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Editors' Foreword

Four years have passed since our first discussion about a *Handbook on International Investment Law* in January 2010. This has been a time of conceptual work, numerous e-mail exchanges with some 90 authors, and correspondence with our publisher.

The main purpose of this handbook – aside from providing basic information – is to strive for more clarity and an attempt to achieve some coherence in this relatively young discipline of international law, a system consisting of arbitral awards and doctrinal interpretations, constituting the most dynamic field of international economic law. After a relatively slow beginning as an integral part of customary international law, international investment law has in the past decade evolved like almost no other field of public international law, especially on the basis of an increasing number of bilateral investment treaties. In this regard, the book approaches the most crucial aspects of international investment law and thereby hopefully provides answers to many questions arising in this field.

We are particularly grateful to the contributors who have anxiously awaited the publication of this work. We owe them not only thanks for their contributions, but also for their patience. We are equally grateful to our assistant editor, Ms Yun-I Kim, for her skilful, meticulous and dedicated management of the entire editorial process. Whoever has edited a book of approximately 2000 pages will appreciate such outstanding commitment. Thanks also go to Mr Christoph Hölken and Ms Katharina Diel-Gligor who supported Ms Kim during parts of the editing process, and to the publisher for their excellent cooperation. Finally, it should also be mentioned that the resources at both the International Investment Law Centre Cologne (IILCC) and at the Department of European, International and Comparative Law of the University of Vienna, provided the necessary basis for such a comprehensive work.

It goes without saying that this first attempt at providing an encompassing overview on existing international investment law is far from perfect. There is an academic responsibility of each author for every article, but also an overall responsibility of the editors who have read each contribution and where necessary, have discussed them with the authors. Therefore, any proposal for improvement of contributions is most welcome and can be directed to the authors as well as to the editors. In any event, we hope that you enjoy reading this handbook!

Cologne, Siegen, and Vienna,
December 2014

Marc Bungenberg Jörn Griebel Stephan Hobe August Reinisch

Table of Contents

IV. Most Favoured Nation Treatment*

August Reinisch

Literature: Lee Caplan and Jeremy Sharpe, 'United States' in Chester Brown (ed), *Commentaries on Selected Model Investment Treaties* (Oxford University Press, 2013) 755–851; Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2008); Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009); Zachary Douglas, 'The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails' (2011) 2(1) J. Int'l Disp. Settlement 97–113; Jörn Griebel, *Internationales Investitionsrecht* (C.H. Beck, 2008); Todd Grierson-Weiler and Ian Laird, 'Standards of Treatment' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) 259–304; Matthias Herdegen, *Internationales Wirtschaftsrecht* (C.H. Beck, 2005); Meinhard Hilf and Robin Geiß, 'Most-Favoured-Nation Clause' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law*, vol. VII (Oxford University Press, 2012) 384–395; Stanley Hornbeck, 'The Most-Favored-Nation Clause' (1909) 3 AJIL 395–422; France Houde

* I am very indebted to Dr Peter Bachmayer who contributed excellently to the formatting of this chapter. It is current as of September 2013.

and Fabrizio Pagani, 'Most-Favoured-Nation Treatment in International Investment Law' in OECD (ed), *International Investment Law: A Changing Landscape* (OECD, 2005) 127–161; Robert Hudec, 'Tiger, Tiger in the House: A critical Evaluation of the Case against discriminatory Trade Measures' in Ernst-Ulrich Petersmann and Meinhard Hilf (eds), *The New GATT Round of Multilateral Trade Negotiations: Legal and Economic Problems* (Kluwer Law and Taxation, 1988) 165–196; ILC, 'Draft Articles on Most-Favoured-Nation Clauses with Commentaries 1978' (1978) YBILC, vol. II, Part Two; Meg Kinnear, Andrea Bjorklund, John Hannaford, *Investment Disputes under NAFTA – An Annotated Guide to NAFTA Chapter 11* (Kluwer Law International, 2006); Martins Paparinskis, 'Latvia' in Chester Brown (ed), *Commentaries on Selected Model Investment Treaties* (Oxford University Press, 2013) 445–463; Stephanie Parker, 'A BIT at a Time: The Proper Extension of the MFN Clause to Dispute Settlement Provisions in Bilateral Investment Treaties' (2012) 2(1) The Arbitration Brief 30–63; Yannick Radi, 'The Application of the Most-Favoured-Nation Clause to the Dispute Settlement Provisions of Bilateral Investment Treaties: Domesticating the Trojan Horse' (2007) 18 EJIL 757–774; August Reinisch, 'How Narrow are Narrow Dispute Settlement Clauses in Investment Treaties?' (2011) 2 J. Int'l Disp. Settlement 115–174; Stephan Schill, 'Multilateralizing Investment Treaties through Most-Favoured-Nation-Clause' (2009) 27 Berkeley J. Int'l L. 496–569; Stephan Schill, *The Multilateralization of International Investment Law* (Cambridge University Press, 2009); Christoph Schreuer, Loretta Malintoppi, August Reinisch, Anthony Sinclair, *The ICSID Convention – A Commentary* (Cambridge University Press, 2009); Georg Schwarzenberger 'The Most-Favoured-Nation Standard in British State Practice' (1945) XXII BYIL 96–121; Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press, 2010); UNCTAD, *Most-Favoured-Nation Treatment*, U.N. Doc. UNCTAD/ITE/IIT/10 (United Nations, 1999); UNCTAD, *Most-Favoured-Nation Treatment*, UNCTAD/DIAE/IA/2010/1 XIII (United Nations, 2010); UNCTAD, *National Treatment*, UNCTAD/ITE/IIT/11 (United Nations, 1999); Andreas Ziegler, 'The Nascent International Law on Most-Favoured-Nation (MFN) Clauses in Bilateral Investment Treaties (BITs)' (2009) EYIEL 77–101.

A. Introduction

1 BITs and multilateral investment agreements regularly contain clauses providing for most favoured nation (MFN) treatment. Such MFN clauses require the contracting parties to accord investors and investments from the other contracting party/parties treatment no less favourable than that accorded to their own investors and investments from third States. Together with national treatment provisions, MFN clauses are the central non-discrimination rules usually contained in international investment agreements (IIAs). Thus, they often appear in 'combined' versions, *i.e.* clauses that combine national and MFN treatment.

2 Like national treatment MFN treatment is a so-called contingent,[1] 'comparative'[2] or 'relative'[3] investment standard, according treatment depending upon

1 See *Anglo-Iranian Oil Co.* case *(United Kingdom v. Iran)*, (1952) ICJ Pleadings 533.

2 Todd Grierson-Weiler and Ian Laird, 'Standards of Treatment' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) 259, 261.

3 UNCTAD, *National Treatment*, UNCTAD/ITE/IIT/11 (United Nations, 1999) 7; UNCTAD, *Most-Favoured-Nation Treatment*, UNCTAD/DIAE/IA/2010/1 XIII (United Nations, 2010); Jörn Griebel, *Internationales Investitionsrecht* (C.H. Beck, 2008) 79; Lee Caplan and Jeremy

the level of treatment given to national or other foreign investors. Thus, the treatment accorded may not necessarily be particularly beneficial.

MFN clauses are traditionally included in investment treaties. Their language has remained relatively uniform. Treaties do, however, vary considerably as regards the exceptions from MFN treatment. Additionally, they may vary as to whether their application is limited to the post-establishment phase or extends to the pre-establishment phase. **3**

In practice, investment tribunals only rarely had to address claims alleging violations of MFN treatment as regards substantive treatment. Rather, most of the MFN debate centres around the so-called *Maffezini* approach, named after a leading 2000 decision on jurisdiction,[4] in which an ICSID tribunal found that a claimant was entitled to rely on an MFN clause in order to 'import' more favourable procedural treatment available under a third country BIT of the host State. **4**

Since then investment tribunals have failed to develop a uniform interpretation of the potential reach of MFN clauses in IIAs. While some have held that they may extend not only to procedural advantages, but also to admissibility and even jurisdictional issues, others have strictly limited the potential reach of MFN clauses to substantive treatment. These inconsistent interpretations of MFN clauses remain among the most controversial issues of international investment arbitration. **5**

In connection with its work on the law of treaties, the International Law Commission (ILC) dealt with the topic of MFN clauses between 1964 and 1978. In 1978, the Commission adopted draft articles on MFN clauses with a detailed commentary.[5] However, the draft articles were not adopted by the General Assembly. Nevertheless, the work of the ILC provided valuable insights into a number of conceptual underpinnings of MFN treatment. In 2006, the ILC debated again whether the MFN clause should be re-considered and included in the Commission's future work programme. In 2007, the ILC established an open-ended Working Group to examine the possibility of the inclusion of the topic 'Most-favoured-nation clause' in its long-term programme of work.[6] **6**

Sharpe, 'United States' in Chester Brown (ed), *Commentaries on Selected Model Investment Treaties* (Oxford University Press, 2013) 755, 776.

4 *Emilio Agustín Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000.

5 ILC, 'Draft Articles on Most-Favoured-Nation-Clauses with Commentaries 1978' (ILC Draft Articles) (1978) 2 YBILC, Part Two, 16.

6 The Working Group made such a recommendation stating that 'the Working Group concluded that the Commission could play a useful role in providing clarification on the meaning and effect of the most-favoured-nation clause in the field of investment agreements. Such work was seen as building on the past work of the Commission on the most-favoured-nation clause'. ILC, Most-Favoured-Nation Clause – Report of the Working Group, Doc. A/CN.4/L.719 of 20 July 2007, para. 1.

B. Historic Origin

7 Like the national treatment standard, examples of MFN provisions in the field of commercial and economic relations, date back to the middle ages. Already treaties entered into by various city states in the 12th and 13th centuries contained MFN treatment.[7] In the late 18th century, however, some States started to extend MFN treatment only conditionally. This treaty practice was pursued in particular by the United States which intended to protect its nascent industries. Beginning with the Treaty of Amity and Commerce with France[8] the US extended MFN treatment only on the condition that the beneficiary State agreed to grant compensation equivalent to that given by the third State. On that basis, France and the US granted MFN treatment to each other's nationals.

8 By the early 20th century, the unconditional MFN clause became the 'cornerstone' of international commercial relations.[9] With the world economic crisis in 1929 the multilateralizing effect of MFN treatment was no longer welcome and States increasingly turned to preferential bilateral trade arrangements. Only with the establishment of the post-World War II liberal economic order of the Bretton Woods system, States generally reintroduced unconditional MFN treatment,[10] most prominently in Article I of the GATT 1947.

9 Today, MFN clauses appear in numerous treaties covering a variety of topics. They are not reserved to trade and investment law but also include, *inter alia*, international regulation of trade and payments (e.g. exports, imports, customs tariffs), international investment protection, the establishment of foreign physical and juridical persons, their personal rights and obligations, international taxation or the protection of intellectual and industrial property.

C. The Functioning and Basic Concepts of MFN Clauses

10 International jurisprudence on MFN issues has been rather limited in the past. The 'explosion' of MFN issues in investment arbitration is a relatively recent phenomenon and can be traced back to the seminal *Maffezini* decision in 2000.[11] Additionally, a few leading ICJ cases and arbitral awards have been closely ob-

7 See Meinhard Hilf and Robin Geiß, 'Most-Favoured-Nation Clause' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law*, vol. VII (Oxford University Press, 2012) 384, 387. See on the historic development of MFN clauses also Stephan Schill, 'Multilateralizing Investment Treaties through Most-Favoured-Nation Clause' (2009) 27 Berkeley J. Int'l L. 496, 509 *et seq.*; Robert Hudec, 'Tiger, Tiger in the House: A critical Evaluation of the Case against discriminatory Trade Measures' in Ernst-Ulrich Petersmann and Meinhard Hilf (eds), *The New GATT Round of Multilateral Trade Negotiations: Legal and Economic Problems* (Kluwer Law and Taxation, 1988) 165–212, 177.

8 Art. II of the Treaty of Amity and Commerce between the United States and France, done 6 February 1778, 8 Statutes at Large 12 (1848).

9 Stanley Hornbeck, 'The Most-Favored-Nation Clause' (1909) 3 AJIL 395–422.

10 Stephan Schill, 'Multilateralizing Investment Treaties through Most-Favoured-Nation Clause' (n. 7) 513 *et seq*.

11 *Emilio Agustín Maffezini v. Spain* (n. 4).

served by international doctrine and found their way into the work of the ILC which culminated in the 1978 Draft Articles on Most-Favoured-Nation clauses with commentaries.[12]

1. The Concept of MFN Treatment

Pursuant to Article 5 of the ILC Draft Articles on Most-Favoured-Nation-Clauses MFN treatment is: **11**

> (…) 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.[13]

The reference to 'persons or things in a determined relationship with' a beneficiary State[14] is of particular relevance in the context of investment law since the treatment to be extended in IIAs usually is treatment of investors and investments of a beneficiary (home) State. **12**

2. MFN as a Treaty, not Custom-Based Obligation

Although MFN clauses have been routinely included in commercial treaties throughout the 19th and early 20th century in treaties relating to bilateral economic relations, it is generally accepted that this has not given rise to a customary law obligation to grant MFN treatment.[15] Thus, in the absence of specific treaty commitments, States are free to discriminate between third States in particular in their economic relations.[16] **13**

3. The 'Basic Treaty' as the Legal Basis of MFN Treatment

An MFN clause aims at extending a certain form of treatment not expressly provided for in a treaty to that treaty's contracting parties. The more favourable **14**

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12 ILC Draft Articles (n. 5).

