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MOST-FAVOURED-NATION TREATMENT IN INTERNATIONAL INVESTMENT LAW

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This document, derestricted under the OECD Secretary General's responsibility, has been developed as an input to the Investment Committee's work aimed at enhancing understanding of investment protection provisions in international investment agreements.

This document benefited from discussions and a variety of perspectives in the Committee. The document as a factual survey, however, does not necessarily reflect the views of the OECD or those of its Member governments. It cannot be construed as prejudging ongoing or future negotiations or disputes pertaining to international investment agreements.

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MOST-FAVOURED-NATION TREATMENT IN INTERNATIONAL INVESTMENT LAW

1. Introduction

Bilateral and regional investment agreements have proliferated in the last decade and new ones are still being negotiated. Most-Favoured-Nation (MFN) clauses link investment agreements by ensuring that the parties to one treaty provide treatment no less favourable than the treatment they provide under other treaties in areas covered by the clause. MFN clauses have thus become a significant instrument of economic liberalisation in the investment area. Moreover, by giving the investors of all the parties benefiting from a country's MFN clause the right, in similar circumstances, to treatment no less favourable than a country's closest or most influential partners can negotiate on the matters the clause covers, MFN avoids economic distortions that would occur through more selective country-by-country liberalisation. Such a treatment may result from the implementation of treaties, legislative or administrative acts of the country and also by mere practice.

The present article provides a factual survey of jurisprudence and related literature on MFN treaty clauses in investment agreements with a view to contributing a better understanding of the MFN interfaces between such agreements.

- *Section II* defines the MFN clause, traces back its origins and provides some examples of such provisions in the two major types of model investment agreements in existence (the "North American model" and the "European model").

- *Section III* summarises the relevant aspects of the extensive work carried out by the International Law Commission (ILC) between 1968 and 1978 on MFN clauses.

- *Section IV* describes recent arbitral awards on the scope of application of MFN treatment clauses resulting from disputes under investment treaties.

- *Section V* provides a summing up.

2.. Definition, origins and examples of MFN clauses

2.1. Definition

To provide MFN treatment under investment agreements is generally understood to mean that an investor from a party to an agreement, or its investment, would be treated by the other party "no less favourably" with respect to a given subject-matter than an investor from any third country, or its investment.[1] MFN treatment clauses are found in most international investment agreements. Although the text of the MFN clause, its context and the object and purpose of the treaty containing it need to be considered whenever that clause is being interpreted, it is the "multilateralisation" instrument *par excellence* of the benefits accorded to foreign investors and their investments.

While MFN is a standard of treatment which has been linked by some to the principle of the equality of States,[2] the prevailing view is that a MFN obligation exists only when a treaty clause creates it.[3] In the absence of a treaty obligation (or for that matter, an MFN obligation under national law), nations retain the possibility of discriminating between foreign nations in their economic affairs.

2.2. Origins[4]

MFN treatment has been a central pillar of trade policy for centuries. It can be traced back to the twelfth century, although the phrase seems to have first appeared in the seventeenth century. MFN treaty clauses spread with the growth of commerce in the fifteenth and sixteenth centuries. The United States included an MFN clause in its first treaty, a 1778 treaty with France.[5] In the 1800s and 1900s the MFN clause was included frequently in various treaties, particularly in the Friendship, Commerce, and Navigation treaties. MFN treatment was made one of the core obligations of commercial policy under the Havana Charter where Members were to undertake the obligation "to give due regard to the desirability of avoiding discrimination as between foreign investors".[6] The inclusion of MFN clauses became a general practice in the numerous bilateral, regional and multilateral investment-related agreements which were concluded after the Charter failed to come into force in 1950.

Its importance for international economic relations is underscored by the fact that the MFN treatment provisions of the GATT (Article I *General Most-Favoured-Nation Treatment*) and the GATS[7] (Article II *Most-Favoured-Nation Treatment*) provide that this obligation shall be accorded "immediately and unconditionally" (although in the case of the GATS, a member may maintain a measure inconsistent with this obligation provided that such measure is listed in, and meets the conditions of, the Annex on Article II Exemptions).

