred.⁴⁴⁹

The object and purpose of a treaty can primarily be gathered from the text of the treaty and from its preamble rather than from a real or presumed party intention.⁴⁵⁰ This is especially true with regard to bilateral investment treaties, which are negotiated in a way different from the much more complex and usually better documented processes of negotiating multilateral treaties⁴⁵¹. BIT negotiators tend to use existing models with standardized language that is taken from earlier treaties, without explicitly discussing every single clause or issuing notes of interpretation.⁴⁵² Therefore a party intention that a certain provision was meant to operate in a certain way can hardly ever be proved.

tion, 20 June 2006, UNCITRAL arbitration, para. 82, referring to the principle of *expressio unius est exclusio alterius*.

⁴⁴⁷ Schollendorf, Die Auslegung völkerrechtlicher Verträge in der Spruchpraxis des Appellate Body, pp. 52, 53.

⁴⁴⁸ Bernhardt, Die Auslegung völkerrechtlicher Verträge, pp. 88, 89.

⁴⁴⁹ Dahm/ Delbrück/ Wolfrum, Völkerrecht, § 153, p. 644.

⁴⁵⁰ Sinclair, The Vienna Convention, p. 127; Heintschel von Heinegg in: Ipsen, Völkerrecht, § 11 para. 15.

⁴⁵¹ Wälde, The Umbrella Clause, p. 217.

⁴⁵² Wälde, The Umbrella Clause, p. 218.

The essential function of the MFN clause is to guard against present or future discrimination by host countries and to guarantee equality of the legal conditions and competitive opportunities among investors from different foreign countries.⁴⁵³

It has been argued by Respondent host countries that only the substantive treatment of transactions of a commercial and economic nature was related to the competitiveness of an investment and that dispute settlement in national courts did not necessarily represent an objective disadvantage in comparison to international dispute settlement.⁴⁵⁴ However, the value and effectiveness of substantive provisions codified in a treaty is linked to and largely dependent on the availability of an effective enforcement procedure. The decisive aspect of an international dispute settlement mechanism for the investor is his possibility to ensure that the obligations of the host country are effectively implemented. Treatment standards and guarantees are of limited significance unless they are subject to a dispute settlement system and, ultimately, to enforcement. Accordingly, the Arbitral Commission in the *Ambatielos* case acknowledged that the administration of justice is part of the protection of traders.⁴⁵⁵ The availability of a dispute settlement system which ensures the host country's compliance with the obligations under the BIT increases the level of certainty and predictability that is essential for a conducive business environment. Accordingly, the ICSID Convention was enacted since the establishment of a rule-oriented adjudication mechanism was regarded a "major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it."⁴⁵⁶ Thus, given that the substantive provisions of the treatment accorded in BITs are rather scant and basic, the key of the protection of the investor lies not only in these substantive provisions, but in the arrangements allowing for the submission of disputes to arbitration.⁴⁵⁷ Since the effective implementation of substantive

⁴⁵³ For details see Part I B.I.

⁴⁵⁴ *Maffezini v. Spain*, Decision on Jurisdiction, 25 January 2000, ICSID Case No. ARB/97/7, para. 42; *Siemens v. Argentina*, Decision on Jurisdiction, 3 August 2004, ICSID Case No. ARB/02/8, para. 84.

⁴⁵⁵ For details concerning the *Ambatielos* case, see Part VI B.III.1.

⁴⁵⁶ ICSID Report of Executive Directors, para. 9.

⁴⁵⁷ Orrego Vicuña, The Most-Favored-Nation Clause, in Kaufmann-Kohler/ Stucki, *Investment Treaties and Arbitration*, p. 138.

obligations is a central element of investment law, it also has an impact on the competitive opportunities of investors.

There are several features which render international arbitration more attractive for investors than domestic proceedings and which reflect that the effective implementation of substantive obligations has an impact on the investor's competitive opportunities. One reason can be terminological differences arising in national court proceedings that may lead to misunderstandings between representatives of different legal cultures. In this respect the differences between civil and common law can particularly lead to misconceptions, not only as regards substantive rights, but especially concerning procedural acts such as document disclosure, the role of witnesses and expert witnesses. Second, confidentiality is perceived to be one of the principal advantages of arbitration.⁴⁵⁸ The proceedings take place in private, and documents, evidence, the award and the existence of the arbitration may remain confidential. Moreover, the courts of the host State may be subject to national bias and political pressure.⁴⁵⁹ Even if there are no formal or informal mechanisms of control and influence, domestic courts will reflect the values, but also the biases and prejudices of their societies which may be activated when the State contends with foreign interests.⁴⁶⁰ For this reason ICSID was designed as a neutral forum intended "to maintain a careful balance between the interests of investors and those of host states".⁴⁶¹ In case international arbitrators are not neutral, they may rather be biased in favour of the investor since they are less close to State concerns and less likely to take account of public policy than domestic judges.⁴⁶² The circumvention of potential bias in favour of the State is therefore another means to protect equal competitive opportunities.

The fact that procedures are also relevant for competitive opportunities was affirmed by the WTO Panel in *US-Section 337*. The case dealt with the question whether the national

⁴⁵⁸ Partasides/ Fullelove, Global Overview: An Introduction to international commercial arbitration, in: Rowley (ed.), *Arbitration World*, pp. 1, 2.

⁴⁵⁹ Lamm, Jurisdiction of the International Centre for Settlement of Investment Disputes, p. 463; Schill, *Tearing Down the Great Wall*, p. 83.

⁴⁶⁰ Wälde, *Denial of Justice*, p. 465.

⁴⁶¹ Report of Executive Directors on the ICSID Convention, para. 13.

⁴⁶² For doubts as regards the neutrality of arbitrators see Kurtz, *The Delicate Extension of MFN Treatment to Foreign Investors*, in: Weiler (ed.), *International Investment Law and Arbitration*, pp. 534, 544.

treatment standard under Article III:4 GATT required equal treatment not only regarding substantive law, but also in terms of procedures designed to secure compliance with patent legislation. The decisive question was whether not only substantive, but also procedural “laws, regulations and requirements” could be regarded as “affecting” the internal sale of imported products within the meaning of Article III:4 GATT.⁴⁶³ For the purpose of enforcing private intellectual property rights, the United States subjected imported goods to a separate procedure from that for domestic goods solely by virtue of their origin. In patent infringement cases concerning imported products, proceedings were established before the United States International Trade Commission (USITC) under Section 337. The proceedings before the USITC differed from those before a federal district court, which were applied when a product of United States origin was challenged on the grounds of patent infringement.⁴⁶⁴ The EC maintained that the United States made an impermissible distinction between procedures applicable in patent litigation according to whether goods which allegedly infringed US patents were imported or domestically produced.⁴⁶⁵ According to the EC, the differences between the rules of procedure of the dispute settlement bodies amounted to less favourable treatment of the imported product within the meaning of Article III:4 GATT since laws and regulations on the enforcement of patent laws directly affected the sale of goods, influencing marketing prospects as well as the

⁴⁶³ Article III:4 GATT provides: “The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. [...]” The provision is supplemented by an interpretative note, the relevant part of which reads: “[...] any law, regulation or requirement [...] which applies to an imported product and to the like domestic product and is [...] enforced in the case of the imported product at the time or point of importation, is [...] subject to the provisions of Article III.”

⁴⁶⁴ In order to substantiate its assertion that the Section 337 procedure provided less favourable treatment for imported products, the EC cited *inter alia* the inadmissibility of counterclaims, confidentiality regulations that allegedly hampered the defence of the Respondents, severe time-limits, the possibility of *in rem* (instead of *in personam*) orders and an alleged lack of independence and expertise of decision-makers in Section 337 cases. Moreover, they adduced that imported products, in contrast to domestic products, could simultaneously face proceedings under Section 337 and in federal district courts and the limitation of availability of Section 337 proceedings to United States producers. For details concerning the procedural differences between federal district court patent actions and the procedure before the USITC see Panel Report, *United States – Section 337*, adopted on 7 November 1989, L/6439 - 36S/345, paras 2.8, 3.12, 3.21-3.46.

⁴⁶⁵ Panel Report, *United States – Section 337*, adopted on 7 November 1989, L/6439 - 36S/345, para 3.11.

resulting enforcement decisions.⁴⁶⁶ They argued that it was not possible to divorce a law from its enforcement since it was the actual application of the law including procedural rules that affected the sale, distribution and purchase of products within the meaning of Article III:4 GATT.⁴⁶⁷ Inversely, the United States argued *inter alia* that the national treatment clause did not cover procedural aspects, but only substantive law.⁴⁶⁸ They cited as evidence the wording of the national treatment clause which referred to laws, regulations and requirements and did not mention procedures and held that it was substantive law which affected the sale, offering for sale, purchase, transportation or use of products rather than the procedures applied to parties in adjudication of whether there was a violation of those laws.⁴⁶⁹

The Panel endorsed the view of the EC that the national treatment standard was applicable to procedural regulations.⁴⁷⁰ Apart from a reference to the wording, which made no distinction between substantive and procedural laws, and the drafting history of Article III:4 GATT, the Panel maintained that the selection of the word “affecting” indicated that the drafters of the Article intended to cover not only the laws and regulations which directly governed the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products on the internal market.⁴⁷¹ In addition, the Panel agreed with the EC that “enforcement procedures cannot be separated from the substantive provisions they serve to enforce”⁴⁷². Otherwise contracting parties could thwart the national treatment standard by enforcing substantive law that is in accordance with the national treatment standard through proce-

⁴⁶⁶ Panel Report, *United States – Section 337*, adopted on 7 November 1989, L/6439 - 36S/345, para. 3.7.

⁴⁶⁷ Panel Report, *United States – Section 337*, adopted on 7 November 1989, L/6439 - 36S/345, para. 3.10.

⁴⁶⁸ Panel Report, *United States – Section 337*, adopted on 7 November 1989, L/6439 - 36S/345, para. 3.9.

⁴⁶⁹ Panel Report, *United States – Section 337*, adopted on 7 November 1989, L/6439 - 36S/345, para. 3.9.

⁴⁷⁰ Panel Report, *United States – Section 337*, adopted on 7 November 1989, L/6439 - 36S/345, para. 5.10.

⁴⁷¹ Panel Report, *United States – Section 337*, adopted on 7 November 1989, L/6439 - 36S/345, para. 5.10.

⁴⁷² Panel Report, *United States – Section 337*, adopted on 7 November 1989, L/6439 - 36S/345, para. 5.10.

dures that are less favourable to imported products.⁴⁷³ Since the Panel found that the term “affecting” in Article III:4 meant that the drafters intended to cover any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products on and since the conditions of competition were modified by differing enforcement rules, the Panel held that the use of a distinct adjudicatory process represented a denial of national treatment.

Although the case concerned the national treatment standard in a very specific wording, the reasoning concerning its applicability to procedural requirements is partly transferable to the most-favoured-nation standard in investment treaties. In contrast to investment cases, the Claimant did not invoke more favourable international dispute settlement provisions, the dispute settlement mechanism in the WTO being uniform for all member States. The case rather concerned national procedural regulations. However, one argument of the Panel was that the national treatment standard was applicable to procedural regulations, since the aim of the standard to ensure equal conditions of competition could only be ensured in case of substantive and procedural equal treatment. Given that both the national treatment clause and the most-favoured-nation clause aim at ensuring equality of competitive opportunities, this reasoning can be transferred to the context of the most-favoured-nation clause.⁴⁷⁴ The case may thus serve as a guideline insofar as it addressed the need to prevent differential treatment both on the substantive and on the procedural plain in order to establish equal conditions of competition. This argues in favour of applying most-favoured-nation clauses to dispute settlement provisions.

This result is supported by the object and purpose of investment treaties. The majority of BITs emphasizes the goal of encouraging investments. This goal is expressed in the common title of investment treaties, which is “Treaty [...] concerning the Encouragement and Reciprocal Protection of Investments”⁴⁷⁵. Since bilateral investment treaties establish as an unambiguous goal the promotion and protection of investments, it has even been argued that any ambiguity in the provisions of the treaty should be interpreted in the light

⁴⁷³ Panel Report, *United States – Section 337*, adopted on 7 November 1989, L/6439 - 36S/345, para. 5.10.

⁴⁷⁴ See also Ben Hamida, *Clause de la nation la plus favorisée*, pp. 1158, 1159.

⁴⁷⁵ See, eg, the German Model BIT.

of this goal, namely in a way that would promote investment protection. This approach was adopted by the tribunal in *SGS v. Philippines* with regard to the Philippines-Switzerland BIT, which contained a preamble almost identical to that of the German model BIT:

“The BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble it is intended ‘to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other’. It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments.”⁴⁷⁶

However, a general pro-investor interpretation of BITs cannot be sustained. First, a teleological interpretation relying on the encouragement of foreign investment should not always and automatically lead to an interpretation of clauses exclusively in favour of investors since the aim of promoting investments is not a goal in itself, but is connected with the aim to promote economic growth in the respective host countries. BITs are meant to strike a balance between the interests of the investor and of the host State. Thus, the tribunal in *Amco Asia v. Indonesia* argued that

“the [ICSID] Convention is aimed to protect, to the same extent and with the same vigour the investor and the host State, not forgetting that to protect investments is to protect the general interest of development and of developing countries”⁴⁷⁷.

The conclusion of BITs is based on the premise that economic development takes place as a result of foreign direct investment⁴⁷⁸ and that BITs stimulate foreign investment

⁴⁷⁶ *SGS v Philippines*, Decision on Objections to Jurisdiction, 29 January 2004, ICSID Case No. ARB/02/6, para. 116.

⁴⁷⁷ *Amco Asia v. Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 389, 400, para. 23.

⁴⁷⁸ Most policymakers agree that foreign direct investment enhances economic growth and global welfare. They regard foreign direct investment as a motor for development and economic cooperation. The importance of foreign direct investment for economic development was for example stressed in the Monterrey

flows⁴⁷⁹. BITs shall both promote the role of foreign investment and control its operations in such a way as to ensure benefit for the host State's economy as a "supplement to a necessarily limited volume of public development finance"⁴⁸⁰. States grant international protection to foreign investment because of the potentially positive effects to their economy. BITs are therefore intended to establish a "fair and balanced [regime] for foreign investment"⁴⁸¹. This aim is also reflected in typical preambles of investment treaties which, even though not explicitly referring to public policy objectives, focus on the importance of fostering economic cooperation among the Contracting Parties, promoting favourable conditions for reciprocal investments and recognizing the impact that such investment may have in generating prosperity in the host country.⁴⁸² The German Model BIT provides such a typical preamble, stating

Consensus of the United Nations International Conference on Financing for Development, para. 20. A positive impact on development can at least be assumed under certain policy conditions, for example on condition that investors do not operate so as to supplant domestic investment.

⁴⁷⁹ It is unclear whether there is actually a link between the conclusion of investment agreements and the attraction of foreign investment to the effect that BITs stimulate foreign investment flows. Economists are divided as to whether BITs in fact significantly attract FDI. At least six factors are key determinants of the location of foreign direct investment in a particular host State, including the size and quality of the market, factor endowments, viz. the presence of natural resources and low wages, prices, the macroeconomic and political stability of the country, the policy environment, viz. trade and investment policy, and geographical and infrastructural determinants (See Gallagher/ Birch, *Do Investment Agreements attract Investments?*, pp. 964, 965). Yet there is very limited evidence of a relationship between BITs and investment flows. The impact of BITs on the flow of foreign investment may be small and secondary to the effects of other determinants. For example, although Brazil has not ratified any of the BITs it has signed, but has a substantial capital inflow. UNCTAD has noted in its *World Investment Report* (2003), p. 89, that „aggregate statistical analysis does not reveal a significant independent impact of BITs in determining FDI flows. At best, BITs play a minor role in influencing global FDI flows and explaining differences in their size among countries“. See also Hallward-Driemeier, *Do Bilateral Investment Treaties Attract FDI?*; pp. 22, 23; Tobin/ Rose-Ackerman, *Foreign direct investment and the business environment in developing countries*, pp. 24, 31. The regulatory framework for foreign investment at best enables the flow of foreign investment. Whether foreign direct investment actually flows into a country is dependent on economic determinants in the host state (UNCTAD, *World Investment Report*, 2003, p. 18). In contrast, another study by Salacuse/ Sullivan found that the number of US BITs correlates with an increase in foreign direct investment (Salacuse/ Sullivan, *Do BITs Really Work?*, pp. 104-111). However, this study was limited to an examination of US BITs.

⁴⁸⁰ Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, p. 343.

⁴⁸¹ Asante, *International Law and Investments*, in: Bedjaoui (ed.), *International Law*, p. 676.

⁴⁸² UNCTAD, *Bilateral Investment Treaties 1995-2006*, p. 3.

“Desiring to intensify economic co-operation between both States, Intending to create favourable conditions for investments by investors of either State in the territory of the other State, Recognizing that the encouragement and contractual protection of such investments are apt to stimulate private business initiative and to increase the prosperity of both nations [...]”⁴⁸³

The reference of most preambles to the increase of prosperity of *both* nations and to economic cooperation, which implies beneficial effects for both treaty partners, supports an interpretation which takes into account the interests of both the investor and the relevant host State. With regard to ICSID tribunals, it can additionally be referred to the ICSID Convention, which is not only an instrument to protect private foreign investment, but is designed as a balanced instrument that shall serve the interests of investors as well as host States.⁴⁸⁴ The goal of economic development is explicitly mentioned as an objective of the ICSID Convention, which recognises “the need for international cooperation for economic development, and the role of private international investment therein”⁴⁸⁵. The link between foreign investment and economic development is also manifested by the fact that it was the World Bank as a development institution which initiated the drafting of the ICSID Convention.⁴⁸⁶ Therefore it cannot be sustained that ambiguities in investment treaties should always be resolved in favour of the foreign investor in the light of the object and purpose of investment treaties.⁴⁸⁷

⁴⁸³ German Model BIT 2005, preamble, paras 1-3.

⁴⁸⁴ Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, p. 348.

⁴⁸⁵ Preamble of the ICSID Convention. The goal of economic development is also emphasised in the Report of the Executive Directors, which provides: “In submitting the attached Convention to governments, the Executive Directors are prompted by the desire to strengthen the partnership between countries in the cause of economic development. The creation of an institution designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it.” (Report of the World Bank Executive Directors on the Convention, para. 9).

⁴⁸⁶ For details about the drafting process see Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, pp. 342-348.

⁴⁸⁷ The Tribunal in *El Paso v. Argentina*, Decision on Jurisdiction, 27 April 2006, ICSID Case No. ARB/03/15, para. 70, held that “a balanced interpretation is needed, taking into account both State sovereignty and the State’s responsibility to create an adapted and evolutionary framework for the development

MFN clauses must therefore be interpreted in the light of the aim of BITs to increase economic cooperation by creating a stable and transparent legal framework for investments. An interpretation of MFN clauses which avoids discriminatory treatment both on the substantive and on the procedural level is in conformity with this overall aim of investment treaties.

5. Party Intention

A separate investigation of the intentions of the parties as a subjective element distinct from the text is not envisaged by the Vienna Convention on the Law of Treaties. One problem connected with an approach focusing on the intention of the parties is that the process of interpretation is likely to remain fruitless if there is no common intention of the parties.⁴⁸⁸ This is possible on a number of occasions, for example if the parties to a treaty understand certain formulations in a treaty differently due to their ambiguousness or did not think of a certain constellation when concluding the treaty, which is however covered by the text of the treaty. This seems to be the case in a great number of bilateral investment treaties with regard to the scope of the most-favoured-nation requirement, as most-favoured-nation clauses seem to have been included in the treaties without thorough reflection as to their consequences. Such difficulties can only be resolved when the interpreter of a treaty concentrates on the treaty's wording.⁴⁸⁹ Accordingly, the drafters of the Vienna Convention gave preference to a textual approach to interpretation.⁴⁹⁰ Article 31 (1) rests on the presumption that the treaty text is the authentic expression of the common will of the parties,⁴⁹¹ which means that the parties' intention has to be ascertained from

of economic activities, and the necessity to protect foreign investment and its continuing flow". See also Vesel, *Clearing a Path Through a Tangled Jurisprudence*, p. 143.

⁴⁸⁸ Fitzmaurice, *The law and procedure of the International Court of Justice*, BYBIL 28 (1951), pp. 3, 4; Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness*, pp. 76-78.

⁴⁸⁹ Schollendorff, *Die Auslegung völkerrechtlicher Verträge in der Spruchpraxis des Appellate Body*, p. 39.

⁴⁹⁰ Yearbook of the International Law Commission 1966, vol. II, p. 220; Bernhardt, *Interpretation and Implied (Tacit) Modification of Treaties*, p. 496; Heintschel von Heinegg in Ipsen, *Völkerrecht*, § 11, para. 5; Dahm/Delbrück/Wolfrum, *Völkerrecht*, § 153, para. 4.

⁴⁹¹ Yearbook of the International Law Commission 1966, vol. II, pp. 220, 221; *Suez and InterAgua v. Argentina*, Decision on Jurisdiction, 16 May 2006, ICSID Case No. ARB/03/17, para. 54. The International Law Commission expressed its view that „the starting point of interpretation is the elucidation of the mean-

the text, the context and the object and purpose of the treaty. The intentions of the parties at the time of the drafting of the text, detected by consultation of preparatory work, can play a supplementary role of interpretation in order to confirm the results from an interpretation on the grounds of Article 31 VCLT or to determine the meaning of a treaty clause if the results of interpretation remain ambiguous or absurd.⁴⁹² The party intention may also be taken into account within the context of the treaty.⁴⁹³ However, preponderant weight should be given to the ordinary meaning of the treaty text. Thus, the emphasis placed on the common intention of the parties at the time of the conclusion of the treaty by tribunals in *Salini v. Jordan*⁴⁹⁴ and *Plama v. Bulgaria*⁴⁹⁵ is misleading, especially as both tribunals focus on the common intention of the parties when inserting the provisions to be overridden by the most-favoured-nation clause, and not on the common intention as expressed in the text of the most-favoured-nation clause itself.

6. Principle of Contemporaneity

It is argued by the tribunal in *ICS v. Argentina* that in interpreting the term „treatment“, it would be helpful and appropriate for the interpreter to rely on the principle of contemporaneity.⁴⁹⁶ This principle can be taken from Article 31 (3) (c) of the VCLT, which states that there shall be taken into account, together with the context, any relevant rules of international law applicable in the relations between the parties. Reference to external sources of international law may be undertaken as part of an enquiry into the ordinary meaning of the words. The provision thus requires the interpreter to determine the ordi-

ing of the text, not an investigation *ab initio* into the intentions of the parties.” (Yearbook of the International Law Commission 1966, vol. II, p. 220)

⁴⁹² Article 32 VCLT provides: „Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.”

⁴⁹³ Dahm/ Delbrück/ Wolfrum, *Völkerrecht*, Vol. I/3, § 153, pp. 638, 639.

⁴⁹⁴ *Salini v. Jordan*, Decision on Jurisdiction, 15 November 2004, ICSID Case No. ARB/02/13, para. 118.

⁴⁹⁵ *Plama v. Bulgaria*, Decision on Jurisdiction, 8 February 2005, ICSID Case No. ARB/03/24, para. 197.

⁴⁹⁶ *ICS Inspection and Control Services Limited v. The Argentine Republic*, Award on Jurisdiction, 10 February 2012, UNCITRAL, PCA Case No. 2010-9, para. 289.

nary meaning of the term in the light of the general rules of international law and in the light of current linguistic usage, at the time when the treaty was originally concluded.⁴⁹⁷

The tribunal in *ICS v. Argentina* stressed that at the time of conclusion of the relevant UK-Argentina BIT in late 1990, scholars and tribunals insisted on the autonomy of the arbitration clause. It took as a „valuable indication of the prevailing view among the community of States during the period leading up to the adoption of the UK-Argentina BIT“ the Guidelines for the Treatment of Foreign Direct Investment by the Development Committee of the World Bank of 1992. These Guidelines set up in Part III, devoted to „treatment“, the common range of substantive treatment standards, whereas „dispute settlement“ was dealt with separately in Part V. It concluded that the parties to the BIT had not intended the term „treatment“ to encompass dispute settlement provisions.

This argumentation is however not convincing. First, the background against which treaty provisions must be interpreted are rules of international law, i.e. general principles of law and customary international law. The World Bank Guidelines are however not a binding legal instrument, but soft law. Moreover, even assuming that the term „treatment“ could be interpreted against the background of the Guidelines, they do not offer unequivocal guidance, since „expropriation“ is also dealt with separately in Part IV of the Guidelines, although its regulation is a typical substantive treatment standard. Accordingly, Part III does not exhaustively regulate all treatment standards.

Furthermore, Article 31 (3) (c) contains no temporal provision. When reference is to be made to other rules of international law, the question is therefore whether the applicable provisions of international law are to be determined as at the date on which the treaty was framed, or whether the interpreter may also refer to subsequent developments. This problem of intertemporality is a question of the intention of the parties. Notably, *Thirlway* suggested that the principle of contemporaneity should be qualified by a proviso in the following terms:

⁴⁹⁷ Fitzmaurice, *The law and procedure of the International Court of Justice*, BYBIL 33 (1957), p. 212.

„Provided that, where it can be established that it was the intention of the parties that the meaning or scope of a term or expression used in the treaty should follow the development of the law, the treaty must be interpreted so as to give effect to that intention.“⁴⁹⁸

This consideration of developments of international law may be permissible where the parties insert provisions in their treaty which by their term or nature are evolutionary concepts.⁴⁹⁹ The term „treatment“ in the context of most-favoured-nation clauses is by its nature rather a concept with an evolving meaning. Notably, it is the background of these clauses that the parties to a treaty are aware that there are developments in international law which may broaden the beneficial treatment accorded to investors *and which they are not aware of now*. This means that the evolution in the frequency of the use of dispute settlement provisions and the importance attached to it would have to be taken into account in a contemporaneous interpretation of „treatment“. The principle of contemporaneity is therefore not capable of changing the interpretation of the term “treatment“.

7. Conclusion

An examination of MFN clauses according to the principles of the Vienna Convention on the Law of Treaties reveals that the language of MFN clauses can be interpreted as encompassing procedural dispute settlement provisions. Since the term “treatment” refers to the entire legal regime that an investor is exposed to, it can generally be understood as encompassing the dispute settlement provisions of a BIT. This result is not altered by a contemporaneous interpretation of the term. Yet the specific wording of the relevant MFN clause has to be examined in each case. Notably, States have the possibility to explicitly exempt dispute settlement provisions from the application of the MFN clause. In case the treaty contains a specific MFN clause in addition to the general one, this specific clause is not meant to exclude application of the general clause to other fields. It is rather meant to clarify that the most-favoured-nation principle is applicable in the specifically mentioned

⁴⁹⁸ Thirlway, *The Law and Procedure of the International Court of Justice*, p. 57.

⁴⁹⁹ See *Namibia (Legal Consequences)*, Advisory Opinion, ICJ Reports 1971, p. 31, para. 53; *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment, ICJ Reports 1978, p. 3, pp. 31-34, paras 75-80.

and possibly particularly controversial domains as well. In case the treaty contains specifically negotiated provisions, this does not exclude the operation of the MFN clause either, since it is the object of MFN clauses to extend the advantages obtained in negotiations. An examination of the object and purpose of MFN clauses as well argues in favour of applying the clause to dispute settlement provisions. The aim of MFN clauses is to level the competitive opportunities of investors, an aim which is best served by applying the clause to dispute settlement provisions as well.

II. Domestic Jurisprudence⁵⁰⁰

The application of MFN clauses to dispute settlement provisions has been rejected by a number of domestic tribunals, for example in the *Braunkohlen Brikett Verkaufsverein Gesellschaft v. Goffart, ès qual Case*, the *Lloyds Bank v. De Ricqlès and De Gaillard Case* and the *National Provincial Bank v. Dollfus Case*. However, the reasoning barring the application of the relevant MFN clauses in these three cases does not argue against its application to procedural and jurisdictional questions in investment disputes.

In the *Braunkohlen Brikett Verkaufsverein Gesellschaft v. Goffart, ès qual case*, the *Cour de Cassation* offered an interpretation of the MFN clause of the Peace Treaty of Frankfurt of 1871, stipulating that the basis of the commercial relations between France and Germany should be most-favoured-nation treatment, which should comprise the entry and exit, customary formalities, the admission and the treatment of the subjects of the two nations.⁵⁰¹ It was questionable whether German nationals could, on the basis of this clause, invoke concessions granted to Switzerland in matters of procedure and judicial competence in a Treaty concluded by France and Switzerland in 1869. The Claimants sought to

⁵⁰⁰ For a detailed overview, see Decisions of national courts relating to the most-favoured-nation clause, digest prepared by the Secretariat, Yearbook of the International Law Commission (1973), vol. II, UN Document A/CN.4/269.

⁵⁰¹ Article 11 of the Treaty of Frankfurt provided:

(1) [...] le gouvernement français et le gouvernement allemand prendront pour base de leurs relations commerciales le régime du traitement réciproque sur le pied de la nation la plus favorisée.
(2) Sont compris dans cette règle les droits d'entrée et de sortie, le transit, les formalités douanières, l'admission et le traitement des sujets des deux nations ainsi que de leurs agents.

avoid the procurement of a *cautio iudicatum solvi*⁵⁰² and evade the jurisdiction of French courts by invoking the MFN clause in the Treaty of Frankfurt in connection with a provision in a French-Swiss Treaty according to which certain matters between French and Swiss subjects had to be tried before tribunals in the home State of the defendant. The Court held that while the Treaty of Frankfurt concerned the commercial relations between France and Germany, it did not in any way touch upon questions of competence and of procedure that may be applicable in case of commercial disputes.⁵⁰³ In contrast, the Convention between Switzerland and France had the specific purpose of regulating the competence of the judiciary.⁵⁰⁴ Since the subject-matters of the treaties were different, the Claimant could not invoke jurisdictional provisions from the French-Swiss Treaty.⁵⁰⁵ The court held that

“The most favoured nation clause may be invoked only if the subject of the treaty stipulation is identical to that of the particularly favourable treaty the benefit of which is claimed.”⁵⁰⁶

In the *Lloyds Bank v. De Ricqlès and De Gaillard* case, the plaintiff, in order to avoid the payment of security for costs (*cautio iudicatum solvi*), invoked the MFN clause of an Anglo-French Convention of 1882 which, according to the Preamble, regulated the “commercial and maritime relations of the two countries, as well as the status of their subjects”, and contained a most-favoured-nation clause applying to “matters of commerce or industry”. On the basis of this clause, Lloyds Bank claimed the benefit of the provisions of a Franco-Swiss Treaty, which waived the requirement of giving security for costs for Swiss nationals intending to bring suit in France. The court rejected this claim, holding that a party to a convention of a general character such as the Anglo-French Convention

⁵⁰² The *cautio iudicatum solvi* was a security that a foreign Claimant who sued against a French defendant had to furnish under French law in order to provide security for the costs of the defendant in case they lost their case, see *Beale*, Harvard Law Review 26 (1913), 196.

⁵⁰³ *Braunkohlen Briket Verkaufsverein Gesellschaft v. Goffart*, *ès qual.*, Recueil Dalloz 1915, p. 4.

⁵⁰⁴ *Braunkohlen Briket Verkaufsverein Gesellschaft v. Goffart*, *ès qual.*, Recueil Dalloz 1915, p. 4.

⁵⁰⁵ *Braunkohlen Briket Verkaufsverein Gesellschaft v. Goffart*, *ès qual.*, Recueil Dalloz 1915, p. 4.

⁵⁰⁶ *Braunkohlen Briket Verkaufsverein Gesellschaft v. Goffart*, *ès qual.*, Recueil Dalloz 1915, p. 1 (author’s translation).

regulating the commercial and maritime relations of the two countries could not claim under the MFN clause of that convention the benefits of a special convention such as the Franco-Swiss Convention, which dealt with one particular subject, namely freedom from the obligation to give security for costs.

The *National Provincial Bank v. Dollfus* case involved the attempt of the Claimant to evade the jurisdiction of French Courts by operation of the MFN clause contained in the Anglo-French Convention of 1882 which had already been at issue in the *Lloyds Bank* case. The court held that

“[...] a most-favoured-nation clause can only be invoked if the subject matter of the treaty containing it is identical with that of the particularly favourable treaty the benefit of which is claimed. In the Franco-British Convention of 1882 the most-favoured-nation clause is not made applicable in any general manner, but only in regard to the special matters enumerated therein. [...] As the Franco-British Convention of 1882 did not deal with questions of jurisdiction and procedure, it cannot permit a British subject, by the application of a most-favoured-nation clause, to claim the benefit of a Treaty between France and a third country relating to these matters.”⁵⁰⁷

The reasoning barring the application of the relevant MFN clauses in these three cases cannot be transferred to those at issue in the investment disputes examined below. In all three cases, the invocation of the MFN clause was rejected due to the different nature and content of the basic treaty and the third-party treaty. While those treaties containing the most-favoured-nation clause regulated general commercial questions without referring to dispute settlement questions, the relevant third-party treaties dealt with the competence of the judiciary and the execution of judgments in civil and commercial matters or with the waiver of the procedural requirement of security for costs respectively. Thus, the cases exemplify the rule that the scope of most-favoured-nation clauses is limited *ratione mate-*

⁵⁰⁷ Case decided by the Court of Appeal of Paris on July 9, 1947, see H. Lauterpacht (ed.), *Annual Digest of Public International Law Cases*, Year 1947, vol 14 (1951), Case No. 79, 166.

riae to the subject-matter of the relevant treaty. In contrast, the subject-matters of investment treaties are comparable as long as the basic treaty and the third-party treaty both deal with dispute settlement. What the cases illustrate is that if the basic treaty does not at all make reference to a certain treatment standard, the application of the clause to such treaty standard is not implied from the subject-matter of the clause. The only comparable situation in which the domestic cases could offer guidance would therefore be in case of invocation of dispute settlement provisions in a third-party BIT where the basic treaty containing the MFN clause would contain no dispute settlement provisions at all.

III. ICJ jurisprudence

The nexus between substantive protection and dispute settlement has been acknowledged by the ICJ and an arbitral commission in the *Ambatielos* case. The interpretation of these judgments and other ICJ judgments has been a focal point in the argumentation of the various investment tribunals dealing with the application of the most-favoured-nation clause to dispute settlement provisions.

1. The *Ambatielos* case

In that case the ICJ did not have to make a final statement about the applicability of the relevant MFN clause to procedural provisions. Yet the majority of judges found the invocation of the MFN clause in order to rely on judicial provisions at least plausible. The Arbitral Commission then acknowledged that the administration of justice encompassed certain procedural standards in terms of treatment standards before courts and that these procedural treatment standards could be invoked by virtue of the most-favoured-nation clause.

a. Facts of the Case

The *Ambatielos* claim involves two decisions of the ICJ and the decision on the merits of a commission of arbitration. The Greek Claimant Nicolas Ambatielos had acquired nine steamships from the United Kingdom that were still under construction at the time of the conclusion of the contract in July 1919. Due to the non-compliance of the United Kingdom with delivery dates allegedly agreed upon orally between the Claimant and an agent of the United Kingdom, the Claimant suffered substantial financial losses. As a result, he

could not pay the mortgage interests he had granted to the British Government on some of the ships, and the British Government initiated proceedings against him for payment of the interests. When in 1923, the Court of Admiralty and the Court of Appeal decided in favour of the United Kingdom, the Claimant did not pursue an appeal to the House of Lords. Instead he claimed that the conduct of the courts and the British government during the judicial proceedings amounted to a denial of justice and therefore to a violation of various treaties concluded between the United Kingdom and third States incorporating customary international law standards, which he could invoke by virtue of the most-favoured-nation clause contained in the 1886 Anglo-Greek treaty. Attempts of the Greek government to have the dispute settled by arbitration failed since the British government denied the applicability of the arbitral procedure in the 1886 Anglo-Greek Treaty of Commerce and Navigation. As a result, Greece requested the ICJ to adjudge and declare that the United Kingdom was under an obligation to agree to refer the dispute to arbitration.

b. The Decisions by the ICJ

After the ICJ had in its first judgment of 1 July 1952 affirmed its jurisdiction under Art. 36 (1) of the ICJ Statute, it decided in its second judgment of 19 May 1953 whether the United Kingdom was obliged to submit the dispute to arbitration. The Anglo-Greek Declaration of 1926 provided that disputes about the validity of private claims, in so far as these claims were based on the treaty of 1886 between Greece and the United Kingdom, were to be settled in accordance with the Protocol to the 1886 Treaty, which required the submission of such disputes to a Commission of Arbitration for binding resolution. The Court thus had to decide whether the Greek claim could *prima facie* be based on the most-favoured-nation clause included in Article X of the 1886 Greece-United Kingdom treaty. This clause provided:

„The Contracting Parties agree that, in all matters relating to commerce and navigation, any privilege, favour, or immunity whatever which either Contracting Party has actually granted or may hereafter grant to the subjects or citizens of any other State shall be extended immediately and unconditionally to the subjects or citizens of the other Contract-

ing Party; it being their intention that the trade and navigation of each country shall be placed, in all respects, by the other on the footing of the most favoured nation.”

The Greek Government relied on this clause to invoke *inter alia* the Treaties of Peace and Commerce concluded between the United Kingdom on the one hand and Denmark, Sweden and Bolivia on the other, which provided that “justice and right” or “justice and equity” should be administered to the subjects of the other party and that individuals should be treated in accordance with international law.⁵⁰⁸ They contended that a litigation arising out of a commercial contract could be considered a matter relating to commerce and thus fell within the term “all matters relating to commerce and navigation” which defined the scope of the most-favoured-nation clause in the 1886 Treaty.⁵⁰⁹ The Government of the United Kingdom objected that the most-favoured-nation clause of the 1886 Treaty, dealing with matters of commerce and navigation, could not be invoked to claim the benefits of provisions in other treaties concerning judicial proceedings, which formed the subject of a separate article in the 1886 treaty⁵¹⁰. Without making a final decision whether the claim could be based on the 1886 treaty, since this question fell within the competence of the Arbitral Commission⁵¹¹, the ICJ decided that the reliance by Greece on the most-favoured-nation clause in order to claim benefits involving judicial proceedings was sufficiently plausible to base the claim on the 1886 treaty. The Court held:

“In order to decide [...] that the Hellenic Government’s claim on behalf of Mr. Ambatielos is ‘based on’ the Treaty of 1886 [...] [t]he Court must determine [...] whether the arguments advanced by the Hellenic Government in respect of the treaty provisions on which the Ambatielos claim is said to be based, are of a sufficiently

⁵⁰⁸ See *Ambatielos case* (merits: obligation to arbitrate), Judgment of 19 May 1953, ICJ Reports 1953, pp. 20, 21.

⁵⁰⁹ See *Ambatielos case* (merits: obligation to arbitrate), Judgment of 19 May 1953, ICJ Reports 1953, p. 21.

⁵¹⁰ See *Ambatielos case* (merits: obligation to arbitrate), Judgment of 19 May 1953, ICJ Reports 1953, p. 21. Article XV of the 1886 treaty provided for “free access to the Courts” for the subjects of both Contracting Parties.

⁵¹¹ See *Ambatielos case* (merits: obligation to arbitrate), Judgment of 19 May 1953, ICJ Reports 1953, pp. 16-19.

plausible character to warrant a conclusion that the claim is based on the Treaty. [...] [T]he Hellenic Government has contended that a litigation arising out of a commercial contract may be considered as a matter relating to commerce and thus falling within the term ‘all matters relating to commerce and navigation’ to which the most-favoured-nation clause [...] applies. [...] Having regard to the contentions of the Parties with respect to the scope and effect of the most-favoured-nation clause [...] and bearing in mind especially the interpretations of these provisions contended for by the Hellenic Government, the Court must conclude that this is a case in which the Hellenic Government is presenting a claim on behalf of a private person ‘based on the provisions of the Anglo-Greek Commercial Treaty of 1886’ [...].”⁵¹²

In the view of the four dissenting judges, the *ejusdem generis* principle precluded the most-favoured-nation clause from applying to judicial matters, given that the clause only referred to commerce and navigation, while the article dealing with the administration of justice did not contain a separate most-favoured-nation clause.⁵¹³

c. Decision by the Commission of Arbitration

The merits of the case were decided by a Commission of Arbitration, which although eventually dismissing the Greek claim, still in principle affirmed the applicability of the most-favoured-nation clause to matters concerning the administration of justice. Greece argued that it was entitled to claim for its nationals treatment in accordance with justice, right, equity and the principles of international law, such treatment having been assured by the United Kingdom to a number of third States. The Arbitral Commission affirmed

⁵¹² *Ambatielos case* (merits: obligation to arbitrate), Judgment of 19 May 1953, ICJ Reports 1953, pp. 12, 22.

