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Just How Favored is 'Most-Favored'?

Establishing International Arbitral Jurisdiction in Investor-State Disputes through Most-Favored-Nation Clauses under Bilateral Investment Treaties

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Summary

Nearly all BITs include the MFN standard. The conventional idea appears to have held that the MFN standard only entitles the beneficiary of an MFN provision to invoke more favorable substantive provisions. However, this conception was altered in 2000 when an ICSID tribunal rendered an award in which it held that the scope of an MFN clause may include dispute settlement and questions of jurisdiction. Since then, other ICSID tribunals have interpreted that case and evaluated the stance taken there with varying outcomes, thereby putting competing arguments of interpretation into sharp focus. The vast majority of all BITs include dispute-settlement provisions that allow foreign investors to resolve disputes directly against the host state through international arbitration. However, there are significant differences in investor-state dispute-settlement provisions among BITs that may limit an investor's access to international arbitration. The MFN obligation can therefore prove to be a powerful tool for investors faced with various obstacles to international arbitral jurisdiction.

The absence of formal precedence in international law enables future jurisprudence to evaluate these ICSID cases and disregard flawed and irrelevant argumentation. An evaluation of these cases reveals a rather negligent jurisprudence in that the tribunals at times appear to have relied on arguments with a highly questionable legitimacy and to have given too simple answers. Despite these flaws and despite the absence of formal precedence in international investment law, these cases have resonated and will resonate in international jurisprudence. Investors and states alike would therefore be wise to take notice of this recent ICSID jurisprudence. However, this is a quite irreconcilable series of cases. For example, one group of cases held the scope of a broadly phrased MFN clause to, in principle, include dispute settlement provisions, while the other cases took the opposing starting point. The cases are however distinguishable in that the tribunals that were faced with claimants that sought to invoke an MFN clause merely to allow the tribunals to hear their claims sooner rather than later, all affirmed jurisdiction based on the MFN clause at issue. By contrast, the tribunals that were concerned with investors that tried to invoke an MFN clause in order to establish jurisdiction concerning a type of claims over which the tribunals had no jurisdiction in the basic treaty, all denied jurisdiction based on the pertinent MFN clause. In other words, tribunals appear willing to entitle claimants to more favorable treatment when they already have access to an investor-state dispute-settlement system, and less willing when the dispute resolution system otherwise is unavailable. Nevertheless, even if this observation may explain the incongruous case law to a certain extent, it is clearly not satisfactory as a matter of treaty interpretation.

Sammanfattning

Närapå samtliga bilaterala investeringsavtal (BITs) innehåller mest-gynnad-nationsklausuler. Den konventionella uppfattningen verkar ha varit att mest-gynnad-nationsklausuler enbart omfattar mer gynnsamma materiella bestämmelser. År 2000 kom emellertid ett avgörande från en tribunal etablerad under det Internationella centralorganet för biläggande av investeringstvister (ICSID) som ruckade på denna föreställning genom att vidhålla att en mest-gynnad-nationsklausul även kan vara tillämplig på tvistelösning. Detta avgörande har sedermera tolkats och utvärderats av andra ICSID-tribunaler med varierande resultat. Denna relativt färska praxis har satt fokus på konkurrerande argument angående i vilken utsträckning en mest-gynnad-nationsklausul anses tillämplig på tvistelösningsbestämmelser och jurisdiktionsfrågor då en utländsk investerare vill lösa en uppkommen tvist med sin värdstat genom internationellt skiljedomsförfarande. BITs inkluderar vanligen bestämmelser angående tvistelösning som ger utländska investerare en rätt att avgöra tvister med värdstaten genom internationell skiljedom. Tvistelösningsbestämmelserna i olika BITs skiljer sig dock inte sällan på ett signifikant vis från varandra. Rätten till den mest gynnsamma behandlingen kan därför visa sig vara ett kraftfullt verktyg för en investerare som står inför diverse hinder mot internationell skiljetribunalsjurisdiktion.

Frånvaron av *stare decisis* i internationell rätt medför att framtida skiljedomstribunaler har möjlighet att utvärdera ifrågavarande praxis från ICSID på ett mer ingående sätt och avfärda bristande argumentation. En utvärdering av denna skiljedomspraxis visar stundom på en relativt slarvig argumentation där tribunalerna tycks ha förlitat sig på argument med tvivelaktig legitimitet och ha valt alltför enkla lösningar. Trots dessa brister samt att *stare decisis* inte är formellt etablerad i internationell rätt, har dessa skiljedomar influerat, och kommer även fortsättningsvis att influera, internationella skiljemannatribunaler. Både investerare och stater skulle därför göra klokt i att uppmärksamma denna praxis. Problemet är att den ter sig oförsonlig. Exempelvis förefaller två tribunaler ha menat att en vitt formulerad mest-gynnad-nationsklausul generellt sett inte kan åberopas för att inkorporera mer gynnsamma tvistelösningsbestämmelser, medan övriga tribunaler var av motsatt ståndpunkt. Det är emellertid möjligt att särskilja denna praxis på ett sätt som får den att framstå som kongruent. Tribunalerna som stod inför en investerare som åberopade en mest-gynnad-nationsklausul för att försöka frångå krav på att använda nationella rättsmedel, innan en tvist fick hänskjutas till internationell skiljedom, ansåg att de hade jurisdiktion på basis av den ifrågavarande mest-gynnad-nationsklausulen. Däremot ansåg övriga tribunaler, där investeraren åberopade en mest-gynnad-nationsklausul för att etablera en bredare jurisdiktion som innefattade fler typer av tvister, inte att de hade jurisdiktion. Även om denna distinktion möjligen kan klargöra de inkonsekventa avgörandena till viss del så är den inte legitim ur traktatstolkningshänseende.

Abbreviations

BIT	bilateral investment treaty
ECHR	European Court of Human Rights
European Commission	European Commission of Human Rights
FDI	foreign direct investment
ICJ	International Court of Justice
ICJ Reports	International Court of Justice, *Reports of Judgements, Advisory Opinions and Orders*
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States
MFN	most-favored-nation
PCIJ	Permanent Court of International Justice
Publ. ECHR	Publications of the European Court of Human Rights
Publ. PCIJ	Publications of the Permanent Court of Human Rights
REIO	regional economic integration organization
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
VCLT	Vienna Convention on the Law of Treaties

1 Introduction

The vast majority of bilateral investment treaties (hereinafter BITs) include a mechanism that allows foreign investors to pursue claims directly against the host state through international arbitration without the support or consent of the investor's government. Traditionally, when a foreign investor had suffered discrimination or other forms of maltreatment at the hands of host governments, remedies could only be sought through the domestic courts of the host state or through diplomatic espousal of the claims.

The most-favored-nation (hereinafter MFN) standard is also a core element of BITs. In essence, the MFN standard means that a host country must extend to the investors from the other contracting state the more favorable treatment that it accords to investors from any other foreign country in like cases.

The MFN standard has a long history in the field of trade and formed a central pillar of post-Second World War efforts to establish a system of guarantees against trade discrimination, first in The General Agreement on Tariffs and Trade and now with the World Trade Organisation. The standard was imported into BITs at the dawn of BIT development. However, the transposition into the investment context seems to have been done without any real contemplation as to the possible implications of the transport. Unlike barriers to trade, which typically take the form of border taxes that are easily quantified and understood, investment measures form part of the vast universe of regulatory measures open to host states, including regulatory measures that apply to investors after they have entered the host state. Additionally, in contrast to trade treaties, BITs have the special feature noted above of generally allowing private investors the right to bring arbitral proceedings against a state. In other words, there appears to have been a lack of forethought when transporting the MFN standard from trade into BITs, which now runs the risk of being amplified by the potentially much broader scope of the MFN standard in the investment arena.[1] For example, the conventional idea appears to have held that the MFN standard only entitles the beneficiary of an MFN provision to invoke more-favorable substantive provisions. However, in the year 2000, the International Centre for Settlement of Investment Disputes (hereinafter ICSID) rendered an award in Emilio Maffezini v. Spain[2] (hereinafter *Maffezini*) that altered this conception. The *Maffezini* Tribunal held that the scope of an MFN clause can include dispute settlement and that the MFN provision in question was an example of that, thereby causing immediate controversy.

There are significant differences in investor-state dispute-settlement provisions among BITs as concerns jurisdictional and procedural requirements that may limit an investor’s access to international arbitration.

[1] Cf. Kurtz, J., pp. 523-533.
[2] ICSID, Decision on Jurisdiction of January 25, 2000.

As an example, not all BITs provide for international arbitration in case of investor-state disputes. Furthermore, access to international arbitration is generally subject to a negotiation period and may require prior recourse to local remedies for a specified period of time. The MFN obligation can therefore prove to be a powerful tool for investors faced with such obstacles to international arbitral jurisdiction. This thesis therefore addresses whether an MFN clause applies to dispute-settlement procedures and questions of jurisdiction, as opposed to merely substantive issues, or more exact to what extent claimants may rely on an MFN clause to establish arbitral jurisdiction over investment disputes with host states. The question is by no means settled. However, *Maffezini* along with subsequent ICSID jurisprudence have dealt with the issue and put competing arguments of interpretation into sharp focus. Therefore, the issue is addressed through an evaluation of this recent ICSID jurisprudence. Considering the absence of formal precedence in international law in general and within ICSID in particular, the focus is more on the competing arguments of interpretation advanced in these cases, rather than their outcomes. This thesis does thus not purport to provide all the answers to this complex issue, but rather to address the general and case-specific legitimacy of different argumentations.

When conducting this evaluation of the ICSID jurisprudence, I have used traditional legal method. An effect of this method is that the analysis of the ICSID cases is based on Articles 31 and 32 of the Vienna Convention on the law of Treaties (1969)(hereinafter VCLT), as the VCLT is considered identical to customary international law on treaty interpretation. The prime sources of material to this thesis have been the arguments advanced in the pertinent ICSID cases as well as the international legal literature and case law concerning the principles of interpretation enshrined in the VCLT. Legal literature concerning the pertinent ICSID cases is relatively sparse. In addition, the literature is mainly of a descriptive nature and the authors rarely provide any creative comments as to why certain arguments should be considered consistent, or inconsistent, with international law. However, this lack of guidance from the legal literature admittedly gives an extra sense of meaning to this thesis.

When approaching the task at hand, I find it accurate to start with a brief introduction to BITs, the MFN standard and investor-state dispute-settlement provisions, as this is a very particular area of law and such knowledge is essential to enable a fruitful argumentation in the following analysis. Naturally, I will also give a brief summary of the relevant circumstances and outcomes in the ICSID jurisprudence. After having given this background, the main analysis will be presented, namely the evaluation of the general and case-specific legitimacy of the competing arguments forwarded in the recent ICSID jurisprudence based on the canons of interpretation enshrined in the VCLT. Since this analysis is the focus of this thesis, it has been given the predominant consideration. Finally, I will conclude with some more general reflections on the implications of the preceding evaluation.

2 Bilateral Investment Treaties

2.1 Introduction

The increase in foreign direct investment (hereinafter FDI) is at the core of the continuing process of globalization. The last decades have shown significant changes in both national and international law and policy on FDI. Changes in law and policy have been both cause and effect in the integration of the world economy. The lowering of barrier to trades and other forms of economic intercourse has facilitated cooperation over the borders and made it easier to internationalise production. This process in turn put pressure on national policy makers to create a legal network that meets the needs of the world economy, but without endangering national economies share in the development and growth of the world economy.[3]

A radical reversal in FDI policies came with a series of national and international developments in the 1980s. Screening and other requirements for admission have since been significantly weakened or eliminated and restrictions on the operation of foreign organization have been greatly softened. For example, foreign affiliates are now commonly allowed to transfer profits out of the host country, property deprivations have decreased considerably and host states are in an increasing number of instances accepting international arbitration as the way in which disputes are to be resolved. In other words, a radically more FDI-friendly climate has emerged, mainly through elimination of restrictions on access and operation as well as granting national and international guarantees against measures that may render a detrimental threat to investment interests. The international legal discourse has had a corresponding change of direction. Nowadays, the focus is more on the most efficient ways of attracting FDI and deriving the benefits from it, as opposed to questions of jurisdiction.[4]

While there is no single legal instrument covering all aspects of FDI, an international legal framework has started to take form consisting of a complex intertwining of national and international rules and principles that differ in form, strength, origin and degree of specificity. The structure rests on customary international law (the principle of state sovereignty and the principle of nationality) and national law (national law directly or indirectly concerning FDI), but predominantly relies on international investment agreements for concrete substantive content.[5] The importance of regional and plurilateral international arrangements, such as the European Union, is steadily increasing. They contribute to the process of changing pre-existing structures in law and policies, as well as creating new essential habits and

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[3] United Nations Conference on Trade and Development (hereinafter UNCTAD), *Trends in International Investment Agreements: an Overview*, p. 9.
[4] Ibidem, pp. 28-31.
[5] Ibidem, pp. 35-36, 38-39.

expectations on a broader transnational plane.[6] However, the most noteworthy addition to substance has been through BITs, that is international treaties between two states to promote and protect the investment made by a national of one of the states in the territory of the other. The process of negotiating BITs started in the 1960s, although it was first later, in the late 1980s and 1990s, that they proliferated.[7] There is still a rapid increase in the number of BITs; as of 2005, almost 2500 BITs had been concluded.[8]

BITs commonly define their purpose in their preamble and/or title. Generally, they state that they are entered into in order to protect and promote investments made in the territory of one contracting party by nationals of another. The provisions in a BIT that to some extent shall embody such a purpose often reflect the two principal classes of government measures. Firstly, government measures concerning FDI have historically concerned the control over admission of investments, ranging from prohibition to selective admission and registration requirements. Industries that are deemed important may moreover be closed to foreign investment or investment in them subject to conditions. The second principal category of government measures against which foreign investors seek protection, are measures damaging foreign investments already made. This includes for example expropriation, nationalisation or other deprivations of property rights, as well as discriminatory taxation, disregard of intellectual property rights, arbitrary refusal of licenses, measures concerning transfer of funds from over the state borders and the possibility of employing foreign or specialised personnel without being subject to restrictions.[9]

Modern BITs are quite standardised and there is a noteworthy uniformity to the principles underlying the provisions. Similarities do for example include a broad definition of investment and provisions encouraging entry and establishment of investment, but most BITs do not contain a right to establishment. Nearly all BITs make a host state's right to expropriate subject to the requirements that the measure is for a public purpose, non-discriminatory, in accordance with due process and that the property owner is duly compensated. Furthermore, virtually all BITs include a guarantee of free transfer of payments connected to an investment. In addition, most BITs include a guarantee of fair and equitable treatment as well as national treatment (requiring there to be no discrimination between foreign and domestic subjects). However, national treatment is often subject to qualifications and exceptions, such as exceptions for certain industries, economic activities or policy measures such as taxation. State-state dispute-settlement provisions are almost a given feature. Especially significant for this thesis, however, is the fact that a guarantee of MFN treatment is

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[6] Ibidem, pp. 42-44.
[7] Ibidem, p. 21.
[8] UNCTAD, *World Investment Report 2006 – FDI from Developing and Transition Countries: Implications for Development*, p. 26.
[9] UNCTAD, *Trends in International Investment Agreements*, pp. 3-4.

practically universal and, nowadays, investor-state dispute-settlement provisions are standard practice.[10]

2.2 The most-favored-nation standard

2.2.1 Definition and purpose

The MFN standard is generally understood to mean that a host country must extend to the investors from the other contracting state the more favorable treatment that it accords to investors from any other foreign country in like cases.[11] The treaty that contains the MFN clause is commonly defined as the basic treaty and the treaty in which you find the more favorable treatment is usually referred to as the third-party treaty, an approach that will be followed in this thesis.