2.3. Examples of MFN Clauses in Investment Agreements

A stock taking of MFN clauses in investment treaties will not yield a uniform picture. In fact the universe of MFN clauses in investment treaties is quite diverse. Some MFN clauses are narrow, others are more general. Moreover, the context of the clauses varies, as does the object and the purpose of the treaties which contain them. Following is a representative sample of these clauses.

Germany has concluded the largest number of BITs. Article 3 (1) and (2) of the **German 1998 Model Treaty** combines the MFN obligation with the national treatment obligation by providing that:

> *"(1) Neither Contracting State shall subject investments in its territory owned or controlled by investors of the other Contracting State to treatment less favourable than it accords to investments of its own investors or to investments of investors of any third State.*
>
> *(2) Neither Contracting State shall subject investors of the other Contracting State, as regards their activity in connection with investments in its territory, to treatment less favourable than it accords to its own investors or to investors of any third State."*

This general MFN provision is not restricted in its scope to any particular part of the treaty containing it. It may also be noted that the 1998 German model BIT contains another MFN provision which only relates to full protection and security and to expropriation which are the matters dealt with by Article 4. Article 4(4) specifically provides that:

> *"Investors of either Contracting State shall enjoy most-favoured-nation treatment in the territory of the other Contracting State in respect of the matters provided for in this Article."*

The same approach is followed by the **Netherlands Model BIT** which in addition combines in its Article 3 the MFN obligation with other standards of treatment, i.e. national treatment (whichever of these two treatments is more favourable), fair and equitable treatment and full protection and security. The non-discriminatory treatment is formulated in Article 3(1) and 3(2) as follows:

"(1) Each Contracting Party shall ensure fair and equitable treatment of the investments of nationals of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals. Each Contracting Party shall accord to such investments full physical security and protection.

(2) More particularly, each Contracting Party shall accord to such investments treatment which in any case shall not be less favourable than that accorded either to investments of its own nationals or to investments of nationals of any third State, whichever is more favourable to the national concerned."

Article 3 of the 1996 **Albania/United Kingdom BIT** provides that:

"National Treatment and Most-Favoured-Nation Provisions

(1) Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State.

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

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

Articles 1 to 11 cover all the provisions of the Agreement, except the final clauses.

The typical formulation of an MFN clause in the **US and Canadian BITs** covers both the establishment and post establishment phases. It also lists the various operations covered[8] and is explicit in stating that the right only applies "in like circumstances", unlike other BITs (particularly the "European model BIT") which make no reference to the comparative context against which treatment is to be assessed. Recent examples are to be found in the investment chapter of US-Chile Free Trade Agreement[9]and the US-Singapore Free Trade Agreement[10] concluded in 2003, and the 1997 Canada-Chile Free Trade Agreement, which are based on NAFTA language. In the **US-Chile FTA**, Article 10.3: Most Favoured Nation Treatment reads**:**

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

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

In the **US-Singapore FTA**, National Treatment and MFN treatment are part of a same article:

> *"Article 15.4: National Treatment and Most-Favoured Nation Treatment*
>
> *(3) Each Party shall accord to investors of the other Party treatment no less favourable than it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. The treatment each Party shall accord under this paragraph is "most-favoured-nation treatment".*
>
> *(4) Each Party shall accord to investors of the other Party and to their covered investments the better of national treatment or most-favoured-nation treatment."*

In the **Canada-Chile FTA**, Article G-03: Most Favoured Nation Treatment reads**:**

> *"(1) Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*
>
> *(2) Each Party shall accord to investments of investors of the other Party treatment no less favourable than that it accords, in like circumstances, to investments of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."*

The texts of these agreements are alike in that they make clear that the intent to use the likeness of the circumstances in which the treatment is granted as the basis for comparison. Jurisprudence from MFN clauses with a different basis for comparison, and which focuses on categorizing industries affected by treatment, or categorizing the types of treaties that require the treatment, may be of little relevance to the analysis required by these agreements.