13 *Ibid*.

14 *Ibid*., Commentary (4) to Article 5, 22 ('Such relationships are nationality or citizenship of persons, place of registry of vessels, State of origin or products, etc.').

15 See UNCTAD, *Most-Favoured-Nation Treatment* (n. 3) 22 ('It is a **treaty-based obligation** that must be contained in a specific treaty.' (emphasis added)); *ibid.* ('Even though thousands of IIAs currently in force contain an MFN treatment clause, it remains a treaty-based obligation. It is a conventional obligation and not a principle of international law which applies to States as a matter of general legal obligation independent of specific treaty commitments.'); Matthias Herdegen, *Internationales Wirtschaftsrecht* (C.H. Beck, 2005) 11; Georg Schwarzenberger 'The Most-Favoured-Nation Standard in British State Practice' (1945) XXII BYIL 96, 103 ('[T]hough widely recognized in treaties by which States grant to each other reciprocal freedom of commerce, it cannot be admitted that that principle has as yet developed into a rule of customary international law.'); Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2008) 206; ILC Draft Articles (n. 5), Commentary (3) to Article 7, 25.

16 France Houde and Fabrizio Pagani, 'Most-Favoured-Nation Treatment in International Investment Law' in OECD (ed), *International Investment Law: A Changing Landscape* (OECD, 2005) 129 ('While MFN is a standard of treatment which has been linked by some to the principle of the equality of States, the prevailing view is that a MFN obligation exists only when a treaty clause creates it.').

treatment may be extended as a matter of mere practice or, in the context of economic relations most frequently, will be accorded pursuant to treaty obligations. The latter are contained in the so-called third-party treaty, whereas the treaty containing the MFN clause is referred to as the basic treaty.

15 Although third-party treaties are determinative of the (relative) standard of treatment owed to the beneficiary State of an MFN clause, they are technically *res inter alios acta* and do not directly give rise to the beneficiary's rights. Rather, it is the basic treaty that forms the legal basis for an improved treatment along the lines of the third-party treaty.[17]

4. The Temporal Scope of MFN Treatment

16 While MFN clauses obviously intend to apply to more favourable future treatment, it appears less certain whether MFN clauses also refer to already existing, more favourable treatment stipulated in third-party treaties concluded before the conclusion of the basic treaty.

17 This issue was raised but not clearly solved in *Bayindir v. Pakistan*, an ICSID case in which an investment tribunal confirmed the 'possibility of importing an FET obligation through the MFN clause expressly included in the Treaty.'[18] When it came to the question which third-party treaty could be imported the tribunal was confronted with the respondent State's objection with regard to a third-party BIT that had been concluded before the basic treaty and eventually decided that an MFN clause could import more favourable treatment contained in subsequent third-party treaties without clearly stating whether this also applied to already existing third-party treaties.

5. The Scope of MFN Clauses – The *ejusdem generis* Principle

18 An MFN clause 'imports' treatment extended to a third party. However, the scope of such importation is not unlimited. Rather, it extends to all matters that are covered by the basic treaty.

19 This *ratione materiae* limitation of an MFN clause is also referred to as the *ejusdem generis* principle which provides that only matters of the same kind are covered by MFN treatment.[19] The *ejusdem generis* principle ensures that only 'matters belonging to the same subject matter or the same category of subject' as to which the MFN clause relates can be 'imported' through MFN treatment.[20] It

17 See *Anglo-Iranian Oil Co.* case *(United Kingdom v. Iran)*, Preliminary Objection, Judgment of 22 July 1952, ICJ Rep. 1952, 109 ('this is the treaty which establishes the juridical link between the beneficiary State and a third party treaty and confers upon that State the rights enjoyed by the third party. A third-party treaty, independent 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*).').

18 *Bayindir v. Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 155.

19 Rudolf Dolzer and Christoph Schreuer (n. 15) 206.

20 France Houde and Fabrizio Pagani (n. 16) 142; UNCTAD, *Most-Favoured-Nation Treatment* (n. 3) xiii ('An MFN clause is governed by the ***ejusdem generis* principle**, in that it may only

is generally regarded to mean that 'general words following or perhaps preceding special words are limited to the genus indicated by the special words.'[21] Thus, an MFN clause in an investment treaty cannot import consular treatment and an MFN clause in a trade treaty cannot lead to the recognition of foreign judgments or to extradition obligations.

The *ejusdem generis* principle is largely accepted both in theory and judicial as well as arbitration practice.[22] However, its application has sometimes led to difficulties in practice, in particular, when it comes to identifying the precise subject matter of treatment. **20**

The relevant international judicial and arbitral practice is instructive and has found its way into modern investment arbitration since many tribunals refer to these precedents. The three major cases regularly cited are the *Anglo-Iranian Oil Company* case,[23] *Rights of Nationals of the United States of America in Morocco*,[24] and the *Ambatielos* case.[25] Moreover, the *ejusdem generis* principle is widely adhered to by investment tribunals. Already in the leading case of *Maffezini v. Spain*, an ICSID tribunal held that under the **21**

> principle *ejusdem generis* the most favored nation clause can only operate in respect of the same matter and cannot be extended to matters different from those envisaged by the basic treaty.[26]

However, more recent decisions have been more nuanced in their application of the *ejusdem generis* principle and opined that it does not solve the issue whether dispute settlement is covered by an MFN clause which can only be deduced from the parties' intentions.[27] **22**

6. The Scope of MFN Treatment – Treaty Stipulations and *de facto* Treatment

An MFN clause obliges States to accord the best (most favoured nation) treatment extended to a third party to the treaty partner of the basic treaty. Such treatment may be treatment extended as a matter of fact[28] – without any specific le- **23**

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apply to issues belonging to the same subject matter or the same category of subjects to which the clause relates.' (emphasis in original)).

21 Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 2003) 604.

22 ILC Draft Articles (n. 5), Commentary (1) to Articles 9 and 10, 27 as well as Commentary (10) to Articles 9 and 10, 30 ('No writer would deny the validity of the *ejusdem generis* rule which, for the purposes of the most-favoured nation clause, derives from its very nature. It is generally admitted that a clause conferring most-favoured-nation rights in respect of a certain matter, or class of matter, can attract the rights conferred by other treaties (or unilateral acts) only in regard to the same matter or class of matter.').

23 *The Anglo-Iranian Oil Company* case *(United Kingdom v. Iran)*, Jurisdiction, 22 July 1952, ICJ Rep. 1952, 109.

24 *The Case Concerning Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, 27 August 1952, ICJ Rep. 1952, 176.

25 *The Ambatielos* case *(Greece v. United Kingdom)*, Award, 6 March 1956, (1963) UNRIAA, vol. XII, 107.

26 *Emilio Agustín Maffezini v. Spain* (n. 4) para. 41.

27 *Daimler Financial Services AG v. Argentina*, ICSID Case No. ARB/05/1, Decision on Jurisdiction, 22 August 2012, para. 215.

gal obligation – or it may in turn be based on treatment owed to a third party by reason of a treaty obligation contained in the third-party treaty.

24 While MFN in trade treaties often relates to the *de facto* treatment given to products from third parties, MFN clauses in investment agreements regularly concern treatment obligations found in third-party treaties.[29] Thus, most investment cases involve attempts by investors to 'import' either more favourable substantive treatment obligations or – more controversially – more favourable procedural rights from third-party treaties.

7. Treatment 'No Less Favourable' – Not 'Equal' Treatment

25 MFN clauses are a form of non-discrimination clauses. Nevertheless, it is clear that MFN treatment – like national treatment – does not require granting States to accord precisely the 'same' treatment extended to third States also to the beneficiary State. States are free to accord more favourable treatment to the beneficiary State. All the MFN clause demands is treatment 'no less favourable' than that accorded to third parties.[30]

26 While this has been expressly endorsed by certain investment tribunals,[31] some tribunals appear to have equalised MFN with equal treatment. For instance, in the *Suez* and *AWG* case,[32] the tribunal concluded that as a result of the applicable MFN clause the investors covered by the basic treaty would be entitled to access investor-State arbitration under the 'same' terms as investors under a third party treaty.[33]

8. What constitutes More Favourable Treatment?

27 In trade matters it is usually easy to determine that the charging of lower tariffs constitutes more favourable treatment. In the context of more complex investment relations the question what constitutes more favourable treatment gains particular weight.

28 This may apply to both 'substantive' and 'procedural treatment'. Complex expropriation clauses may contain different elements, some of which may appear more or less favourable to investors. The same is true with dispute settlement clauses that often do not simply provide for investor-State arbitration, but consti-

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28 ILC Draft Articles (n. 5), Commentary (6) to Article 5, 23.

29 Rudolf Dolzer and Christoph Schreuer (n. 15) 207.

30 See also ILC Draft Articles (n. 5), Commentary (5) to Article 5, 23 ('(…) while most-favoured-nation treatment excludes preferential treatment of third States by the granting State, it is fully compatible with preferential treatment of the beneficiary State by the granting State, although it may be required to accord such preferential treatment under other most-favoured-nation clauses. Consequently, the treatment accorded to the beneficiary State and that accorded to the third State are not necessarily "equal".').

31 *Daimler Financial Services AG v. Argentina* (n. 27) para. 243.

32 *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/03/19 and *AWG Group Ltd. v. Argentina*, UNCITRAL, Decision on Jurisdiction, 3 August 2006.

33 *Ibid.*, para. 55.

tute a multifaceted system of waiting periods, alternative remedies, fork in the road clauses, etc. In such situations, it may not be easy to determine whether a particular dispute settlement provision is 'more' favourable than another.

Interestingly, investment tribunals rarely address this issue. In most cases, it appears that they accept claimants' characterisation of what they consider to be more favourable treatment under a third country IIA. **29**

For instance, in *Maffezini* and other cases, tribunals followed claimants' characterisation of direct access to arbitration without waiting periods as more favourable treatment than access after exhaustion of such periods.[34] A number of tribunals indicated that they considered a choice of dispute settlement options more favourable than only limited options.[35] **30**

D. MFN in International Investment Agreements

Already FCN treaties – often regarded as precursors to modern BITs – routinely included MFN clauses.[36] Most modern model BITs include the MFN treatment standard and almost all BITs contain MFN clauses. While MFN clauses often appear as stand-alone provisions in IIAs, they are also often combined with the other non-discrimination standard of national treatment or with other treatment standards. However, there are also some IIAs which do not contain MFN treatment.[37] **31**

While differences in wording of MFN clauses regularly occur, it has also been cautioned that the underlying concept of MFN is a fairly clear and standard one that does not necessarily change with textual nuances adopted by treaty-makers.[38] One is reminded of Georg Schwarzenberger's dictum that '[t]hough there is no such thing as *the* m.f.n. clause, it is equally necessary to emphasize that there is such a thing as *the* m.f.n. standard.'[39] **32**

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34 *Emilio Agustín Maffezini v. Spain* (n. 4) para. 64; *Gas Natural SDG SA v. Argentina*, ICSID Case No. ARB/03/10, Decision on Jurisdiction, 17 June 2005, para. 31; *Telefónica SA v. Argentina*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, 25 May 2006, para. 103.

35 *Impregilo S.p.A. v. Argentina*, ICSID Case No. ARB/07/17, Award, 21 June 2011, para. 101; *Hochtief AG v. Argentina*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011, para. 100; *Plama Consortium Ltd. v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, para. 208.

36 See, e.g., UNCTAD, *Most-Favored-Nation Treatment*, U.N. Doc. UNCTAD/ITE/IIT/10 (United Nations, 1999) 39 (referring to MFN clauses as a 'core element of international investment agreements.').

37 UNCTAD reported in 2010 that almost 20 percent of IIAs would not have an MFN clause. See UNCTAD, *Most-Favoured-Nation Treatment* (n. 3) 12 ('A sample of 715 IIAs reviewed by UNCTAD reveals that only 19.6 per cent did not include a reference to MFN.').

38 UNCTAD, *Most-Favoured-Nation Treatment* (n. 3) 6 ('There is no evidence that, by using different wording, the parties to these various agreements intended to give the MFN clauses a different scope. Whatever the specific terminology used, it does not change the basic thrust of MFN.').

39 Georg Schwarzenberger (n. 15) 104 (emphasis in original).

33 MFN clauses in investment agreements typically stipulate 'treatment' no less favourable than that accorded to third State investors and investments. Sometimes, language is added clarifying that the treatment concerns investments and/or investors 'in like circumstances'.[40] Other IIAs provide that MFN applies to 'all matters subject to this agreement'.[41] The following paragraphs provide an overview of textual variations found in IIA practice.

1. MFN in the Pre-Establishment Phase

34 The most significant variation found in IIAs relates to whether MFN and national treatment is also owed in the pre-establishment (pre-entry) phase or only in the post-establishment phase. While NAFTA as well as US and Canadian BITs typically provide for MFN and national treatment in both phases, most European BITs restrict MFN treatment to the post-establishment phase.

35 That MFN should also apply in the pre-establishment phase is usually expressed by language indicating that MFN should apply 'with respect to the establishment, acquisition, expansion, (…),'[42] while IIAs limiting the application of their MFN clauses to the post-establishment phase do not have such language.