The purpose of the MFN standard is to prevent discrimination against investors from foreign countries on grounds of their nationality, which has been deemed crucial for the establishment of equality of competitive opportunities between investors from different foreign countries.[12] At the same time, the standard may limit countries' room for manoeuvre in respect of investment agreements they want to conclude in the future, since the MFN standard obliges a contracting party to extend to its treaty partners the more favorable treatment that it grants to any other country investors in any future agreement dealing with investment.[13]

However, the non-discrimination purpose does not mean that the host state is obliged to grant an equal or identical treatment to investors operating on its territory. Considering the aim of granting investors an equal level of protection and the formal definition of the standard, it is sufficient for the host state to grant foreign investors a treatment that is 'no less favorable' than that provided to the most favored foreign nationals.[14]

Another corollary to the non-discrimination purpose is that, in order for the treatment to fall under the scope of an MFN clause, the treatment must be the general treatment usually provided to foreign investors. Special privileges or incentives do therefore not automatically induce an obligation to treat other investors no less favorably. The MFN standard merely requires that all foreign investors should be treated no less favorably for the opportunity to become a possible beneficiary of such a privilege, even if the privilege can only be given to one investor. In addition, a differentiation between foreign investors is justified if the investors are in different objective situations. For instance, the MFN standard would not per se

[10] UNCTAD, *Bilateral Investment Treaties in The Mid-1990s*, pp. 137-138.
[11] Cf. e.g. UNCTAD, *Most-favoured-nation-treatment*, p. 5.
[12] UNCTAD, *International Investment Agreements: Key Issues*, p. 191.
[13] Ibidem, p. 194.
[14] Cf. UNCTAD, *Trends in international investment agreements*, p. 60.

protect a big investor that is denied assistance under a government program designed for small companies. It could however perhaps be considered *de facto* discrimination if the purpose of the differentiation is to exclude investors of a certain nationality from the programme.[15]

2.2.2 The clause

An inventory of MFN clauses in BITs would not yield a uniform picture. Some MFN clauses are narrow, while others are more general. In addition, the context of the clauses varies considerably.

MFN clauses are nevertheless characterised by a basic similarity in terms of structure and scope, even if they may be worded differently. Some of the common similarities found in MFN clauses may be displayed by a rather typical MFN provision, such as the one found in Article 3 of the BIT between Barbados and Germany (1994):

> '1. Neither Contracting Party shall subject investments in its territory owned or controlled by nationals or companies of the other Contracting Party to treatment less favourable than it accords in equivalent circumstances to investments of its own nationals or companies or to investments of nationals or companies of any third State.
> 2. Neither Contracting Party shall subject nationals or companies of the other Contracting Party, as regards their activity in connection investments in its territory, to treatment less favourable than it accords in equivalent circumstances to its own nationals or companies or to nationals or companies of any third State.
> 3. Such treatment shall not relate to privileges which either Contracting Party accords to nationals or companies of third States on account of its membership of, or association with, a customs or economic union, a common market or a free trade area.
> 4. The treatment granted under this Article shall not relate to advantages which either Contracting Party accords to nationals or companies of third States by virtue of a double taxation agreement or other agreements regarding matters of taxation.'

Most BITs refer to 'treatment no less favourable' when defining the standard.[16] It is however also quite common that the negation is earlier in

[15] UNCTAD, *Most-favoured-nation treatment*, pp. 6-7.
[16] Ibidem, p. 5. See also Article 5 of the Draft Articles on Most-Favoured-Nation Clauses prepared by the International Law Commission, which defines MFN treatment as 'treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, *not less favourable* than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State' (emphasis added), International Law Commission, Report to the United Nations General Assembly ,on the work of its thirtieth session (1978), p. 21.

the clause, as was the case in the provision above.[17] Many BITs also entitle both investors and investment to MFN treatment.[18] By contrast, some BITs only refer to the investment[19] while other BITs grant the standard to investors with regard to their investments[20].

There are variations concerning the investment activities covered by the standard. The coverage is in general very broad. Definitions used include ′activities in connection with investments′[21], 'activities associated with investments'[22] and 'management, maintenance, use, enjoyment or disposal of their investments'[23]. Some BITs also, as displayed by the Barbados-Germany BIT, contain an express limitation in the requirement that the standard only applies to investors and/or investments 'in like [or equivalent] circumstances [or situations]′.[24] It is furthermore quite common to combine MFN treatment with the national treatment standard. Some BITs also assert the right to 'whichever is the more favourable' of the two standards to the national concerned.[25]

In addition to the various qualifications often found in the definition of the MFN standard, it is quite common that BITs seek to limit further the obligation by including specific qualifications, exceptions or derogations. It should however be stressed that most BITs contain very few exceptions to the MFN standard.[26]

For example, BITs do in general contain several types of exceptions of a general nature that are not specifically limited to MFN. Most BITs do for example allow for derogation from the non-discrimination standard if this is

[17] See e.g. also many United Kingdom BITs, such as Article 3 of the United Kingdom-Burundi BIT (1990).

[18]UNCTAD, *International Investment Agreements: Key Issues*, p. 192. See especially Swiss and British BITs, such as Article 3 of the United Kingdom-Morocco BIT(1990) and Article 4 of the Mauritius-Switzerland BIT (1998).

[19]UNCTAD, *International Investment Agreements: Key Issues*, p. 192. See e.g. Article 3(1) of the Jordan-Egypt BIT (1996), which states that MFN treatment shall be accorded ' the investments made in its territory by investors of the other Contracting Party'. Many BITs of the United States of America refer to 'investment, and activities associated therewith' or similar expressions, see e.g. Article II(1)of the United States of America -Moldova BIT (1993).

[20] UNCTAD, *International Investment Agreements: Key Issues*, p. 192. See e.g. Article 4 of the France-Uganda BIT (2002) which refers to 'the nationals and companies of the other Party, with respect to their investments and activities related to the investments'.

[21] In addition to the Barbados-Germany BIT (1994), see e.g. Article 3(2) of the Zimbabwe-Germany BIT (1995) that refers to the similar 'activities connected with the investments'.

[22] See e.g. Article II (1) of the United States of America-Latvia BIT (1995). See also e.g. Article III(3) of the Canada-Poland BIT (1990) for the similar expression 'management, use, enjoyment or disposal of their investments'.

[23] See e.g. Article 3(2) in the Thailand-Israel BIT (2000).

[24] See e.g. Article II(1) of the United States of America-Latvia BIT (1995) for an example of the 'in like situations' requirement.

[25] See e.g. Article 3(1) of the Finland-Brazil BIT (1995); Article 3(1) of the Sweden-Belarus BIT (1994).

[26] UNCTAD, *Most-favoured-nation treatment*, p. 26.

necessary for the maintenance of public order or national security.[27] Nevertheless, it is arguably difficult to identify concrete cases where the maintenance of public order or national security would actually require discrimination amongst foreign investors.[28]

Furthermore, all BITs dealing with taxation matters contain an MFN exception. The reason for these tax exceptions is to avoid the obligation to extend the advantages granted to other foreign investors in double taxation treaties. Under these treaties, the contracting parties partly renounce their right to tax investors located within their territories in order to avoid double taxation. This happens on a mutual basis and each contracting party therefore waives its taxation rights only if the other contracting party undertakes the same commitment. Therefore, a unilateral extension of the waiver to third countries via the MFN standard is not deemed acceptable.[29] Moreover, countries that are members of a regional economic integration organization, such as the European Union, usually include a so-called regional economic integration organization (hereinafter REIO) clause in which members are exempt from the obligation to grant MFN treatment to non-members. Without such a clause, the MFN clause would oblige the REIO members to grant unilaterally investors from non-member countries all the privileges deriving from the REIO membership.[30]

The general MFN provision is not restricted in scope to any particular part of the treaty containing it, but there are notable exceptions. As an example, some MFN clauses of the United Kingdom provide that: ‘For the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement’.[31] Articles 1 to 11 in the pertinent BIT cover all the provisions except the final clauses, such as for example the dispute-settlement provisions.

2.3 Investor-state dispute-settlement provisions

2.3.1 Introduction

The predominant part of BITs contain investor-state dispute-settlement provision that provide for international arbitration in case of a dispute. However, one should bear in mind that there are notable exceptions, such as

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[27] Ibidem, p. 15. See e.g. Ad Article 3(a) of the Protocol to the Germany-Bolivia BIT (1987): ‘Measures that have to be taken for reasons of public security and order, public health or morality shall not be deemed "treatment less favourable" within the meaning of article 3‘.

[28] UNCTAD, *Most-favoured-nation treatment*, p. 15.

[29] UNCTAD, *International Investment Agreements: Key Issues*, p. 197.

[30] Ibidem, p. 198.

[31] See e.g. Article 3(3) of the United Kingdom-Albania BIT (1994): Article 3(3) of the United Kingdom-Turkmenistan (1995) BIT.

when there are no dispute-settlement provisions at all[32] or when the provisions are applicable only to certain types of disputes[33].

It is moreover worth mentioning that even though provisions concerning investor-state dispute settlement have been included in BITs since the 1960s, the use of these provisions to institute arbitral proceedings has been rare until recently. As of April 1998, only 14 cases had been brought before ICSID involving BITs, and only 2 awards and 2 settlements had been issued.[34] However, since the late 1990s, the number of arbitrations has grown vastly. The cumulative number of treaty-based cases had risen to at least 226 by the end of 2005. Some 136 cases had been filed with ICSID, 67 under the United Nations Commission on International Trade Laws (UNCITRAL) Arbitration Rules, 14 with the Stockholm Chamber of Commerce, 4 with the International Chamber of Commerce, a single case with the Cairo Regional Centre for International Commercial Arbitration and the remaining 4 were ad-hoc arbitration. Notably, the total number of treaty-based investment arbitrations is impossible to measure. The figures above only display claims that were disclosed by the parties or arbitral institutions.[35]

2.3.2 Purpose

The existence of effective dispute-settlement procedures contributes to the creation of a favorable investment climate in the host country and play the critical role of ensuring that the standards of treatment and protection granted in a BIT are effectively implemented and enforced.[36] A special feature to BITs is that foreign investors are commonly given the right to resolve disputes directly with the host state since the predominant part of all BITs include investor-state dispute-settlement provisions which allow investors recourse to international commercial arbitration against the host state in the event of a dispute.[37]

The principal reason for including dispute-settlement provisions in BITs is the fact that there exists no independent right for an investor to claim violation of a rule of international law and to demand compensation based on international responsibility. Principally, only states may bring claims under international law, given that they are the principal subjects of that system. Non-state actors lack the requisite international legal personality. Therefore, in absence of specific dispute resolution provisions in a BIT, the forms of redress available to an investor, whose investment is injured

[32] See e.g. the Sweden-Senegal BIT (1967); Sweden-Madagascar BIT (1966).
[33] See e.g. Article 7(2) of the Romania-Sri-Lanka BIT (1981) which only provides for investor-state arbitration when there is a dispute concerning ‘the amount of compensation in case of expropriation’.
[34] UNCTAD, *Bilateral Investment Treaties in The Mid-1990s*, p. 140.
[35] UNCTAD, *World Investment Report 2006 – FDI from Developing and Transition Countries: Implications for Development*, p. 27.
[36] UNCTAD, *Bilateral Investment Treaties in The Mid-1990s*, p. 87.
[37]UNCTAD, *International Investment Agreements: Key Issues*, p. 3.

because of unfair or unlawful treatment, are to either bring the claim against the host country in the domestic courts or to request that their home country exercise diplomatic protection in favor of them.[38] Commonly, however, neither of these two remedies would provide the investor with effective protection. An investor might not be comfortable with bringing a claim against the host state in 'its' domestic courts or with the procedure and speed with which they function. Jurisdiction over a claim against the host state may moreover be barred by the doctrine of sovereign immunity. Concerning diplomatic protection, a state has no obligation under international law to exercise diplomatic protection, but is free to accept or refuse as it sees fit. One may perhaps imagine how inclined home states are to exercise this possibility when the claim is relatively small. Even if a country chooses to espouse a claim, it will usually seek to resolve the claim through diplomatic negotiations, which might take years without any resolution. The claim may be settled on any grounds the state wishes and the home state may, at least in theory, retain any compensation. The compensation may moreover be considerably less than full compensation. In addition, according to international customary law, a state may only lodge an international complaint in the name of diplomatic protection once its national has exhausted the remedies available under domestic law in the host country, whether for settlement in court or out of court.[39]

2.3.3 The duty to negotiate

There is a largely uniform requirement in BITs requiring that the investor and the host state attempt to resolve the dispute amicably prior initiating the other means of dispute settlement.[40] The requirement for consultation or negotiation is valuable to states, not only because it may help to defuse tensions in some instances, but also because it can underline the amicable spirit in which most states hope to conduct their investment relations. The obligation is not to be taken lightly; it is an obligation of substance. The parties in the dispute must negotiate in good faith.[41] Where the BIT provides for the amicable settlement of disputes, a time limit is usually placed upon the obligation in order to facilitate the interests of both protagonists.[42] However, time limits are not always specified.[43] The time limits commonly range from three to 12 months. More recently, a six-month period appears to have become commonplace.[44] Furthermore, it should be noted that the 1965 Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States

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[38] UNCTAD, *Dispute Settlement: Investor-State*, pp. 5-6.
[39] UNCTAD, *Bilateral Investment Treaties in the Mid 1990s*, p. 89.
[40] Ibidem, p. 92.
[41] UNCTAD, *Dispute Settlement: Investor-State*, p. 24
[42] Ibidem, p. 25
[43] See e.g. Article 9(1) of the United Kingdom-Armenia BIT (1993).
[44] UNCTAD, *Dispute Settlement: Investor-State*, p. 25. See e.g. also Article 9(2) of the Denmark-Lithuania (1992) that specify a time limit of three months; Article 9(2) of the Indonesia-Republic of Korea BIT (1991) that specifies a time limit of twelve months; Article 7(2) of the Chile-Sweden BIT(1993) that specifies a time limit of six months.