⁵¹³ *Ambatielos case* (merits: obligation to arbitrate), Judgment of 19 May 1953, ICJ Reports 1953, p. 34 (joint dissenting opinion of Judges McNair, Basdevant, Klaestad and Read). The dissenting judges held: “[h]aving regard to its terms, Article X promises most-favoured-nation treatment only in matters of commerce and navigation; it makes no provision concerning the administration of justice; in the whole of the Treaty this matter is the subject of only one provision, of limited scope, namely, Article XV, paragraph 3, concerning free access to the Courts, and that Article contains no reference to most-favoured-nation treatment. The most-favoured-nation clause in Article X cannot be extended to matters other than those in respect of which it has been stipulated.”

the application of the *ejusdem generis* principle, stating that the most-favoured-nation clause could only be applied to “matters belonging to the same category of subject as that to which the clause itself relates.”⁵¹⁴ Although the most-favoured-nation clause only referred to matters relating to commerce and navigation, the Commission held that the administration of justice could be seen as a natural complementary to other treatment subject to the most-favoured-nation clause since the judicial enforcement of claims concerning matters of commerce and navigation was a necessary corollary to the rights contained in the treaty.⁵¹⁵ The Arbitral Commission made its finding in the light of the fact that treaties of commerce and navigation usually contained provisions concerning the administration of justice, such as the right to free access to courts, which indicated that the protection of commerce and navigation was closely related to the settlement of traders’ claims. This was also true for the Anglo-Greek treaty, which contained in Article XV the right of subjects to free access to court. The most-favoured-nation clause relating to commerce and navigation could therefore be read broadly.⁵¹⁶ The Commission derived further evidence for its interpretation from the broad formulation of the most-favoured-nation clause, which was designed by the parties to assure most-favoured-nation treatment “in all respects”.⁵¹⁷ In the words of the Commission of Arbitration,

„It is true that ‘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

⁵¹⁴ *Ambatielos Case*, Commission of Arbitration, UNRIAA XII, p. 107.

⁵¹⁵ *Ambatielos Case*, Commission of Arbitration, UNRIAA XII, p. 107.

⁵¹⁶ *Ambatielos Case*, Commission of Arbitration, UNRIAA XII, p. 107.

⁵¹⁷ *Ambatielos Case*, Commission of Arbitration, UNRIAA XII, p. 107.

be excluded from the field of application of the most-favoured-nation clause when the latter includes ‘all matters relating to commerce and navigation’.”⁵¹⁸

d. Assessment

In the *Ambatielos* case, the ICJ ordered the United Kingdom to submit to arbitration the dispute with Greece about whether the most-favoured-nation clause in a treaty between the two States applied to matters of administration of justice, holding that it was at least *prima facie* possible that the most-favoured-nation clause in question could be applied to judicial matters. The Arbitral Commission then affirmed that such matters were within the scope of the most-favoured-nation clause.

Yet although the Arbitral Commission affirmed the applicability of the relevant MFN clause to provisions governing the administration of justice, investment arbitral tribunals have differed on the question whether the *Ambatielos* case offers a basis for the applicability of the most-favoured-nation clause to dispute settlement provisions. While the *Maffezini* and the *Siemens* tribunals have argued that the notion of administration of justice had a procedural connotation,⁵¹⁹ the *Salini* tribunal has tried to distinguish its case from the *Ambatielos* arbitration by stating that Greece had not invoked the most-favoured nation-clause in order to profit from more favourable dispute settlement provisions negotiated with a third party, but in order to attain the application of certain substantive treatment standards requiring treatment in accordance with justice, right and equity.⁵²⁰ Although the *Plama* tribunal admitted that the ICJ had accepted in principle that a most-favoured-nation provision could be applied to jurisdictional matters, it still argued that the ruling did not relate to the importation of dispute settlement provisions, but of provisions con-

⁵¹⁸ *Ambatielos Case*, Commission of Arbitration, UNRIAA XII, p. 107. Although the Commission of Arbitration affirmed the applicability of the most-favoured-nation clause to the administration of justice, it finally denied the extension of *Ambatielos*’s rights via the clause, arguing that there was no less favourable treatment under the treaty of 1886 since the third-party treaties invoked by Greece granted justice, right and equity only within the framework of national law and to the extent that these principles were also codified in Article XV of the treaty of 1886.

⁵¹⁹ *Maffezini v. Spain*, Decision on Jurisdiction, 25 January 2000, ICSID Case No. ARB/97/7, para. 50; *Siemens v. Argentina*, Decision on Jurisdiction, 3 August 2004, ICSID Case No. ARB/02/8, para. 99.

⁵²⁰ *Salini v. Jordan*, Decision on Jurisdiction, 15 November 2004, ICSID Case No. ARB/02/13, para. 112.

cerning the substantive protection of traders which prohibited denial of justice in domestic courts.⁵²¹ However, the benefits invoked by Greece, which were summarised by the Arbitral Commission as concerning the “administration of justice”, did not only comprise the substantive protection of traders. Rather the Commission acknowledged that the administration of justice encompassed the principle of free access to courts.⁵²² This right of access to courts included “the right to use the Courts fully and to avail themselves of any procedural remedies or guarantees provided by the law of the land in order that justice may be administered on a footing of equality with nationals of the country.”⁵²³ According to the tribunal, it applied both to physical access to courts and to the effective possibility for the foreigner to defend his rights, including *inter alia* the delivery of pleadings, the possibility of counterclaims, the right to engage Counsel, to adduce evidence, and to lodge appeals.⁵²⁴ Since one of Ambatielos’s claims was that the United Kingdom had withheld crucial documents in the judicial proceedings and refused to call a British agent as a witness, his claims related to the free access to courts as an element of the administration of justice and thus had a procedural connotation. What was actually in question was therefore not the substantive standards of justice, right and equity, but the importation of these standards into the procedures followed in the British court proceedings. The Arbitral Tribunal thus acknowledged that the administration of justice encompassed certain procedural standards in terms of treatment standards before courts and that these procedural treatment standards could be invoked by virtue of the most-favoured-nation clause. In order to make this finding, the Commission of Arbitration relied both on the broad wording of the most-favoured-nation clause, which referred to treatment “in all respects” and the fact that the treaty containing the most-favoured-nation clause comprised a provision dealing with the administration of justice, indicating that “all matters concerning commerce and navigation” also encompassed the settlement of disputes. Transposed to the investment context, this award stands for the proposition that if an investment treaty con-

⁵²¹ *Plama v. Bulgaria*, Decision on Jurisdiction, 8 February 2005, ICSID Case No. ARB/03/24, para. 215. This reasoning was endorsed by the majority in *Berschader v. Russia*, Award, 21 April 2006, Arbitration Institute of the Stockholm Chamber of Commerce, Case No. 080/2004, para. 200.

⁵²² *Ambatielos Case*, Commission of Arbitration, UNRIAA XII, 107.

⁵²³ *Ambatielos Case*, Commission of Arbitration, UNRIAA XII, 110.

⁵²⁴ *Ambatielos Case*, Commission of Arbitration, UNRIAA XII, 110.

tains a broad most-favoured-nation clause to the effect that investments and investors of each country shall be placed on the footing of the most-favoured-nation “in all respects” and a provision concerning dispute resolution, the most-favoured-nation clause also applies to provisions concerning the procedural protection of investors’ rights.

2. Anglo-Iranian Oil Company Case⁵²⁵

Since the scope of the MFN clause was not decisive for the outcome of the case, the decision offers only limited insight into the question whether MFN clauses can generally be applied to dispute settlement questions.

a. Facts of the Case

The ICJ as well dealt with the scope of a most-favoured-nation clause in the *Anglo-Iranian Oil Company* case, in which the jurisdiction of the Court was in question. Iran and the British Anglo-Iranian Oil Company had concluded an oil concession agreement in 1933. When Iran enacted a law nationalising the Iranian oil industry in 1951, a dispute arose between Iran and the British Government, which initiated proceedings against Iran before the ICJ in May 1951.⁵²⁶ Iran had accepted the jurisdiction of the PCIJ in a Declaration ratified in 1932. The acceptance of jurisdiction was valid only for disputes arising after the Declaration and based on treaties ratified subsequent to the Declaration.⁵²⁷ The United Kingdom submitted that the dispute directly concerned the treaties between Iran and certain third states, notably Denmark, which were all ratified after the declaration of acceptance, and which the United Kingdom could invoke by means of the most-favoured-

⁵²⁵ For a comprehensive analysis of the case, see Orakelashvili, *Anglo-Iranian Oil Company Case*, in: Wolfrum (ed.), *Encyclopedia of Public International Law*.

⁵²⁶ For the historical background of the case, see Ford, *The Anglo-American Oil Dispute of 1951-1952*, pp. 164-179; Ghosh, *The Anglo-Iranian Oil Dispute*, pp. 98-138.

⁵²⁷ There was principal disagreement between the Parties whether the jurisdiction of the ICJ only concerned treaties that Iran had concluded after ratification of its declaration of acceptance under Article 36 (2) (ratified on 19 September 1932), or whether jurisdiction of the ICJ extended to treaties concluded before the ratification of the declaration. The ICJ followed from an examination of the text of the declaration and of the party intention that Iran had solely accepted jurisdiction of the ICJ with regard to controversies relating to the application of treaties ratified subsequent to the declaration (*Anglo-Iranian Oil Co. case* (jurisdiction), Judgment of 22 July 1952, ICJ Reports 1952, pp. 102-107).

nation clause contained in two Anglo-Iranian commercial treaties of 1857 and 1903.⁵²⁸ They argued that the most-favoured-nation clause was essentially a contingent clause without substance whose material content was determined by the third-party treaty, which meant that the decisive treaties were ratified subsequent to the declaration. They therefore argued that the ICJ as the successor of the PCIJ had jurisdiction under the optional clause of Article 36 (2) of the ICJ Statute.

b. Decision of the Court

The ICJ denied jurisdiction, arguing that the basic treaties conferring a right to the United Kingdom were those containing the most-favoured-nation clauses, which had been ratified before the declaration of acceptance.⁵²⁹ The Court held that the third-party treaty itself did not create a legal relation between Iran and the United Kingdom, but was *res inter alios acta*. The Court observed:

“Without considering the meaning and scope of the most-favoured-nation clause, the court confines itself to stating that this clause 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.”⁵³⁰

The *Siemens* tribunal invoked this part of the judgment to argue that jurisdiction could not be denied on the grounds of this decision, since the denial of jurisdiction was not based on

⁵²⁸ The Treaty mainly relied upon was a Treaty of Friendship, Establishment and Commerce between Iran and Denmark, signed on 20 February 1934, which provided in Art. IV that “The nationals of each of the High Contracting Parties shall, in the territory of the other, be received and treated, as regards their persons and property, in accordance with the principles and practice of ordinary international law. They shall enjoy therein the most constant protection of the laws and authorities of the territory for their persons, property, rights and interests.” The United Kingdom argued that the nationalization undertaken by the Iranian government was in violation of the principles and practice of international law. Additionally, the Claimants relied on a treaty between Iran and Switzerland of 25 April 1934 and a treaty between Iran and Turkey of 14 March 1937.

⁵²⁹ The Court held: “A third party treaty, independent 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*).” (Anglo-Iranian Oil Co. case (jurisdiction), Judgment of 22 July 1952, ICJ Reports 1952, p. 109) Therefore the Treaty containing the most-favoured-nation clause was to be considered the basic treaty that established the legal connection between the beneficiary State and the third state.

⁵³⁰ *Anglo-Iranian Oil Co. case* (jurisdiction), Judgment of 22 July 1952, ICJ Reports 1952, p. 109. (Italics added by the author)

the non-applicability of the most-favoured-nation clause to jurisdiction, but rather on the timely application of treaties.⁵³¹

Yet in its second string of argumentation, the Court made a further statement, which was completely ignored by the *Siemens* tribunal. The relevant question presented by the United Kingdom did not only focus on the question of the time of ratification of treaties, but related more closely to the invocation of jurisdictional provisions by operation of the most-favoured-nation clause. The United Kingdom argued that in contrast to Denmark, although it benefited from the substantive provisions of the treaty between Iran and Denmark, it had no possibility to submit disputes as to the application of this treaty before the ICJ, which meant that it was not in the position of the most favoured nation. The Court rejected this argument, suggesting that the most-favoured-nation clauses, whose wording was actually rather broad, covering treatment “in every respect” or “in all respects”,⁵³² did not relate to jurisdictional matters. In the words of the Court,

„The Court needs only observe that the most-favoured-nation clause in the Treaties of 1857 and 1903 between Iran and the United Kingdom has no relation whatever to jurisdictional matters between the two Governments. If Denmark is entitled under Article 36, paragraph 2, of the Statute, to bring before the court any dispute as to the application of its Treaty with Iran, it is because that Treaty is subsequent to the ratification of the Iranian Declaration. This can not give rise to any question in relation to most-favoured-nation treatment.”⁵³³

c. Assessment

⁵³¹ *Siemens v. Argentina*, Decision on Jurisdiction, 3 August 2004, ICSID Case No. ARB/02/8, para. 96.

⁵³² The most-favoured-nation clause in the British-Iranian Commercial Convention of 1857 provided: “The High Contracting Parties shall engage [...] that the treatment of their respective subjects, and their trade, shall [...], in every respect, be placed on the footing of the treatment of the subjects and commerce of the most-favoured nation.” The Commercial Convention of 1903 provided that: “[...] British subjects and importations in Persia, as well as Persian subjects and Persian importations in the British Empire, shall continue to enjoy in all respects, the régime of the most-favoured nation.” See *Anglo-Iranian Oil Co. case* (jurisdiction), Judgment of 22 July 1952, ICJ Reports 1952, p. 108.

⁵³³ *Anglo-Iranian Oil Co. case* (jurisdiction), Judgment of 22 July 1952, ICJ Reports 1952, p. 110.

The Anglo-Iranian Oil Company case offers no unequivocal guidance on the issue of applicability of the most-favoured-nation clause to jurisdictional questions.

What was finally decisive for the outcome of the case was not a refined analysis of the scope of the most-favoured-nation clause, but the nature of the treaty containing the clause as the basic treaty and its time of ratification. The major argument brought forward by the ICJ was that the treaties containing the MFN clause were ratified previous to the Declaration establishing the jurisdiction of the ICJ. Thus, the case must be read as denying adjudication on the grounds of the Iranian Declaration and the chronology of ratifications.

The assertion of the Court that the MFN clause had "no relation whatever to jurisdictional matters", which the Plama tribunal took as evidence against applicability of MFN clauses to jurisdictional questions⁵³⁴, cannot be cited as an argument against the application of MFN clauses to jurisdictional matters. The Court declined jurisdiction not because it considered that an MFN clause could in principle not incorporate more favourable jurisdictional provisions. Indeed its finding that the MFN clause in question had no relation to jurisdictional matters rather indicates that the Court did not exclude that treaty rights of a procedural nature may be part of the "treatment" guaranteed by a broadly-worded MFN clause. Rather, the jurisdiction of the ICJ was limited by the Court's statute in connection with the Iranian declaration. The treaties containing the MFN clause and the third-party treaties did not contain a reference to a dispute settlement mechanism, but jurisdiction of the Court could only be based upon the Iranian Declaration. The case therefore does not serve to reject the application of MFN clauses to jurisdictional provisions, but is based on the specific circumstances of the case where consent to the Court's jurisdiction could not be based on the MFN clause in connection with third-party BITs, but only on the Iranian Declaration under Art. 36 (2) ICJ Statute.

⁵³⁴ *Plama v. Bulgaria*, Decision on Jurisdiction, 8 February 2005, ICSID Case No. ARB/03/24, para. 214.

3. Rights of U.S. Nationals in Morocco case⁵³⁵

Although the Court affirmed the applicability of the MFN clause to jurisdictional provisions, neither can this judgment be used as a guideline since the question was not decisive for the outcome of the case and therefore not subject to a detailed examination.

a. Facts of the Case

In order to obtain the right to exercise consular jurisdiction in the French zone of Morocco, the United States invoked the most-favoured-nation clauses contained in the agreement between the United States and Morocco of 1936⁵³⁶ and in the Madrid Convention of 1880⁵³⁷, together with the General Treaty between France and the United Kingdom of 1856 and the Treaty of Commerce and Navigation between France and Spain of 1861, which both provided for consular jurisdiction in civil and criminal cases in which British or Spanish nationals, respectively, were defendants. In contrast, it was provided in the 1936 treaty between France and the United States that the United States should only have consular jurisdiction for disputes between American citizens, but not in mixed disputes in which the defendant was American. However, Spain and the United Kingdom had already renounced their capitulatory privileges.⁵³⁸ The United States nevertheless claimed that it was entitled to continue to exercise consular jurisdiction in mixed disputes on the theory that it was the effect of the most-favoured-nation clause that these rights had been incorporated by reference in the treaty between France and the United States, no matter whether the United Kingdom and Spain had surrendered their right to exercise consular jurisdiction.

⁵³⁵ For details regarding the case, see de Soto, Judgment of the International Court of Justice of 27 August 1952, pp. 516-583.

⁵³⁶ Art. 14 of the France-United States Treaty of 1836 provided: „The commerce with the United States shall be on the same footing [...] as that with the most favored nation [...]”.

⁵³⁷ Art. 17 of the Madrid Convention provided: “The right to the treatment of the most favoured nation is recognized by Morocco as belonging to all the Powers represented at the Madrid Conference.”

⁵³⁸ The protectorate of France over Morocco was established in the Treaty of Fez of 1912. The establishment of the protectorate including the organisation its tribunals, which had jurisdiction over disputes between foreigners, led to a situation differing from the situation that had reigned during the regime of capitulations, which was marked by the exercise of consular jurisdiction by the capitulatory powers. Thus, France negotiated a renunciation of capitulatory rights and privileges with all treaty partners except the United States.

b. Decision

The ICJ rejected the United States' argument of permanent incorporation on the ground

“[...] that it would lead to a position in which the United States was entitled to exercise consular jurisdiction in the French Zone notwithstanding the loss of this right by Great Britain. This result would be contrary to the intention of the most-favoured-nation clauses to establish and maintain at all times fundamental equality without discrimination as between the countries concerned.”⁵³⁹

Although denying the applicability of the most-favoured-nation clause on the ground of a lack of more favourable treatment granted to third states, the Court acknowledged that before renunciation of the treaties by the United Kingdom and Spain, the United States had enjoyed the same consular rights as Spain and the United Kingdom by virtue of the MFN clause in its treaty with Morocco. In the words of the ICJ,

“Accordingly, 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.”⁵⁴⁰

c. Assessment

This statement suggests that the ICJ affirmed the possibility to acquire jurisdiction by means of the most-favoured-nation clause.⁵⁴¹ However, the ICJ did not engage in a detailed analysis of the scope of the most-favoured-nation clause, the decisive aspect of the case being that the more favourable provisions of the third-party treaties had ceased to be

⁵³⁹ *Case concerning rights of nationals of the United States of America in Morocco*, Judgment of August 27th, 1952: I.C.J. Reports 1952, p. 192.

⁵⁴⁰ *Case concerning rights of nationals of the United States of America in Morocco*, Judgment of August 27th, 1952: I.C.J. Reports 1952, p. 190.

⁵⁴¹ The case was interpreted in that way in *Siemens v. Argentina*, Decision on Jurisdiction, 3 August 2004, ICSID Case No. ARB/02/8, para. 99.

operative between the Contracting Parties.⁵⁴² Since the Court could deny the applicability of the clause on the ground of the lack of favourable treatment granted to any third state and did not make any effort to explain its finding that the most-favoured-nation clause covered the extension of consular jurisdiction, the judgment offers only limited insight into the question whether the most-favoured-nation clause should be applicable to jurisdictional issues.

IV. Conclusion

It follows from these arguments that the MFN clause generally allows circumvention of admissibility-related requirements. This outcome is supported by the usual wording of MFN clauses and the close connection between substantive and procedural protection of investors. The reference of MFN clauses to “treatment” encompasses both substantive and procedural standards, given that access to dispute settlement mechanisms is part of the protection offered under BITs. This result is also in conformity with the economic rationale of MFN clauses to establish equal conditions of competition for foreign investors from different home States since the possibility to enforce the host State’s obligations under the investment treaty more easily creates a competitive advantage. In contrast, the specific negotiation of provisions or the introduction of public policy considerations cannot serve as an argument against the application of MFN clauses to procedural provisions. Neither does the presumed intention of the parties or the object and purpose of BITs argue against such application. While ICJ and domestic jurisprudence offers only limited insight into the question whether most-favoured-nation clauses should be applicable to jurisdictional issues, it can at least not be invoked as a bar to such application. The reasoning of the ICJ and the Arbitral Commission in the *Ambatielos* case even rather militates in favour of application. Thus, in case the parties want to exclude applicability of the clause to procedural requirements, they have to make an exception to the most-favoured-nation clause as regards procedural dispute settlement provisions.

⁵⁴² *Case concerning rights of nationals of the United States of America in Morocco*, Judgment of August 27th, 1952: I.C.J. Reports 1952, p. 191.

C. Arguments Relating to the Application of Most-Favoured-Nation Clauses to Jurisdictional Dispute Settlement Provisions

In order to affirm the applicability of MFN clauses to jurisdictional provisions, the same arguments can be brought forward that have already been cited to affirm its applicability to procedural provisions. Furthermore, there is no difference between the consent to substantive or procedural and jurisdictional requirements which would justify a differentiating approach. In addition, an argument that has been brought forward by some tribunals, can be rebutted. According to these tribunals, there is a need to apply jurisdictional instruments restrictively. However, the consent to confer jurisdiction on a tribunal must be proved in the same way as any other obligation undertaken in a treaty.

I. Importance of Consent to Jurisdictional as well as Substantive or Procedural Provisions

It has been suggested by tribunals and in scientific literature that MFN clauses may not be applicable to jurisdictional provisions, with MFN clauses not being able to override the lack of consent to the jurisdiction of a tribunal.⁵⁴³ Indeed the decisions of the various tribunals can largely be harmonized by distinguishing between jurisdictional and procedural provisions. While the *Maffezini*, *Siemens*, *Camuzzi* and *Gas Natural* tribunals gave effect to the MFN clauses in order to overcome admissibility requirements, application of MFN clauses was denied – with the exception of the decision in the *RosInvest* arbitration – where jurisdiction was in question. Under this interpretation, the scope of application of a substantive obligation is an entirely separate question to the conferral of jurisdiction upon an international tribunal.⁵⁴⁴ The underlying argument is that that the judicial sovereignty of the host State contradicts the operation of the clause, the consent to arbitration being a waiver of the host State's sovereign right not to be cited before an international tribunal. It is a fundamental principle of international law that no State can be compelled to submit its disputes to the jurisdiction of an international tribunal. The consent of the parties, as a

⁵⁴³ See for example Teitelbaum, *Who's afraid of Maffezini?*, p. 232: "To shorten a seemingly arbitrary waiting period for the submission of a dispute affects the timing of the host state's consent [...], but does not necessarily undermine the host state's consent as a whole."

⁵⁴⁴ See McLachlan/Shore/Weiniger, p. 257, para. 7.168.

corollary of the principle of the sovereign equality of States, is the essential prerequisite for the establishment of jurisdiction.⁵⁴⁵ The PCIJ held with regard to its own jurisdiction that

"It is true that the Court's jurisdiction is always a limited one, existing only in so far as States have accepted it[.]"⁵⁴⁶

As with traditional forms of international arbitration, recourse to ICSID arbitration is entirely voluntary.⁵⁴⁷ The condition of consent is enshrined in Article 25 of the ICSID Convention, which limits ICSID jurisdiction to cases where both parties have consented in writing to submit their dispute to the ICSID Centre.⁵⁴⁸ There are two aspects to the requirement of consent. Since Article 25 (1) requires a dispute submitted to an ICSID Tribunal to be "between a Contracting State [...] and a national of another Contracting State", the first prerequisite is that the State party to the dispute and the home State must be parties to the Convention. However, the ratification of the Convention does not entail the automatic acceptance of jurisdiction, but it is necessary for both parties to additionally

⁵⁴⁵ Status of Eastern Carelia, Advisory Opinion, PCIJ Series B No. 5 (1923), p. 19; Minority Schools (Upper Silesia), PCIJ Series A, No. 15 (1928), p. 22; Mavrommatis Palestine Concessions (Greece v. U.K.), PCIJ Series B No. 3 (1924), p. 16; Corfu Channel Case, Judgment on Preliminary Objection, 25 March 1948, ICJ Reports 1948, p. 27; Anglo-Iranian Oil Company case (Jurisdiction), Judgment of 22 July 1952, ICJ Reports 1952, p. 103; Ambatielos case (merits: obligation to arbitrate), Judgment of 19 May 1953, ICJ Reports 1953, p. 19; Interpretation of Peace Treaties, Advisory Opinion of 30 March 1950, ICJ Reports 1950, p. 71; Land and Maritime Boundary between Cameroon and Nigeria Case, Preliminary Objections, Judgment of 11 June 1998, ICJ Reports 1998, p. 312. See also Rosenne, *The law of treaties*, pp. 549, 550; Amerasinghe, *Jurisdiction of international tribunals*, p. 51; Lauterpacht, *The Development of International Law*, p. 338; Santulli, *Droit du contentieux international*, para. 179; Lauterpacht, *Aspects of the Administration of International Justice*, p. 23; Fitzmaurice, *The Law and Procedure of the International Court of Justice* (1986), p. 492.

⁵⁴⁶ The Factory at Chorzow (Jurisdiction) (Germany v. Poland), Judgment of 26 July 1928, PCIJ Series A No. 9 (1927), p. 32.

⁵⁴⁷ This has been stressed in the Report of the Executive Directors on the ICSID Convention, where consent was described as the "cornerstone" of the jurisdiction of the Centre (Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Report of 18 March 1965, para. 23).

⁵⁴⁸ Art. 25 (1) provides: "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."

submit disputes to ICSID arbitration.⁵⁴⁹ Thus, the jurisdiction of an ICSID arbitral tribunal requires a two-step procedure, consisting of the ratification of the Convention and an additional step by which consent to jurisdiction is given by the parties to the dispute. The parties in those two steps are not identical, since in the second step the home State's consent is replaced by the investor's. The agreement between the parties to the dispute may be expressed in various ways.⁵⁵⁰ The most common form is a direct agreement between the parties recorded in an investment contract. If the dispute has already arisen, the parties may submit the dispute by way of a *compromis*. Alternatively, the host State may in its national investment legislation offer to submit all or certain categories of disputes arising from investments to ICSID.⁵⁵¹ Moreover, numerous bilateral investment treaties and multilateral investment agreements foresee the possibility of ICSID arbitration between either party of the treaty and a national of the other party.⁵⁵² These unilateral offers may be accepted by the investor either by a written submission or by the institution of proceedings.⁵⁵³

The UNCITRAL Arbitration Rules also explicitly hold in Article 1 that the Rules are only applicable when the parties have agreed in writing to submit the dispute to arbitration under the UNCITRAL rules. The ICSID and UNCITRAL rules are thus an expression of the principle that international courts and tribunals only have jurisdiction to the extent to which States have consented to confer jurisdiction upon them.

It is also true with regard to substantive law that the rules of law binding upon states must reflect their free will, which is expressed in the following statement of the ICJ:

⁵⁴⁹ This can be derived from the last paragraph of the preamble and from Article 25 I ICSID Convention.

⁵⁵⁰ On the various forms of consent see Schreuer, *The Interpretation of ICSID Arbitration Agreements*, in: Wellens (ed.), *International Law: Theory and Practice*, p. 719; Schreuer, *The ICSID Convention: A Commentary*, Article 25, paras 241-319.

⁵⁵¹ See eg. *SPP v. Egypt*, Decision on Jurisdiction, 14 April 1988, ICSID case No. ARB/84/3, paras 101, 116.

⁵⁵² See eg Article 11 (2) of the German Model BIT (Model I), Article 1122 NAFTA, Article 26 ECT, Article 9 of the Investment Protocols of MERCOSUR.

⁵⁵³ *Tradex v. Albania*, Decision on Jurisdiction, 24 December 1996, ICSID case No. ARB/94/2, ICSID Review vol. 14 (1999), pp. 186, 187.

“International law governs relations between independent States. The rules of law binding upon States [...] emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law [...].”⁵⁵⁴

Also with regard to substantive international norms, it flows from the sovereign equality of States that States have the right to determine what shall be the content of the legal rules by which they will be bound.⁵⁵⁵ The importance of consent as the basis of judicial jurisdiction therefore is not a phenomenon different from the notion of consent in general, but the relevance of consent for a tribunal’s jurisdiction follows from the importance of consent in the creation of international obligations in general.⁵⁵⁶ It is also stated in the Vienna Convention on the Law of Treaties that treaty obligations are only binding if the State has validly consented.⁵⁵⁷ With the consent of sovereign States being decisive for the creation of the entire legal framework of international relations, the issue of consent does not only pose itself in the context of application of the most-favoured-nation clause to jurisdictional provisions, but comes up in the same way with regard to substantive standards of protection. When a State has to grant a more favourable substantive standard, the original consent to the less favourable national treatment standard is also overridden. This does however not affect State sovereignty, with consent to that change of standard of investment protection being incorporated in the most-favoured-nation clause. Therefore the MFN clause must not be interpreted as a substitute for consent to jurisdiction. It can however, depending on its interpretation according to the Vienna Convention, be viewed as incorporating the consent to jurisdiction in case there is such consent in a third-party treaty.

II. Rejection of a Restrictive Interpretation of Jurisdictional Instruments

Although the most-favoured-nation clause is not itself a jurisdictional instrument, its restrictive interpretation and application as regards jurisdictional matters could still be justi-

⁵⁵⁴ *The Case of the S.S. “Lotus”*, Judgment of 7 September 1927, PCIJ Series A, No. 9, (1927), p. 18.

⁵⁵⁵ Ipsen, *Völkerrecht*, § 26, para. 7.

⁵⁵⁶ Orakelashvili, *The concept of international judicial jurisdiction*, p. 508.

⁵⁵⁷ See Articles 11-17, 51-52 of the VCLT.

fied if the consensual nature of jurisdiction warranted the adoption of a restrictive approach. Yet there is no requirement under international law to adopt a restrictive interpretation of jurisdictional instruments.⁵⁵⁸ The ICJ determined that there must be a “clear agreement” between the parties as to jurisdiction.⁵⁵⁹ *Fitzmaurice* suggests that the only thing which is required is a strict proof of consent.⁵⁶⁰ However, there is no requirement under international law to construe jurisdictional treaty provisions restrictively.⁵⁶¹ The specifically jurisdictional character of an instrument does not require any deviation from the regime of interpretation applicable to treaties; instead the consent to confer jurisdiction on a tribunal must be proved in the same way as any other obligation undertaken in a treaty, which means that “neither a deliberately liberal nor a deliberately restrictive interpretation of such clauses can be justified.”⁵⁶² Rather, the regular principles of interpretation as specified in the Vienna Convention are applicable.⁵⁶³ International courts including the PCIJ and the ICJ⁵⁶⁴ and ICSID tribunals⁵⁶⁵ have consistently held that declarations

⁵⁵⁸ Fitzmaurice, *The Law and Procedure of the International Court of Justice* (1986), p. 513; Lauterpacht, *The Development of International Law*, pp. 338, 339; Orakhelashvili, *Interpretation of Jurisdictional Instruments*, p. 169.

⁵⁵⁹ *Ambatielos case*, ICJ 1952, 38: “in the absence of a clear agreement between the Parties in this respect, the Court has no jurisdiction to go into [...] the merits of the present case [...]”

⁵⁶⁰ Fitzmaurice, *The Law and Procedure of the International Court of Justice* (1986), p. 514. “[...] To sum up – what is required, if injustice is not to be done to the one party or the other, is neither restricted nor liberal interpretations of jurisdictional clauses, but *strict proof of consent*.” (Emphasis in the original).

⁵⁶¹ Orakhelashvili, *The concept of international judicial jurisdiction*, pp. 517, 518; Shihata, *The Power of the International Court to Determine its Own Jurisdiction*, p. 190; *Rhodope Forests Case* (Preliminary Question), p. 1403: “Le Gouvernement défendeur soutient qu’il convient, en cas de doute sur la portée d’une clause arbitrale, de conclure toujours à l’incompétence de l’Arbitre, en raison du principe général selon lequel un Etat n’est obligé à recourir à l’arbitrage que dans les cas où il existe un engagement formel à cet effet. L’Arbitre ne saurait se rallier à ce principe d’interprétation des clauses arbitrales. Une telle clause doit être interprétée plutôt d’après la même méthode que les autres stipulations contractuelles.”

⁵⁶² Fitzmaurice, *The Law and Procedure of the International Court of Justice* (1986), p. 513. See also *Suez and Vivendi v. Argentina*, Decision on Jurisdiction, 3 August 2006, ICSID Case No. ARB/03/19, para. 66.

⁵⁶³ Lauterpacht, *The Development of International Law*, p. 339; Amerasinghe, *Jurisdiction of International Tribunals*, p. 115. For an overview of the case law of the ICJ see Orakhelashvili, *Interpretation of Jurisdictional Instruments*, pp. 174-184, and Amerasinghe, *Jurisdiction of International Tribunals*, pp. 105-115.

⁵⁶⁴ Case concerning the Temple of Preah Vihear (preliminary objections), Judgment of 26 May 1961, ICJ Reports 1961, p. 32; *Central Rhodope Forests Case* (Preliminary Question), Reports of International Arbitral Awards, vol. III, p. 1403. In his dissenting opinion in the *Anglo-Iranian Oil Company Case*, p. 143, Judge Read stated: “It has been contended that the Court should apply a restrictive construction to the provisions of the Declaration, because it is a treaty provision or clause conferring jurisdiction on the Court. Further, it has been suggested that a jurisdictional clause is a limitation upon the sovereignty of a State, and that, therefore, it should be strictly construed.

of consent to jurisdiction should neither be construed restrictively nor broadly. Neither should MFN clauses be interpreted restrictively on account of a rule of restrictive interpretation when it comes to the importation of jurisdictional provisions. The reference to the consensual principle therefore does not have an influence on the means of interpretation of the scope of the most-favoured-nation clause.

According to the approach of the tribunals in *Plama*, *Telenor*, *Berschader*, and *Wintershall*, dispute settlement clauses should not be covered unless the MFN clause in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.⁵⁶⁶ According to the *Plama* tribunal,

“Doubts as to the parties’ clear and unambiguous intentions can arise if the agreement to arbitrate is to be reached by incorporation by reference. [...] [t]he reference must be such that the parties’ intention to import the arbitration provision of the other agreement is clear and unambiguous.”⁵⁶⁷

The *Berschader* tribunal agreed with the *Plama* tribunal that an agreement to arbitrate should be “clear and unambiguous”⁵⁶⁸. These tribunals have been criticized for advocating a restrictive interpretation of jurisdictional instruments.⁵⁶⁹ The tribunals are however

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

⁵⁶⁵ *Soabi v. Senegal*, Decision on Jurisdiction, 25 February 1988, ICSID Case No. ARB/82/1, paras 4.09-4.10; *SPP v. Egypt*, Decision on Jurisdiction, 14 April 1988, ICSID Case No. ARB/84/3, paras 62-63; *Tradex v. Albania*, Decision on Jurisdiction, 24 December 1996, ICSID case No. ARB/94/2, ICSID Review vol. 14 (1999), p. 194.

⁵⁶⁶ *Plama v. Bulgaria*, Decision on Jurisdiction, 8 February 2005, ICSID Case No. ARB/03/24, para. 223; *Telenor v. Hungary*, Award, 13 September 2006, ICSID Case No. ARB/04/15, para. 91; *Wintershall v. Argentina*, Award, 8 December 2008, ICSID Case No. ARB/04/14, para. 178; *Berschader v. Russia*, Award, 21 April 2006, Arbitration Institute of the Stockholm Chamber of Commerce, SCC Case No. 080/2004, para. 182.

⁵⁶⁷ *Plama v. Bulgaria*, Decision on Jurisdiction, 8 February 2005, ICSID Case No. ARB/03/24, paras. 198-200.

⁵⁶⁸ *Berschader v. Russia*, Award, 21 April 2006, Arbitration Institute of the Stockholm Chamber of Commerce, SCC Case No. 080/2004, para. 182.

⁵⁶⁹ Brower/ Meier, The Unsound „*Plama* Principle“, in: Rovine, Contemporary Issues in International Arbitration and Mediation, p. 11.

correct in requiring a „clear and unambiguous“ agreement to arbitrate. A State’s consent cannot be presumed in the face of ambiguity. However, as argued above⁵⁷⁰, an interpretation of MFN clauses according to the Vienna Convention on the Law of Treaties, taking into account in particular its wording with the reference to “treatment”, suggests their application to dispute settlement provisions, including jurisdictional provisions. Instead of examining the plain meaning of the text, the tribunals in *Plama*, *Telenor*, *Salini*, *Berschader* and *Wintershall* shifted on the Claimant the burden of proof that the text intends what it suggests at a natural reading. The tribunals thus reversed the general rule that if the plain meaning is clear from the treaty text, the party disagreeing with the plain meaning has the burden to persuade the tribunal that the real meaning differs from that suggested by the wording of the provision.⁵⁷¹

III. Conclusion

In addition to procedural provisions, MFN clauses are also applicable to jurisdictional requirements. For one, a distinction between the application of most-favoured-nation clauses to procedural and to jurisdictional dispute settlement provisions, which has sometimes been suggested by tribunals, cannot be sustained. State sovereignty requires that States consent to all provisions of a treaty be they substantive, procedural or jurisdictional. Notably, applying MFN clauses to jurisdictional provisions does not equal a situation where a lack of consent is overridden, but consent is inherent in the MFN clause itself. Moreover, the Vienna Convention on the Law of Treaties does not require a specifically restrictive interpretation of jurisdictional instruments, but application of the ordinary principles of interpretation. Taking the wording of MFN clauses as a starting point, and taking into account the economic rationale of MFN clauses to establish equal competition, application of these principles gives no reason to restrict the clauses’ scope. As for ICJ jurisprudence, the case law again offers no clear answer. While it does not deal in detail with the question of application of MFN clauses to jurisdictional provisions, it can at least not be invoked as a proof of opposition. The *US Nationals in Morocco* case can even be seen as

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See Part VI.B.I.

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See also Wälde, *The Umbrella Clause*, p. 217.

an indication that the ICJ generally had no reservations against the application of MFN clauses to jurisdictional provisions.

There are several situations in which an investor might invoke a most-favoured-nation clause in order to obtain the jurisdiction of an international arbitral tribunal. The first is extension of jurisdiction to contract-based claims. While there is little leeway for the enlargement of jurisdiction by invocation of umbrella clauses from third-party treaties,⁵⁷² the issue whether the most-favoured-nation clause can be applied to establish jurisdiction over contractual claims can also arise in other constellations, for example as regards the invocation of a broader dispute settlement clause encompassing the settlement of contractual disputes or such constellation as relevant in the *Salini* case. The second situation is the enlargement of the range of claims covered by the dispute settlement clause. Third, investors could attempt to bring their claim before a different arbitral forum, and fourth, investors could invoke an entire dispute settlement mechanism when the basic BIT does not contain one at all. Yet with MFN clauses only operating in the context in which they were inserted, the fourth option is barred by the *ejusdem generis* principle.

D. Jurisprudence by International Investment Arbitration Tribunals

I. Importation of Procedural Provisions – Circumvention of a Waiting Period

The cases concerning the importation of more favourable admissibility requirements all deal with the circumvention of the requirement of prior resort to local courts. In this respect, tribunals have in the beginning homogenously applied the relevant most-favoured-nation clauses to provisions requiring a waiting period, albeit with diverging emphases in the reasons. Such application was first rejected by the *Wintershall* tribunal, which was followed by the tribunals in *Daimler*, *ICS* and *Kılıç*. Those tribunals declined to circumvent through the MFN clause in question a requirement of prior resort to local courts. However, the interpretation of the notion of “treatment” according to the principles enshrined in the Vienna Convention on the Law of Treaties argues in favour of the general possibility to circumvent waiting periods by means of most-favoured-nation clauses.