2. MFN Linked to Fair and Equitable Treatment

36 Some BITs link MFN to fair and equitable treatment as, for instance, the Chile–Malaysia BIT.[43] This wording has given rise to uncertainty whether MFN should thus be limited to fair and equitable treatment. In *MTD v. Chile*,[44] an ICSID tribunal appeared to give such a limited interpretation to the applicable MFN clause.[45] The annulment committee in the same case, however, made clear that the MFN clause 'attract[ed] any more favourable treatment extended to third State investments and [did] so unconditionally.'[46]

37 A more express limitation of MFN obligations to fair and equitable treatment can be seen in the Russian Model BIT which expressly relates MFN to fair and equitable treatment.[47]

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40 Art. 1103 of NAFTA (1992); Art. 4 of the US Model BIT (2012); Art. 4 of the Canadian Model FIPA (2004).

41 Art. IV(2) of the Argentina–Spain BIT 1991.

42 See e.g. Art. 1103 of NAFTA (1992); Art. 4 of the US Model BIT (2012); Art. 4 of the Canadian Model FIPA (2004).

43 Art. 3(1) of the Chile–Malaysia BIT 1992, *Agreement between the Government of Malaysia and the Government of the Republic of Chile for the Promotion and Protection of Investments* ('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.'). Similar clauses have been widely used in Latvian BITs; see Martins Paparinskis, 'Latvia', in Chester Brown (ed) (n. 3) 445.

44 *MTD Equity v. Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004.

45 *Ibid.*, para. 104.

46 *MTD Equity v. Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, 21 March 2007, para. 64.

3. MFN and National Treatment Combined

While MFN clauses may appear as stand-alone obligations, many IIAs combine them with national treatment obligations.[48] In some instances, IIAs provide that investors should receive the better of MFN or national treatment.[49] Another variation of MFN clauses provides for the automatic extension of more favourable treatment under international law or under domestic law to treatment obligations under the basic treaty.[50] **38**

4. MFN Clauses and Dispute Settlement

The question whether MFN clauses are limited to substantive treatment or may also encompass dispute settlement issues, whether qualified as jurisdictional or admissibility questions, has been the central controversial issue in investment arbitration since the 2000 *Maffezini* decision on jurisdiction.[51] It is therefore not surprising that States have reacted to this jurisprudential development by expressly rejecting or endorsing the *Maffezini* approach. **39**

A number of States have rejected the interpretation given to an MFN clause by the *Maffezini* tribunal. The techniques vary. Some have said so in the treaty or in an annex to it,[52] while others have opted for the adoption of instruments relating to MFN clauses in existing IIAs.[53] An interesting alternative to reject the *Maffezini* approach without formally adopting specific treaty language arose **40**

47 Art. 3 of the Russian Model BIT (2002) ('1. Each Contracting Party shall ensure in its territory fair and equitable treatment of investments by investors of the other Contracting Party related to the management and disposal of investments. 2. The treatment referred to in paragraph 1 of this Article shall be at least as favourable as that granted to investments of its own investors or to investors of a third State whichever is more favourable according to the investor. (…).').

48 E.g. Art. 3(1) of the UK Model BIT (2005); Art. III(1) of the Italian Model BIT (2003); Art. IV(1) of the Colombian Model BIT (2009). See also the references in UNCTAD, *National Treatment* (n. 3) 42 *et seq*.

49 E.g. Art. II(2)(a) of the Egypt–US BIT (1986); Art. II(2) of the Pakistan–Turkey BIT (1995); Art. 3(3) of the Austrian Model BIT (2008); Art. 3(1) of the Latvian Model BIT (2009) ('Each Contracting Party shall accord to investments of investors of the other Contracting Party, treatment no less favourable than that which it accords to investments of its own investors or investments of investors of any third State, whichever is the most favourable to the investor.').

50 Art. 3(5) of the Czechoslovakia–Netherlands BIT 1991 ('If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain rules, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such rules shall to the extent that they are more favourable prevail over the present Agreement.').

51 *Emilio Agustín Maffezini v. Spain* (n. 4).

52 Colombia–Switzerland Agreement, 17 May 2006, annex; cited in Andreas Ziegler, 'The Nascent International Law on Most-Favoured-Nation (MFN) Clauses in Bilateral Investment Treaties (BITs)' (2009) EYIEL 77–101, 95. Similar clauses can be found in the Canada–Peru FIPA 2006; Art. 5(4) of the ASEAN–China Investment Agreement (2009); Art. IV(2) of the Colombian Model BIT (2009).

53 See, e.g., the *National Grid* decision on jurisdiction in which the tribunal noted that 'the Argentine Republic and Panama exchanged diplomatic notes with an "interpretative declaration" of the MFN clause in their 1996 investment treaty to the effect that, the MFN clause does not

in the course of the negotiations for the Free Trade of the Americas Agreement. A footnote, disapproving of the *Maffezini* approach, was included in the draft of 21 November 2003, which was to be deleted before the adoption of the final text (thus sometimes referred to as 'vanishing footnote'), but thereby had become part of the negotiating history of the treaty.[54]

41 On the contrary, a number of States have expressly endorsed the *Maffezini* approach and formulated MFN clauses in a way to remove any doubt that dispute settlement was intended to be covered by them.[55] An example of this intention is found in the 2008 Austrian Model BIT which adds to the language 'with respect to the management, operation, maintenance, use, enjoyment, sale and liquidation' 'as well as dispute settlement'.[56]

42 It is clear, however, that also the clarifying language inserted in some post-*Maffezini* BITs may not remove all interpretation difficulties. Clauses now expressly encompassing dispute settlement may give rise to an *e contrario* interpretation, implying that all other MFN clauses of such countries do not refer to dispute settlement. But they could also be regarded as reaffirmations that MFN clauses in general include dispute settlement. Such ambiguity could be avoided by language suggesting that one or the other interpretation of the scope of an MFN clause is not limited to the MFN clause of a particular investment agreement.

43 An even safer approach may be the one chosen by some States that have exchanged diplomatic notes in which they express their understanding of MFN clauses.

5. Exceptions from MFN Obligations

44 BITs and other IIAs vary considerably with regard to the exceptions from MFN treatment. In addition to the 'classic exceptions' of regional economic integration organisations and taxation, States have used a variety of other explicit derogations from MFN obligations.[57]

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extend to dispute resolution clauses, and that this has always been their intention.' *National Grid plc v. Argentina*, UNCITRAL, Decision on Jurisdiction, 20 June 2006, para 85.

54 The text is reproduced in *Plama Consortium Ltd. v. Bulgaria* (n. 35) para. 202. In a similar vein, it has been argued that the reference typically found in US BITs 'with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments' refers to 'the life cycle of investments' and 'does not therefore create MFN treatment protection with respect to dispute resolution mechanisms.' See Lee Caplan and Jeremy Sharpe (n. 3) 780.

55 See, e.g., Art. 3(3) of the UK Model IPPA 2008.

56 See Art. 3(3) of the Austrian Model BIT 2008 ('Each Contracting Party shall accord to investors of the other Contracting Party and to their investments or returns treatment no less favourable than that it accords to its own investors and their investments or to investors of any third country and their investments or returns with respect to the management, operation, maintenance, use, enjoyment, sale and liquidation as well as dispute settlement of their investments or returns, whichever is more favourable to the investor.').

57 UNCTAD, *Most-Favoured-Nation Treatment* (n. 3) 10.

The most important exception to MFN treatment relates to preferences members of regional economic organisations mutually grant each other.[58] Thus, many BITs contain clauses ensuring that MFN does not apply with regard to special rights based on customs unions, free trade organisations and similar regional economic integration organisations (REIOs).[59] Another very common exception relates to tax treatment.[60] Some countries granting MFN in the pre-establishment phase have inserted in their IIAs country exceptions.[61] In a few cases, countries have also inserted specific subject-matter exceptions, relating, e.g. to aviation and fisheries matters.[62] **45**

E. The Application of MFN Clauses in Investment Practice

In investment arbitration, MFN clauses – though standard in most IIAs – are less often invoked than the obligation to treat foreign investors in a fair and equitable manner and to grant them full protection and security. In fact, most invocations of MFN clauses concern attempts by claimants to receive better ('more favourable') treatment in regard to dispute settlement than that provided for in a basic investment treaty.[63] **46**

58 See Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press, 2010) 205.

59 See e.g. Art. 3(3) of the 1998 German Model BIT ('Such treatment shall not relate to privileges which either Contracting State accords to investors of third States on account of its membership of, or association with, a customs or economic union, a common market or a free trade area.'); Art. 3(2) of the Bulgaria–Cyprus BIT ('This treatment shall not be applied to the privileges which either Contracting Party accords to investors from third countries in virtue of their participation in economic communities and unions, a customs union or a free trade area.'); Art. IV(3) of the Argentina–Spain BIT 1991 ('Such treatment shall not extend, however, to the privileges which either Party may grant investors of a third State by virtue of its participation in: – a free trade area; – a customs union; – a common market; – a regional integration agreement; or an organization of mutual economic assistance by virtue of an agreement concluded prior to the entry into force of this Agreement, containing terms analogous to those accorded by that Party to participants of the said organization.'); Annex III(2)(a) (Exceptions from Most-Favoured-Nation Treatment) of the Canadian Model FIPA 2004 ('Article 4 shall not apply to treatment by a Party pursuant to any existing or future bilateral and multilateral agreement: (a) establishing, strengthening or expanding free trade area or customs union; (…)').

60 See e.g. Art. 3(4) of the 1998 German Model BIT ('The treatment granted under this Article shall not relate to advantages which either Contracting State accords to investors of third States by virtue of a double taxation agreement or other agreements regarding matters of taxation.'); Art. IV(4) of the Argentina–Spain BIT 1991 ('The treatment accorded under this article shall not extend to tax deductions or exemptions or other analogous privileges granted by either Party to investors of third countries by virtue of an agreement to prevent double taxation or any other tax agreement.').

61 Canada and the US. See France Houde and Fabrizio Pagani (n. 16) 135.

62 See e.g. Annex III(2)(b) (Exceptions from Most-Favoured-Nation Treatment) of the Canadian Model FIPA 2004 ('Article 4 shall not apply to treatment by a Party pursuant to any existing or future bilateral and multilateral agreement: (…) (b) relating to: (i) aviation; (ii) fisheries; (iii) maritime matters, including salvage.').

63 See also UNCTAD, *Most-Favoured-Nation Treatment* (n. 3) 17 *et seq*.

47 The following overview of the actual investment law practice starts with the potential reach of MFN clauses to the scope of investment. It then analyses the limited case law dealing with the less controversial question of 'importing' better substantive treatment from third party investment treaties and continues to address the core dispute of whether an MFN clause may serve to provide better dispute settlement treatment than the one provided for under the basic treaty.

1. MFN and the Scope of Protected Investment

48 While MFN clauses have been mostly invoked in order to claim a better substantive treatment or to 'import' more beneficial procedural advantages from third party treaties, there have also been a few attempts to rely on an MFN clause in order to achieve other purposes.

49 One such example can be witnessed in the *HICEE* case[64] in which a claimant sought to rely on an MFN clause which was expressly linked to full protection and security in order to broaden the scope of 'investments' protected under the basic BIT. The claimant's attempt to receive BIT protection by relying on the applicable MFN was unsuccessful as the tribunal held that

> [t]he clear purpose of the [MFN clause] [was] to broaden the scope of the substantive protection granted to the eligible investments of eligible investors; it [could not] legitimately be used to broaden the definition of the investors or the investments themselves.[65]

2. Substantive Treatment

50 It is widely accepted that MFN clauses may be relied upon by investors in order to claim a better substantive treatment accorded by a host State to investors of a third State.[66]

51 In fact, the first investment arbitration dealing with an MFN clause, *Asian Agricultural Products Ltd. (AAPL) v. Sri Lanka*[67] can be read this way. The case primarily concerned the physical destruction of an investor's shrimp farm during civil war in the host State and primarily rested on full protection and security. But the claimant also argued that it could rely on the more favourable liability provisions of the 1981 Sri Lanka–Switzerland BIT which contained neither a war clause nor a civil disturbance exemption. Although the ICSID tribunal rejected the investor's claim, it did not reject the possibility to import a more favourable substantive treaty provision as such. Rather, it found that it was not clear whether the Sri Lanka–Switzerland treaty contained indeed more favourable provisions.[68]

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64 *HICEE B.V. v. Slovakia*, UNCITRAL, Partial Award, 23 May 2011.
65 *Ibid.*, para. 149 (emphasis in original).
66 *Berschader v. Russia*, SCC Case No. 080/2004, Award, 21 April 2006, para. 179 ('It is universally agreed that the very essence of an MFN provision in a BIT is to afford to investors all material protection provided by subsequent treaties (…).'). Rudolf Dolzer and Christoph Schreuer (n. 15) 211.
67 *AAPL v. Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990.
68 *Ibid.*, para. 54.