(hereinafter the ICSID Convention), under which ICSID was established, provides for conciliation as well as arbitration. Conciliation under the ICSID Convention is an international form of third-party, non-binding dispute settlement, in which the role of the conciliators is ‘to clarify the issues in dispute between the parties and to endeavour to bring about agreement between them upon mutually acceptable terms’.[45] However, the ICSID conciliations procedure is rarely used. [46]

2.3.4 Exhaustion of local remedies

As was briefly noted above, under customary international law, a claim will not be admissible on the international plane unless the individual concerned exhausts the local remedies. Whether an investor must exhaust local remedies prior to invoking an investor-state dispute-settlement provision in a BIT has been dealt with differently in different BITs. [47]

A number of the early BITs require domestic remedies to be exhausted.[48] Some BITs that require recourse to local remedies also limit the obligation in that the investor may submit the dispute to international arbitration after the dispute has been before local remedies for a fixed period of time, even if the particular remedy is still dealing with the particular dispute. These fixed time limits tend to range from three months to 18 months.[49]

Some BITs consider the investor’s submission of the dispute to an arbitral tribunal to be a waiver of the investor’s right to international arbitration, or alternatively that the invocation of local remedies extinguishes the right to arbitration.[50] Sometimes the investor is not precluded from later resorting to international arbitration if the result reached locally is unsatisfactory to the investor.[51]

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[45] Article 34(1) of the ICSID Convention.
[46] UNCTAD, *Dispute Settlement: Investor-State*, p. 26.
[47] UNCTAD, Bilateral Investment Treaties in The Mid 1990s, p. 93.
[48] See e.g. Article XII of the Netherlands-Malaysia BIT (1971); Article 9(1) of the United Kingdom-Jamaica BIT (1987).
[49] UNCTAD, *Dispute Settlement: Investor-State*, p. 31. See e.g. also Article 8(1) of the United Kingdom-Egypt BIT (1975) which provides for ICSID arbitration if an ‘agreement cannot be reached within three months between the parties to this dispute through pursuit of local remedies, through conciliation or otherwise’; Article 9(2) of the Indonesia-Republic of Korea BIT (1991), which requires 12 months; Article X(3)(a) of the Spain-Argentina BIT (1991), which requires eighteen months.
[50] UNCTAD, *Bilateral Investment Treaties in the Mid 1990s*, p. 93. See e.g. also Article 9(4) of the Jamaica-Argentina BIT, which states ‘where an investor or a Contracting Party has submitted a dispute to the aforementioned competent tribunal of the Contracting Party where the investment has been made or to international arbitration, this choice shall be final’.
[51] See e.g. Article 7(3) of the United Kingdom-Chile BIT (1996), which states that: ’Notwithstanding the provision of paragraph (2) of this Article, the Centre shall not have jurisdiction if the investor has already submitted the dispute to the courts of the Contracting Party which is party to the dispute’.

Another group merely specifies that local remedies as one of several choices available to the investor.[52]

A numerous amount of BITs are silent on the issue of whether the disputant investor has an obligation to exhaust local remedies.[53] However, notable in this respect is the fact that the ICSID Convention explicitly excludes the local remedies rule, unless a contracting state party expresses a reservation to preserve the operation of the rule. Article 26 of ICSID Convention states: 'Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.' States do however almost never insist on the exhaustion of local remedies.[54]

2.3.5 Arbitration mechanisms

The earliest investor-state dispute-settlement provisions included the parties consent only to ICSID jurisdiction. The trend nowadays is to offer foreign investors the choice of venue in instance of a dispute.[55] Even though the dispute-settlement provisions vary on points of detail, the basic idea is that host countries shall be guaranteed third-party settlement as one option available to foreign investors in their territory.[56] It is generally up to the investor to choose the mechanism to which the dispute is to be submitted.[57]

ICSID arbitration is still the predominant choice of institutional arbitration.[58] ICSID provides a facility for conciliation or arbitration of investment disputes between a private investor and a host state. It is the only institutional system of conciliation/arbitration specially designed to deal with investment disputes.[59] ICSID jurisdiction requires, according to Article 25(1) of the ICSID Convention, that both the home and host country are parties to the convention. If ICSID jurisdiction is ruled out based on the fact that one of the contracting parties has not adhered to the ICSID Convention, there is still a possibility to consent to arbitration under the so-called Additional Facility, which also is established under the ICSID Convention.

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[52] UNCTAD, *Bilateral Investment Treaties in the Mid 1990s*, p. 93. See e.g. also Article 12 of the Australia-Lao People's Democratic Republic BIT (1994).
[53] From the many examples in this regard, see e.g. Article 8 of the Bangladesh-Switzerland BIT (2000).
[54] Only Israel had, at the time of its ratification of the ICSID Convention in 1983, made a notification to ICSID requiring the exhaustion of local remedies. This reservation was later withdrawn, Schreuer, C., p. 391.
[55] UNCTAD, *Bilateral Investment Treaties in The Mid-1990s*, p. 93.
[56] UNCTAD, *Dispute Settlement: Investor-State*, p.40.
[57] UNCTAD, *Bilateral Investment Treaties in The Mid-1990s*, p 96.
[58] Advance consents by governments to submit investment disputes to ICSID arbitration can be found in over 900 bilateral investment treaties, see http://www.worldbank.org/icsid/about/about.htm.
[59] UNCTAD, *International Investment Agreements: Key Issues*, p. 351.

The Additional Facility is an alternative mechanism that has jurisdiction to arbitrate or conciliate certain types of disputes when either the investor's home or host country, but not both, has adhered to the ICSID Convention.[60] Apart from ICSID, arbitration clauses referring to for example the International Chamber of Commerce do occur, but are used relatively infrequently.[61]

A quite common alternative to institutional arbitration is to settle the dispute through *ad hoc* arbitration, i.e. arbitration before a single individual arbitrator or a tribunal constituted for a specific dispute.[62] For *ad hoc* arbitration to be effective, the BIT in question needs to provide the procedure with which the arbitrator(s) is to be appointed. Generally, this is accomplished by prescribing a set of existing rules that govern the formation of the tribunal as well as the arbitration at large. The most commonly prescribed rules are the United Nations Commission on International Trade Law (hereinafter UNCITRAL) Arbitration Rules.[63]

[60] Article 2 of the Additional Facility Rules.
[61] Cf. UNCTAD, *International Investment Agreements: Key Issues*, p. 351.
[62] Dolzer, R. and Stevens, M., p. 121.
[63] UNCTAD, *Bilateral Investment Treaties in the Mid 1990s*, p. 95.

3 Recent ICSID Jurisprudence

3.1 Introduction

Up until recently, the conventional wisdom appears to have held that the MFN standard applies to substantive provisions, unless there is explicit language to the contrary.[64] However, the seminal holding in *Maffezini* gave birth to the concept that the MFN standard may be applicable to dispute-settlement provisions and questions of jurisdiction. Since then, other ICSID tribunals have interpreted *Maffezini* and evaluated the stance taken there with varying outcomes.

The ICSID decisions under scrutiny in this thesis should not be seen as an exhaustive display of all the ICSID jurisprudence on the pertinent issue. There have been more ICSID tribunals faced with the issue, but these do not add any significant arguments to those made in the decisions that are the focus of this thesis.[65] It is also noteworthy that prior to the entry into force of the ICSID Convention, the International Court of Justice (hereinafter the ICJ) had also considered the effect of MFN clauses on dispute settlement. These decisions are frequently raised in ICSID proceedings. However, the focus of this thesis is the recent ICSID decisions since the ICJ cases do not, in my opinion, provide any particular guidance to the pertinent issue. Furthermore, the ICJ cases concerned MFN provisions in less relevant areas, such as consular jurisdiction, whereas the recent ICSID decisions focus especially on investment arbitration under modern BITs.[66]

The jurisprudence on the substantive application of the MFN standard could be fruitful to the pertinent issue, especially when general comments are made regarding the scope of the MFN standard. What should be borne in mind though, is the fact that there are significant differences in the procedural and substantive application of the standard, such as the role that may be played by the principle *ejusdem generis*[67], potential likeness requirements in the MFN provision, context etc.[68] Before continuing on to the recent ICSID jurisprudence that specifically deal with the MFN standard's application to dispute settlement and questions of jurisdiction, I do therefore briefly want to mention two ICSID cases that concerned the

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[64] Boscariol, J. W. and Silva, O. E., p. 61.
[65] See e.g. Camuzzi International S.A. v. Argentina, Decision on Objection to Jurisdiction of May 11, 2005; Imperiglio S.p.A. v. Pakistan, Decision on Jurisdiction of April 22, 2005.
[66] See e.g. Ambatielos Case, Preliminary Objection, Judgement of July 1, 1952; Anglo-Iranian Oil Co. Case, Preliminary Objection, Judgement of July 22, 1952.
[67] The *ejusdem generis* principle is dealt with below (4.5.3.).
[68] See e.g. also Occidental Exploration and Production Company v. Ecuador, London Court of International Arbitration, Award of July 1, 2004. The Tribunal did not rule on the investor's MFN argument, but did in any event express that it found *Maffezini 'not* really pertinent to the present dispute as it deals with the most-favored-nation treatment insofar as procedural rights of the claimant were involved, not substantive treatment as is the case here' (para. 178).

MFN standard's substantive scope, but which potentially provide some guidance as to the scope of an MFN provision in general. These are MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile[69] (hereinafter *MTD*) and Técnicas Medioambientales Tecmed v. Mexico[70] (hereinafter *Tecmed*).

MTD concerned a Malaysian claimant who sought to rely on an MFN clause in order to incorporate substantive provisions from third-party treaties, which obliged the host state to award certain permits subsequent to approval of an investment and to fulfil contractual obligations. Without mentioning *Maffezini*, the *MTD* Tribunal concluded that the MFN provision had to be interpreted in the manner most conducive to the fulfilment of the BIT's object and purpose to protect and promote investments. Incorporation of the substantive provisions from the third-party treaty was held commensurate with this purpose.[71] Notably, the Tribunal required that the obligation in the third-party treaty, to award permits subsequent to approval of an investment and to fulfil contractual obligations, could be construed to form part of the fair and equitable standard in the basic treaty. In other words, only those provisions that were specifically relevant to the clarification of obligations under the basic treaty would be considered.[72]

In *Tecmed*, the Spanish claimant sought to invoke an MFN provision in the basic treaty as a means of securing retroactive application of its substantive provisions, as Mexico had concluded another BIT that contained a clause allowing for retroactive effect. The *Tecmed* Tribunal rejected the argument and referred to *Maffezini*, stating that 'matters relating to the application over time of the Agreement, which involve more the time dimension of application of its substantive provisions rather than matters of procedure or jurisdiction, due to their significance and importance, go to the core of matters that must be deemed specifically negotiated by the Contracting Parties' as they were perceived to be 'determining factors for their acceptance of the Agreement'.[73]

3.2 Maffezini v. Spain

This seminal case arose from a dispute concerning an investment made by an Argentine national in Spain, which was submitted to arbitration under the Argentina-Spain BIT. The Argentina-Spain BIT required a claimant to resort to Spanish courts for a period of 18 months prior commencing ICSID arbitration, which the claimant, Mr Maffezini, acknowledged that he had not done. However, the Chile-Spain BIT imposed no such condition. Mr Maffezini therefore argued that Chilean investors were treated more favorably than Argentine investors were. He claimed that the MFN clause in the Argentine-Spain BIT allowed him to invoke more favorable dispute

[69] Award of May 25, 2004.
[70] Award of May 29, 2003.
[71] *MTD*, para. 104.
[72] Ibidem, paras. 103-104.
[73] *Tecmed*, para. 69.

settlement procedures in the Chile-Spain BIT, thereby giving him the option to submit the dispute to arbitration without prior referral to domestic courts.[74]

The MFN clause at issue in *Maffezini*:

> 'In *all matters* governed by the present Agreement, such treatment shall not be less favourable than that accorded by each Party to investments made in its territory by investors of Third States.'[75]

The *Maffezini* Tribunal held that the scope of a broadly phrased MFN clause covers dispute settlement and that such a conclusion was consistent with the *ejusdem generis* principle, unless it is established that the omission of an express reference to dispute settlement was intended or can be inferred from the state practice of the parties.[76]

However, the Tribunal emphasised that a distinction has to be made between the legitimate extension of rights and benefits by means of the operation of an MFN clause and 'disruptive treaty-shopping that would play havoc with the public policy objectives of underlying specific treaty provisions'.[77] In this light, the *Maffezini* Tribunal asserted that there are exceptions to its ruling arising from 'public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in question'.[78] The Tribunal provided a non-exhaustive list of these exceptions:

- where there is an express condition to arbitration of exhaustion of local remedies by he investor, since 'the stipulated condition reflects a fundamental rule of international law';
- so-called 'fork in the road' clauses, pursuant to which the disputing parties have an irrevocable choice between submission to domestic courts *or* to international arbitration, since to apply an MFN clause in such a situation 'would upset the finality of arrangements that many countries deem important as a matter of public policy';
- where there is an express reference to a particular arbitration form, such as ICSID, or if the parties have agreed to a highly institutionalized system of arbitration that incorporates precise rules of procedure, since 'it is clear that neither of these mechanisms could be altered by the operation of the clause because these very specific provisions reflect the precise will of the contracting parties'.[79]

[74] *Maffezini*, paras. 38-40.
[75] Ibidem, para. 38, emphasis added.
[76] Ibidem, paras. 53, 56.
[77] Ibidem, para. 63.
[78] Ibidem, para. 62.
[79] Ibidem, para. 63.