⁵⁷² See Part VI D.II.1.c.

Therefore the outcome of the majority of decisions must be endorsed, albeit sometimes for different reasons than those cited by the tribunals.

1. Introduction: The requirement of prior resort to local courts

A considerable number of investment treaties contain provisions requiring resort to local courts for a certain period of time before submission of the dispute to international arbitration. Such requirements provide domestic courts with the opportunity to deal with investment disputes for a certain period of time. After the case has been submitted to local courts and the waiting period has elapsed, the investor has the right to bring the dispute before an international arbitral tribunal, no matter whether the national courts have reached a decision or not. Calling for the adherence to a fixed waiting period of domestic litigation, these provisions cannot be equated with the requirement to exhaust domestic remedies in the host country.⁵⁷³ The effect of the waiting period is to establish a time limitation on the ability of an investor to initiate a claim against the host State. Such waiting periods can thus be qualified as admissibility-related rather than jurisdictional provisions.⁵⁷⁴ The waiting period does not put into question the jurisdiction of a tribunal since it does not impair the authority of the international tribunal to adjudicate the claim. This authority is merely postponed until the waiting period has elapsed. Notably, the fact that the requirement to first resort to local courts does not strike at the jurisdiction of the tribunal, but at the admissibility of the claim, does not mean that that non-compliance with the requirement has no legal consequences. The requirement is mandatory, which means that the case is not admissible if the waiting period is not observed.

2. Case Law

In each of the following cases, the Claimant was required under the dispute settlement mechanism of the relevant BIT to seek a remedy before a local court of the host State for

⁵⁷³ See *Maffezini v. Spain*, Decision on Jurisdiction, 25 January 2000, ICSID Case No. ARB/97/7, para. 28. Concerning the application of MFN clauses to provisions requiring exhaustion of local remedies see Part VI E.I.2.

⁵⁷⁴ For a different view, see *Wintershall v. Argentina*, Award, 8 December 2008, ICSID Case No. ARB/04/14, paras 133-153, *ICS v. Argentina*, Award on Jurisdiction, 10 February 2012, UNCITRAL, PCA Case No. 2010-9, para. 262.

a period of time before instituting arbitral proceedings. The Claimants all sought to invoke the BIT's MFN clause in connection with a dispute settlement provision from a third-party BIT which did not contain the local court requirement.

a. *Maffezini v. Spain*

The case *Maffezini v. Spain* involved a dispute between the Argentinean investor, who had invested in an enterprise for the production and distribution of chemical products in Spain, and the Spanish government.⁵⁷⁵ The bilateral investment treaty between Argentina and Spain provided that if the attempt to settle the dispute amicably failed, it should first be submitted to the competent national court of the host state.⁵⁷⁶ Only after a period of eighteen months of domestic litigation should the parties have the right to bring the dispute before an international arbitral tribunal.⁵⁷⁷ The Claimant sought to circumvent the requirement to submit the dispute to local courts prior to the initiation of arbitral proceedings. In order to proceed directly to ICSID arbitration, the Claimant invoked the most-favoured-nation clause of the Argentina-Spain BIT, together with the dispute settlement provisions of the Chile-Spain BIT, which lacked the requirement of a waiting period for domestic litigation and instead allowed submittal of the dispute to an international arbitral tribunal directly after a six-month period of amicable negotiation.⁵⁷⁸ The Claimant argued that this absence of a waiting period for domestic litigation in the Chile-Argentina BIT constituted more favourable treatment within the meaning of the most-favoured-nation clause. The most-favoured-nation clause of the Argentina-Spain treaty provided:

⁵⁷⁵ For the details, see Reinisch, Maffezini, in : Wolfrum, Rüdiger, Max Planck Encyclopedia of Public International Law.

⁵⁷⁶ Article X (2) of the Argentina-Spain BIT provides: "Si una controversia [...] no pudiera ser dirigida dentro del plazo de seis meses, contando desde la fecha en que una de las partes en la controversia la haya promovido, será sometida a petición de una de ellas a los tribunals competentes de la Parte en cuyo territorio se realizó la inversión."

⁵⁷⁷ Art. X (3) of the Argentina-Spain BIT provides: "La controversia podrá ser sometida a un tribunal arbitral internacional en cualquiera de las circunstancias siguientes: (a) a petición de una de las partes en la controversia, cuando no exista una decisión sobre el fondo después de transcurridos dieciocho meses contados a partir de la iniciación del proceso previsto por el apartado 2 de este artículo o cuando exista tal decisión pero la controversia subsiste entre las partes. [...]"

⁵⁷⁸ See Article X (2) of the Chile-Spain BIT of 2 Oktober 1991.

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

Spain objected to the application of the most-favoured-nation clause, stating that the reference to „matters“ only referred to material treatment, but did not comprise procedural or jurisdictional questions, and that the application of the most-favoured-nation principle to matters not intended in the basic treaty would be contrary to the *ejusdem generis* principle. The tribunal affirmed applicability of the most-favoured-nation clause to dispute settlement provisions, bringing forward three arguments, namely the *ejusdem generis* principle, the wording of the clause as compared with other MFN clauses and treaty practice. The *Maffezini* tribunal made rather extensive reference to the *ejusdem generis* principle, relying to a large extent on ICJ jurisprudence and especially on the *Ambatielos case*. The tribunal argued that there were

“good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights of traders under treaties of commerce”.⁵⁷⁹

The tribunal compared the situation in *Maffezini v. Spain* with the situation which existed under capitulation regimes, where consular jurisdiction had been regarded as essential for the protection of merchants. Equally, in international arbitration, which was designed as a substitute for consular jurisdiction, dispute settlement mechanisms were essential for the protection of the rights enshrined in the treaty and “closely linked” to the substantive standards. As long as the subject-matters of the basic treaty and the third-party treaty was the same, parties could invoke more favourable dispute settlement provisions from a

⁵⁷⁹ *Maffezini v. Spain*, Decision on Jurisdiction, 25 January 2000, ICSID Case No. ARB/97/7, para. 54.

third-party treaty via the most-favoured-nation clause in full accord with the *ejusdem generis* principle.⁵⁸⁰

According to the Tribunal, this result did not have to be questioned due to the formulation of the clause in other bilateral investment treaties, especially those concluded with the United Kingdom, which expressly comprised dispute settlement provisions.⁵⁸¹ While the *Plama* tribunal later referred to these clauses in order to distinguish most-favoured-nation clauses which explicitly encompass dispute settlement provisions from less definitive ones⁵⁸², the *Maffezini* tribunal emphasized that the United Kingdom investment treaties provided that the applicability of the clause to all treaty provisions should only be confirmed “for avoidance of doubt”, thus implying that Great Britain did not believe that it was derogating from a general rule but only inserted the clarification to ensure a correct interpretation. The same effect, *viz.* the applicability of the most-favoured-nation clause to all provisions of the treaty, could thus as well be achieved without an explicit reference.⁵⁸³ Moreover, the tribunal referred to formulations of most-favoured-nation clauses in other treaties concluded by Spain, which were not applicable to “all matters subject to this agreement” but only to “this treatment”, which it considered a narrower formulation.⁵⁸⁴ The tribunal denied that the eighteen-month requirement was a fundamental public policy of the state that should not be overridden, which was reflected in its treaty practice in other bilateral investment treaties. It first stated its conviction that the eighteen-month requirement was the outcome of a policy conflict between Spain as a typical home state and Argentina as a typical host state. It held that the Claimant had convincingly explained that in the negotiations for the bilateral investment treaty, Argentina, which was in the posi-

⁵⁸⁰ *Maffezini v. Spain*, Decision on Jurisdiction, 25 January 2000, ICSID Case No. ARB/97/7, para. 56.

⁵⁸¹ See eg Art. 3 (3) of the United Kingdom-Albania BIT, which provides: “For the avoidance of doubt it is confirmed that that [the most favoured nation principle] shall apply to the provisions of Articles 1-11 of this Agreement.” Articles 1 to 11 comprise provisions concerning dispute settlement.

⁵⁸² For details concerning the *Plama* arbitration, see Part VI D.II.2.b.aa.

⁵⁸³ *Maffezini v. Spain*, Decision on Jurisdiction, 25 January 2000, ICSID Case No. ARB/97/7, para. 52.

⁵⁸⁴ *Maffezini v. Spain*, Decision on Jurisdiction, 25 January 2000, ICSID Case No. ARB/97/7, para. 60. This way of reasoning was not pursued by the *Siemens* tribunal, which held that the lack of a reference to all matters governed by the agreement in the relevant most-favoured-nation clause did not constitute an obstacle to its applicability to procedural matters. See *Siemens v. Argentina*, Decision on Jurisdiction, 3 August 2004, ICSID Case No. ARB/02/8, para. 103.

tion of a typical host country, tried to insert some form of prior exhaustion of local remedies, while Spain, the potential home country to investors, preferred direct access to international arbitration, which was reflected in the numerous agreements it had negotiated with other countries at that time. The eighteen-month waiting requirement could thus be viewed as a compromise between these two positions. The tribunal noted that in the present case, the roles of home and host country were reversed, indicating that Spain should not be able to rely on a requirement that it originally had intended to exclude from the treaty. Moreover, the tribunal found that Argentina had in the meanwhile abandoned its policy of requiring an eighteen-month period in domestic courts, and that the major part of Spanish investment treaties, including those ratified prior to the Argentina-Spain BIT, did not contain a domestic litigation waiting requirement. Rather, it was typical Spanish practice to allow direct access to arbitration for investors, requiring only a negotiation period prior to arbitration. The fact that Spain pursued an inconsistent treaty practice since its treaties included different dispute settlement mechanisms (six, nine, or twelve month negotiation periods followed by sometimes optional, sometimes mandatory resort to arbitration) convinced the tribunal that Spain did not consider the waiting period a fundamental public policy requirement. Hence, it allowed the Claimant to bypass this requirement by virtue of the most-favoured-nation clause.

However, the tribunal also limited its holding by establishing public policy considerations as a restriction to the applicability of the most-favoured-nation standard, stating that

“[...] 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.”⁵⁸⁵

The tribunal acknowledged four situations in which the parties should not be able to invoke the most-favoured-nation clause for public policy reasons, namely in case of a condition to exhaust local remedies in the basic treaty, a fork-in-the-road clause, the choice of

⁵⁸⁵ *Maffezini v. Spain*, Decision on Jurisdiction, 25 January 2000, ICSID Case No. ARB/97/7, para. 62.

a specific dispute settlement forum such as ICSID explicitly specified in the Agreement, and the choice of a “highly institutionalized system of arbitration that incorporates precise rules of procedure”, such as NAFTA. First, the tribunal held that consent to arbitration under the condition to exhaust local remedies could not be circumvented via the most-favoured-nation clause since the exhaustion of remedies was a fundamental rule of international law.⁵⁸⁶ The tribunal accordingly placed great emphasis on the distinction between the eighteen-month requirement and the exhaustion of local remedies.⁵⁸⁷ The second limitation concerns the impossibility to invalidate a fork-in-the-road clause. These clauses provide that the parties may either choose dispute settlement before national courts or alternatively before an international arbitral tribunal. Once the dispute settlement procedure is chosen, it is declared exclusive and cannot be changed.⁵⁸⁸ According to the Tribunal, if the parties could evade such a clause by virtue of a most-favoured-nation clause, the finality of dispute settlement, which many countries considered an important element of public policy, would be in danger.⁵⁸⁹ Third, the tribunal held that if a treaty provided for dispute settlement in a specific forum, such as ICSID, the parties could not have the dispute decided in another forum by invoking the most-favoured-nation clause. Finally, in case the treaty provided for dispute settlement by a highly institutionalised arbitral system with specific and precise rules of procedure like was the case in NAFTA, diverging rules in a third-party treaty could not have a legal effect by virtue of the most-favoured-nation clause, since “these very specific provisions reflect the precise will of the contracting parties”.⁵⁹⁰ The Tribunal expressed its conviction that further situations involving public policy in which the application of the most-favoured-nation clause was limited would be

⁵⁸⁶ *Maffezini v. Spain*, Decision on Jurisdiction, 25 January 2000, ICSID Case No. ARB/97/7, para. 63. The tribunal referred to the Mavrommatis Palestine Concessions Case, PCIJ Series A, No. 2 (1924), p. 12, and to the Interhandel Case, Preliminary Objections, Judgment of 21 March 1959, ICJ Reports 1959, p. 27. The rule has also been codified in Articles 14 and 15 of the draft Articles on Diplomatic Protection of the ILC.

⁵⁸⁷ *Maffezini v. Spain*, Decision on Jurisdiction, 25 January 2000, ICSID Case No. ARB/97/7, paras 19-37.

⁵⁸⁸ For details, see Part VI E.II.1.

⁵⁸⁹ *Maffezini v. Spain*, Decision on Jurisdiction, 25 January 2000, ICSID Case No. ARB/97/7, para. 63.

⁵⁹⁰ *Maffezini v. Spain*, Decision on Jurisdiction, 25 January 2000, ICSID Case No. ARB/97/7, para. 63.

identified in the future, thus clarifying that its list could not be regarded as exhaustive. As a guideline, it noted two general public policy considerations, namely that a balance had to be established “between the legitimate extension of rights and favours by means of the operation of the clause [...] and disruptive treaty-shopping that would play havoc with the policy objectives of underlying specific treaty provisions [...]”.⁵⁹¹ Since the prior consultation of national courts was not to be deemed a fundamental question of Spanish public policy, which the Court inferred from the inconsistent Spanish state practice, the most-favoured-nation clause could be applied.

b. Siemens v. Argentina

In May 2001, Argentina cancelled a contract with a local subsidiary of the Claimant by means of a regulation based on emergency legislation. The Claimant held this to be a breach of the investment treaty between Germany and Argentina and submitted the dispute to an ICSID tribunal after the six-month negotiation period had elapsed fruitlessly. The dispute settlement provisions in the investment treaty between Germany and Argentina were identical to the dispute settlement provisions relevant in the *Maffezini* case, providing that prior submittal of disputes to national courts and an eighteen-month domestic litigation waiting period were a condition for international arbitration.⁵⁹² The Claimant invoked the allegedly more favourable dispute settlement provisions of the Argentina-Chile treaty under which submittal of the dispute to an international arbitral tribunal was possible directly after the completion of amicable negotiations.⁵⁹³ The tribunal affirmed the applicability of the most-favoured-nation clause despite the lack of a reference in the most-favoured-nation clause to “all matters covered by this Agreement”.⁵⁹⁴ It

⁵⁹¹ *Maffezini v. Spain*, Decision on Jurisdiction, 25 January 2000, ICSID Case No. ARB/97/7, para. 63.

⁵⁹² Art. X (3) of the Argentina-Germany BIT.

⁵⁹³ Art. X (2) of the Chile-Argentina BIT.

⁵⁹⁴ The most-favoured-nation clause in Article 3 of the Argentina-Germany BIT provided:

- (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 favourable treatment than the treatment granted to the investments of its own nationals or companies or to the investments of nationals or companies of third States.

also relied on the object and purpose of the investment treaty, which was to “protect and promote investments” and “create favourable conditions for investments”, as expressed in its title and preamble.⁵⁹⁵ It derived from these provisions that the party intention was “to create favorable conditions for investments and to stimulate private initiative”.⁵⁹⁶ The tribunal refused to “second-guess” the party intention from a singular procedural clause in the investment treaty, since the party intention to stimulate foreign investment and thereby increase the well-being of the peoples of both countries could clearly and unambiguously be derived from the object and purpose of the treaty.⁵⁹⁷ The tribunal concurred with the *Maffezini* tribunal in acknowledging an exception to most-favoured-nation treatment in matters of public policy. However, it did not specifically resort to the four constellations described in *Maffezini*, but more generally named „sensitive issues of economic or foreign policy”⁵⁹⁸ and “public policy considerations judged by the parties to a treaty essential to their agreement”⁵⁹⁹. It held that other bilateral investment treaties concluded by Argentina, such as the treaties with the United States and Chile, did not contain similar provisions, indicating that no sensitive matter of Argentinean economic or foreign policy was affected and that prior submission of the dispute to local courts was not an essential part of the consent of the Respondent to arbitration.⁶⁰⁰ The tribunal thus concurred with the *Maffezini* tribunal that inconsistency of BITs may serve as evidence that a provision is not part of the public policy of a state. Moreover, the tribunal held that it fell within the burden of proof of the Respondent Government to prove that it was an essential policy to

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- (2) None of the Contracting Parties shall accord in its territory to nationals or companies of the other contracting Party a less favourable treatment of activities related to investments than granted to its own nationals and companies or to the nationals and companies of third States.⁵⁹⁴

⁵⁹⁵ 81. *Siemens v. Argentina*, Decision on Jurisdiction, 3 August 2004, ICSID Case No. ARB/02/8, para.

⁵⁹⁶ 81. *Siemens v. Argentina*, Decision on Jurisdiction, 3 August 2004, ICSID Case No. ARB/02/8, para.

⁵⁹⁷ 106. *Siemens v. Argentina*, Decision on Jurisdiction, 3 August 2004, ICSID Case No. ARB/02/8, para.

⁵⁹⁸ 105. *Siemens v. Argentina*, Decision on Jurisdiction, 3 August 2004, ICSID Case No. ARB/02/8, para.

⁵⁹⁹ 109. *Siemens v. Argentina*, Decision on Jurisdiction, 3 August 2004, ICSID Case No. ARB/02/8, para.

⁶⁰⁰ 105. *Siemens v. Argentina*, Decision on Jurisdiction, 3 August 2004, ICSID Case No. ARB/02/8, para.

allow access to international arbitration only after the submittal of the dispute before national courts.⁶⁰¹ In the words of the tribunal,

“[a]s to the claim that Article 10 (2) reflects the policy of Argentina, the Respondent has not presented any evidence [...]. 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. [...] This lack of consistency among the BITs entered into by the Respondent during the same year as the Treaty was signed does not support the argument that the institution of proceedings before the local courts is a ‘sensitive’ issue of economic or foreign policy or that it is an essential part of the consent of the Respondent in arbitration.”⁶⁰²

c. *Camuzzi International S.A. v. Argentina*

The *Camuzzi* case concerned a dispute between *Camuzzi International S.A.*, a national of Luxembourg, and Argentina. The Claimant argued that certain measures adopted by Argentina severely affected the company’s investment in two national gas distribution companies. It invoked the most-favoured-nation clause in Article 4 (1) of the investment treaty concluded between Argentina and the Belgo-Luxembourg Economic Unit in 1990 to claim the benefit of direct recourse to arbitration after the completion of six months of negotiation as provided by the treaty between Argentina and the United States. Argentina did not even make an attempt to contest the Claimant’s allegation that it could circumvent the waiting period for domestic litigation required in the relevant investment treaty by operation of the MFN clause.⁶⁰³

⁶⁰¹ In the words of the Tribunal, “[a]s to the claim that Article 10 (2) reflects the policy of Argentina, the Respondent has not presented any evidence beyond its affirmations to this effect in the written pleadings.” See *Siemens v. Argentina*, Decision on Jurisdiction, 3 August 2004, ICSID Case No. ARB/02/8, para. 105.

⁶⁰² *Siemens v. Argentina*, Decision on Jurisdiction, 3 August 2004, ICSID Case No. ARB/02/8, para. 105.

⁶⁰³ *Camuzzi v. Argentina*, Decision on Jurisdiction, 11 May 2005, ICSID Case No. ARB/03/2, paras 120-121. However, Argentina appears to have refrained from contesting the argument since according to its reasoning concerning a forum selection clause contained in the relevant contract, the investor had in fact submitted the dispute to national courts. In the view of Argentina, the requirement to observe a waiting period for domestic litigation was thus met anyway (See para. 105 of the decision).

d. Gas Natural v. Argentina

In this case, the Claimant sought compensation for losses to its shareholding in an Argentinean gas firm following measures taken by Argentina during its financial crisis. It directly submitted the dispute to arbitration, relying on the most-favoured-nation clause to circumvent the waiting period required in the Argentina-Spain BIT.⁶⁰⁴ While the Tribunal arrived at the same conclusion as the *Maffezini* tribunal, it stressed even more insistently that dispute settlement provisions had to be regarded “essential to a regime of protection of foreign direct investment”. It therefore concluded after a revision of the decisions in *Maffezini*, *Siemens* and *Salini* that

“assurance of independent international arbitration is an important – perhaps the most important – element in investor protection. Unless it appears clearly that the state parties to a BIT or the parties to a particular investment agreement 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.”⁶⁰⁵

The tribunal thus advanced the view that given the importance of the right to have recourse to independent investor-state arbitration, absent contradictory evidence, there was a presumption in favour of the applicability of MFN clauses to dispute settlement provisions. However, although the decision in the *Plama* case was published several months before the *Gas Natural* tribunal issued its decision, the tribunal failed to even make reference to it.

e. National Grid PLC v. Argentina

The *National Grid* case was administered by the UNCITRAL Rules. The tribunal affirmed the Claimant’s possibility to submit the dispute directly to arbitration. According

⁶⁰⁴ As in the *Maffezini* case, the case concerned the most-favoured-nation clause in the Argentina-Spain BIT. Yet unlike in *Maffezini*, the dispute involved a Spanish investor who had made an investment in Argentina.

⁶⁰⁵ *Gas Natural v. Argentina*, Decision on Jurisdiction, 17 June 2005, ICSID Case No. ARB 03/10, para. 49.

to the reasoning of the Tribunal, the MFN clause is applicable as long as the relevant investment treaty contains the parties' consent to arbitration in the relevant dispute settlement forum and as long as the Respondent has "consented to arbitration for the resolution of the type of disputes raised by the Claimant".⁶⁰⁶ The tribunal distinguished the present case and the disputes in *Maffezini* and *Siemens* from the disputes in *Salini* and *Plama*. It rejected as inappropriate the "attempt to create consent to ICSID arbitration" by virtue of the most-favoured-nation clause, as had been attempted by the Claimant in *Plama*. Given that the present case did not concern the creation of consent, the tribunal concurred with the "balanced considerations" of the *Maffezini* tribunal.⁶⁰⁷ While the Tribunal concurred with the outcome of the *Plama* arbitration, it argued that "cases like *Plama* do not justify depriving the MFN clause of its legitimate meaning or purpose in a particular case"⁶⁰⁸. It stressed that what was in question in the present case was not the host state's consent to arbitration but the waiver of a procedural requirement.⁶⁰⁹ The Tribunal held that although the relevant MFN clause only referred to "this treatment" as in the *Siemens* case and not to "all matters subject to this agreement", as had been the case in *Maffezini*, this did not exclude procedural prerequisites to dispute resolution from the scope of application of the clause, the elements of dispute settlement being part of the treatment offered for the protection of investors.⁶¹⁰

f. *Suez et al. v. Argentina*

The claim concerned the Claimants' investments in a concession for water distribution and waste water treatment in an Argentinean province. Argentina raised the preliminary objection that the Spanish Claimants had failed to comply with the treaty provision requiring prior submission of the dispute to local courts before invoking international arbi-

⁶⁰⁶ *National Grid v. Argentina*, Decision on Jurisdiction, 20 June 2006, UNCITRAL arbitration, paras 91-93.

⁶⁰⁷ *National Grid v. Argentina*, Decision on Jurisdiction, 20 June 2006, UNCITRAL arbitration, paras 91, 92.

⁶⁰⁸ *National Grid v. Argentina*, Decision on Jurisdiction, 20 June 2006, UNCITRAL arbitration, para. 92.

⁶⁰⁹ *National Grid v. Argentina*, Decision on Jurisdiction, 20 June 2006, UNCITRAL arbitration, para. 91.

⁶¹⁰ *National Grid v. Argentina*, Decision on Jurisdiction, 20 June 2006, UNCITRAL arbitration, para. 89.

tration. In response, the Claimants argued that the most-favoured-nation clause contained in that treaty allowed them to rely on the dispute settlement clause included in the Argentinean-French BIT, which included no local remedies clause. The Tribunal noted that the most-favoured-nation clause applied to “all matters” and that dispute settlement had not been included in the list of exceptions to MFN treatment. The Tribunal rejected the argument of the *Plama* tribunal that an arbitration agreement must be clear and unambiguous, especially where it is incorporated by reference to another text. Instead it argued that

“dispute resolution provisions are subject to interpretation like any other provision of a treaty, neither more restrictive nor more liberal”.⁶¹¹

MFN clauses should, according to the Tribunal, not be interpreted broadly or narrowly, but according to the regular rules on treaty interpretation. As a consequence, the tribunal considered dispute settlement provisions to be included in the term “all matters”. Moreover, it argued there was no basis for treating dispute settlement provisions in a manner different from substantive treaty standards:

“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 as the stated purposes of both the Argentina-Spain BIT and the Argentina-UK BIT, dispute settlement is as important as other matters governed by the BITs and is an integral part of the investment protection regime that the respective sovereign states have agreed upon.”⁶¹²

The tribunal found that the *Plama* decision was distinguishable from the present case, given that the most-favoured-nation clause in the present dispute was broader and that

⁶¹¹ *Suez and Vivendi v. Argentina*, Decision on Jurisdiction, 3 August 2006, ICSID Case No. ARB/03/19, para. 66.

⁶¹² *Suez and Vivendi v. Argentina*, Decision on Jurisdiction, 3 August 2006, ICSID Case No. ARB/03/19, para. 59.

there was in contrast to *Plama* no evidence of an intention of the parties in the present case not to apply the clause to dispute settlement provisions. Third, the effect of the clause in the present case was much more limited. “Without expressing an opinion on whether an MFN clause may achieve such a result”, the Tribunal distinguished the “radical effect” of substituting a complete dispute settlement mechanism with an entirely different dispute resolution mechanism incorporated from another treaty as attempted in *Plama* from the more limited effect in the present case, which merely consisted in waiving a preliminary step in accessing a mechanism.⁶¹³

g. *Wintershall v. Argentina*

In that case, the Claimant argued that the tribunal had jurisdiction on the basis of an MFN clause in the German-Argentine BIT together with the dispute settlement provisions under the US-Argentina BIT. While the issue in the case was the same as in the previously discussed cases – namely whether the investor had to pursue local remedies in the host State’s courts for eighteen months before initiating international arbitration – the tribunal qualified the local-remedies requirement as an obstacle to jurisdiction. The relevant most-favoured-nation clause could not be applied to the 18-months waiting requirement mainly due to the significance that the parties had attached to the submittal of the dispute to local courts during that period. According to the tribunal, the waiting period was “part and parcel of Argentina’s integrated “offer” for ICSID arbitration”.⁶¹⁴ Moreover, the tribunal argued that the *ejusdem generis* principle did not permit a replacement by the MFN clause of one means of dispute settlement with another. According to the tribunal,

“It is one thing to stipulate that the investor is to have the benefit of MFN treatment but quite another to use a MFN clause in a BIT to bypass a limitation in the settle-

⁶¹³ *Suez and Vivendi v. Argentina*, Decision on Jurisdiction, 3 August 2006, ICSID Case No. ARB/03/19, para. 63.

⁶¹⁴ *Wintershall v. Argentina*, Award, 8 December 2008, ICSID Case No. ARB/04/14, para. 162.

ment resolution clause of the very same BIT when the Parties have not chosen language in the MFN clause showing an intention to do this.”⁶¹⁵

The tribunal rejected the presumption that dispute resolution provisions fall within the scope of an MFN provision in a BIT, but held that the ordinary meaning of an MFN clause was that only the investor’s substantive rights in respect to the investment are to be treated no less favourably than under a BIT between the host State and a third State. If an MFN clause should be applied to dispute settlement provisions, it had to expressly provide for such application.⁶¹⁶ It thus endorsed the approach of the tribunals in *Plama*, *Telenor* and *Berschader*⁶¹⁷ that MFN clauses as a rule do not incorporate the host State’s broader consent to arbitration under its third-party BITs.

h. Impregilo S.p.A. v. Argentina

In this case the majority of the arbitral tribunal was of the view that the term „treatment“ was wide enough to refer to dispute settlement provisions as well.⁶¹⁸ It mainly relied on prior case law dealing with MFN clauses referring to „all matters“ regulated in a BIT. The dissenting arbitrator held MFN clauses should not be applied to dispute settlement mechanisms. She argued that there were two different types of treatment – substantive and jurisdictional – which should be treated differently under the *ejusdem generis* principle.⁶¹⁹ She gave as a reason that in contrast to the national level, on the international level jurisdictional treatment is never inherent in substantive treatment. She distinguished between rights and fundamental conditions for access to the rights, arguing that MFN clauses are applicable only to rights, but cannot modify the fundamental conditions for access to the rights.⁶²⁰ These conditions included not only the conditions *ratione personae*, *ratione*

⁶¹⁵ *Wintershall v. Argentina*, Award, 8 December 2008, ICSID Case No. ARB/04/14, para. 168 (quoting *Telenor v. Hungary*, Award, 13 September 2006, ICSID Case No. ARB/04/15, para. 92).

⁶¹⁶ *Wintershall v. Argentina*, Award, 8 December 2008, ICSID Case No. ARB/04/14, paras 167, 179.

⁶¹⁷ See Part VI D.II.2.b.

⁶¹⁸ *Impregilo SpA v. Argentine Republic*, Dissenting Opinion of Arbitrator Brigitte Stern, 21 June 2011, ICSID Case No. ARB/07/17, para. 37.

⁶¹⁹ *Impregilo SpA v. Argentine Republic*, Award, 21 June 2011, ICSID Case No. ARB/07/17, para. 99.

⁶²⁰ *Impregilo SpA v. Argentine Republic*, Dissenting Opinion of Arbitrator Brigitte Stern, 21 June 2011, ICSID Case No. ARB/07/17, para. 47.

temporis and *ratione materiae*, but also the condition *ratione voluntatis*.⁶²¹ The arbitrator argues that if the conditions *ratione personae*, *ratione temporis* and *ratione materiae* are not fulfilled, the investor clearly does not have access to the rights guaranteed in the treaty. She argues that the same is true if the condition *ratione voluntatis* as the condition for the access of investors to jurisdictional provisions is not met. According to the dissent, all conditions shaping the State's consent are jurisdictional prerequisites to the existence of a right to international arbitration, which means that no distinction is to be made between jurisdictional and admissibility-related criteria.

i. Hochtief AG v. Argentina

The Claimant had a concession for the construction and maintenance of a road and several bridges in Argentina. It sought to commence arbitration, claiming that Argentina had violated several BIT provisions and customary international law. The tribunal was split on the question whether the Claimant could invoke the beneficial dispute settlement provisions from the Argentina-Chile BIT. The majority held that it was allowed to circumvent the requirement to refer the dispute to Argentine courts for 18 months before pursuing arbitration. In particular, the majority considered dispute settlement to be part of an investment's „management“, since the right of enforcement was an essential component of the property right itself.⁶²² The tribunal held that the *ejusdem generis* principle was not a bar to application of the MFN clause because circumvention of the 18-months period did not entail the creation of a new right, but concerned the exercise of an already existing right. The tribunal thus considered relevant that the waiting period was a procedural requirement⁶²³ and explicitly left open the question whether MFN clauses could be applied to jurisdictional matters.⁶²⁴

⁶²¹ *Impregilo SpA v. Argentine Republic*, Dissenting Opinion of Arbitrator Brigitte Stern, 21 June 2011, ICSID Case No. ARB/07/17, paras 51, 52.

⁶²² *Hochtief AG v Argentine Republic*, Decision on Jurisdiction, 24 October 2011, ICSID Case No. ARB/07/31, para. 66, 67.

⁶²³ *Hochtief AG v Argentine Republic*, Decision on Jurisdiction, 24 October 2011, ICSID Case No. ARB/07/31, paras 80-91.

⁶²⁴ *Hochtief AG v Argentine Republic*, Decision on Jurisdiction, 24 October 2011, ICSID Case No. ARB/07/31, para. 99.

j. Daimler AG v Argentina

The Claimant commenced ICSID arbitration proceedings seeking damages in relation to several measures Argentina had taken in an attempt to mitigate its currency crisis. Argentina challenged the tribunal's jurisdiction on the basis that Daimler had failed to observe the waiting period prescribed in Article 10 of the Argentina-Germany BIT. In response, the Claimant asserted that it could import a more favourable dispute resolution clause from the Argentina-Chile BIT. The majority declined jurisdiction over the claim. They relied on the mandatory wording of the dispute settlement provisions in the basic BIT and on the sequential nature of dispute settlement⁶²⁵, which manifested itself in the order of dispute settlement paragraphs in the basic BIT, with each paragraph referring to the one before. The majority also considered the waiting requirement a jurisdictional requirement rather than a procedural or purely administrative matter.⁶²⁶ In their view, the word „treatment“ that was used by the MFN clause referred to direct treatment of the investment by the host State and not to the conduct of an international arbitration arising from that treatment.⁶²⁷ In contrast, the dissenting judge held that the investor's ability to defend its rights by a prompt access to dispute settlement mechanisms was a fundamental aspect of an investor's „treatment“ by the host country.⁶²⁸

k. ICS v. Argentina

The dispute related to the treatment accorded to the Claimant in connection with an agreement between the parties to the dispute relating to the provision of auditing services. The Claimant sought access to arbitration without submitting the dispute to domestic courts for an 18 month-period, as required in the UK-Argentina BIT. They relied on the

⁶²⁵ *Daimler AG v. Argentina*, Award on Jurisdiction, 22 August 2012, ICSID Case No. ARB/05/1, paras 180-182.

⁶²⁶ *Daimler AG v. Argentina*, Award on Jurisdiction, 22 August 2012, ICSID Case No. ARB/05/1, paras 191, 192.

⁶²⁷ *Daimler AG v. Argentina*, Award on Jurisdiction, 22 August 2012, ICSID Case No. ARB/05/1, para. 224.

⁶²⁸ *Daimler AG v. Argentina*, Dissenting Opinion by Judge Brower, 15 August 2012, ICSID Case No. ARB/05/1, para. 20.

BIT between the Respondent and Lithuania, where there was no such requirement, in connection with the MFN clause of the UK-Argentina BIT, which stated:

(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 its own investors or 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 its own investors or to investors of any third State.

The tribunal emphasized the mandatory nature of the 18 months-waiting period, which manifested itself in the formulation that disputes „shall“ be submitted to the competent tribunal of the host State.⁶²⁹ It argued that the trend in public international law has favoured the strict application of procedural prerequisites, as in the Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination, where the phrase “dispute [...] which is not settled by negotiation or by the procedures expressly provided for in this Convention” had established a precondition to resort to negotiations or to the procedures expressly provided for under the International Convention on the Elimination of All Forms of Racial Discrimination, prior to the seisin of the ICJ.⁶³⁰ Since the 18 months-period had not yet elapsed, there was no consent to arbitration. As a result, the tribunal held that

⁶²⁹ *ICS Inspection and Control Services Limited v. The Argentine Republic*, Award on Jurisdiction, 10 February 2012, UNCITRAL, PCA Case No. 2010-9, para. 247.

⁶³⁰ *ICS Inspection and Control Services Limited v. The Argentine Republic*, Award on Jurisdiction, 10 February 2012, UNCITRAL, PCA Case No. 2010-9, para. 250, quoting the *Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation), Decision on Preliminary Objections, Judgment of 1 April 2011, paras 133-135.

„failure to respect the pre-condition to the Respondent’s consent to arbitrate cannot but lead to the conclusion that the Tribunal lacks jurisdiction over the present dispute“⁶³¹.

Having qualified the requirement as jurisdictional, the tribunal turned to its crucial argument to decline application of the MFN clause, namely to the interpretation of the word „treatment“, which in its view did not encompass jurisdictional requirements. The tribunal derived this from the assumed understanding held by the Contracting Parties of the term “treatment” at the time of the conclusion of the Treaty, relying on the principle of contemporaneity in treaty interpretation.⁶³² The tribunal then turned to an examination of sources contemporary to the conclusion of the BIT. At the time of conclusion of the relevant treaty between the United Kingdom and Argentina, tribunals and scholars had insisted on the autonomy of the arbitration clause; the issue of application of the MFN clause to dispute settlement mechanisms had not yet surfaced. The tribunal noted the „conspicuous absence“ of a discussion of the subject in the ILC’s Draft Articles on Most-Favoured-Nation Clauses of 1978.⁶³³ However, the Draft Articles had cited the Anglo-Iranian Oil Company Case and the Ambatielos Case as the basis for the interpretation of MFN clauses. According to the tribunal, these cases had to be taken into account „not only as legal authorities on the proper interpretation of MFN clauses, but also as precedent that informed subsequent treaty drafting“⁶³⁴. According to the tribunal, these cases did not clearly support the use of MFN clauses to extend jurisdiction. The tribunal also relied on the Guidelines on the Treatment of Foreign Direct Investment issued by the World Bank in 1992⁶³⁵. While the document dealt with substantive treatment standards in its Part III, dis-

⁶³¹ *ICS Inspection and Control Services Limited v. The Argentine Republic*, Award on Jurisdiction, 10 February 2012, UNCITRAL, PCA Case No. 2010-9, para. 262.

⁶³² *ICS Inspection and Control Services Limited v. The Argentine Republic*, Award on Jurisdiction, 10 February 2012, UNCITRAL, PCA Case No. 2010-9, para. 289.

⁶³³ *ICS Inspection and Control Services Limited v. The Argentine Republic*, Award on Jurisdiction, 10 February 2012, UNCITRAL, PCA Case No. 2010-9, para. 291.

⁶³⁴ *ICS Inspection and Control Services Limited v. The Argentine Republic*, Award on Jurisdiction, 10 February 2012, UNCITRAL, PCA Case No. 2010-9, para. 291.

⁶³⁵ World Bank, Guidelines on the Treatment of Foreign Direct Investment (1992), available at <http://ita.law.uvic.ca/documents/WorldBank.pdf>.

pute settlement was dealt with in Part V of the Guidelines. Although the tribunal recognised that these Guidelines were only soft law, in its view they provided a

„valuable indication of the prevailing view among the community of States during the period leading up to the adoption of the UK-Argentina BIT“⁶³⁶.

The tribunal concluded that

„On the basis of the above examination of sources contemporary to the BIT, the Tribunal’s view is that the term “treatment”, in the absence of any contrary stipulation in the treaty itself, was most likely meant by the two Contracting Parties to refer only to the legal regime to be respected by the host State in conformity with its international obligations, conventional or customary. The settlement of disputes meanwhile remained an entirely distinct issue, covered by a separate and specific treaty provision.“⁶³⁷

The tribunal confirmed its conclusion by referring to the wording of the relevant MFN clause, which provided most-favoured-nation treatment for activities taking place in the Contracting States’ territory, while the nature of dispute resolution was non-territorial. International arbitration was not an activity inherently linked to the territory of the Respondent State.⁶³⁸

The tribunal argued:

⁶³⁶ *ICS Inspection and Control Services Limited v. The Argentine Republic*, Award on Jurisdiction, 10 February 2012, UNCITRAL, PCA Case No. 2010-9, para. 295.

⁶³⁷ *ICS Inspection and Control Services Limited v. The Argentine Republic*, Award on Jurisdiction, 10 February 2012, UNCITRAL, PCA Case No. 2010-9, para. 296.

⁶³⁸ *ICS Inspection and Control Services Limited v. The Argentine Republic*, Award on Jurisdiction, 10 February 2012, UNCITRAL, PCA Case No. 2010-9, para. 306.

„Where an MFN clause applies only to treatment in the territory of the host State, the logical corollary is that treatment outside the territory of the host State does not fall within the scope of the clause.“⁶³⁹

1. *Teinver et al. v. Argentina*

The dispute concerned the Claimants’ allegations that the Respondent had violated the law by unlawfully re-nationalizing and taking other measures regarding the Claimants’ investments in two Argentine airlines. The Tribunal found that the Claimants had satisfied all procedural requirements set out in the BIT, including the requirement to make an attempt to settle the dispute amicably for a six-month period and the requirement of prior resort to local courts for an 18-month period. Nevertheless, since the Claimants had as well invoked the MFN clause, the Tribunal turned to the question whether it was possible to circumvent dispute settlement provisions by means of an MFN clause. The MFN clause in Article IV (1) and (2) provided:

„(1) Each Party shall guarantee in its territory fair and equitable treatment of investments made by investors of the other Party.