2.4. Restrictions and Exceptions

Many MFN clauses in investment treaties contain specific restrictions and exceptions, which exclude certain areas from their application. Such areas may include *inter alia* regional economic integration, matters of taxation, subsidies or government procurement and country exceptions. Depending on the way these exceptions are drafted, the fact that these limitations are specifically mentioned could be a factor in deciding whether certain other matters are within the scope of an MFN clause. Consider the following examples.

The **1998 German Model BIT** provides in its Article 3, points (3) and (4) that:

> *"(3) Such treatment shall not relate to privileges which either Contracting State accords to investors of third States on account of its membership of, or association with, a customs or economic union, a common market or a free trade area.*

(4) The treatment granted under this Article shall not relate to advantages which either Contracting State accords to investors of third States by virtue of a double taxation agreement or other agreements regarding matters of taxation."

The **Dutch Model BIT** contains the following exception to the MFN obligation in the general treatment article (Article 3):

"*(3) If a Contracting Party has accorded special advantages to nationals of any third State by virtue of agreements establishing customs unions, economic unions, monetary unions or similar institutions, or on the basis of interim agreements leading to such unions or institutions, that Contracting Party shall not be obliged to accord such advantages to nationals of the other Contracting Party";*

In addition, Article 4 of the Model, which only deals with the treatment of taxes, includes in its second part, some exceptions to the MFN treatment and National treatment obligations provided by the first part of that article. This article applies to nationals of Contracting Parties or nationals of any third State which are "in the same circumstances". The whole Article 4 reads as follows:

"With respect to taxes, fees, charges and to fiscal deductions and exemptions, each Contracting Party shall accord to nationals of the other Contracting Party who are engaged in any economic activity in its territory, treatment not less favourable than that accorded to its own nationals or to those of any third State who are in the same circumstances, whichever is more favourable to the nationals concerned. For this purpose, however, any special fiscal advantages accorded by that Party, shall not be taken into account:

(a) under an agreement for the avoidance of double taxation; or

(b) by virtue of its participation in a customs union, economic union or similar institution; or

(c) on the basis of reciprocity with a third State."

The MFN limitations in the **Agreement between EFTA States and Singapore** state:

"Article 40

2. If a Party accords more favourable treatment to investors of any other State or their investments by virtue of free trade agreement, customs unions or similar agreement that also provides for substantial liberalization of investments, it shall not be obliged to accord such treatment to investors of another Party or their investments. However, upon request from another Party, it shall accord adequate opportunity to negotiate the benefits granted therein…

Article 41: Taxation

1. Except as otherwise provided for in this Article, nothing in this Chapter shall create rights or impose obligations with respect to taxation measures.

2. Article 40 shall apply to taxation measures subject to deviations from national treatment that is necessary for the equitable or effective imposition or collection of direct taxes.

3. If a Party accords special advantages to investors and their investments of any other State by virtue of an agreement for the avoidance of double taxation, it shall not be obliged to accord such advantages to investors of another Party and their investments."

The agreements concluded by Canada and the United States since the early 1990s have followed the practice of listing "country" exceptions or reservations to MFN treatment (and other standards) as "non-conforming measures" in separate annexes to the Agreement. For example, Article 15.12 (Non-Conforming Measures) of the **United States – Singapore Free Trade Agreement** reads as follows:

1. Articles 15.4(National Treatment and Most-Favoured-Nation Treatment)…do not apply to:

(a) any existing non-conforming measure that is maintained by a Party at:

(i) the central level of government, as set out by that Party in its Scheduled to Annex 8A,

(ii) a regional level of government, as set out by that Party in its Schedule to Annex 8A, or

(iii) a local level of government;

(b) the continuation or prompt renewal of any non-conforming measure referred to in sub-paragraph (a); or

(c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Article 15.4, 15.8, and 15.9.