Other elements of public policy limiting the operation of an MFN clause were held to 'no doubt' be identified by the parties or tribunals.[80]

In applying this limitation, the *Maffezini* Tribunal investigated whether Spain held a strong public policy that required recourse to domestic courts. The Tribunal found that 'the requirement for the prior resort to domestic courts spelled out in the Argentina-Spain BIT does not reflect a fundamental question of public policy considered in the context of the treaty, the negotiations relating to it, the other legal arrangements or the subsequent practice of the parties'. The Tribunal thereby affirmed jurisdiction in the case.[81]

3.3 Gas Natural v. Argentina

The same basic treaty, MFN clause and 18-month requirement as had been prevalent in *Maffezini*, was at issue in Gas Natural SDG, S.A. v. Argentina[82] (hereinafter *Gas Natural*). The *Gas Natural* Tribunal relied fully on *Maffezini* and came to the same conclusion in that the claimant could rely on the MFN clause to invoke more favorable dispute-settlement provisions in another BIT.[83]

The *Gas Natural* Tribunal also implicitly acknowledged the legitimacy of the 'public policy considerations' by rejecting such argumentation merely because it was not persuasive in the instant case.[84]

3.4 Siemens v. Argentina

Siemens A.G. v. Argentina[85] (hereinafter *Siemens*) concerned a dispute under the Germany-Argentina BIT, which, just as the basic treaty in *Maffezini* and *Gas Natural*, required disputes to be submitted to Argentine courts for a period of 18 months before commencing ICSID arbitration. However, the MFN clause in question did not refer to 'all matters' covered by the agreement.

The articles containing the MFN clauses at issue in *Siemens*:

> Article 3(1):'None of he Contracting Parties shall accord in its territory to the investments of nationals or companies of the other Contracting Party or to investments in which they hold

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[80] Ibidem.
[81] Ibidem, para. 64.
[82] Decision on Jurisdiction of June 17, 2005.
[83] *Gas* Natural, see especially paras. 9-16, 31, 46-47.
[84] Ibidem, para. 30.
[85] Decision on Jurisdiction of August 3, 2004.

> shares, a less favourable treatment than the treatment granted to the investments of its own nationals or companies or to the investments of nationals or companies of third States.'
> Article 3(2): 'None of the Contracting Parties shall accord in its Territory to nationals or companies of the other Contracting Party a less favourable *treatment* of *activities related to investments* than granted to its own nationals and companies or to the nationals and companies of third States.'[86]
>
> Article 4(1): 'The investments of nationals or companies of each Contracting Party shall enjoy full protection and legal security in the territory of the other Contracting Party.
> Article 4(2): '[This paragraph deals with expropriation and compensation and is not necessary to reproduce for the present discussion].'
> Article 4(3): 'The nationals or companies of one of the Contracting Parties that suffer losses in their investments because of war or other armed conflict, revolution, national state of emergency or insurrection in the territory of the other Contracting Party, shall not be treated by such party less favorably than its own nationals or companies as to restitution, compensation, indemnities or other. These payments will be freely transferable.
> Article 4(4): 'The nationals or companies of each Contracting Party shall enjoy in the territory of the other Contracting Party the treatment of the most favored nation in all matters covered in this Article.'[87]

The *Siemens* Tribunal nevertheless relied on *Maffezini* and held that the MFN clause entitled the claimant to more favorable dispute-settlement procedures in other BITs concluded by the Argentina, such as the Argentina-Chile BIT, which did not require the dispute to be submitted to domestic courts prior ICSID arbitration.[88]

The *Siemens* Tribunal furthermore concurred with the *Maffezini* Tribunal in that the beneficiary of an MFN clause may not override public policy considerations that the parties to a BIT have judged essential to their agreement.[89] However, the Tribunal did not find there to be a public policy to consider in the instant case since Argentina did not display a consistency in the other BITs that it had concluded.[90]

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[86] *Siemens*, para. 82, emphasis added.
[87] This is an English interpretation of the Spanish original text made by the *Siemens* Tribunal, see *Siemens*, para. 88.
[88] Ibidem, paras. 80, 81, 105.
[89] Ibidem, para. 109.
[90] Ibidem, para. 105.

3.5 Salini v. Jordan

Salini Costruttori S.p.A. and Italstrade S.p.A. v. Jordan[91] (hereinafter *Salini*) concerned a dispute that arose from the construction of a dam in Jordan, which was submitted to ICSID by the Italian claimants under the Italy-Jordan BIT. The claim concerned a contractual dispute based on an investment contract between two Italian contractors and the Ministry of Water and Irrigation-Jordan Valley Authority (employer).[92] The dispute-settlement provisions in the basic BIT provided for amicable negotiations followed by either resort to domestic courts or ICSID arbitration.[93] However, Article 9(2) of the basic treaty provided that '[i]n case the investor and an entity of the Contracting Parties have stipulated an investment Agreement, the procedure foreseen in such investment agreement shall apply'.[94] The parties' investment contract stipulated that contractual disputes would be settled by amicable negotiations, which, if necessary, would be followed by resort to local courts, unless both parties agree to arbitration.[95] The claimants submitted that they could rely on the MFN clause in the basic treaty to invoke more favorable dispute-settlement arrangements, such as the ones contained in the Jordan-United States of America BITs, which entitled investors to bring contractual claims before an ICSID tribunal 'regardless of any clause in the investment agreement providing for a different dispute settlement mechanism'.[96]

Thus, the claimants were not merely trying to evade a temporal hurdle, but also to establish jurisdiction concerning a type of claims over which the Tribunal had no jurisdiction at all in the basic treaty.

The MFN clause at issue in *Salini*:

> 'Both Contracting Parties, within the bounds of their own Territory, shall grant investments effected by, and the income accruing to, investors of the Contracting Party no less favorable treatment than that accorded to the investments effected by, and income accruing to, its own nationals or investors of Third States.'[97]

The *Salini* tribunal declined jurisdiction over contractual disputes on the basis of the MFN clause, stating that 'the Claimants have submitted nothing from which it *might* be established that the common intention of the Parties was to have the most-favoured-nation clause apply to dispute settlement'.[98]

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[91] Decision on Jurisdiction of November 29, 2004.
[92] *Salini*, paras. 14-19.
[93] Ibidem, para. 66.
[94] Ibidem, para. 70.
[95] Ibidem, para. 71.
[96] Ibidem, paras. 21, 36.
[97] Ibidem, para. 104.
[98] Ibidem, para. 119.

With respect to *Maffezini*, the *Salini* Tribunal stressed that the circumstances of the two cases were different, especially regarding 'the common intention of the Parties' (Article 9(2) of the Italy-Jordan BIT) and the text of the MFN clause (which did not refer to '*all matters*').[99] The Tribunal did not expressly disagree with the conclusion reached in *Maffezini*, but clearly voiced concern regarding the broad statements of principle made in that decision, particularly the workability of the public policy exceptions.[100]

3.6 Plama v. Bulgaria

Plama Consortium Limited v. Bulgaria[101] (hereinafter *Plama*) concerned a dispute based on a Cypriot investor's claim that public authorities in Bulgaria deliberately created difficulties and caused material damage to a company that it had purchased.[102]

The claimant argued two grounds for ICSID jurisdiction. Firstly, Part V of the Energy Charter Treaty, and secondly, the 1987 Bulgaria-Cyprus BIT. The Bulgaria-Cyprus BIT was however limited in the sense that it only provided for *ad hoc* ICSID arbitration of disputes with regard to fixing the amount of compensation due to an investor after Belgian courts had already ruled on the merits of the underlying dispute. The claimant sought to overcome these limitations by relying on the MFN clause in the Bulgaria-Cyprus BIT to import dispute resolution provisions of other Bulgarian BITs, such as the Bulgaria-Finland BIT, which provided for jurisdiction in a wider class of disputes. The claimant was thus claiming to be entitled to a broader consent to jurisdiction (jurisdiction over merits disputes) and thereby totally replace one dispute settlement mechanism (ad hoc arbitration) with another dispute-resolution mechanism (ICSID arbitration).[103]

The MFN clause at issue in *Plama*:

> *'Each Contracting Party shall apply to the investments in its territory by investors of the other Contracting Party a treatment which is not less favorable than that accorded to investments by investors of third states.'*[104]

In stark contrast to the *Maffezini* Tribunal, the *Plama* Tribunal asserted that an MFN provision in a basic treaty generally does not incorporate by reference dispute-settlement provisions set forth in another treaty. The Tribunal wanted to replace the principle with multiple exception advanced in *Maffezini*, and replace it with a single rule with one exception: 'an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless

[99] Ibidem, paras. 117-118.
[100] Ibidem, paras. 114-115.
[101] Decision on Jurisdiction of February 8, 2005.
[102] *Plama*, para. 21.
[103] Ibidem, para. 26.
[104] Ibidem.

the MFN provision in the basic treaty leaves *no doubt* that the Contracting Parties intended to incorporate them‘.[105] The MFN clause at issue in *Plama* did not meet such a high standard and was hence not held to be a legitimate consent to submit a dispute under the Bulgaria-Cyprus BIT to ICSID arbitration.[106]

The Tribunal was harsh and uncensored in its criticism of *Maffezini*, as it considered the ’string citation’ it derived its decision from an ‘inappropriate basis for analysis’ which led to ‘a chaotic situation-actually counterproductive to harmonization’ that could not be considered ‘the presumed intent of Contracting Parties’. The Tribunal also strongly criticized the ‘public policy considerations’, stating that it was ‘puzzled’ as to what the origin of them were, but added that they were ’prone to falling soon into oblivion’.[107] Nevertheless, the *Plama* Tribunal was fairly understanding in that it regarded the *Maffezini* Tribunal to have been faced with ‘exceptional circumstances’, particularly referring to the 18-month requirement in the basic treaty which it considered ‘a curious requirement’ and ‘nonsensical from a practical point if view’. However, the Tribunal added that such exceptional circumstances are not suitable to be ‘treated as a statement of general principle guiding future tribunals in other cases where exceptional circumstances are not present’.[108]

[105] Ibidem, emphasis added.
[106] Ibidem, para 227.
[107] Ibidem, paras. 221, 226.
[108] Ibidem, para. 224.

4 Competing Arguments of Interpretation

4.1 Introduction

When a judicial actor interprets a treaty, it is first and foremost Articles 31-33 of the VCLT that should guide the process. This argument is motivated not so much by the fact that the VCLT is an international agreement, as the fact that these articles are considered identical to the customary rules of international law on treaty interpretation.[109] Articles 31 and 32 of the VCLT read as follows[110]:

> *Article 31: General rule of interpretation*
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
> 3. There shall be taken into account, together with the context:
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) any relevant rules of international law applicable in the relations between the parties.
> 4. A special meaning shall be given to a term if it is established that the parties so intended.
>
> *Article 32: Supplementary means of interpretation*
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable.

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[109] See e.g. Bernhardt, R., p. 13; Haraszti, G., p. 206; Linderfalk, U., pp. 8-9; Sinclair, I. (1984), p. 19. See also international jurisprudence such as Case concerning Oil Platforms, Preliminary Objection, ICJ, Judgement of December 12, 1996, p. 812, para. 23; Case Concerning Maritime Delimitation and Territorial Questions between Quatar and Bahrain (Quatar v. Bahrain), ICJ, Judgement of July 1, 1994, p. 59; European Molecular Biology Laboratory Arbitration, Arbitration Tribunal, Award of June 29, 1990, p. 25; Rainbow Warrior (New Zeeland v. France), France-New Zeeland Arbitration Tribunal, Award of April 30, 1990, p. 548, para 72.

[110] Article 33, which concerns how treaty interpretation shall deal the particular issue of treaties that have been authenticated in two or more languages, is omitted since it is outside the realm of this thesis.

The VCLT thus expresses that a starting point shall be taken in the 'ordinary meaning', i.e. wording, of the treaty text that is the object of interpretation. Article 31 is moreover entitled 'General rule of interpretation'. The singular noun emphasises that one must consider each of these three elements, that is wording, object/purpose and context, when interpreting a treaty.[111] In contrast, the supplementary means of interpretation are aids of interpretation that may be used, but not used blindly.[112]

The VCLT also expresses some sort of hierarchy between Article 31 and Article 32 in that the means of interpretation embodied in Article 31 shall be considered a higher authority if it cannot be showed that the interpretation according to Article 31 'leaves the meaning ambiguous or obscure', or 'leads to a result which is manifestly absurd or unreasonable'.[113]

The essential aim of treaty interpretation is to clarify the intention of the contracting parties.[114] It is however crucial to note that although the ultimate goal is to clarify the intentions of the parties, the VCLT only legitimises an interpretation that gives effect to the parties' intention *as expressed in* the words used by them in the light of the other circumstances that the VCLT deem relevant.[115] An obvious breach of this distinction can be observed in *Plama*. The *Plama* Tribunal asserted that subsequent negotiations between the contracting parties showed that they had not intended the MFN provision to extend to more favorable dispute-settlement provisions. These subsequent negotiations took place in 1998 when Bulgaria and Cyprus negotiated a revision of their BIT. The negotiations failed, but the parties had specifically contemplated a revision of the dispute settlement provisions under their BIT.[116] The Tribunal actually referred to a witness statement as well as an exchange of notes between Bulgaria and Cyprus and stated that '[i]t can be inferred from these negotiations that the Contracting Parties to the BIT themselves did not consider that the MFN provision extends to dispute settlement provisions in other BITs'.[117] Expressed differently, the *Plama* Tribunal's argumentation is erroneous in that it appears to have considered the contracting parties' subjective intention, or at least any indication of that intention, as a means of interpretation in itself.

It is significant to note that the rules contained in Articles 31 and 32 are canons of interpretation, i.e. principles of weight character that often contradict. Exactly how they are to be used in order to extract the 'correct' meaning of a treaty's text is a task left to the jurisprudence. As expressed by

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[111] Aust, A., pp.186-187.
[112] Ibidem, p. 201.
[113] Linderfalk, U., pp. 10-12.
[114] See e.g. Sinclair, I. (1984), p. 115; Brownlie, I., p. 605.
[115] Cf. e.g. McNair, A. D., p. 365. McNair describes the process of treaty interpretation as 'the duty of giving effect to the expressed intention of the parties, that is, their intention *as expressed in the words used by them in the light of the surrounding circumstances*'. Cf. e.g. also Brownlie, I., p. 605.
[116] *Plama*, para. 195.
[117] Ibidem.

the International Law Commission: ‘the interpretation of documents is to some extent an art, not an exact science’.[118]

I will now continue on to evaluate arguments forwarded in the recent ICSID jurisprudence rationalised under headings that represent canons of interpretations embodied in the VCLT. The tribunals in the foregoing cases seldom explicitly referred to these customary rules of international law in the VCLT as guiding their interpretation. The categorisation is therefore largely a product of my own rationalisation.

4.2 Wording

Consistent with customary rules of international law, the ICSID tribunals in the foregoing cases stringently took a starting point in the wording of the pertinent MFN provision.