(2) In all areas governed by this Treaty, such treatment shall not be less favourable than that accorded by each Contracting Party to investments made within its territory by investors of a third country.“

The Tribunal noted the broad language of the MFN clause, although it considered this not to be decisive for the issue. It then noted that issues of jurisdiction and admissibility were absent in the list of exceptions in Article IV (3). In the light of prior case law, the Tribunal held:

„The Tribunal is cognizant of the concern articulated by numerous tribunals that the reach of the MFN clause not extend beyond appropriate limits. The Tribunal also

⁶³⁹ *ICS Inspection and Control Services Limited v. The Argentine Republic*, Award on Jurisdiction, 10 February 2012, UNCITRAL, PCA Case No. 2010-9, para. 308.

acknowledges that the nature of the dispute settlement provisions that Claimants seek to replace via the Article IV(2) MFN clause is relevant to any such determination.⁶⁴⁰

The Tribunal concluded that the Claimant was allowed to rely on the MFN clause in order to invoke more beneficial admissibility –related provisions from a third-party BIT.

m. *Kılıç v. Turkmenistan*

In that case, the tribunal held that the MFN clause did not apply to the Turkey-Turkmenistan BIT's dispute resolution provisions so as to permit the Claimant to rely on the dispute settlement provisions of the Switzerland-Turkmenistan BIT. The tribunal mainly relied on the structure of the BIT, which contained the „substantive rights in relation to investments“ in Articles II - VI, while „the procedures for the resolution of disputes“ were set out in Article VII. According to the tribunal,

„[t]his distinction suggests strongly that the “treatment” of “investments” for which MFN rights were granted was intended to refer only to the scope of the *substantive rights* identified and adopted in Articles II -VI.“⁶⁴¹

According to the tribunal, this result was confirmed by the fact that application of the MFN clause to the dispute resolution provisions in question would deprive these „carefully crafted“ provisions of effect.⁶⁴² Moreover, it would lead to the existence of non-reciprocal obligations, given that in the absence of any Turkmenistan BIT's not requiring prior recourse to local courts, Turkish investors would always be required to institute proceedings in domestic courts first.⁶⁴³

⁶⁴⁰ *Teinver S.A. et al. v. Argentina*, Decision on Jurisdiction, 21 December 2012, ICSID Case No. ARB/09/1), para. 181.

⁶⁴¹ *Kılıç v. Turkmenistan*, Award, 2 July 2013, ICSID Case No. ARB/10/1, para. 7.3.9.

⁶⁴² *Kılıç v. Turkmenistan*, Award, 2 July 2013, ICSID Case No. ARB/10/1, para. 7.4.3.

⁶⁴³ *Kılıç v. Turkmenistan*, Award, 2 July 2013, ICSID Case No. ARB/10/1, para. 7.5.1.

In a separate opinion, one arbitrator found that failure to comply with the requirement of prior submittal of the dispute to local courts concerned not the jurisdiction of the tribunal, but the admissibility of the claim.

3. Assessment

Arbitral jurisprudence has in the beginning consistently accepted that investors may circumvent the requirement of prior submittal of the dispute to domestic courts by relying on the MFN clause in the basic BIT in combination with more favourable provisions for investor-State dispute settlement under third-party BITs, provided that the MFN clause in question did not expressly exclude such an effect. The first tribunal to reject such application was the tribunal in *Wintershall v. Argentina*, which has now been followed by the tribunals in *Hochtief*, *Daimler*, *ICS* and *Kılıç*. The tribunals in *Impregilo* and *Hochtief* were split on the question whether MFN clauses could be applied so as to circumvent the local court requirement.

The tribunals in *Wintershall*, *Daimler*, *ICS* and *Kılıç* were of the view that the term “treatment” did not encompass dispute settlement provisions, unless the treaty clearly and unambiguously indicated that it should be so interpreted. As argued above, application of the principles of the Vienna Convention suggests the opposite. The term treatment encompasses the entire legal regime that an investor is exposed to in the host country, which includes its ability to settle disputes promptly. Application of the principle of contemporaneity as advocated by the tribunal in *ICS* does not change this result.

Moreover, the argumentation in *ICS v. Argentina* that clauses that refer to treatment in the State’s territory cannot be applicable to international dispute settlement provisions must be discarded. It is true that what is at stake is earlier access to international arbitration, which takes place outside the State’s territory. However, what has to take place in the host State is not the beneficial, but the less favourable treatment. In the case of the invocation of an 18-month period of domestic proceedings, the less favourable treatment is the deci-

sion to invoke the challenge. This is an act which is located in the seat of the host State's government and which would be implemented in its domestic courts.⁶⁴⁴

Neither is the argumentation in *Daimler v. Argentina* that the term "treatment" only refers to direct treatment of the investor by the host State and does not encompass the conduct of an international arbitration arising from that treatment convincing. Notably, the less favourable treatment is not the conduct of the international arbitration, but the insistence on the requirement to first submit disputes to local courts.

According to the dissenting arbitrator in *Impregilo*, each treaty sets forth its own conditions and scope of application *ratione personae*, *ratione materiae* and *ratione temporis* and *ratione voluntatis*. The arbitrator rightly stresses the importance of consent to international arbitration. However, the consent to arbitration is inherent in the MFN clause. Application of the dissenting arbitrator's reasoning would mean the establishment of a sequence in which the BIT's articles have to be read – first the dispute settlement provisions, and only if their requirements were met and a dispute settlement relationship was established on the ground of the dispute settlement provisions, the arbitrator would be allowed to interpret the MFN clause. However, the arbitrator is allowed to decide on its own jurisdiction according to the principle of *Kompetenz-Kompetenz*. In order to make that decision, the arbitrator must examine whether jurisdiction is established in the treaty. What is relevant is therefore not the order in which treaty provisions must be examined but the interpretation of the MFN clause itself.

The outcome of the cases affirming application of the MFN clause to the local court requirement must therefore be endorsed, although the reasoning is sometimes disputable. The *Maffezini Case* was the first case in which an ICSID arbitral tribunal acknowledged the application of the most-favoured-nation clause to procedural provisions. The Tribunal relied on several arguments to arrive at its conclusion, one of them being the *ejusdem generis* principle and the close connection between substantive and procedural rights. According to the tribunal's interpretation of the *ejusdem generis* principle, it is generally not

⁶⁴⁴ See also *Hochtief v. Argentina*, Decision on Jurisdiction, 24 October 2011, ICSID Case No. ARB/07/31, paras 107-111.

possible to separate treaty rights from treaty remedies and to apply the most-favoured-nation clause only to the substantive rights and not to the remedies. The case thus stands for the presumption that application of most-favoured-nation clauses to dispute settlement provisions is generally covered by the *ejusdem generis* rule. The *Siemens* case reinforced the interpretative approach of the *Maffezini* tribunal although it can in several aspects be distinguished from the situation in *Maffezini*. One difference was that the most-favoured-nation clause was formulated more narrowly than in *Maffezini*, referring only to "treatment" and "activities related to investments" in contrast to "all matters covered by this Agreement". The tribunal nevertheless held that dispute settlement provisions were part of the "treatment" and protection offered to the investor.⁶⁴⁵

Another decisive aspect in both decisions was the examination of State practice, which both tribunals interpreted as indicating whether the contracting states had a public policy of including certain procedural provisions which were central for their consent to arbitration. The *Maffezini* tribunal considered relevant Spanish state practice as evidence that Spain did not have a policy of insisting on waiting periods and could therefore not argue that its consent to arbitration in the Argentina-Spain BIT was conditioned on compliance with the clause.⁶⁴⁶ As in *Maffezini*, the *Siemens* tribunal considered the inconsistent state practice of Argentina an indication that the waiting period was not a public policy and therefore not a necessary condition for Argentina's consent to arbitration.

As a precaution to limit the impact of its decision, in addition to its reference to the broad wording of the MFN clause in the Spanish-Argentinean BIT, the *Maffezini* tribunal noted the atypical situation that the host state Spain was a typically capital-exporting country, while the investor came from Argentina, a typically capital-importing country, thus refer-

⁶⁴⁵ *Siemens v. Argentina*, Decision on Jurisdiction, 3 August 2004, ICSID Case No. ARB/02/8, para. 85.

⁶⁴⁶ The examination of state practice in the *Maffezini* case becomes problematic in the passage where the tribunal states that "[...] if a Government seeks to obtain a dispute settlement method for its investors abroad, which is more favorable than that granted under the basic treaty to foreign investors in its territory, the clause may be construed so as to require a similar treatment of the latter" (*Maffezini v. Spain*, Decision on Jurisdiction, 25 January 2000, ICSID Case No. ARB/97/7, para. 61). With this statement, the tribunal confuses the requirements of the MFN clause with the principle of material reciprocity, which is not implicated in the unconditional MFN clause. Spain is generally not required to accord foreign investors the same treatment as it seeks for its own investors abroad.

ring to the intentions of the parties. This emphasis on the role reversal of Spain and Argentina indicates that the tribunal might have reached a different result had the Respondent host country been the driving force to include the waiting period. Again, the Siemens arbitration – where Argentina was the Respondent host state instead of the home state of the Claimant – went beyond the argumentation of the Maffezini tribunal.

Summing up, the *Siemens case* affirmed the findings of the Tribunal in the *Maffezini case* in that it principally affirmed the applicability of the most-favoured-nation clause to procedural provisions and allowed to deviate from this rule in case public policies were at stake. However, the reasoning of the tribunal was much broader than the reasoning of the *Maffezini* tribunal, which was particularly due to the narrower formulation of the most-favoured-nation clause in question and to the role reversal between Argentina and Spain as home or host state respectively. The following tribunals basically endorsed the findings of the *Maffezini* and the *Siemens* tribunals. The *Gas Natural* tribunal stressed the importance of procedural protection and established a presumption in favour of the applicability of the most-favoured-nation clause to dispute settlement provisions. The *National Grid* tribunal was the first tribunal to explicitly draw a distinction between the attempt to create consent to arbitration by virtue of the most-favoured-nation clause and the invocation of procedural benefits. This distinction was upheld in *Suez and InterAguas v. Argentina*, *AWG v. Argentina* and *Suez and Vivendi v. Argentina*, although the tribunal did not completely reject the possibility of incorporating an entire dispute settlement mechanism. The *Suez* tribunal moreover emphasized that under the Vienna Convention on the Law of Treaties, textual interpretation, supplemented by the object and purpose of the treaty in question, had to prevail over those intentions of the parties that did not find textual support, and that dispute settlement was an integral part of the investment protection regime of a BIT.

The introduction by the *Maffezini* tribunal of the public policy criterion, which was upheld by the Siemens tribunal, should be discarded. The notion of public policy refers to the laws and standards of fundamental concern to the state or the whole society.⁶⁴⁷ However, both the *Maffezini* and the *Siemens* tribunal offered no transparent and workable

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Krajewski, National Regulation and Trade Liberalization in Services, p. 158.

standard indicating what provisions should be regarded as provisions embodying a public policy that is fundamental for the acceptance of the agreement so as to prevent the application of the MFN clause.⁶⁴⁸ For example, the *Maffezini* tribunal considered an exhaustion of local remedies requirement as an outflow of a public policy that cannot be overridden by the clause. It is however not plausible why a state would enter into several BITs some of which contain an exhaustion of local remedies requirement and into others which do not contain such requirement if the state considers these provisions to be a matter of public policy which is more important than others.⁶⁴⁹ As argued above, treaty practice can hardly be a criterion to determine a state's public policy.⁶⁵⁰ Neither does the criterion whether provisions are deemed to have been specifically negotiated provide any guidance since the acceptance of a treaty is always the result of negotiations in which each provision is specifically negotiated in respect to others. All provisions in a treaty are the expression of a certain party intention embodying a certain public policy. Since every provision and the entire treaty relates to public policy considerations and the contracting states' public interest, it is hardly possible to distinguish the provisions of a treaty according to this criterion.⁶⁵¹ Moreover, it is the intended effect of most-favoured-nation clauses to eliminate the effect of specifically negotiated provisions and to establish equal treatment in areas where treatment standards have been specifically negotiated.⁶⁵² Thus, if a certain clause is the expression of a certain party intention, this does not mean that it cannot be overridden by a most-favoured-nation clause. What is decisive is not the party intention as regards the less favourable provision, but the party intention as regards the most-favoured-nation clause, as expressed in the text of the clause. Accordingly, although affirming that dispute settlement clauses were negotiated on a case by case basis and there-

⁶⁴⁸ See the critique in *Salini v. Jordan*, Decision on Jurisdiction, 15 November 2004, ICSID Case No. ARB/02/13, para. 115, where the tribunal held that the four exceptions "may in practice prove difficult to apply, thereby adding more uncertainties to the risk of 'treaty shopping'". See also Dolzer, *Meistbegünstigungsklauseln in Investitionsschutzverträgen*, p. 50; Kurtz, *The Delicate Extension of MFN Treatment to Foreign Investors*, in: Weiler (ed.), *International Investment Law and Arbitration*, p. 547; Schill, *The Multilateralization of International Investment Law*, p. 156.

⁶⁴⁹ Chukwumerije, p. 630. See Part VI E.I.2.

⁶⁵⁰ See Part VI B.I.3.f.

⁶⁵¹ See also Radi, *The application of the most-favoured-nation clause*, p. 773.

⁶⁵² See Part VI B.I.3.e.

fore always reflected a certain party intention, the *Siemens* tribunal still denied that specifically negotiated provisions were not subject to most-favoured-nation treatment. The tribunal argued that it was not the effect of specifically negotiated provisions to exclude the applicability of the most-favoured-nation clause, but that it was rather precisely the object and purpose of most-favoured-nation treatment to eliminate specifically negotiated provisions and replace them by more favourable provisions unless these provisions were explicitly exempted.⁶⁵³

The introduction of the public policy criterion can be read as an attempt of the *Maffezini* Tribunal to limit its holding and prevent treaty shopping since it was not necessary for the determination of the scope of the clause, none of the situations envisaged being pertinent in the present case. The guideline that it offers is that the “policy objectives of [...] specific treaty provisions” should be weighed against the legitimate extension of rights by virtue of the most-favoured-nation clause.⁶⁵⁴ It held that „a distinction has to be made between the legitimate extension of rights and benefits by means of the operation of the clause, on the one hand, and disruptive treaty shopping that would play havoc with the policy objectives of underlying specific treaty provisions, on the other hand“⁶⁵⁵. However, treaty shopping, *i.e.* the deliberate choice of the applicable treaty by the Claimant, is an unavoidable and intended consequence of enshrining most-favoured-nation clauses in BITs since it is always through treaty shopping that an investor can ensure that it is receiving the most favoured treatment promised by the host state. The examples of public policy criteria should therefore be discarded. If a state wishes to reduce treaty shopping in order to protect public policy considerations, it has to clearly delimit the scope of application of the most-favoured-nation clause.

⁶⁵³ *Siemens v. Argentina*, Decision on Jurisdiction, 3 August 2004, ICSID Case No. ARB/02/8, para. 106.

⁶⁵⁴ *Maffezini v. Spain*, Decision on Jurisdiction, 25 January 2000, ICSID Case No. ARB/97/7, para. 63.

⁶⁵⁵ *Maffezini v. Spain*, Decision on Jurisdiction, 25 January 2000, ICSID Case No. ARB/97/7, para. 63.

II. Importation of Jurisdictional Provisions

Tribunals have diverged on the question of whether jurisdictional provisions can be imported through MFN clauses, largely rejecting such possibility.⁶⁵⁶ In fact, all tribunals with the exception of the *RosInvest* tribunal have rejected to extend the jurisdictional basis of BITs by means of MFN clauses. The question whether MFN clauses can be applied to broaden the jurisdiction of a treaty-based tribunal arises, above all, in situations where some BITs of a host State do not contain consent to investor-State dispute resolution at all⁶⁵⁷, while others allow such recourse, where some host State BITs limit recourse to investor-State arbitration to certain causes of action, while others encompass a broader range of causes of action, and where different host State BITs provide for recourse to different dispute settlement fora. Investment tribunals have dealt with the invocation of jurisdictional provisions in various constellations, which involved the extension of jurisdiction to contract-based claims, the enlargement of the range of treaty claims covered by the dispute settlement clause, and the choice of a different arbitral forum.

1. Extension of jurisdiction to contract-based claims

a) Introduction: Jurisdiction of Tribunals over contract-based claims

Under general international law, not every breach of a contract with a foreign national constitutes a breach of international law.⁶⁵⁸ More specifically, the breach of a contract by a State in ordinary commercial intercourse is generally not considered a violation of international law, while the use of the sovereign authority of a State to violate a contract with an alien is considered a violation of international law.⁶⁵⁹ The decisive criterion under

⁶⁵⁶ For the same view, see Vesel, *Clearing a Path Through a Tangled Jurisprudence*, p. 172, and Markert, *Streitschlichtungsklauseln in Investitionsschutzabkommen*, pp. 304, 305.

⁶⁵⁷ See e.g. the Germany-Pakistan BIT.

⁶⁵⁸ American Law Institute, *Restatement of the Law (Third), The Foreign Relations Law of the United States*, vol. 2 (1987), § 712, Comment h, p. 201 stipulates that “[...] not every repudiation or breach by a state of a contract with a foreign national constitutes a violation of international law.” See also *Joy Mining v. Egypt*, Award on Jurisdiction, 6 August 2004, ICSID Case No. ARB/03/11, para. 72; *CMS v. Argentina*, Award, 12 May 2005, ICSID Case No. ARB/01/8, para. 299.

⁶⁵⁹ Schwebel, *On whether the breach by a state of a contract with an alien is a breach of international law*, in: *International law at the time of its codification*, pp. 408, 409. See also *Salini v. Jordan*, Decision on Jurisdiction, 15 November 2004, ICSID Case No. ARB/02/13, para. 155; *Consortium R.F.C.C. v. Morocco*,

general international law is therefore whether the violation was undertaken “for governmental rather than commercial reasons”.⁶⁶⁰ ICSID tribunals have uniformly accepted the existence of treaty claims that are independent from contractual claims and have affirmed their jurisdiction over treaty claims even though they were related to or arose out of the same set of facts as contractual claims.⁶⁶¹ Even if the claims are interwoven, an investment tribunal may not decline jurisdiction over BIT claims on the ground that another forum is competent for adjudicating on the contract claim. Dispute settlement clauses in contracts are designed to deal with contract claims, while dispute settlement clauses in BITs give tribunals jurisdiction to hear claims arising from the terms of the BIT. Although the two proceedings may arise from the same set of facts, they are still based on different causes of action. The distinction between treaty claims under international law and contract claims does not mean that tribunals never have jurisdiction to deal with contract claims. Parties may under certain circumstances have the right to submit contractual claims to arbitration if contractual rights are included in the protection of the relevant BIT. There are basically three situations in which tribunals affirmed their jurisdiction over contract-based claims, namely the rise of a contract violation to a treaty violation or the inclusion of a broadly drafted dispute settlement clause or of an umbrella (*pacta sunt servanda*) clause in the treaty.

Sentence arbitrale, para. 51; *Impregilo v. Pakistan*, Decision on Jurisdiction, 22 April 2005, ICSID Case No. ARB/03/3, para. 260. The American Restatement of the Law provides in § 712 (2) that a state is responsible under international law for injury resulting from: [...]

(2) a repudiation or breach by the state of a contract with a national of another state

(a) where the repudiation or breach is (i) discriminatory; or (ii) motivated by other non-commercial considerations and compensatory damages are not paid; or

(b) where the foreign national is not given an adequate forum to determine his claim of breach or is not compensated for any breach determined to have occurred; [...]

⁶⁶⁰ Schwebel, On whether the breach by a state of a contract with an alien is a breach of international law, in: International law at the time of its codification, p. 412.

⁶⁶¹ *Compañía de Aguas de Acoquija and Vivendi Universal v. Argentina*, Decision on Annulment, 3 July 2002, ICSID Case No. ARB/97/3, paras 60, 95-97, 101-105, 112; *SGS v. Pakistan*, Decision on Objections to Jurisdiction, 6 August 2003, ICSID Case No. ARB/01/13, para. 148; *SGS v. Philippines*, Decision on Objections to Jurisdiction, 29 January 2004, ICSID Case No. ARB/02/6, para. 162; *Impregilo v. Pakistan*, Decision on Jurisdiction, 22 April 2005, ICSID Case No. ARB/03/3, para. 258; *Siemens v. Argentina*, Decision on Jurisdiction, 3 August 2004, ICSID Case No. ARB/02/8, para. 180. See also Ben Hamida, L'arbitrage transnational face à un désordre procédural, in: Horchani (ed.), Où va le droit de l'investissement?, p. 199.

aa) Breach of contract amounting to a violation of international law

While not every breach of contract amounts to a breach of international law, it does not follow that only because a breach of contract is involved, there can be no violation of the bilateral investment treaty. The fact that treaty and contract violations are based on different standards does not mean that no violation of the BIT can arise from breaches of contract. This is underlined by the fact that contracts are a protected form of investment under most BITs. For example, the *SGS-Pakistan* tribunal has indicated that there would be a treaty breach if the investor was prevented from submitting disputes to the contractual dispute settlement mechanism.⁶⁶² Moreover, it has long been accepted that measures of a State affecting contractual rights may amount to expropriation contrary to international law.⁶⁶³

bb) Submission of Contractual Disputes on the Basis of a Widely Drafted Dispute Settlement Provision

Second, a treaty-based tribunal has jurisdiction to decide on contractual claims where the respective dispute settlement clause in the BIT grants jurisdiction over a broad category of disputes not limited to disputes relating to substantive treaty provisions. Some BITs contain limited dispute settlement clauses that only cover disputes relating to obligations under the BIT.⁶⁶⁴ In these cases, jurisdiction of the tribunal is restricted to claims of treaty violations. Others extend jurisdiction to any dispute between a foreign investor and a State relating to a protected investment.⁶⁶⁵ The question is whether in such a situation the tribunal is competent to decide on purely contractual claims that do not necessarily amount to a claim for violation of a treaty. From the broad wording of the clause, which

⁶⁶² *SGS v. Pakistan*, Decision on Objections to Jurisdiction, 6 August 2003, ICSID Case No. ARB/01/13, para. 172.

⁶⁶³ Norwegian shipowners' claims, Award, 13 October 1922, R.I.A.A. vol. I, p. 325; Case Concerning Certain German Interests in Polish Upper Silesia (Merits), PCIJ Series A No. 7 (1926), p. 44; *Letco v. Liberia*, Award, 31 March 1986, ICSID Case No. ARB/83/2, 2 ICSID Reports, p. 366.

⁶⁶⁴ E.g. Art. XIII Canada-Ecuador BIT; Art. 9 (1) of the Netherlands-Venezuela BIT; Art. X (1) of the Costa Rica-Paraguay BIT.

⁶⁶⁵ E.g. Art. 11 I German Model BIT, 9 (1) Italy-Pakistan BIT, Art. 8 (1) of the Argentina-France BIT; Art. XI (1) and (2) of the Ecuador-Netherlands BIT.

generally refers to “any disputes with respect to investments”, one can follow that disputes arising from breaches of contract can fall under these clauses, with the necessary prerequisite only being the existence of an investment.⁶⁶⁶ The term “investment” in the majority of BITs includes a broad range of contractual rights, which means that disputes relating to investments generally encompass contractual disputes. The majority of tribunals have accordingly interpreted these broad jurisdictional provisions as extending their jurisdiction beyond disputes concerning the BIT’s substantive provisions to disputes involving breaches of contract.⁶⁶⁷

cc) Submission of Contractual Disputes on the Basis of an Umbrella Clause

Many bilateral investment treaties explicitly provide by means of a so-called umbrella clause that the contracting states shall observe their contractual obligations. A typical umbrella clause provides:

“Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.”⁶⁶⁸

Umbrella clauses can for example be found in the BITs concluded by Switzerland with Bolivia and Kazakhstan, but not in the BIT concluded between Switzerland and Ecuador. Another example is the German model BIT, whereas the treaty between Germany and the United Arab Emirates does not contain an umbrella clause. Article 13 (2) of the Germany-India BIT as well departs from the German Model BIT, providing that “Each Contracting Party shall observe any other obligation it has assumed with regard to investments in its territory by investors of the other Contracting Party, *with disputes arising from such obli-*

⁶⁶⁶ Alexandrov, Breaches of Contract and Breaches of Treaty, pp. 573, 575; Gaffney/ Loftis, The “Effective Ordinary Meaning” of BITs, p. 14; Schreuer, Investment Treaty Arbitration and Jurisdiction over Contract Claims, in: Weiler (ed.), International Investment Law and Arbitration, pp. 296, 299.

⁶⁶⁷ *Salini v. Morocco*, paras 59-61; *Vivendi*, Decision on Annulment, para. 55; *SGS v Philippines*, Decision on Objections to Jurisdiction, 29 January 2004, ICSID Case No. ARB/02/6, paras 131-135. For the contrary position, see *SGS v. Pakistan*, Decision on Objections to Jurisdiction, 6 August 2003, ICSID Case No. ARB/01/13, para. 161. The question was left open in *Impregilo v. Pakistan*, Decision on Jurisdiction, 22 April 2005, ICSID Case No. ARB/03/3.

⁶⁶⁸ Article 10 (1) last sentence ECT. See also Article 8 (2) of the German Model BIT.

gations being only redressed under the terms of the contracts underlying the obligations.”⁶⁶⁹

It is highly controversial whether an international arbitration tribunal constituted under the dispute settlement provisions of an investment treaty has the authority to exercise jurisdiction over claims for breaches of a contract concluded between a foreign investor and a State where the Contracting States have included an umbrella clause in the treaty. One could argue that it is the effect of umbrella clauses to put contractual commitments under the BIT’s protective umbrella.⁶⁷⁰ Under this interpretation, the clause elevates every contractual obligation into an international obligation and thus transforms a breach of contract into a treaty violation. The jurisdictional consequence of this transformation would be that a BIT-based tribunal may assert jurisdiction over claims arising out of the contract due to the host State’s international obligations under the umbrella clause.⁶⁷¹ Contract violations are thus transformed into justiciable obligations under the international law of the treaty. Summing up, the umbrella clause has two effects under this interpretation: First, it

⁶⁶⁹ Emphasis by the author. A similar difference can be found in Mexican BITs. For instance, Article 10 of the Mexico-Switzerland BIT provides: “Each Contracting Party shall observe any other obligation it has assumed with regard to investments in its territory by investors of the other Contracting Party.” Article 9 of the Austria-Mexico BIT contains a first sentence that is almost identical with Article 10 of the Mexico-Switzerland BIT, but adds in its second sentence: “Disputes arising from such obligations shall be settled under the terms of the contracts underlying the obligations.”

⁶⁷⁰ See *SGS v Philippines*, Decision on Objections to Jurisdiction, 29 January 2004, ICSID Case No. ARB/02/6, paras 115-128; *Noble Ventures v. Romania*, Award, 12 October 2005, ICSID Case No. ARB/01/11, paras 54, 60; Alexandrov, Breaches of Contract and Breaches of Treaty, p. 572; Weil, Problèmes relatifs aux contrats passés entre un Etat et un particulier, pp. 130-132; Gaillard, Investment Treaty Arbitration and Jurisdiction Over Contract Claims, in: Weiler (ed.), International Investment Law and Arbitration, p. 345; Mann, British Treaties for the Promotion and Protection of Investments, pp. 245, 246; Dolzer/ Stevens, Bilateral Investment Treaties, pp. 81-82; Schreuer, Of Waiting Periods, Umbrella Clauses and Forks in the Road, pp. 231-256, 250; Schreuer, Investment Treaty Arbitration and Jurisdiction over Contract Claims, in: Weiler (ed.), International Investment Law and Arbitration, p. 299; von Walter, Die Reichweite von Schirmklauseln in Investitionsschutzabkommen, p. 816; Rigaux, Les situations juridiques individuelles, pp. 229-230; Shihata, Applicable Law in International Arbitration, in: Shihata/ Wolfensohn (eds), The World Bank in a Changing World, vol. II, p. 601; Karl, The Promotion and Protection of German Foreign Investment Abroad, p. 23; UNCTAD, Bilateral Investment Treaties 1995-2006, p. 75.

⁶⁷¹ This effect can be evaded under the ECT, which provides in its Annex IA that Contracting Parties may opt out of the umbrella clause by not permitting their investors to submit a dispute concerning this provision to international arbitration. The decision whether the *pacta sunt servanda* clause has the effect of creating jurisdiction for contractual claims may also depend on the specific wording of the relevant *pacta sunt servanda* clause. This is stressed by the SGS-Philippines Tribunal (*SGS v Philippines*, Decision on Objections to Jurisdiction, 29 January 2004, ICSID Case No. ARB/02/6, para. 119) and the Noble Ventures Tribunal (*Noble Ventures v. Romania*, Award, 12 October 2005, ICSID Case No. ARB/01/11, para. 56).

lifts contracts out of the exclusive domain of the domestic legal system, which means that an interference with the investor's contractual rights is governed by international law. Second, on the procedural plane, a violation of an investor-State agreement is subject to the BIT's dispute settlement mechanism, and the jurisdiction of the arbitral tribunal is extended to contractual disputes. Proponents of this view argue that when inserting a *pacta sunt servanda* clause, the State intends to provide the investor with an international remedy as an inducement to invest in its territory and that it is the object and purpose of an umbrella clause to add extra protection to the investor.⁶⁷² Moreover, an *effet utile* argumentation is used insofar as it is argued that the clause would be deprived of any effect if it was nevertheless required that there must be a treaty violation to establish the jurisdiction of the arbitral tribunal.⁶⁷³ This view is supported by the origins and the historical use of the clause, which shows that the insertion of the clause became common in order to elevate breaches of contract to treaty violations.⁶⁷⁴ Moreover, it finds support in the *pacta sunt servanda* logic.⁶⁷⁵

In contrast, the *SGS-Pakistan* tribunal denied the establishment of jurisdiction over contract claims by virtue of the relevant umbrella clause.⁶⁷⁶ This reading of the clause upholds the distinction between contractual and treaty obligations, preventing investors from using the provision in order to submit to arbitration trivial disputes and minor disagreements on details of contract performance, such as for example a small delay in paying. This interpretation reflects an understanding of the object and purpose of investment agreements as instruments to protect investors against political rather than against purely economic risks.

In order to avoid the submission of trivial exclusively contractual disputes before international tribunals and to take into account the aim of investment arbitration, which is not the

⁶⁷² , Investment Treaty Arbitration and Jurisdiction over Contract Claims, in: Weiler (ed.), *International Investment Law and Arbitration*, p. 301.

⁶⁷³ , Investment Treaty Arbitration and Jurisdiction over Contract Claims, in: Weiler (ed.), *International Investment Law and Arbitration*, p. 301; Wälde, *The Umbrella Clause*, pp. 220, 221.

⁶⁷⁴ For an overview of the history of the umbrella clause see Sinclair, *The Origins of the umbrella clause*, pp. 411-434.

⁶⁷⁵ Jacob, BITs, in: Wolfrum (ed.), *Encyclopedia of Public International Law*, para. 62.

⁶⁷⁶ See *SGS v. Pakistan*, Decision on Objections to Jurisdiction, 6 August 2003, ICSID Case No. ARB/01/13, paras 165-173. See also *Joy Mining v. Egypt*, Award on Jurisdiction, 6 August 2004, ICSID Case No. ARB/03/11, para. 81.

protection of investors against purely commercial risks, but their protection against arbitrary exercise of State power, it is preferable to follow an intermediary approach according to which one has to distinguish between breaches of contract by the government in case the government exercised its particular sovereign prerogatives to escape from its contractual commitments and cases in which the government acted solely on a commercial basis. The fact that BITs are designed to protect investors from political, but not from commercial risks militates against an interpretation which would apply the umbrella clause to such situations involving only trivial contract violations. If the main focus of a dispute involves a purely commercial dispute, the umbrella clause should therefore not be applicable.⁶⁷⁷

b) Case Law

aa) *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Jordan*

The *Salini* tribunal was the first tribunal to reject the application of a most-favoured-nation clause to dispute settlement provisions. The subject of the case was a controversy about the outstanding amount of money that the investor could claim from the Respondent for the construction of a dam in Jordan. The Claimants invoked violations of the State contract and of the BIT. The case concerned the question whether a clause in the basic BIT excluding jurisdiction over contract-based claims can be overridden by means of the relevant MFN clause. The question in *Salini* was whether the most-favoured-nation standard could be invoked in order to override a treaty provision requiring that contractual disputes must be submitted to the contractual dispute settlement mechanism. The Italy-Jordan investment treaty provided in Article 9 (2) that in case a dispute settlement mechanism was provided for in a state contract, the application of such dispute settlement mechanism should take priority over the dispute settlement mechanism in the treaty.⁶⁷⁸

⁶⁷⁷ Wälde, *The Umbrella Clause*, at p. 235 states: “[i]f the core or centre of gravity of a dispute is not about the exercise of governmental powers [...] but about ‘normal’ contract disputes, then the BIT and the umbrella clause have no role.”

⁶⁷⁸ Art. 9 (2): “In case the investor and an entity of the Contracting Parties have stipulated an investment Agreement, the procedure foreseen in such investment Agreement shall apply.”

The investment was subject to an investment contract providing that disputes should be finally settled by reference to the competent court of law in the Jordanian Kingdom, unless both parties agree that the dispute shall be referred to arbitration. Nevertheless, the Claimants brought their contractual claims before an ICSID tribunal. They argued that they were entitled to bypass Article 9 (2) of the Italy-Jordan BIT by operation of the most-favoured-nation clause since the Jordan-United States BIT and the Jordan-United Kingdom BIT 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.⁶⁷⁹ The tribunal refused to override Article 9 (2) of the BIT by virtue of the most-favoured-nation clause. It made an effort to distinguish the *Maffezini* case from the present case, partly by underlining the narrower formulation of the most-favoured-nation clause in the present case, which did not make reference to “all rights or matters covered by this agreement”.⁶⁸⁰ In contrast, the *Siemens* Tribunal had not considered the lack of a reference to “all matters covered by the agreement” in the MFN clause an obstacle to its applicability to procedural provisions, arguing that the term “treatment” was so general that the tribunal could not limit its application unless in cases of specific agreement by the parties.⁶⁸¹ *Salini* reached the diametrically opposite result although it was decided only three months after *Siemens*, without however making any reference to the *Siemens* case. Apart from the focus on the wording of the clause, the judgment is based on the argument that the Claimant did not submit evidence of a common intention of the parties to apply the most-favoured-nation clause to dispute settlement provisions. In contrast to the *Maffezini* case, the Claimant in *Salini* had not adduced any evidence with regard to state practice of Italy and Jordan that supported the assumption that it was the intention of the par-

⁶⁷⁹ According to Article 6 of the Jordan-United Kingdom BIT, the parties consent to submit all legal disputes concerning an investment before an ICSID tribunal. Article IX of the United States-Jordan investment treaty allows investors to bring claims before ICSID arbitration “regardless of any clause in the investment agreement providing for a different dispute settlement mechanism”.

⁶⁸⁰ *Salini v. Jordan*, Decision on Jurisdiction, 15 November 2004, ICSID Case No. ARB/02/13, para. 117. The most-favoured-nation clause of the Italy-Jordan BIT provided: “Both Contracting Parties, within the bounds of their own territory, shall grant investments effected by, and the income accruing to, investors of the other Contracting Party no less favourable treatment than that accorded to investments effected by, and income accruing to, its own nationals or investors of Third States.”

⁶⁸¹ See Part VI D.I.2.b.

ties to apply the most-favoured-nation clause to dispute settlement.⁶⁸² The order to the Claimant to show that the most-favoured-nation clause covers dispute settlement provisions indicates a shift of the burden of proof. In *Maffezini*, the tribunal had assumed that an MFN clause generally applies to dispute settlement, unless there is a compelling argument for a contrary intention. In contrast, the *Salini* tribunal started from the presumption that the MFN clause generally does not apply to dispute settlement provisions unless there is specific evidence to the contrary.

Moreover, the tribunal concluded from the party intention expressed in Article 9 (2) to exclude contractual disputes from international arbitration that it was also the parties' intention that this could not be changed by operation of the most-favoured-nation clause. The Tribunal held:

“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.”⁶⁸³

bb) Impregilo S.p.A. v Islamic Republic of Pakistan

This dispute involved the question whether the jurisdiction of the ICSID tribunal could be extended to contract-based claims by means of incorporation of an umbrella clause. Impregilo was the project leader of a joint venture that was formed to construct hydroelectric power facilities in Pakistan. Two contracts were concluded between the Claimant acting on behalf of the joint venture and the Pakistan Water and Power Development Authority (WAPDA). According to the Claimant, the implementation of these contracts was seri-

⁶⁸² *Salini v. Jordan*, Decision on Jurisdiction, 15 November 2004, ICSID Case No. ARB/02/13, paras 117, 118.

⁶⁸³ *Salini v. Jordan*, Decision on Jurisdiction, 15 November 2004, ICSID Case No. ARB/02/13, para. 118.

ously impeded by the engineer selected by WAPDA to control the performance of the contracts and WAPDA itself. As a consequence, the Claimant filed a request for arbitration at ICSID and claimed that the tribunal had jurisdiction *ratione materiae* to decide on breaches of the contracts and of the Italy-Pakistan investment treaty.⁶⁸⁴ Unlike other BITs to which Pakistan was a party, the BIT between Pakistan and Italy did not contain an umbrella clause. Therefore the Claimant argued that jurisdiction over contractual claims was established through the most-favoured-nation clause read in conjunction with an umbrella clause included in a bilateral investment treaty concluded between Pakistan and Switzerland.⁶⁸⁵ The tribunal denied jurisdiction over the contractual claims, ruling that

“Even assuming *arguendo* that Pakistan, through the MFN clause and the Swiss-Pakistan BIT, has guaranteed the observance of the contractual commitments into which it has entered together with Italian investors such a guarantee would not cover the present Contracts – since these are agreements into which it has not entered. On the contrary, the Contracts were concluded by a separate and distinct entity.”⁶⁸⁶

⁶⁸⁴ With regard to the contract, the Claimant argued that the Respondent caused delays in the performance of the contracts, denied the Claimant’s rights to extensions of time and additional costs, frustrated the dispute settlement mechanism under the contracts, required the investor to continue the work in spite of serious security risks, and threatened to impose liquidated damages (*Impregilo v. Pakistan*, Decision on Jurisdiction, 22 April 2005, ICSID Case No. ARB/03/3, para. 33). With regard to the bilateral investment treaty, the Claimant claimed a violation of the fair and equitable treatment-standard and of the prohibition of expropriation (*Impregilo v. Pakistan*, Decision on Jurisdiction, 22 April 2005, ICSID Case No. ARB/03/3, para. 34).

⁶⁸⁵ Art. 3 (1) of the Italy-Pakistan BIT in conjunction with Art. 11 of the Pakistan-Switzerland BIT. Article 3 (1) of the Italy-Pakistan BIT provided that: “Both Contracting Parties, within the bounds of their own territory, shall offer investments effected by, and the income accruing to, investors of the other Contracting Party no less favorable treatment than that accorded to investments effected by, and income accruing to, its own nationals or investors of Third States.” The reliance on the most favoured nation clause was in fact only a secondary claim. Primarily, the Claimant had focused on the general wording of Article 9 of the investment treaty, covering “any disputes arising between the contracting Party and the investors of the other”. The tribunal argued that the Contracts were concluded with WAPDA, which was an autonomous corporate body and legally and financially distinct from Pakistan under Pakistani law (*Impregilo v. Pakistan*, Decision on Jurisdiction, 22 April 2005, ICSID Case No. ARB/03/3, paras 211-214). Its behaviour could not be attributed to Pakistan since the international law rules on state responsibility did not apply to acts of an entity that breached a municipal law contract. Thus, WAPDA was not a contracting Party within the meaning of Article 9.

⁶⁸⁶ *Impregilo v. Pakistan*, Decision on Jurisdiction, 22 April 2005, ICSID Case No. ARB/03/3, para. 223.

