MFN Clauses and International Dispute Settlement: Moving beyond *Maffezini* and *Plama*?

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I. INTRODUCTION

IN THE SIXTEEN YEARS SINCE Jan Paulsson coined the expression "arbitration without privity,"[1] international investment law has received scrupulous attention.[2] Perhaps the most surprising controversy relates to the interpretation of most-favored-nation (MFN) clauses. When the *Maffezini v. Spain* Tribunal applied an MFN clause to matters of investor-State arbitration procedure in a jurisdictional decision, it ignited a split in the case law.[3] This debate combines heated disagreement amongst tribunals about the legal approach to the interpretation of MFN clauses with silent but often apparent

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[1] Jan Paulsson, *Arbitration Without Privity*, 10 ICSID Rev.—FILJ 232, 232–57 (1995).

[2] Campbell McLachlan et al., International Investment Arbitration: Substantive Principles chs. 7–9 (2008); Rudolf Dolzer & Christoph Schreuer, Principles of International Investment Law part V (2008); Andrew Newcombe & Luis Paradell, Law and Practice of International Investment Treaties: Standards of Treatment chs. 4, 6–9 (2009).

[3] *Emilio Augustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, paras. 38–64 (Jan. 25, 2000) (unofficial English translation) ["*Maffezini* Decision on Jurisdiction"].

consensus about the results in each case. The former point can be seen in the *Suez* decision of August 3, 2006 which, after extensive analysis, lent its support to the approach used by the *Maffezini* Tribunal,[4] while the *Telenor* award of September 15, 2006 just as fully rejected it.[5] The second trend is the consensus on the results. The *Plama* decision expressed its sympathy with the *Maffezini* result (although critical of its approach),[6] while the *National Grid* decision approved the conclusions of the *Plama* decision itself (although again disagreeing with the approach).[7] The purpose of this article is to explain the differing approaches and yet, until recently, fairly uniform results in the treatment of MFN clauses and rules of international dispute settlement.

The article is composed of four parts. First, it will be argued that the contemporary controversies are not novel but represent only another stage in a long-running debate about the rules of interpretation and approach to MFN clauses. Second, the main contours of the case law dealing with MFN clauses and rules of international dispute settlement will be briefly sketched. Third, existing explanations of the application of MFN clauses to procedural rules of international dispute settlement will be considered against the background of Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("VCLT"). Fourth, possible alternative views of the debate will be discussed.

To paraphrase James Crawford, when the debate bogs down around a dichotomy such as "MFN can apply to procedural matters" / "MFN cannot apply to procedural matters," something has almost always gone wrong, and the problem may be in the level of analysis.[8] The uniquely lengthy and eloquent analysis of *Maffezini* meant that subsequent pleadings and awards were presented and explained in terms of the "MFN clauses and procedural rules" vocabulary. Alternative ways of framing the argument were not utilized by the parties, and consequently, nor were they used by the Tribunals. The two antagonistic approaches intuitively suggest the enquiry into whether there could be an intermediate third way. The article will consider the possibility of applying the distinction between jurisdiction and admissibility and the concept

[4] *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, paras. 52–68 (Aug. 3, 2006) ["*Suez* Decision on Jurisdiction"].

[5] *Telenor Mobile Commc'n AS v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, paras. 83–101 (Sept. 13, 2006) ["*Telenor* Award"].

[6] *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, para. 244 (Feb. 8, 2005) ["*Plama* Decision on Jurisdiction"].

[7] *National Grid PLC v. Argentine Republic*, UNCITRAL, Decision on Jurisdiction, para. 92 (June 20, 2006) ["*National Grid* Decision on Jurisdiction"].

[8] James Crawford & Simon Olleson, *The Nature and Forms of International Responsibility*, *in* Malcolm D. Evans ed., International Law 451, 465 (2d ed. 2006).

of "actual consent" in order to establish the limits of MFN clauses. However, rather than discuss "MFN clauses and procedural rules," the better alternative might be to ask whether procedural rules regulating the consequences of a breach of obligation can be considered "treatment" and whether they can be compared to determine the most "favored" treatment.

II. MFN CLAUSES AND INTERNATIONAL LAW

Speaking in 1907, Elihu Root described the function of MFN clauses in the following terms:

> [I]f any state chooses to extend privileges to alien residents . . . , the state will be forbidden by the operation of the treaty to discriminate against the resident citizens of the particular country with which the treaty is made and will be forbidden to deny to them the privileges which it grants to the citizens of other foreign countries.[9]

The structure and purpose of the MFN clause seem reasonably clear. However, the recent case law shows that the apparent simplicity of form does not necessarily lead to consensus about the most appropriate solutions.[10] Rather, as the Fourth Special Rapporteur on the Law of Treaties, Sir Humprey Waldock, remarked, "although the idea behind [the MFN clause] was simple enough, its application could be extremely difficult."[11]

Four issues have given rise to debate: (A) the source of MFN obligations; (B) the place of MFN clauses in the law of treaties; (C) whether MFN clauses are to be interpreted according to extra-legal considerations; and (D) whether MFN clauses are instead to be interpreted under special rules rather than the general rule of interpretation. Each issue will be considered in turn, showing how and why MFN clauses are substantive treaty rules that are to be interpreted according to Articles 31 and 32 of the VCLT (and analogous rules of customary law of interpretation), not by reference to extra-legal political or economical considerations.

[9] Elihu Root, *The Real Question Under the Japanese Treaty and the San Francisco School Board Resolution*, 1 Am. J. Int'l L. 273, 277–78 (1907).

[10] In parenthesis, the potential of controversy hidden in MFN clauses was perfectly clear to Root. He picked this topic for the Presidential address of the first annual meeting of ASIL, stressing that "all the foolish talk about war was sensational and imaginative" and criticizing "the discourtesy, insult, imputations of inferiority and abuse" of the American debate. Root, *supra* note 9, at 284–85. J.B. Scott, *Elihu Root's Services to International Law*, 18 ASIL Proc. 2, 11–14 (1907).

[11] *Summary Records of the 16th Session of the International Law Commission, May 11–July 24, 1964*, 741st mtg. (June 9, 1964), I Y.B. Int'l L. Comm'n (1964)., U.N. Doc. A/CN.4/SER.A/1964, at 113, para. 12 (1965) ["*Summary Records of the ILC's 16th Session, Vol. I*"].

A. The Source of MFN Obligations as Rules of Treaty Law

Unlike other examples of substantive investment protection law rules,[12] MFN clauses neither refer to nor reflect customary international law. Certainly, MFN clauses have an impressive historic pedigree, even predating international law.[13] However, the MFN clause has not become a rule of customary law because of the lack of *opinio juris*.[14] In its absence, generalized different treatment of investors of different nationalities is not internationally wrongful.[15]

The practical consequence of situating MFN clauses exclusively within treaty law rather than customary law is that State practice has considerably less relevance to its interpretation.[16] Arguments relying on State practice have, however, been made.[17] Such arguments would make sense if MFN treatment were a customary rule,[18] but it could not influence the interpretation of a treaty

[12] On the definition of expropriation being read in from customary law, see, *e.g.*, Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 INT'L COMP. L.Q. 279, 317 (2005); *Saluka Investment BV v. Czech Republic*, UNCITRAL, Partial Award, para. 254 (Mar. 17, 2006); Martins Paparinskis, *Regulatory Expropriation and Sustainable Development*, *in* MARIE-CLAIRE CORDONIER SEGGER ET AL. EDS., SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 303–07 (2010). On the customary law background to the creation of *pacta sunt servanda* clauses, see Thomas W. Wälde, *The "Umbrella" (or Sanctity of Contract/*Pacta sunt Servanda*) Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases*, 1(4) TRANSNAT'L DISP. MGMT. 21, 27, 34, 42, 52, 53, 66 (2004).

[13] Stanley K. Hornbeck, *The Most-Favored-Nation Clause*, 3 AM. J. INT'L L. 395, 395–403 (1909); Boris Nolde, *La clause de la nation la plus favorisée et les tarifs préférentiels*, 39 REC. DES COURS 1, 23–30 (1932); George Schwarzenberger, *The Most-Favoured-Nation Standard in British State Practice*, 22 BRIT. Y.B. INT'L L. 96, 97 (1945); ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 30–31 (1947).

[14] Schwarzenberger, *British State Practice*, *supra* note 13, at 103; MITSUO MATSUSHITA ET AL., THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY 146 (1st ed., 2003).

[15] *Methanex Corp. v. United States of America*, UNCITRAL, Final Award, part IV, ch. C, para. 24 (Aug. 9, 2005). This is qualified by narrower restrictions of differential treatment imposed by other rules of international law like the law of expropriation or *jus cogens* prohibitions on discrimination.

[16] *See* Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT'L L. 179 (2010).

[17] For example, in *Rights of Nationals of the United States of America in Morocco* (*France v. U.S.*) ("*U.S. Nationals in Morocco*"), the U.S. argued that MFN clauses in the old treaties with Muslim States were different from those in modern treaties between European States in that they acted as permanent drafting by reference. The U.S. pointed out that "the practice which it [the modern approach] crystallized was essentially developed by the States of the European and American continents in their relations among themselves" and that it was "not a practice involving Mohammedan States." *U.S. Nationals in Morocco*, I.C.J. Pleadings, vol. I, at 372, Counter-Memorial Submitted by the U.S. (Dec. 20, 1951), and vol. II, at 120, Rejoinder Submitted by the U.S. (Apr. 18, 1952).

[18] *See* VAUGHAN LOWE, INTERNATIONAL LAW 54 (2007). Alternatively, the U.S. perhaps made two overlapping arguments about a change in the special meaning of a treaty term and the principle of contemporaneity directing the interpreter at the original special meaning. *Cf.* Hugh Thirlway, *The Law and Procedure of the International Court of Justice 1960–1989 (Part Three)*, 62 BRIT. Y.B. INT'L L. 1, 27–28 (1991).

rule.[19] In the recent case law, some tribunals have interpreted MFN clauses by reference to policy shifts of some Latin American and former Soviet Union countries regarding international dispute settlement in a manner reminiscent of customary rather than treaty law.[20] Since such arguments do not have direct legal relevance, the implicit exceptions and presumptions must be explained solely in terms of treaty law.

B. MFN Clauses as Rules of Treaty Law, not Law of Treaties

MFN clauses could be treated differently from other treaty rules if they were in some sense part of the general law of treaties, rather than simple substantive treaty rules. Historically, there has been a minority support for such a view.[21] For example, at the 1964 ILC debate on Waldock's Third Report on the Law of Treaties, Eduardo Jiménez de Aréchaga suggested a separate article to make it clear that the presumption against rights accruing to third States did not affect MFN clauses, and that States could not use the MFN clause to rely on abrogated or renounced treaties.[22] The majority rejected the proposal. Waldock,[23] Paul Reuter,[24] Herbert Briggs[25] and Alfred Verdross all agreed that MFN clauses were treaty rules that could not be considered in a draft on the general law of treaties.[26] The minority treated MFN clauses in more *sui generis* terms like law-making treaties and self-contained systems.[27] The ILC accepted

[19] The Court rejected the argument. *U.S. Nationals in Morocco*, *supra* note 17, Judgment, 1952 I.C.J. Rep. 176, 191–92 (Aug. 27). Judge Hsu Mo took the view that consular jurisdiction could not "derive from any admission made . . . to a third party." Declaration of Judge Hsu Mo, *id.* at 214. The dissenting judges also accepted that "the external sources of the right have ceased." *Id.* at 219.

[20] *Maffezini* Decision on Jurisdiction, *supra* note 3, paras. 58–61; *Telenor* Award, *supra* note 5, para. 96; *Vladimir Berschader and Moïse Berschader v. Russian Federation*, SCC Case No. 080/2004, Award, paras. 203–05 (Apr. 21, 2006) ["*Berschader* Award"]. The *Berschader* tribunal even referred to the "consistent practice on the part of the Soviet Union," *id.* para. 204, an argument that makes sense in terms of customary law (either identifying customary law or perhaps the persistent objector status, *see* Maurice H. Mendelson, *The Formation of Customary International Law*, 272 Rec. des Cours 155, 211–14, 227–42 (1999)) but not in terms of treaty law, as noted in the Separate Opinion of Todd Weiler, para. 24. The *RosInvestCo* tribunal rightly rejected the relevance of such arguments. *RoInvestCo UK Ltd. v. Russian Federation*, SCC Case No. Arb. V 079/2005, Award on Jurisdiction, paras. 37–44 (Oct. 2007) ["*RosInvestCo* Award on Jurisdiction"].

[21] Dionisio Anzilloti discussed MFN clauses after the general sections on "Adhesion or accession to treaties" and before "Causes of extinction of treaties." Dionisio Anzilotti, Cours de Droit International 432–39 (1929). Lord McNair dealt with MFN clauses in his general treatise on the law of treaties. Lord McNair, The Law of Treaties 273, 273–305 (1961).

[22] *Summary Records of the ILC's 16th Session, Vol. I*, *supra* note 11, at 184.

[23] *Id.* at 113.

[24] *Id. See* Paul Reuter, Introduction au Droit des Traites 97–99 (3d ed., 1996).

[25] *Summary Records of the ILC's 16th Session, Vol. I*, *supra* note 11, at 188.

[26] *Id.*

[27] *Id.* at 113 (de Aréchaga) and 188 (Yasseen).

the majority view and "did not think it advisable to deal with [MFN clauses] in the present codification of the general law of treaties."[28]

The express rejection of de Aréchaga's argument suggests that MFN clauses are not structurally unique but only simple substantive treaty rules. To talk about *the* MFN clause is misleading because of the many forms of the clause. There is no larger overreaching purpose for all MFN clauses.[29] Their operation is also not something functionally unique in international law: it simply makes reference to other treaties.[30] It also perhaps concretizes the interpretative principle that "open or evolving concepts" can direct the interpreter to rules subsequent to the treaty.[31] Consequently, the place of MFN clauses in the law of treaties does not justify addressing and interpreting them differently than other rules of treaty law.

C. Legal (Not Extra-Legal) Rules of Interpretation

Another controversy is whether the interpretation of MFN clauses is exclusively governed by legal standards or whether MFN clauses are to be interpreted according to extralegal considerations. The classic debate addressed the question whether an MFN clause that did not mention reciprocity still contained an implicit distinction between favors granted gratuitously and

[28] *Documents of the 16th Session of the International Law Commission, May 11–July 24, 1964*, II Y.B. Int'l L. Comm'n (1965), U.N. Doc. A/CN.4/SER.A/1964/Add.1, at 176 (1965). The Vienna Conference on the Law of Treaties came to a similar conclusion, rejecting the relevance of MFN clauses for the general law of treaties. *See* Shabtai Rosenne, Developments in the Law of Treaties 1945–1986, at 67 (1989).

[29] Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951–1954*, 32 Brit. Y.B. Int'l L. 20, 88 (1955–1956). Reuter used another metaphor when saying that a State could use an MFN clause to refer to other treaties "as a yardstick for its own obligations." Paul Reuter, Introduction to the Law of Treaties 106 (2d ed., 1995).