3. Fair and Equitable Treatment in NAFTA

NAFTA tribunals have developed a specific line of jurisprudence according to which the fair and equitable treatment standard of NAFTA Article 1105 is one coextensive to the international minimum standard. Though this equalisation was initially controversial and some NAFTA tribunals obviously struggled with that concept, at least since the interpretation of the NAFTA Free Trade Commission in 2011[69] most Chapter 11 panels have followed this approach. It is thus not surprising that investors have resorted to NAFTA's MFN clause in order to claim more favourable fair and equitable treatment from non-NAFTA investment agreements entered into by NAFTA host States. **52**

An early example of such an attempt was evident in a 1999 procedural order in *Pope & Talbot Inc. v. Canada* which did not reach the MFN issue. The US investor had invoked the MFN clause of NAFTA[70] in order to import the 'fair and equitable treatment' standard as contained in various BITs concluded by Canada with third States and which was arguably not limited to the NAFTA Article 1105 Minimum Standard of Treatment. While the claim was subsequently dropped, thus hindering the tribunal to address it in detail,[71] it did briefly touch upon the issue in its award on the merits.[72] Since the tribunal adopted the controversial position that NAFTA Article 1105 was not to be considered as coextensive to the international minimum standard of treatment, but rather went beyond that and formed an autonomous treaty standard, it could directly rely on such higher standard of protection and did not have to 'import' an autonomous standard via NAFTA's MFN clause. But in a telling *obiter dictum* the tribunal stated that **53**

> (…) there is a practical reason for adopting the additive interpretation to Article 1105. As noted, the contrary view of that provision would provide to NAFTA investors a more limited right to object to laws, regulation and administration than accorded to host country investors and investments as well as to those from countries that have concluded BITs with a NAFTA party. This state of affairs would surely run afoul of Articles 1102 and 1103, which give every NAFTA investor and investment the right to national and most favoured nation treatment. NAFTA investors and investments that would be denied access to the fairness elements untrammeled by the 'egregious' conduct threshold that Canada would graft onto Article 1105 would simply turn to Articles 1102 and 1103 for relief.[73]

Clearly, the *Pope & Talbot* tribunal suggests that a limited interpretation of the fair and equitable treatment standard contained in NAFTA Article 1105 **54**

69 NAFTA Free Trade Commission, Notes of Interpretation of certain Chapter 11 Provisions (31 July 2001), available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/NAFTA-Interpr.aspx.

70 NAFTA Art. 1103.

71 *Pope & Talbot Inc. v. Canada*, UNCITRAL (NAFTA), Procedural Order No. 2, 28 October 1999, as referred to in Meg Kinnear, Andrea Bjorklund, John Hannaford, *Investment Disputes under NAFTA – An Annotated Guide to NAFTA Chapter 11* (Kluwer Law International, 2006) 1103–1109.

72 *Pope & Talbot Inc. v. Canada*, UNCITRAL (NAFTA), Award on the Merits, 10 April 2001.

73 *Ibid.*, para. 117.

could be avoided by recourse to NAFTA's MFN clause through which higher fair and equitable treatment standards of third country BITs could be imported.

4. Fair and Equitable Treatment in Non-NAFTA Cases

55 The possibility to 'import' a fair and equitable treatment provision through an MFN clause in a basic treaty, in which such fair and equitable treatment was not included, was expressly endorsed by the ICSID tribunal in *Bayindir v. Pakistan*.[74]

56 In its decision on jurisdiction the tribunal found that the applicable MFN clause[75] *prima facie* permitted the Turkish investor to rely on fair and equitable treatment provisions contained in other Pakistani BITs. The tribunal reasoned:

> Neither in its Reply nor at the jurisdictional hearing, did Pakistan dispute Bayindir's assertion that the investment treaties which Pakistan has concluded with France, the Netherlands, China, the United Kingdom, Australia, and Switzerland contains an explicit fair and equitable treatment clause. (…) Under these circumstances and for the purposes of assessing jurisdiction, the Tribunal considers, *prima facie*, that Pakistan is bound to treat investments of Turkish nationals 'fairly and equitably.'[76]

57 In its award, the *Bayindir* tribunal confirmed its preliminary finding and reaffirmed the 'possibility of importing an FET obligation through the MFN clause expressly included in the Treaty.'[77] It held that the fact that fair and equitable treatment was mentioned in the preamble of the Pakistan–Turkey BIT[78] was not sufficient to consider that the contracting States were bound by such a standard. Thus the *Bayindir* tribunal turned to the applicable MFN clause as well as its limitations[79] and concluded:

> The ordinary meaning of the words used in Article II(2) together with the limitations provided in Article II(4) show that the parties to the Treaty did not intend to exclude the importation of a more favourable substantive standard of treatment accorded to investors of third countries. This reading is supported by the preamble's insistence on FET.[80]

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74 *Bayindir v. Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005.

75 Art. II(2) of the Pakistan–Turkey BIT ('Each Party shall accord to these investments, once established, treatment no less favourable than that accorded in similar situations to investments of its investors or to investments of investors of any third country, which ever is the most favourable.').

76 *Bayindir v. Pakistan* (n. 74) paras. 231, 232.

77 *Bayindir v. Pakistan* (n. 18) para. 155.

78 Preamble to the Pakistan–Turkey BIT ('Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources.').

79 Art. II(4) of the Pakistan–Turkey BIT ('The provisions of this Article shall have no effect in relation to following agreements entered into by either of the Parties: (a) relating to any existing or future customs unions, regional economic organization or similar international agreements, (b) relating wholly or mainly to taxation.').

80 *Bayindir v. Pakistan* (n. 18) para. 157.

5. MFN and Expropriation

Investment tribunals have also relied upon MFN clauses in order to import certain provisions relevant in the context of expropriation for the solution of specific disputes. **58**

For instance, in *CME v. Czech Republic*,[81] an UNCITRAL tribunal relied on the MFN clause of the Czech Republic–Netherlands BIT[82] in order to hold that an investor was entitled to 'fair market value' as the relevant standard of compensation though such standard was not expressly contained in the applicable BIT. Rather, the BIT provided for 'just compensation' which should reflect the 'genuine value of the investment'.[83] The *CME* tribunal, however, was of the opinion that the various references to genuine or fair market value all referred to the same basic, underlying notion that full compensation had to be paid in case of expropriation.[84] In addition, the tribunal reasoned: **59**

> The determination of compensation under the Treaty between the Netherlands and the Czech Republic on basis of the 'fair market value' finds further support in 'the most favored nation' provision of Art. 3 (5) of the Treaty. That paragraph specifies that if the obligations under national law of either party in addition to the present Treaty contain rules, whether general or specific, entitling investments by investors of the other party to a treatment more favourable than provided by the present treaty, 'such rules shall to the extent that they are more favourable prevail over the present Agreement.' The bilateral investment treaty between the United States and the Czech Republic provides that compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken (see also Maffezini (…)). The Czech Republic therefore is obligated to provide no less than 'fair market value' to Claimant in respect of its investment, should (in contrast to this Tribunal's opinion) 'just compensation' representing the 'genuine value' be interpreted to be less than 'fair market value'.[85]

Other tribunals, however, have taken a more cautious approach in their assessment of MFN clauses in respect to importing expropriation relevant obligations from other sources.[86] **60**

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81 *CME Czech Republic B.V. v. Czech Republic*, Final Award, 14 March 2003.

82 Art. 3(5) of the Czechoslovakia–Netherlands BIT 1991 ('If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain rules, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such rules shall to the extent that they are more favourable prevail over the present Agreement.').

83 Art. 5 of the Czechoslovakia–Netherlands BIT 1991 ('Neither Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments unless the following conditions are complied with: (…) (c) the measures are accompanied by provision for the payment of just compensation. Such compensation shall represent the genuine value of the investments affected and shall, in order to be effective for the claimants, be paid and made transferable, without undue delay, to the country designated by the claimants concerned and in any freely convertible currency accepted by the claimants.').

84 *CME Czech Republic B.V. v. Czech Republic* (n. 81) para. 497.

85 *Ibid.*, para. 500.

86 See, e.g., *Accession Mezzanine Capital L.P. and Danubius Kereskedöház Vagyonkezelö Zrt. v. Hungary*, ICSID Case No. ARB/12/3, Decision on Respondent's Objection under Arbitration Rule 41(5), 16 January 2013.

6. MFN and *de facto* Discrimination

61 Most investment cases in which an investor invoked an MFN clause concerned the attempt to 'import' more favourable treatment obligations under a third party IIA. It is clear, however, that the MFN treatment standard also prohibits host States from factually discriminating between foreign investors by extending better treatment to third party investors than to those of the beneficiary State of the basic investment treaty.

62 Such an issue was discussed in detail in the 2007 ICSID case of *Parkerings v. Lithuania*.[87] The claimant had argued that the fact that the construction and operation of parking facilities in the city of Vilnius were granted to another foreign investor constituted such *de facto* less favourable treatment. In spite of the broad and unqualified wording of the applicable MFN clause,[88] the tribunal held that any comparison between different investors required that such investors be in a comparable situation.[89]

63 On this basis, the *Parkerings* tribunal specifically compared the two projects which were both planned for the old city of Vilnius, the tribunal found that Claimant's bigger project raised significant concerns as regards historical preservation as well as environmental protection and was thus not in like circumstances.[90] Consequently, the tribunal denied a violation of the MFN treatment obligation.

7. Treatment in Regard to Dispute Settlement

64 Since the leading case of *Maffezini v. Spain*,[91] ICSID and other arbitral tribunals have been split on whether an MFN clause can be relied upon in order to invoke more favourable dispute settlement provisions contained in third party BITs. At the same time, the *Maffezini* jurisprudence has led to a considerable debate among academics and practitioners on the advantages and disadvantages of applying MFN to dispute settlement issues.[92]

65 A number of authors consider the *Maffezini* approach as 'unwarranted adventurism' and the 'product of the liberal expansiveness of the period'.[93] The main point of criticism usually refers to the 'unintended'[94] or 'unexpected'[95] effect of

87 *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007.

88 Art. IV of the Lithuania–Norway BIT ('1. 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.').

89 *Parkerings v. Lithuania* (n. 87) para. 369.

90 *Ibid*., para. 396.

91 *Emilio Agustín Maffezini v. Spain* (n. 4).

92 ILC, Most-Favoured-Nation Clause – Report of the Working Group (n. 6) para. 19 ('The scope accorded to certain MFN provisions and the differing approaches taken by various investment tribunals has created what is perhaps the greatest challenge in respect of MFN provisions.').

93 Muthucumaraswamy Sornarajah (n. 58) 322.

extending MFN to dispute settlement questions. Critics of *Maffezini* usually assert that MFN was only intended to apply to substantive treatment and that the extension of MFN to dispute settlement will 'undermine the possibility of a valid and binding arbitration agreement'.[96]

Those who support the application of MFN clauses to dispute settlement in principle stress the importance of dispute settlement as a means of investment protection and emphasise that there is nothing in the notion of 'treatment' that would suggest that dispute settlement is excluded. They argue that the extension of rights of investors is in the nature of MFN clauses.[97] They also contend that a broad application of MFN clauses to dispute settlement provisions will further the goals of bilateral investment treaties.[98] **66**

a) The Maffezini Case

In *Maffezini v. Spain*,[99] an ICSID tribunal came to the conclusion that an Argentinian investor could rely on the broad MFN clause contained in the 1991 Argentina–Spain BIT in order to avoid an 18-month waiting period before resorting to investment arbitration since he was held to be entitled to invoke the more favourable dispute settlement provisions of the Chile–Spain BIT 1991 which permitted the institution of investment arbitration without such a waiting period. **67**

Spain had argued that the investor had failed to exhaust domestic remedies as required by Article 10 of the Argentina–Spain BIT.[100] The *Maffezini* tribunal found, however, that Article 10 of the BIT did not require such exhaustion of **68**

94 *Ibid*.

95 UNCTAD, *Most-Favoured-Nation Treatment* (n. 3) xiv ('(…) an unexpected application of MFN treatment in investment treaties gave raise [sic!] to a debate that has so far not found an end and that has generated different and sometimes inconsistent decisions by arbitral tribunals. The issue at stake is the application of the MFN treatment provision to import investor-State dispute settlement (ISDS) provisions from third treaties considered more favourable to solve issues relating to admissibility and jurisdiction over a claim, such as the elimination of a preliminary requirement to arbitration or the extension of the scope of jurisdiction.').

96 Zachary Douglas, 'The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails' (2011) 2(1) J. Int'l Disp. Settlement 97, 114.

97 See Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention – A Commentary* (Cambridge University Press, 2009) 248.

98 Stephan Schill, *The Multilateralization of International Investment Law* (Cambridge University Press, 2009); Stephan Schill (n. 7); Stephanie Parker, 'A BIT at a Time: The Proper Extension of the MFN Clause to Dispute Settlement Provisions in Bilateral Investment Treaties' (2012) 2(1) The Arbitration Brief 30, 33.

99 *Emilio Agustín Maffezini v. Spain* (n. 4).

100 Art. 10(2) of the Argentina–Spain BIT provided that a dispute which cannot be settled amicably 'shall be submitted to the competent tribunal of the Contracting Party in whose territory the investment was made.' Pursuant to Art. 10(3) of the Argentina–Spain BIT, the 'dispute may be submitted to international arbitration in any of the following circumstances: a) at the request of one of the parties to the dispute, if no decision has been rendered on the merits of the claim after the expiration of a period of eighteen months from the date on which the proceedings referred to in paragraph 2 of this Article have been initiated, or if such decision has been rendered, but the dispute between the parties continues; b) if both parties to the dispute agree thereto.'

domestic remedies; rather it 'wanted to give their respective courts the opportunity, within the specified period of eighteen months, to resolve the dispute before it could be taken to international arbitration.'[101]

69 Since the claimant had not complied with the requirement to go to Spanish courts in the first place, the tribunal had to address Maffezini's submission that he was not required to do so as a result of the more favourable dispute settlement provisions contained in the Chile–Spain BIT and applicable to him by operation of the MFN clause in Article IV (2) of the Argentina–Spain BIT.[102] The tribunal expressly rejected the host State's argument that 'matters' can only be understood to refer to substantive matters or material aspects of the treatment granted to investors and not to procedural or jurisdictional questions.