2. Articles 15.4, …do not apply to any measure that a Party adopts or maintains with respect to sectors, sub-sectors, or activities, as set out in its Schedule to Annex 8B.

3. Neither Party may, under any measure adopted after the date of entry into force of this Agreement and covered by its Schedule to Annex 8B, require an investor of the other Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.

4. Article 15.4 does not apply to any measures that is an exception to, or a derogation from, the obligations under Article 16.1.3 (General provisions) as specifically provided in that Article.

5. Articles 15.4 and 15.9 do not apply to:

(a) government procurement; or

(b) subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance.

In addition to the measures listed in Annexes I-II, Annex IV of NAFTA is specifically devoted to exceptions to Most-Favoured-Nation Treatment for treatment accorded pursuant to all prior bilateral or multilateral international agreements and for treatment accorded pursuant to all such future agreements with respect to certain sectors only.[11] The scope of the NAFTA and that of its investment chapter limit its MFN treatment obligation in other areas as well, including, for example, taxation[12] and financial services.[13] The same kind of limitations to the scope of MFN protection appears in the U.S.-Chile and U.S.-Singapore free trade agreements and the recently concluded U.S.-Australia free trade agreement.

Some US and Canadian BITs also contain limitations to the MFN clauses that preclude coverage of the advantages accorded by virtue of multilateral agreements or negotiations (such as the GATT/Uruguay Round) to which their BIT partners may or may not have adhered. Language of this sort (the "GATT exception") appeared for the first time in the Article XII (2) (b) 1990 US-Poland BIT.[14] Another example is Article G-8 of the Canada-Chile Agreement which provides that the MFN clause in the investment chapter of that agreement "does not apply to any measure that is an exception to, or derogation from, a Party's obligations under the TRIPS Agreement, as specifically provided for in that agreement".

The Understanding reached by the United States, the European Commission and certain acceding and candidate countries regarding their BITs with the United States on 22 September 2003 describes the means, through individual protocols, of avoiding potential incompatibilities arising from MFN obligations in the BITs and the obligations of membership in the European Union.

Finally, it may be noted that some WTO members have listed substantive provisions in their bilateral investment treaties as involving exemptions to the MFN obligations of the GATS with a view of protecting a higher level of treatment in such BITs in relation to GATS commitments.[15]

GATS Article V(1) (Economic Integration) does not prevent, however, any of its Members from being a party to or entering into an agreement liberalising trade in services between or among the parties to such an agreement, provided that such an agreement meets the conditions set out in paragraph 1 of that Article. GATS Article V(6) further provides that a service supplier of any Member that is a juridical person constituted under the law of a party to an agreement meeting the conditions of paragraph 1 shall be entitled to treatment granted under such agreement, provided that it engages in substantive business operations in the territory of the parties to such agreement. Examples of the treatment accorded to enterprises of third party investors in accordance with these provisions is to be found in NAFTA Article 1101 and 1139, EC Treaty Articles 43-48, and Annex G of the draft Understanding between the EU and the USA concerning Certain Bilateral Investment Treaties, dated September 22, 2003.

3. International Law Commission Work[16,17]

In 1964 the International Law Commission (ILC) embarked on a multi-year project to prepare a set of draft articles on the MFN clause.[18] The idea for the project originally arose in the context of the ILC's work on the law of treaties, and, as noted in the introduction to the draft articles, they should be interpreted in light of the Vienna Convention on the Law of Treaties (Vienna Convention).[19] In determining to proceed with the project, the ILC acknowledged the importance of the role of the most-favoured-nation treatment obligation in the sphere of international trade.[20] However, the ILC specifically did not confine its studies to that sphere, but rather explored the application of the clause in as many spheres as possible.[21]