[30] Article 29 of the VCLT provides that treaties are presumed to be territorially applicable in respect of the entire territory of the State. A treaty between two States affecting territorial change will modify the territorial scope of the treaties that the two States have with third States, in accordance with the implicit reference that these treaties make regarding their territorial scope. *See* Reuter, *supra* note 29. at 106–07.

[31] The *RosInvestCo* tribunal seemed to accept the functional similarity when it stated that in the particular BIT the "chosen vehicle" for any evolutionary development was the MFN clause. *RosInvestCo* Award on Jurisdiction, *supra* note 20, para. 40. The similarity is incomplete because, while in practice the more favorable treatment is more likely to appear in a subsequent treaty, there is nothing that would in principle preclude MFN clauses from applying to earlier treaties. *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, para. 160 (Aug. 27, 2009). On evolutionary interpretation, see generally *Fragmentation of International Law: Difficulties Arising from Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, 58th Sess., Geneva, May 1 – June 9 and July 3 – Aug. 11, 2006, U.N. Doc. A/CN.4/L.702, para. 23 (July 18, 2006); Hugh Thirlway, *The Law and Procedure of the International Court of Justice 1960–1989*, 76 Brit. Y.B. Int'l L. 1, 71–77 (2005 supp., parts I & II); Hugh Thirlway, *The Law and Procedure of the International Court of Justice 1960–1989*, 77 Brit. Y.B. Int'l L. 1, 67–69 (2006 supp., part III).

those given for some consideration.[32] The question whether some extra-legal arguments could be relevant for the interpretation of MFN clauses was never conclusively resolved because the U.S. modified its position and accepted the unconditionality view.[33] The argument that MFN clauses should be interpreted according to extra-legal considerations was also made by the U.S. in the *U.S. Nationals in Morocco* case. The U.S. relied on "[t]he existence among [European and American] States of common needs and interests, commercial and otherwise," the "substantial identity of civilizations, cultures, legal systems [and] concepts"[34] and the "common foundation of jurisprudence and socio-political development," contrasting them with "the disparity between the social order and legal system of the Mohammedan States and their own."[35] The Court rejected the argument that the MFN clauses in "treaties made with countries like Morocco" had some special meaning inconsistent with the intentions of the parties to the treaties reflected in the "wording of the particular treaties, and by the general treaty pattern."[36]

In recent investment arbitration case law, some Tribunals have referred to the policy conflicts between capital exporting and importing countries[37] and between former Soviet Union countries and other States.[38] However, in line with the *U.S. Nationals in Morocco* judgment, the common or differing conceptions of legal systems or jurisprudence of States (like policies towards international dispute settlement) are in principle irrelevant for the purposes of interpretation, and can only become relevant to the extent that they are reflected in "the wording of the particular treaties."

D. General (Not Special) Rules of Interpretation

If MFN clauses are rules of treaty law that have to be interpreted in legal terms, the next question is whether they should be interpreted according to general or special rules of interpretation. Is there is anything more to the process of interpretation than the customary rule now stated in Articles 31 and 32 of the

[32] Hornbeck, *supra* note 13, at 619–27. Hornbeck explained that MFN clauses could be interpreted not only according to the "the strict or literal, perhaps the more truly juristic school" but also "the practical, or—as it may seem to some—opportunist, but surely more truly economic," preferring the latter approach. *Id.* at 628–29. *See also* Charles Rousseau, I Principes Généraux du Droit International Public 467 (1944)

[33] Scott Vesel, *Clearing a Path through a Tangled Jurisprudence: Most-Favored-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties*, 32 Yale J. Int'l L. 125, 130–32 (2007).

[34] *U.S. Nationals in Morocco*, *supra* note 17, I.C.J. Pleadings, vol. I, at 372, Counter-memorial.

[35] *Id.* at 375.

[36] *U.S. Nationals in Morocco*, *supra* note 17, Judgment, at 191–92.

[37] *Maffezini* Decision on Jurisdiction, *supra* note 3, para. 57.

[38] *Berschader* Award, *supra* note 20, para. 203.

VCLT? Historically, a minority view argued for special rules of interpretation for MFN clauses.[39] The issue was expressly addressed at the 1927 League of Nations Committee of Experts for the Progressive Codification of International Law. Special Rapporteur George Wickersham argued[40] and McNair,[41] Simon Rundstein and Guilio Diena agreed that it was neither necessary nor desirable to frame specific rules because the usual rules of judicial interpretation seemed adequate.[42] Barbosa de Magalhães, the lone dissenter, countered that "it was desirable to frame supplementary provisions in a general international convention" that would assist in uncertain cases where States have not clearly expressed their intention.[43]

The issue of a special rule of interpretation for MFN clauses was considered when the ILC debated the 1978 Draft Articles on Most-Favoured-Nation Clauses (the Draft Articles) that also included sections on interpretation. According to Sir Francis Vallat, there were four ways to explain the interpretation of MFN clauses. The first (and preferable) approach was to simply apply the general rule of interpretation to the particular clause: "The application of the most-favoured-nation clause in a treaty was *par excellence* a question of the interpretation of the particular clause in the particular treaty."[44] Secondly, MFN clauses could be interpreted by rules of interpretation for a special kind of treaty, disrupting the deliberate system of VCLT. Such a development was undesirable from a systemic point of view. Thirdly, these rules of interpretation could be a codification of rules binding through the proviso of Article 31(3)(c) of the VCLT about "any relevant rules of international law applicable in the relations between the parties." This argument would need very persuasive support from State practice that seemed to be lacking. Fourthly, the ILC could simply draft new treaty rules that would be applicable only between the State parties.[45] Special Rapporteur on MFN Clauses Endre Ustor assured Vallat that

[39] Charles C. Hyde, *Concerning the Interpretation of Treaties*, 3 Am. J. Int'l L. 46, 46–61 (1909).

[40] Shabtai Rosenne ed., II The Committee of Experts for the Progressive Codification of International Law [1925–1928], at 329–30 (1972) ["II Progressive Codification"].

[41] Shabtai Rosenne ed., I The Committee of Experts for the Progressive Codification of International Law [1925–1928], at 244 (1971).

[42] *Id.* at 243.

[43] Rosenne, II Progressive Codification, *supra* note 40, at 330–31 (while not providing much guidance as to what these rules should be); Quincy Wright, *The Most-Favored-Nation Clause*, 21 Am. J. Int'l L. 760, 762 (1927).

[44] *Summary Records of the ILC's 25th Session, May 7 – July 13, 1973*, I Y.B. Int'l L. Comm. (1973), U.N. Doc. A/CN.4/Ser.A/1973, at 64 (1974); *see also id.* at 67 (Tammes). Special Rapporteur Endre Ustor agreed, while recalling the abovementioned controversies at the Committee of Experts. *Id.* at 71.

[45] *Summary Records of the ILC's 27th Session, May 5 – July 25, 1973*, I Y.B. Int'l L. Comm. (1975), U.N. Doc. A/CN.4/Ser.A/1975, at 152 (1976). The last option is similar to the proposal de Magalhães made in 1927.

"there was no intention to question any of the rules embodied in the Vienna Convention."[46] The Commentary to the Draft Articles is also unequivocal that "the rule follows clearly from the general principles of treaty interpretation."[47] In light of the debates and the language of the Draft Articles, it can be said that the ILC has expressly rejected the possibility of special rules of interpretation for MFN clauses.[48]

The Draft Articles explain the possible application of the general rule of interpretation in the following terms:

> 2. The most-favoured-nation treatment to which the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, is entitled under [an MFN clause] is determined by the treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State.[49]
> . . .
> 1. Under a most-favoured-nation clause the beneficiary State acquires, for itself or for the benefit of persons or things in a determined relationship with it, only those rights which fall within the limits of the subject-matter of the clause.
> 2. The beneficiary State acquires rights . . . only in respect of persons or things which are specified in the clause or implied from its subject-matter.[50]

The Draft Articles accurately postulate the general rule of interpretation, as it could be applied to MFN clauses. At the same time, they are set at such a high degree of abstraction that they do not advance much further than elaborating in legal language the idea that "a reference to A is not a reference to B." The Draft Articles state the self-evident point that the limits of the MFN clause are established by the language of the clause itself, and "a clause conferring most-favoured-rights in respect of a certain matter, or class of matter, can attract the

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[46] *Id.* at 156. Ustor also somewhat ambiguously suggested that the ILC was trying to codify the international law rules applicable to MFN clauses.

[47] Draft Articles on Most-Favoured-Nation Clauses, with Commentaries, *in Report of the International Law Commission on the Work of its Thirtieth Session, May 8 –July 28, 1978*, II Y.B. Int'l L. Comm'n, pt. II, U.N. Doc A/CN.4/SER.A/1978/Add.1 (Part 2), at 30 (1978) ["ILC 1978 Draft Articles"].

[48] The ILC 2007 Working Group on MFN clauses accepted that "[a]t one level the problem is simply a matter of treaty interpretation." *Report of the International Law Commission, Sixtieth Session, May 5 – June 6 and July 7 – Aug. 8, 2008*, U.N. GAOR, 63rd Sess., Supp. 10, U.N. Doc. A/63/10, annex B, para. 29 (2008) ["ILC 2007 Report"].

[49] ILC 1978 Draft Articles, *supra* note 47, at 25, art. 8(2).

[50] *Id.* at 27, art. 9.

rights conferred by other treaties (or unilateral acts) only in regard to the same matter or class of matter."[51]

III. INTERPRETATION OF MFN CLAUSES AND RULES OF INTERNATIONAL DISPUTE SETTLEMENT

The language of "substantive" and "procedural" rules is often used in the debate about MFN clauses, but the framing of the distinction in these terms might be misleading. Primary investment obligations may require the host States to treat investors in a certain manner regarding the quality of judicial administration and administrative procedure. Such rules are procedural in this sense, and denial of justice is a primary rule that encompasses many types of procedural guarantees.[52] Diplomatic protection and investment arbitration are also procedural, but in a very different sense: they deal with the invocation of State responsibility after the primary obligations have been breached.[53] The classic cases and authorities apply MFN clauses to procedural matters in the former sense, and it is less obvious whether they can provide support for the qualitatively different latter argument, particularly since they dealt with the invocation of responsibility by States within an international legal order often skeptical of the rights of individuals.[54] The present analysis will refer to "substantive rules" and "procedural rules" to describe the existing debate, and to "rules of international dispute settlement" when the procedural issues relate to investor-State dispute settlement.

Before addressing MFN clauses and rules of international dispute settlement, it might be useful to briefly reflect on the position relating to substantive obligations. States have three times put questions about MFN clauses in a commercial context and substantive rules before the International Court of Justice ("ICJ" or "Court"), but, despite arguments of equal eloquence

[51] *Id.* at 30, cmt. 10 to arts. 9–10 (citation omitted).

[52] Charles de Visscher, *Le déni de justice en droit international*, 52 Rec. des Cours 369 (1935); C.T. Eustathiadès, La responsabilité international de l'Etat pour les actes des organes judiciares et le problème du déni de justice en droit international (1936); Alwyn V. Freeman, The International Responsibility of States for Denial of Justice (1938); Jan Paulsson, Denial of Justice in International Law (2005).

[53] See the analysis of investor-State treaty arbitration as invocation of responsibility. Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 Brit. Y.B. Int'l L. 151, 162–93 (2003); Martins Paparinskis, *Investment Arbitration and the Law of Countermeasures*, 79 Brit. Y.B. Int'l L. 264, 281–97 (2008); Zachary Douglas, *Other Specific Regimes of Responsibility: Investment Treaty Arbitration and ICSID in* James Crawford et al. eds., The Law of International Responsibility 815 (2010).

[54] *But see* Walid Ben Hamida, *Clause de la nation la plus favorisée et mécanismes de règlement des différends: que dit l'histoire?*, 134 J. droit int'l 1126, 1145–47, 1154–55 (2007).

and erudition in favor of narrow[55] and broad readings,[56] the Court for different reasons left them unanswered.[57] One possible explanation for the variety of arguments presented and the caution of the Court is that the cases were argued and decided before the VCLT was adopted, when people could reasonably differ on whether interpretation should focus on the original intentions of

[55] In the *Nationality Decrees Issued in Tunis and Morocco* advisory ("*Nationality Decrees*") proceedings where the applicability of MFN clauses to nationality issues was debated, Albert de Lapradelle on behalf of France argued that "[t]he existence of the most favoured nation clause, a clause which belongs to the domain of commerce, cannot be advanced in order to claim, under this very clause, the application of a régime, which appertains to the law of persons, and more particularly to obtain advantages which a particular State, situated in special circumstances, with a foresight displayed by no one else, took care to secure by one of three minutely drafted conventions, whereas Great Britain limited herself to a general extension of the regime." P.C.I.J. (ser. C) No. 2, Pleadings, Oral Pleadings, at 172 (Jan. 12, 1923); *see generally id.* at 166–76 (de Lapradelle), 227–28 (Mérillon); *see also Nationality Decrees*, add'l vol., at 32, Memorial Submitted by the Government of France (Nov. 24, 1922), and at 245, Counter-memorial Submitted by the Government of France (Dec. 23, 1922). In the *U.S. Nationals in Morocco* case, the U.S. argued that "[t]he most-favoured-nation clause in the Madrid Convention, which is by its terms applicable to all matters, is certainly applicable to a fundamental commercial matter such as the right of import." *U.S. Nationals in Morocco*, *supra* note 17, I.C.J. Pleadings, vol. II, Oral Pleadings, at 282 (Adrian Fischer) (July 21, 1952). In the *Ambatielos* case, Sir Frank Soskice on behalf of Greece made probably the best imaginable argument for a broad reading of a "commerce" MFN clause by saying that "[t]hose words are wide. Those words include not merely the core and kernel of commerce itself, but they cover all words which, as it were, describe those things on the outside, the circumference of what may be described as commerce itself. They are matters relating to commerce—matters which have some connection with commerce—matters which touch commerce—matters which in some way are placed in relationship to immediately commercial transactions." *Ambatielos Case (Greece v. United Kingdom)*, I.C.J. Pleadings, Oral Pleadings, at 457 (Mar. 28, 1953); *see also id.* at 458.

[56] In the *Nationality Decrees* proceedings, Sir Ernest Pollock on behalf of the UK responded to de Lapradelle by saying that "both exemptions from military service and freedom of the subject, as well as similar matters, are all matters which could have their bearing upon the economic position of subjects in a state, and it does not really answer the question merely to say, 'Oh, this is an economic question and therefore it has nothing to do with these matters.'" *Nationality Decrees*, *supra* note 55, Pleadings, Oral Pleadings, at 207 (Jan. 13, 1923); *see also id.* at 49 (Hog). In the *U.S. Nationals in Morocco* case, France argued that the MFN clause applied only to matters already provided for in the treaty. *Supra* note 17, I.C.J. Pleadings, vol. II, Oral Pleadings, at 163 (Gross) (July 15, 1952). In the *Ambatielos* case, Sir Gerald Fitzmaurice of behalf of the UK argued for textual fidelity: "A right relative to a certain subject-matter, for instance commerce, conferred by a particular treaty, might be given effect to by virtue of the treaty, but the *process* by which such a commercial right would be given effect to would be essentially non commercial, would be a matter appertaining to litigation as such, to litigation or the administration of justice generally, as a self-contained category. The process would not of itself be a matter of commerce and would not neither have anything directly to do with the treaty, nor spring from it." *Ambatielos*, *supra* note 55, Oral Pleadings, at 393 (Mar. 25, 1953).