70 Relying on international precedents and considering the broad wording of the MFN clause which referred to 'all matters subject to this Agreement', the *Maffezini* tribunal emphasised that dispute settlement provisions in BITs were 'essential to the protection of the rights envisaged under the pertinent treaties; they are also closely linked to the material aspects of the treatment accorded.'[103]

71 The tribunal did, however, narrow down its broad interpretation of the MFN clause by 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.'[104] In the tribunal's view this would apply, for instance, where a State has conditioned its consent to arbitration on the exhaustion of local remedies, where a BIT contains a 'fork in the road' clause according to which a choice between domestic or international courts or tribunals becomes irreversible once made, or where a particular forum such as ICSID or NAFTA has been chosen.

72 In the specific case, the requirement of Article 10 of the Argentina–Spain BIT to first resort to domestic courts did not deprive the investor of the ultimate possibility to access international arbitration after a 'waiting period' of 18 months. Thus, it did not reflect a fundamental question of public policy which would have limited the scope of the MFN clause. As a result the *Maffezini* tribunal upheld its jurisdiction.

b) Post-Maffezini Cases

73 The *Maffezini* approach of interpreting an MFN clause as extending to dispute settlement has become one of the most controversial issues in investment arbitration.[105] To date no clearly prevailing view has emerged, though the case law has led to some commonly accepted principles.

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101 *Emilio Agustín Maffezini v. Spain* (n. 4) para. 35.
102 Art. IV(2) of the Argentina–Spain BIT ('In all matters subject to this Agreement, this treatment shall not be less favorable than that extended by each Party to the investments made in its territory by investors of a third country.').
103 *Emilio Agustín Maffezini v. Spain* (n. 4) para. 55.
104 *Emilio Agustín Maffezini v. Spain* (n. 4) para. 62.
105 *Berschader v. Russia* (n. 66) para. 179.

The cases rejecting the *Maffezini* approach have initially stressed that an MFN clause cannot have the effect of supplanting consent to arbitration where no such consent was contained in the basic treaty,[106] but then even denied the possibility to overcome mere procedural hurdles like waiting periods.[107] **74**

c) Cases Following and Widening the Maffezini Approach

In an exceptionally long treatment of the issue, the tribunal in *Siemens v. Argentina*[108] endorsed the *Maffezini* approach in interpreting the applicable MFN clause in the Argentina–Germany BIT.[109] Like in *Maffezini*, the ICSID tribunal allowed the claimant to bypass the BIT obligation to pursue local remedies for 18 months before commencing investment arbitration by 'importing' a more favourable dispute settlement provision contained in the Argentina–Chile BIT. **75**

In addition, the tribunal allowed the investor to 'cherry pick' single aspects of the 'imported' dispute settlement provisions.[110] While the Argentina–Chile BIT did not provide for a waiting period before initiating arbitration, it contained a so-called 'fork in the road' provision according to which the investor had to choose between local remedies or international arbitration with the implication that once an option has been pursued, the other becomes unavailable. By rejecting the Argentine argument that *Siemens* should be prevented from instituting ICSID arbitration as a result of administrative proceedings started earlier before Argentine tribunals, the *Siemens* panel literally provided most favourable treatment to the investor.[111] **76**

The *Siemens* tribunal summed up the rationale of the *Maffezini* interpretation of an MFN clause by stating that BITs included **77**

> (…) as a distinctive feature special dispute settlement mechanisms not normally open to investors. Access to these mechanisms is part of the protection offered under the Treaty. It is part of the treatment of foreign investors and investments and of the advantages accessible through a*[sic]* MFN clause.[112]

106 *Salini Costruttori S.p.A and Italstrade S.p.A v. Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 29 November 2004; *Plama Consortium Ltd. v. Bulgaria* (n. 35).

107 *Wintershall Aktiengesellschaft v. Argentina*, ICSID Case No. ARB/04/14, Award, 8 December 2008.

108 *Siemens AG v. Argentina*, ICSID Case No ARB/02/08, Decision on Jurisdiction, 3 August 2004, paras. 32–121.

109 Art. 3(1) and 3(2) of the Argentina–Germany BIT, as translated by the *Siemens* tribunal, *Siemens AG v. Argentina* (n. 108) para. 82 ('(1) None of the Contracting Parties shall accord in its territory to the investments of nationals or companies of the other Contracting Party or to investments in which they hold shares, a less favorable treatment than the treatment granted to the investments of its own nationals or companies or to the investments of nationals or companies of third States. (2) None of the Contracting Parties shall accord in its territory to nationals or companies of the other Contracting Party a less favorable treatment of activities related to investments than granted to its own nationals and companies or to the nationals and companies of third States.').

110 Stephan Schill (n. 7) 533.

111 *Siemens AG v. Argentina* (n. 108) para. 120.

112 *Ibid.*, para. 102.

78 Interpreting the same MFN clause of the Argentina–Germany BIT, the tribunal in *Hochtief v. Argentina*[113] came to the same result. The 18-month waiting period of the basic BIT could be avoided through the invocation of more favourable dispute settlement clauses via the applicable MFN clause.

79 The ICSID tribunal in *Gas Natural v. Argentina*[114] followed the *Maffezini* approach in an equally detailed fashion. It stressed that investor-State dispute settlement was an important aspect of treatment, 'essential to a regime of protection of foreign direct investment.'[115] It further noted the broad wording of the applicable MFN clause of the Argentina–Spain BIT[116] (the same provision that was relied upon in the *Maffezini* case, referring to 'all matters governed by the present Agreement') and the fact that the BIT contained certain exceptions, none of which related to dispute settlement.[117] The tribunal thus came to the following conclusion:

> The Tribunal holds that provision for international investor-state arbitration in bilateral investment treaties is a significant substantive incentive and protection for foreign investors; further, that access to such arbitration only after resort to national courts and an eighteen-month waiting period is a less favorable degree of protection than access to arbitration immediately upon expiration of the negotiation period. **Accordingly, Claimant is entitled to avail itself of the dispute settlement provision in the United States–Argentina BIT in reliance on Article IV(2) of the Bilateral Investment Treaty between Spain and Argentina.**[118]

80 The avoidance of the 18-month waiting period in the Argentina–Spain BIT was also permitted by the ICSID tribunal in *Telefónica v. Argentina*[119] where the tribunal specifically noted that it was not asked to extend 'ICSID arbitration beyond what is provided for in the Argentina–Spain BIT by virtue of the reference to another BIT under the MFN clause',[120] but merely to declare that the investor was 'exempted from the precondition of submitting the claim to the domestic courts of the host state, thanks to the application of the MFN clause.'[121] As to the more preferential treatment by avoiding the 18-month waiting period, the tribunal held:

> It is undisputable that it is preferable for an investor not to be obliged to submit, and pursue for 18 months, its claim before the courts of the host State before being allowed to submit it to the specific investment arbitration at ICSID. Being exempted from such a requirement (also considering the unlikelihood that a decision on the merits be rendered within this time limit) represents a 'better treatment' in respect of which, therefore, the MFN clause operates.[122]

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113 *Hochtief AG v. Argentina*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011.
114 *Gas Natural SDG SA v. Argentina* (n. 34) 2005.
115 *Ibid.*, para. 29.
116 Art. IV(2) of the Argentina–Spain BIT ('In all matters subject to this Agreement, this treatment shall not be less favorable than that extended by each Party to the investments made in its territory by investors of a third country.').
117 *Gas Natural SDG SA v. Argentina* (n. 34) para. 30.
118 *Ibid.*, para. 31 (emphasis in original).
119 *Telefónica SA v. Argentina* (n. 34).
120 *Ibid.*, para. 102.
121 *Ibid*.
122 *Telefónica SA v. Argentina* (n. 34) para. 103.

The view that international arbitration is an important element in investor protection was also endorsed in *National Grid v. Argentina*[123] in which the tribunal concluded **81**

> (…) that, in the context in which the Respondent has consented to arbitration for the resolution of the type of disputes raised by the Claimant, 'treatment' under the MFN clause of the Treaty makes it possible for UK investors in Argentina to resort to arbitration without first resorting to Argentine courts, as is permitted under the US–Argentina Treaty.[124]

It reached this result by stressing that the wide unqualified MFN clause in the applicable Argentina–UK BIT had to be interpreted as including dispute settlement since the specific exceptions to MFN treatment in the BIT did not mention dispute settlement. The tribunal stated that **82**

> (…) the MFN clause does not expressly refer to dispute resolution or for that matter to any other standard of treatment provided for specifically in the Treaty. On the other hand, dispute resolution is not included among the exceptions to the application of the clause. As a matter of interpretation, specific mention of an item excludes others: *expressio unius est exclusio alterius.*[125]

In the joined ICSID and UNCITRAL arbitrations of *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentina* and *AWG Group Ltd. v. Argentina*,[126] the tribunal had to look at two different BITs containing differently worded MFN clauses. Nevertheless, the tribunal permitted both claimants to rely on these MFN clauses in order to 'import' more favourable dispute settlement provisions. **83**

With regard to the MFN clause of the Argentina–Spain BIT which referred to 'all matters' the tribunal concurred with the *Maffezini* tribunal and held that such a clause extended to dispute settlement being a matter regulated by the BIT.[127] It further held that dispute settlement was certainly a 'matter' governed by the BIT and that the 'ordinary meaning' of the term 'treatment' included the rights and privileges granted by a contracting State to investors covered by the treaty.[128] **84**

With regard to the Argentina–UK BIT the tribunal came to the same conclusion, though it noted the textual differences of the applicable MFN clause. It held that **85**

123 *National Grid plc v. Argentina* (n. 53).
124 *Ibid.*, para. 96.
125 *Ibid.*, para. 82.
126 *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentina* and *AWG Group Ltd. v. Argentina* (n. 32).
127 *Ibid.*, para. 55 ('The text quoted above clearly states that "in all matters" (*en todas las materias*) a Contracting party is to give a treatment no less favorable than that which it grants to investments made in its territory by investors from any third country. Article X of the Argentina–Spain BIT specifies in detail the processes for the "Settlement of Disputes between a Party and Investors of the other Party." Consequently, dispute settlement is certainly a "matter" governed by the Argentina–Spain BIT.').
128 *Ibid.*, para. 55 ('The word "treatment" is not defined in the treaty text. However, the ordinary meaning of that term within the context of investment includes the rights and privileges granted and the obligations and burdens imposed by a Contracting State on investments made by investors covered by the treaty.').

> [t]he right to have recourse to international arbitration is very much related to investors' 'management, maintenance, use, enjoyment, or disposal of their investments.'[129]

86 In *Impregilo v. Argentina*,[130] an ICSID tribunal permitted an investor to rely on the Argentina–Italy BIT's broad MFN clause[131] and stressed its reference to 'all other matters regulated by this Agreement' which was crucial for the majority's decision that the investor was entitled to invoke the more favourable dispute settlement provisions of another BIT that did not contain a comparable waiting period.[132]

87 The most far-reaching interpretation of an MFN clause in relation to dispute settlement was adopted by the SCC tribunal in *RosInvest v. Russia.*[133] In that case an investment tribunal found that it had jurisdiction to decide whether an expropriation had occurred on the basis of a jurisdictional provision 'imported' via the UK–USSR BIT's MFN clause.[134]

88 Recourse to the MFN clause was necessary because the narrow dispute settlement clause of the basic treaty only permitted to arbitrate the amount of compensation in case of expropriation.[135] In the view of the *RosInvest* tribunal, this dispute settlement clause '[did] not include jurisdiction over the questions whether an expropriation occurred and was legal.'[136]

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129 *Ibid.*, para. 57.

130 *Impreglio S.p.A. v. Argentina*, ICSID Case No. ARB/07/17, Award, 21 June 2011.

131 Article 3(1) of the Argentina–Italy BIT provided: 'Each Contracting Party shall, within its own territory, accord to investments made by investors of the other Contracting Party, to the income and activities related to such investments and to all other matters regulated by this Agreement, a treatment that is no less favorable than that accorded to its own investors or investors from third-party countries.'

132 *Impreglio S.p.A. v. Argentina*, para. 108 ('Nevertheless, the Arbitral Tribunal finds it unfortunate if the assessment of these issues would in each case be dependent on the personal opinions of individual arbitrators. The best way to avoid such a result is to make the determination on the basis of case law whenever a clear case law can be discerned. It is true that (…) the jurisprudence regarding the application of MFN clauses to settlement of disputes provisions is not fully consistent. Nevertheless, in cases where the MFN clause has referred to "all matters" or "any matter" regulated in the BIT, there has been near-unanimity in finding that the clause covered the dispute settlement rules.').

133 *RosInvestCo UK Ltd. v. Russia*, Award on Jurisdiction 2007, SCC Case No. Arb. V079/2005.

134 Art. 3(2) of the 1989 *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Promotion and Reciprocal Protection of Investments* (UK–USSR BIT) ('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.').

135 Art. 8(1) of the UK–USSR BIT 1989 ('This Article shall apply to any legal disputes between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former either concerning the amount or payment of compensation under Articles 4 or 5 of this Agreement, or concerning any other matter consequential upon an act of expropriation in accordance with Article 5 of this Agreement, or concerning the consequences of the non-implementation, or of the incorrect implementation, of Article 6 of this Agreement.').

136 *RosInvestCo UK Ltd. v. Russia* (n. 133) para. 114.