Relying on the nature of WAPDA, which it considered to be a legal entity different from the State of Pakistan according to Pakistani law, the tribunal did not examine whether the MFN clause could be applied to umbrella clauses.

cc) MTD v. Chile

The *MTD* tribunal, as the tribunal in *Impregilo v. Pakistan*, dealt with the extension of jurisdiction to contract-based claims by means of importation of an umbrella clause. The *MTD* tribunal was disposed to apply the most-favoured-nation clause to various substantive standards. Among others, it was willing to elevate contractual obligations to the international plane by means of incorporating an umbrella clause from a third-party BIT, without however going into the question whether the jurisdiction of an arbitral tribunal can be extended to contractual claims by application of the most-favoured-nation clause.⁶⁸⁷ Thus, while the *MTD* tribunal was the only tribunal until now which was ready to apply the most-favoured-nation clause to an umbrella clause⁶⁸⁸, it did not rule on the question whether the MFN clause may be applied to establish jurisdiction over contract-based claims. Finally, it denied a violation of the umbrella clause since there had been no breach of contract.⁶⁸⁹

c) Assessment

The *Salini* tribunal refused the application of most-favoured-nation clauses to provisions expanding the jurisdiction of arbitral tribunals to contract-based claims. The tribunal declined to extend its subject-matter jurisdiction to entertain purely contractual claims 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 US-Jordanian BITs. Although it distinguished the case from the *Maffezini* case and avoided to make a general and definitive statement as to the applicability of the most-favoured-

⁶⁸⁷ *MTD v. Chile*, Award, 25 May 2004, ICSID Case No. ARB/01/7, para. 187. Although the incorporation of an umbrella clause entails questions concerning the jurisdiction of a tribunal over contractual claims, the Tribunal only dealt with the issue in the context of the merits.

⁶⁸⁸ Affirming applicability also Chukwumerije, p. 626.

⁶⁸⁹ *MTD v. Chile*, Award, 25 May 2004, ICSID Case No. ARB/01/7, para. 188.

nation standard to dispute settlement provisions, it stands for a different approach towards the most-favoured-nation clause, namely for the idea that most-favoured-nation clauses referring to “treatment” should not be interpreted as being presumptively applicable to dispute settlement provisions. Moreover, the tribunal expressed concerns with regard to the statements of principle made by the *Maffezini* tribunal, arguing that the exceptions mentioned by the *Maffezini* tribunal might in practice prove difficult to apply, thereby adding more uncertainties to the risk of treaty shopping.⁶⁹⁰ However, the award is not convincing in this respect. It is the very sense of the most-favoured-nation clause to render possible treaty shopping, i.e. the invocation of more favourable treaty clauses. Moreover, it is no obstacle to the application of most-favoured-nation clauses that beneficiary silence in a third-party treaty is invoked since the relevant subject-matter to which the most-favoured-nation clause shall be applied is explicitly regulated in the basic treaty.⁶⁹¹ While one can derive from Article 9 (2) that contractual disputes should not be submitted to arbitration, the focus should not be on the intention of the parties regarding that provision, but rather on the effect of the most-favoured-nation clause, which reflects the intention that investors should be able to benefit from more favourable guarantees included in third-party treaties.

The *Impregilo* Tribunal rejected any effect of an imported *pacta sunt servanda* clause because the investment treaty had not been concluded with Pakistan, but with the WAPDA as an autonomous authority. In that regard, the tribunal relied on the wording of the umbrella clause in the Pakistan-Switzerland treaty that provided that the Contracting Parties had to observe all obligations that *they* had undertaken vis-à-vis foreign investors.⁶⁹² It therefore refrained from engaging in a detailed analysis of the most-favoured-nation clause; neither did it evaluate prior case law. Instead it explicitly left open both the questions whether jurisdiction can be extended to contractual claims by means of a *pacta sunt*

⁶⁹⁰ *Salini v. Jordan*, Decision on Jurisdiction, 15 November 2004, ICSID Case No. ARB/02/13, para. 115.

⁶⁹¹ See Part IV A.II.3.

⁶⁹² Article 11 of the Switzerland-Pakistan BIT provides: “Chacune des Parties Contractantes assure à tout moment le respect des engagements assumés *par elle* à l’égard des investissements des investisseurs de l’autre Partie Contractante.” (Italics added by the author)

servanda clause and whether it is possible to import such a clause via a most-favoured-nation clause.

Even if one accepts the applicability of the most-favoured-nation clause to invoke umbrella clauses, the effect is very limited on account of the necessity of more favourable treatment in the third-party BIT. First, the umbrella clause can only have an effect on the jurisdiction of a tribunal on condition that the basic BIT contains a narrowly formulated dispute settlement clause which does not itself include contractual disputes. Second, if the host State has committed a contract violation which also constitutes a violation of the BIT, the jurisdiction of the tribunal is given in any event. Moreover, according to the intermediary approach suggested above⁶⁹³, if the main focus of a dispute involves a purely commercial dispute which does not involve abuse of sovereign state power, the umbrella clause is not applicable. Since the presence of arbitrary use of state power will usually entail a violation of the BIT, the tribunal will usually have jurisdiction anyway, without the need to have recourse to the *pacta sunt servanda* clause.

2. Enlargement of the Range of Treaty Claims Covered by the Dispute Settlement Clause

a) Introduction: The Scope of Subject-Matter Jurisdiction in BITs

Another potential field of application for most-favoured-nation clauses is the situation where BITs differ as to the kind of disputes that may be brought to arbitration.

A number of bilateral investment treaties, especially those concluded by China or former Soviet or Eastern European countries, contain dispute settlement mechanisms which are only applicable to limited classes of disputes. In these treaties, the scope of subject-matter jurisdiction of arbitral tribunals is often limited to disputes concerning the expropriation of an investment⁶⁹⁴ or the amount of compensation in case of expropriation.⁶⁹⁵ The issue could become virulent in the context of Chinese BITs. China used to give its consent in

⁶⁹³ See Part VI D.II.1.a.cc.

⁶⁹⁴ Eg Art. 7 of the Cyprus-Hungary BIT; Art. XI Hungary-Norway BIT.

⁶⁹⁵ Eg Art. 4 (3) Ghana-Romania BIT; Article 9 (3) of the China-Ecuador BIT. Art. 13 (3) of the 1988 China-New Zealand BIT.

BITs to arbitration only as regards the amount of compensation required as a result of an expropriation. The 2003 Sino-Germany BIT has substantially enlarged the scope of foreign investors' right of submitting investment disputes to international arbitration. Under that BIT, foreign investors are entitled to submit "any dispute concerning investments between a Contracting Party and an investor of the other Contracting Party"⁶⁹⁶. These BITs enable the investor to bring disputes before an arbitral tribunal which relate to standards apart from the amount of compensation required as a result of an expropriation, such as for example the fair and equitable treatment standard as a very frequently invoked standard.

b) Case Law

The following cases all involved dispute settlement clauses where consent to arbitration was only given with regard to a limited number of disputes.⁶⁹⁷

aa) *Plama Consortium Ltd v. Republic of Bulgaria*

The *Plama* case involved a dispute settlement clause which provided for international arbitration only in case there was a dispute concerning the amount of compensation for expropriation. Moreover, in the BIT concluded between Bulgaria and Cyprus, the parties had only given their consent to *ad hoc* arbitration, while access to an ICSID arbitral tribunal was not envisaged in the dispute settlement provisions of the treaty. The question was therefore not only whether the range of claims covered by the dispute settlement clause could be enlarged but also whether a different dispute settlement forum could be chosen by operation of the most-favoured-nation clause. Since the tribunal concentrated on the second question, the case will be dealt with in that context.⁶⁹⁸

⁶⁹⁶ Article 9 (1) of the 2003 Sino-Germany BIT.

⁶⁹⁷ In addition, the relevant dispute settlement clause in the *Plama* case did not even provide for ICSID arbitration, but only for *ad hoc* arbitration according to the UNCITRAL rules. For importation of a different dispute settlement mechanism see below.

⁶⁹⁸ See Part VI D.II.3.b.aa.

bb) *Telenor v. Hungary*

The dispute concerned a concession agreement between Hungary and the GSM Consortium, a wholly owned subsidiary of the Norwegian investor, for the provision of public mobile radiotelephone services in Hungary. Due to certain measures undertaken by Hungary, *Telenor* claimed violations of the expropriation and the fair and equitable standards of the Hungary-Norway BIT. In contrast to the Hungary-Cyprus BIT, which was at issue in the *Plama* case, the Hungary-Norway BIT in principle allowed for the submission of investment disputes to an ICSID tribunal in certain cases, which were however limited to disputes concerning the amount or payment of compensation in case of expropriation or losses due to war.⁶⁹⁹

The Tribunal did not consider the measures to amount to an expropriation and was therefore confronted with the question whether it had jurisdiction over the fair and equitable treatment claim by importation of more favourable dispute resolution provisions from other BITs concluded by Hungary.⁷⁰⁰ The tribunal held that

“[...] an MFN clause in a BIT providing for most favoured nation treatment of investments should not be construed as extending the jurisdiction of the arbitral tribunal to categories of dispute beyond those set out in the BIT itself in the absence of clear language that this is the intention of the parties.”⁷⁰¹

The tribunal endorsed the “statement of principle” adopted by the *Plama* tribunal that MFN clauses should generally not be construed as extending the jurisdiction of an arbitral tribunal to categories of dispute beyond those set out in the treaty itself,⁷⁰² giving four reasons. First, the *Telenor* tribunal considered the ordinary meaning of the most-favoured-

⁶⁹⁹ See Article XI of the Hungary-Norway BIT.

⁷⁰⁰ The most-favoured-nation clause in Article IV (1) of the Hungary-Norway treaty provides: „Investments 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 favourable than that accorded to investments made by Investors of any third State.”

⁷⁰¹ *Telenor v. Hungary*, Award, 13 September 2006, ICSID Case No. ARB/04/15, para. 91.

⁷⁰² *Telenor v. Hungary*, Award, 13 September 2006, ICSID Case No. ARB/04/15, para. 90.

nation clause as only referring to substantive rights.⁷⁰³ Second, it considered essential the prevention of treaty shopping on the side of the investor.⁷⁰⁴ Third, the tribunal introduced the argument that to override dispute settlement provisions in a BIT would generate an element of uncertainty and instability.⁷⁰⁵ Fourth, the tribunal stressed that treaties should be interpreted from the perspective of the intention of the Contracting States.⁷⁰⁶ It inferred from the fact that both parties had also concluded investment treaties with wider dispute settlement provisions that it was their common intention and a deliberate choice to limit the jurisdiction of the arbitral tribunal in this treaty to the specified categories.

cc) *Berschader v. Russia*

This ruling concerned a dispute between two Belgian construction firm owners and Russia over payments under a construction contract for the renovation of the Russian Supreme Court building. The relevant Soviet-era investment treaty contained a narrow dispute settlement clause which permitted investor-state arbitration only in case of disputes over the amount or mode of compensation in the event of an expropriation or nationalisation.⁷⁰⁷ Therefore principally Belgian investors could not seek arbitration over alleged breaches of the other protective standards in the treaty. The Claimants invoked the MFN clause in the BIT between Belgium and Luxembourg and the USSR and the Denmark-Russia BIT, which permitted “[a]ny dispute [...] in connection with an investment” to be submitted to arbitration⁷⁰⁸, including disputes about other treaty standards apart from the amount and mode of expropriation. The tribunal was split on the question as to whether the Belgian investor could invoke the most-favoured-nation clause in the Belgium-Russia investment treaty in order to incorporate more favourable dispute settlement provisions included in more recent bilateral investment treaties concluded between Russia and third states. By a majority of two to one, the tribunal rejected the argument and dismissed the claim. While the Tribunal conceded that there was no general principle according to

⁷⁰³ *Telenor v. Hungary*, Award, 13 September 2006, ICSID Case No. ARB/04/15, para. 92.

⁷⁰⁴ *Telenor v. Hungary*, Award, 13 September 2006, ICSID Case No. ARB/04/15, para. 93.

⁷⁰⁵ *Telenor v. Hungary*, Award, 13 September 2006, ICSID Case No. ARB/04/15, para. 94.

⁷⁰⁶ *Telenor v. Hungary*, Award, 13 September 2006, ICSID Case No. ARB/04/15, para. 95.

⁷⁰⁷ Article 10 (1) of the Belgium-Russia BIT.

⁷⁰⁸ Article 8 of the Denmark-Russia BIT.

which arbitration agreements should be construed restrictively⁷⁰⁹, it focused on the party intention, arguing that if an agreement to arbitrate was to be reached by incorporation by reference, doubts as to the intentions of the parties arise.⁷¹⁰ While there was a general agreement that MFN provisions should afford material equal treatment, this was uncertain as regards dispute settlement provisions.⁷¹¹ The tribunal therefore found that the interpretation of the most-favoured-nation clause by the Maffezini tribunal went too far. Instead it adopted the principle that an MFN provision in a BIT will only incorporate by reference an arbitration clause from another BIT where it can clearly and unambiguously be inferred that this was the intention of the parties.⁷¹² In contrast, the dissenting arbitrator relied on the primacy of textual interpretation and the object and purpose of the treaty, and found that “MFN clauses apply to all aspects of the regulatory environment governed by an investment protection treaty, including availability of all means of dispute settlement”⁷¹³.

dd) RosInvestCo UK Ltd v. The Russian Federation

In contrast to the until then prevailing approach of the tribunals in *Salini*, *Plama*, *Telenor* and *Berschader*, the Tribunal in *RosInvest v. Russia* extended its jurisdiction by means of the relevant MFN clause. In that case a tribunal decided for the first time that an investor may circumvent a restrictive arbitration provision to extend the jurisdiction *ratione materiae* of the tribunal by widening the range of claims that may be adjudicated by the tribunal.

The Claimant was a shareholder of Yukos Oil Company alleging that certain conduct by Russia amounted to expropriation of its investment. The arbitration clause in the Soviet-

⁷⁰⁹ *Berschader v. Russia*, Award, 21 April 2006, Arbitration Institute of the Stockholm Chamber of Commerce, SCC Case No. 080/2004, para. 178.

⁷¹⁰ *Berschader v. Russia*, Award, 21 April 2006, Arbitration Institute of the Stockholm Chamber of Commerce, SCC Case No. 080/2004, para. 178.

⁷¹¹ *Berschader v. Russia*, Award, 21 April 2006, Arbitration Institute of the Stockholm Chamber of Commerce, SCC Case No. 080/2004, para. 179.

⁷¹² *Berschader v. Russia*, Award, 21 April 2006, Arbitration Institute of the Stockholm Chamber of Commerce, SCC Case No. 080/2004, para. 181.

⁷¹³ *Berschader v. Russia*, Award, 21 April 2006, Arbitration Institute of the Stockholm Chamber of Commerce, SCC Case No. 080/2004, Separate Opinion by Todd Weiler, para. 20.

UK BIT did not empower the tribunal to determine whether an expropriation had actually occurred. The Claimant sought to import the broader jurisdiction granted *inter alia* in Art. 8 of the Denmark-Russia BIT by means of the MFN clause in Article 3 of the basic BIT. The Tribunal made an attempt to limit its holding by refusing to develop further the general discussion on the applicability of MFN clauses to dispute settlement provisions and by stressing its primary task to deal with the case before it rather than making general statements, referring to the unique wording of the MFN and dispute settlement provisions it had to interpret. It gave its decision “without entering into the much more general question whether MFN clauses can be used to transfer arbitration clauses from one treaty to another”⁷¹⁴. Therefore the *Wintershall* Tribunal stressed that the *RosInvest Tribunal* had expressly left open the question whether the word “treatment” in an MFN clause included the protection of the arbitration clause. Nevertheless, the tribunal’s findings can hardly be reconciled with the until then existing case law.

The tribunal agreed with the parties the dispute settlement clause of the Denmark-Russia BIT conferred jurisdiction on the arbitral tribunal on the issue whether an act of the host state was an expropriation. While the tribunal refused to answer the general question whether MFN clauses could transfer dispute settlement provisions, it affirmed the question whether it included an arbitration clause covering expropriation. The tribunal interpreted the most-favoured-nation clause of the BIT, which referred to the “management, maintenance, use, enjoyment or disposal of [...] investments”⁷¹⁵ by investors, as covering access to arbitration in case of expropriation, arguing that expropriation interferes with the investor’s use and enjoyment of the investment and that submission to arbitration forms a “highly relevant part” of the corresponding procedural protection for the inves-

⁷¹⁴ *RosInvestCo v. Russia*, Award on Jurisdiction, October 2007, Arbitration Institute of the Stockholm Chamber of Commerce, SCC Case No. V 079/2005, para. 129.

⁷¹⁵ The most-favoured-nation clause in Article 3 of the BIT provided:

„(1) Neither Contracting Party shall in its territory subject investments or returns of investors 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.“

Since the protection by the arbitration was a matter that affected the procedural rights of the investor, the tribunal found the second paragraph to be pertinent.

tor.⁷¹⁶ The tribunal found decisive that “an arbitration clause, at least in the context of expropriation, is of the same protective value as any substantive protection afforded by applicable provisions [...]”⁷¹⁷ It confirmed its finding by referring to the exceptions to most-favoured-nation treatment in the BIT, which did not refer to dispute settlement. The tribunal moreover held that the widening of the scope of the dispute settlement provisions of the basic BIT was the normal result of the application of MFN clauses.⁷¹⁸ It saw no reason not to accept the effect in the context of procedural clauses if it is accepted in the context of substantive protection. In its view, “[q]uite the contrary, it could be argued that, if it applies to substantive protection, then it should apply even more to “only” procedural protection”.⁷¹⁹

ee) *Renta 4 et al. v. Russia*

In this case, seven Spanish entities claimed that their investments in Yukos American Depository Receipts had been expropriated as a result of measures taken by the Russian government against the Yukos Oil Company. The tribunal found that it had jurisdiction under Article 10 of the Spain-USSR BIT, which provided jurisdiction “relating to the amount or method of payment of the compensation due under Article 6 [expropriation]”.⁷²⁰ The tribunal went on to address the question of whether access to arbitration may in principle fall within the scope of an MFN clause. In that case, the Claimant could rely on a dispute settlement clause in the Denmark-Russia BIT, which did not limit arbitration to disputes relating to the compensation in the case of expropriation. The tribunal reasoned that MFN treatment is not limited to primary or substantive obligations and that

⁷¹⁶ *RosInvestCo v. Russia*, Award on Jurisdiction, October 2007, Arbitration Institute of the Stockholm Chamber of Commerce, SCC Case No. V 079/2005, para. 130.

⁷¹⁷ *RosInvestCo v. Russia*, Award on Jurisdiction, October 2007, Arbitration Institute of the Stockholm Chamber of Commerce, SCC Case No. V 079/2005, para. 132.

⁷¹⁸ *RosInvestCo v. Russia*, SCC Award on Jurisdiction, October 2007, Arbitration Institute of the Stockholm Chamber of Commerce, SCC Case No. V 079/2005, para. 131.

⁷¹⁹ *RosInvestCo v. Russia*, Award on Jurisdiction, October 2007, Arbitration Institute of the Stockholm Chamber of Commerce, Case No. V 079/2005, para. 131.

⁷²⁰ *Renta 4 S.V.S.A. et al. v. Russian Federation*, Award on Preliminary Objections, 20 March 2009, SCC Case No. 24/2007, paras 27, 28. This finding is noteworthy because contrary to the findings of the tribunal in *Berschader*, the tribunal affirmed its jurisdiction not only for the determination of the amount of compensation, but also concerning the prior question whether an expropriation had occurred.

“there is no textual basis or legal rule to say that “treatment” does not encompass the host state’s acceptance of international arbitration.”⁷²¹

In spite of these general remarks, the tribunal declined jurisdiction in the case at hand because the relevant clause referred to MFN treatment in the context of a cross-reference to fair and equitable treatment.⁷²² The majority of the tribunal found that treatment extended only to fair and equitable treatment and that access to arbitration was not an element of fair and equitable treatment.

In his Separate Opinion, one arbitrator expressed his conviction that MFN clauses could be applied to jurisdictional treaty provisions.⁷²³ He reasoned that the MFN treatment clause at hand was wider and included all sorts of treatment, not only fair and equitable treatment. Furthermore, he held that access to international arbitration was a form of fair and equitable treatment granted to third party investors.⁷²⁴ As a conclusion, the arbitrator found that the relevant MFN clause granted the Claimant the benefits of the Respondent’s broader consent to SCC arbitration in the third-party BIT.

ff) Tza Yap Shum v. Peru

Mr. Tza Yap Shum invested in Peru in the business of producing and exporting fish-based food products. The investor claimed that various actions of the Peruvian tax authorities breached treatment standards under the China-Peru BIT. The BIT’s arbitration provision limited tribunal jurisdiction to disputes “involving the amount of compensation for expropriation”. Art. 8(3) of the BIT also provided that other disputes could be submitted to IC-

⁷²¹ *Renta 4 S.V.S.A. et al. v. Russian Federation*, Award on Preliminary Objections, 20 March 2009, SCC Case No. 24/2007, para. 101.

⁷²² Article 5 stated: (1) Each Party shall guarantee fair and equitable treatment within its territory for the investments made by investors of the other Party.

(2) The treatment referred to in paragraph (1) above shall be no less favourable than that accorded by either Party in respect of investments made within its territory by investors of any third State.

⁷²³ *Renta 4 S.V.S.A. et al. v. Russian Federation*, Separate Opinion of Charles Brower, 20 March 2009, SCC Case No. 24/2007, para. 10.

⁷²⁴ *Renta 4 S.V.S.A. et al. v. Russian Federation*, Separate Opinion of Charles Brower, 20 March 2009, SCC Case No. 24/2007, para. 22.

SID if the parties to the dispute so agreed. As in *Renta 4 v. Russia*, the tribunal held that if jurisdiction was given for disputes involving the amount of compensation for expropriation, this included jurisdiction on the question whether there had in fact been an expropriation. Next the tribunal held that the BIT's MFN provision could not be used to broaden the subject-matter scope of the tribunal's jurisdiction, in connection with other BITs without limited subject-matter jurisdiction that Peru had signed. The MFN clause in the BIT provided:

“The treatment and protection referred to in Paragraph 1 of this Article [fair and equitable treatment] shall not be less favourable than that accorded to investments and activities associated with such investments of investors of a third State.”

The tribunal found that the submission to investor-state arbitration in Art. 8(3) reflected the parties' agreement on two fundamental issues, namely the agreement to submit expropriation disputes to ICSID arbitration and that specific agreement would be need to submit other types of disputes to ICSID arbitration. The Tribunal concluded that the specific provision in the Peru-China BIT for arbitration of expropriation claims superseded the general MFN provision, precluding application of arbitration provisions from other BITs. The tribunal determined that

„the specific wording of Article 8(3) should prevail over the general wording of the MFN clause in Article 3".⁷²⁵

gg) *Austrian Airlines v. The Slovak Republic*

In *Austrian Airlines v The Slovak Republic*, the tribunal considered whether it had jurisdiction over claims of expropriation and breach of the full protection and security obligation and the umbrella clause in the Austrian-Slovak BIT. The tribunal held that the dispute settlement provisions in the BIT only provided for arbitration in respect of disputes

⁷²⁵ *Tza Yap Shum v. The Republic of Peru*, Decision on Jurisdiction and Competence, 19 June 2009, ICSID Case No. ARB/07/6, para. 216.

over the amount or conditions of payment of compensation for expropriation and not in respect of disputes concerning the legitimacy of an expropriation.⁷²⁶ The majority of the tribunal rejected the Claimant's attempt to import into the BIT Slovakia's broader consent to arbitration contained in treaties with third States, by virtue of the most-favoured-nation clause. It first stated that it saw no conceptual reason why MFN clauses should not be applicable to procedural provisions.⁷²⁷ Although the MFN clause did not expressly exclude access to dispute settlement provisions in third-party BITs, the fact that the parties had specifically agreed that access to arbitration should be restricted had the effect that the MFN clause should be interpreted so as to exclude broader access to arbitration.⁷²⁸ According to the tribunal,

“[s]een in interaction with the express limitations which the treaty imposes on arbitration, the general intent manifested in the MFN clause is insufficient to displace such limitations.”⁷²⁹

The dissenting arbitrator disagreed with the majority's conclusion on the interpretation of the MFN clause. His view was that the MFN clause broadened the tribunal's jurisdiction by incorporating into the BIT the broader consent to arbitration given by Slovakia to third-state investors.⁷³⁰ The primary reason for this conclusion was that the MFN clause in the BIT in this case contained express exceptions to more favourable treatment, and there were no grounds for implying further exceptions from other provisions in the BIT.

c) Assessment

⁷²⁶ In contrast to the BITs relevant in *Renta 4* and *Tza Yap Shum*, the Austria-Slovakia BIT expressly provided that the investor shall have the right to have the legitimacy of an expropriation reviewed by local authorities.

⁷²⁷ *Austrian Airlines v. The Slovak Republic*, Final Award, 9 October 2009, UNCITRAL ad hoc arbitration, para. 124.

⁷²⁸ *Austrian Airlines v. The Slovak Republic*, Final Award, 9 October 2009, UNCITRAL ad hoc arbitration, paras 133-136.

⁷²⁹ *Austrian Airlines v. The Slovak Republic*, Final Award, 9 October 2009, UNCITRAL ad hoc arbitration, paras 138.

⁷³⁰

In the majority of the examined cases, the Claimants' attempt to rely on the MFN clause to broaden the tribunal's jurisdiction were rejected by the tribunal. *RosInvestCo v. Russia* was the only case where the claim was successful. Notably, the tribunal in *Renta 4 v. Russia* agreed in principle that access to arbitration could in principle fall within the scope of an MFN clause. The denial of the claim was due to the formulation of the MFN clause, which referred to fair and equitable treatment.

The *Plama*, *Telenor* and *Berschader* tribunals denied the Claimants' request to adjudicate a claim that the Contracting Parties had excluded from consent to arbitration in the applicable BIT, arguing that dispute settlement provisions should not be incorporated unless there was a clear intention of the parties to do so. First, the focus on a hardly discernible party intention detached from the wording of the relevant clause is not in line with the requirements of the Vienna Convention on the Law of Treaties. Moreover, by relying on the risk of treaty shopping and unpredictability, the *Telenor* tribunal ignored that treaty shopping is the primary way of guaranteeing the promise of equality embodied in MFN clauses, also in the context of substantive provisions. Accepting the argument of uncertainty would mean to significantly reduce the equalizing force of the MFN clause. Moreover, with the operation of the MFN clause entirely depending on the existence of more favourable standards in a third party treaty, its operation is not completely unpredictable, but depends on the treaty practice of the relevant state party.

The reasoning in *Tza Yap Shum* and *Austrian Airlines* that a specific provision should prevail over an MFN clause is flawed. It is the intended effect of MFN provisions to overrule specifically negotiated provisions. Moreover, if one reads an MFN clause only in connection with the clause they are supposed to supersede, there is no room for applying the clause.⁷³¹

Although the tribunal in *RosInvestCo* did not explicitly criticize the findings of the previous tribunals, stressing that it concentrated only on the interpretation of the case before it, its argumentation and that of the previous tribunals clearly diverge. The tribunal accepted the effect of the MFN clause to widen the jurisdictional scope of the dispute settlement

⁷³¹ See Part VI B.I.3.e.

provisions of the basic BIT, rejecting a distinction between substantive and procedural protection in that context. Thus, despite its attempts to limit the impact of its holding by denying to examine closer the word “treatment” and to enter into a further general discussion of MFN clauses, the argumentation of the *RosInvest* tribunal can hardly be reconciled with the findings made in previous case law. The result of the ruling in *RosInvestCo* must be endorsed, although the tribunal’s emphasis on the close the connection between substantive and procedural protection is problematic. The importance that enforcement procedures have for investors cannot be the reason for extended MFN treatment to them. The implementation of obligations is important in every field of international law, nevertheless, international law is generally governed by a system of facultative jurisdiction. While arbitration may be of the same importance for investors as substantive protection standards, this may not be a reason for the creation of compulsory jurisdiction. Rather, what is decisive is the interpretation of MFN clauses according to the principles of the Vienna Convention and especially of the word treatment, an exercise which the tribunal explicitly did not undertake. It is only within this interpretation that the importance of an enforcement mechanism for the competitive opportunities of investors becomes relevant.

3. Choice of a Different Arbitral Forum

a) Introduction: Overview of Arbitral Fora

Another field of application for the most-favoured-nation clause could be the creation of the competence of an arbitral forum not mentioned in the basic BIT. BITs differ as to the type of arbitration procedures that they make available for the settlement of investment disputes. Most bilateral investment treaties refer to investor-State arbitration under the auspices of the International Center for the Settlement of Investment Disputes.⁷³² There is often the alternative possibility to open proceedings via the ICSID Additional Facility.⁷³³

⁷³² Schreuer, *Of Waiting Periods, Umbrella Clauses and Forks in the Road*, p. 231. See, e.g., Art. 11 (2), 2nd sentence of the German Model BIT: “Unless the parties in dispute agree otherwise, the divergency shall be submitted for arbitration under the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and nationals of other States.”

⁷³³ The ICSID Additional Facility Rules were adopted in order to authorise the ICSID Secretariat to administer among others investment arbitration between parties one of which is not a Contracting State or a national of a Contracting State, see Article 2 (a) of the Additional Facility Rules.

Other treaties refer to arbitration under the Arbitration Rules adopted by the United Nations Commission on International Trade Law (UNCITRAL))⁷³⁴, arbitration under the auspices of the International Chamber of Commerce (ICC) or *ad hoc* arbitration⁷³⁵. For example, the China-Egypt BIT generally only provides for dispute settlement in the courts of the host state or, in the event of expropriation, by an *ad hoc* tribunal.⁷³⁶ In contrast, the China-Germany BIT provides for the possibility to initiate *ad hoc* arbitration or ICSID arbitration.⁷³⁷ Furthermore, some United Kingdom BITs provide consent to ICSID arbitration,⁷³⁸ while others refer to arbitration under the UNCITRAL rules.⁷³⁹ A considerable number of BITs include references to several dispute settlement fora.⁷⁴⁰

Depending on the chosen forum, the proceedings may differ in various aspects. For example, under UNCITRAL Arbitration Rules article 32 (5) there is a general rule to protect confidentiality, since awards are to be made public only with the consent of both parties. In ICSID, there is no provision which expressly provides for the confidentiality of pleadings, documents and other information.⁷⁴¹ Moreover, while ICSID Arbitration Rule No. 3 interprets the concept of neutrality in the sense that arbitrators must not have the same

⁷³⁴ Eg Article 8 of the 1992 Netherlands-Poland BIT, Article 9 of the 1990 Switzerland-Czechoslovakia BIT. According to both provisions, ICSID arbitration is possible as soon as both parties are Contracting States of the Convention. Neither Poland nor Vietnam has until now become member states to the ICSID Convention.

⁷³⁵ In *ad hoc* arbitration, the parties and the arbitrators execute the arbitration without the assistance of an arbitral administering institution. In some cases of *ad hoc* arbitration, the parties may decide to adopt a set of arbitration rules as the framework for the proceedings, often the UNCITRAL Arbitration rules.

⁷³⁶ Article 9 (2) and (3) of the China-Egypt BIT.

⁷³⁷ Article 9 (3) of the China-Germany BIT.

⁷³⁸ Article 8 (1) of the United Kingdom-Nigeria BIT; Article 8 (1) of the United Kingdom-Barbados BIT.

⁷³⁹ Article 8 of the United Kingdom-Bahrein BIT.

⁷⁴⁰ Eg Article VII (3) of the US-Argentina BIT, which provides for the possibility to arbitrate under ICSID, the ICSID Additional Facility, the UNCITRAL arbitration rules, or any other arbitration forum agreed upon by the parties. Under the NAFTA, investor-state arbitration can take place under three different sets of arbitral rules: the ICSID Convention, the ICSID Additional Facility Rules, and the UNCITRAL arbitration rules. Under Article 26 of the the ECT, the investor has the choice to submit a dispute to the fora of the host state, or for binding arbitration to ICSID, a forum established under the UNCITRAL rules, or proceedings of the Arbitration Institute of the Stockholm Chamber of Commerce. Under Art. 9 (2), (4) of the Protocol of Colonia for the Promotion and Reciprocal Protection of Investments in Mercosur, investors may choose between dispute settlement by national courts, an ICSID arbitral tribunal or an *ad hoc* arbitral tribunal established in accordance with the UNCITRAL rules.

⁷⁴¹ However, the parties may agree to keep information confidential, particularly if they feel that publication may exacerbate the dispute. See *Biwater Gauff v. Tanzania*, Procedural Order No. 3, 29 September 2006, ICSID Case No. ARB/05/22, para. 125 (citing Arbitration Rule 30, Note F, 1 ICSID Reports p. 93).

nationality as the parties, Article 9 (5) of the ICC rules expresses only a preference for neutrality, but does not contain a strict requirement. Another difference is the possibility of judicial review – while ICSID only provides for an annulment procedure, it is possible under the UNCITRAL rules to have recourse to national courts.⁷⁴² Moreover, the enforcement of arbitral awards outside the ICSID framework can only be based on national legislation or on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), according to which a State in which recognition and enforcement is sought may refuse recognition and enforcement of an award if it would be contrary to the public policy of that state.⁷⁴³ In contrast, the ICSID arbitration rules limit the grounds for non-recognition of an arbitral award.⁷⁴⁴ In addition, the broad definition of investments under BITs and the terminology under many BITs referring to disputes “in connection with an investment” may be broader than the terminology under the ICSID Convention, referring to “any dispute arising directly out of an investment” (Article 25 (1)), which may explain the reference in BITs to arbitration under the UNCITRAL Arbitration Rules or the rules of private arbitral institutions.⁷⁴⁵

b) Case Law

aa) *Plama Consortium Ltd v. Republic of Bulgaria*

The Claimant *Plama Consortium Ltd*, a company incorporated in Cyprus, was the owner of the Bulgarian company *Nova Plama AD*, which owned an oil refinery in Bulgaria. In 2002, Bulgaria passed a law according to which *Nova Plama* was liable for environmental damage caused in the seventies by the then state-owned *Plama AD*. The Claimant alleged that this amounted to a violation of the Energy Charter Treaty (ECT) and the Bulgaria-Cyprus BIT. It filed a request with ICSID against Bulgaria, claiming jurisdiction of an ICSID tribunal first on the basis of Article 26 (4) (a) (i) ECT and second on the basis of

⁷⁴² For example, the Swedish Court of Appeal reviewed the award of an *ad hoc* tribunal operating under the UNCITRAL rules in the case of *CME v. Czech Republic*, Partial Award, 13 September 2001, 14 World Trade and Arbitration Materials 35 (2002), p. 109. For the judgment of the Svea court of Appeal of 15 May 2003, see 42 ILM 919 (2003).

⁷⁴³ See Article V (2) (b) of the New York Convention.

⁷⁴⁴ Articles 53, 54 of the ICSID Convention.

⁷⁴⁵ Sacerdoti, Investment Arbitration under ICSID and UNCITRAL Rules, p. 14.

the most-favoured-nation provision in Article 3 (1) of the 1987 Bulgaria-Cyprus BIT⁷⁴⁶ in connection with ICSID arbitration provisions from other bilateral investment treaties entered into *inter alia* by Bulgaria and Finland. The Bulgaria-Cyprus BIT contained limited dispute settlement provisions covering only the legality and the amount of compensation for expropriation. In disputes concerning the legality of expropriation, only the domestic administrative and legal procedures of the host State should be applicable; disputes concerning the amount of compensation should be decided either in a legal procedure of the host State or by an international *ad hoc* arbitration court applying UNCITRAL rules for the arbitration procedure.⁷⁴⁷ Access to international arbitration was thus only provided for as regards disputes concerning the amount of compensation for expropriation; there was no option under the basic BIT to choose arbitration in disputes concerning other BIT obligations. Furthermore, even in arbitrable constellations, only access to *ad hoc* arbitration was provided, while access to an ICSID arbitral tribunal was not at all envisaged in the treaty.

The tribunal affirmed jurisdiction under Article 26 ECT⁷⁴⁸, but declined jurisdiction over claims based on the Bulgaria-Cyprus BIT, denying the applicability of the most-favoured-nation standard to the relevant dispute settlement provisions. The tribunal held that the most-favoured-nation provision of the Bulgaria-Cyprus BIT could not be interpreted as providing consent to submit a dispute under the Bulgaria-Cyprus BIT to ICSID arbitration.⁷⁴⁹

⁷⁴⁶ The bilateral investment treaty contained a most-favoured-nation clause that was similar to those at issue in the *Siemens* and the *Salini* case. Article 3 of the Bulgaria-Cyprus BIT provided: “Each 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.”

⁷⁴⁷ Article 4 of the Bulgaria-Cyprus BIT.

⁷⁴⁸ It is possible under Article 17 I ECT to deny the advantages of part III of the ECT (protecting investments) to legal entities “if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized; [...]”, i.e. to mailbox companies. However, the tribunal concluded that the denial of benefits under Article 17 I ECT did not affect the dispute settlement provisions in part V of the ECT and thus affirmed jurisdiction (*Plama v. Bulgaria*, Decision on Jurisdiction, 8 February 2005, ICSID Case No. ARB/03/24, paras 147-151).

⁷⁴⁹ *Plama v. Bulgaria*, Decision on Jurisdiction, 8 February 2005, ICSID Case No. ARB/03/24, paras 184, 227.

The tribunal distinguished the *Maffezini* case from the *Plama* case, referring to the impracticability of the relevant time-limits for international arbitration in the *Maffezini* Case. In contrast, in the *Plama* case, *ad hoc* arbitration as a specifically agreed upon procedure would be replaced by a completely different dispute settlement mechanism. Yet the tribunal did not confine itself to distinguishing the two cases, but distanced itself explicitly from prior case law. Otherwise it could have argued on the basis of the *Maffezini* case that even if dispute resolution fell within the subject-matter of the treatment contemplated by the BIT, the Claimant could not override the choice of a particular arbitration forum, which the *Maffezini* tribunal had qualified as one of the fundamental policy considerations that could not be overridden by virtue of the most-favoured-nation clause.⁷⁵⁰ Instead the tribunal expressed the view that the *Maffezini* “interpretation went beyond what State Parties to BITs generally intended to achieve by an MFN provision in a bilateral or multilateral investment treaty.”⁷⁵¹ It established that there was a presumption that MFN clauses did not cover dispute settlement provisions unless the most-favoured-nation provision in the basic treaty left no doubt that the Contracting Parties intended to incorporate them.⁷⁵² Furthermore, it did not confine this solution to the establishment of consent to arbitration by means of a most-favoured-nation clause, but applied it generally to dispute settlement provisions.⁷⁵³ It thus reversed the position taken by the *Maffezini* Tribunal, where it had been held that dispute resolution provisions should in principle be covered by most-favoured-nation clauses unless this would run counter to public policy. The tribunal did not consider instructive the wording of the most-favoured-nation clause, holding that it was not clear whether the ordinary meaning of the term “treatment” in the

⁷⁵⁰ See Part VI D.I.2.a.

⁷⁵¹ *Plama v. Bulgaria*, Decision on Jurisdiction, 8 February 2005, ICSID Case No. ARB/03/24, para. 203.

⁷⁵² *Plama v. Bulgaria*, Decision on Jurisdiction, 8 February 2005, ICSID Case No. ARB/03/24, para. 223: “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.”

⁷⁵³ *Plama v. Bulgaria*, Decision on Jurisdiction, 8 February 2005, ICSID Case No. ARB/03/24, para. 227. Here the tribunal held that the most-favoured-nation clause “[...] cannot be interpreted as providing consent to submit a dispute under the Bulgaria-Cyprus BIT to ICSID arbitration and that the Claimant cannot rely on dispute settlement provisions in other BITs to which Bulgaria is a Contracting Party in the present case.”

MFN provision of the BIT included or excluded dispute settlement provisions contained in other BITs to which Bulgaria was a Contracting Party.⁷⁵⁴ Moreover, it rejected the reliance on the object and purpose of investment treaties to create favourable conditions for investment as pursued by the Claimant and formerly by the *Siemens* tribunal as “insufficient to conclude that the Contracting Parties to the Bulgaria-Cyprus BIT intended to cover by the MFN provision agreements to arbitrate in other treaties [...]”⁷⁵⁵ It then turned to circumstantial evidence, mainly relying on the different historical background of the dispute settlement clauses, which were much more restricted during the era of the Soviet Union. It stressed that the Bulgaria-Cyprus BIT had been negotiated in 1987, i.e. when Bulgaria was still under a communist regime which had a policy of favouring bilateral investment treaties with limited protection for foreign investors and very limited international dispute resolution provisions.⁷⁵⁶ In the 1990s, after the collapse of the communist regime, Bulgaria began concluding bilateral investment treaties with significantly more liberal dispute resolution provisions, including resort to ICSID arbitration. Moreover, the tribunal inferred from the negotiations between Bulgaria and Cyprus that had taken place in 1998 and had also comprised the dispute settlement provisions of the BIT that the Contracting Parties had not considered the most-favoured-nation clause of the treaty to effect importation of dispute settlement provisions from other BITs.