[57] In *Nationality Decrees*, the question was whether the "treaty dispute falls solely within the domestic jurisdiction of a single State" rather than about the content of treaties. *Nationality Decrees*, *supra* note 55, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4, at 31 (Feb. 7). In *U.S. Nationals in Morocco*, the U.S. case was rejected on the assumption that its reading of the MFN clause was correct. *U.S. Nationals in Morocco*, *supra* note 17, Judgment, 1952 I.C.J. Rep. 176, 191 (Aug. 27). The *Ambatielos* case was decided on the basis of plausibility and not correctness of interpretation. *Ambatielos*, *supra* note 55, Judgment, 1953 I.C.J. Rep. 10, at 15–19.

the drafters (as *per* Hersch Lauterpacht),[58] the purpose of the treaty (as *per* Myres McDougal),[59] or the text of the treaty itself (as *per* Sir William Eric Beckett and Gerald Fitzmaurice himself).[60] This might be contrasted with the uncontroversial and even mundane application of MFN clauses to substantive rules in investment arbitration where VCLT provides a relatively formalistic framework for reaching an appropriate solution.[61]

It is clear that MFN clauses are *jus dispositivum.* States can limit, extend or clarify their scope and content, both with respect to primary obligations and rules of international dispute settlement. For example, Article 3 of the 2001 Austrian–Saudi Arabian BIT expressly extends the MFN treatment to "the means to assure [investors'] rights to such investment," probably also applying to dispute settlement.[62] Conversely, the *travaux préparatoires* of certain treaties expressly reject the *Maffezini* approach.[63] It does not seem to be clearly settled which terms by their ordinary or special meaning signify the application of MFN clauses to rules of international dispute settlement.[64]

The issue is most problematic when States leave the question open, and the clause is worded sufficiently broadly ("all matters") to *prima facie* cover rules of international dispute settlement and yet is not specific enough to indicate its scope in an unambiguous manner. To avoid any doubts, the 1991 UK Model BIT stated that the MFN clause extended *inter alia* to dispute resolution.[65] Conversely, Argentina and Panama adopted an interpretative declaration stating

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[58] Hersch Lauterpacht, *Some Observations on the Preparatory Work in the Interpretation of Treaties*, 48 Harv. L. Rev. 549 (1934–1935).

[59] *See, e.g.*, Myres S. McDougal, *The International Law Commission's Draft Articles upon Interpretation: Textuality* Redivivus, 61 Am. J. Int'l L. 992, 992–1000 (1967); *Vienna Conference on the Law of Treaties: Statement of Professor Myres S. McDougal, United States Delegation, to Committee of the Whole, Vienna Conference on the Law of Treaties, April 19, 1968*, 62 Am. J. Int'l L. 1021, 1021–27 (1968) (particularly relevant is page 1027).

[60] *See, e.g.*, Gerald Fitzmaurice & Francis Vallat, *Sir (William) Eric Beckett, K.C.M.G., Q.C. (1896–1966)*, 17 Int'l & Comp. L.Q. 267, 302–13 (1968).

[61] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/07, Decision on Annulment, para. 64 (Mar. 21, 2007)["*MTD* Decision on Annulment"]; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, para. 575 (July 29, 2008).

[62] UNCTAD, *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking*, U.N. Doc. UNCTAD/ITE/IIT/2006/5, at 40 (2007), *available at* http://www.unctad.org/en/docs/iteiia20065_en.pdf ["*Bilateral Investment Treaties 1995–2006*"].

[63] *Plama* Decision on Jurisdiction, *supra* note 6, para. 202.

[64] *Compare* UNCTAD, *Bilateral Investment Treaties 1995–2006*, *supra* note 62, at 41 (stating that a rule granting MFN treatment regarding "use and enjoyment" of investments was restricted to substantive rules), *with RosInvestCo* Award on Jurisdiction, *supra* note 20, para. 130 (finding that a similarly worded rule could cover the submission to arbitration).

[65] *National Grid* Decision on Jurisdiction, *supra* note 7, para. 85. Article 3 of the 1995 Armenia–Egypt BIT provides for a similar rule. *See* UNCTAD, *Bilateral Investment Treaties 1995–2006*, *supra* note 62, at 40–41.

that the MFN clause did not extend to dispute resolution.[66] These examples are prone to create ambiguity more generally, because their implication is that the same interpretative result would exist even without these clarifications.

A. Before Investment Protection Treaties

The willingness of tribunals to stress the historical and systemic pedigree of their arguments to increase the legitimacy of controversial arguments is understandable.[67] It is less obvious that the guidance derived from the ICJ's judgments is relevant for the interpretation of MFN clauses[68] and it can be positively misleading, as shown by the increasing reluctance to rely on these arguments.[69]

The *Anglo-Iranian Oil Co.* case dealt with an unsuccessful attempt by the UK to rely on an MFN clause to obtain the ICJ's jurisdiction. Iran had limited its consent to the Court's jurisdiction to disputes arising from treaties made after the declaration to the Optional Clause. The UK argued that an MFN clause in a pre-declaration treaty and a number of post-declaration treaties between Iran and third States gave the Court jurisdiction. The crucial question was which treaty was relevant for determining the compliance with the temporal limitation: the treaty with the MFN clause (as argued by Iran) or the third-party treaty that provided the content to the MFN clause (as argued by the UK). The Court accepted the Iranian approach and found that, "[w]ithout considering the meaning and the scope of the most-favoured-nation clause," the UK's right arose from the pre-declaration MFN treaty and consequently the Court *ratione temporis* lacked the jurisdiction.[70]

The Court continued to state that "the most-favoured-nation clause in the [MFN treaty] between Iran and the United Kingdom has no relation whatever to jurisdictional matters between the two Governments."[71] One way of reading it would be to say that the Court was describing the lack of sufficient connection between the right claimed (submission of a dispute to adjudication) and the

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[66] *National Grid* Decision on Jurisdiction, *supra* note 7, para. 85.

[67] Thomas Franck, Fairness in International Law and Institutions 25–46, 438–73 (1995); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 Fordham L. Rev. 1521 (2005).

[68] Locknie Hsu, *MFN and Dispute Settlement: When the Twain Meet*, 7(1) J. World Invest. & Trade 25, 34 (2006).

[69] The *Gas Natural* decision described these judgments as marginally relevant, *Gas Natural SDG S.A. v. Argentina*, ICSID Case No. ARB/03/10, Decision on Jurisdiction, para. 44 (June 17, 2005) ["*Gas Natural* Decision on Jurisdiction"], and the *Suez* decision did not mention them at all. *Suez* Decision on Jurisdiction, *supra* note 4.

[70] *Anglo-Iranian Oil Co. (UK v. Iran)*, Judgment, 1952 I.C.J. Rep. 93, 109 (July 22).

[71] *Id.* at 110.

class of matter in respect of which the MFN treatment had been granted (compliance with principles of international law).[72] A more persuasive approach is to consider this passage in the context of the relevant British pleadings[73] and the thrust of the British claim of being able to "telescope together [the third-party treaty] and [the MFN treaty] by praying in aid a most-favored-nation clause contained in the last-mentioned treaty."[74] The seeming inelegance of the Court's language becomes perfectly clear against this background.

Regarding the *U.S. Nationals* case, some Tribunals have suggested that the uncontroversial application of MFN to consular jurisdiction supports the *Maffezini* approach because investment arbitration in contemporary law allegedly occupies an analogous place. Even if the similarity of functions is accepted for the sake of argument, their legal context is qualitatively different to the extent that any reasonable analogy is hard to maintain. Moreover, maintaining the functional analogy between consular jurisdiction, often considered in the context of unequal treaties, and the investment protection regime is not entirely attractive in terms of policy.[75]

Regarding the *Ambatielos* case, the *Maffezini* and *Siemens* Tribunals took the view that the application of the MFN clause to the "administration of justice" can be extended to procedural rights of international dispute settlement,[76] while the *Salini* and *Plama* tribunals restricted it to substantive rights of the treatment of aliens.[77] The latter view seems more persuasive. The question before the

[72] Fitzmaurice, *Law and Procedure*, *supra* note 29, at 85; McNair, The Law of Treaties, *supra* note 21, at 190; Ben Hamida, *Que dit l'histoire*, *supra* note 54, at 1157.

[73] *Anglo-Iranian Oil Co.*, *supra* note 70, I.C.J. Pleadings, Oral Pleadings, at 533–34 (Heald) (June 13, 1952).

[74] *Anglo-Iranian Oil Co.*, *supra* note 70, Separate Opinion of President McNair, at 116, 122.

[75] The American pleadings are frank in this respect, saying that "the Western Powers were mainly concerned with obtaining from the Mohammedan States a privileged status of extraterritoriality which they regarded as necessary to the protection of their citizens and their interests, in view of the disparity between the social order and the legal system of the Mohammedan States and their own." *U.S. Nationals in Morocco*, *supra* note 17, I.C.J. Pleadings, vol. I, at 375, Counter-Memorial Submitted by the U.S. (Dec. 20, 1951). According to one representative view, it was the absence of order in non-Christian States, difference in culture, spirit and religious approaches made it impossible to apply to them international law and required extraterritorial regimes. Alphonse Heyking, *L'exterritorialité et ses applications en Extrême-Orient*, 7 Rec. des Cours 237, 289 (1925). On the inequality of treaties and consular jurisdiction, and the role of MFN clauses in making the renegotiation of these treaties difficult, see Matthew Craven, *What Happened to Unequal Treaties? The Continuities of Informal Empire*, 74 Nordic J. Int'l L. 335 *et seq.* (2005) (particularly pages 343–44).

[76] *Maffezini* Decision on Jurisdiction, *supra* note 3, paras. 48–50; *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, paras. 100–02 (Aug. 3, 2004) ["*Siemens* Decision on Jurisdiction"].

[77] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, para. 112 (Nov. 29, 2004) ["*Salini* Decision on Jurisdiction"]; *Plama* Decision on Jurisdiction, *supra* note 6, para. 215.

Court and later before the Arbitration Commission was whether the concept of "commercial matters" could be stretched to apply to the administration of justice as a matter of a primary obligation of the UK, and the Commission found that it could. While to a modern eye the reference to "administration of justice" seems to cover procedural aspects even of international dispute settlement,[78] the rationale of the *Ambatielos* judgment and award does not extend beyond the scope of the primary rules of denial of justice, particularly considering the factual and legal context of the case and the arguments presented.[79] Greece never argued that anything related to procedure could be attracted by reference to the commercial treatment.[80] None of the judgments therefore are directly relevant for the present debate.

B. Investment Protection Treaties

1. Maffezini *and* Plama

The two strands of arbitral cases have already been alluded to. The first line of cases is associated with the *Maffezini* decision, recognizing the applicability of MFN clauses to procedural rules to bypass the requirement to litigate a certain period of time in domestic courts before going to investment arbitration.[81] In the *Maffezini* case, the treaty in question imposed certain requirements before the investor could make an investor-State treaty claim: it had to engage in negotiations for six months and then submit the dispute to the competent tribunals of the host State for eighteen months.[82] The Tribunal found that the investor had not complied with the latter requirement by not submitting the dispute to the competent domestic tribunals at all.[83] However, the investor relied on the MFN clause in the treaty, which stated: "In all matters subject to

[78] Ben Hamida, *Que dit l'histoire*, *supra* note 54, at 1147, 1154–55; *see also id.* at 1145–47 (suggesting that application of MFN treatment to access to courts in FCN treaties could support applying MFN clauses to procedural rules when they are closely linked to substantive guarantees, which seems to conflate "procedural rules" *qua* primary rules and "procedural rules" *qua* rules of international dispute settlement dealing with invocation of responsibility—problematic especially regarding authorities of the classic system where the dispute settlement rights of States and not individuals were considered).

[79] Mohamed Shahabuddeen, Precedent in the World Court 117–19 (1996); *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Judgment on Jurisdiction and Admissibility, 2006 I.C.J. Rep. 6 (Feb. 3), Joint Separate Opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma, at 65, paras. 5–13 (warning against reading judgments in an overly sweeping manner and suggesting attention towards the specific questions put before the Court).

[80] *See Ambatielos*, *supra* note 55, I.C.J. Pleadings, Oral Pleadings, at 457 (Mar. 28, 1953).

[81] *Maffezini* Decision on Jurisdiction, *supra* note 3, paras. 38–64.

[82] *Id.* para. 24.

[83] *Id.* paras. 27–37.

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."[84] The investor suggested that the absence of domestic litigation requirements in other Spanish treaties represented a more favorable treatment that should apply.[85] The Tribunal recalled the ICJ's case law on the matter[86] and concluded that rules on the settlement of disputes may also fall under an MFN clause, particularly in light of the close connection of dispute settlement rules to the protection of investors.[87] However, the Tribunal also noted a number of "public policy considerations" (not present in the particular case) that could limit the reach of the MFN clause, for example a requirement of exhaustion of local remedies, a fork-in-the-road clause, the choice of particular arbitral forum or the existence of a highly institutionalized procedure.[88] The *Maffezini* rationale was accepted in the subsequent cases dealing with similar legal issues.[89] The *Maffezini ratio* was also approved in the *Tecmed* case where the claimant unsuccessfully tried to invoke an MFN clause to apply the treaty retroactively.[90]

The other line of cases arose from a more overt criticism of the *Maffezini ratio.* The *Salini* award did not apply an MFN clause to bypass a requirement to use the contractually agreed procedures clause and voiced concern about the broader implications.[91] In the *Plama* case, the investor argued that an ICSID tribunal's jurisdiction could be founded on an MFN clause in one Bulgarian BIT and on consent to ICSID arbitration in another Bulgarian BIT. The Tribunal rejected this argument. It emphasized that agreement to arbitrate needed to be clear and unambiguous, and mere incorporation by reference would not satisfy this criterion. It also found the *Maffezini* decision unpersuasive, albeit noting that the public policy exceptions took away much from the general

[84] *Id.* para. 38 (quoting Argentina–Spain BIT, art. IV).

[85] *Id.* paras. 39–40.

[86] *Id.* paras. 43–50.

[87] *Id.* paras. 54–61.

[88] *Id.* paras. 62–63.

[89] *Siemens* Decision on Jurisdiction, *supra* note 76, paras. 79–110; *Gas Natural* Decision on Jurisdicition, *supra* note 69, paras. 31, 41–49; *Suez* Decision on Jurisdiction, *supra* note 4, paras. 52–68; *National Grid* Decision on Jurisdiction, *supra* note 7, paras. 79–94; *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Award, para. 68 (Feb. 6, 2007) ["*Siemens* Award"].