In 1978, the ILC adopted the Draft Articles on Most-Favoured-Nation Clauses and recommended to the General Assembly of the United Nations that they be used for a Convention on the subject. The General Assembly did not act upon this recommendation and took no substantive action on the draft articles.[22] The ILC's work provides, nevertheless, a general analysis of MFN clauses and insight into the "*ejusdem generis*" principle, which has been used in their interpretation in several judicial and arbitral cases, including recent ones. [23] [24] The present section summarises the most general aspects of this work.[25]

3.1. General principles of an MFN clause[26]

In examining the ILC's work, it is important to note first of all that the Draft Articles elaborated by the Commission were intended to be "without prejudice to any provision on which the granting State and the beneficiary State may otherwise agree" (Art. 29).[27] Thus, the content of the treatment due in each specific case is defined by the actual language of the MFN clause in question. This text must be interpreted in accordance with the principles of treaty interpretation, as codified in the Vienna Convention. Article 31.1 of the Vienna Convention states that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[28]

In the ILC's work, the MFN clause is described as taking the form of a treaty provision whereby a State (the granting State) undertakes an "obligation" towards another State (the beneficiary State) to accord MFN treatment in an agreed sphere of relations and that (beneficiary) State accepts it.[29] The clause may also determine the persons or things to whom and to which the MFN treatment is applicable. Ultimately, the extent of the benefits to which the beneficiary State may lay claim (for itself or for persons or things in determined relationship with it) is limited by the treatment extended by the granting State to a third State (or to persons or things in the same relationship with a third State).[30]

The MFN clause may be invoked if the third State (or persons or things in the same relationship with the third State as are the persons or things mentioned in the clause with the beneficiary State) have been extended the favours that constitute the MFN treatment foreseen in the clause. The mere fact of a more favourable treatment is what is required to set in motion the operation of the clause. This treatment may be based upon a treaty, another agreement or a unilateral, legislative or other act or mere practice.[31] The beneficiary State, on the strength of an MFN clause may invoke the clause to also demand the same benefits as were extended to the third State. Depending on the drafting of the MFN clause, the mere fact that the third State has not availed itself of the benefits which were extended to it by the granting State does not absolve the granting State from the obligation under the MFN clause.[32]

When two treaties exist, one between the granting State and the beneficiary State containing the MFN clause, and the other between the granting State and a third State, the treaty that contains the MFN treatment clause is considered to be the "basic" treaty.[33] As was held by the majority of the Court in the landmark *Anglo-Iranian Oil Company case*,[34] "this is the treaty which establishes the juridical link between the beneficiary State and a third party treaty and confers upon that State the rights enjoyed by the third party. A third-party treaty, independent and isolated from the basic treaty, cannot produce any legal effect as between […] the beneficiary State and […] the granting State (it is *res inter alios acta*)."[35] The beneficiary is entitled, to the extent provided by the MFN provision under its own treaty, to claim all rights and favours extended by the granting State to the third State. This extension can be seen as "ingenious" legal shorthand to treaty process.[36]

The granting State and the beneficiary State can however limit in the basic treaty the extent of the favours that can be claimed by the beneficiary. If the clause contains a restriction, the beneficiary State cannot claim any favours beyond the limits set by the clause, even if this treatment does not reach the level of the favours extended by the granting State to a third State.[37]

3.2. The ejusdem generis *principle*

The *ejusdem generis* principle is the rule according to which a MFN clause can only attract matters belonging to the same subject matter or the same category of subject as to which the clause relates.

Article 9 of the ILC Draft Articles provides that the beneficiary State of a MFN clause should acquire, for itself or for the benefit of persons or things in a determined relationship with it, only those rights which fall within the limits of the subject matter of the MFN clause, and only with respect to persons or things which are specified in the clause or implied from its subject matter to benefit from it. Draft Article 10 goes on to suggest that the rights acquired should be those that the granting State extends to a third State within the limits of the subject matter of the MFN clause and only if the beneficiary persons or things belong to same category of persons or things which benefit from the treatment extended to the third party and have the same relationship with that State.[38]

(a) What subject matter?