The tribunal underlined that one reason for its decision which was “equally, if not more, important” than Bulgarian State practice in communist times was that absent express evidence otherwise, most-favoured-nation provision could not create a basis for jurisdiction where none existed in the basic treaty. It stressed that the basic prerequisite for arbitration was an agreement of the parties to arbitrate and that such agreement should be clear and

⁷⁵⁴ *Plama v. Bulgaria*, Decision on Jurisdiction, 8 February 2005, ICSID Case No. ARB/03/24, para. 189.

⁷⁵⁵ *Plama v. Bulgaria*, Decision on Jurisdiction, 8 February 2005, ICSID Case No. ARB/03/24, para. 193 (quoting Sinclair, *The Vienna Convention*, p. 130, who warned against the “risk that the placing of undue emphasis on the ‘object and purpose’ of a treaty will encourage teleological methods of interpretation [which,] in some of its more extreme forms, will even deny the relevance of the intentions of the parties”).

⁷⁵⁶ *Plama v. Bulgaria*, Decision on Jurisdiction, 8 February 2005, ICSID Case No. ARB/03/24, para. 196.

unambiguous.⁷⁵⁷ Therefore the intention to incorporate dispute settlement provisions had to be clearly and unambiguously expressed. The tribunal held that when the parties had agreed on a special dispute settlement mechanism, for example on *ad hoc* arbitration, they could not be expected to leave those provisions to future replacement by different dispute resolution provisions by means of the most-favoured-nation clause, unless they had explicitly agreed on such replacement.⁷⁵⁸ In the words of the Tribunal,

“[i]t is a well-established principle, both in domestic and international law, that such an agreement [to submit disputes to arbitration] should be clear and unambiguous. [...] Doubts as to the parties’ clear and unambiguous intention can arise if the agreement to arbitrate is to be reached by incorporation by reference.”⁷⁵⁹

Diverging from the conceptual approach in *Maffezini*, the tribunal based 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. It supported its view by invoking the “generally accepted principle of separability (autonomy) of the arbitration clause”, according to which dispute resolution provisions constituted “an agreement on their own”⁷⁶⁰, thus highlighting the distinction between substantive rights and their procedural implementation.

Moreover, it cited the prevention of a “chaotic situation” where “an investor has the option to pick and choose provisions from the various BITs” as a counter-argument against application of the MFN clause.⁷⁶¹

⁷⁵⁷ *Plama v. Bulgaria*, Decision on Jurisdiction, 8 February 2005, ICSID Case No. ARB/03/24, para. 198.

⁷⁵⁸ *Plama v. Bulgaria*, Decision on Jurisdiction, 8 February 2005, ICSID Case No. ARB/03/24, para. 209.

⁷⁵⁹ *Plama v. Bulgaria*, Decision on Jurisdiction, 8 February 2005, ICSID Case No. ARB/03/24, paras 198, 199.

⁷⁶⁰ *Plama v. Bulgaria*, Decision on Jurisdiction, 8 February 2005, ICSID Case No. ARB/03/24, para. 212.

⁷⁶¹ *Plama v. Bulgaria*, Decision on Jurisdiction, 8 February 2005, ICSID Case No. ARB/03/24, para. 219.

bb) *Yaung Chi Oo v Myanmar*

The *Yaung Chi Oo* case was the first arbitration award issued under the ASEAN Investment Agreement. The dispute concerned a joint venture agreement concluded in 1993 between Myanmar Foodstuff Industries, a Myanmar State-owned corporation, and the State industrial Organization of Myanmar on the one hand and the Singaporean Claimant on the other. The parties formed a joint venture company which was designed to operate a brewery in Myanmar. The Claimant claimed that in December 1997 and November 1998, armed agents of the Myanmar Government had seized the brewery and that the government had frozen certain of its bank accounts. After a period of five years, a winding up order had been made. The Claimant held that these measures resulted in a violation of various provisions of the 1987 ASEAN Investment Agreement and commenced arbitration proceedings according to Article X of the Agreement. The key issue of the case was whether the tribunal had jurisdiction over the claims under either the 1987 ASEAN Agreement or the 1998 Framework Agreement.

The tribunal denied jurisdiction under the 1987 ASEAN Agreement⁷⁶² and under Article 12 of the 1998 Framework Agreement⁷⁶³. The Claimant also claimed jurisdiction under the 1998 Framework Agreement by invoking the most-favoured-nation clause in Article 8

⁷⁶² Myanmar was not a member of ASEAN at the time of the conclusion of the joint venture agreement. It acceded to the 1987 ASEAN Agreement in July 1997 and became a party to the 1998 Framework Agreement when that agreement entered into force in 1999. The Tribunal denied jurisdiction due to Article II (3), which provided that “This Agreement shall also apply to investments made prior to its entry into force, provided such investments are specifically approved in writing and registered by the host country and upon such-conditions as it deems fit for purpose of this Agreement subsequent in its entry into force.” The investment was approved by the competent Myanmar authority before 1997, i.e. prior to the entry into force of the ASEAN Agreement for Myanmar. According to the Tribunal, “The mere fact that an approval and registration earlier given by the host State continued to be operative after the entry into force of the 1987 ASEAN Agreement for that State is not sufficient.” (*Yaung Chi Oo v. Myanmar*, Award, 31 March 2003, ASEAN Case No. ARB/01/1, para. 60) The Tribunal therefore held that the Claimant’s investment did not qualify as an ASEAN investment under Article II (3) of the 1987 ASEAN Agreement.

⁷⁶³ The tribunal affirmed that the 1998 Framework Agreement applied to existing investments and that the present investment could be considered an investment under Article 2 of that Agreement. However, it denied that Article 2 of the 1998 Framework Agreement was a better provision in the sense of Article 12 of the Framework Agreement, which provided: “In the event that this Agreement provides for better and enhanced provisions over the [1987 Agreement], then such provisions of this Agreement shall prevail.” Rather the tribunal considered Article 12 as an assurance that investments which are covered by both agreements are entitled to the most beneficial treatment afforded by either agreement. It therefore concluded that Article 12 did not give the Claimant any new rights in relation to its claim (*Yaung Chi Oo v. Myanmar*, Award, 31 March 2003, ASEAN Case No. ARB/01/1, para. 82).

of the Agreement read in conjunction with the BIT between Myanmar and the Philippines. This BIT provided for the possibility of *ad hoc* international arbitration.⁷⁶⁴ The tribunal declined jurisdiction on this ground, arguing that the Claimant should have invoked the most-favored-nation clause at the initiation of arbitration proceedings. Moreover, it denied that there would be more favourable treatment in the form of arbitral jurisdiction under the Myanmar-Philippines BIT. It pointed out that

“[...] if a party wishes to rely on the jurisdictional possibility affirmed by an ICSID Tribunal in *Maffezini v. Kingdom of Spain*, it would normally be incumbent on it to rely on that possibility, and on the other treaty in question, at the time of instituting the arbitral proceedings. 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.”⁷⁶⁵

cc) *Garanti v. Turkmenistan*

Contrary to former statements by the *Maffezini* and *Plama* tribunals, the tribunal in *Garanti v. Turkmenistan* held that an investor could invoke the MFN clause to obtain the benefit of a more favourable arbitration process provided by another treaty to nationals or companies of a third country.

The dispute concerned several measures by the Respondent relating to a construction contract between the parties to the dispute. The tribunal decided to commence arbitral proceedings although the Respondent had not consented to ICSID arbitration in the arbitration clause of the basic BIT between the United Kingdom and Turkmenistan. The BIT required in its dispute settlement clause in Article 8 of the BIT that in order for a dispute to be submitted to ICSID, an agreement to ICSID arbitration between the investor and the BIT’s Contracting Party must exist. Turkmenistan has consented, in other BITs and in the ECT, to either ICSID arbitration or UNCITRAL arbitration, at the election of the investor.

⁷⁶⁴ Article IX of the Myanmar-Philippines BIT of 17 February 1998.

⁷⁶⁵ *Yaung Chi Oo v. Myanmar*, Award, 31 March 2003, ASEAN Case No. ARB/01/1, para. 83.

The Claimant relied on the most-favoured-nation clause of the basic BIT to bypass the requirement of a specific agreement to ICSID arbitration. The Respondent held that the UK-Turkmenistan BIT contained only Turkmenistan's consent to arbitration under the UNCITRAL Rules. Consent to ICSID arbitration could not be created by operation of the MFN clause. Article 8 of the UK-Turkmenistan BIT provides:

„(1) Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period of four [months] from written notification of a claim, be submitted to international arbitration if the national or company concerned so wishes.

(2) Where the dispute is referred to international arbitration, the national or company and the Contracting Party concerned in the dispute may agree to refer the dispute either to:

- (a) the International Centre for the Settlement of Investment Disputes [...] or
- (b) the Court of Arbitration of the International Chamber of Commerce; or
- (c) an international arbitrator or ad hoc arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law.

If after a period of four months from written notification of the claim there is no agreement to one of the above alternative procedures, the dispute shall at the request in writing of the national or company concerned be submitted to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. [...]

The non-discrimination provision in Article 3 of the U.K.-Turkmenistan BIT provides:

(1) Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State.

(2) Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State.

(3) For the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement.

The majority of the tribunal was of the view that the Respondent had generally agreed to submit disputes to international arbitration in Article 8 (1) of the BIT. Since Article 8 (1) of the UK-Turkmenistan BIT established consent of the Respondent to international arbitration, there was no need to refer to the MFN clause to import such consent.⁷⁶⁶ In order to override the requirement of a specific agreement and import consent to ICSID arbitration, it was possible to invoke the relevant MFN clause, which explicitly stated that it was also applicable to the arbitration clause of the BIT. The reliance on the MFN clause could be equated to an incorporation by reference, which had been at issue in *C.S.O.B. v. Slovakia*⁷⁶⁷ The tribunal affirmed that the third-party treaty contained more favourable treatment. Although there was no reason to conclude that UNCITRAL arbitration was objectively more favourable than ICSID arbitration, the more favourable treatment stemmed

⁷⁶⁶ *Garanti v. Turkmenistan*, Decision on the Objection to Jurisdiction for Lack of Consent, 3 July 2013, ICSID Case No. ARB/11/20, paras 75, 78.

⁷⁶⁷ *Garanti v. Turkmenistan*, Decision on the Objection to Jurisdiction for Lack of Consent, 3 July 2013, ICSID Case No. ARB/11/20, para. 73. In *C.S.O.B. v. Slovakia*, the Czech and Slovak Republic had, prior to their separation, signed a BIT that gave an investor of one State the right to elect ICSID arbitration in a dispute with the other State. The Respondent argued that the BIT had never entered into force between the State parties. The tribunal found that “the uncertainties relating to the entry into force of the BIT prevent that instrument from providing a sound basis upon which to found the parties’ consent to ICSID jurisdiction.” (See *C.S.O.B. v. Slovakia*, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, ICSID Case No. ARB/97/4, para. 43.) However, the parties to the *C.S.O.B. v. Slovakia* arbitration had signed a “Consolidation Agreement” which made reference to the BIT, and the tribunal found that „[i]n the absence of a separate dispute resolution provision, the reference to the BIT satisfies the requirement that international arbitration, as specified in its Article 8, is the agreed dispute resolution mechanism.“ (See *C.S.O.B. v. Slovakia*, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, ICSID Case No. ARB/97/4, para. 54.)

from the fact that the investor had a choice between UNCITRAL and ICSID arbitration in the third-party BITs.⁷⁶⁸

The dissenting arbitrator did not find the MFN clause to be able to establish consent to ICSID arbitration, even though the relevant MFN clause in its para. 3 explicitly stated that the clause should be applicable to Articles 1 to 11 of the BIT, including the dispute settlement clause. She stressed that “consent to jurisdiction in international adjudication must always be *established*”.⁷⁶⁹ She held that applying the MFN clause to the dispute settlement provision establishing the jurisdiction of an ICSID tribunal would mean „consent shopping“ and the creation of a *de facto* system of compulsory jurisdiction, while the international legal order still rested largely on a system of facultative jurisdiction.⁷⁷⁰ Where consent was not established in the relevant BIT, it could not be imported via an MFN clause. In contrast to the majority, the dissenting arbitrator found that consent to ICSID arbitration was embodied in Article 8 (2) of the BIT. Article 3 (3) had to be read in the light of that provision. It could not be read in a way as to completely override another treaty provision.⁷⁷¹ Like the tribunal in *Austrian Airlines v. Slovak Republic*, the dissenting arbitrator examined the relationship of the MFN clause and the dispute settlement provisions. She held that

“[t]o give effect to the MFN clause contained in Article 3 (3), the foreign investor must first be in a *dispute settlement relationship* with the host state. A problem of *treatment* can only arise when the foreign investor is treated in a certain way while entertaining a specific relationship with the host state. If there is no relationship be-

⁷⁶⁸ *Garanti v. Turkmenistan*, Decision on the Objection to Jurisdiction for Lack of Consent, 3 July 2013, ICSID Case No. ARB/11/20, paras 89-95, with further references.

⁷⁶⁹ *Garanti v. Turkmenistan*, Dissenting opinion of Laurence Boisson de Chazournes, 3 July 2013, ICSID Case No. ARB/11/20, para. 5 (Emphasis in the original).

⁷⁷⁰ *Garanti v. Turkmenistan*, Dissenting opinion of Laurence Boisson de Chazournes, 3 July 2013, ICSID Case No. ARB/11/20, para. 6.

⁷⁷¹ *Garanti v. Turkmenistan*, Dissenting opinion of Laurence Boisson de Chazournes, 3 July 2013, ICSID Case No. ARB/11/20, para. 12.

tween the host state and the foreign investor, the question of more or less favourable treatment is not at stake and thus, the MFN principle does not apply.”⁷⁷²

As a consequence, according to the dissenting opinion,

“the application of Article 3 (3) of the U.K.-Turkmenistan BIT is subordinated or conditioned to the prior application of Article 8 (2) [...].”⁷⁷³

The dissenting arbitrator held that even if Article 3 (3) were applicable, consent to ICSID arbitration could not be established from an MFN clause read together with an ICSID arbitration clause from another treaty. According to her, an MFN clause cannot by reference incorporate an agreement to arbitrate and does not have the function to establish jurisdiction. This

„would involve a forum-shopping attitude that bypasses the consent requirement of the Respondent while running against the fundamental principles of international adjudication.”⁷⁷⁴

c) Assessment

The reference by the *Plama* tribunal to Bulgaria’s practice during the communist era to agree only to very limited possibilities of international dispute resolution does not indicate the scope of the MFN clause. It is rather an important function of the clause to effect a general change in policy of a State without the need to renegotiate all BITs.⁷⁷⁵ Neither is the reference to the treaty renegotiations convincing. According to the theory of the tribunal, a renegotiation of treaties would only be necessary in cases where states intend to include standards that are more favourable than any standard that has as yet been granted to

⁷⁷² *Garanti v. Turkmenistan*, Dissenting opinion of Laurence Boisson de Chazournes, 3 July 2013, ICSID Case No. ARB/11/20, para. 40.

⁷⁷³ *Garanti v. Turkmenistan*, Dissenting opinion of Laurence Boisson de Chazournes, 3 July 2013, ICSID Case No. ARB/11/20, para. 41.

⁷⁷⁴ *Garanti v. Turkmenistan*, Dissenting opinion of Laurence Boisson de Chazournes, 3 July 2013, ICSID Case No. ARB/11/20, para. 63.

⁷⁷⁵ See Part VI B.I.3.f.

any third state or in order to modify provisions that fall outside the scope of the MFN clause. In reality, however, BITs are constantly renegotiated for various reasons, *inter alia* for the clarification of existing commitments.⁷⁷⁶ There is always a certain unpredictability in the operation of the MFN clause, which entirely depends on the existence of more favourable standards in a third party treaty. The problem with the reliance on third-party treaties can well be demonstrated by the *Rights of US Nationals in Morocco case*, where the US was deprived of its rights after their abrogation in the third-party treaties. The aim of the renegotiations may thus also have been to achieve clear and predictable standards and a clear and predictable enforcement mechanism.

It was moreover argued by the *Plama* tribunal that the reasoning of the tribunal in the *Maffezini case* could be limited insofar as it merely invalidated a rather useless treaty provision, since domestic courts could not render a final decision in such a short period of time. The tribunal said that it “sympathize[d] with a tribunal that attempts to neutralize such a provision that is nonsensical from a practical point of view”⁷⁷⁷. This argument is however not convincing. Comparable to the requirement to exhaust local remedies, the object and purpose of the waiting requirement is to give domestic courts the opportunity to redress a wrong allegedly committed by the state. One cannot generally exclude the possibility that the domestic court acknowledges the commitment of a wrong by the state and decides in favour of the investor. Moreover, a decision could be made in the first instance which might convince the parties or lead to an amicable settlement. An eighteen-month domestic litigation period can therefore not *per se* be perceived as unreasonable or inadequate.⁷⁷⁸

Regarding the principle of the autonomy of the arbitration clause invoked by the *Plama* tribunal, it is indeed a recognised principle of international arbitration law that the fate of the arbitration clause can be dissociated from the fate of the remainder of the agree-

⁷⁷⁶ For various other reasons for the renegotiation of BITs, see UNCTAD, World Investment Report 2005, p. at 27.

⁷⁷⁷ *Plama v. Bulgaria*, Decision on Jurisdiction, 8 February 2005, ICSID Case No. ARB/03/24, para. 224. This argument was also invoked in *Suez and InterAguas v. Argentina*, Decision on Jurisdiction, 16 May 2006, ICSID Case No. ARB/03/17, paras 65, 66.

⁷⁷⁸ Wälde, The umbrella clause, p. 228.

ment.⁷⁷⁹ Courts have referred to the severability of the arbitration clause to find that this clause is not affected by the alleged invalidity or termination of the agreement. One reason given for this view is that the parties to an agreement containing an arbitration clause conclude not one agreement but two, namely the substantive or principal agreement and an additional, separable agreement which provides for arbitration of disputes arising out of the principal agreement.⁷⁸⁰ ICSID arbitration clauses reinforce the rule of severability. For example, Article 45 (1) of the ICSID Additional Facility Rules provides that

„[t]he Tribunal shall have the power to rule on its competence. *For the purposes of this Article*, an agreement providing for arbitration under the Additional Facility shall be separable from the other terms of the contract in which it may have been included.“⁷⁸¹

It can also be derived from Article 25 ICSID Convention, which provides that a party is not entitled to vitiate the arbitral process by withdrawing its agreement to arbitrate, that it is neither entitled to vitiate the arbitral process by maintaining that the principal agreement containing the arbitral obligation is void.⁷⁸² Severability in these cases serves the purpose to give the arbitral tribunal the opportunity to rule upon the alleged invalidity of the agreement. If one party to an agreement containing an arbitration clause could deny arbitration to the other party by alleging that the agreement was not valid and could deprive an arbitral tribunal of the competence to rule upon that allegation, upon its constitution and jurisdiction and upon the merits of the dispute, it would always be open to that party to vitiate the arbitral remedy by simply declaring the agreement void.⁷⁸³ The separation is therefore in the case of an alleged invalidity of the agreement a necessary outflow

⁷⁷⁹ Schwebel, *International arbitration*, pp. 2, 3; Weil, *Problèmes relatifs aux contrats passés entre un Etat et un particulier*, pp. 222, 223; *Lena Goldfields v. USSR*, paras 11, 15; *Fisheries Jurisdiction Case*, Judgment of 2 February 1973, ICJ Reports 1973, Separate Opinion of Judge Sir Gerald Fitzmaurice, p. 31.

⁷⁸⁰ Schwebel, *International arbitration*, p. 5.

⁷⁸¹ Emphasis added by the author.

⁷⁸² Schwebel, *International arbitration*, p. 16.

⁷⁸³ Schwebel, *International arbitration*, p. 4; Weil, *Problèmes relatifs aux contrats passés entre un Etat et un particulier*, p. 222.

of the doctrine of *Kompetenz-Kompetenz*. Since it keeps up the arbitral obligations of the parties, the doctrine of severability is in this regard a means to enhance arbitral protection. This reasoning cannot be transferred to the context of the most-favoured-nation clause. An arbitration clause in an investment agreement cannot be regarded as completely disconnected from the substantive provisions of an investment agreement since it is included for the purpose of being applied to disputes arising out of these substantive provisions. While the object and purpose of the doctrine of severability is to lay into the hands of the tribunal the power to rule on its own competence and thus to prevent the possibility of one party to unilaterally vitiate the arbitral process, application of the doctrine to bar the application of the MFN clause to the dispute settlement mechanism of a treaty would in contrast lead to a lower level of protection of the investor. Accordingly, the WTO Panel in *US – Section 337* denied the separability of substantive provisions and procedural provisions serving to enforce them since both affected the competitive opportunities of investors.⁷⁸⁴ The protective function of the dispute settlement mechanism thus militates against application of the severability concept in the field of most-favoured-nation treatment.⁷⁸⁵

The *Yaung Chi Oo* case in principle suggests that MFN clauses, in conjunction with broader dispute settlement clauses in third-party BITs, can form the basis of jurisdiction of an investment tribunal. However, the tribunal dismissed the Claimant's argument concerning the most-favoured-nation clause in very short terms and evinced a complete lack of sensitivity to the issue. Especially, the ruling cited *Maffezini* as evidence for a possibility which that case had in fact explicitly rejected as one of the four public policy exceptions, namely for the possibility to invoke jurisdiction in a situation where the third-party investment treaty provides access to a completely different arbitration forum than that foreseen in the basic treaty. Moreover, the tribunal did not seem to notice that the intention of the Claimant to invoke a different definition of investment was beyond the scope of MFN clauses, given that MFN clauses apply only to the treatment of a defined invest-

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See Part VI B.I.4.

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See also Radi, *The application of the most-favoured-nation clause*, p. 762.

ment, not to the definition of an investment itself.⁷⁸⁶ The case thus hardly offers any guidance concerning the attraction of jurisdictional provisions via MFN clauses.

In *Garanti v. Turkmenistan*, the dissenting arbitrator held that the most-favoured-nation clause can only be applied after a dispute settlement relationship has been established. However, there is no basis for conditioning the right to most-favoured-nation treatment on the prior establishment of a dispute settlement relationship. The majority opinion cites the International Law Commission, which stated:

„The right of the beneficiary State [...] to most-favoured-nation treatment under a most-favoured-nation clause [...] arises at the moment when the relevant treatment is extended by the granting State to a third state or to persons or things in the same relationship with that third State.⁷⁸⁷

Thus, the MFN clause applies to investors from the moment that the host State accords more favourable treatment to an investor from a third State. The finding of the dissenting arbitrator that consent is the cornerstone of ICSID arbitration and that no such consent is given under Article 8 (2) of the relevant treaty must be endorsed. However, it is not argued that most-favoured-nation clauses can bypass the requirement of consent. It follows rather from their interpretation according to the Vienna Convention that consent can be established by means of most-favoured-nation clauses. As a consequence, depending on the wording of each particular MFN clause, it is generally possible to institute arbitral proceedings before a different arbitral forum where investors from third states may seek arbitration.

E. Further Potential Fields of Application

This Chapter examines the applicability of MFN clauses to a number of further procedural and jurisdictional dispute settlement provisions. Apart from domestic litigation periods, among the dispute settlement requirements that may be circumvented are consultation pe-

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See Part V B.

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ILC Draft Articles on MFN Clauses, Article 20(1).

riods, the requirement to exhaust local remedies and fork in the road clauses. In contrast, the definition of investor or investment cannot be broadened by means of the MFN clause. Neither is the importation of an entire dispute settlement mechanism possible.

I. Procedural Requirements

1. Circumvention of Consultation Periods

The great majority of BITs require as a condition for the institution of dispute settlement proceedings that a certain consultation period be observed before the institution of proceedings in order to give the parties to the dispute an opportunity to amicably negotiate a settlement.⁷⁸⁸ One can basically imagine three scenarios in which a most-favoured-nation clause might be applied. First an investor may attempt to invoke dispute settlement provisions which do not require a consultation period at all. Second, an investor could attempt to invoke a treaty with a shorter waiting period than that required under the basic treaty.⁷⁸⁹ And third, the basic treaty may not provide for a fixed time limit at all, but simply stipulate that if no solution can be found, the dispute may be submitted to an international tribunal.⁷⁹⁰ Investors may try to circumvent such opaque provision by referring to a BIT with a clear time limit.

In the context of the question whether the requirement to observe a waiting period is a procedural requirement that may be dispensed with, especially in cases in which there is no prospect of reaching a negotiated settlement, tribunals have generally tended to treat consultation periods as directory and procedural rather than mandatory and jurisdictional in nature.⁷⁹¹ Indeed the consultation period is not a bar to jurisdiction since it does not put

⁷⁸⁸ See, for example, Article 11 of the German Model BIT:

(1) Divergencies concerning investments between a Contracting State and an investor of the other Contracting State should as far as possible be settled amicably between the parties in the dispute.

(2) If the divergency cannot be settled within six months of the date when it has been raised by one of the parties in dispute, it shall, at the request of the investor of the other Contracting State, be submitted for arbitration.

⁷⁸⁹ For example, Art. 9 (2) of the Pakistan-Switzerland BIT requires a twelve-month consultation period, while Art. 8 (2) of the Pakistan-France BIT only requires a six-month consultation period. Swiss investors thus have to wait longer before they can initiate ICSID arbitral proceedings than French investors.

⁷⁹⁰ Eg Art. 11 (1) and (2) of the Germany-Pakistan BIT; Article 9 (2) Chile-Germany BIT.

⁷⁹¹ *Lauder v. The Czech Republic*, Final Award, 3 September 2001, UNCITRAL arbitration, para. 187; *Wena v. Egypt*, Decision on Jurisdiction, 29 June 1999, ICSID Case No. ARB/98/4, para. 891; *SGS v.*

into question the consent of the host state to arbitration. As a procedural rule, it can generally be circumvented by means of the most-favoured-nation clause.

2. Circumvention of the Requirement to Exhaust Local Remedies

It is a well-established rule of customary international law that local remedies must be exhausted before international proceedings are instituted in all cases involving diplomatic protection.⁷⁹² The rule applies when a claim is brought in respect of the rights of a private person, not in inter-State disputes.⁷⁹³ The main reason for the insertion of the local remedies rule is that the state must be afforded an opportunity to redress wrongs by its own organs, by ascertaining the facts of the case and then applying national law.⁷⁹⁴ Reflecting respect for the internal processes of the state, the rationale of the rule is the recognition of the sovereign rights, equality and independence of the Respondent state.⁷⁹⁵ Besides, local remedies relieve international tribunals from the burden of excessive litigation⁷⁹⁶ and provide an opportunity for the parties to settle the dispute at lower costs and with less publicity than international dispute settlement.⁷⁹⁷ For the determination of the limits of the rule, it is instructive to take into account the Claimant's interests, which are impaired to the extent that he can get more efficient justice through international adjudication. Therefore the rule may be dispensed with if local remedies are unsatisfactory and ineffective.⁷⁹⁸ Article 26 ICSID Convention is the reverse of traditional customary international law

Pakistan, Decision on Objections to Jurisdiction, 6 August 2003, ICSID Case No. ARB/01/13, para. 184; *Goetz v. Burundi*, Award, 10 February 1999, ICSID Case No. ARB/95/3, para. 93. In contrast, the tribunal in *Enron v. Argentina* underlined in an obiter dictum that it considered the six-month waiting period not a merely procedural, but a jurisdictional requirement and that a failure to comply with it would lead to a lack of jurisdiction (*Enron v. Argentina*, Decision on Jurisdiction, 2 August 2004, ICSID Case No. ARB/01/3, para. 88).

⁷⁹² *Interhandel Case*, Preliminary Objections, Judgment of 21 March 1959, ICJ Reports 1959, p. 27.

⁷⁹³ On the differentiation between claims relating to private persons and claims of the State, see ITLOS, M/V "Saiga" (No. 2) (*Saint Vincent and the Grenadines v. Guinea*), Separate Opinion of Judge Wolfrum, paras 46, 50 et seq.; ITLOS, M/V "Virginia G" (*Panama v. Guinea-Bissau*), Judgment of 14 April 2014, para. 153; ITLOS, M/V "Virginia G" (*Panama v. Guinea-Bissau*), Dissenting Opinion of Judge Jesus, paras 58-80; ITLOS, M/V "Virginia G" (*Panama v. Guinea-Bissau*), Joint Separate Opinion of Judges Cot and Kelly, paras 2 et seq.

⁷⁹⁴ *Interhandel Case*, Preliminary Objections, Judgment of 21 March 1959, ICJ Reports 1959, p. 27.

⁷⁹⁵ Amerasinghe, Local Remedies in International Law, p. 58.

⁷⁹⁶ Amerasinghe, Local Remedies in International Law, p. 58.

⁷⁹⁷ Amerasinghe, Local Remedies in International Law, p. 61.

⁷⁹⁸ *Claim of Finnish Shipowners*, Award, 9 May 1934, pp. 1503-1504; *Loewen v. United States of America*, Award, 26 June 2003, ICSID Case No. ARB(AF)/98/3, para. 168.

concerning disputes between states by which in the absence of specific rules, local remedies must be exhausted before international dispute settlement may be chosen. Article 26 establishes as a rule that if the parties do not agree otherwise, consent to ICSID arbitration means consent to such arbitration to the exclusion of any other remedy, which includes redress by national courts.⁷⁹⁹ Exhaustion of local remedies is therefore usually not required, which is also reflected in the majority of BITs. The investment chapter of NAFTA also waives the local remedies rule.⁸⁰⁰ However, Article 26, second sentence of the ICSID Convention specifically mentions the possibility for the Contracting States to condition their consent to arbitration on the prior exhaustion of local administrative or judicial remedies.⁸⁰¹

The requirement to exhaust local remedies has been cited by the *Maffezini* tribunal as a public policy requirement that may not be overridden by a most-favoured-nation clause. However, as argued above, the exception of public policy requirements is not convincing. Therefore most-favoured-nation clauses can be used to waive the applicability of the procedural requirement of exhaustion of remedies.

This result remains the same even if one draws a distinction between procedural and jurisdictional requirements. The requirement of exhaustion of local remedies does not directly relate to the consent of the parties to submit the dispute to the court and does not challenge the power of the tribunal. It does not deprive the court of jurisdiction, but rather governs the timing of decision-making. Accordingly, it is a procedural rather than a jurisdictional requirement, with non-exhaustion barring admissibility rather than jurisdiction.⁸⁰²

⁷⁹⁹ Article 26 provides: "Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention."

⁸⁰⁰ Dodge, pp. 373-376. See NAFTA Article 1121 (1) (b), which expressly mentions domestic courts without requiring exhaustion of local remedies. Instead the provision speaks of the „right“ of investors to initiate or continue proceedings in domestic courts.

⁸⁰¹ For a requirement to exhaust local remedies, see Art. 4 (3) the Ghana-Romania BIT of 22 March 1989; Art. 7 (2) of the 1981 Romania-Sri Lanka BIT.

⁸⁰² Crawford, Brownlie's Principles of Public International Law, p. 710; Shihata, The power of the International Court, p. 106; Santulli, Droit du contentieux international, pp. 264, 265; *Interhandel case*, Preliminary Objections, Judgment of 21 March 1959, ICJ Reports 1959, p. 26; *Ambatielos case* (merits: obliga-

It is not an obstacle to the application of the most-favoured-nation principle that the exhaustion of local remedies is a fundamental principle of customary international law. This fundamental nature of the principle was stressed in the ELSI case, where the ICJ held:

“The Chamber has no doubt that the parties to a treaty can therein either agree that the local remedies rule shall not apply to claims based on alleged breaches of the treaty; or confirm that it shall apply. Yet the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so.”⁸⁰³

In the ELSI case, the relevant provision of the FCN treaty conferring compulsory jurisdiction on the court contained no indication that the local remedies requirement should be dispensed with, which led to the application of customary international law. This reasoning cannot be transferred to the context of investment agreements, where the typical most-favoured-nation clause gives sufficient indication that the requirement can be dispensed with in case the host state has renounced it in a third-party treaty.

II. Jurisdictional Provisions

1. Circumvention of Fork-in-the-Road Clauses

A considerable number of BITs contain a fork-in-the-road (*electa una via*) provision stipulating that disputes may, at the choice of the investor, be submitted either to the domestic jurisdictions of the Contracting Parties involved or to international arbitration, and that once the choice of one or the other of these fora is made, such choice shall be final.⁸⁰⁴ A fork-in-the-road provision thus compels the investor to make a decision *ab initio* as to whether to pursue the adjudication of the dispute in domestic courts or before an interna-

tion to arbitrate), Judgment of 19 May 1953, ICJ Reports 1953, p. 23; *ELSI case*, Judgment of 20 July 1989, ICJ reports 1989, p. 42; *RosInvestCo v. Russia*, Award on Jurisdiction, October 2007, Arbitration Institute of the Stockholm Chamber of Commerce, Case No. V 079/2005, para. 152.

⁸⁰³ *ELSI case*, Judgment of 20 July 1989, ICJ reports 1989, p. 42.

⁸⁰⁴ See, e.g., Article VII (2) and (3) of the Argentina-United States BIT.

tional tribunal, thus avoiding the concurrence of domestic and international proceedings. Difficulties in interpretation arise when tribunals have to decide whether the criterion of submission to domestic jurisdiction has been fulfilled. Under a fork-in-the-road provision, access to international arbitration is only precluded if the same dispute between the same parties has been submitted to the domestic courts of the host State.⁸⁰⁵ The *Maffezini* tribunal found that a fork-in-the-road clause reflected the host State's public policy and could thus not be overridden by application of a most-favoured-nation clause.⁸⁰⁶ However, as argued before, the public policy argumentation should be discarded. The investor rather has the right to invoke beneficiary silence in a third-party treaty in case such treaty does not contain a fork-in-the-road clause. The disadvantageous provision prohibiting the submission to another dispute settlement forum can be circumvented by an MFN clause.

2. Importation of an Entire Dispute Settlement Mechanism When the Basic BIT Does not Contain a Dispute Settlement Mechanism

There are investment agreements which do not contain an investor-state dispute settlement mechanism at all, like for example the Germany-Pakistan treaty, which only contains provisions for state-state arbitration, and Chapter 11 of the Australia-United States Free Trade Agreement (AUSFTA), which contains substantial protections for investors, but does not allow them to bring claims on the ground of an alleged violation of AUSFTA before an arbitration panel.⁸⁰⁷ The likely reason for the absence of investor-state dispute settlement provisions in AUSFTA is the desire to avoid the experience of the United

⁸⁰⁵ *Compañía de Aguas del Aconquija and Compagnie Générale des Eaux v. Argentina*, Award, 21 November 2000, paras. 53-55; *Genin v. Estonia*, Award, 25 June 2001, ICSID Case No. ARB/99/2, paras 331-333; *Lauder v. The Czech Republic*, Final Award, 3 September 2001, UNCITRAL arbitration, paras 162-163; *Middle East Cement v. Egypt*, Award, 12 April 2002, ICSID Case No. ARB/99/6, para. 71; *CMS v. Argentina*, Decision on Jurisdiction, 17 July 2003, ICSID Case No. ARB/01/8, para. 80; *Azurix v. Argentina*, Decision on Jurisdiction, 8 December 2003, ICSID Case No. ARB/01/12, paras 88-90; *Enron v. Argentina*, Decision on Jurisdiction, 2 August 2004, ICSID Case No. ARB/01/3, paras 97-98.

⁸⁰⁶ *Maffezini v. Spain*, Decision on Jurisdiction, 25 January 2000, ICSID Case No. ARB/97/7, para. 63.

⁸⁰⁷ See Article 11.16 AUSFTA, which provides for the possibility to enter into consultations if a Party is in favour of introducing an investor-state dispute settlement mechanism. Since the agreement also excludes to bring claims concerning an alleged violation of AUSFTA before the domestic legal system (Article 21.5 AUSFTA), the only way of enforcing the agreement's investment provisions is through the state-to-state dispute settlement provisions provided in AUSFTA Chapter 21. Thus, the parties to AUSFTA have created a system that depends entirely on diplomatic protection.

States and Canada under NAFTA. Both Canada and the United States had entered into bilateral investment treaties which contained investor-state mechanisms, but these treaties had been concluded with less developed countries. While the obligations of BITs are reciprocal in theory, in practice it is usually only the less developed country that bears the risk of being sued, since there are rarely foreign investors from less developed countries that invest in the United States or Canada. However, since the enactment of NAFTA, the United States and Canada have been the addressees of a series of claims. Moreover, the Australian government pointed out that both Australia and the United States had legal systems that were developed enough to resolve investment disputes expeditiously and without bias.⁸⁰⁸

Since the most-favoured-nation clause only operates in the context in which it was inserted, its scope is limited to the subject-matter of the relevant treaty.⁸⁰⁹ When a certain clause in a third-party treaty has no corresponding provision in the basic treaty, the most-favoured-nation clause is therefore not applicable. Thus, when the basic treaty does not contain a dispute settlement provision, the MFN clause cannot be employed to import a dispute settlement mechanism from a third-party BIT.⁸¹⁰

F. Conclusion

While the concept of jurisdiction refers to the power of a court to adjudicate upon a matter, the non-fulfilment of procedural provisions is not an obstacle to jurisdiction, but can be a bar to the admissibility of a claim. Several arbitral tribunals have made a distinction between procedural and jurisdictional provisions, arguing that MFN clauses could not create jurisdiction in case there was no consent to such jurisdiction in the basic treaty and that they should therefore only be applicable to procedural provisions.

However, this distinction cannot be upheld. Tribunals should rather generally apply MFN clauses to dispute settlement provisions, be they procedural or jurisdictional. This does

⁸⁰⁸ See Dodge, *Investor-State Dispute Settlement Between Developed Countries*, p. 2 (quoting the Australia Department of Foreign Affairs and Trade: “[...] both countries have robust and sophisticated domestic legal systems that provide adequate scope for investors, both domestic and foreign, to pursue concerns about government actions.”).

⁸⁰⁹ See Part VI B.I.2.

⁸¹⁰ See also Schill, *The Multilateralization of International Investment Law*, p. 183.

not mean that the fundamental requirement of consent can be bypassed via the most-favoured-nation clause. It is a fundamental principle of international law that without consent to arbitration, the tribunal does not have jurisdiction to adjudicate a claim. The essential consent is given in the relevant most-favoured-nation clause.

This result is supported by an interpretation of MFN clauses according to the Vienna Convention on the Law of Treaties. Of course, the specific wording of MFN clauses has to be examined in each particular case. However, with the term “treatment” referring to the entire legal regime that an investor is exposed to, the language of the majority of MFN clauses can be interpreted as encompassing the dispute settlement provisions of a BIT. An examination of the object and purpose of MFN clauses as well argues in favour of applying the clause to dispute settlement provisions. The aim of MFN clauses is to level the competitive opportunities of investors, an aim which is best served by applying the clause to dispute settlement provisions as well. Notably, the fact that value of the substantive provisions codified in a treaty is largely dependent on the availability of an effective enforcement procedure does not by itself argue in favour of applying MFN clauses to dispute settlement. International law is marked by a facultative system of jurisdiction, which may not be replaced by a compulsory system of jurisdiction purely for the convenience of investors. It is rather the term “treatment” which encompasses procedural and jurisdictional treatment and the impact that the implementation of substantive obligations has on investors’ competitive opportunities which argue in favour of applying MFN clauses both to procedural and jurisdictional dispute settlement provisions.

There is no unequivocal ICJ jurisprudence which can be used to support the view that MFN clauses should be applicable to dispute settlement provisions. Neither does the Court’s case law argue against such application.