[90] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/02, Award, para. 69 (May 29, 2003) ["*Tecmed* Award"].

[91] *Salini* Decision on Jurisdiction, *supra* note 77, paras. 102–19. Though the *Salini* Decision's precise *ratio* may be hard to identify, it could be that the tribunal meant that the MFN clause could apply to *pacta sunt servanda* as a substantive rule, raising conceptually different issues. *See Siemens* Award, *supra* note 89, para. 68; *National Grid* Decision on Jurisdiction, *supra* note 7, para. 91. The *Impregilo* tribunal (sharing two arbitrators with the *Salini* tribunal) seemed to approach the issue in substantive terms. *Impregilo S.p.A. v. Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, paras. 220–23 (Apr. 22, 2005).

proposition.[92] In *Telenor* and *Berschader*, claimants unsuccessfully tried to extend the jurisdiction of the Tribunal that was limited to expropriation cases by the treaty, leading to further criticism of *Maffezini*.[93]

It is possible to read the cases of 2000–2007 as *jurisprudence constante*, even if by leaving aside most of the explicit rationale provided by the Tribunals and concentrating on the bare bones of the conclusions. Both lines of cases largely agree on the specific conclusions. The *Plama* line of cases concedes that the requirement to litigate in domestic courts is nonsensical from a practical point of view.[94] The *Maffezini* line of cases notes the radical nature of the arguments in *Salini* and *Plama*, unlike the limited reach of the application of MFN clauses in their own cases.[95] At this point, despite the competing rationales, the cases could still be explained in an intellectually coherent manner.[96]

2. Beyond Maffezini *and* Plama

The cases after 2007 are less easily read as reflecting an even implicit consensus. Some recent decisions follow the earlier approaches. The 2009 decision in *Tza Yap Shum* and the majority decision in *Austrian Airlines* rejected the investors' argument for the extension of its jurisdiction. The former tribunal explained itself as following both *Plama* and *Maffezini,*[97] and the majority of the latter tribunal also relied on the distinction between substantive and procedural rules attracted by the MFN clause.[98] In 2011, a majority of the *Impregilo* tribunal explicitly situated itself within the *Maffezini* line of decisions.[99] However, the recent general trend rejects earlier practices and explanations.

At one end of the spectrum, the broader reading of MFN clauses has been rejected. The *Wintershall* tribunal rejected the *Maffezini* approach, finding that an MFN clause could not modify the State's consent through evading the domestic litigation requirement.[100] The *Renta 4* Tribunal took an intermediate

[92] Plama *Decision on Jurisdiction*, *supra* note 6, paras. 183–227.

[93] *Telenor* Award, *supra* note 5, paras. 90–101; *Berschader* Award, *supra* note 20, paras. 159–208.

[94] *Plama* Decision on Jurisdiction, *supra* note 6, para. 224.

[95] *Suez* Decision on Jurisdiction, *supra* note 4, para. 64; *Siemens* Award, *supra* note 89, para. 68; *National Grid* Decision on Jurisdiction, *supra* note 7, para. 91.

[96] *See Siemens* Award, *supra* note 89, para. 68.

[97] *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, para. 220 (June 19, 2009).

[98] *Austrian Airlines v. Slovakia*, UNCITRAL, Final Award, para. 130 (Oct. 9, 2009) (more generally see paragraphs 117–40) ["*Austrian Airlines* Final Award"].

[99] *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, paras. 104–08 (June 21, 2011).

[100] *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, paras. 161–-97 (Dec. 8, 2008) ["*Wintershall* Award"].

position, rejecting by a majority an argument to extend jurisdiction on the basis of a third treaty, relying on the somewhat peculiar language requiring a link of MFN and fair and equitable treatment. However, the Tribunal was also explicit in its rejection of the normative value of the *Maffezini*-based substantive/procedural dichotomy.[101] More recently, the majority award in *Hochtief* applied an MFN clause to a domestic litigation requirement but did not refer to *Maffezini*, relying instead on the distinction between jurisdiction and admissibility.[102]

At the other end of the spectrum, the limitations on the application of MFN clauses have been rejected as well. In a case raising legal questions not dissimilar from *Telenor* and *Berschader*, the *RosInvestCo* Tribunal accepted that its jurisdiction to decide on expropriation could be based on an MFN clause. The Tribunal suggested that the MFN treatment of investors regarding their use and enjoyment of investments covers the important procedural option of international arbitration.[103] The *RosInvestCo* Tribunal did not consider it necessary to develop the general discussion on the issue and did not attempt to situate itself within the existing debate.[104] While differences of treaty language and pleading strategies may explain some of the differences in the solutions adopted, the erosion of even the implicit consensus of the early and mid-2000s calls for a reevaluation of the analytical underpinnings of different approaches.

IV. *MAFFEZINI* AND *PLAMA*: THE INTERPRETATIVE PERSPECTIVES

The *prima facie* easiest interpretative approach would be to say that broadly worded MFN clauses apply to all procedural rules unless specifically excluded.[105] However, the *Maffezini* Tribunals find implicit limitations and the *Plama* Tribunals are skeptical about the whole idea. Decisions and scholarship associated with *Maffezini* and *Plama* structure the early debate, and even the more recent developments take place against their background. Before discussing the

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[101] *Renta 4 S.V.S.A. and Others v. Russian Federation*, SCC Case No. 024/2007, Award on Preliminary Objections, paras. 68–120 (Mar. 20, 2009) ["*Renta 4* Award on Preliminary Objections"]. Judge Brower took the view that the different dispute settlement options would be covered by the MFN clause both by being different and objectively more favorable. *Id.*, Separate Opinion of Charles Brower, paras. 5–24.

[102] *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, paras. 77–99 (Oct. 24, 2011) ["*Hochtief* Decision on Jurisdiction"].

[103] *RosInvestCo* Award on Jurisdiction, *supra* note 20, paras. 124–35.

[104] *Id.* paras. 136–37.

[105] Christoph Schreuer, *Consent to Jurisdiction*, *in* Peter Muchlinski et al eds., The Oxford Handbook of International Investment Law 855 (2008); Dolzer & Schreuer, *supra* note 2, at 256–57; Emmanuel Gaillard, *Establishing Jurisdiction through a Most-Favored-Nation Clause*, 233 N.Y.L.J. 3, 7–8 (June 2, 2005).

alternative approaches that may be taken in the MFN clause debate, it is necessary to consider the approaches taken by the *Maffezini* and *Plama* lines of cases themselves. Both approaches are vulnerable to criticism for relying on arguments that cannot be easily traced back to the traditional rules of interpretation. It will be suggested that both approaches paradoxically reflect an excessively narrow focus on the possible expectations of the drafters of the MFN clause.

A. Maffezini *and Interpretation*

The *Maffezini* tribunal presented a balanced argument, simultaneously applying the MFN clause to procedural issues while providing a number of exceptions. The tribunal began its analysis with a provision in Article IV of the Argentina–Spain BIT which stated that "[i]n all matters subject to this Agreement, this treatment shall not be less favorable"[106] and concluded with a rule essentially saying that, in all matters subject to this Agreement *including rules of international dispute settlement but except important public policy considerations like local remedies, fork-in-the-road, new arbitration forum or a highly institutionalized arbitration system*, this treatment shall not be less favorable. The *Maffezini* approach is problematic because it cannot be explained in terms of the rules of interpretation stated in Articles 31 and 32 of the VCLT.[107]

First, none of the public policy exceptions excluded from coverage under the MFN clauses (exhaustion of local remedies, fork-in-the-road, different or institutionalized dispute settlement regimes) can be considered rules of *jus cogens* that could arguably justify such a limitation. Since the States may waive the requirement to exhaust local remedies[108] it can only be a rule of *jus dispositivum*. The other examples relate to particular treaty-based formulations of dispute settlement procedures and do not reflect customary law, let alone of a *jus cogens* character.

Second, the Tribunal itself explained these rules as "public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in question . . . ."[109] The idea

[106] *Maffezini* Decision on Jurisdiction, *supra* note 3, para. 38 (quoting Argentina–Spain BIT, art. IV).

[107] *Plama* Decision on Jurisdiction, *supra* note 6, para. 22; *Telenor* Award, *supra* note 5, para. 87; Claire C. Daigremont, *Traitement national et traitement de la nation la plus favorisée dans la jurisprudence arbitrale récente relative à l'investissement international*, *in* Charles Leben ed., Le Contentieux Arbitral Transnational Relatif à L'investissement 107, 137 (2006). As the ILC 2007 Working Group on MFN clauses noted, "the principle on which those exceptions are based is not clear." ILC 2007 Report, *supra* note 48, para. 25.

[108] International Law Commission, Draft Articles on Diplomatic Protection with Commentaries, *Report of the International Law Commission, Fifty-Eighth Session (May 1–June 9 and July 3–Aug. 11, 2006)*, U.N. Doc A/61/10, art. 15(e) (2006), II Y.B. Int'l L. Comm'n, part 2 (2006) ["ILC Draft Articles on Diplomatic Protection"].

[109] *Maffezini* Decision on Jurisdiction, *supra* note 3, para. 62.

behind this seems to be the policy to protect the original bargain, and to use the MFN clause only to supplement the less important or obsolete parts of it. With all due respect to the laudable policy concerns, it is not immediately obvious how "all matters" can be interpreted as "all matters, except fundamental considerations of public policy," particularly when the VCLT does not permit any interpretative distinction between fundamental and non-fundamental rules, instead treating them in an identical manner.[110]

Third, the *Tecmed* tribunal suggested that some matters are deemed to be specifically negotiated, and such matters would not be covered by the MFN clause.[111] This argument is problematic for a number of reasons. The VCLT is silent on any special rule of interpretation for specifically negotiated rules. In any event, the nature of negotiations leading to a particular rule would be relevant as *travaux préparatoires* only in the more limited terms of Article 32. The presumption of specific negotiation of important rules also seems to apply improper analogies from domestic consumer protection law. Finally, it would also be almost impossible to carry out in practice.[112]

Fourth, non-MFN rules could be considered as *lex specialis*, overriding the more general MFN rules.[113] However, the MFN clause is not a default rule out of which the parties contract when more specific rules are contemplated. It is rather a residual rule that does not operate if the treatment provided by other rules is more beneficial than that in the third-party treaties, and starts to operate only when the third-party treaty becomes more beneficial. If MFN clauses were *lex generalis*, they would not apply at all, because any less favorable rule under this approach would be more specific than a rule of MFN treatment. In the *Austrian Airlines* case, the majority relied on a combination of the third and the fourth arguments, finding that, in light of the specific negotiation and formulation of narrow dispute settlement provisions, "the general intent manifested in the MFN clause is insufficient to displace such limitations."[114]

Finally, some tribunals have scrupulously examined shifting policies and attitudes towards dispute settlement reflected in the prior and subsequent general BIT practice of the relevant States.[115] Such arguments are complicated

[110] Dana H. Freyer and David Herlihy, *Most-Favored-Nation Treatment and Dispute Settlement in Investment Arbitration: Just How 'Favored' is 'Most-Favored'?*, 20 ICSID Rev.—FILJ 58, 82 (2005).

[111] *Tecmed* Award, *supra* note 90, para. 69.

[112] *Siemens* Decision on Jurisdiction, *supra* note 76, para. 106.

[113] Freyer & Herlihy, *supra* note 110, at 82–83.

[114] *Austrian Airlines* Final Award, *supra* note 98, paras. 135–40.

[115] The *Maffezini* tribunal discussed Spain's BIT practice, *Maffezini* Decision on Jurisdiction, *supra* note 3, paras. 57–60; the *Telenor* tribunal discussed Norwegian and Hungarian practice, *Telenor* Award, *supra* note 5, para. 96; the *Berschader* tribunal discussed USSR practice, *Berschader* Award, *supra* note 20, paras. 203–04; the *Plama* tribunal briefly noted Bulgarian practice, *Plama* Decision on Jurisdiction, *supra*

to rationalize in terms of treaty interpretation. These subsequent treaties are not related to the treaty in question.[116] They are not subsequent agreements by the parties in the meaning of Article 31(3)(a) because they are not expressed by the same parties in respect of the same treaty.[117] Subsequent practice in the meaning of Article 31(3)(b), as recognized by the Iran–U.S. Claims Tribunal[118] and the WTO Appellate Body, requires concordant, common and consistent practice of parties in the application of the specific treaty that implies agreement on its interpretation.[119] In bilateral treaties such practice should normally be that of its parties,[120] and it is not obvious how treaties with third States, reflecting policy shifts in different directions, could ever reach this threshold.[121] The *RosInvestCo* Tribunal confirmed that such subsequent events must be directed towards the implementation of the specific treaty, showing an express or implicit agreement on its meaning.[122] Even though the meaning of Article 31(3)(c) ("rules . . . applicable in the relations between the parties") is contested in the multilateral context,[123] when interpreting bilateral treaties the words "between the parties" should exclude rules that are applicable between only one party and third States. The *RosInvestCo* Tribunal also persuasively rejected the appropriateness of analogies with multilateral treaties on human rights and international organizations, and those bilateral treaties providing for an inter-temporal *renvoi* in environmental matters.[124]

To conclude, even though the broader treaty practice of States seems intuitively relevant in identifying the purpose of the parties, the VCLT does not permit to directly articulate this intuition in legal terms.[125] The VCLT does not share

note 6, para. 195; and the *Austrian Airlines* tribunal took the view that Czechoslovakian treaty practice supported its conclusions, *Austrian Airlines* Final Award, *supra* note 98, para. 134.

[116] Frank Berman, *Treaty Interpretation in a Judicial Context*, 29 Yale J. Int'l L. 315, 317–18 (2004).

[117] *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, 1999 I.C.J. Rep. 1045, paras. 48–49 (Dec. 13) ["*Kasikili/Sedudu Island* Judgment"]. Some States have made such agreements regarding interpretation of MFN clauses. *See supra* note 65.

[118] Interlocutory Award No. ITL 83-B1-FT (Counterclaim), paras. 106–115 (Sept. 9, 2004).

[119] WTO Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WTO Docs. WT/DS268/AB/R and WT/DS269/AB/R, paras. 255–76 (Sept. 12, 2005); WTO Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Docs. WT/DS285/AB/R and WT/DS269/AB/R, paras. 191–95 (Apr. 7, 2005).

[120] *Kasikili/Sedudu Island* Judgment, *supra* note 117, paras. 55, 74; Thirlway (2005), *supra* note 31, at 59–60.

[121] *Oil Platforms (Iran v. U.S.)*, Judgment on Preliminary Objections, 1996 I.C.J. Rep. 803, Separate Opinion of Judge Shahabuddeen, at 835 (Dec. 12).

[122] RosInvestCo, *supra* note 20, para. 38.

[123] *See, e.g.*, McLachlan, *supra* note 12; Duncan French, *Treaty Interpretation and the Incorporation of Extraneous Legal Rules*, 55 Int'l & Comp. L.Q. 281 (2006).

[124] *RosInvestCo* Award on Jurisdiction, *supra* note 20, para. 40.