With regard to the scope of the MFN clause, the *RosInvest* tribunal reasoned that it would be **89**

> (…) difficult to doubt that an expropriation interferes with the investor's use and enjoyment of the investment, and that the submission to arbitration forms a highly relevant part of the corresponding protection for the investor by granting him, in case of interference with his '*use*' and '*enjoyment*', procedural options of obvious and great significance compared to the sole option of challenging such interference before the domestic courts of the host state.[137]

In the eyes of the tribunal, an MFN clause should apply not only to substantive, but also to procedural issues.[138] Most important for its finding was, however, the specific wording of the exceptions to MFN treatment. These related explicitly to preferential trade agreements and to tax matters.[139] Considering this detailed and carefully formulated exceptions clause, the *RosInvest* tribunal concluded that **90**

> (…) it can certainly not be presumed that the Parties 'forgot' arbitration when drafting and agreeing on Article 7. Had the Parties intended that the MFN clauses should also not apply to arbitration, it would indeed have been easy to add a subsection (c) to that effect in Article 7. The fact that this was not done, in the view of the Tribunal, is further confirmation that the MFN-clauses in Article 3 are also applicable to submissions to arbitration in other Treaties.[140]

Consequently, the tribunal held that as a result of the MFN clause it had jurisdiction beyond the narrow dispute settlement clause of the UK–USSR BIT in order to assess whether an expropriation had taken place and was lawful.[141] **91**

A clear endorsement of the *Maffezini* approach can finally be seen in the *Teinver v. Argentina* decision.[142] In that case, the tribunal qualified the specific waiting periods in the Argentina–Spain BIT 1991 as mere admissibility requirements which could be avoided through reliance on an MFN clause. As the tribunal in *Maffezini*, the *Teinver* tribunal held that the 'broad "all matters" language of the Article IV(2) MFN clause [was] unambiguously inclusive'.[143] **92**

The tribunal emphasised that the claimant only asked to overcome a procedural obstacle in the basic treaty and did not request the broadening of the tribunal's jurisdiction.[144] **93**

137 *Ibid.*, para. 130.
138 *Ibid.*, para. 132.
139 Art. 7 of the UK–USSR BIT ('The provisions of Articles 3 and 4 of this Agreement shall not be construed so as to oblige one Contracting Party to extend to the investors of the other the benefit of any treatment, preference or privilege resulting from (a) any existing or future customs union, organisation for mutual economic assistance or similar international agreement, whether multilateral or bilateral, to which either of the Contracting Parties is or may become a party, or (b) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly taxation.').
140 *RosInvestCo UK Ltd. v. Russia* (n. 133) para. 135.
141 *Ibid.*, para. 139.
142 *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentina*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012.
143 *Ibid.*, para. 186.
144 *Ibid.*, para. 182.

d) Cases Rejecting the Maffezini Approach

94 Shortly after the *Siemens v. Argentina*[145] decision, another ICSID tribunal in *Salini v. Jordan*,[146] rejected the *Maffezini* approach. The tribunal held that the applicable MFN clause in the Jordan–Italy BIT[147] – as opposed to the MFN clause in *Maffezini* referring to 'all matters' subject to the agreement – was not broad enough to form the basis for ICSID jurisdiction over contractual disputes, as provided for in other BITs of the host State.

95 The *Salini* tribunal had first held that the applicable dispute settlement clause in the Jordan–Italy BIT only allowed investor-State arbitration in regard to alleged violations of the BIT (treaty claims) not with regard to contractual disputes (contract claims) which were supposed to be litigated exclusively according to their own contractual dispute settlement clauses.[148]

96 Relying on the *Maffezini* approach, the claimant had invoked the MFN clause in order to bring also contractual claims under the tribunal's jurisdiction arguing that this would have been possible under third country BITs.

97 The *Salini* tribunal, however, rejected this attempt, concluding that the MFN clause did 'not apply insofar as dispute settlement clauses [were] concerned.'[149] Rather, the applicable dispute settlement provisions in the Jordan–Italy BIT, giving preference to the remedies directly provided for in contracts between the investor and the host State, had to be complied with.

98 The *Salini* tribunal invoked the danger of 'disruptive treaty shopping' identified by the *Maffezini* tribunal[150] which would guard against a broad extension of MFN clauses to dispute settlement.[151] More specifically the tribunal noted that the applicable MFN clause, as opposed to others, neither directly referred to dispute settlement nor broadly covered 'all matters' of the basic BIT as in *Maffezini*.[152] Further, it could not identify any intention of the parties to have dispute settlement included in the reach of MFN treatment.[153]

99 Soon after the *Salini* decision, another ICSID tribunal in *Plama v. Bulgaria*,[154] forcefully rejected the argument that its jurisdiction could be based on dispute settlement clauses in third party BITs through an MFN clause.

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145 *Siemens AG v. Argentina* (n. 108) para. 120.
146 *Salini Costruttori S.p.A and Italstrade S.p.A v. Jordan* (n. 106).
147 The combined national treatment and MFN Clause in Art. 3(1) of the Jordan–Italy BIT provided as follows: 'Both Contracting Parties, within the bounds of their own territory, shall grant investments effected by, and the income accruing to, investors of the Contracting Party no less favourable treatment than that accorded to investments effected by, and income accruing to, its own nationals or investors of Third States.'
148 *Salini Costruttori S.p.A and Italstrade S.p.A v. Jordan* (n. 106) para. 101.
149 *Ibid.*, para. 119.
150 *Maffezini v. Spain* (n. 4) para. 63.
151 *Salini Costruttori S.p.A and Italstrade S.p.A v. Jordan* (n. 106) para. 115.
152 *Ibid.*, paras. 116, 117.
153 *Ibid.*, para. 118.
154 *Plama Consortium Ltd. v. Bulgaria* (n. 35).

The applicable Bulgaria–Cyprus BIT contained a typical narrow dispute settlement clause providing only for UNCITRAL arbitration concerning disputes over the amount of compensation in the event of expropriation. *Plama* had invoked the treaty's MFN clause[155] which applied to 'all aspects of treatment' and, thus, according to the claimant, also to the dispute settlement provisions in other Bulgarian BITs, in order to gain access to ICSID arbitration also over other matters than the amount of compensation. **100**

The *Plama* tribunal, however, rejected this attempt arguing that a 'clear and unambiguous intention'[156] of the parties was required in order to find an agreement to arbitrate and that basically such could not be presumed through a standard MFN clause.[157] It was highly critical of the *Maffezini* decision and proposed an alternative more restrictive principle: **101**

> 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.[158]

As regards the wording of the exception to MFN treatment, the tribunal acknowledged that the specific mentioning of preferential trade agreements could lead to the *e contrario* argument that dispute settlement was covered by the MFN clause; however, it also remarked that the reference to 'privileges' could indicate that only substantive treatment was covered.[159] The *Plama* tribunal was equally dismissive with regard to the suggestion that because dispute settlement was an important aspect of investment protection it should be regarded as covered by MFN clauses. Rather, the tribunal emphasised the crucial importance of consent to arbitration as a basis for jurisdiction which must be 'clear and unambiguous'.[160] Though it acknowledged that such consent may be given by reference,[161] it found that in the case of the applicable MFN clause this was not 'clear and unambiguous'.[162] **102**

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155 Art. 3 of the Bulgaria–Cyprus BIT ('1. 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. 2. This treatment shall not be applied to the privileges which either Contracting Party accords to investors from third countries in virtue of their participation in economic communities and unions, a customs union or a free trade area.').

156 *Plama Consortium Ltd. v. Bulgaria* (n. 35) para. 199.

157 *Ibid.*, para. 223.

158 *Ibid*.

159 *Plama Consortium Ltd. v. Bulgaria* (n. 35) para. 191.

160 *Ibid.*, para. 198.

161 *Ibid.*, para. 200 ('(…) a reference may in and of itself not be sufficient; the reference is required to be such as to make the arbitration clause part of the contract (i.e., in this case, the Bulgaria–Cyprus BIT). This is another way of saying that the reference must be such that the parties' intention to import the arbitration provision of the other agreement is clear and unambiguous.').

162 *Ibid.*, para. 200 ('(…) A clause reading "a treatment which is not less favourable than that accorded to investments by investors of third states" as appears in Article 3(1) of the Bulgaria–Cyprus BIT, cannot be said to be a typical incorporation by reference clause as appearing in ordinary contracts. It creates doubt whether the reference to the other document (in this

103 On this basis, and taking note of the *Maffezini* tribunal's concern over 'disruptive treaty-shopping',[163] the *Plama* tribunal reversed the *Maffezini* presumption by claiming:

> the principle with multiple exceptions as stated by the tribunal in the *Maffezini* case should instead be a different principle with one, single exception: an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.[164]

104 In *Telenor v. Hungary*[165] an ICSID tribunal found that MFN clauses might help to overcome procedural obstacles, but could not be permissibly relied upon in order to expand the scope of ICSID jurisdiction to substantive claims that the BIT parties had deliberately excluded from submission. The claimant had tried to expand the scope of jurisdiction which, according to the Hungary–Norway BIT, was limited to issues concerning the amount and payment of compensation in case of expropriation.

105 In a particularly sweeping assertion, the tribunal found that the 'ordinary meaning' of a BIT clause calling for 'treatment no less favourable than that accorded to investments made by investors of any third State' is 'that the investor's *substantive* rights in respect of the investments are to be treated no less favourably than under a BIT between the host State and a third State, and there is no warrant for construing the above phrase as importing *procedural* rights as well.'[166]

106 One of the more extreme forms of rejecting *Maffezini* can be discerned in the majority opinion of the SCC tribunal in *Berschader v. Russia*.[167] With regard to an MFN clause,[168] similar to the one applicable in *Maffezini*, the tribunal questioned the literal interpretation given by many other investment panels. It stated that

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case the other BITs concluded by Bulgaria) clearly and unambiguously includes a reference to the dispute settlement provisions contained in those BITs.').

163 Cited in *Plama Consortium Ltd. v. Bulgaria* (n. 35) para. 202 ('It is clear, in any event, 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.').

164 *Plama Consortium Ltd. v. Bulgaria* (n. 35) para. 223.

165 *Telenor Mobile Communications AS v. Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006.

166 *Ibid.*, para. 92.

167 *Berschader v. Russia* (n. 66).

168 Art. 2 of the Belgium and Luxembourg–USSR BIT 1989 ('Each Contracting Party guarantees that the most favoured nation clause shall be applied to investors of the other Contracting Party in all matters covered by the present Treaty, and in particular in articles 4, 5 and 6, with the exception of benefits provided by one Contracting Party to investors of a third country on the basis – of its participation in a customs union or other international economic organisations, or – of an agreement to avoid double taxation and other taxation issues.').

> [w]ith respect to the construction of expressions such as 'all matters' or 'all rights' covered by the treaty, it should be noted that (…) not even seemingly clear language like this can be considered to have an unambiguous meaning in the context of an MFN clause.[169]

The tribunal concluded that the 'expression "all matters covered by the present Treaty" certainly cannot be understood literally.'[170] Rather, it should be read to relate only to the 'classical elements of material investment protection, i.e. fair and equitable treatment, non-expropriation and free transfer of funds' as referred to in the clarification.[171] The *Berschader* tribunal concluded **107**

> (…) that the expression 'all matters covered by the present Treaty' does not really mean that the MFN provision extends to all matters covered by the Treaty. Therefore, the 'ordinary meaning' of that expression is of no assistance in the instant case, and the expression as such does not warrant the conclusion that the parties intended the MFN provision to extend to the dispute resolution clause.[172]

The *Berschader* tribunal reviewed the pertinent cases of *Maffezini*, *Siemens*, and *Plama* at length and expressly sided with the restrictive approach of the *Plama* decision and its presumption[173] that an MFN clause would extend to dispute settlement only if it could be unambiguously deduced from the contracting parties' intent.[174] **108**

A more nuanced rejection of the *Maffezini* approach was expressed in the *Renta4 v. Russian Federation* case.[175] In that case, an SCC tribunal rejected the claimant's attempt to rely on the MFN clause of the Spain–Russia BIT in order to avoid a narrow dispute settlement clause[176] similar to the one applicable in the *RosInvest* case. **109**

The *Renta4* tribunal stressed, however, that this finding resulted from the particular wording and structure of the rather specific MFN clause which only ap- **110**

169 *Berschader v. Russia* (n. 66) para. 184.
170 *Ibid.*, para. 192.
171 *Ibid.*, para. 193.
172 *Ibid.*, para. 194.
173 *Plama Consortium Ltd. v. Bulgaria* (n. 35) 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.').
174 *Berschader v. Russia* (n. 66) para. 181 ('(…) the principle that an MFN provision in a BIT will only incorporate by reference an arbitration clause from another BIT where the terms of the original BIT clearly and unambiguously so provide or where it can otherwise be clearly inferred that this was the intention of the contracting parties.').
175 *Renta4 S.V.S.A, Ahorro Corporación Emergentes F.I., Ahorro Corporación Eurofondo F.I., Rovime Inversiones SICAV S.A., Quasar de Valors SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. v. Russia*, SCC No. 24/2007, Award on Preliminary Objections, 20 March 2009.
176 Art. 10 of the Spain–Russia BIT ('1. Any dispute between one Party and an investor of the other Party relating to the amount or method of payment of the compensation due under Article 6 of this Agreement, shall be communicated in writing, together with a detailed report by the investor to the Party in whose territory the investment was made. The two shall, as far as possible, endeavour to settle the dispute amicably. 2. If the dispute cannot be settled thus within six months of the date of the written notification referred to by [sic] either of the following, the choice being left to the investor: [Stockholm Chamber of Commerce arbitration or UNCITRAL arbitration].').

plied to fair and equitable treatment.[177] The outcome of the majority decision was very much determined by the fact that 'the terms of the Spanish BIT restrict MFN treatment to the realm of FET as understood in international law.'[178]

111 With the 2008 decision on jurisdiction in *Wintershall v. Argentina*[179] a new extremely limited interpretation of MFN clauses was introduced. An ICSID tribunal disallowed a German investor to avoid an 18-month waiting period by relying on the dispute settlement clause of a more favourable BIT. The *Wintershall* tribunal came to this conclusion:

> not because 'treatment' in Article 3 may not include 'protection' of an investment by the investor adopting ICSID arbitration, but primarily because of the significance that has been attached by the Contracting States to the eighteen-month requirement in Article 10(2): it is part and parcel of Argentina's integrated 'offer' for ICSID arbitration; this 'offer' must be accepted by the investor on the same terms.[180]

112 The tribunal rejected the proposition of the *Maffezini* tribunal that treatment is not limited to substantive rights, but also encompasses the enforcement of such rights through dispute settlement because it found that 'treatment' could only relate to substantive rights. In its line of argumentation, the *Wintershall* tribunal noted that

> [t]he ordinary meaning of expressions such as 'investment related activities' or 'associated activities' used in BITs refer generally to activities of the investor *for the conduct of his/its business in the territory of the host State* rather than to activities related to or associated with the settlement of disputes between the investors and the Host State.[181]

113 This outcome of the *Wintershall* case is in direct conflict with the decision on jurisdiction in the *Siemens* case which was also based on the Argentina–Germany BIT.