There are two more arguments which militate in favour of applying MFN clauses not only to procedural, but also to jurisdictional provisions. First, there is no difference between the consent to substantive or procedural and jurisdictional requirements which justifies differential treatment. MFN clauses rather incorporate the consent to jurisdiction in case there is such consent in a third-party treaty, just as they incorporate the consent to substantive or procedural provisions in case there is such consent in the third-party treaty. Thus, the judicial sovereignty of the host state does not contradict the operation of the

clause. Second, the jurisdictional character of a provision does not require any deviation from the regular regime of interpretation applicable to treaties, with the result that MFN clauses should not be interpreted restrictively on account of a rule of restrictive interpretation when it comes to the importation of jurisdictional provisions.

Given the result that MFN clauses are generally applicable to procedural and jurisdictional dispute settlement provisions, it is possible to circumvent not only domestic litigation periods, but also the requirement to exhaust local remedies and fork-in-the-road clauses. In contrast, the definition of investor or investment cannot be broadened by means of the MFN clause, since the existence of an investor or investment is a necessary prerequisite for the applicability of MFN clauses. Neither is it possible to import an entire dispute settlement mechanism in cases where the basic BIT does not contain any. Since the most-favoured-nation clause only operates in the context in which it was inserted according to the *ejusdem generis* principle, its scope is limited to the subject-matter of the relevant treaty. Thus, when the basic treaty does not contain a dispute settlement provision, the MFN clause cannot be employed to import a dispute settlement mechanism from a third-party BIT.

In order to achieve more predictability both for the investor and for the host state, it would be desirable to promote a uniformisation of standards included in bilateral investment treaties. However, this uniformisation is also connection with certain risks, with the decisions of arbitral tribunals depending on the legal views of the different arbitrators. Thus, against the background of the complex effects of the most-favoured-nation principle and the differing standards in the bilateral treaty network, another option to evade the problems of unpredictability and difficulties in the negotiation of treatment standards and nevertheless achieve legal equality could be the creation of a multilateral framework⁸¹¹. However, attempts to draft a multilateral agreement failed in 1998. It therefore remains crucial for host States to make exceptions to most-favoured-nation treatment in the MFN clause itself in order to control its application. For example, States have the possibility to explicitly exempt dispute settlement provisions from the application of the MFN clause,

⁸¹¹ See also Braun/ Schonard, Der neue deutsch-chinesische Investitionsförderungs- und -schutzvertrag, p. 562.

which has been done in a number of recent treaties. Annex III of the Canadian Model BIT 2004 relating to “exceptions from MFN treatment” even states that MFN treatment “shall not apply to treatment accorded under all bilateral or multilateral international agreements in force or signed prior to the date of entry into force of this agreement.” This demonstrates that reservations are a key technique to preserve flexibility in the pursuit of national policy objectives or to preserve the reciprocal nature of an agreement.

Part VII: Selective Invocation of Provisions from Third-Party BITs

The broad application of the most-favoured-nation principle raises the question whether a party can invoke more favourable provisions without simultaneously having to take into account balancing disadvantages possibly inserted in the third-party BIT. One option is to argue that investors may invoke more favourable treatment in one respect regardless of less favourable treatment in another. Another option is to allow only the importation of the third-party treaty provisions as a whole.

The question first came up in the *Siemens* case, in which the Respondent State Argentina opposed the selective importation of more favourable provisions from the third-party BIT. Under the interpretation advanced by the *Siemens* tribunal, investors may benefit from favours granted to third States without having to abide by duties that were inserted in the third-party treaty in order to balance the favours. Argentina had argued that if the investor was allowed to have recourse to the Argentine-Chilean BIT to evade the domestic litigation period, it was also bound to adhere to the fork-in-the-road clause which was included in the Chile BIT and was absent in the Germany BIT.⁸¹² According to the Respondent, the most-favoured-nation clause should cover the entire third-party treaty and the Claimant could choose between the application of one or the other treaty, but could not pick and choose beneficial provisions from various treaties.⁸¹³ Claiming that the investor had already submitted the case to domestic jurisdiction, the Respondent denied the jurisdiction

⁸¹² Article X (2) of the Argentina-Chile BIT provides: “[...] Una vez que un nacional o sociedad haya sometido la controversia a las jurisdicciones de la Parte Contratante implicada o al arbitraje internacional, la elección de uno u otro de esos procedimientos será definitiva.”

⁸¹³ *Siemens v. Argentina*, Decision on Jurisdiction, 3 August 2004, ICSID Case No. ARB/02/8, para. 124.

of the ICSID tribunal. On the other hand, the Claimant argued that the most-favoured-nation clause “implies the right to select those aspects of provisions in different treaties that favor the MFNC’s beneficiary most.”⁸¹⁴ The tribunal agreed with the Claimant that the importation of single provisions in isolation from the rest of the treaty was possible. The application of the MFN clause was therefore limited to the benefits conferred by the third-party treaty and did not extend to its disadvantages. Accordingly, the tribunal came to the conclusion that Germany could import the right of direct access to arbitration from the Argentina-Chile BIT without being bound by the fork-in-the-road clause of that BIT. It reached this conclusion although explicitly acknowledging that with treaties being negotiated in a package, “[t]he disadvantages may have been a trade-off for the claimed advantages.”⁸¹⁵ The tribunal based its finding on the view that the most-favoured-nation clause “relate[d] only to more favourable treatment”⁸¹⁶ and that another understanding of the clause “would defeat the intended result of the clause to harmonize benefits agreed with a party with those considered more favourable granted to another party.”⁸¹⁷

On the other hand, the *Plama* tribunal observed that it could not be the intention of contracting States that investors should have the option, by way of a most-favoured-nation clause, to “pick and choose” dispute resolution provisions from the various BITs they have concluded.⁸¹⁸ The tribunal argued that this would even be counterproductive in terms of a harmonization of dispute settlement provisions, leading to a “chaotic situation” in which States could be confronted with a large number of permutations of dispute settlement mechanisms from the various investment treaties it has concluded.⁸¹⁹

⁸¹⁴ *Siemens v. Argentina*, Decision on Jurisdiction, 3 August 2004, ICSID Case No. ARB/02/8, para. 116.

⁸¹⁵ *Siemens v. Argentina*, Decision on Jurisdiction, 3 August 2004, ICSID Case No. ARB/02/8, para. 120.

⁸¹⁶ *Siemens v. Argentina*, Decision on Jurisdiction, 3 August 2004, ICSID Case No. ARB/02/8, para. 120.

⁸¹⁷ *Siemens v. Argentina*, Decision on Jurisdiction, 3 August 2004, ICSID Case No. ARB/02/8, para. 120.

⁸¹⁸ *Plama v. Bulgaria*, Decision on Jurisdiction, 8 February 2005, ICSID Case No. ARB/03/24, para. 219.

⁸¹⁹ *Plama v. Bulgaria*, Decision on Jurisdiction, 8 February 2005, ICSID Case No. ARB/03/24, para. 219.

The concerns of the *Plama* tribunal, which imagined a large number of permutations of dispute settlement mechanisms that may evolve from the selective invocation of favours, are hardly justified. If the selective invocation of BIT provisions is allowed, favours will usually be combined similarly since a situation in which the same provision which was in one case beneficiary to an investor may in another be disadvantageous is hardly imaginable. The approach adopted by the *Siemens* tribunal is therefore not at odds with the policy behind MFN clauses, which is to abolish discrimination and inequalities among investors from different countries.

Moreover, bearing in mind the objective of MFN clauses to extend only more (and not less) favourable treatment, invocation of a benefit under a most-favoured-nation clause should not necessarily entail the obligation to invoke the third-party treaty in its entirety, including its less favourable provisions. Most-favoured-nation clauses do not refer to “more favourable treaties”, but to “treatment”. It is therefore not the effect of a treaty as a whole that has to be evaluated, but rather the various treatment standards in a treaty that have to be examined separately. The balancing element is not a simultaneous transfer of disadvantages, but the reciprocal grant of most-favoured-nation treatment to the granting State. The concerns about the selective invocation of provisions should therefore not be met by denying the effect of the MFN clause to harmonize benefits. Instead, if States wish to limit the extension of certain treatment standards to third-State investors and thus preserve material reciprocity, they have to exempt certain treatment standards from the most-favoured-nation clause. Thus, BITs should not be balanced in their entirety, but MFN clauses generally allow the importation of selective provisions without requiring consideration of less favourable provisions.

However, as a limiting principle to this approach, the balancing of treatment standards does not mean that every single provision can be offset against another single provision in third-party treaties. Departing from the wording of MFN clauses, which refers to “more favourable treatment”, those features of a BIT which constitute one single treatment standard should not be offset against each other. Thus, those provisions which form one single treatment standard are as closely connected as to allow only conjoint incorporation. In this respect, BITs should be understood as incorporating various treatment standards which may consist of sets of provisions including, for example, provisions dealing with

pre-establishment issues, with expropriation and compensation, fair and equitable treatment or with dispute settlement.⁸²⁰ Notably, rules merged in one article in an investment treaty should generally be imported jointly, since it can be assumed that they were understood by the parties to form one treatment standard. Investors can thus import a set of related provisions, for example the provisions relating to dispute settlement, from another treaty without having to import the entire treaty, since this set of provisions constitutes the relevant treatment standard. They can however not import one single dispute settlement provision, detached from the other dispute settlement provisions that are included in the third-party treaty. The *Siemens* tribunal should therefore have denied less favourable treatment under the third-party treaty, given that the fork-in-the-road provision inserted in the third-party treaty was also part of the treatment concerning dispute settlement.

Part VIII: The Concept of Like Circumstances

This Part contains an examination of the like circumstances requirement in MFN clauses, including a comparison with the likeness requirement in the non-discrimination provisions of GATT and GATS, and a survey of the comparators relevant for the determination of like circumstances.

The implementation of the principle of non-discrimination requires the determination of a pair of comparison, i.e. a category of subjects among which differentiations must not be made. Different treatment is justified vis-à-vis investors from different foreign countries only if they are in different objective situations. Many most-favoured-nation clauses in investment treaties therefore include a reference to a “like circumstances” requirement, providing that investors and investments shall only benefit from most-favoured-nation

⁸²⁰ *Hochtief AG v Argentine Republic*, Decision on Jurisdiction, 24 October 2011, ICSID Case No. ARB/07/31, para. 98: “However, the majority did note that the MFN provision did not permit the selective picking of components from each set of conditions, to manufacture a synthetic set of conditions to which no state's nationals would be entitled. The investor must rely on the whole scheme as set out in either the Argentina-Chile BIT or the Argentina-Germany BIT.” See also Vesel, *Clearing a Path Through a Tangled Jurisprudence*, p. 169; Chukwumerije, p. 622.

treatment if more favourable treatment is accorded to investments or investors in like circumstances.⁸²¹

The most-favoured-nation principle only has a marginal impact on national regulation since in the case of most-favoured-nation treatment, it is less likely than in national treatment cases that a measure originates in the preference of one nationality over another. National regulations are sometimes used in a protectionist way to give local producers a competitive advantage, but usually do not intentionally discriminate between investors from certain third States in comparison to other third States. Since the regulatory powers of States are more likely to be affected when investors claim national treatment than when they claim most-favoured-nation treatment, the majority of cases dealing with the likeness requirement do so in the context of the national treatment obligation. However, even if host States do not discriminate against third States on account of nationality, but rather in order to favour certain industries, the most-favoured-nation obligation may play a role in case domestic investors and third-State investors both operate in that kind of industry.

A. Formulations of the Requirement

There are different formulations of the likeness requirement in international investment agreements. Sparsely, BITs limit MFN treatment to investments and investors in the “same circumstances”⁸²², which is a very restrictive formulation, given that entirely identical circumstances can hardly ever be found. Other more common formulations, such as “like situations”⁸²³, “similar situations” and “like circumstances”⁸²⁴, can be regarded as synonymous.⁸²⁵ There are also bilateral investment treaties which do not refer to the re-

⁸²¹ See, *inter alia*, Art. 3 (1) of the 1994 Germany-Barbados BIT; Art. 3 (1) of the 1994 Germany-Kuwait BIT; Art. 4 (1) of the 2004 Canadian Model BIT; Art. 4 (1) of the 2004 US Model BIT; Art. 1103 (1) NAFTA.

⁸²² Reference to “same circumstances” is made by early United Kingdom BITs, eg Art. 3 (1) and (2) of the 1982 UK-Belize BIT.

⁸²³ This formulation can be found in some US BITs, see eg Article 2 (2) of the 1983 US-Senegal BIT.

⁸²⁴ NAFTA Article 1103.

⁸²⁵ This was confirmed by the NAFTA tribunal in *US-Trucking* with regard to the NAFTA compared to several US BITs (*US-Trucking*, Final Panel Report, 6 February 2001, Secretariat File No. USA-MEX-98-2008-01, para. 249).

quirement of like circumstances.⁸²⁶ Whether the agreement should contain a reference to the like circumstances requirement was the object of controversy during the negotiations leading to the Draft MAI. While some delegations would have preferred to clarify the comparative context of the principle, others contended that the insertion of a “like circumstances” requirement opened the way to abuse.⁸²⁷ However, the insertion or non-insertion of a like-circumstances requirement does not lead to legally different results as regards the effect of the clause. As a requirement of non-discrimination, the most-favoured-nation principle requires by its very nature the comparison of treatment accorded to foreign investors and therefore the formation of categories as a basis of comparison. Whether or not a like circumstances requirement is explicitly included in a most-favoured-nation clause, there is always the need to ascertain whether the respective situations are comparable. Otherwise the treatment would not be less favourable but simply different.⁸²⁸

B. Like Products and Like Services/ Service Suppliers in the GATT/ GATS

There is a vast amount of case law and literature on the concepts of like products and like services in world trade law. Although it is not possible to directly transfer the arguments that are valid in world trade law to the investment sphere, the rationale used by WTO panels and the Appellate Body can still serve as a guideline to identify which comparators might – and might not – be applied in investment cases.

The notion of “like products” is a central notion of world trade law which is incorporated in several articles of the GATT and can also be found in various other WTO trade agreements.⁸²⁹ There is no uniform definition of like products since the concept is employed in a variety of provisions that serve different purposes.⁸³⁰ GATT and WTO dispute settle-

⁸²⁶ See, *inter alia*, Art. 3 (1) of the German Model BIT, Art. 10 (7) ECT, Art. 8 (1) of the ASEAN Framework Agreement; Art. 4 (1) of the 1994 UK-India BIT.

⁸²⁷ The Multilateral Agreement on Investment, Commentary to the Consolidated Text, 22 April 1998, DAF/MAI(98)8/REV1.

⁸²⁸ See also Krajewski/Ceyssens, *Internationaler Investitionsschutz und innerstaatliche Regulierung*, p. 197.

⁸²⁹ See *inter alia* articles I, II:2, III:2 and 4, VI:1, IX:1, XI:2 (c), XIII:1, XVI:4, XIX:1 GATT; Article 2.3 of the SPS agreement.

⁸³⁰ In *Japan-Alcohol*, the Appellate Body held: “The concept of ‘likeness’ is a relative one that evokes the image of an accordion. The accordion of ‘likeness’ stretches and squeezes in different places as different provisions of the *WTO Agreement* are applied. The width of the accordion in any one of those places must

ment practice has used the criteria developed by the Working Group on *Border Tax Adjustments* to affirm or reject likeness in GATT, which include the product's properties, nature and quality, *i.e.* its physical attributes, the product's end-use in a given market, and consumers' tastes and habits, *i.e.* consumers' perceptions and behaviour, which may change from country to country.⁸³¹ These criteria have been supplemented in the case law of panels and the Appellate Body by the international tariff classification of the relevant products.⁸³² In the context of GATT's national treatment standard, two GATT panels introduced an "aim and effects" test based on a broad understanding of Article III:1 GATT.⁸³³ The aim and effects approach advocates that in determining like products under Article III, one should consider, in addition to the other criteria, the basic policy objective of the measure as set out in Article III:1, which states that regulatory measures "should not be applied to imported or domestic products so as to afford protection to domestic production". Under this test, the legitimacy of internal regulations can be determined by asking whether they have a *bona fide* regulatory purpose and on the basis of their effects on the conditions of competition.⁸³⁴ This approach was however rejected by the Panel in *Japan-Alcoholic Beverages* with regard to Article III:2, first and second sentence GATT, principally because it was not grounded in treaty language and because its application would have the effect of rendering Article XX superfluous.⁸³⁵ According to that report,

be determined by the particular provision in which the term 'like' is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply." (Appellate Body Report, *Japan-Alcohol*, 4 October 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 21) This was affirmed in *EC-Asbestos* (Appellate Body Report, EC-Asbestos, signed on 16 February 2001, WT/DS135/AB/R, para. 88).

⁸³¹ Report of the Working Party on *Border Tax Adjustments*, para. 18. See also Sacerdoti/ Castren, Article I, in: Wolfrum/ Stoll/ Hestermeyer, WTO, Trade in Goods (2011), paras 14, 15, Hestermeyer, Article III, in: Wolfrum/ Stoll/ Hestermeyer, WTO, Trade in Goods (2011), paras 28-27, 67-75.

⁸³² This criterion was added by the Panel on *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages* (Panel Report adopted on 10 November 1987, L/6216 - 34S/83, para. 5.6).

⁸³³ Panel Report, *US-Alcoholic and Malt Beverages*, adopted on 19 June 1992, DS23/R - 39S/206, paras 5.25, 5.71-5.77; *United States – Taxes on Automobiles*, dated 11 October 1994 (not adopted), DS31/R, paras 5.23-5.37. Endorsing the aim and effects test Howse/ Regan, EJIL 11 (2000), pp. 260-268; with respect to the non-discrimination clauses of the GATS Zdouc, WTO Dispute Settlement Practice Relating to the GATS, p. 342.

⁸³⁴ Hudec, GATT/WTO Constraints on National Regulation, p. 368.

⁸³⁵ *Japan-Alcohol*, Panel Report, 11 July 1996, WT/DS8/R, WT/DS10/R, WT/DS11/R, paras 6.16-6.18; upheld by the Appellate Body, (*Japan-Alcohol*, 4 October 1996, WT/DS8/AB/R, WT/DS10/AB/R,

the central feature of the analysis whether the products are like should be a market-place-based analysis of the competitive relationship between products.⁸³⁶ In *EC-Asbestos*, which involved an alleged violation of Article III:4 GATT, the Appellate Body affirmed that the general principle in Article III:1 should be taken account of, although not reverting to an “aim and effects” analysis.⁸³⁷ The Appellate Body did not examine whether the measures pursued a legitimate regulatory purpose, but rather found decisive the competitive relationship of the products in the market-place to determine whether the products were like. However, in the examination whether the products were in a competitive relationship, the Appellate Body not only pointed out that asbestos and PCG fibres were chemically distinct⁸³⁸, but also that the health risk made it implausible that there was a competitive relationship between asbestos and PCB fibres as regards consumer behaviour.⁸³⁹ Thus, it took into account the products’ effects on health not through an examination of regulatory purpose, but rather by making this fundamental interest relevant to an analysis of the competitive relationship between the products in the market place.⁸⁴⁰ With this approach, non-economic concerns can be addressed only on condition that consumers perceive a difference between two products. It should be noted, however, that the WTO competition test indicates more and more that the Appellate Body and Panels take into account policy objectives.⁸⁴¹

The GATS concept of like services and service suppliers is still an opaque concept. It is unclear what characteristics should be compared to determine the likeness of services and service suppliers, especially since the traditional GATT approach to like products cannot

WT/DS11/AB/R, p. 27). The rejection of the aim and effects test was confirmed as regards GATT Article III:4 and GATS Articles II and XVII in *EC-Bananas* (Appellate Body Report, 9 September 1997, WT/DS27/AB/R, paras 216, 241, 246, 248).

⁸³⁶ *Japan – Alcohol*, Panel Report, 11 July 1996, WT/DS8/R, WT/DS10/R, WT/DS11/R, para. 6.22; *Japan – Alcohol*, Appellate Body Report, 4 October 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 25.

⁸³⁷ *EC-Asbestos*, Appellate Body Report, 16 February 2001, WT/DS135/AB/R, paras 93-126.

⁸³⁸ *EC-Asbestos*, Appellate Body Report, 16 February 2001, WT/DS135/AB/R, paras. 118, 121.

⁸³⁹ *EC-Asbestos*, Appellate Body Report, 16 February 2001, WT/DS135/AB/R, paras. 114, 115.

⁸⁴⁰ Endorsing the objective market-based approach Puth, p. 245; Bronckers/ McNelis, pp. 374-476.

⁸⁴¹ *Chile-Alcoholic Beverages*, Appellate Body Report, 13 December 1999, WT/DS87/AB/R, para. 71; *Dominican Republic – Import and Sale of Cigarettes*, Appellate Body Report, 25 April 2005, WT/DS302/AB/R, para. 96; *EC – Biotech Products*, Reports of the Panel, 29 September 2006, WT/DS291/R, WT/DS292/R, WT/DS293/R, para. 7.2514.

simply be transferred to the GATS context.⁸⁴² Physical properties, which are referred to in the context of trade in goods, are inappropriate for the determination of likeness of services because services are usually intangible.⁸⁴³ Moreover, there is no suitable international tariff classification system for services. The Services Sectoral Classification List developed by the GATT Secretariat during the Uruguay Round is only of limited value since it was developed for statistical purposes and is not based on the competitive relationship of services.⁸⁴⁴ Moreover, the regulation of services is generally more complex than the regulation of goods. The scope of making further regulatory distinctions may therefore be greater in the case of services than in the case of goods.⁸⁴⁵

In parallel to the physical properties examined in the context of trade in goods, the nature and the characteristics of a service can be a relevant criterion to determine the likeness of two services.⁸⁴⁶ Accordingly, the Panel on *EC-Bananas III* held that wholesale trading services with respect to EC and traditional ACP bananas were like wholesale trading services with respect to third-country and non-traditional ACP bananas because the services could only be distinguished by the origin of the bananas.⁸⁴⁷ In *US – Gambling*, the US discussed the nature and risks of different kinds of games.⁸⁴⁸ Other relevant criteria for

⁸⁴² Zdouc, WTO Dispute Settlement Practice Relating to the GATS, p. 342; Verhoosel, National Treatment and WTO Dispute Settlement, p. 59; Krajewski, National Regulation and Trade Liberalisation in Services, p. 99.

⁸⁴³ Krajewski, National Regulation and Trade Liberalisation in Services, p. 99; Mattoo, National treatment in the GATS, pp. 127, 128; Krajewski, Article XVII, in: Wolfrum/ Stoll/ Feinäugle (eds), GATS Commentary, para. 21. Wolfrum, in: Wolfrum/ Stoll/ Feinäugle (eds), WTO – Trade in Services, Article II, para. 36. The Services Sectoral Classification List developed by the GATT Secretariat during the Uruguay Round was developed for statistical purposes and is not based on the competitive relationship of services. Their classification can therefore not be regarded as a decisive factor to determine likeness (Krajewski, Article XVII, in: Wolfrum/ Stoll/ Feinäugle (eds), GATS Commentary, para. 24).

⁸⁴⁴ Krajewski, Article XVII, in: Wolfrum/ Stoll/ Feinäugle (eds), GATS Commentary, para. 24, Wolfrum, Article II, in: Wolfrum/ Stoll/ Feinäugle (eds), GATS Commentary, para. 37.

⁸⁴⁵ Mattoo, National treatment in the GATS, p. 128. In *US-Gambling Services*, the United States argued that in interpreting and applying the likeness analysis under Article XVII GATS, the existence of regulatory distinctions between services should be taken into account directly and “not solely through the lens of consumer perceptions” (*US-Gambling Services*, Panel Report, 10 November 2004, WT/DS285/R, para. 3.188). For reasons of judicial economy, the Panel and the Appellate Body did not rule on the claimed inconsistency of the challenged measures with the United States’ national treatment obligation under Article XVII GATS and therefore did not contribute to the clarification of the likeness requirement (*US-Gambling Services*, Panel Report, 10 November 2004, WT/DS285/R, para. 6.426).

⁸⁴⁶ Krajewski, Article XVII, in: Wolfrum/ Stoll/ Feinäugle (eds), GATS Commentary, paras 20, 21.

⁸⁴⁷ *EC-Bananas III*, Panel Report, 22 May 1997, WT/DS27/R, para. 7.322.

⁸⁴⁸ *US-Gambling*, Panel Report, WT/DS285/R, paras 3.185-3.196.

the determination of like services and service suppliers are consumers' tastes and habits and the end-use of a service⁸⁴⁹. Using these criteria, services can be considered like if they are regarded as substitutable by consumers or if they are used for similar purposes.⁸⁵⁰

Regarding service suppliers, their likeness can be based on the characteristics of the service suppliers. Moreover, the Panel in *EC-Bananas III* held that to the extent that entities provide like services, they are like service suppliers.⁸⁵¹ It is true that suppliers of unlike services will usually not be like service suppliers. However, the language of the non-discrimination provisions in the GATS clearly refers to like "services and service suppliers". The likeness of the service should therefore not be the only factor to determine the likeness of suppliers.⁸⁵²

C. Comparators Relevant to the Determination of Like Circumstances in the Investment Sphere

Given that investment treaties require no less favourable treatment "in like circumstances" instead of referring to non-discriminatory treatment of like products, services, investors or investments, arguments that are valid in the context of world trade law cannot simply be transferred to the investment sphere. For example, since investment treaties do not merely require a comparison of the products two investors produce or of the investment or investor, but broadly refer to the requirement of like circumstances, the concept of like circumstances in investment law allows to take into account more factors than the like product concept in WTO law.⁸⁵³ With the broader language of non-discrimination provisions in investment treaties, there is no need to ask whether it is possible to introduce an aims and effects test in order to examine whether the state pursues a legitimate regula-

⁸⁴⁹ Krajewski, National Regulation and Trade Liberalisation in Services, p. 99; Mattoo, National treatment in the GATS, p. 128; Wolfrum, in: Wolfrum/ Stoll/ Feinäugle (eds), GATS Commentary, Article II, para. 38.

⁸⁵⁰ Krajewski, Article XVII, in: Wolfrum/ Stoll/ Feinäugle (eds), GATS Commentary, para. 22.

⁸⁵¹ *EC-Bananas III*, Panel Report, 22 May 1997, WT/DS27/R, para. 7.322. Affirmed in *Canada-Autos* (Panel Report, 11 February 2000, WT/DS139/R, WT/DS142/R, para. 10.248). For a critique of this finding, see Krajewski, National Regulation, p. 104; Verhoosel, National Treatment, at 61; Zdouc, WTO Dispute Settlement Practice Relating to the GATS, pp. 332, 333.

⁸⁵² Krajewski, Article XVII, in: Wolfrum/ Stoll/ Feinäugle (eds), GATS Commentary, para. 34; Wolfrum, Article II, in: Wolfrum/ Stoll/ Feinäugle (eds), GATS Commentary, para. 44.

⁸⁵³ See also Baetens, Discrimination on the Basis of Nationality, p. 315.

tory objective. Accordingly, the tribunal in *Methanex v. USA* refused to apply the test used under the GATT, arguing that “trade provisions were not to be transported to investment provisions”.⁸⁵⁴ NAFTA jurisprudence has interpreted the like circumstances requirement as being broader than a mere competitive test as applied under the GATT approach, interpreting the requirement as allowing a panel to take into account regulatory distinctions and weigh them in the light of a “legitimate objective”.⁸⁵⁵

According to OECD practice, the determining factors are whether the two enterprises operate in the same sector and whether the respective state measure pursues a legitimate public policy.⁸⁵⁶ Not only does this interpretation conform to the broader language of the requirement, but it is also a corollary to the intrusive nature of foreign investment, which is due to the presence of investors in the host country and which may enhance the need of host States to regulate their commercial operations in order to pursue important public policies. This Chapter deals with the comparators that are relevant for the determination of like circumstances.

I. Competitive Situation and Economic Sector

The goal of the most-favoured-nation obligation is to provide foreign investors with the promise of effective equality of competitive opportunities with their competitors. Therefore, characteristics of investments and investors which reflect the competitive relationship between foreign investors are factors that have been taken into account by tribunals when determining likeness. According to such interpretation, investments are not in like circumstances if they are not in a competitive position on the market. Since investments can only be in competitive circumstances if they belong to the same category of industry, tribunals have identified as one criterion to determine whether investors or investments

⁸⁵⁴ *Methanex v. USA*, Final Award, 9 August 2005, NAFTA Chapter 11/UNCITRAL arbitration, Part IV, Chapter B, para. 37.

⁸⁵⁵ See Part VIII C.II.

⁸⁵⁶ OECD, National Treatment for Foreign-Controlled Enterprises, p. 22. See also *S.D. Myers v. Canada*, Partial Award, 13 November 2000, NAFTA Chapter 11 arbitration/UNCITRAL, para. 248; *Pope and Talbot Inc. v. Canada*, Award on the Merits of Phase 2, 10 April 2001, para. 78.

are in like circumstances their operation in the same economic sector.⁸⁵⁷ For the NAFTA tribunal in *US-Trucking*, the class of comparators was composed of trucking firms which operated or sought to operate in the United States.⁸⁵⁸ In addition, tribunals have recognized as economic sectors serving as comparators in the context of NAFTA's national treatment obligation the provision of PCB waste remediation services⁸⁵⁹, the business of purchasing cigarettes in order to resell or export them,⁸⁶⁰ the steel fabrication business⁸⁶¹ and gambling operations⁸⁶². In *Pope and Talbot v. Canada*, the tribunal recognized the production of softwood lumber in Canada as an economic sector.⁸⁶³ In *UPS v. Canada*, the NAFTA tribunal held that different customs treatment for postal traffic and courier shipments was justified since postal traffic and courier services had different characteristics and were therefore not in like circumstances.⁸⁶⁴ The tribunal in *Parkerings v. Lithuania*

⁸⁵⁷ *Pope and Talbot Inc. v. Canada*, Award on the Merits of Phase 2, 10 April 2001, para. 78; *Marvin Feldman v. Mexico*, Final Award of 16 December 2002, para. 171; *S.D. Myers v. Canada*, Partial Award, 13 November 2000, NAFTA Chapter 11 arbitration/UNCITRAL, para. 250.

⁸⁵⁸ *US-Trucking*, Final Panel Report, 6 February 2001, NAFTA Secretariat File No. USA-MEX-98-2008-01; para. 253. In this case, the like circumstances requirement was interpreted to determine the comparability of services.

⁸⁵⁹ *S.D. Myers v. Canada*, Partial Award, 13 November 2000, NAFTA Chapter 11 arbitration/UNCITRAL, para. 251. In that case, the Claimant tried to obtain the necessary approvals to import equipment containing PCB wastes from Canada into the USA. The investor was an enterprise specialized in the disposal of PCB waste and intended to remediate PCB from Canada using its facilities in the USA. Canada banned the commercial export of PCB waste for disposal to ensure that Canadian PCB wastes be remediated in Canada. The Claimant contended that Canada violated the national treatment obligation under NAFTA since US PCB waste disposal companies were not permitted to operate in Canada in the same fashion as Canadian PCB waste disposal companies. Canada claimed among others that Chapter 11 had to be construed in consistence with Canada's other international obligations under the Basel Convention and Canada-US Transboundary Agreement on Hazardous Waste. The Basel Convention requires that the transboundary movement of hazardous wastes shall be reduced to the minimum consistent with the environmentally sound and efficient management of such wastes (See Article 4 (2) (d) of the Basel Convention).

⁸⁶⁰ *Marvin Feldman v. Mexico*, Final Award of 16 December 2002, para. 171. The investor's company CEMSA engaged in the purchase and export of Mexican cigarettes. Mexico had enacted a law which granted tax rebates to exports undertaken by cigarette producers, while no rebates were granted for exports by resellers of cigarettes such as the company CEMSA, which was owned by the Claimant. The Claimant argued that at least some Mexican resellers had nevertheless obtained such rebates when CEMSA had not obtained them. The tribunal qualified the business of purchasing cigarettes in order to resell or export them as an economic sector, rather than a wider group that could have included cigarette producers.

⁸⁶¹ *ADF v. U.S.*, Award, 9 January 2003, ICSID Case No. ARB(AF)/00/1, para. 157.

⁸⁶² *International Thunderbird v. Mexico*, Award, 26 January 2006, NAFTA Chapter 11/UNCITRAL, paras 175-183.

⁸⁶³ *Pope and Talbot Inc. v. Canada*, Award on the Merits of Phase 2, 10 April 2001, para. 74.

⁸⁶⁴ *UPS v. Canada*, Award on the Merits, 24 May 2007, NAFTA Chapter 11 arbitration, paras 98-120. In contrast, the dissenting arbitrator held that the delivery of express mail and the delivery of courier parcel products are competitive activities on the market, focusing his attention not on all products imported for

nia also asked whether investments operated in the same economic sector in order to assess whether they raised similar public policy concerns.⁸⁶⁵

In *Occidental v. Ecuador*, the UNCITRAL tribunal turned away from the interpretation of the like circumstances requirement as advanced by the NAFTA tribunals in *Feldman v. Mexico*, *S.D. Myers v. Canada* and *UPS v. Canada*, holding that the term „in like circumstances” was not limited to companies competing in the same economic sector.⁸⁶⁶ Instead it considered the appropriate class of comparison to be exporters in general, even if encompassing different sectors. Although the tribunal acknowledged that the concept of “like products” was interpreted rather narrowly in the GATT, relating to the concept of directly competitive or substitutable products, it found that the present case was not comparable with the situation under GATT, first because of the broader wording of “like situations” in comparison with “like products”, and second because the present case did not involve discrimination of importers in the country of destination as in the GATT, but discrimination in the country of origin.⁸⁶⁷ The dispute concerned a challenge by the US investor of Ecuador’s tax system. According to an Ecuadorian tax law, certain industries that were engaged in manufacturing received VAT refunds in connection with their export activities. The Ecuadorian tax agency had determined that companies involved in the export of certain natural resources, including flowers, mining and seafood were, as manufacturers, entitled to VAT refunds, while companies engaged in the oil industry were not. The agency’s explanation was that there was no right to a VAT refund under Ecuadorian law and that “the policy” allowed distinctions between flowers and oil.⁸⁶⁸ The tribunal rejected Ecuador’s argument that a United States oil exporter should be compared only to domestic investments in the same business sector. In its determination of which invest-

postal delivery by UPS Canada and Canada Post, but on the category of items that is committed for express delivery and that is carried by both UPS Canada and Canada Post (*UPS v. Canada*, Award on the Merits, 24 May 2007, NAFTA Chapter 11 arbitration, Separate Statement, paras 18-26).

⁸⁶⁵ *Parkerings v. Lithuania*, Award, 11 September 2007, ICSID Case. No. ARB/05/8, paras 371 et seq.

⁸⁶⁶ *Occidental v. Ecuador*, Final Award, 1 July 2004, UNCITRAL Arbitration, London Court of International Arbitration, Case No. UN 3467, para. 173.

⁸⁶⁷ *Occidental v. Ecuador*, Final Award, 1 July 2004, UNCITRAL Arbitration, London Court of International Arbitration, Case No. UN 3467, paras 174-176.

⁸⁶⁸ *Occidental v. Ecuador*, Final Award, 1 July 2004, UNCITRAL Arbitration, London Court of International Arbitration, Case No. UN 3467, para. 172.

ments were in like circumstances, the tribunal did not evaluate whether the Claimant company received less favourable treatment than other companies in the oil sector, but it considered the appropriate class of comparison to be exporters in general, even if encompassing different sectors, such as flowers, mining and seafood products, lumber and bananas. Even though it was convinced that there was no intent on the side of Ecuador to discriminate against foreign-owned companies,⁸⁶⁹ it affirmed a breach of the national treatment obligation. It held that “the purpose of national treatment in this dispute is to avoid exporters being placed at a disadvantage in foreign markets because of indirect taxes paid in the country of origin”⁸⁷⁰. Therefore it held that “no exporter ought to be put at a disadvantageous position as compared to other exporters”⁸⁷¹.

According to this view, the comparison of sectors may be a first step establishing a certain probability for the existence or non-existence of like circumstances, given that investments in the same economic sector operate within the same public policy background, but it cannot be the decisive criterion for the determination of like circumstances. For example, two investors can operate in completely different economic sectors and nevertheless use the same harmful substance in their production processes. Admittedly, it would generally not be useful to treat them differently in a regulation dealing with harmful substances simply because they are in different sectors of the economy.⁸⁷² This approach may lead to a comparison of investors that are not competitors, as long as the regulatory circumstances in which they find themselves are sufficiently alike.

This approach should however be discarded. A competitive position should rather always be required for the assumption of like circumstances.⁸⁷³ First, the reliance by the *Occidental* tribunal on the broader wording of „like situation“ compared to „like products“ should not lead to a view neglecting the economic sector as a comparator, but rather means that even more factors in addition to the economic sector must be taken into ac-

⁸⁶⁹ *Occidental v. Ecuador*, Final Award, 1 July 2004, UNCITRAL Arbitration, London Court of International Arbitration, Case No. UN 3467, para. 177.

⁸⁷⁰ *Occidental v. Ecuador*, Final Award, 1 July 2004, UNCITRAL Arbitration, London Court of International Arbitration, Case No. UN 3467, para. 141.

⁸⁷¹ *Occidental v. Ecuador*, Final Award, 1 July 2004, UNCITRAL Arbitration, London Court of International Arbitration, Case No. UN 3467, paras 175-176.

⁸⁷² See DiMascio/ Pauwelyn, Nondiscrimination in Trade and Investment Treaties, p. 85.

⁸⁷³ See also Franck, AJIL 2005, 679.

count. Second, States may have legitimate reasons for differentiating between different economic sectors. For example, if a certain industry has a great impact on a country's economy, such as for example natural resource exploitation, there may be a greater need to regulate it effectively than other industries with a less significant impact, such as manufacturing or high technology.⁸⁷⁴ Moreover, since many investments undertaken by foreign investors concern essential and basic issues such as water supply, telecommunications, energy and transportation, special regulation may be needed to ensure universal and equal access to these services.⁸⁷⁵ Finally, the establishment of equal conditions of competition is the central function of most-favoured-nation clauses. The activity which is prohibited by non-discrimination obligations in investment treaties is the modification of conditions of competition. Since only investors operating in the same economic sector can be competitors on the market, the operation in the same economic centre is a necessary prerequisite for the assumption of like circumstances.

II. Protectionist Intent and Legitimate Regulatory Objectives

1. Identification of Legitimate Regulatory Objectives

Tribunals that have referred to the economic sector as a relevant comparator nevertheless recognize that this criterion is not sufficient to determine that investors or investments are in like circumstances.⁸⁷⁶ Investors that do operate in the same economic sector are not necessarily in like circumstances. Investments, even those operating in the same economic sector, may differ in a number of factors, for example their location and their effects on the environment and human beings as regards health, safety or consumer protection. For example, even if two investors operate in the same economic sector, one may use harmful substances in the production process which the other does not use. In these cases, the State may enact different regulations for investors operating in the same economic sector.

⁸⁷⁴ Franck, AJIL 2005, 679.

⁸⁷⁵ However, such motivations could also be taken into account when examining whether a distinction pursues a legitimate regulatory objective.

⁸⁷⁶ *Pope and Talbot Inc. v. Canada*, Award on the Merits of Phase 2, 10 April 2001, para. 78; S.D. Myers v. Canada, Partial Award, 13 November 2000, NAFTA Chapter 11 arbitration/UNCITRAL, para. 250, *Parkerings v. Lithuania*, Award, 11 September 2007, ICSID Case No. ARB/05/8, para. 371.

According to an OECD study on the national treatment obligation in investment treaties, one of the key factors to be used when determining whether investments or investors are in like circumstances is to ascertain whether the discrimination is motivated, at least in part, by the fact that the enterprises concerned are under foreign control, i.e. by the intent to give local producers a competitive advantage.⁸⁷⁷

The *S.D. Myers* tribunal recognized that protectionist intent was a factor to be taken into account when deciding on an alleged violation of NAFTA's national treatment obligation.⁸⁷⁸ It identified protectionist intent on the side of Canada, whose measures protected the domestic PCB disposal industry from U.S. competition.⁸⁷⁹ Emphasizing that international investment agreements usually do not contain a list of exceptions, the tribunal held that the examination of like circumstances had to take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest – in this case promoting national environmental policies.⁸⁸⁰ The tribunal recognized that due to the Basel Convention, there was a legitimate need to ensure a domestic capacity to remediate PCB wastes, but held that banning exports was not a valid means of accomplishing this goal as the same result could be achieved by granting subsidies or sourcing all government requirements to the domestic industries.⁸⁸¹

The tribunal in *Siemens v. Argentina* held that “intent is not decisive or essential for a finding of discrimination, and that the impact of the measure on the investment would be the determining factor to ascertain whether it had resulted in non-discriminatory treatment”⁸⁸². According to this holding, discriminatory intent can play a role when it is proven, but it is not a prerequisite for a finding of a national treatment violation. This finding

⁸⁷⁷ OECD, National Treatment for Foreign-Controlled Enterprises, 1993, p. 22.