[125] *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No ARB/02/03, Decision on Respondent's Objections to Jurisdiction, para. 291 (Oct. 21, 2005).

Hornbeck's historic skepticism about the possibility of interpreting MFN clauses according to legal rules, and does not direct the adjudicator to research the policy changes of States at any given time. An MFN clause referring to "all matters" can hardly be read as referring to "all matters reflected in discarded policies."[126]

B. Plama *and Interpretation*

If the *Maffezini* approach assumes the applicability of MFN clauses to rules of international dispute settlement and then introduces exceptions, the *Plama* approach reaches a similar conclusion by applying a strong interpretative presumption against the extension of MFN clauses.[127] First, the reference to "treatment" in MFN clauses is read as limited to substantive treatment.[128] However, the practice of the UK shows that "treatment" *can* extend to dispute settlement. Second, a broader argument relies on policy concerns over "treaty-shopping" and "uncertainty and instability" arising out of MFN clauses overriding the procedural limitations.[129] While both of these points are correct, it is difficult to make a persuasive distinction between this uncertainty and instability and that arising out of the MFN treatment in substantive matters.

The goal of an MFN clause is to address "both uncertainty and instability" by linking the treaty to future developments. After all, had the future developments been clear and predictable at the moment of treaty conclusions, drafters could (and probably should and would) have dealt with them by explicit treaty language. The unpredictability is not a policy reason for restricting the operation of the clause, but a sign of its successful operation.[130] Finally, it is argued that if the BIT practice with other States shows that the specific rules do not appear in other contexts, then they reflect the actual intent.[131] This *a contrario* argument that is based on the presumptive inferiority of MFN clauses fails for the same reasons as its mirror image discussed above. The broader treaty practice with third States is of unclear interpretative relevance, and should be applied with the greatest care without attempting to extrapolate from it an overriding general will of the State.

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[126] The *Plama* tribunal correctly dismissed the relevance of the post-Communist change of attitude towards dispute settlement. *Plama* Decision on Jurisdiction, *supra* note 6, para. 195.

[127] Stephen Fietta, *Most Favoured Nation Treatment and Dispute Resolution Clauses Under Bilateral Investment Treaties: A Turning Point*, 8 Int'l Arb. L. Rev. 131, 137 (2005).

[128] *Telenor* Award, *supra* note 5, para. 92.

[129] *Id.* paras. 93–94.

[130] *Cf.* Noah Rubins, *MFN Clauses, Procedural Rights and a Return to the Treaty Text*, *in* Todd Weiler ed., Investment Treaty Arbitration and International Law 226–27 (2008); *RosInvestCo* Award on Jurisdiction, *supra* note 20, para. 131; Emmanuel Gaillard, *Chronique des sentences arbitrales*, 134 J. droit int'l 255, 316–17 (2007).

[131] *Telenor* Award, *supra* note 5, para. 95.

MFN clauses are treaty clauses without a parallel-running customary obligation. While the changing State practice may be of direct importance in identifying the position of the State under customary international law, it is much less important for treaty interpretation. Unless express treaty language provides otherwise, it is not immediately clear why the MFN clause should be considered a less authentic statement of the parties' will and how the reach of the MFN clause could be limited to subject matter through specific standards within, or benefits provided by, the treaty.

C. MFN Clause Treaty and Third Party Treaty

While the *Maffezini* and *Plama* lines of cases justify their conclusions in different ways, they both proceed from a similar appreciation of the role of MFN clauses that focuses on the perspective of the MFN clause treaty. To simplify, this approach looks at the original treaty as the centerpiece of analysis and uses the MFN clause to provide only minor modifications that do not disrupt the original bilateral bargain. Both *Maffezini* and *Plama* placed the interpretation reference point at the time when the treaty containing the MFN clause was concluded. In policy terms, such a perspective cautions against imposing obligations on States implied from MFN clauses which have not explicitly been agreed to. Rules specifically negotiated should not be disrupted and far-reaching rules should not override the underlying will of the parties,[132] which is clearly reflected only in the non-MFN clauses.[133] The historical role of MFN clauses at the beginning of last century could be said to support this view, since "ninety-five percent of the claims made under the [MFN] clause are for reductions of tariff, and in practically all works on the clause, only that aspect is given serious consideration."[134] Parties to such treaties were aware that the MFN clause would operate only to reduce tariffs (even if to an *ex ante* unclear level). Unlike the predictable pattern of slow improvement of the initial benefits, the reading in through MFN clauses of qualitatively different BIT rules could easily surpass the limit's presumptive intent.[135]

In a very different context, Fitzmaurice described a particular dispute as "not so much a disagreement about the meaning of terms as a difference of attitude

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[132] Ruth Teitelbaum, *Who's Afraid of Maffezini? Recent Developments in the Interpretation of Most Favoured Nation Clause*, 22 J. Int'l Arb. 225, 233 (2005).

[133] *CME v. Czech Republic*, UNCITRAL, Final Award, Separate Opinion of Ian Brownlie, para. 11 (Mar. 14, 2003).

[134] Eugene J. Conroy, *The American Interpretation of the Most Favored Nation Clause*, 12 Cornell L.Q. 327, 329 (1926–1927).

[135] Rudolf Dolzer & Terry Myers, *After Tecmed: Most-Favored-Nation Clauses in Investment Protection Agreements*, 19 ICSID Rev.—FILJ 49, 59–60 (2004); *see also* M. Sornarajah, The International Law on Foreign Investment 236–37 (2d ed., 2004).

or frame of mind."[136] In cases of such disagreement, "[t]here is no solution to the problem unless the correct—or rather acceptable—frame of reference can first be determined."[137] The acceptable framework in contemporary law is the VCLT, and it is not immediately obvious that cases focusing only on the MFN clause treaty are fully situated within this framework. The annulment committee in *MTD* adopted the opposite approach. It expressly confirmed that the reach of the MFN clause is not limited by anything in the original treaty:

> The most-favoured-nation clause in Article 3(1) is not limited to attracting more favourable levels of treatment accorded to investments from third States only where they can be considered to fall within the scope of the fair and equitable treatment standard. Article 3(1) attracts any more favourable treatment extended to third State investments and does so unconditionally.[138]

The approach of the *MTD* annulment committee seems to follow the correct "frame of reference" for reading the VCLT rule of interpretation. States can undoubtedly limit the reach of MFN clauses by linking them to the benefits or types of benefits already being provided or to an important standard. States can even limit the clauses to a minor gap-filling function (and there may be good policy reasons for doing that).[139] However, they have to articulate these policy concerns in legal terms, since it is not immediately obvious how such limitations could be implied into the interpretative process. MFN clauses should *prima facie* be considered not from the perspective of the MFN treaty, but instead from the perspective of the treaty among the tangled web of treaties that guarantees the highest standard. The clause would then bring any treaty standard—whether initially low or high, simple or complex, scrupulously negotiated or copied verbatim from a Model BIT—up to the highest level.[140]

V. BEYOND *MAFFEZINI* AND *PLAMA*

It was argued in the previous section that both *Maffezini* and *Plama* might be criticized as unduly focusing on the implicit policy expectations of the drafters

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[136] *Golder v. United Kingdom*, App. No. 4451/70, 1 Eur. Ct. H.R. (ser. A) No. 18, Separate Opinion of Judge Sir Gerald Fitzmaurice, para. 23 (Feb. 25, 1975).

[137] *Id.*

[138] *MTD* Decision on Annulment, *supra* note 61, para. 64.

[139] Alejandro F. Rodriguez, *The Most-Favoured-Nation Clause in International Investment Agreements: A Tool for Treaty Shopping?*, 25 J. Int'l Arb. 89 *et seq.* (2008).

[140] Alan Redfern et al., Law and Practice of International Commercial Arbitration 590 (4th ed., 2004).

of MFN clause treaties. Recent case law and legal writings have suggested a number of ways that the debate could move beyond the apparent stalemate. The purpose of this section is to consider in turn different approaches that have been suggested as possible alternatives or supplements to *Maffezini* and *Plama.*

A. Jurisdiction or Admissibility

Some legal writers have explained the *Maffezini-Plama* case law by distinguishing those cases where the more favored treatment related to admissibility of the claim (*e.g. Maffezini*) and those where it related to the creation or extension of the jurisdiction of the tribunal (*e.g. Plama*).

There are at least three problems with this approach. First, it cannot really explain the *Maffezini* rationale and its public policy exceptions. The Tribunal itself addressed the 18-month domestic litigation rule in terms of jurisdiction, observing that noncompliance with it would mean "that the Centre lacked jurisdiction and the Tribunal lacked competence to hear the case."[141] Conversely, the first example that the *Maffezini* tribunal gave of a rule that would not be covered by MFN clauses—exhaustion of local remedies—is an admissibility issue in the law of State responsibility[142] and has been treated as such by two ICSID tribunals.[143] One may therefore question the descriptive potential of this perspective.

Second, the VCLT does not provide for any interpretative distinction in terms of *contra*-jurisdiction and *pro*-admissibility. It is, at best, unclear by what interpretative tools the obligation to provide the most favored treatment can be split into the obligation to provide the favored treatment regarding admissibility but not the obligation to do the same thing regarding jurisdiction. To the extent that the argument relates to the impossibility of modifying a State's consent, it is an analytically separate issue that will be addressed in the next section.

Third, the pragmatic concern is that moving the debate from the structure and meaning of the substantive rules to different types of objections in dispute settlement could result in proliferation of "MFN doctrines" within and between different regimes, causing confusion more than clarity. In descriptive terms, the dividing line between jurisdiction and admissibility in investment treaty arbitration seems blurred.[144] Establishing the scope of MFN clauses by

[141] *Maffezini* Decision on Jurisdiction, *supra* note 3, para. 36.

[142] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part Two), art. 44(b), II Y.B. Int'l L. Comm'n (2001) .

[143] *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Cases No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, paras. 136–155, fn. 84 (Jan. 29, 2004); *Saipem S.p.A. v. Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, paras. 77, 150–53 (Mar. 21, 2007).

[144] David A.R. Williams, *Jurisdiction and Admissibility*, *in* Peter Muchlinski et al. eds., The

reference to this distinction is therefore controversial in principle and would be complicated to apply in practice. It may be illustrated by two recent decisions—one by arbitrator Brigitte Stern in *Impregilo* and the other by the majority in *Hochtief*—which addressed the applicability of MFN clauses to the domestic litigation requirement from the perspective of jurisdiction and admissibility and reached opposite conclusions about their character.[145]

B. Actual or Apparent Consent

It is possible to address the jurisdictional issue from a slightly different angle. Drawing on the *Plama* requirement that the agreement to arbitrate be clear and unambiguous, some authors have suggested that an MFN clause cannot substitute for "actual consent." According to this view, only after the consent has been actually given can MFN clauses start to operate.[146] However, this point assumes what has to be shown: that an MFN clause itself does not provide (actual) consent. It may be useful to distinguish two issues. The first question is whether consent can *in principle* be given by three instruments (State consent in a third-party BIT, the MFN clause BIT, and the investor's consent, *e.g.* by a claim under the MFN clause BIT) or whether there is a rule of international law stipulating that it can only be given by no more than two instruments (State consent in a BIT and investor's consent in the claim). The argument that the very *possibility* of establishing consent through MFN clauses should be interpreted narrowly seems inaccurate. It is either possible or impossible to give consent through an MFN clause.[147] The ICSID Convention does not require consent to be given in a single instrument.[148]

Oxford Handbook of International Investment Law 919–28 (2008); Jan Paulsson, *Jurisdiction and Admissibility*, *in* Gerald Aksen et al. eds., Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum Robert Briner 616 (2005); Ian Laird, *A Distinction Without a Difference? An Examination of the Concepts of Admissibility and Jurisdiction in* Salini v. Jordan *and* Methanex v. USA, *in* Todd Weiler ed., International Law and Investment Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law 201–22 (2005).

[145] For Stern, "all conditions shaping the State's consent are considered jurisdictional prerequisites to the existence of a right to international arbitration." *Impregilo S.p.A. v. Argentine Republic*, *supra* note 99, Award, Concurring and Dissenting Opinion of Arbitrator Stern, para. 88; *see generally id.* paras. 82–88. For the majority in *Hochtief*, "right to arbitrate and what is simply a manner in which an existing right to arbitrate must be exercised reflects the distinction between questions of jurisdiction and questions of admissibility," and the domestic litigation requirement is of the latter kind. *Hochtief* Decision on Jurisdiction, *supra* note 102, para. 90; *see generally id.* paras. 90–96.

[146] *Impregilo S.p.A. v. Argentine Republic*, *supra* note 99, Award, Concurring and Dissenting Opinion of Arbitrator Stern, paras. 78–90; Vesel, *supra* note 33, at 185–86.

[147] *Contra* Vesel, *supra* note 33, at 185–86; Holger Essig, *Balancing Investors' Interests and State Sovereignty: The ICSID Decision on Jurisdiction* Plama Consortium Limited v. Republic of Bulgaria, 4(5) Transnat'l Disp. Mgmt. 26 (2007).

[148] Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other

State practice of expressly applying MFN clauses to provisions dealing with dispute settlement would also support the view that this operation is possible in principle. Case law is not unanimous, and the *Maffezini* approach would caution against applying MFN clauses at least to create access to new procedural regimes. At the same time, there is some support from the cases that considered the issue more directly. The *Plama*, *Telenor* and *Berschader* tribunals required clear and unambiguous language for the consent, implicitly accepting the underlying principle of giving consent in such a manner.[149] The *Yuang Chi Oo* tribunal expressly accepted the possibility in principle.[150] The *RosInvestCo* tribunal founded its jurisdiction on an MFN clause.[151] The *Wintershall* tribunal rejected the argument for applying an MFN clause to remove the requirement to litigate for a minimum amount of time in domestic courts because it would impermissibly affect the State's consent given in the particular treaty.[152] Even though the tribunal was correct in emphasizing both the importance of consent for the submission of disputes to international jurisdiction and the manner in which the MFN clause affects this submission, it did not expressly consider the possibility of consent being given by three legal instruments.

The second question is whether the consent has been given in the particular case. Just like with MFN clauses, Articles 31 and 32 of the VCLT do not provide any special rules of interpretation to deal with dispute settlement clauses.[153] Most arguments to limit the scope of MFN clause consent are not necessarily persuasive. The argument that consent should be given particularly clearly or its scope construed strictly[154] is accepted by neither the VCLT nor contemporary international dispute settlement practice.[155] The argument that consent given in one BIT transforms itself into a *promise* of consent by passing through an MFN clause misstates the content-neutral nature of the MFN clause. It attracts nothing more and nothing less than the more favorable treatment in other treaties, without modifying its substance.[156]

States, para. 24 (Aug. 6, 1964). While clearly not excluding the possibility, the Report's support is at its best neutral, because BITs were not particularly considered during the drafting process of ICSID. Christoph Schreuer et al., The ICSID Convention: A Commentary 205 (2d ed., 2009).

[149] *Plama* Decision on Jurisdiction, *supra* note 6, paras. 198–99, 204; *Telenor* Award, *supra* note 5, para. 91; *Berschader* Award, *supra* note 20, paras. 178–80.