The Commentary to Draft Articles 9 and 10 underlines that the rights of the beneficiary are limited, with respect to the subject matter, in two ways, namely by the clause itself, which refers to a certain matter, and secondly by the rights conferred by the granting State on the third State. Although the meaning of the rule is clear, its application is not always easy. The Commission considered the following cases.

In the ***Anglo-Iranian Oil Company case (1952)***[39] – which resulted from the nationalisation by the Government of Iran of the oil industry – the United Kingdom invoked the MFN clauses of the agreements concluded with Iran in 1857 and 1903 to seek the treatment foreseen in the Treaty of Friendship, Establishment of Commerce of 1934 between Iran and Denmark and similar agreements concluded with Switzerland and Turkey in 1934 and 1937 that guaranteed the persons and property of the parties treatment in accordance with international law. The Court dismissed the claim on the basis that it had no jurisdiction.[40]

In the case concerning ***Rights of Nationals by the United States of America in Morocco (1952)***[41] – which dealt in particular with the extent of the consular jurisdiction which the United States could exercise in the French Zone of Morocco and the question of fiscal immunity of US citizens – the International Court of Justice concluded that the United States was not entitled, by virtue of the MFN treatment clauses in its 1836 treaty with Morocco, to exercise consular jurisdictional rights in the French zone of Morocco other than those strictly included in that Agreement. The Court held in this connection that the United States had acquired additional consular jurisdiction by the effect of such MFN clauses, but that those MFN-derived benefits had come to an end with the termination by Great Britain of all its rights and privileges of a capitulatory character by the Franco-British Convention of 1937. The Court also concluded that the MFN clause did not provide the basis for fiscal immunity, given that no other State enjoyed it for the benefit of its nationals.[42] The Court's comments seemed to imply, however, that the scope of the MFN clause in a treaty was confined to the matters dealt with in that Convention.

In the ***Ambatielos case (1952,***[43] ***1953,***[44] ***1956***[45]***)***, the Greek government, relying upon Article X (MFN clause) and article XV (National treatment) of the Treaty of Commerce and Navigation concluded by Greece and the United Kingdom in 1886 and a Declaration annexed to the Treaty of Commerce and Navigation of 1926, invoked provisions embodied in earlier treaties between the United Kingdom and third States (Denmark, Sweden and Bolivia) to claim that Ambatielos, a Greek ship-owner, had suffered a denial of justice in regard to a dispute it brought before the English courts. By its Judgments of 1 July 1952 and 19 May 1953, the International Court of Justice found that it had jurisdiction to decide whether the United Kingdom was under the obligation to submit to arbitration the difference as to the validity of Ambatielos' claim, in so far as it was based on the Anglo-Hellenic Treaty of 1886. At the same time, the Court held that it had no jurisdiction to go into all the merits of the case. The case was subsequently submitted to a Commission of Arbitration which ultimately rejected the claim, in its Award of 6 March 1956, on the basis that the provisions contained in other

Treaties invoked by the Greek government provided for "privileges, favours or immunities" no more favourable than those resulting from the national treatment clause. However, the ILC referred to this case because the Commission of Arbitration said:

> *"The most-favoured-nation clause can only attract matters belonging to the same category of subject as that to which the clause itself relates"*. Regarding the specifics of the case, it held that: *"…It is true that the administration of justice", when viewed in isolation is a subject-matter other than "commerce and navigation", but this is not necessarily so when it is viewed in connection with the protection of the rights of traders. Protection of the rights of traders naturally finds a place among the matters dealt with by Treaties of commerce and navigation. … Therefore it cannot be said the administration of justice, in so far as it is concerned with the protection of these rights, must necessarily be excluded from the application of the most-favoured-nation clause, when the latter includes "all matters relating to commerce and navigation"*.[46]

The International Law Commission also relied on decisions of national courts.[47] In a 1913 ***French case***,[48] the French Court of Cassation decided against the invocation of certain procedural requirements for bringing suit found in a French-Swiss Convention on jurisdiction and execution of judgment, in favour of German nationals as a result of an MFN clause in an 1871 Franco-German commercial treaty applying to the "admission and treatment of subjects of the two nations." The Court concluded that "these MFN provisions pertain exclusively to the commercial relations between France and Germany, considered from the point of view of the rights under international law, and that they do not concern the rights under civil law and that "the most-favoured-nation clause may be invoked only if the subject of the treaty stipulating it is the same as the particularly favourable treaty the benefit of which is claimed".