Where an MFN clause explicitly includes or excludes dispute settlement from its scope, the parties’ intention is clear and must be given effect.[119] However, as generally is the case, the MFN clauses in the foregoing cases were predominantly broadly phrased and left a wide scope to argue opposing interpretations. Most tribunals merely noted the broad wording of the pertinent MFN provision and seemingly did not place much significance on the exact phrasing of the broadly worded clause at issue, but used other principles of interpretation to determine if the omission to expressly include dispute settlement was intentional or not. As an example, the *Siemens* Tribunal acknowledged that the MFN clause at hand was narrower in wording than the one in *Maffezini*, but did not see a significant difference, considering that the MFN provision at issue ‘was sufficiently wide to include dispute settlement’.[120] The *Siemens* Tribunal actually went so far as to assert that ‘the term “treatment” is so general that the Tribunal cannot limit its application except as specifically agreed by the parties’.[121]

There are nevertheless significant differences in wording amongst the MFN clauses at hand in the pertinent ICSID jurisprudence. As was argued by Argentina in *Siemens* as well as by the *Salini* Tribunal, an MFN clause that refers to ‘*all* matters subject to this agreement’, as was the case in *Maffezini*, is substantially different and broader than a provision such as the one at hand in *Siemens* which does not in any way clarify to which treatment it relates to.[122] The *Gas Natural* Tribunal simply stated that ‘the terms of the

[118] International Law Commission, Report to the United Nations General Assembly, on the work of the second part of its seventeenth session and on its eighteenth session (1966), p. 218, para. 4.
[119] Gaillard, E., p. 3. See also implicitly *Maffezini*, para. 54.
[120] *Siemens*, para. 103. See e.g. also *Maffezini*, paras. 49, 53; *Plama*, para. 190.
[121] *Siemens*, para. 106.
[122] Ibidem, para 34; *Salini*, paras. 117-118.

BIT between Spain and Argentina show that dispute resolution was included within the scope of most-favored-nation treatment'.[123]

The ordinary meaning of 'all' is hardly ambiguous. '[A]ll matters' is quite simply all matters, including dispute-settlement procedures. It appears difficult to find arguments to the contrary, at least when the basic treaty includes dispute-settlement provisions. Therefore, the *Siemens* Tribunal should not have squarely adopted the wide statements of principle made in *Maffezini* and applied them to a considerably more narrowly drafted MFN clause.

Furthermore, Gaillard has argued that an MFN clause which merely refers to treatment should be interpreted differently to an MFN clause which specifies that the standard applies only to the foreign investor's 'management, maintenance, use, enjoyment or disposal' (or similar enumerations) of investments. He based this assertion on the fact that dispute settlement is not explicitly part of such enumerations.[124] Perhaps such clauses may be seen as implying with a greater degree of clarity that the parties intended to exclude dispute settlement and thus limit the scope to substantive matters. However, it seems difficult to 'maintain', 'use' or 'enjoy' an investment if one cannot ensure these rights through effective dispute resolution.

4.3 Object and purpose

The process of determining a treaty's object and purpose is also a question of treaty interpretation. How such an interpretation shall be practically executed is the subject of debate.[125] However, it is common knowledge that most treaties have multiple objects and purposes. Every provision may have its own separate purpose along with several others that are common to a group of provisions and/or the treaty at large.[126] The international legal literature is furthermore almost unanimously holding that a treaty interpretation using a treaty's object and purpose shall not neglect any of the objects and purposes that the parties presumable intended to realise through the application of the relevant provision.[127]

Most, if not all, of the tribunals in the foregoing cases acknowledged that an interpretation in line with the broader object and purpose of a BIT supports an application of the MFN standard to dispute settlement, because of the inextricably linkage between substantive and procedural rights.

For example, the *Maffezini* Tribunal placed decisive emphasis on the object and purpose of the BIT at large. The Tribunal argued that, notwithstanding

[123] *Gas Natural*, para. 49.
[124] Gaillard, E., p. 3.
[125] See e.g. Haraszti, G., p. 112; Sinclair, I. (1984), p. 135; Villiger, M. E., pp. 343-344.
[126] Linderfalk, U., p. 238.
[127] See e.g. ibidem, pp. 239-246; Villiger, M. E., pp. 321-322.

the fact that the MFN clause did not expressly refer to dispute settlement, there were 'good reasons' to conclude that today's dispute settlement arrangements are 'inextricably related to the protection of foreign investors' in that international arbitration was held to be 'essential' to the substantive protection of rights accorded under BITs.[128] Teitelbaum has expressed that underlining *Maffezini* is the purpose of a BIT to remedy arbitrary discrimination of foreign investors, which she asserts would be contravened if a state would be free to arbitrarily allow some foreign investors access to international arbitration within six months, while making other foreign investors wait 18 months.[129] However, the reliance on this narrower purpose was not expressed in *Maffezini* and an underline is arguably not a sufficient basis for justifying a certain treaty interpretation.

The *Gas Natural* Tribunal concurred with the *Maffezini* Tribunal and considered that the critical issue concerning the extent of an MFN clause is whether dispute-settlement provisions in a BIT forms part of the bundle of protections granted to foreign investors by host states. The Tribunal held that to be the case since independent international arbitration of disputes between investors and host states is 'crucial' and 'perhaps the most crucial element' of investor and investment protection, and the Tribunal furthermore asserted that it is universally regarded as such by opponents as well as proponents. The explanation was said to lie in that provisions for independent international arbitration are designed to assure investors that disputes arising from their investments would not be subject to the 'perceived hazards of delays and political pressures of adjudication in national courts', and, correspondingly, 'to offer to host states freedom from political pressures by governments of the state of which the investor is a national'. The Tribunal also noted that the vast majority of BITs, and nearly all the recent ones, provide for investor-state disputes to be resolved by independent international arbitration.[130] Therefore, the *Gas Natural* Tribunal held that unless it appears clearly that the state arties to a BIT have settled on a different method for dispute settlement, MFN provisions should be understood to be applicable to dispute settlement.[131]

The *Plama* Tribunal questioned the choice if placing the predominant emphasis on a broad object and purpose argumentation. The Tribunal forwarded that such argumentations are 'undeniable in their generality, but legally insufficient' to conclude that the contracting parties intended to cover dispute settlement. The Tribunal said to be mindful of the 'risk that the placing of undue emphasis on the 'object and purpose' of a treaty will encourage teleological methods of interpretation [which], in some of its more extreme forms, will even deny the relevance of the intentions of the parties'.[132]

[128] *Maffezini*, para. 54.
[129] Teitelbaum, R., p. 233.
[130] *Gas Natural*, para 29.
[131] Ibidem, para., 49.
[132] *Plama*, para. 193

The issue of whether an investor may rely on an MFN clause to benefit from the more favorable provisions in the third-party treaty without also having to regard the disadvantageous provisions in that BIT was addressed in both *Plama* and *Siemens*. The *Plama* Tribunal referred to the *Maffezini* Tribunal's assertion of the fact that the application of an MFN provision to dispute settlement 'might result in the 'harmonization and enlargement of the scope of such arrangements'. The Tribunal acknowledged that by allowing an investor to 'pick and choose' provisions from various BITs, a host state, which has not specifically agreed thereto, might be confronted with a large number of permutations of dispute settlement provisions that it has concluded. According to the *Plama* Tribunal, such a 'chaotic situation' would rather be counterproductive to harmonisation and could not be held to be the presumed intent of a contracting party.[133] In *Siemens*, Argentina argued that if the claimants were entitled to import the advantageous aspects of dispute resolution provisions in the basic treaty, then they shall also be required to import the disadvantageous aspects of those provisions, in particular a 'fork in the road' provision absent from the third-party treaty.[134] The *Siemens* Tribunal recognised that there might be a merit in the proposition that a treaty has been negotiated as a package and that the disadvantages may have been a trade-off for the claimed advantages. However, the Tribunal held this not be the meaning of an MFN clause since an MFN clause only refers to 'more-favorable' treatment and that another interpretation would defeat the intended result of a MFN clause, which was held to be the harmonisation of benefits agreed to with different countries.[135]

It is undeniably difficult to deny the inextricable linkage between substantive and procedural rights. However, as was implied by the *Plama* Tribunal, this assertion does not mean that one must agree with the notion that investment treaty obligations shall be interpreted broadly to assist in the promotion of foreign investment, which seems to be governing the argumentation made by the Tribunals in *Maffezini* and *Gas Natural*. The fact that the promotion of foreign investment is one of the key policies underlying the conclusion of investment treaties by states is clear from their preambles. Nevertheless, if this policy is the sole basis for deciding whether a treaty provision should be imported, then the implication is that the investor must prevail for this policy objective of the BIT to be upheld. If reference to the policy of promoting foreign investment never can result in an interpretation favorable to the host state party's defence, then something is terribly wrong with the customary rules enshrined in the VCLT.[136]

As noted, a treaty often has multiple objects and purposes, none of which should be neglected. Accordingly, one may most arguably maintain that, in comparison to the broader purpose of the BIT at large, the MFN standard has a more specific, and arguably more relevant, purpose of contributing to

[133] Ibidem, para. 219.
[134] *Siemens*, para. 111.
[135] Ibidem, para. 120.
[136] A similar argumentation is forwarded in Douglas, Z., p. 51.

investor protection through non-discrimination. When addressing the 'pick and chose' issue, both the *Siemens* and *Plama* Tribunals supported their stances by referring to the objective of MFN provisions to harmonise the rights accorded to foreign investors. It is however highly debatable whether harmonisation is the purpose and not a possible effect of the MFN standard. If one instead places emphasis on the non-discrimination purpose of the MFN standard, an object and purpose interpretation would be legitimate only if the entitlement to more favorable dispute-settlement protection furthered non-discrimination. Therefore, it might be argued that the legitimacy of allowing investors to 'pick and chose', on the basis of an object and purpose argumentation, is dependant upon whether or not the dispute-settlement provisions in the third-party treaty regarded as a whole, including the counterbalances to those benefits set out in the third-party treaty (such as the 'fork in the road' provision in *Siemens*), is more favorable than the dispute-settlement provisions in the basic treaty regarded as a whole.

Even if an arbitral tribunal faced with a request for arbitration under a BIT on the basis on an MFN clause finds the provision to be applicable to dispute settlement and questions of jurisdiction, the tribunal must still, in order to establish jurisdiction, consider whether or not the dispute-settlement provisions in the third-party treaty should be regarded to be a more favorable way of dispute settlement. The issue is almost a corollary to the assessment of whether or not the application of an MFN provision is in line with a BITs broader object and purpose, since both assessments imply that the dispute-settlement provisions in the third-party treaty serve as a more favorable protection. The three tribunals that addressed the issue seem to reflect an epistemological belief in the superiority of international investment arbitration. The *Maffezini* Tribunal merely asserted that international arbitration is 'essential' to the protection of the rights envisaged under the pertinent treaties' and that 'investors, like their States of nationality, have traditionally felt that their rights and interests are better protected by recourse to international arbitration'.[137] Likewise, the *Siemens* Tribunal plainly stated that access to international arbitration is 'part of the protection offered under the Treaty'.[138] Furthermore, as noted, the *Gas Natural* Tribunal asserted that international arbitration assures investors that 'their investments would not be subject to the perceived hazards of delays and political pressures of adjudication in national courts'. Therefore, the Tribunal advanced that 'access to such arbitration only after resort to national courts and an eighteen-month waiting period is a less favorable degree of protection than access to arbitration immediately upon expiration of the negotiation period'.[139]

Nevertheless, is the issue of whether international arbitration shall be regarded more favorable as straightforward as is implied by these decisions? Admittedly, it is most arguably sufficient to render international arbitration

[137] *Maffezini*, paras. 54-55.
[138] *Siemens*, para. 102.
[139] *Gas Natural*, para. 29.

more favorable because recourse to international arbitration generally is regarded to better protect investor's rights and interests as well as to protect investors from the perceived hazards of delays and political pressures of national courts. It is plainly more attractive to choose a tribunal of experienced arbitrators, which may have knowledge of the investor's language and commercial field of operation, who will sit in a neutral country and do their best to carry out the reasonable expectations of the parties, than to entrust the dispute settlement to a an unknown and perhaps commercially inexperienced foreign court that is governed by its own particular national procedural rules and regulations. However, it is at least perceivable to be of a different view. International arbitration has its critics, especially concerning costs, the limited powers of arbitrators, the general incapability of bringing multi-party disputes before the same tribunal and conflicting awards. In addition, the notion of confidentiality in international arbitration has been relaxed.[140] Regardless of which view one takes in the issue, a comparison should arguably have been drawn between the procedural mechanism open to the investor under national law and that in an investor-state arbitral proceeding. However, the outcome in the pertinent cases was perhaps quite apparent and not very controversial. As the claimant in *Plama* argued, it is quite obvious that it is more favorable for the investor to have a choice among different dispute resolution mechanisms and to have the entire dispute resolved by arbitration, than to be confined to *ad hoc* arbitration limited to fixing the amount of compensation that should be accorded for an expropriation.[141] In other words, a choice is better than no choice. It is probably neither considered controversial that access to international arbitration after an 18-month waiting period is less favorable than having that opportunity after six months or directly after a negotiation period. Likewise, access to dispute resolution directly with a state is more favorable than having to rely on the mercy of your own state to take on the dispute on your behalf. However, what if for example the basic treaty provides for UNCITRAL arbitration and the third-party BIT provides for ICSID arbitration; which one should be deemed more favourable? This question raises both the issue of how different arbitration institutions shall be evaluated and which out of institutional and *ad hoc* arbitration should be considered more favorable. One may for example look at the issue of *ad hoc* versus institutional arbitration. The principal advantage of *ad hoc* arbitration is perhaps that the procedure can be shaped to suit the parties. There are nevertheless numerous problems associated with *ad hoc* arbitration. For example, the content is governed by the arbitration agreement, which depends on the relative bargaining power of the parties. In addition, it may be difficult to select acceptable arbitrators who can be relied on to act impartially and not as advocates for the side that has selected them. Finally, there may be problems enforcing any award before municipal courts should they decide that the award is tainted with irregularity or because the state party to the proceedings enjoys immunity from execution under the laws of the forum state. An institutional system of arbitration may be a more reliable means of resolving a dispute than an *ad hoc a*pproach, especially as it is

[140] See e.g. Redfern, A. and Hunter, M., pp. 28-39.
[141] *Plama*, para. 208.

likely to have been devised on a multilateral level. Furthermore, the parties generally have the benefit of the assistance provided by an institution such as ICSID, which may provide a list of arbitrators, detailed rules of procedure or assist in the choice of arbitrators. The ICSID is in addition the only institutional system international conciliation/arbitration specifically designed to deal with investment disputes under BITs. In any event, the question of the more favorable way of dispute settlement is a difficult task facing the jurisprudence.