[150] *Yuang Chi Oo Trading PTE Ltd. v. Government of the Union of Myanmar*, ASEAN Case No. ARB/01/1, Award, para. 83 (Mar. 31, 2003).

[151] *RosInvestCo* Award on Jurisdiction, *supra* note 20, paras. 124–39.

[152] *Wintershall* Award, *supra* note 100, para. 160.

[153] *National Grid* Decision on Jurisdiction, *supra* note 7, para. 80.

[154] McLachlan et al., *supra* note 2, at 257; Okezie Chukwumerije, *Interpreting Most-Favoured-Nation Clauses in Investment Treaty Arbitration*, 5 J. World Invest. & Trade 597, 635–43 (2007) (particularly page 636).

[155] Christian Tomuschat, *Article 36*, *in* Andreas Zimmerman et al. eds., The Statute of the International Court of Justice: A Commentary 610–11 (2006).

[156] *Contra* Chukwumerije, *supra* note 154, at 640.

The distinction between cases which provide for arbitration at least in an embryonic form (where an MFN clause would apply) and those which do not provide for arbitration at all (where an MFN clause would not apply) is not entirely persuasive.[157] Assuming for the sake of argument that rules on dispute settlement fall within the scope of favorability, their absence would be less favorable even (and in fact *a fortiori*) if they are not provided in the treaty at all. To rely on *ejusdem generis* to require preexistence of certain rules seems to mischaracterize the concept. *Ejusdem generis* is relevant for identifying the subject matter that has to be assessed from the perspective of favorability (investment, trade, double taxation, human rights, consular protection, etc.), but procedural matters should not be subject to an additional degree of *ejusdem generis* analysis. While the MFN clauses can expressly limit its scope to the types of rights already provided by the treaty, in the absence of such language, as the *MTD* committee rightly said, there is no such inherent limitation and an MFN clause in principle "attracts any more favourable treatment extended to third State investments and does so unconditionally."[158]

In policy terms, there is a degree of artificiality[159] in, on the one hand, accepting as "actual consent" a BIT's offer of "arbitration without privity"[160] to an investor (perhaps a corporation in another State controlling minority shares through many corporate layers in third States),[161] and on the other hand, not accepting as "actual consent" a BIT offer made through an MFN clause. In Roberto Ago's view, the MFN clause's application meant that "content of the first treaty [is] established according to the content of the second."[162] Ignaz Seidl-Hohenveldern characterized the operation of an MFN clause in economic treaties as "transform[ing] any treaty which one of the States concerned subsequently concludes with a third State into a treaty providing rights for the other partner to the first treaty."[163] It is not clear why the "established content" or "transformed rights" could not cover consent to arbitration. Consequently, the argument taken on its own is in some disaccord with the broader trends in investment protection law where consent and bilateralism are increasingly

[157] Stephan Schill, Multilateralization of International Investment Law 557 (2009).

[158] *MTD* Decision on Annulment, *supra* note 61, para. 64.

[159] Bruno Poulain, *Clauses de la Nation la Plus Favorisée et Clauses d'Arbitrage Investisseur-Etat: Est-ce la Fin de la Jurisprudence Maffezini?*, 25(2) ASA Bull. 287–91 (2007).

[160] Schreuer, Commentary, *supra* note 148, at 205–17.

[161] *See, e.g.*, Stanimir Alexandrov, *The 'Baby Boom' of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as 'Investors' and Jurisdiction* Ratione Temporis, 4 L. & Prac. Int'l Cts. & Tribs. 27–34 (2005).

[162] *Summary Records of the ILC's 16th Session, Vol. I*, *supra* note 11, at 187.

[163] Ignaz Seidl-Hohenveldern, *International Economic Law: General Course on Public International Law*, 198 Rec. des Cours 9, 57 (1986).

only legal abstractions.[164] However, even if the critique of "actual consent" is rejected, it does not necessarily mean that MFN clauses would apply to rules of international dispute settlement. The key question is whether the rule "I shall grant more favorable treatment" means "I shall go to arbitration," to which the answer has to be given with reference to the favorability and comparability of rules of international dispute settlement.

C. Within or Outside Jurisdiction

The third way of approaching the jurisdictional issues would ask not whether an MFN clause attracts certain rights but whether the specific tribunal is entitled to adjudicate upon them. In *Plama*, *Telenor*, *Berschader* and *RosInvestCo*, the jurisdiction of the tribunals was *ratione materiae* limited to certain aspects of expropriation and did not cover the MFN clauses that the investors tried to rely on.[165] The investors' arguments raised the seemingly circular question about the right of a tribunal to interpret a treaty rule that could grant or extend its jurisdictional rights but was outside its jurisdictional reach in the first place. Since the most favored treatment accrues directly and exclusively to the MFN clause the crucial issue to determine is whether the adjudicator has jurisdiction to interpret the clause and whatever treatment it may attract. The MFN clause does not impose new obligations[166] but simply explains the scope and content of the existing MFN obligation by means of a parameter which varies according to the undertakings that States have assumed towards third States.[167] The application of the MFN clause to substantive obligations could help to illustrate this point. Assuming that the MFN clause treaty contains no rules on expropriation (and leaving the customary law aspect aside), the existence of rules on expropriation in a third party treaty would be more favorable, and

[164] Kenneth J. Vandevelde, *International Decision:* Aguas del Tunari, S.A. v. Republic of Bolivia, 101 Am. J. Int'l L. 179, 183–84 (2007).

[165] The *Plama* investor argued that *arguendo* the ICSID tribunal did not have jurisdiction on the basis of the Energy Charter Treaty, and the MFN clause in the Bulgaria–Cyprus BIT could provide it. *Plama* Decision on Jurisdiction, *supra* note 6, para. 183. Even though the tribunal actually upheld its jurisdiction under the ECT, the MFN analysis still proceeded on the premise that the tribunal had no independent jurisdictional basis.

[166] *Contra* Pia Acconci, *The Most-favoured-nation Treatment and International Law on Foreign Investment*, *in* Peter Muchlinski et al. eds., The Oxford Handbook of International Investment Law 401–02 (2008). Acconci refers to Gaetano Morelli and Francesco Capotorti as authorities for this proposition. However, Morelli seems to address less the legal nature of application of MFN clauses and more their actual effect (Gaetano Morelli, Nozioni di Diritto Internazionale 39–40 (7th ed., 1967)), and Capotorti expressly talks about the reference to the *content* of the treaties and not the imposition of new obligations (Francesco Capotorti, *Cours général de droit international public*, 248 Rec. des Cours 9, 216 (1994).

[167] Reuter, *supra* note 29, at 106.

consequently the obligation of MFN treatment imposed by the MFN clause would include obligations on expropriation. Indeed, even if the MFN clause treaty provides only for a less favorable version of expropriation (for example without the non-discrimination guarantee), the additional more favorable criterion of expropriation from a third party treaty would have its normative locus in the MFN clause rather than in the incomplete article on expropriation.

While the point may be without practical relevance in other instances—the place of the obligation in the treaty does not affect its binding force—it may be more important in cases when the adjudicator's jurisdiction is limited. Because of that, the relationship between the MFN clause and the scope of jurisdiction is crucial. If the MFN clause is inside the tribunal's jurisdiction (as it was in the *MTD* and *Rumeli* cases), the MFN treatment is also within the tribunal's jurisdiction. If the MFN clause is outside the tribunal's *ratione temporis* (as in *Anglo-Iranian Oil Co.*) or *ratione materiae* (as in *Plama*, *Telenor* and *Berschader*) jurisdiction, whatever treatment it guarantees could be argued to also be outside the tribunal's jurisdiction. The circular point that to interpret an MFN clause a tribunal needs to have it within its jurisdiction could provide a more cogent reason for refusing to base the jurisdiction of a tribunal on such a clause.[168] The argument would apply to cases where tribunals have jurisdiction to interpret some rules but not the MFN clause, and *a fortiori* where access to a tribunal would be based only on the MFN clause.

One of the counterarguments is that if one *arguendo* accepts the possibility of giving consent through three instruments, this consent should be treated in precisely the same manner as that obtained through two instruments (a claim and a BIT) or one instrument (a contract), without requiring any express authority for determining jurisdiction.[169] In other words, rather than taking the MFN clause as the starting point of the normative journey and tracing from it the rights in relation to dispute settlement, it could be accepted as one of the *ex ante* founding blocks of the tribunal's jurisdiction. A tribunal constituted on the basis of a contract or a treaty and a claim would not need any preexisting jurisdiction to interpret these instruments; the instruments themselves would provide that jurisdiction. The analogy earlier drawn with the application of MFN clauses to substantive obligations could be dismissed as conflating two different issues. In the case of substantive obligations, the added more favorable element is an obligation to engage in certain conduct (for example, to expropriate provided certain criteria are met). Assuming that access to a tribunal

[168] Rubins, *supra* note 130, at 228.

[169] *Renta 4* Award on Preliminary Objections, *supra* note 101, para. 82. *See generally*, Ibrahim F.I. Shihata, The Power of the International Court to Determine its Own Jurisdiction: Compétence de la Compétence (1965).

or its broader jurisdiction is more favorable, the creation of such a tribunal would itself be the manifestation of favorability. The emphasis on the MFN clause would then be misguided. The investor would simply benefit from the more favorable treatment of "arbitration," just as the claimant in *MTD*, which benefited from an "award of permits subsequent to approval of investment" and "fulfillment of contractual obligations," and the British nationals in *Nationality Decrees*, who arguably would have benefited from the treatment of "nationality not being imposed." A curious result that would seem to follow for a tribunal of limited jurisdiction is a transformation from a tribunal whose jurisdiction is founded on a claim and an MFN clause treaty to a very different tribunal whose jurisdiction is founded on a claim, an MFN clause and a third party treaty. This may raise further questions about the interplay of different procedures and fora.

D. Similarities or Differences in WTO Law

It has been suggested that the MFN clause came to the investment protection field from multilateral trade law,[170] and its interpretation should have regard to the experience of the GATT and WTO[171] supporting the *Maffezini* approach.[172] While investment protection law may overlap with trade law in different substantive and procedural ways and contexts,[173] it is not immediately obvious that the proposed analogies are appropriate or useful. The MFN clause did not come to bilateral treaties from multilateral ones; the story seems to have been exactly the opposite. The predecessors of contemporary BITs, the FCN treaties,[174] dealt with matters of both trade and investment and provided for MFN treatment.[175] In the immediate aftermath of the Second World War, FCN treaties reflected the experience of trade agreements and protected trading

[170] Jürgen Kurtz, *The Delicate Extension of Most-Favoured-Nation Treatment To Foreign Investors:* Maffezini v. Kingdom of Spain, *in* Todd Weiler ed., International Law and Investment Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law 529–30 (2005).

[171] *Id.* at 530–36.

[172] *Id.* at 545–47; *see also* Nick Gallus, Plama v. Bulgaria *and the Scope of Investment Treaty MFN Clauses*, 2(3) Transnat'l Disp. Mgmt. 17–18 (2005); Barry Appleton, *MFN and International Investment Treaty Arbitration: Have We Lost Sight of the Forest through the Trees?*, 1(2) Appleton's Int'l Invest. L. & Arb. News 52 (2005); Ben Hamida, *Que dit l'histoire*, *supra* note 54, at 1158–59.

[173] Pierre Sauvé, *Multilateral Rules on Investment: Is Forward Movement Possible*, 9 J. Int'l Econ. L. 325, 325–55 (2006); Joost Pauwelyn, *Editorial Comment: Adding Sweeteners to Softwood Lumber: The WTO-NAFTA 'Spaghetti Bowl' is Cooking*, 9 J. Int'l Econ. L. 187, 197–206 (2006).

[174] Sornarajah, *supra* note 135, at 204–17.

[175] Robert R. Wilson, United States Commercial Treaties and International Law 6–7 (1960); Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 U. Ca. Davis J. Int'l L. & Pol'y 157, 159 (2005).

interests.[176] Because of administrative problems concerning the emerging system of multilateral trade,[177] trade matters were shifted to the GATT, and the FCN treaties adopted a more commercial focus.[178] The further shift from FCN treaties to BITs[179] (with MFN clauses remaining largely unchanged)[180] and the subsequent emergence of the investor's right to arbitration[181] took place independently from the developments in the GATT.

The lack of a link between BIT MFN clauses and the WTO does not in principle exclude the possibility of valuable comparative analysis. At the same time, this raises the key question of comparative analysis in international law: *to what extent* is it appropriate to employ these principles to investment protection law?[182] It is important to determine whether the procedural matters in WTO law are functionally similar to those in investment protection law.[183] The WTO Appellate Body Report in *EC-Bananas III* affirmed that MFN treatment also applies to procedural matters.[184] However, procedural guarantees as elements of substantive treatment and procedural guarantees as elements of international dispute settlement are functionally different. The WTO Report deals only with the former, while the *Maffezini* debate is conducted in terms of the latter. The

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[176] Robert R. Wilson, *Postwar Commercial Treaties of the United States*, 43 Am. J. Int'l L. 279 (1949); Herman Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 Am. J. Comp. L. 231 (1956).

[177] Wilson, *Postwar Commercial Treaties*, *supra* note 176, at 279–80.

[178] Vandevelde, *A Brief History*, *supra* note 175, at 166.

[179] Rudolf Dolzer & Margrete Stevens, Bilateral Investment Treaties 2–13 (1995).

[180] Vandevelde, *A Brief History*, *supra* note 175, at 172; K. Scott Gudgeon, *United States Bilateral Investment Treaties: Comments on Their Origin, Purposes, and General Treatment Standards*, 4 Int'l Tax. & Bus. L. 105, 117 (1986).

[181] Dolzer & Stevens, *supra* note 179, at 130.

[182] Dan Sarooshi, International Organizations and Their Exercise of Sovereign Powers 16 (2005). The comparative argument could not be made in *Siemens* regarding the rules on compensation in human rights law. *Siemens* Award, *supra* note 89, para. 354.

[183] Federico Ortino, Basic Legal Instruments for the Liberalisation of Trade 5 (2004); Konrad Zweigert & Hein Kötz, Introduction to Comparative Law 34 (1998); Ralf Michaels, *The Functional Method of Comparative Law*, *in* Mathias Reimann & Reinhard Zimmermann eds., The Oxford Handbook of Comparative Law 339–82 (2006).