⁸⁷⁸ *S.D. Myers v. Canada*, Partial Award, 13 November 2000, NAFTA Chapter 11 arbitration/UNCITRAL, para. 254.

⁸⁷⁹ *S.D. Myers v. Canada*, Partial Award, 13 November 2000, NAFTA Chapter 11 arbitration/UNCITRAL, paras 161-195.

⁸⁸⁰ *S.D. Myers v. Canada*, Partial Award, 13 November 2000, NAFTA Chapter 11 arbitration/UNCITRAL, para. 250.

⁸⁸¹ *S.D. Myers v. Canada*, Partial Award, 13 November 2000, NAFTA Chapter 11 arbitration/UNCITRAL, para. 250.

⁸⁸² *Siemens v. Argentina*, Award, 6 February 2007, ICSID Case No. ARB/02/8 para. 321.

corresponds to the finding of the Appellate Body, which held that protectionism “is not an issue of intent”⁸⁸³, but an issue of application of the respective measure.

It is usually difficult to discover whether a measure is motivated by protectionist intent. In order to find out whether the host State had the intent to discriminate, it is more promising to examine whether the government pursued a legitimate regulatory aim.⁸⁸⁴ If a valid argument can be made that the national measure in question has been taken to pursue a legitimate public policy, this is evidence disproving the existence of discriminatory intent.

It is an important difference compared to WTO practice, where the only public policy concerns that can be taken into account are listed in GATT Article XX, that NAFTA tribunals have taken into account the object and purpose of differential treatment in the context of the determination of like circumstances within NAFTA’s national treatment obligation. This is due to the different wording of the non-discrimination provisions in WTO law and investment law: While it may be difficult to argue that reference should be made to the aims or effect of the contested *measure* which imposes the differential treatment when determining whether two categories of *products* are like,⁸⁸⁵ the reference to like circumstances allows to take into account a broader range of factors that may be relevant for the treatment accorded to the investments or investors including regulatory objectives. In the context of NAFTA’s national treatment obligation, in determining whether investors were in like circumstances, tribunals asked whether the differential treatment was based on a rational government policy.⁸⁸⁶

In *Parkerings v. Lithuania*, the tribunal underscored that investments were not in like circumstances if a State’s legitimate objectives justified differential treatment.⁸⁸⁷ It held that the existence of non-commercial issues, notably archaeological preservation and environmental protection justified differential treatment. It held that

⁸⁸³ *Japan-Alcohol*, Appellate Body Report, 4 October 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 27.

⁸⁸⁴ Krajewski/Ceyssens, *Internationaler Investitionsschutz und innerstaatliche Regulierung*, p. 202.

⁸⁸⁵ Davey/ Pauwelyn, MFN-Unconditionality, in: Cottier/Mavroidis, *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law*, p. 38.

⁸⁸⁶ *Pope and Talbot Inc. v. Canada*, Award on the Merits of Phase 2, 10 April 2001, para. 78.

⁸⁸⁷ *Parkerings v. Lithuania*, Award, 11 September 2007, ICSID Case No. ARB/05/8, para. 371.

“[t]he historical and archaeological preservation and environmental protection could be and in this case were a justification for the refusal of the project. The potential negative impact of the BP project in the Old Town was increased by its considerable size and its proximity with the culturally sensitive area of the cathedral.”⁸⁸⁸

The tribunal thus acknowledged that cultural and environmental concerns had to be integrated in the interpretation of the like circumstances requirement.

US- Trucking is the only case in which a NAFTA tribunal has considered in some detail the NAFTA’s MFN provision and in particular its “like circumstances” requirement, albeit in the context of Chapter 12, dealing with trade in services.⁸⁸⁹ The case involved US restrictions on cross-border trucking services and on Mexican investment in the US trucking industry. The US had refused to consider applications by Mexican-owned trucking firms to operate in the US and had refused to permit Mexican investment in companies in the US that provided transportation of international cargo. The MFN issue arose because Canadian investors and service providers were not restricted in their ability to access the US market. The US argued that because Mexico did not maintain the same rigorous standards as the regulatory systems in the US and Canada and had not enacted adequate procedures to ensure US highway safety (such as a limitation of driving hours for truck drivers and equipment requirements), the US pursued a legitimate regulatory objective in refusing Mexican applications. Mexico in contrast held that likeness had to be determined solely by comparing the relevant services or companies without taking into account the pursuance of objectives such as health and security. The Panel held that in principle, differential treatment may be justified by legitimate regulatory objectives such as health or safety reasons.⁸⁹⁰ Further public policies have been recognized as rational or legitimate by other NAFTA tribunals in the context of the national treatment obligation: to ensure the

⁸⁸⁸ *Parkerings v. Lithuania*, Award, 11 September 2007, ICSID Case No. ARB/05/8, para. 392.

⁸⁸⁹ *US-Trucking*, Final Panel Report, 6 February 2001, NAFTA Secretariat File No. USA-MEX-98-2008-01, paras 246-278.

⁸⁹⁰ *US-Trucking*, Final Panel Report, 6 February 2001, NAFTA Secretariat File No. USA-MEX-98-2008-01, paras 249, 250, 258. It derived this from an interpretation of the United States-Canada FTA, which explicitly permitted differential treatment for health and safety reasons.

economic strength of the domestic PCB processing industry in order to maintain the ability to process PCBs within the country in the future,⁸⁹¹ to remove the threat of countervailing duty actions⁸⁹², to better control over tax revenues, discourage smuggling, protect intellectual property rights, and prohibit grey market sales,⁸⁹³ to ensure that the Mexican sugar industry was in the hands of solvent enterprises,⁸⁹⁴ to ensure the widest-possible distribution of Canadian publications to individual Canadian consumers at affordable and uniform prices throughout the country.⁸⁹⁵

Summing up, there is a tendency of tribunals to acknowledge a broad range of economic and non-economic regulatory objectives that may justify differential treatment.⁸⁹⁶ This list is much broader than the list of exceptions under Article XX GATT. The broad range of acknowledged legitimate measures reflects the fact that investment tribunals should in principle not be allowed to question the legitimacy of a domestic policy objective by replacing the State's set of value with its own, but should decide whether the State has made a convincing argument concerning the choice of comparator underlying the regulatory distinction.

The background for the necessity of taking into account the host State's policy aims within the likeness requirement is that most bilateral investment treaties do not contain a device of correction in the sense of Article XX GATT or Article XIV GATS as exceptions for important social policies. In WTO law, a finding of likeness does not dispose of the case. The affirmation of like products or services is followed by an enquiry into whether the different treatment of situations found to be like is justified by legitimate public policy measures. Since there is generally no comprehensive list of public policy exceptions in investment agreements, the consideration of legitimate regulatory objectives is necessary

⁸⁹¹ *S.D. Myers v. Canada*, Partial Award, 13 November 2000, NAFTA Chapter 11 arbitration/UNCITRAL, para. 255.

⁸⁹² *Pope and Talbot Inc. v. Canada*, Award on the Merits of Phase 2, 10 April 2001, para. 87.

⁸⁹³ *Feldman v. Mexico*, Award, 16 December 2002, ICSID CASE No. ARB(AF)/99/1, para. 170.

⁸⁹⁴ *GAMI v. Mexico*, Final Award, 15 November 2004, NAFTA Chapter 11/UNCITRAL arbitration, para. 114.

⁸⁹⁵ *UPS v. Canada*, Award on the Merits, 24 May 2007, NAFTA Chapter 11 arbitration, para. 175.

⁸⁹⁶ In contrast, Articles XX GATT and XIV GATS only refer to non-trade related objectives.

to achieve a balance between trade liberalization and necessary national regulation.⁸⁹⁷ Taking into account the purpose of a measure when deciding whether there is discrimination between like investments or investors, investment arbitral tribunals can integrate certain standards that are part of the general exceptions in WTO law.⁸⁹⁸ The difference to Article XX GATT is that while that provision has been interpreted as providing an exhaustive list,⁸⁹⁹ there is no limitation on the types of public policies that may be taken into account for purposes of justifying less favourable treatment under the non-discrimination obligations of BITs, except that they be “legitimate” or “rational”. The lack of a reference to a list of exceptions renders unapplicable one argument against the introduction of an aim and effects test in the WTO, which is that an aim and effects test would render Article XX virtually redundant.⁹⁰⁰ However, even if there is a list of exceptions, such list is not rendered inapplicable since it still has an effect with regard to other provisions.⁹⁰¹ Thus, even in such a case, there is no limitation on the types of public policies that can be taken into account within the “like circumstances” requirement. The practice of taking into account legitimate public interests is integrated in some investment treaties, such as for example the Protocol of the German Model treaty, which provides that measures that have to be taken for reasons of public security and order, public health or morality shall not be deemed “treatment less favourable” within the meaning of the non-discrimination obligations.⁹⁰² However, even in the case of BITs that contain public policy exceptions justifying deviation from the obligations of the agreement, there are usually further legitimate policy goals that can only be attained by taking them into account within the like circum-

⁸⁹⁷ See, e.g., *S.D. Myers v. Canada*, Partial Award, 13 November 2000, NAFTA Chapter 11 arbitration/UNCITRAL, p. 250, where concern for the environment is mentioned as a public policy.

⁸⁹⁸ The concurring opinion in *S.D. Myers* argues that although the national treatment obligation of NAFTA is not subject to an equivalent of GATT Article XX, the like circumstances requirement in Article 1102 in many cases requires the same kind of analysis as is required in Article XX case under the GATT (*S.D. Myers v. Canada*, Partial Award, 13 November 2000, NAFTA Chapter 11 arbitration/UNCITRAL, Separate Opinion, para. 131).

⁸⁹⁹ Hudec, *GATT/WTO Constraints on National Regulation*, p. 638; DiMascio/ Pauwelyn, *Nondiscrimination in Trade and Investment Treaties*, p. 64.

⁹⁰⁰ Hudec, *GATT/WTO Constraints on National Regulation*, p. 628.

⁹⁰¹ With regard to Article XX GATT, see Horn/ Weiler, p. 142.

⁹⁰² Protocol to the German Model Treaty, ad Article 3.

stances requirement, such as consumer protection or environmental concerns, which are not mentioned in the German Model BIT.

Apart from the broader language of the like circumstances requirement, the intrusion in the host State, which is much more pronounced in the investment context than in the context of trade⁹⁰³, calls for such approach. The WTO Appellate Body has acknowledged the importance of taking into account different aims and objectives.⁹⁰⁴ Also in investment law, there is the dogmatic and political need to balance conflicting interests.⁹⁰⁵ In order to do so, investment law must on the one hand enjoy the confidence of investors and secure the benefits of trade liberalization, and on the other hand, it must adopt an integrative approach in order to assure that host States are granted the flexibility to adopt national regulation in order to respond effectively to social and economic objectives. For example, factual characteristics such as the location and the size of the company, measured on the basis of its assets or the number of employees, may be taken into account. A foreign investment situated in an environmentally sensitive area in the host State may be subject to environmental regulations on the ground of its location, or small enterprises may receive certain benefits.⁹⁰⁶ Moreover, the legal constitution of the company, which may be organised as a share-holding or a private equity company, may require different regulatory measures. Moreover, the contribution of the company to the economic development of a developing host country may be taken into account in the determination of like circumstances.

2. Relationship Between the Measure and the Public Policy

a) WTO law

⁹⁰³ See Part I C.I.

⁹⁰⁴ Appellate Body Report, *Korea-Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, paras 166 and 163; Appellate Body Report, *EC-Asbestos*, signed on 16 February 2001, WT/DS135/AB/R, para. 172.

⁹⁰⁵ Krajewski/Ceyssens, *Internationaler Investitionsschutz und innerstaatliche Regulierung*, p. 200.

⁹⁰⁶ Labidi, *Où va la clause de la nation la plus favorisée en droit international des investissements?*, in: Horchani (ed.), *Où va le droit de l'investissement?*, p. 33; UNCTAD, *Most-Favoured-Nation Treatment*, p. 7.

Once a legitimate aim of the State has been identified, the relationship between that aim and the measure must be established. Under the least intrusive review of national regulation, tribunals would simply have to ask whether the measure is suitable to achieve the policy goal. Another option is or to ask whether the measure is necessary to achieve the aim, i.e. whether there exist alternative means which are equally capable of pursuing the aim in a less trade- or investment-restricting way. The most intrusive test would involve a balancing of different interests under which it would have to be determined whether the disadvantages of a measure exceed its benefits, i.e. whether the restriction on investment is out of proportion to the benefits arising from the protection of the legitimate value which the measure pursues.

In WTO law, Article XX GATT provides for a wide range of formulations qualifying the connection between the measure and the public policy objective, varying between the requirement that a measure must “involve” or “relate to” or be “essential”, “necessary”, “undertaken in pursuance of” or “imposed for the protection of” the achievement of an objective.

The term “relating to” is used in Article XX (c), (e) and (g). Although this language suggests that the link between the measure and the policy objective does not have to be particularly close,⁹⁰⁷ panels and the Appellate Body have enquired whether the measure is “primarily aimed at” achieving the policy objective when interpreting whether a measure is “relating to” a certain objective.⁹⁰⁸ However, in *US-Shrimp*, this language was replaced by the question whether the means and ends pursued were “directly connected” or “reasonably related”.⁹⁰⁹

According to Article XX (a), (b) and (d), measures must be necessary to achieve the policy objective. In *Thailand – Cigarettes* and *US – Section 337*, the panels interpreted the term “necessary” as requiring the adoption of a measure which entails the least degree of inconsistency with GATT provisions and which could reasonably be expected to be

⁹⁰⁷ See Wolfrum, in: Wolfrum/ Stoll/ Hestermeyer, WTO, Trade in Goods, Article XX, para. 21.

⁹⁰⁸ Panel Report, *Canada – Herring and Salmon*, L/6268 - 35S/98, adopted on 22 March 1988, para. 4.6; Panel Report, *US-Gasoline*, WT/DS2/R, 29 January 1996, para. 6.40; Appellate Body Report, *US-Gasoline*, WT/DS2/AB/R, 29 April 1996, pp. 18, 19.

⁹⁰⁹ Appellate Body Report, *US-Shrimp*, WT/DS58/AB/R, 12 October 1998, paras. 140-141.

adopted by the Member in question.⁹¹⁰ In *Korea-Beef*, the Appellate Body introduced an approach which it referred to as a “process of weighing and balancing”⁹¹¹. According to this approach, it first has to be established whether the measure contributes to the achievement of the objective pursued. Second, there may be no less trade restrictive options that provide an equivalent contribution to the achievement of the objective pursued. The final step is the “weighing and balancing” of interests involved. Such interpretation of the necessity requirement signifies a development from a least-trade restrictive approach to a less-trade restrictive approach, supplemented by a proportionality test. It can thus be argued that the “necessity test” comes close to the principle of proportionality.⁹¹²

b) Investment Law

aa) Necessity Test

In contrast to Article XX GATT and related WTO provisions, the wording of the non-discrimination provisions of BITs does not shed light on the question concerning the required relationship between the challenged measure and the public policy pursued, which has been answered differently by investment tribunals. In the context of NAFTA’s national treatment obligation, in determining whether investors were in like circumstances, some tribunals have required that the measure under review be necessary to pursue the State’s policy objective, enquiring whether it is the least investment-restrictive alternative. For example, having conceded that Canada was pursuing a legitimate goal, namely to en-

⁹¹⁰ Panel Report, *Thailand – Cigarettes*, DS10/R - 37S/200, adopted on 7 November 1990, para. 75; Panel Report, *US – Section 337*, adopted on 7 November 1989, L/6439 - 36S/345, para. 5.26.

⁹¹¹ Appellate Body Report, *Korea-Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, para. 164. See also Appellate Body Report, *EC-Asbestos*, signed on 16 February 2001, WT/DS135/AB/R, para. 172; Appellate Body Report, *US-Gambling*, WT/DS285/AB/R, 7 April 2005, paras 305-307; Appellate Body Report, *Dominican Republic – Cigarettes*, 25 April 2005, WT/DS302/AB/R, paras 66-69; Appellate Body Report, *Brazil – Retreaded Tyres*, WT/DS332/AB/R, para. 156.

⁹¹² Stoll/ Strack, in: Wolfrum/ Stoll/ Hestermeyer (eds), WTO Commentary, Article XX lit. b, para. 45. For the contrary view, see Howse/ Tuerk, *The WTO Impact on Internal Regulations*, in: de Búrca/ Scott (eds), *The EU and the WTO*, pp. 326, 327, who argue that such proportionality test would be in contradiction with the statement of the Appellate Body in *Korea-Beef* that all members may determine for themselves their desired level of protection (paras 176-178), which means that States’ policy choices cannot be outweighed, and with the statement that “[m]easures which are indispensable [...] certainly fulfil the [requirement of necessity]” (para. 161), which indicates that there is no room for a balancing test if the measure is indispensable.

sure the economic strength of the domestic PCB processing industry in order to maintain the ability to process PCBs within the country in the future, the *S.D. Myers* tribunal noted that there were a number of legitimate ways by which Canada could have achieved its goal and that the export ban was not one of them.⁹¹³ It held that a State had to choose among those measures that are equally effective and reasonable to pursue its aim the measure which is most consistent with open trade.⁹¹⁴ It backed up its conclusion by a reference to NAFTA Article 104, which states that in the event of any inconsistency between NAFTA and the specific trade obligations set out in certain environmental agreements, such obligations shall prevail, “provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement”.⁹¹⁵ Likewise, the Panel in *US-Trucking* argued that the phrase “in like circumstances” may warrant differential treatment based on legitimate regulatory purposes, but only if the differential treatment was necessary to achieve the aspired purpose.⁹¹⁶

bb) Reasonable Nexus Test

In contrast, the *Pope and Talbot* tribunal enquired whether the difference in treatment was justified by a reasonable relationship to a rational policy objective which was not based on preference for domestic over foreign investors and did not unduly undermine the investment-liberalizing objectives of NAFTA. In the words of the tribunal in *Pope and Talbot*, the question is whether the differences in treatment have a “reasonable nexus to rational government policies that (1) do not distinguish, on their face or *de facto*, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA.”⁹¹⁷ The tribunal found that the application

⁹¹³ *S.D. Myers v. Canada*, Partial Award, 13 November 2000, NAFTA Chapter 11 arbitration/UNCITRAL, para. 255.

⁹¹⁴ *S.D. Myers v. Canada*, Partial Award, 13 November 2000, NAFTA Chapter 11 arbitration/UNCITRAL, para. 221.

⁹¹⁵ *S.D. Myers v. Canada*, Partial Award, 13 November 2000, NAFTA Chapter 11 arbitration/UNCITRAL, para. 215.

⁹¹⁶ *US-Trucking*, Final Panel Report, 6 February 2001, NAFTA Secretariat File No. USA-MEX-98-2008-01, para. 258.

⁹¹⁷ *Pope and Talbot Inc. v. Canada*, Award on the Merits of Phase 2, 10 April 2001, para. 78.

by Canada of the export control regime for softwood lumber only to certain provinces was “reasonably related” to the rational policy of removing the threat of countervailing duty actions by the United States. It thus merely enquired on the reasonableness of the measure at issue to pursue the policy objective, not on its necessity.⁹¹⁸

Echoing the *Pope and Talbot* test, the tribunal in *Feldman v. Mexico* stated that “in the investment context, the concept of discrimination has been defined to imply *unreasonable* distinctions between foreign and domestic investors”.⁹¹⁹

The Panel in *GAMI v. Mexico* asked whether the measure was “plausibly connected” with a legitimate policy goal. It acknowledged that

“Mexico perceived that mills operating in conditions of effective insolvency needed public participation in the interest of the national economy in a broad sense. The Government may have been misguided. [...] But ineffectiveness is not discrimination. The arbitrators are satisfied that a reason exists for the measure which was not itself discriminatory. That measure was plausibly connected with a legitimate goal of policy (ensuring that the sugar industry was in the hands of solvent enterprises) [...]”.⁹²⁰

Being convinced that the measure was not discriminatory, given that Mexican sugar mills were affected by the programme of nationalisation independent of the fact whether they had foreign shareholders or not⁹²¹, the tribunal left the State a considerable margin of appreciation to decide what measures to take in order to achieve a legitimate policy goal, arguing that this decision was a “matter of policy and politics”⁹²². Acknowledging that the measure to require public participation may not have been necessary or even suitable to

⁹¹⁸ *Pope and Talbot Inc. v. Canada*, Award on the Merits of Phase 2, 10 April 2001, para. 87.

⁹¹⁹ *Feldman v. Mexico*, Award, 16 December 2002, ICSID CASE No. ARB(AF)/99/1, para. 170.

⁹²⁰ *GAMI v. Mexico*, Final Award, 15 November 2004, NAFTA Chapter 11/UNCITRAL arbitration, 114.

⁹²¹ *GAMI v. Mexico*, Final Award, 15 November 2004, NAFTA Chapter 11/UNCITRAL arbitration, para. 112.

⁹²² *GAMI v. Mexico*, Final Award, 15 November 2004, NAFTA Chapter 11/UNCITRAL arbitration, para. 114.

achieve the policy goal, the tribunal was satisfied with the result that the measure was plausibly connected with the policy goal.

cc) Conclusion

Tribunals have not undertaken a proportionality review. A strict analysis of proportionality would imply that tribunals can reduce the level of protection that the host country aims at and would therefore significantly interfere with that state's domestic regulatory choices.⁹²³ In contrast, the necessity approach ensures that the aspired level of protection of non-investment related objectives can be pursued. However, international investment tribunals are not apt to identify the range of possible measures that pursue the same policy objective and to assess whether other measures present a smaller competitive disadvantage to foreign investors. These are rather policy decisions that should be taken by the relevant host States, which should accordingly be granted a broad margin of appreciation in their decision which measures to take in order to pursue a legitimate policy goal. Therefore an approach should be adopted which in principle leaves the policy decision which measure to take to the State and merely asks if there is a rational nexus between the State measure and the policy objective.

3. Burden of Proof

The burden of proof rests upon the party who asserts the affirmative of a claim or defence.⁹²⁴ The language of non-discrimination provisions in investment treaties grounds the like circumstances analysis as a part of the operative elements of the national treatment and most-favoured-nation standards.⁹²⁵ It is therefore not the host State that has to prove the absence of like circumstances, but it is for the investor to prove that less favour-

⁹²³ The ECJ as well, although in principle enquiring whether a measure is proportionate *strictu sensu*, has been very careful in assuming that a measure is disproportionate. See ECJ Case C-1/90, C-176/90, *Aragonesa*, (1991) E.C.R. I-4151, paras 16-26.

⁹²⁴ Kazazi, p. 117.

⁹²⁵ The reasoning of the tribunal in *US-Trucking*, which read NAFTA's like circumstances requirement as an exception to the national treatment standard (*US-Trucking*, Final Panel Report, 6 February 2001, NAFTA Secretariat File No. USA-MEX-98-2008-01, para. 260) should therefore be rejected.

able treatment is accorded in like circumstances.⁹²⁶ If the party bearing the burden of proof adduces evidence sufficient to raise a presumption that what is claimed is true, the burden shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.⁹²⁷ Therefore once a *prima facie* breach of a non-discrimination provision has been established, the burden shifts to the Respondent government to explain why the difference in treatment is justified.⁹²⁸ Tribunals have argued that operation in like economic sectors resulting in a competitive relationship can establish a presumption of like circumstances.⁹²⁹ They have argued that the ensuing distribution of the burden of proof takes into account that proving protective intent and the absence of a legitimate regulatory aim on the side of the host State could be an insurmountable burden for the investor.⁹³⁰ Indeed it would be impossible for an investor to address all possible reasons as to why the differential treatment could not be based on any legitimate regulatory objective or as to why the measure had no reasonable link to an existing legitimate regulatory objective. Once a *prima facie* case has been made that investors are in like circumstances, it will be for the respondent to supply an explanation as to why the differential treatment was reasonably linked to a legitimate policy objective.⁹³¹ The claimant would then have to rebut any reasonable justification given by the state.

D. Conclusion

Foreign investors do not have to be treated equally irrespective of their concrete activity and situation in a given host State. Different treatment is justified vis-à-vis investors from different foreign countries if they are in different objective situations. The language of the like circumstances requirement allows taking into account a broader range of comparators than the like products or like services concept in WTO law, providing scope for legitimate

⁹²⁶ *UPS v. Canada*, Award on the Merits, 24 May 2007, NAFTA Chapter 11 arbitration, para. 84.

⁹²⁷ Appellate Body Report, *US-Wool Shirts and Blouses*, 25 April 1997, WT/DS33/AB/R, p. 14; Kazazi, pp. 332, 333.

⁹²⁸ *Pope and Talbot v. Canada*, Award on the Merits of Phase 2, 10 April 2001, para. 78.

⁹²⁹ *Pope and Talbot v. Canada*, Award on the Merits of Phase 2, 10 April 2001, para. 78. For the contrary view see *Methanex Corporation v. United States*, Final Award, Part IV, Chapter B, para. 12.

⁹³⁰ *Feldman v. Mexico*, Award, 16 December 2002, ICSID CASE No. ARB(AF)/99/1, paras 181, 183.

⁹³¹ Weiler, *The Interpretation of International Investment Law*, pp. 451, 452.

regulatory initiatives. Moreover, BITs traditionally focus on the protection of individual investors from discrimination rather than on economy-wide efficiency. The objective of protecting individual investors from discriminatory behaviour on the side of host countries has appropriately led investment tribunals to focus upon the circumstances giving rise to governmental choices concerning the regulation of investments, not on conditions of competition.⁹³² Comparators that can be identified as relevant for the determination of like circumstances include therefore not only the economic sector in which the investments or investors operate and whether they are in a competitive situation on the market, but first and foremost protectionist intent and legitimate policy objectives on the side of the host State. Accordingly, in contrast to the like products analysis by the WTO Appellate Body, investment tribunals have been more prone to take into account legitimate regulatory aims within the like circumstances requirement. The focus on regulatory objectives of the host country is appropriate in that investments have a much broader impact on society and operate in the context of an equally broad array of regulations.⁹³³

When a legitimate public policy has been identified, it should be asked whether there is a reasonable nexus between this policy and the government measure. It should not be enquired whether the measure is necessary to pursue the public policy since tribunals are not able to identify the range of possible measures that pursue the same policy objective and to assess whether other measures present a smaller competitive disadvantage. Concerning the burden of proof, it is for the investor to prove that the two investments are in like circumstances.

Final Conclusion

Most-favoured-nation clauses in bilateral investment treaties oblige the conceding State to extend to investors from another State all the benefits which it accords to investors from third States and serve several functions. Above all, they are meant to safeguard against discrimination and to create equal conditions of competition for investors investing in the same host State. Moreover, MFN clauses in BITs play an important role in liberalising the

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DiMascio/ Pauwelyn, *Nondiscrimination in Trade and Investment Treaties*, p. 81.

⁹³³

See Part I C.I.

investment regimes of host States and harmonising investors' rights on the highest possible plane. Leading to harmonisation and universalisation of investors' rights, the most-favoured-nation clause is an instrument of multilateralisation of the benefits accorded to foreign investors and their investments. Moreover, it is the function of MFN clauses to automatically adapt a treaty to changing circumstances. In the now commonly used unconditional form of the clause, material reciprocity is not guaranteed, since one Contracting State may grant an advantage to third-State investors which the other Contracting State does not grant in any of its bilateral investment treaties. Thus, MFN clauses in BITs only provide for formal reciprocity, given that both parties to an investment treaty grant their investors most-favoured-nation treatment.

Compared to trade law, the insertion of MFN clauses in investment treaties has potentially stronger implications for the regulatory autonomy of host States. First, the scope of the most-favoured-nation clause inserted in investment treaties is potentially much broader since it covers a wide range of domestic regulations. BITs usually do not include a comprehensive list of exceptions to MFN treatment comparable to Article XX GATT and Article XIV GATS which could mitigate the effect on domestic regulation. Second, host governments face a larger number of disputes, given that investors directly initiate disputes without the filter of home government discretion. Moreover, the negotiating position of developing States may be weaker on the bilateral plane, given that they cannot join forces with other developing States.

An overview of most-favoured-nation clauses demonstrates that they do not use identical language in different bilateral and multilateral investment treaties. While offering potentially different interpretative options for arbitral tribunals, what they have in common is the reference to the term "treatment", whose interpretation is therefore essential for the determination of the scope of MFN clauses.

As regards the invocation of substantive provisions, investment tribunals have uniformly accepted applicability of MFN clauses. These clauses can generally be applied to a wide range of substantive treaty standards, including the fair and equitable treatment standard, non-precluded measures clauses, national treatment clauses, performance requirements and the choice of applicable law. They can however neither be applied to provisions granting market access nor to contractual benefits. It is possible to invoke beneficiary si-

lence in the third-party treaty since the *ejusdem generis* principle only requires that the matter is dealt with in the basic treaty. In contrast, the invocation of a more favourable provision in the third-party treaty without an equivalent provision in the basic treaty depends upon the question whether it can be defined as “treatment” within the meaning of the most-favoured-nation clause, taking into account the *ejusdem generis* principle. As a tool to multilateralize substantive treatment standards, MFN clauses elevate the level of protection in host States to the maximum level granted in any of that host State’s investment treaties. This result can only be evaded if the parties offer no more favourable treatment to third parties or agree on a restrictive scope of the most-favoured-nation clause. Thus, explicit exceptions to MFN clauses are an effective means of shielding bilateral bargains against the multilateralizing effect of the clauses.

In contrast to their application to substantive treaty provisions, MFN clauses can never be used to circumvent the conditions *ratione personae*, *ratione materiae* and *ratione temporis*. In case these conditions are not fulfilled, the entire treaty including its MFN clause is not applicable. The definition of investment or investor or the timely application of a treaty can therefore not be a form of treatment covered by the relevant most-favoured-nation clause.

While jurisprudence is homogenous as regards application of MFN clauses to substantive provisions, the question whether MFN clauses may also be invoked in order to import more favourable dispute settlement provisions is still highly controversial. It is impossible to make a judgment on the applicability of MFN clauses to the various provisions that may be included in BITs for all possibly upcoming cases, given that the formulation of MFN clauses varies from treaty to treaty. Yet despite differences between the clauses, some generalizing statements can be made. To begin with, the term “treatment” that MFN clauses refer to must be interpreted as encompassing the entire legal regime that investors are exposed to, including their ability to settle disputes. With respect to the context, specifically negotiated MFN provisions do not have the effect of excluding any other fields of application from the scope of the general MFN clause. Moreover, the inclusion of specifically negotiated provisions embodying a specific party intention does not serve to exclude the operation of the most-favoured-nation clause. It can be said of all provisions in an investment treaty that they are the expression of a certain party intention, and it is pre-

cisely the function of a most-favoured-nation clause to eliminate specifically negotiated provisions that are discriminatory towards certain investors. Therefore if an MFN clause is not to be applied to certain provisions, the limitation of the scope of such clause cannot be derived from the existence of more specific provisions, but has to be expressed in the MFN clause itself.

The object and purpose of MFN clauses also argues in favour of applying these clauses to dispute settlement provisions. It is the essential function of MFN clauses to prevent present or future discrimination by host countries and to guarantee equality of the legal conditions and competitive opportunities among investors from different foreign countries. For investors' competitive opportunities, it is not only vital that they benefit from the same substantive protection as other investors. Rather the possibility to implement substantive rights is also closely related to their competitive opportunities since the availability of a dispute settlement system which ensures the host country's compliance with the obligations under the BIT increases the level of certainty and predictability that is essential for a conducive business environment.

The domestic case law dealing with most-favoured-nation treatment does not offer guidance on the question whether most-favoured-nation clauses should be applicable to dispute settlement questions. In these cases, the invocation of the MFN clause was rejected due to the different nature and content of the basic treaty and the third-party treaty. Thus, the cases exemplify the rule that the scope of most-favoured-nation clauses is limited *ratione materiae* to the subject-matter of the relevant treaty. What the cases illustrate is that if the basic treaty does not at all make reference dispute settlement, the application of the MFN clause to dispute settlement provisions is not implied from the subject-matter of the clause.

There are three cases in which the ICJ and an Arbitral Commission had to decide on the applicability of most-favoured-nation clauses. However, neither do these cases offer unequivocal guidance on the issue. The Arbitral Commission in *Ambatielos* acknowledged that the standards of justice, right and equity could be invoked by means of an MFN clause. What was in question was the importation of these standards into the procedures followed in the domestic court proceedings. The Arbitral Tribunal thus acknowledged that the administration of justice encompassed certain procedural standards and that these pro-

cedural treatment standards could be invoked by virtue of the most-favoured-nation clause. The Anglo-Iranian Oil Company case does not serve to reject the application of MFN clauses to jurisdictional provisions, but is based on the specific circumstances of the case where consent to the Court's jurisdiction could not be based on the MFN clause in connection with third-party BITs, but only on the Iranian Declaration under Art. 36 (2) ICJ Statute. With respect to the U.S. nationals in Morocco case, although one statement in the case suggests that the ICJ affirmed the possibility to acquire jurisdiction by means of the most-favoured-nation clause, the reasoning is not clear since the ICJ did not engage in a detailed analysis of the scope of the most-favoured-nation clause, the decisive aspect of the case being that the more favourable provisions of the third-party treaties had ceased to be operative between the Contracting Parties.

In addition to the interpretation of the term "treatment", which argues in favour of applying MFN clauses to dispute settlement provisions, further reasons can be identified in order to affirm applicability of MFN clauses to jurisdictional dispute settlement provisions. First it must be stressed that consent to international arbitration is a fundamental requirement which cannot be circumvented. However, this is equally true for the consent to substantive treaty obligations. With the consent of sovereign States being decisive for the creation of the entire legal framework of international relations, the issue of consent does not only pose itself in the context of application of the most-favoured-nation clause to jurisdictional provisions, but comes up in the same way with regard to substantive standards of protection. In the case of substantive obligations, it is accepted that the consent to more favourable provisions is inherent in the MFN clause. The interpretation extending application of MFN clauses to jurisdictional provisions is therefore not in conflict with the need for consent to the jurisdiction of a Tribunal. It does not equal a situation where lack of consent is overridden since the MFN clause cannot be interpreted as a substitute for consent, but must be viewed as incorporating consent to jurisdiction in case the host State has granted such consent in the dispute settlement provisions of a third-party BIT. Second, jurisdictional provisions are to be interpreted neither narrowly nor broadly, but in accordance with the regular standards of interpretation set out in the Vienna Convention.

The case law dealing with the circumvention of procedural and jurisdictional dispute settlement provisions is heterogenous. Concerning the invocation of more favourable proce-

dural provisions, the majority of tribunals has accepted application of the MFN clause, often by distinguishing between procedural and jurisdictional provisions. However, some tribunals and dissenting opinions have strongly rejected such application. Against the background of the interpretation of the term “treatment” according to the Vienna Convention, the findings of those tribunals that have agreed to apply the clause must be endorsed, although their reasoning is not always convincing. Concerning the invocation of more favourable jurisdictional provisions, tribunals have dealt with the extension of jurisdiction to contract-based claims, with the enlargement of the range of treaty claims covered by the dispute settlement clause and with the choice of a different arbitral forum. Only one tribunal has so far accepted application of the MFN clause. However, interpretation of MFN clauses generally argues in favour of applying it to jurisdictional dispute settlement provisions. Only in case the basic treaty does not at all refer to dispute settlement, such application is barred due to the *ejusdem generis* principle.

Summing up, while a distinction can be drawn between procedural and jurisdictional provisions in an investment treaty, tribunals should not differentiate between the application of MFN clauses to admissibility and jurisdictional requirements. Rather, the possibility to achieve most-favoured-nation treatment should in principle be affirmed both as regards the importation of procedural and jurisdictional provisions. Although the specific wording of each MFN clause has to be examined, as a rule, the language of MFN clauses can be interpreted as encompassing dispute settlement provisions. Even those clauses that do not make reference to dispute settlement provisions can be applied to dispute settlement provisions since the notion of “treatment” covers the legal rules that govern dispute settlement proceedings. Notably, it cannot simply be argued that the value and effectiveness of substantive provisions is largely dependent on the availability of an enforcement procedure. This is true in all fields of international law, nevertheless, compulsory jurisdiction is still an exception. However, access to dispute settlement mechanisms is part of the protection offered under BITs and is therefore an element of the “treatment” granted to them. The application to dispute settlement provisions is also in conformity with the economic rationale of MFN clauses to establish equal conditions of competition for foreign investors from different home States since the possibility to enforce the host State’s obligations under the investment treaty creates a competitive advantage.

The cases dealing with the application of MFN clauses to jurisdictional or procedural provisions have often addressed the question whether it should be possible to invoke only the beneficial provisions while benefitting from treatment standards of the basic treaty where these are more favourable. Generally speaking, this is the normal and intended effect of MFN clauses, which harmonises the benefits, but not the disadvantages of a treaty. MFN clauses thus may have the effect of creating sets of provisions that the host State has not consented to in any investment treaty by allowing for the selective invocation of beneficiary provisions without taking into account less favourable provisions. The balancing element is not an evaluation of the entire treaty combined with a simultaneous transfer of disadvantages, but the reciprocal grant of most-favoured-nation treatment to the granting State. However, as a limiting principle to this approach, the selective invocation of treaty provisions should be restricted to provisions that are not as closely interconnected as to present a carefully balanced equilibrium that should not be distorted. The relevant criterion should be whether certain provisions were included as a counterbalance for certain advantages. Rules merged in one article in an investment treaty should generally be imported jointly, since it can be assumed that they were understood by the parties to be related insofar as they create an equilibrium of treatment standards that the contracting states are willing to provide in respect of the regulated matter. Thus, in case an investor invokes one dispute settlement provisions, he should be required to invoke the entire dispute settlement mechanism from the third-party BIT. It can only be assumed that treatment standards can be imported separately from treatment standards that are dealt with in separate articles of the third-party BIT.

Foreign investors do not have to be treated equally irrespective of their concrete activity and situation in a given host State. Different treatment is justified vis-à-vis investors from different foreign countries if they are in different objective situations. The concept of like circumstances in investment law allows to take into account more factors than the like product concept in WTO law. Since it is the aim of non-discrimination provisions to grant equal conditions of competition and investments can only be in competitive circumstances if they belong to the same category of industry, investors or investments can only be in like circumstances if they operate in the same economic sector. Moreover, legitimate regulatory objectives of the host State must be taken into account. Not only does this inter-

pretation conform to the broader language of the requirement, but it is also a corollary to the intrusive nature of foreign investment, which is due to the presence of investors in the host country and which may enhance the need of host States to regulate their commercial operations in order to pursue important public policies.

In the view of the potentially far-reaching effects of MFN clauses, in order to achieve more predictability both for the investor and for the host state, it would be desirable to promote a uniformisation of standards included in bilateral investment treaties. However, this uniformisation is also connected with certain risks, with the decisions of arbitral tribunals depending on the legal views of the different arbitrators. Thus, against the background of the complex effects of the most-favoured-nation principle and the differing standards in the bilateral treaty network, another option to evade the problems of unpredictability and difficulties in the negotiation of treatment standards and nevertheless achieve legal equality could be the creation of a multilateral framework. The elevation of negotiations on a multilateral plane would enable States to control the treatment standards they wish to include in the treaty text. Moreover, the risk of cherry picking and thus the combination of standards which were never meant to be combined would be eliminated by the creation of a multilateral framework. However, attempts to draft a multilateral agreement failed in 1998, and pushing for a truly multilateral investment treaty, at least in the short- to medium run, seems a futile endeavour.⁹³⁴ It therefore remains crucial for host States to make exceptions to most-favoured-nation treatment in the MFN clause itself in order to control its application. Such reservations are a key technique to preserve flexibility in the pursuit of national policy objectives or to preserve the reciprocal nature of an agreement.

⁹³⁴ Schill/ Jacob, *Trends in International Investment Agreements*, p. 178.

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