The issue of what should be deemed more favorable raises more questions that have not yet been properly dealt with in the international legal arena. For example, should one apply an objective or a subjective criterion for making this assessment? In the latter case, should it be the opinion of the investor or the host government that prevails? Both the *Plama* Tribunal and the respondent state in *Maffezini* seem to favor an objective assessment, but without supplying any particular explanation as to why.[142] Moreover, one may ask whether the assessment needs to be made in respect of an individual case or with regard to the issue in general, i.e. if one should apply an abstract or concrete test. Domestic law may for example provide a foreign investor with a greater choice of judicial remedies than would be available under international arbitration. Could the investor nevertheless opt for the latter if the domestic courts of the host country do not function properly for the moment being (for instance in a situation of political turbulence)? If emphasis is placed on the non-discrimination purpose an MFN provision, it is most arguable that it is an objective and abstract test that should be used. This conclusion is based on the fact that the MFN standard accords the investor protection to foreign investor against arbitrary discrimination based on nationality, i.e. not merely based on the fact that the individual is an investor. A subjective and/or concrete test does not necessarily further this non-discrimination purpose, but merely the foreign investor's interests as an individual. In comparison, an abstract and objective test can take in to consideration whether the measure that the foreign investor has been exposed to generally would have a discriminatory effect.

Another concern is how much better the dispute-settlement provisions in the third-party treaty must be in order to be considered 'more favorable'. The wording of MFN provisions does not appear to pose any hindrance as they merely refer to 'more favorable' treatment. Maybe the question is whether an arbitration will further the relevant purpose, which may be questionable with really ´insignificant' claims. However, the cost of international commercial arbitration will probably prevent this issue from being something other than a theoretical concern.

Kurtz has argued that a broad interpretation of MFN clauses in trade-related treaties is justified based on the accepted economic benefits of trade liberalisation. Conversely, he argues that the haphazardly transfer of the

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[142] *Maffezini*, para. 42; *Plama*, para. 208.

MFN standard into investment, alongside with the fact that the economic case for removal of investment barriers, which in his view by no means is clear and absolute, results in 'a pressing need for a greater level of institutional sensitivity by the dispute settlement organs which will decide how the [investment] MFN standard is to be interpreted'.[143] If you may view the purpose of an MFN clause this wide is more than questionable. However, what Kurtz in effect appears to have done, is to deliver an effect argumentation, which is not an accepted means of interpretation under the VCLT. An express provision, on what generally is called the rule or principle of effectiveness, was contemplated in the work leading up to the VCLT in a report by Sir Waldrock.[144] However, the proposal received criticism and was unanimously rejected.[145] Furthermore, the general opinion in international law literature appears to be that the principle does not have an independent role to play. The general view on the matter is instead that if the principle has any place in international law, it is because the treaty text is presupposed to be effective in relation to its wording, object and purpose, and context.[146] Therefore, Appleton has rightly argued that 'the economic consequences of treaty interpretation, as well as the decision to transfer MFN into investment, are matters for policy makers and not for arbitral tribunals. After national policy makers have agreed on the economic benefits of a BIT, it is not a tribunal's role to question those benefits but to interpret the treaty accordingly.'[147]

4.4 Context

The context of an MFN clause in the meaning of Article 31(2) of the VCLT is basically the remaining provisions of the BIT that contains it, i.e. the treaty text, as well as additional agreements and instruments that the parties have agreed on and that specifically relate to the pertinent treaty. Article 31(3) lists a number of other circumstances that 'shall be taken into account together with the context', such as 'any relevant rules of international law applicable in the relations between the parties'. Generally, the circumstances in paragraph 3 are also considered to form part of the context.[148] I will follow this practice for the purpose of this thesis.

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[143] Kurtz, J., p. 554.

[144] International Law Commission, Third Report on the Law of Treaties (1964), p. 53.

[145] International Law Commission, Summary Records of the sixteenth session (1964), p. 291, para. 120.

[146] See e.g. Amerasinghe, C. F., pp. 195-196; Haraszti, G., pp. 166-170; Fitzmaurice, G. (1957), pp. 220-223; Fitzmaurice, G. (1951), pp. 18-20; International Law Commission, Third Report on the Law of Treaties (1964), pp. 60-61, paras. 27-30.

[147] Appleton, B., p. 16.

[148] See e.g. Villiger, M., p. 344. See also 'Draft Article With Commentaries' in International Law Commission, Report to the United Nations General Assembly, on the work of the second part of its seventeenth session and on its eighteenth session (1966), p. 220, para. 8: 'the word "context" in the opening phrase of paragraph 2 is designed to link all the elements of interpretation mentioned in this paragraph to the word "context" in the first paragraph and thereby incorporate them in the provision contained in that paragraph. Equally, the opening phrase of paragraph 3 "There shall be taken into account together with

4.4.1 Article 31(2): 'the text'

Based on the remaining text of a BIT, it might be argued that if the basic treaty contains specific dispute-settlement provisions, the contracting parties cannot reasonably have intended them to be overridden by dispute-settlement provisions from a third-party treaty via the invocation of an MFN clause.

The respondent state in *Salini*, Jordan, submitted arguments to this effect. Jordan argued that the dispute settlement envisaged in the basic treaty should prevail since an MFN clause cannot override the express choice of dispute resolution procedure in Article 9(2) of the BIT.[149] The Tribunal agreed and thus found that Article 9(2) revealed an express common intention to exclude contractual disputes from ICSID arbitration in order that such disputes might be settled in accordance with the procedures set forth in the investment agreements.[150]

In *Siemens*, Argentina argued that the relevant dispute resolution provisions of the basic treaty had been specially negotiated and therefore not subject to amendment by virtue of the MFN clause. According to Argentina, another interpretation would deprive the specifically negotiated dispute resolution provisions of any meaning.[151] The *Siemens* Tribunal commented as follows: '...the purpose of the MFN clause is to eliminate the effect of specially negotiated provisions unless they have been excepted'.[152] To say the least, this is a bold statement made by the Tribunal. The justification for this assertion seems absent. Eliminating the effect of specially negotiated provisions is hardly the purpose of an MFN clause, arguably the effect. Nevertheless, the *Siemens* Tribunal appears to have placed emphasis on other contextual arguments. The article containing the MFN clause as well as a protocol to the basic treaty provided for express exceptions concerning for example the relation to security measures or taxation privileges of nationals or national companies. The *Siemens* Tribunal held that these exceptions confirmed the generality of the words used in the MFN clause since it indicated that when the parties meant to provide a limitation by way of an exception, they had done so expressly.[153] The Tribunal therefore found that the plain and general wording of the pertinent MFN clauses, in conjunction with the context, could not be interpreted as limiting the scope of the MFN clause to exclude the protection of investment through arbitration.[154]

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the context" is designed to incorporate in paragraph 1 the elements of interpretation set out in paragraph 3'.

[149] *Salini*, para. 103.

[150] Ibidem, para. 118, emphasis added.

[151] *Siemens*, para. 59.

[152] Ibidem, para. 106.

[153] Ibidem, para. 81.

[154] Ibidem, para. 86.

The *Plama* Tribunal explicitly expressed that it found no guidance in Article 31 (2) and (3).[155] Notwithstanding, the Tribunal did advance and place emphasis on rather convincing contextual arguments. The Tribunal asserted that 'dispute resolution provisions in a specific treaty have been negotiated with a view to resolving disputes under that treaty. Contracting States cannot be presumed to have agreed that those provisions can be enlarged by incorporating dispute resolution provisions from other treaties negotiated in an entirely different context'.[156] These arguments were held to be particularly strong 'when parties have agreed in a particular BIT on a specific dispute resolution mechanism, as is the case with the Bulgaria-Cyprus BIT (*ad hoc* arbitration), their agreement to most-favored nation treatment means that they intended that, by operation of the MFN clause, their specific agreement on such a dispute settlement mechanism could be replaced by a totally different dispute resolution mechanism (ICSID arbitration)'. The Tribunal thereby acknowledged the (contextual) difference of adding more favorable treatment provided for in a third-party treaty, and the instance of when the enlargement sought by the applicant would require the replacement of a procedure specifically negotiated by parties with an entirely different mechanism.[157] However, a basic treaty that does not contain investor-state dispute-settlement provisions is contextually different. In such instances, the case for arguing that the parties intended dispute-settlement to be included within the scope of the MFN clause is considerably weaker. An effect of such argumentation may arguably be found in *MTD*, where the Tribunal expressed that only provisions that are specifically relevant to the clarification of obligations under the BIT containing the MFN clause may be considered for incorporation via the clause.

In *Siemens*, Argentina wanted to differentiate between Article 3(1), i.e. the part of the pertinent MFN clause that referred to 'investments', Article 3(2), which referred to 'nationals or companies of the other Contracting Party' and the double reference to investments and investors in Article 4.[158] This highlights the issue of whether there should be a differentiation between MFN clauses that only refer to investments, and MFN clauses that refer to investments and/or investors. The *Siemens* Tribunal found that, for purposes of applying the MFN clause, there was no special significance to the differential use of the terms investor or investments in the BIT. The Tribunal noted that the BIT was a treaty to promote and protect investments. Investors did not expressly figure in the title. The *Siemens* Tribunal found it appropriate to consider that treatment of investments includes treatment of the investor and that the reference to both investors and investments in Articles 3 and 4 was a matter of emphasis of this fact.[159] In additions, there is perhaps a general argument to be made against a possible differentiation between MFN clauses in that the inextricable linkage between the

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[155] *Plama*, para. 194.
[156] Ibidem, para. 207.
[157] Ibidem, para, 209.
[158] *Siemens*, para. 36.
[159] Ibidem, para. 92.

investment and the investor makes it highly illogical to not include the protection of investors in the protection of the investment. Notably, this is more of an object and purpose argumentation.

Also in *Siemens*, Argentina contended that the MFN clause in Article 4(4) of the Germany-Argentina BIT, which referred to 'treatment... in all matters covered in this Article' could not cover dispute settlement, because that subject was addressed in another article of the BIT and would thus be covered by Article 3(1) and (2) of the treaty, thereby making Article 4(4) superfluous.[160] The *Siemens* Tribunal found that, to the extent there was an overlap, it needed to be understood as covering areas of special interest to the parties. The Tribunal explained that compensation on account of expropriation, civil war or other violent disturbances is a key issue in the treatment of foreign investment and foreign nationals and that a specific reference to it would seem congruent with its importance. The repeated provision in a particular context was therefore to be seen as stressing the concern of the parties in respect of that particular matter rather than limiting the scope of the clauses of a general character.[161] Why and how this importance was extracted is unclear. Moreover, it is not clear why the Tribunal's argumentation would prevent Article 4(4) from being a specification, considering that only providing MFN treatment to these certain matters also would be commensurate with their importance.

Notably, a respondent state might perhaps argue that an MFN provision relates to substantive issues since MFN provisions generally are set forth amongst the treaty's provisions relating to substantive investment protection. However, none of the respondent states in the foregoing cases made such an argument.

Lastly, a common element to the 'public policy' limitations listed in *Maffezini* is that all the identified situations relate to the expressed intention of the parties, which undoubtedly could serve as contextual arguments. The problem with the arguments is the way in which they were argued in *Maffezini*. Firstly, the *Maffezini* Tribunal did not limit possible exceptions to instances where the basic treaty or other relevant context contains express intentions. Secondly, the basis for seemingly giving these limitations an absolute character is unclear and most arguably difficult to legitimise, since the VCLT consists of principles. Furthermore, the *Maffezini* Tribunal did not find any of these exceptions applicable, which is quite remarkable since, by doing so, the Tribunal differentiated between the requirement to refer the dispute to local courts for eighteen months and the requirement of 'exhaustion of local remedies'.

[160] Ibidem, paras. 43-44.
[161] Ibidem, para. 90.

4.4.2 Article 31(3)(c): ‘relevant rules of international law’

Article 31(3)(c) requires that account shall be taken of ’any relevant rules of international law applicable in the relations between the parties’. The article expresses the objective of a general principle governing all treaty interpretation, namely *systematic integration*.[162] The objective of this principle is that treaties are part of the international law system and, as such, are deemed to refer tacitly to general principles of international law for all questions that the treaty in itself does not resolve in express terms.[163] The reference to ‘international law’ in Article 31(3)(c) is therefore, according to the predominant part of the international law literature, a referral to rules that have an origin which can be traced back to the acknowledged sources of international law, i.e. international conventions and treaties, custom and general principles of law.[164]

The limitation to ´relevant´ international law in Article 31(3)(c) is a requirement that the rule shall regulate the substantive issue that the interpretation concerns.[165] Since principles of interpretation only indirectly regulate substantive issues, they are relevant first as supplementary means of interpretation.