In Lloyds Bank v. de Ricqlès and Gaillard (1930),[49] the Commercial Tribunal of the Seine dismissed a claim by Lloyds Bank, which having been ordered to give security for costs, invoked Article I of the Anglo-French Convention regulating commercial maritime relations of 28 February 1882 to benefit from the provisions of a Franco-Swiss Treaty of 15 June 1889, which gave Swiss nationals the right to sue in France without being required to give security for costs. Lloyds argued that Article I of the Anglo-Convention engaged the parties to give each other "immediately and unconditionally the benefit of every favour, immunity or privilege in matters of commerce and industry which have been conceded by one [of] the parties to any third nation whatsoever, whether within or beyond Europe." The Tribunal held that a party to a convention of a general character such as the Anglo-French Convention could not claim the MFN clause the benefits of a special convention such as the Franco-Swiss Convention, which dealt with one particular subject, namely freedom from the obligation to give security for costs.[50]

In reference to this case, the International Law Commission suggested that, under the reasoning of this case, there would be a dilemma facing the drafters of an MFN clause of either drafting the clause in too general terms, risking the loss of its effectiveness through a strict interpretation of the *ejusdem generis* rule, or of drafting it too explicitly, enumerating its specific domains, in which cases the risk consists in the possible incompleteness of the enumeration.[51]

The ILC Commentary stated that it is only the subject-matter of the clause, not the treaty or agreement containing the clause that must belong to the same category. In other words, it is not necessary that the treaty or agreement including the clause be of the same category as that of the benefits that are claimed under the clause. To hold otherwise would seriously diminish the value of the MFN clause. However, the text of the treaty including the MFN clause does serve as part of the context for its interpretation under Article 31(1) of the Vienna Convention on the Law of Treaties.

In its Commentary (11) to Draft Articles 9 and 10, the Commission observed that, since the effect of the MFN process is, by means of the provisions of one treaty, to attract those of another, unless this process is strictly limited to cases where there is a substantial identity between the subject matter of the two sets of clauses concerned, the result could be to impose upon the granting State obligations it never contemplated.

(b) What categories of persons or things?

A similar reasoning was proposed by the Commission for gauging the application of the MFN treatment to particular categories of persons or things. In essence, the beneficiary State may claim MFN treatment only for the category of persons or things that receives or is entitled to receive certain treatment or certain favour, under the right of a third State. Furthermore, the persons or things in respect of which the MFN treatment is claimed must be in the same relationship with the beneficiary State as are the comparable persons or things with the third States.[52] There are cases where the MFN clause is silent on the persons or things that may benefit from it. In such case, the ILC suggests, the subject matter of the clause – for instance customs duties, commerce, shipping, – would implicitly determine the class of persons or things that can benefit from it – importers, merchants, vessels.[53]

4. Recent cases

Among the numerous cases brought to ICSID in recent years,[54] two cases, **Maffezini v. Kingdom of Spain** and **Tecnicas MedioAmbientales Tecmed S.A. v. the United Mexican States** stand out as raising issues concerning the MFN clause. None of the investor-State claims brought under NAFTA Chapter Eleven has resulted in a finding of a breach of the MFN clauses.