114 That BIT was also the basis for the award in *Daimler v. Argentina*,[182] in which an ICSID tribunal very explicitly rejected the *Maffezini* approach. In a lengthy discussion of existing precedent the tribunal's majority stressed the im-

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177 Art. 5 of the Spain–Russia BIT ('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. 3. Such treatment shall not, however, include privileges which may be granted by either Party to investors of a third State, by virtue of its participation in: – A free trade area; – A customs union; – A common market; – An organization of mutual economic assistance or other agreement concluded prior to the signing of this Agreement and containing conditions comparable to those accorded by the party to the participants in said organization. The treatment granted under this article shall not include tax exemptions or other comparable privileges granted by either Party to the investors of a third State by virtue of a double taxation agreement or any other agreement concerning matters of taxation.').

178 *Renta4 S.V.S.A, Ahorro Corporación Emergentes F.I., Ahorro Corporación Eurofondo F.I., Rovime Inversiones SICAV S.A., Quasar de Valors SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. v. Russia* (n. 175) para. 119.

179 *Wintershall Aktiengesellschaft v. Argentina* (n. 107).

180 *Ibid.*, para. 162.

181 *Ibid.*, para. 171.

182 *Daimler Financial Services AG v. Argentina* (n. 27).

portance of the 18-month waiting period as a jurisdictional requirement conditioning the respondent State's consent to arbitration.

This discussion is related to the more general debate of how to qualify so- **115**
called waiting periods which usually require investors to engage in consultations/negotiations or to initiate dispute settlement in domestic courts before instituting investment arbitration. In the past, many tribunals have qualified such 'consultation periods as directory and procedural rather than as mandatory and jurisdictional in nature,'[183] *i.e.* as questions of admissibility or procedure, and have found that non-compliance with them would not deprive them of their jurisdiction.[184] In 2010, however, two ICSID decisions in *Burlington*[185] and *Murphy*[186] found that non-compliance with a waiting period would not be merely a procedural or admissibility problem, but constituted a jurisdictional defect.[187]

In a similar vein, the tribunal in *Daimler v. Argentina* emphasised that under **116**
the applicable Argentina–Germany BIT it was not a mere waiting period, but rather an obligation to submit the dispute to the local courts of the respondent State for a period of at least 18 months.[188] It specifically endorsed the *Wintershall* approach[189] and held that '[a]ll BIT-based dispute resolution provisions (…) are by their very nature jurisdictional.'[190] On this basis the *Daimler* tribunal concluded:

183 *SGS Société Générale de Surveillance S.A. v. Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003, para. 184.

184 *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001, para. 190 (holding that insistence on the expiry of a waiting period before the commencement of arbitration proceedings would 'amount to an unnecessary, overly formalistic approach which would not serve to protect any legitimate interests of the Parties.'); *Western NIS Enterprise Fund v. Ukraine*, ICSID Case No ARB/04/2, Order, 16 March 2006, paras. 6–7 (holding that the fact that '[p]roper notice of the present claim was not given' did not 'in and of itself, affect the Tribunal's jurisdiction.').

185 *Burlington Resources Inc. v. Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010.

186 *Murphy Exploration and Prod. Co. Int'l v. Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, 15 December 2010.

187 *Burlington Resources Inc. v. Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)* (n. 185) para. 340; *Murphy Exploration and Prod. Co. Int'l v. Ecuador* (n. 186) para. 149.

188 *Daimler Financial Services AG v. Argentina* (n. 27) para. 189.

189 The Daimler tribunal at *Daimler Financial Services AG v. Argentina* (n. 27) para. 193, found that the applicable BIT 'describes its dispute resolution process in mandatory and necessarily sequential language' and that it sets forth 'the conditions under which an investor-State tribunal may exercise jurisdiction with the contracting state parties' consent, much in the same way in which legislative acts confer jurisdiction upon domestic courts.' This finding is followed by approvingly citing the *Wintershall* tribunal which stated: 'That an investor could choose at will to omit the second step [the 18-month domestic courts requirement] is simply not provided for nor even envisaged by the Argentina–Germany BIT – because (Argentina's) the Host State's "consent" (standing offer) is premised on there being first submitted to the courts of competent jurisdiction in the Host State the entire dispute for resolution in the local courts.' *Wintershall Aktiengesellschaft v. Argentina* (n. 179) para. 160.

190 *Daimler Financial Services AG v. Argentina* (n. 27) para. 193.

> Since the 18-month domestic courts provision constitutes a treaty-based pre-condition to the Host State's consent to arbitrate, it cannot be bypassed or otherwise waived by the Tribunal as a mere 'procedural' or 'admissibility-related' matter.[191]

117 The *Daimler* tribunal continued by dismissing the *Plama* dictum that 18-month domestic court litigation requirements may be 'nonsensical'.[192] In the opinion of the *Daimler* tribunal it was not for the tribunal to second-guess the BIT parties' choice of dispute settlement procedures and it would uphold them as long as they were not 'futile'.[193]

118 Its ultimate rejection of extending MFN to dispute settlement resulted from a number of other findings. First, the *Daimler* tribunal emphasised that the applicable MFN clause was qualified by the words 'in the territory' which implied that only dispute settlement before national courts could be covered, not, however, international investment arbitration.[194] Second, the *Daimler* tribunal found that the MFN clause's failure to refer to 'all matters' subject to the treaty suggested that international dispute settlement was not included.[195] Third, the tribunal was of the opinion that the specific exceptions relating to tax and regional economic preferences related to treatment in the territory of a host State and thus could not imply that the parties intended to include dispute settlement.[196] Fourth, the tribunal did not find that the third party treaty's dispute resolution provisions (which contained a fork in the road provision) were more favourable than those of the basic treaty.[197] Further, the *Daimler* tribunal concluded that since the basic treaty's dispute settlement mechanism was not 'objectively less favorable' than that of the third party treaty invoked, it would have been incorrect to 'characterize the Claimant's position as more compatible with the Treaty's objects and purposes then the Respondent's position.'[198] Finally, the tribunal reviewed State practice following the *Maffezini* decision,[199] including some statements of treaty parties rejecting the *Maffezini* approach, and concluded that they 'converge in signalling that the specified MFN clauses do not, and were never intended to, reach the international dispute resolution provisions of the respectively mentioned investment agreements.'[200]

119 The findings in *Daimler* were echoed in *Kılıç v. Turkmenistan*[201] where another ICSID tribunal equally considered that the procedural steps which included a requirement to pursue local remedies for a 12-month period 'constitute[d] funda-

191 *Ibid.*, para. 194.
192 *Plama Consortium Ltd. v. Bulgaria* (n. 35) para. 224.
193 *Daimler Financial Services AG v. Argentina* (n. 27) para. 198.
194 *Ibid.*, para. 225.
195 *Ibid.*, paras. 234–236.
196 *Ibid.*, paras. 237–239.
197 *Ibid.*, paras. 240–250.
198 *Ibid.*, para. 260.
199 *Ibid.*, paras. 261–278.
200 *Ibid.*, para. 276.
201 *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award, 2 July 2013.

mental jurisdictional conditions to the Contracting Parties' offers to arbitrate disputes with investors of the other Party'[202] which could not be avoided by an MFN clause.

Following the tribunals in *Berschader v. Russian Federation*,[203] *Renta4 v. Russian Federation*,[204] and *Telenor v. Hungary*,[205] two UNCITRAL tribunals rejected attempts to invoke an MFN clause in order to avoid a narrow dispute settlement clause in the Austria–Czech and Slovak Federal Republic BIT.[206] Both the majority in *Austrian Airlines v. Slovakia*[207] and the tribunal in *Euram v. Slovakia*[208] held that claimants could not invoke their jurisdiction over issues not expressly contained in the basic treaty through reliance on its MFN clause. The applicable BIT contained a broad and unqualified MFN clause[209] and an exceptions clause relating to regional economic integration treaties. **120**

The *Austrian Airlines* tribunal rejected the claimant's *e contrario* argument that the limited specific exceptions to the MFN clause indicated that other exceptions should not be read into the broad wording of Article 3(1) of the BIT on the basis of a somewhat vague contextual interpretation of the MFN clause. The tribunal held: **121**

> Faced with a manifest, specific intent to restrict arbitration to disputes over the amount of compensation for expropriation to the exclusion of disputes over the principle of expropriation, it would be paradoxical to invalidate that specific intent by virtue of the general, unspecific intent expressed in the MFN clause. As a result of these contextual considerations, the specific intent expressed in Articles 8, 4(4) and 4(5) informs the scope of the general intent expressed in Article 3(1), with the result that the former prevails over the latter. In other words, the restrictive dispute settlement mechanism for expropriation claims set out in Articles 8, 4(4) and 4(5) constitutes an exception to the scope of

202 *Ibid.*, para. 6.5.2.

203 *Berschader v. Russia* (n. 66).

204 *Renta4 S.V.S.A, Ahorro Corporación Emergentes F.I., Ahorro Corporación Eurofondo F.I., Rovime Inversiones SICAV S.A., Quasar de Valors SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. v. Russia* (n. 175).

205 *Telenor Mobile Communications A.S. v. Hungary* (n. 165).

206 Art. 8 of the *Agreement between the Republic of Austria and the Czech and Slovak Federal Republic Concerning the Promotion and Protection of Investments*, 15 October 1990 (Austria–Czech and Slovak Federal Republic BIT 1990) (emphasis added) ('1. Any dispute arising out of an investment, between a Contracting Party and an investor of the other Contracting Party, concerning the amount or the conditions of payment of a compensation pursuant to Article 4 of this Agreement, or the transfer obligations pursuant to Article 5 of this Agreement, shall, as far as possible, be settled amicably by the parties to the disputes. 2. If a dispute pursuant to para. 1 above cannot be amicably settled within six months as from the date of a written notice containing sufficiently specified claims, the dispute shall, unless otherwise agreed, be decided upon the request of the Contracting Party or the investor of the other Contracting Party by way of arbitral proceedings in accordance with the UNCITRAL Arbitration Rules, as effective at the date of the motion for the institution of the arbitration proceedings.').

207 *Austrian Airlines AG v. Slovakia*, UNCITRAL, Final Award, 9 October 2009.

208 *Euram v. Slovakia*, UNCITRAL, Award on Jurisdiction, 22 October 2012.

209 Art. 3(1) of the Austria–Czech and Slovak Federal Republic BIT ('Each Contracting Party shall accord to investors of the other Contracting Party and to their investments treatment that is no less favourable than that which it accords to its own investors or to investors of any third State and their investments.').

Article 3(1). Hence, the MFN clause does not apply to the settlement of disputes over the legality of expropriations.[210]

F. The Main Aspects of the Post-*Maffezini* Debate

122 Though the *Maffezini* debate is relatively recent, the potential reach of MFN clauses remains one of the main controversial issues in international investment arbitration. The central dilemma surrounding the *Maffezini* approach lies in the insoluble question whether dispute settlement can be regarded as 'treatment' and whether the provisions on dispute settlement can be seen as part of the 'protection' granted by IIAs.[211]

123 On the one hand, tribunals and commentators stress that access to the effective mechanism of directly enforcing the substantive guarantees of IIAs is in itself a major aspect of treatment. On the other hand, tribunals and commentators base their concept of MFN clauses being limited to substantive as opposed to procedural treatment on preconceived distinctions between substance and procedure.