4.4.2.1 ‘[A]n agreement to arbitrate shall be clear and unambiguous’

As noted, the *Plama* Tribunal did expressly proclaim that it did not find guidance in Article 31(3) of the VCLT.[166] Nevertheless, the Tribunal placed significant, if not the predominant, emphasis on what it considered a ‘well-established principle, both in domestic and international law’, that an agreement to arbitrate shall be ‘clear and unambiguous’.[167] It is perhaps arguable that the *Plama* Tribunal implied that the requirement of a clear and unambiguous agreement to arbitrate is a principle of interpretation that thus would constitute a supplementary means of interpretation, but such a

[162] See e.g. International Law Commission, Report to the General Assembly, on the work of its fifty-eighth session (2006), p. 413, para. 17.
[163] See e.g. McNair, A. D., p. 466. See also international jurisprudence such as Georges Pinson Case (France v. Mexico), French-Mexican Claims Commission, Award of October 19, 1928, p. 422, para. 50. The Commission noted that the parties are taken to refer to general principles of international law for questions which the treaty does not itself resolve in express terms or in a different way.; Case concerning the Right of Passage over Indian Territory (Portugal v. India), ICJ, Judgement of November 26, 1957, p. 142. The Court stated that ‘[i]t is a rule of interpretation that a text emanating from a government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it.’
[164] See e.g. Haraszti, G., p. 146; Villiger, M, p. 268. See also International Law Commission, Report to the General Assembly, on the work of its fifty-eighth session (2006), p. 413, para. 18.
[165] Linderfalk, U., p. 203.
[166] *Plama*, para. 194.
[167] Ibidem, para. 200.

proposition seems far-fetched. For example, the principle appears to require that the treaty first be interpreted in order to determine whether the arbitration agreement is clear and unambiguous. In any event, the *Maffezini* Tribunal wanted to replace the *Maffezini* rule and its public policy exceptions with a single rule with one exception that embodied the principle: 'an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves *no doubt* that the Contracting Parties intended to incorporate them'.[168] The *Plama* Tribunal used the MFN provision in Article 3 of the UK Model BIT as an example of when an MFN clause clearly and unambiguously constitutes an agreement to arbitrate, which expressly states that the MFN standard should apply to dispute settlement.[169] The *Plama* Tribunal did not comment directly on whether the MFN clause in *Maffezini* would meet the 'no doubt' criteria. However, it asserted that an MFN clause that used the quite similar expression 'with respect to *all matters*' did not alleviate such doubt.[170]

The principle that an agreement to arbitrate shall be clear and unambiguous may perhaps surmount to a source of international law.[171] For example, the European Court of Human Rights (hereinafter the ECHR) has stated that the waiver of the rights under Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), which embodies the right to access to court, must be made in an 'unequivocal' manner.[172] The European Commission of Human Rights (hereinafter the European Commission) has required an 'unequivocal' waiver also in an arbitral context.[173] One may perhaps also claim that the principle underlines the international conventions on arbitration, such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral awards (1968)(the New York Convention), which all require an arbitration agreement to be 'in writing'.[174] Redfern and Hunter have furthermore stated that '[t]he reasons for imposing this ['in writing'] requirement is self evident. A valid agreement to arbitrate excludes the jurisdiction of the national courts and means that any dispute between the parties must be resolved by a private method of dispute resolution, namely arbitration. This is a serious step to take, albeit one that is becoming increasingly commonplace. There exist good reasons, therefore, for ensuring that the existence of such an agreement should be clearly established.'[175] In addition, the *Plama* Tribunal implied that the incorporation via an MFN clause may be likened to incorporation of an arbitration agreement by

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[168] Ibidem, para. 223, emphasis added.
[169] *Plama*, para. 204.
[170] Ibidem, para. 205.
[171] Fietta for example welcomed the approach taken in *Plama*, submitting that 'this approach is consistent with the applicable principles of international law, Fietta, S., p. 141.
[172] See e.g. Pfeifer and Plankl v. Austria, ECHR, Judgement of February 25, 1992, p. 16, para. 37.
[173] Axelsson v. Sweden, European Commission, Decision of July 13, 1990.
[174] See e.g. Article II(1) of the New York Convention.
[175] Redfern, A. and Hunter, M., p. 159.

reference.[176] The Tribunal referred to Article 7(2) of the UNCITRAL Model Law which provides: *'The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract' (emphasis added). The Tribunal found this article to exemplify the principle in that a reference in it self would not be sufficient, but* has to be such as to make the arbitration clause part of the contract. In the Tribunal's view, this was 'another way of saying that the reference must be such that the parties' intention to import the arbitration provision of the other agreement is clear and unambiguous'.[177]

Nevertheless, even if the principle would amount to an established principle of international law; why should this principle be held relevant to a state's agreement to arbitrate? This principle is quite evidently based on the interest of protecting individuals and/or the individuals need for protection.[178] The nationals of contracting states are not parties to the BITs and do not waiver their right to anything based on these treaties. It is a state's possible waiver through an MFN provision under a BIT that is the issue here and a state's need for protection involves entirely different concerns than what constitutes the basis for this principle. In other words, the argumentation made by the *Plama* Tribunal appears seriously flawed since the principle, whether or not it amounts to a source of international law, cannot squarely be held applicable to a state's agreement to arbitrate.

4.4.2.2 Lex specialis

Dolzer and Myers are of the opinion that the 'public policy' exceptions, especially the last two identified in *Maffezini*, rely on the maxim according to which a specific regulation (the contractual stipulation in the basic treaty) supersedes a more general provision (the MFN provision).[179] However, this is for a fact not the way in which the *Maffezini* Tribunal legitimised their argument. It may in any event be interesting to look into whether an argument based on this maxim is legitimate, which is highly doubtful.

The maxim *lex specialis* (sometimes referred to as *lex specialis derogat legi generali* or *generalia specialibus non derogat*) has a long pedigree in international jurisprudence and is generally accepted as a general principle of law.[180] The maxim suggests that whenever two or more norms deal with

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[176] *Plama*, para. 199.
[177] Ibidem, para. 200.
[178] The principle may for example be commensurate to rule of law concerns, that an individual's waiver of state administered justice is a serious step to take and hence one that must be clearly established, that individuals need to be protected of protecting individuals from being subjected to stronger private parties' arbitrary use of power, and/or that individuals would not fathom the implications of an agreement to arbitrate etc., cf. e.g. Westberg, P., pp. 361-362.
[179] Dolzer, R. and Myers, T., p. 54.
[180] See e.g. Mus, J. B., p. 218. For application in relation to provisions within a single treaty, see e.g. Beagle Channel Arbitration (Argentina v. Chile), Court of Arbitration established by the British Government pursuant to the Argentina-Chile General Treaty of

the same subject matter, priority should be given to the norm that is more specific, that is, the rule with a more precisely delimited scope of application.[181] The relationship between the general standard and the specific rule is perceived in principally two ways. One is where the specific rule should be read and understood within the confines or against the background of the general standard, i.e. one assists in the interpretation of the other and the rules are applied in conjunction.[182] The predominant part of the international law literature does however view the maxim as a rule that aids in the determination of priority between two rules that conflict, either as an interpretative rule or as a conflict rule. As such, it covers the case where two legal provisions that are both valid and applicable provide incompatible direction on how to deal with the same set of facts. *Lex specialis* then suggests that, instead of the general rule, the specific rule shall have priority.[183] However, whichever way one looks at it, both perspectives take a starting point in two or more rules or principles that are valid and applicable in respect of a situation. However, before one knows whether two norms are applicable to the same issue, the norms need to be interpreted, and this is not something for which the maxim provides any tools. In other words, *lex specialis* will not provide any guidance to whether an MFN provision is applicable. Furthermore, even if an MFN clause would be interpreted as being able to incorporate a certain dispute-settlement provision, the nature of the standard is that conflicting provisions may be incorporated and that process should therefore not be limited by *lex specialis*.

4.4.2.3 Exhaustion of local remedies

The first of the ’public policy considerations’ listed in *Maffezini* was ‘where there is an express condition to arbitration of exhaustion of local remedies’ in the basic treaty, since ‘the stipulated condition reflects a fundamental rule of international law’.

There is a striking consensus that the rule on exhaustion of local remedies forms part of customary international law.[184] In essence, the rule states that, in the absence of an agreement to the contrary, a claim will not be admissible on the international plane unless the alien or corporation concerned has exhausted the legal remedies available to him in the state that

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Arbitration, 1902, 1977, pp. 141-142, paras. 36, 38-39; Brannigan and McBride v .the United Kingdom, ECHR, 1993, p. 57, para. 76.

[181] See e.g. International Law Commission, Report to the United Nation General Assembly, on the work of its fifty-eighth session (2006), p. 408, para. 5.

[182] Haraszti, G., pp. 191-192; Fitzmaurice, G. (1957), pp. 236-238

[183] See e.g. Linderfalk, U., pp. 353-354; Mus, J. B., p. 218; Wolfram, K., p. 937.

[184] See e.g. International Law Commission, Second Report on Diplomatic Protection, by Sir John Dugard (2001), pp. 2-4; Doehring, K., p. 238. See also e.g. Interhandel Case (Switzerland v. the United States), ICJ, 1959, p. 27; Case concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy), ICJ, 1989 (hereinafter *ELSI*), p. 42, para. 50 and Article 41(c) of International Covenant on Civil and Political Rights (1966) (ICCPR); Article 2 of Optional Protocol to the ICCPR.

supposedly has caused injury.[185] In any event, the *Maffezini* Tribunal adhered the principle to 'public policy' and regarded it as an exception and not merely an argument for the limitation of an MFN provision. It appears more adequate, from a VCLT perspective, to acknowledge a condition of exhaustion of local remedies to be part of the context as it is an expression of a 'relevant rule of international law', which therefore should not be tacitly overridden. In comparison to *Maffezini* however, this would just be an argument amongst others, since Articles 31 and 32 of the VCLT embodies several ways to argue, none of which excludes all the other arguments.

In both *Siemens* and *Gas Natural*, Argentina argued that the 18-month requirement of recourse to local remedies was an expression of the exhaustion of local remedies rule that cannot be avoided by means of resort to an MFN clause.[186] Both the *Siemens* Tribunal and the *Gas Natural* Tribunal convincingly repudiated such an argumentation. The 18-month requirement does neither require a prior final decision of a court at any level, nor does it hinder recourse to arbitration if a non-final decision has been rendered in domestic courts. Furthermore, as was noted by the *Gas Natural* Tribunal, Article 26 of the ICSID Convention expressly provides that the rule of exhaustion of local remedies is excluded. Accordingly, the 18-month provision does not come within the concept of prior exhaustion of local remedies as understood in international law.[187]

However, the question remains of how the rule relates to investor-state dispute-settlement provisions that remain silent on whether the disputant investor has an obligation to exhaust local remedies. Arguably, it should not be possible to exclude so basic a rule of customary international without express words to the contrary.[188] Support for this view may be amassed from the decision of the ICJ in *ELSI*, in which the Chamber of the Court considered whether a foreign investor was required to exhaust local remedies before the investor's home state could pursue an international claim with the host state concerning an alleged breach against the investor. The treaty in question provided for state-state arbitration, but was silent on the need to exhaust local remedies. The ICJ did in any event hold the local remedies rule applicable: 'The Chamber has no doubt that the parties to a treaty can therein either agree that the local remedies rule shall not apply to claims based on alleged breaches of that treaty; or confirm that it shall apply. Yet the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so'.[189] Even if the *ELSI* case concerned whether local remedies needed to be exhausted prior state-state arbitration, this distinction does not necessarily mean that the approach taken should be disregarded, as there is arguably no

[185] See. e.g. Brownlie, I., pp. 482-483.
[186] *Siemens*, para. 51; *Gas Natural*, para. 27.
[187] *Siemens*, para. 104; *Gas Natural*, para. 30.
[188] Cf. UNCTAD, *International Investment Agreements: Key Issues*, p. 356.
[189] *ELSI*, p. 42, para. 50.

reason in principle to reject the ICJ's pronouncement with respect to investor-state disputes. The need to observe the local remedies rule may therefore apply in relation to arbitration other than ICSID arbitration, considering Article 26 of the ICSID Convention.[190] On the other hand, since BITs allow for direct access to international arbitration, investor-state dispute-settlement provisions may be understood to imply that the contracting states have dispensed with the requirement that local remedies must be exhausted.[191] This view is supported by Article 26 of the ICSID Convention. Furthermore, the pertinent treaty in *ELSI* did not contain an investor-state dispute settlement clause providing for direct investor access to international arbitration.[192]

4.4.2.4 Non-retroactivity of treaties

The same basic rationale, as concerning the exhaustion of local remedies, may be applied to a principle like the non-retroactivity of treaties, which the *Tecmed* Tribunal appears to have added to the list of limitations in *Maffezini*. Non-retroactivity of treaties is most arguably a customary rule of international law.[193] As such, it may be used as an argument amongst others under the VCLT against incorporating provisions that allow for retroactive application.

4.5 Supplementary means of interpretation

'Supplementary means of interpretation' are meant to shed further light on the intentions of the parties and their common understanding of the treaty terms.[194] In comparison to Article 31, the interpretation under Article 32 does not have to be reconcilable with the ordinary meaning of the treaty text. Article 32 provides two examples of supplementary means of interpretation, namely the 'preparatory work of the treaty and the circumstances of its conclusion'. Other supplementary means naturally pertain to the means of interpretation that do not satisfy the conditions of Article 31, but which international custom acknowledges as interpretative

[190] Cf. UNCTAD, *International Investment Agreements: Key Issues*, p. 357.
[191] Cf. Schreuer, C., pp. 390-396.
[192] Cf. UNCTAD, *International Investment Agreements: Key Issues*, p. 357.
[193] See e.g. Article 28 of the VCLT; International Law Commission, Report to the United Nations General Assembly, on the work of the second part of its seventeenth session and on its eighteenth session (1966), pp. 211-214, paras. 1-5. See also international jurisprudence such as Mavrommatis Palestine Concessions (Greece v. Great Britain), Permanent Court if International Justice (hereinafter PCIJ), Judgement of August 30, 1924, p. 28; Ambatielos Case, ICJ, Judgement of July 1, 1952, p. 40: 'To accept this theory would mean giving retroactive effect to Article 29 of the Treaty of 1926, whereas Article 32 of this Treaty states that the Treaty, which must mean all the provisions of the Treaty, shall come into force immediately upon ratification. Such a conclusion might have been rebutted if there had been any special clause or any special object necessitating retroactive interpretation. There is no such clause or object in the present case. It is therefore impossible to hold that any of its provisions must be deemed to have been in force earlier.'
[194] Villiger, M. E., p. 345.

means that may be used when the general rule of interpretation turn out to be insufficient.[195] This embodies both means of interpretation, such as treaties *in pari materia*, as well as rules of interpretation, such as *the rule of necessary implication* and the principle *ejusdem generis*.[196]

4.5.1 Treaties in pari materia

International law literature along with international legal practice support that *treaties in pari materia* may be considered when interpreting a treaty text.[197] Treaties *in pari materia* refer to any instrument that at least partially shares the same substance matter as the treaty that is interpreted.[198] Such instruments may of course at times be considered already under 31(3)(c) as a 'relevant rule of international law applicable between the parties'. Notably, the referral to 'parties' in Article 31(3)(c) is a reference to all the parties to a treaty.[199] In other words, only when both parties to a BIT are parties also to another treaty, the latter treaty would constitutes a 'relevant rule of international law applicable in the relation between the parties, which should be taken into account already under Article 31 of the VCLT.

The *Maffezini* Tribunal examined in detail the practice followed by Spain in respect of BITs with other countries in order to establish whether Spain held a public policy that could limit the scope of the MFN clause. The Tribunal found Spain not to hold such a policy since Spain's preferred practice was to allow for arbitration following a six-month effort to reach a friendly settlement.[200] The *Plama* Tribunal also expressed that the treaties between one of the contracting parties and third states may be taken into account for the purpose of clarifying the meaning of a treaty's text at the time it was entered into. The claimant had provided a presentation of Bulgaria's practice regarding investment treaties that Bulgaria had concluded subsequent to the Bulgaria-Cyprus BIT in 1987. The presentation revealed that in the 1990s, after Bulgaria's communist regime changed, it began

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[195] Linderfalk, U., pp. 264-265.