[184] WTO Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, paras. 205–07, WTO Doc. WT/DS27/AB/R (Sept. 9, 1997); *see also* GATT Panel Report, *United States – Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil*, GATT Doc. BISD 39S/128, para. 6.8 (June 19, 1992). Curiously, the comparative argument has not been made in reliance on GATT or WTO reports on MFN treatment, but rather the GATT panel *Section 337* report dealing with national treatment (*see* Jürgen Kurtz, *The MFN Standard and Foreign Investment: An Uneasy Fit?*, 5 J. World Invest. & Trade 861, 879 (2004); Ben Hamida, *Que dit l'histoire*, *supra* note 54, at 1158) that would bring in a whole host of other issues peculiar to national treatment in multilateral trade. *See, e.g.*, Gaetan Verhoosel, National Treatment and WTO Dispute Settlement: Adjudicating the Boundaries of Regulatory Autonomy (2002); Nicholas DiMascio & Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin*, 102 Am. J. Int'l L. 48, 62–66 (2008).

functionally similar element in the WTO system is the Dispute Settlement Understanding, an overarching single treaty, systemically too different to provide any analogy for MFN clauses.[185] The question whether GATS Article II's MFN rule could require extension of investment arbitration may seem more on point. Still, the difference between using an MFN clause to extend the application of other regimes (even those dealing with dispute settlement) and using an MFN clause to modify the dispute settlement regime itself brings the analysis back to the fundamental distinction between dispute settlement in centralized multilateral trade law and decentralized bilateral investment law, precluding any meaningful analogies.[186]

The comparative analysis at its best can support the uncontroversial point that MFN treatment can apply to procedural matters as elements of substantive treatment. In a different sense, the WTO experience supports the view that different degrees of intrusiveness of norms into the regulatory autonomy of States may indeed justify giving MFN clauses different scope, as the Contracting Parties did for the GATS (and not GATT).[187] However, the true comparative lesson is that when States desire to give MFN clauses operating in different contexts different substantive content, they do so *expressis verbis* and do not leave the policy gaps to be filled by adjudicators.

E. Primary or Secondary Rules

One general objection to the earlier explanations of the relationship between MFN clauses and rules of international dispute settlement is that they do not follow from the textual expression of the MFN clause itself. An argument of greater textual legitimacy could draw upon the distinction between obligations and the consequences of their breach, commonly described in contemporary law as primary rules and secondary rules of State responsibility. The *Renta 4* tribunal showed little regard for this view.[188] However, it is also possible to give this argument a more generous reading. The textual expression of MFN clauses usually requires States to provide the most *favored treatment.* The term "treatment", particularly when taken together with its qualification "favored," could be said to refer to the States' *primary* obligations under other international

[185] Yang Guohua et al., WTO Dispute Settlement Understanding: A Detailed Interpretation (2005); Matsushita et al., *supra* note 14, at 103–40.

[186] *Although see* Ben Hamida, *Que dit l'histoire*, *supra* note 54, 1159–62; Walid Ben Hamida, *MFN and Procedural Rights: Solutions from WTO Experience*, *in* Todd Weiler ed., Investment Treaty Arbitration and International Law 242–46 (2008).

[187] Matsushita et al., *supra* note 14, at 623–26.

[188] *Renta 4* Award on Preliminary Objections, *supra* note 101, paras. 99–100.

treaties. It is natural to describe primary obligations as treatment and compare them in terms of favorability. It is less natural to describe consequences of *mis*treatment—secondary rules of State responsibility—as "treatment" that can be more "favored." If the language of "favored treatment" is read as ordinarily referring to primary obligations, it would provide support to conclusions (if not the rationale) of the *Plama* line of cases. Under this reading, the problem with the investors' claims in these cases lies not in the procedural form that the treatment would take but in the nature of the legal relationship that would be implemented through it. The rules of investor-State dispute settlement regulate the invocation of State responsibility for the internationally wrongful act in breach of its investment law obligations, and therefore fall outside the natural meaning of the MFN clause.

This reading could be challenged on a number of levels. The *Renta 4* tribunal was certainly right in saying that there was no structural impediment to applying MFN treatment to secondary rules. However, the fact that there is no *a priori* reason for a treaty rule not to have certain effect (indeed, the limits to legislative imagination are usually set only by *jus cogens* and rights of third parties) does not mean that the effect follows from the particular wording. Another criticism would point to the trends in treaty practice applying MFN clauses to dispute settlement matters, especially the UK practice where an interpretative clarification expressly confirmed the application. However, this could be said to merely confirm the earlier point about the natural and ordinary meaning of "favored treatment" not extending to secondary rule-based consequences of mistreatment. The UK offered a special meaning of the MFN clause, and therefore rebutted the presumption of interpretative ordinariness in accordance with Article 31(4) of the VCLT (indeed, perhaps this is what the *Plama* tribunal was hinting at when it required clear and unambiguous consent).[189] The strongest argument against this reading is the pragmatic one of the apparent lack of invocation: even if it has textual plausibility, States have so far simply not seriously raised it.

F. Comparable or Incomparable Rules

The language of MFN clauses suggests another textually supportable interpretative approach to the rules of dispute settlement. If an MFN clause incorporates the *more favored* rules, then it can necessarily apply only to those

[189] In *RosInvestCo*, the claimant's argument for taking into account the consistent UK practice of applying MFN clauses to dispute settlement rules may also reflect Article 31(4). *RosInvestCo* Award on Jurisdiction, *supra* note 20, para. 99.

rules that can be compared on the scale between more or less favored matters. The *Plama* tribunal hinted at this approach by rhetorically asking: "But what if one BIT provides for UNCITRAL arbitration and another provides for ICSID? Which is more favorable?"[190] The proper question for determining the limits of the application of MFN clauses is to consider the logically preliminary question of whether the matters at issue are at all comparable. It is insufficient for the rules addressing a particular issue to be different. If the rules (or the absence of rules) in the MFN clause treaty cannot be compared in terms of favorability with the rules in the third party treaty, the latter simply cannot be more or less favorable and consequently cannot fall within the MFN clause.

1. The Perspective of Comparability

The criterion of favorability invites the analysis of the comparison of degree, amount or quality amongst a particular class or kind.[191] A question about the comparability would naturally flow from the ordinary meaning of "favorability" in the text, as well as the very nature of the clause *sine qua non* requiring the ability of comparing matters so that they may be found more or less favorable. As Todd Weiler explained in *Berschader*, "'all matters' in context obviously means 'all matters from which one may be capable of deriving more or less favourable treatment.'"[192]

It is useful to explain the concept of favorability by reference to a case where it was implicitly dismissed. The *RosInvestCo* tribunal extended its jurisdiction on the basis of an MFN clause, describing the investor's right to arbitration as a "procedural options of obvious and great significance . . . ."[193] It did not explain how this right could be compared in terms of lesser or greater favorability. The tribunal pointed out that access to arbitration in the context of expropriation was of the same protective value as the substantive rule.[194] The argument about the strategic value of arbitration in the particular circumstances is cogent. Still, one may query whether focusing on the protective aspects and subjective

[190] *Plama* Decision on Jurisdiction, *supra* note 6, para. 208.

[191] The Oxford English Dictionary explains "favourable" as "attended with advantage or convenience": "[t]he official returns indicate that the balance of 'current items,' visible and invisible, is much less 'favourable' than before the war." 5 The Oxford English Dictionary 774–75 (2d ed., 1989). The first meaning of "advantage" is "superior position": "The position, state, or circumstance of being *in advance* or ahead of another, or having the better of him in any respect; superior or better position; precedence, superiority, *esp.* in contest or debate." *Id.*, vol. 1, at 184. "Superior" means "[i]n a positive or absolute sense (admitting comparison with *more* and *most*): Supereminent in degree, amount, or (most commonly) quality; surpassing the generality of its class or kind." *Id.*, vol. 17, at 229.

[192] *Berschader* Award, *supra* note 20, Separate Opinion of Todd Weiler, para. 22.

[193] *RosInvestCo* Award on Jurisdiction, *supra* note 20, para. 130.

[194] *Id.* para. 132.

convenience is not subtly different from the criteria of objective favorability and comparability that are expressly dictated by the clause. As will be further suggested, international dispute settlement is not more favorable than domestic dispute settlement; it is simply fundamentally different in structure. Even when an investor goes to investment arbitration, the State (including its judicial system) is presumed to have acted and still be acting *bona fide*[195] (and the *Loewen* case is a useful reminder that the presumption is not an easy one to displace).[196] Matters that cannot be compared are not more or less favorable and thus cannot be subject to MFN treatment.

Tribunals have often pointed out the important role of investment arbitration in investment protection treaties.[197] However, for the MFN clause to apply it is insufficient that certain rights (*e.g.* a right to arbitration) exist in a third-party treaty that do not exist in the original treaty; the rights also have to be susceptible to meaningful comparison to find more or less favorable treatment.[198] Accepting the subjective convenience of the investor itself as the criterion ("Would the investor be better off if . . . ?") is attractive but ultimately unpersuasive. The argument that places the meaning of the clause at the hands of the investor effectively turns the MFN clause into a self-judging clause in the investor's favor. It is problematic for a number of reasons. First of all, other investment protection rules such as rules on national treatment, fair and equitable treatment and expropriation do not direct analysis towards the subjective perception of the investor regarding discrimination or unfair treatment. The criterion is objective, and while investor's expectations may play a role in the process of interpretation, they would have to be reasonable and justified and are

[195] As Judge Tanaka noted when discussing denial of justice, "[b]ad faith cannot be presumed." *Barcelona Traction, Light and Power Co., Ltd.*, Judgment, 1970 I.C.J. Rep. 3, 160 (Feb. 5).

[196] Don Wallace, Jr., *Fair and Equitable Treatment and Denial of Justice:* Chattin v. Mexico *and* Loewen v. USA, *in* Todd Weiler ed., International Law and Investment Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law 669 *et seq.* (2005).

[197] *Maffezini* Decision on Jurisdiction, *supra* note 3, paras. 54–55; *Siemens* Award, *supra* note 89, para. 102; *Gas Natural* Decision on Jurisdiction, *supra* note 69, para. 31; *RosInvestCo* Award on Jurisdiction, *supra* note 20, paras. 128–29; *Renta 4* Award on Preliminary Objections, *supra* note 101, Separate Opinion of Charles Brower, para. 20.

[198] Judge Brower suggested that mere differences between dispute settlement mechanisms would trigger the MFN clause, without considering it relevant which one of them was "more favorable." *Renta 4* Award on Preliminary Objections, *supra* note 101, Separate Opinion of Charles Brower, para. 21. The statement in the *U.S. Nationals* that "the intention of the most-favoured-nation clauses was to establish and to maintain at all times fundamental equality without discrimination," *U.S. Nationals in Morocco*, *supra* note 17, I.C.J. Pleadings, at 192, should be put in its proper context, responding to the American argument about permanent drafting by reference and being derived from the wording and pattern of the treaties with Morocco. In any event, the concepts of "equality" and "discrimination" do not preclude differences *per se* but only unjustifiable differences between comparable matters, bringing the analysis back to favorability dictated by the text of the MFN clause.

only one of a number of criteria. Lacking express textual indications, one would assume that MFN clauses should also be read as addressing objective standards.

Second, the ICJ in the *Nicaragua* case suggested a need for express stipulations regarding the self-judging nature of the clause.[199] If one accepts the correctness of this proposition, the language usually used in MFN clauses suggests an objective ("MFN treatment") rather than a self-judging standard ("treatment considered most favored by the investor"). Third, the general caution regarding the self-judging nature of the clause should perhaps *a fortiori* apply regarding investment protection treaties, where the beneficiary of the alleged self-judging clause does not participate in the treaty-making. Bringing all the strands of arguments together, if a State A agrees with State B to grant MFN treatment to State B's investors, it seems more logical to read the rule as guaranteeing treatment that is objectively more favorable rather than one that merely *seems* more favorable to a particular investor in a particular situation.

2. Before Investment Protection Treaties

The argument about the comparability developed in classical international law consisted of two interlinked and overlapping arguments about the comparability of both regimes and rights. The MFN clause cannot apply to matters that are too fundamentally different from those in the original treaty, either because of the specific regime pertaining to the parties of the other treaty or because of the nature of the rights as such. While formulated in the classical law, these arguments have continued relevance for contemporary law. In the *Nationality Decrees* proceedings, de Lapradelle argued against the application of the MFN clause: "No correspondence can be established between these two regimes, because they are so fundamentally different in structure."[200] The discourse of comparability proved to be very appropriate in the Venezuelan arbitrations. The Venezuelan arbitrations are perhaps unique in light of the international law concerning pre-investment arbitration, as they are parallel bilateral treaty arbitrations dealing with similar factual and legal issues and providing an interesting functional parallel to contemporary law. Because of divergent case law regarding the responsibility for damages caused by revolutionaries, the claimant States unsuccessfully tried to use MFN clauses to rely on the more beneficial interpretations by the other Commissions.[201]

[199] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.)*, Judgment, 1986 I.C.J. Rep. 116, para. 222 (June 27).

[200] *Nationality Decrees*, *supra* note 55, Pleadings, Oral Pleadings, at 170–71 (Jan. 12, 1923).

[201] The issue was addressed most directly by Commissioner Zouloga in the *Guastini* case: "It is difficult to determine which is the nation having the most favored claimants in these mixed commissions.

Delimiting the scope of the MFN clause by referencing the possibility of comparing different matters provided an appropriate analytical framework for the Commissioners of the Venezuelan arbitrations, and a similar approach could also be adopted in investment protection law.

3. Investment Protection Treaties

As a practical matter, an MFN clause would have *prima facie* relevance when an issue is dealt with differently in a third-party treaty than in the MFN clause treaty, or is indeed not dealt with at all in the MFN clause treaty. However, the first legal question is whether the rules (or lack thereof) in the MFN clause treaty and the third-party treaty can be compared in terms of lesser and greater favorability. The effect of an MFN clause is to ensure the most-favored treatment and not identical treatment. If a particular issue is addressed by techniques and approaches that are too distinct to be more or less favorable, the MFN clause would have no application. The perspective of comparability provides legal support for the policy exceptions of *Maffezini* and the general skepticism of *Plama.*

In applying objective comparability, first, exhaustion of domestic remedies is *not* comparable to direct access to investment arbitration. Legal process in the domestic courts is not inherently inferior to international dispute settlement.[202] It is simply, as de Lapradelle likely would have put it, "fundamentally different in structure." The more or less beneficial nature of the regimes is a fact-specific issue which is clear only with the benefit of hindsight, and cannot be conceptualized in terms of comparability. There are persuasive reasons for the existence of the rule of exhaustion of local remedies, reflecting the interests of the host State, home State, aliens and international community at large.[203] If the investor went to the domestic courts, disputes could also be resolved swiftly, the judgments of the appeals courts could overturn the unfavorable decisions and

In some, as in this one, by the decisions of the umpire a long delay has been granted for the presentation of the claims: in others, not. In some, the consideration of proof has been left absolutely free; in others, not. In some, the responsibility of the Government for the acts of revolutionists has not been admitted, while admitting its responsibility for the acts of its agents; in others, the Government has been held accountable for the acts of revolutionists, but not for the acts of its agents. Again, interest has been allowed in some commissions, and not in others. England has presented no revolutionary claims, yet it has a protocol similar to the Italian. By what criterion is it possible to determine which is the most favored nation in carrying out the provisions of the various protocols?" *Guastini case*, Award, X Rep. Int'l Arb. Awards 561, 576 (1903). *See also Aroa Mines (Limited) Claim – Supplementary Claim*, Award, IX Rep. Int'l Arb. Awards 402, 404, 407 & 443 (1903); *Sambiaggio case*, Award, X Rep. Int'l Arb. Awards 499, 502 & 522–23 (1903); *see also Guastini case*, *id.*, at 572–73 & 576.