124 Those who support the application of MFN clauses to dispute settlement stress the importance of dispute settlement as a means of investment protection[212] and emphasise that there is nothing in the notion of 'treatment' that would suggest that dispute settlement is excluded.[213]

125 Apparently, a number of tribunals have adopted a presumption that MFN clauses should be presumed to include dispute settlement unless a contrary intention of the treaty parties can be clearly discerned.[214]

126 Those who oppose the application of MFN clauses to dispute settlement stress that, unless specifically provided otherwise, 'treatment' only refers to substantive rights.[215]

127 Many tribunals have thus adopted a reverse presumption according to which MFN clauses should be presumed not to include dispute settlement unless a contrary intention of the treaty parties can be clearly discerned.[216]

128 Tribunals and scholars regularly stress the importance of the specific wording of MFN clauses contained in IIAs.[217] However, even if tribunals agree on the re-

210 *Austrian Airlines AG v. Slovakia* (n. 207) para. 135.
211 *Gas Natural SDG SA v. Argentina* (n. 34) para. 29.
212 E.g., *Emilio Agustín Maffezini v. Spain* (n. 4) para. 54; *Gas Natural SDG SA v. Argentina* (n. 34) para. 29; *ibid*., para. 49; *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentina* and *AWG Group Ltd. v. Argentina* (n. 32) para. 59.
213 E.g., *Siemens AG v. Argentina* (n. 108) para. 86.
214 *Gas Natural SDG, S.A. v. Argentina* (n. 34) para. 49.
215 *Wintershall Aktiengesellschaft v. Argentina* (n. 179) para. 168.
216 *Plama Consortium Ltd. v. Bulgaria* (n. 35) para. 223. See also Rule 43 suggested by Douglas that an MFN clause in a basic investment treaty 'does not incorporate by reference provisions relating to the jurisdiction of the arbitral tribunal, in whole or in part, set forth in a third investment treaty, unless there is an unequivocal provision to that effect in the basic investment treaty.' Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009) 344.

quirement to interpret each specific MFN clause, they may still come to opposing results.[218]

129 It may be doubtful whether the term 'treatment' itself is sufficient to determine whether dispute settlement should be included. Nevertheless, tribunals have attempted to provide definitions of 'treatment'.

130 While the *Siemens* tribunal considered that '"[t]reatment" in its ordinary meaning refers to behaviour in respect of an entity or a person',[219] the tribunal in the joined ICSID and UNCITRAL arbitrations of *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentina* and *AWG Group Ltd. v. Argentina* noted that

> [t]he word 'treatment' is not defined in the treaty text. However, the ordinary meaning of that term within the context of investment includes the rights and privileges granted and the obligations and burdens imposed by a Contracting State on investments made by investors covered by the treaty.[220]

131 Though they ultimately held that the applicable MFN clauses extended to dispute settlement, it appears that this conclusion was based more on additional considerations than merely on the meaning of the expression 'treatment'.

132 The definitions of treatment as found in the *Siemens* and the *Suez* cases were cited in the *Daimler* decision and qualified as broad and indeterminate of what exactly they included or excluded.[221] The *Daimler* tribunal added its own definition by stating that

> In common usage, 'treatment' evokes one party's manner of dealing with or behaving towards another party. In the international law setting, the term typically carries with it the sense of how a State or other legal authority regulates, protects, or otherwise interacts with specified actors, whether public or private (…).[222]

133 The indeterminate notion of 'treatment' was also expressly mentioned by the *Plama* tribunal which held that '[i]t [was] not clear whether the ordinary meaning of the term "treatment" in the MFN provision of the BIT includes or excludes dispute settlement provisions contained in other BITs to which Bulgaria is a Contracting Party.'[223]

134 This ambiguity was addressed from a different perspective in the *Renta4* case in which an SCC tribunal held that there was 'no textual basis or legal rule to say that "treatment" does not encompass the host state's acceptance of international arbitration.'[224]

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217 *HICEE B.V. v. Slovakia* (n. 64) para. 149 ('The Tribunal endorses the approach adopted by other investment tribunals that each most-favoured-nation clause is to be interpreted according to its own terms.').

218 See also August Reinisch, 'How Narrow are Narrow Dispute Settlement Clauses in Investment Treaties?' (2011) 2 J. Int'l Disp. Settlement 115–174.

219 *Siemens AG v. Argentina* (n. 108) para. 85.

220 *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentina* and *AWG Group Ltd. v. Argentina* (n. 32) para. 55.

221 *Daimler Financial Services AG v. Argentina* (n. 27) para. 218.

222 *Ibid.*

223 *Plama Consortium Ltd. v. Bulgaria* (n. 35) para. 189.

135 Apparently other, additional elements of MFN clauses may be more helpful when it comes to their interpretation.

136 As mentioned above, a number of MFN clauses specifically qualify the treatment concerned, e.g. by referring to treatment with respect to 'the management, maintenance, use, enjoyment or disposal of their investment.' Other IIAs add the qualification 'in the territory' of the Contracting State Parties to the treatment owed under an MFN clause. Another phrase often, but not always found in the context of MFN clauses is the addition 'in respect to all matters' covered by the respective IIA.

137 However, also these forms of more specific wording have given rise to divergent interpretations. A number of tribunals that had to interpret MFN clauses specifically referring to treatment with respect to 'the management, maintenance, use, enjoyment or disposal of their investment' stressed, however, that the 'right to have recourse to international arbitration is (…) particularly related to the "maintenance" of an investment, a term which includes the protection of an investment.'[225]

138 The *Wintershall* tribunal concluded that BIT language referring to 'investment related activities' or 'associated activities' generally refers to activities of investors *for the conduct of their business in the territory of the host State* rather than to activities related to or associated with the settlement of disputes between them and the host state.'[226]

139 The *Daimler* tribunal particularly emphasised the 'limiting effect of the words "in its territory" on the scope of the MFN clauses'.[227] Though a rather standard formulation, it appears that the *Daimler* tribunal was the first to derive a specific lesson for the question whether an MFN clause covered international dispute settlement or not. According to the tribunal, an MFN clause may prohibit dis-

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224 *Renta4 S.V.S.A, Ahorro Corporación Emergentes F.I., Ahorro Corporación Eurofondo F.I., Rovime Inversiones SICAV S.A., Quasar de Valors SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. v. Russia* (n. 175) para. 101.

225 *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentina* and *AWG Group Ltd. v. Argentina* (n. 32) para. 57 ('Paragraph (2) of Article 3 of the Argentina–UK BIT, quoted above, states that a Contracting state may not subject an investor to a treatment less favorable with respect to "the management, maintenance, use, enjoyment or disposal of their investment" than it accords to investors from other countries. The right to have recourse to international arbitration is very much related to investors' "management, maintenance, use, enjoyment, or disposal of their investments." It is particularly related to the "maintenance" of an investment, a term which includes the protection of an investment.'). See also *Hochtief AG v. Argentina* (n. 35) para. 68 ('(…) recourse to arbitration in addition to the right to have recourse to national courts, are a form of protection that is enjoyed within the scope of "the management, utilization, use and enjoyment of an investment".').

226 *Wintershall Aktiengesellschaft v. Argentina* (n. 179) para. 171 ('The ordinary meaning of expressions such as "investment related activities" or "associated activities" used in BITs refer generally to activities of the investor *for the conduct of his/its business in the territory of the host State* rather than to activities related to or associated with the settlement of disputes between the investors and the Host State.' (emphasis in original)).

227 *Daimler Financial Services AG v. Argentina* (n. 27) paras. 225–224 (heading to these paragraphs).

criminatory access to domestic courts of a host State since this would be treatment 'in its territory'.[228] However, because of the international nature of investment arbitration, the same would not be the case for investment arbitration.[229] The *Daimler* tribunal therefore held that

> (…) the Treaty's clearly expressed territorial limitation upon the scope of its MFN clauses establishes that the Contracting State Parties to the German–Argentine BIT did not intend for the Treaty's extra-territorial dispute resolution provisions to fall within the scope of those clauses.[230]

Already the *Maffezini* tribunal attributed particular importance to the fact that **140**
the applicable MFN clause of the Argentina–Spain BIT referred 'to all matters subject to this Agreement.' This formulation was indicative for the intention of the parties that the MFN clauses extended to dispute settlement. Also a number of other tribunals found the inclusion or absence of such a qualification, at least co-determinative for their findings.[231] Nevertheless, there are also tribunals which have not given any particular weight to this language.[232]

G. Conclusions

The apparently conflicting interpretations of MFN clauses in *Maffezini* and its **141**
followers, on the one hand, and in *Salini*, *Plama*, and others, on the other hand, initially could be distinguished with regard to a number of important factors that may have explained that these cases did not necessarily form inconsistent case law.

The *Plama* tribunal hinted at an important distinction that could be made be- **142**
tween the two types of approaches. The tribunal found that

> [i]t is one thing to add to the treatment provided in one treaty more favorable treatment provided elsewhere. It is quite another thing to replace a procedure specifically negotiated by parties with an entirely different mechanism.[233]

228 *Ibid.*, para. 227 ('(…) the resolution of an investor-State dispute within the domestic courts of a Host State would constitute an activity that takes place within its territory. Thus, if a Host State were to accord to the investors of some third State more favorable rights in relation to domestic dispute resolution than the rights accorded to the investors of the other contracting State party to the BIT, this could give rise to a violation of the MFN clause.').

229 *Ibid.*, para. 228 ('The same cannot be said, however, of international arbitration, which almost without exception takes place outside the territory of the Host State and which per definition proceeds independently of any state control. (…)' (emphasis in original)).

230 *Ibid.*, para. 231.

231 *Ibid*., para. 236.

232 See, e.g., *Berschader v. Russia* (n. 66) para. 194 ('(…) the expression "all matters covered by the present Treaty" does not really mean that the MFN provision extends to all matters covered by the Treaty. Therefore, the "ordinary meaning" of that expression is of no assistance in the instant case, and the expression as such does not warrant the conclusion that the parties intended the MFN provision to extend to the dispute resolution clause.').

233 *Plama Consortium Ltd. v. Bulgaria* (n. 35) para. 209.

143 After the awards in *Wintershall v. Argentina*[234] and in *RosInvest v. Russia*,[235] however, this potentially harmonising interpretation suffered a severe blow. Tribunals now follow the entire range of possible outcomes, from denying any effect of MFN clauses beyond substantive protection (*Wintershall*) to permitting the importation of all (substantive, procedural and jurisdictional) advantages of other BITs (*RosInvest*).

144 It has been noted, however, that the *Wintershall* tribunal qualified the applicable waiting period as a jurisdictional and not merely an admissibility issue. One could thus still maintain that MFN clauses can serve to avoid admissibility related access restrictions.[236]

145 In a 2010 UNCTAD publication this distinction[237] was also upheld, as is expressly reflected in the 2012 *Teinver v. Argentina* decision.[238] Indeed, if one is willing to discount the divergent characterisations of waiting periods and domestic litigation requirements as admissibility-related or jurisdictional, one can still

234 *Wintershall Aktiengesellschaft v. Argentina* (n. 179).

235 *RosInvestCo UK Ltd. v. Russia* (n. 133).

236 See Stephan Schill (n. 7) 530.

237 UNCTAD, *Most-Favoured-Nation Treatment* (n. 3), distinguished between the so-called admissibility cases, in which claimants 'have invoked the MFN treatment clause to override a procedural requirement that constitutes a condition for the submission of a claim to international arbitration' and so-called jurisdictional cases in which claimants 'have attempted to extend via MFN the jurisdictional threshold, i.e., the scope of the mandate of the arbitral tribunal, beyond that specifically set forth in the basic treaty. This use of the MFN clause would give the arbitral tribunal jurisdiction to hear issues or disputes that the basic treaty does not contemplate or expressly excludes.'

238 *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentina* (n. 142) paras. 170–171 ('UNCTAD identifies the following cases as fitting within the "admissibility" category: *Maffezini*, *Siemens*, *Gas Natural*, *National Grid*, *Suez InterAguas*, *AWG Group* and *Wintershall*. To these cases, the Tribunal would add *Impregilo*, *Hochtief*, *Abaclat*, *ICS*, and *Daimler*. In each of these cases, the claimant was required under the respective terms of its BIT's dispute settlement provisions to seek a remedy before a local court of the host State for a period of time before bringing arbitration. Each of the claimants in these cases sought to use its BIT's MFN clause in order to "borrow" a dispute settlement provision from another treaty that did not contain a local court requirement as a precondition of arbitration. With the exceptions of *Wintershall*, *ICS* and *Daimler* the claimants' arguments were successful.
UNCTAD identifies the following cases as fitting within the "scope of jurisdiction" category: *Salini*, *Plama*, *Telenor*, *Berschader*, and *Tza Yap Shum*. In these cases, the claimants sought to use the MFN clause to expand the scope of jurisdiction under their applicable BIT. In *Salini*, the claimant attempted to use the MFN clause to bring in contract claims before an ICSID tribunal. In *Plama*, the claimant attempted to use the MFN clause to broaden the scope of jurisdiction beyond that of its applicable BIT, which only provided jurisdiction to resolve issues of compensation in the case of an expropriation. Similarly, in *Telenor* and *Berschader*, the claimants attempted to use the MFN clause to broaden jurisdiction beyond their BITs, which only provided jurisdiction over expropriation claims. In each of these cases, the claimant's attempts to rely on the MFN clause were rejected by the tribunals. UNCTAD identified only one case within this category, *RosInvestCo*, that departed from this trend.' (footnotes omitted)).

maintain the basic dividing line according to which most tribunals appear to accept that mere procedural/admissibility obstacles may be overcome through reliance on an MFN clause, while it may not serve to establish a jurisdiction where no such jurisdiction would be available under the basic treaty.