[196] Cf. Villiger, M. E., p. 345. In addition, Linderfalk is of the view that the context as well as the object and purpose also may be regarded as supplementary means of interpretation. Thereby, in contrast to under Article 31, these means could be used to reach a result that is not in accordance with the ordinary meaning of the text, Linderfalk, U., pp. 293-30.

[197] See e.g. Haraszti, G., p.148; Villiger, M. E., p. 345. See also international jurisprudence such as Müller and Others v. Switzerland, ECHR, 1988. The ECHR found confirmation to the fact that Article 10 of the European Convention should be interpreted to include 'artistic expressions' in Article 19(2) of the ICCPR, which expressly includes information and ideas 'in the form of art' within the right to freedom of expression.; Case concerning Oil Platforms, Preliminary Objection, ICJ, Judgement of December 12, 1996. The case concerned *inter alia* whether a clause involved an actual obligation or merely an ambition. The ICJ interpreted the clause in the light of four other multilateral treaties, to which Iran and the United States both were parties to and which contained similar clauses. According to the ICJ, the nature of these clauses was given clarity through a discussion in the United States preceeding the ratifications of these four treaties.

[198] Cf. e.g. Linderfalk, U., p. 287.

[199] Haraszti, G., p. 148.

[200] *Maffezini*, para. 58

concluding BITs with much more liberal dispute resolution provisions, including resort to ICSID arbitration. The *Plama* Tribunal did not hold that practice particularly relevant in the instant case, but merely because the subsequent negotiations considering a new BIT had revealed a contrary intention concerning the MFN clause in the basic BIT.[201]

Notably, the argumentation forwarded by the *Maffezini* and *Plama* Tribunals concerning the host states BIT practice cannot be justified under Article 31(3)(b), since it refers to 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'. Thus, Article 31(3)(b) does not allow for recourse to subsequent practice concerning other treaties than the one that is the subject of interpretation and only concern a practice that both parties have participated in or agreed to. Neither did the Tribunals seem to imply that the practice would amount to a regional custom, which may be justified under 31(3)(c), since they only considered the host state's practice. However, the referral to other BITs may be justified if seen as reliance upon treaties *in pari materia*. Nevertheless, there are circumstances in the arguments forwarded above that eat away at the strength of such argumentation. Firstly, consideration does only appear to have been taken to the subsequent practice of one of the contracting parties. It is at least arguable that account should be taken of the subsequent BITs of both the contracting parties in order to clarify the intentions that may be deemed common to the parties. Furthermore, the mere fact that subsequent BITs contain more liberal dispute settlement provisions, does not per necessity or logic deem the basic treaty to imply that the parties to the basic treaty also had such liberal intentions. The subsequent BITs could for example merely display a change of policy commensurate to a new regime, as may have been the case in *Plama*.

In *Siemens*, Argentina argued that since it had expressly included dispute settlement in the MFN clauses contained in other investment treaties, the failure to do so in the Argentina-Germany BIT showed that, if the parties intended to include the dispute settlement system within the scope of application of the MFN clause, they expressly did so.[202] The *Siemens* Tribunal did however not find it pertinent to address the issue since it found that the intention of the parties had been clearly expressed.[203] Even if Argentina's argument may be viewed as reliance upon treaties *in pari materia*; an emphasis on the fact that other MFN clauses expressly include dispute settlement within their scope does not appear to be a strong basis for arguing how a differently worded MFN clause should be interpreted. It would have been interesting if the parties' intentions concerning the scope of similar MFN clauses could somehow have been clarified.

[201] *Plama*, para. 195. The legitimacy of these subsequent negotiations has been dealt with above under 4.1.
[202] *Siemens*, para. 48.
[203] Ibidem, para. 106.

4.5.2 The rule of restrictive interpretation

What the *Plama* Tribunal perhaps could have considered in order to protect the state's interests, instead of the 'well-established principle, both in domestic and international law', is *the rule of restrictive interpretation*. It has rarely been applied in international law practice.[204] Nevertheless, the general opinion in international legal literature appears to be that it amounts to a principle of international law.[205] The principle is an expression of the fundamental principle of state sovereignty, and as such, it implies that an ambiguous treaty text shall be interpreted in a way that restricts state obligation.[206] Thereby, it is arguable that *the rule of restrictive interpretation* shall influence the interpretation of a broadly worded MFN provision in the direction that infringes the least upon a state's exclusive jurisdiction concerning activities within its territory.

4.5.3 Ejusdem generis

According to several international law scholars, the principle *ejusdem generis* shall be applied when interpreting a treaty text.[207] It was also frequently acknowledged in the ICSID cases pertinent to this thesis. The principle is to the effect that general words, when following or sometimes preceeding special words, are limited to the genus, if any, indicated by the special words.[208] When applied in the context of determining the scope of an MFN provision, the principle proposes that an MFN clause only can attract matters belonging to the same category of subject as that to which the clause itself relates.[209]

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[204] Essentially, three cases are used in international law literature as examples of the application of *the rule of restrictive* interpretation: Article 3, Paragraph 2, of the Treaty of Lausanne (Frontier between Turkey and Iraq), PCIJ, November 21, 1925; The Kronprins Gustaf Adolf; The Pacific (United States and Sweden), Borel, Arbitrator, Award of July 18, 1932 (hereinafter *Kronprins Gustav Adolf*); Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder, PCIJ, Judgement of September 10, 1929 (hereinafter *International Commission of the River Oder*).

[205] See e.g. Akehurst, M., p. 205; Brownlie, I. (1973), p. 609; Haraszti, G., pp. 154-163.

[206] See e.g. *Kronprins Gustav Adolf*, p. 375, para. 2: 'it must be observed that, considering the natural state of liberty and independence which is inherent in sovereign states, they are not to be presumed to have abandoned any part thereof, the consequence being that the high contracting parties to a treaty are to be considered as bound only within the limits of what can be clearly and unequivocally found in the provisions agreed to and that those provision, in case of doubt, are to be interpreted in favor of the natural liberty and independence of the party concerned'. See also e.g. *International Commission of the River Oder*, p. 21 (of the web site edition).

[207] See e.g. Brownlie, I. (1973), p. 607; Haraszti, G., p. 192; McNair, A. D., p. 393.

[208] Cf. e.g. Brownlie, I. (1973), p. 607; McNair, A. D., p. 393.

[209] Ambatielos Claim (Greece v. United Kingdom), Commission of Arbitration established by the Agreement concluded on the 24th of February 1955 between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Greece for the arbitration of the Ambatielos Claim, Award of March 6, 1956, p. 107. See also Freyer, D. H. and Herlihy, D., p. 66, footnote 21; Gaillard, E., p. 1.

Accordingly, the claimant in *Siemens* argued that, since both the basic treaty and the third-party treaty relate to investment, all the principle implies is that the MFN provision and the more favorable provision both shall relate to jurisdiction.[210] However, the principle *ejusdem generis* does not answer how one shall determine, i.e. interpret, to what matters an MFN provision relates. As noted, the *MTD* Tribunal decided that the provisions in the third-party treaty related to the fair and equitable standard in the basic treaty first after having interpreted the standard in the manner most conducive to fulfil the objective of the BIT. Naturally, the principle also has a limited, if any, practical value to the process of determining whether the scope of an MFN clause includes dispute settlement and questions of jurisdiction. As an example, the *Maffezini* Tribunal reasoned that whether or not the *ejusdem generis* principle was satisfied depended on the actual text of the clause, taking into account 'the intention of the Parties as deduced from a reasonable interpretation of the Treaty'.[211]

[210]*Siemens*, para. 69.
[211] *Maffezini*, para. 53.

5 Concluding reflections

The preceeding evaluation reveals a rather negligent jurisprudence. The tribunals at times appear to have reached for simple answers and relied on arguments that have a highly questionable or skin-deep legitimacy.

Significantly, the absence of formal precedence means that future jurisprudence may, and most arguable should, compare and evaluate the preceding jurisprudence and disregard flawed and irrelevant argumentation. For example, an MFN clause such as the one in *Maffezini* should, by way of its opening words, be held to express a clear intention of the contracting parties that dispute resolution was to be included within the scope of the clause. Such a clause should most arguably be distinguished from MFN clauses that merely refer to 'treatment', even if the *Siemens* Tribunal failed to do so. Furthermore, there is almost undeniably an inextricable relation between dispute settlement arrangements and the protection of foreign investors. A broad object and purpose argument is therefore justified as an argument amongst others in support of including administration of justice within the scope of a MFN clause. However, this assertion does not mean that one must agree with the notion that investment treaty obligations should be interpreted broadly to assist in the promotion of foreign investment if this policy is the sole basis for deciding whether a treaty provision should be imported, even if it appears to have been governing the argumentation made by the Tribunals in *Maffezini* and *Gas Natural*. Such an interpretive approach, that in effect systematically favours the interests of one of the disputing parties, needs only be articulated to be regarded unsound. Instead, a more relevant purpose may perhaps be found in the MFN standard's more specific non-discrimination purpose. The non-discrimination purpose should not in any event be neglected. A claimant's right to cherry-pick benefits from a third-party treaty may thereby be dependant upon whether or not the dispute-settlement provisions in the third-party treaty, including the counterbalances to those benefits set out in the third-party treaty, are considered more favorable than the protection provided to the investor in the basic treaty. Concerning contextual arguments, the significant difference between adding more favorable treatment provided for in a third-party treaty, and the instance of when the application of an MFN clause would require the replacement of a procedure specifically negotiated by parties with an entirely different mechanism, should be acknowledged. However, if there is no dispute settlement provision at all in the basic treaty, there may be an argument in that such absence indicates that the contracting parties did not have such provisions in mind. In addition, the maxim *lex* specialis and the principle *ejusdem generis* are, as shown, not principles that provide any particular guidance to the interpretation of an MFN clause. Moreover, even if the *Plama* Tribunal was correct when arguing that there is a 'well-established principle, both in domestic and international law' that dictates that an agreement to arbitrate shall be 'clear and unambiguous', the principle lacks relevance in this context. The principle is based on the

interest of protecting individuals, but it is a state's possible waiver through an MFN provision under a BIT that is relevant here. A state's need for protection does at least involve different concerns than what constitutes the basis for this principle, which therefore should not squarely be held applicable to a state's agreement to arbitrate. Finally, the 'public policy' exceptions argued in *Maffezini* are, to say the least, difficult to attribute under the principles embodied in the VCLT. The *Maffezini* Tribunal's sole justification for these limitations was the parties' intentions discerned from domestic 'public policy'. With such justification, the *Maffezini* Tribunal must be seen as having narrowed the scope of the pertinent MFN clause based on perceived limitations that had not been expressly stipulated by the parties. If a treaty text does not reveal any reasons to restrict the scope of an MFN clause, it is not proper for tribunals to identify those reasons. In addition, these limitations appear logically flawed. The only reason claimants seek to rely on an MFN clause to avoid provisions is because the host state has not included those provisions in a third-party treaty. It is therefore highly questionable if such provisions should be considered so important to the host state that they might never be avoided through the operation of an MFN clause. Furthermore, the public policy limitations seem to require a subjective assessment of a state's policy from sources unrelated to the actual treaty and then application of that policy in the interpretation of the treaty. In conclusion, the 'public policy' exceptions are, frankly, unfortunate as a matter of treaty interpretation.

Despite the flaws displayed above and despite the absence of formal precedence in international investment law, these cases will resonate and have resonated in subsequent international jurisprudence, being ICSID jurisprudence. Investors and states alike would therefore be wise to acquire knowledge of this jurisprudence, considering the possibly vast implications on their rights and obligations. However, this is a quite irreconcilable series of cases. The *Maffezini*, *Siemens* and *Gas Natural* Tribunals held MFN clauses, in conjunction with the absence of an explicit reference to dispute settlement, to in principle serve as a legitimate basis for incorporating more favorable dispute settlement provisions. On the other hand, the *Plama* Tribunal, and arguably the *Salini* Tribunal, took the opposing starting point. One may perhaps argue that the approach taken in *Plama* was dictated by the fact that the claimant wanted to replace one specifically negotiated dispute-resolution mechanism with another, but if the *Plama* Tribunal truly had agreed with *Maffezini*, it could have reached the same result within the framework of *Maffezini*. The claim could have been rejected based on the public policy consideration that allowed for an exception where a claimant seeks to displace dispute resolution procedures in favor of an entirely different system. Instead, the *Plama* Tribunal reversed the general rule with multiple exceptions advanced in *Maffezini*, and replaced it with a single rule and one exception. The *Salini* Tribunal tried to distinguish from *Maffezini* by referring to that the MFN clause considered by the tribunal did not refer to 'all matters'. However, the *Maffezini* Tribunal does not appear to have based their decision on these words and, in addition, the *Siemens* Tribunal was obviously not hindered by the diverging language. Moreover, the

Siemens Tribunal found the term 'treatment' in the MFN clause 'so general that the Tribunal cannot limit its application except as specifically agreed by the parties'. By contrast, the *Salini* Tribunal, which also was concerned with the term 'treatment' in the pertinent MFN clause, expressed that 'the Claimants have submitted nothing from which it *might* be established that the common intention of the Parties was to have the most-favored-nation clause apply to dispute settlement.' The decisions are however distinguishable in that tribunals appear willing to entitle the claimants to more favorable treatment when they already have access to an investor-state dispute-settlement system, and less willing when the dispute resolution system is otherwise unavailable. The underline in these cases may thus be the purpose for which each MFN clause was invoked. The application of the MFN clauses in *Maffezini*, *Siemens* and *Gas Natural* did not actually create a consent that was otherwise lacking, but merely affected the timing of the host state's consent to jurisdiction and allowed the tribunals to hear the claims sooner rather than later. In contrast, *Plama* and *Salini* concerned investors that were claiming to be entitled to international arbitral jurisdiction concerning a type of claims over which the tribunals had no jurisdiction at all in the basic treaty. Nevertheless, even if this observation may explain the incongruous case law to a certain extent, it is clearly not satisfactory as a matter of treaty interpretation.

My last reflection is that contracting parties can avoid most, if not all, of the addressed issues, as well as the commensurate legal uncertainties and costs, if they give more consideration to the drafting of MFN clauses and specifically determine how and in what circumstances an MFN clause is intended to apply. Otherwise, future jurisprudence is faced with the hefty task of clarifying and refining the basic canons of treaty interpretation in order to do justice to the intention of the parties.

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