[202] McLachlan et al., *supra* note 2, at 257.

[203] C.F. Amerasinghe, Local Remedies in International Law 56–62 (2d ed., 2004).

perhaps the broader business relationships would be less likely to be disrupted. The multifaceted and substantively and procedurally decentralized regime of investment arbitration has aspects that are more or less favorable than, or simply incomparable to, domestic remedies, and in broader systemic terms no meaningful comparison can be made.

Second, the choice of a specific arbitration regime restates the same question as regarding domestic courts by moving the comparison to the international arena. Comparing the favorability of different arbitration regimes is also complicated.[204] Different degrees of delocalization, conditions of access, standards of transparency, procedures of review and enforcement make objective comparison of regimes *qua* regimes very complicated. The rhetorical question of the *Plama* tribunal is precisely correct. The different regimes may be more or less favorable to specific investors from their own perspectives due to specific aspects of their cases (fully clear only with the benefit of hindsight), but it is impossible to directly compare regimes.[205] Third, the highly institutionalized arbitration system is again a case of synallagmatic and fundamentally different regimes (like NAFTA) that are impossible to judge in terms of comparability. Particular aspects of procedural regimes could be compared with each other, for example the more effective enforcement mechanism of the ICSID Convention would be more favorable than that of the New York Convention. However, these procedural rules come as part of the broader regime and are complicated to compare.

Fourth, the fork-in-the-road clause presents the most complex question. Fork-in-the-road clauses require the investor to choose between settling investment disputes in domestic courts or in international arbitration. If the regimes of domestic and international dispute settlement (and different regimes of international dispute settlement *inter se*) are not comparable, does it follow that the choice between them is also not comparable? The *Salini* award refused to apply an MFN clause to bypass a requirement to exhaust contractually agreed procedures (arguably non-comparable to international dispute settlement).[206] The *Plama* decision agreed that having the choice was more beneficial in the specific case.[207] Arguably, the same question should have been asked in *RosInvestCo*, where the option to go to investment arbitration was considered more favorable than a lack of such an option. The *Hochtief* tribunal

[204] Rodriguez makes a similar point, although viewing the problems with favorability as part of his broader criticism of extension of MFN clauses rather than as a method of their application. Rodriguez, *supra* note 139, at 100.

[205] McLachlan et al., *supra* note 2, at 257.

[206] *Salini* Decision on Jurisdiction, *supra* note 77, paras. 102–19.

[207] *Plama* Decision on Jurisdiction, *supra* note 6, para. 208.

explicitly addressed this issue, concluding that "whatever the substantive merits of litigation and of arbitration, it is always more favourable to have the choice as to which to employ than it is not to have that choice."[208] However, if apples cannot be compared to oranges (and the MFN clause of a Bilateral Fruit Treaty would not apply to apples from a third-party treaty because apples are not "more favorable"), is it not slightly odd to conclude that the choice *inter se* would be more favorable and therefore caught by MFN treatment? One hopes that future tribunals will follow *Hochtief* in further elaborating the scope of the MFN clause by reference to favorability.

The final challenge for the comparability doctrine in investment treaty arbitration is the *Maffezini* factual pattern where the investors had to litigate in domestic courts for a certain period of time before going to investment arbitration.[209] From the perspective of favorability, *Maffezini* can be explained as the exceptional case where the existence of a completely nonsensical procedural regime is less beneficial than lack thereof. In the words of Christoph Schreuer, "it does not seem to serve any useful purpose. The time periods foreseen for this purpose are usually too short to yield a meaningful result."[210] The *Plama* tribunal, as critical as it was of the *Maffezini* doctrine, could not help but observe that it sympathized "with a tribunal that attempts to neutralize such a provision that is nonsensical from a practical point of view."[211] Even if historically understandable as a transitional regime for certain States, the concept seems objectively nonsensical from all perspectives. For the claimant, it both precludes access to investment arbitration and does not require it to seriously exhaust domestic remedies (that would fully involve a fundamentally different legal regime). From the broader perspective of salvaging the relationship between States and investors,[212] the requirement to litigate does not increase the potential for reaching a settlement with a State, because even domestic litigation would disrupt the relationships, and negotiations are not required by this clause. *Not* having a completely nonsensical regime is more favorable than having it, and thus the *Maffezini* conclusion is justified under the comparability argument.

[208] *Hochtief* Decision on Jurisdiction, *supra* note 102, para. 100.

[209] Christoph Schreuer, *The Return of Local Remedies in Investment Arbitration*, 4 L. & Prac. Int'l Cts. & Tribs. 1, 4 (2005).

[210] *Id.* In the *TSA Spectrum* case the clause at issue provided for a final decision or litigation for eighteen months as alternative preconditions for international arbitration, but the investor had commenced arbitration after fifteen months and with no final decision rendered. The tribunal left open the MFN clause argument because "it would be highly formalistic now to reject the case on the ground of failures to observe formalities." *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award, para. 112 (Dec. 19, 2008).

[211] *Plama* Decision on Jurisdiction, *supra* note 6, para. 224.

[212] Vaughan Lowe, *Some Comments on Procedural Weaknesses in International Law*, 98 ASIL Proc. 37 (2004).

When the *Wintershall* tribunal did not apply the MFN clause to the domestic litigation requirement, its questions to the investor's expert suggest that it did not consider the domestic litigation requirement to be nonsensical.[213] Some of the possible benefits of the requirement might include the collection of factual and legal materials relating to the aspects of domestic law and greater clarity about the relative merits of the domestic aspects of the case, thus improving the chances for successful negotiations. From the perspective of comparability, the rule would not reach the stage of favorability analysis at all. Whichever approach is preferred, the correct answer turns on the objective favorability of the particular regime.

The perspective of comparability and favorability is important because it necessarily supplements the other perspectives. The questions about actual consent and the scope of a tribunal's jurisdiction cannot be conclusively answered without determining whether the giving of consent or establishment of a tribunal count as more favorable treatment. This issue may be approached in two ways. One could say—similarly to the previous arguments for why different procedural rules and regimes are not comparable—that investor-State arbitration is not more favorable than other approaches to dispute settlement. As was suggested before, investor-State dispute settlement is not more favorable than dispute settlement in domestic law; it is just fundamentally different. The same argument could be made about diplomatic protection. Traditional rules of State responsibility and diplomatic protection still apply in investment law,[214] and the home State of an investor could simply invoke the responsibility for breach of a treaty, just as the U.S. did in the *ELSI* case.[215] Invocation of State responsibility through diplomatic protection and invocation of State responsibility in investor-State arbitration are two very different regimes that could not be compared in terms of favorability.[216] Indeed, if one takes the *ELSI* case as an example, it is not at all clear whether an investor would find a hypothetical *ELSI v. Italy* investment arbitration more favorable. The U.S. espoused a relatively small claim (USD $12,679,000 plus interest) and put forward a sterling legal team including Sofaer, Matheson, Ramish, Chandler, Murphy, Gardner and Rosenne, one would assume at no expense to the investor.

[213] *Wintershall* Award, *supra* note 100, paras. 85–88.

[214] Paparinskis, *Countermeasures*, *supra* note 53, at 281–97.

[215] *Elettronica Sicula S.p.A. (ELSI) (U.S. v Italy)*, Judgment, 1989 I.C.J. Rep. 15 (July 20).

[216] On investor-State arbitration from the perspective of State responsibility, see *supra* note 53. One may also take the less obvious position that investor-State arbitration is not an invocation of responsibility by the beneficiary at all but a delegated and considerably modified exercise of diplomatic protection. If that is the case, investor-State arbitration could be compared to diplomatic protection, since its important characteristics (particularly the functional control of the claim) have been modified to being more favorable to investors.

On the other hand, such a response rings somewhat hollow in light of an apparent absence of any post-*ELSI* home State claims on the basis of investment treaties.[217] The better way to harmonize the normative argument with the pragmatic perceptions would be through the lenses of availability of redress for a wrongful act. Availability of a procedure for redress is more favorable than the absence of such a procedure. Investor-State treaty arbitration is not *per se* more favorable than domestic adjudication or diplomatic protection. However, it may become more favorable when no other avenues for redress exist. In methodological terms, an investor injured by an internationally wrongful act may first turn to the domestic judicial system of the particular State. After exhausting all the reasonable remedies available within this system or after being subjected to denial of justice (or indeed if the original wrongful act was denial of justice), the investor may turn to its home State with a request for diplomatic protection. If the home State decides not to espouse the claim, the investor is left with no other avenue for seeking redress, and therefore investor-State arbitration becomes more favorable. The methodology suggested admittedly goes in a somewhat different direction than the dominant trends in recent decisions, but it seems justified by the clear language of the clause. The likely criticism from the perspective of *ejusdem generis* would be based on a misstatement of *genus*. *Ejusdem generis* is instrumental in distinguishing investment rules in third party treaties from, say, rules of trade law, human rights law and consular protection. However, the absence of any remedies is not an aspect of *genus* but lesser favorability, in the same way as the absence of any rules of fair and equitable treatment would be.

Application of the suggested methodology may be illustrated by the *RosInvestCo* case, where the right to arbitration for claims of expropriation was described as a "procedural option of obvious and great significance" and incorporated by the MFN clause. From the perspective of comparability, the starting point should be that investor-State arbitration, diplomatic espousal and litigation in domestic courts are all procedural options of significance, and because of their structural distinctiveness they cannot as such be compared on the same scale of favorability. However, investor-State arbitration may become more favorable if the other procedural options are no longer available. The investor would first have to show that it has exhausted all reasonably available domestic remedies or has been subject to denial of justice, either during the process of exhaustion or from the outset. If the local courts lack integrity or independence, one of the exceptions to the obligation to exhaust local remedies would probably be applicable, whether regarding a lack of reasonably available remedies, an undue delay of the remedial process or an impossibility of pursuing

[217] *But see Italy v. Cuba*, Arbitrage *ad hoc*, Sentence finale (2008).

the remedies.[218] The investor would also have to show that its home State refused or failed to invoke responsibility for the wrongful act committed by the host State. By adopting this approach, it is possible to take into account the intuitive impulse—"of course investor arbitration is more favorable because local courts are unreliable and the home State will not get involved"—by requiring it to be demonstrated and proved in legal terms.[219]

The implications of this argument are simultaneously narrower and broader than *RosInvestCo.* The suggested methodology would require the investor to show that it had exhausted all reasonably available remedies in the Russian courts, had been subject to denial of justice during the process or because of the original wrongful act. It would also have to show that the UK had refused or failed to exercise diplomatic protection over the matter. In that sense, the approach would be narrower because the investor would have to overcome the additional hurdle of showing that investor-State arbitration was the only remaining avenue for redress. However, the approach is also broader because it would not necessarily be limited to an extension of limited jurisdiction over a particular obligation (*in casu* expropriation). If the investor had shown that it had exhausted local remedies and had failed to receive diplomatic protection regarding other breaches of the investment treaty (for example, fair and equitable treatment, full protection and security or non-discrimination), the absence of any available remedies would have constituted less favorable treatment. In these circumstances, access to investor-State arbitration becomes more favorable than the lack of any remedy, and jurisdiction can be founded on this basis.

A further question relates to the type of investor-State arbitration that an investor would be entitled to under more favorable treatment. It has been suggested that different types of investor-State arbitration cannot be compared *inter se.* The logical consequence of presuming that ICSID arbitration is not more favorable than UNCITRAL or SCC arbitration is that access to justice would not mean access to a particular forum. Rather, the investor would be entitled to choose among the fora provided in the third-party treaty. A curious consequence of accepting the argument is that it may be easier for an investor to make the furthest-reaching argument about finding or extending jurisdiction of a tribunal rather than modifying relatively minor aspects of pre-arbitration procedures. Still, to put the argument in its broader context, the investor would have to exhaust all available domestic and international remedies to find itself in a less favored situation where the MFN clause would apply.

[218] ILC Draft Articles on Diplomatic Protection, *supra* note 108, art. 15.

[219] Sometimes investors' views about domestic courts have been based more on emotions than on their actual reliability. *Parkerings Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/08, Award, para. 319 (Sept. 11, 2007).

VI. CONCLUSION

Despite the overt disagreement about methodology, the *Maffezini* and *Plama* lines of cases paradoxically share the respect for the underlying narrow will of the States. This is reflected respectively in the policy exceptions of *Maffezini* and the general skepticism about the applicability of MFN clauses of *Plama.* The present article has considered and rejected this position as a matter of interpretative argument, arguing for the adoption of the approach reflected in the VCLT rule of interpretation and confirmed by the *MTD* annulment committee.[220] The case law of the ICJ and recent arbitral awards have shown that the policy debate between the presumptively narrow will of States and presumptively unlimited reach of the MFN clause is unsolvable, and particularly so in the decentralized investment arbitration regime. The case law on substantive matters has also shown that linking the debate to the acceptable (and formalistic) framework of the VCLT can contribute to making the analysis uniformly accepted and indeed seemingly inevitable.

A number of alternative approaches to those in *Maffezini* and *Plama* have been considered. The application of MFN clauses to matters of admissibility and not of jurisdiction is unsatisfactory both in descriptive and prescriptive terms, and the broader uncertainty about the precise distinction between these matters is unlikely to illuminate interpretative practice. The objection that MFN clauses cannot replace actual consent does not take into account the possibility of the MFN clause itself being one of the three instruments constituting actual consent. The point that a tribunal cannot interpret more favored treatment if it cannot interpret the MFN clause is accurate. However, it still leaves open the possibility that the very existence of the tribunal is more favorable treatment, with the MFN clause providing a proper jurisdictional basis without a need for anterior jurisdiction to interpret it.

While suggestive, none of these arguments are conclusive. It may be more fruitful to explore two interpretative paths suggested by the explicit formulation of the clause. First, the guarantee of "treatment" in its ordinary meaning would appear to exclude *mis*treatment in breach of obligations and the invocation of responsibility for this breach through investor-State arbitration. Second, the ordinary meaning of "favorable" would require the relevant matters to be sufficiently comparable to establish the relationship of lesser and greater favorability. Most procedural matters do not seem to be capable of such a relationship, reflecting either very different legal techniques without obvious benchmarks for objective comparison or self-judging *ad hoc* peculiar

[220] *MTD* Decision on Annulment, *supra* note 61, para. 64.

conveniences of the particular situation. Investor-State arbitration is also not more favorable than domestic adjudication or diplomatic protection; these are simply very different regimes. However, availability of procedural redress is more favorable than lack thereof. In the absence of other remedies (local remedies being exhausted and diplomatic protection rejected), access to investor-State arbitration arguably becomes more favorable.

Implicit exceptions and presumptions in case law so far have not led to normative coherence. It is not suggested that a closer analysis of "favorable" and "treatment" would immediately lead to unanimous consensus. Still, it is perhaps time to recast the debate according to the textual formulation of MFN clauses and explicitly elaborate the limits of "favorable" and "treatment" in the law of investment dispute settlement.