4.1. BITs

Maffezini v. Spain

Maffezini v. Kingdom of Spain (2000)[55] concerned a dispute arising from the treatment allegedly received by the Argentine investor Emilio Agustin Maffezini from Spanish entities, in connection with his investment in an enterprise for the production and distribution of chemical products in the Spanish region of Galicia. Spain (the Respondent) objected to the tribunal's jurisdiction since Mr. Maffezini (the Claimant) had failed to comply with an exhaustion of local remedies requirements set forth in the Argentine-Spain BIT. Mr. Maffezini admitted that the dispute had not been referred to the Spanish courts prior to its submission to ICSID, but he argued that the MFN clause in the Argentine-Spain BIT would allow him to invoke Spain's acceptance of ICSID arbitration contained in the Chile-Spain BIT and that none of the exceptions from MFN in the Argentine-Spain BIT applied to the dispute settlement provisions at issue in the case.

On 25 January 2000, the Tribunal decided that,[56] by virtue of the MFN clause of the 1991 Argentine-Spain Bilateral Investment Treaty, the claimant had the right to import the more favourable jurisdictional provisions of the 1991 Chile-Spain Agreement and, as a result, to resort to international arbitration without being obliged to submit its dispute to Spanish courts for a period of eighteen months beforehand.[57] Paragraph 2 of Article IV of the Argentina/Spain BIT provides that after guaranteeing a fair and equitable treatment for investors (paragraph 1):

> *"In all matters subject to this Agreement, this treatment shall be no less favourable than that extended by each Party to the investments made in its territory by investors of a third country."*[58]

In this connection, the Tribunal referred to the *ejusdem generis* principle[59] and the reasoning found in the *Ambatielos* case (namely that the MFN clause can apply to provisions concerning the "administration of justice"). The Tribunal also stated that today's dispute settlement arrangements are "inextricably related" to the protection of foreign investors as shown below:

> *"Notwithstanding the fact that the basic treaty containing the clause does not refer expressly to dispute settlement as covered by the most favoured nation clause, the Tribunal considers that there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights of traders under treaties of commerce. Consular jurisdiction in the past, like other forms of extraterritorial jurisdiction, were considered essential for the protection of rights of traders and, hence, were regarded not merely as procedural devices but as arrangements designed to better protect the rights of such persons abroad.*[60] *It follows that such arrangements, even if not strictly a part of the material aspect of the trade and investment policy pursued by treaties of commerce and navigation, were essential for the adequate protection of the rights they sought to guarantee.*
>
> *International arbitration and other dispute settlement arrangements have replaced these older and frequently abusive practices of the past. These modern developments are essential, however, to the protection of the rights envisaged under the pertinent treaties; they are closely linked to the material aspects of the treatment accorded. …"*

The Tribunal concluded that:

> *"…if a third-party treaty contains provisions for the settlement of disputes that are more favourable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favoured nation clause as they are fully compatible with the ejusdem generis principle…"*[61]

Under the broad MFN clause of the Argentine-Spain treaty, which expressly referred to "all matters subject to the Agreement"[62] the Tribunal did not accept the respondent's claim that "under the principle *ejusdem generis* the most favoured nation clause can only operate in respect to … substantive matters or material aspects of the treatment granted to investors and not to procedural or jurisdictional questions".[63]

In rendering its decision, the Tribunal observed that in some BITs the MFN clause explicitly embraces the provisions on dispute settlement.[64] In other treaties it refers to all rights contained in the agreement without mentioning dispute settlement.[65]

However, the Tribunal stated the following limits to its interpretation of the clause:

> *"… As a matter of principle, the beneficiary of the clause should not be able to override public policy considerations that the contracting parties might not have envisaged as fundamental conditions for their acceptance of the agreement in questions, particularly if the beneficiary is a private investor….*
>
> *Here it is possible to envisage a number of situations not present in the instant case. First, if one contracting party has conditioned its consent to arbitration on the exhaustion of local remedies, which the ICSID Convention allows, this requirement could not be bypassed by invoking the most favoured nation clause in relation to a third-party agreement that does not contain this element since the stipulated condition reflects a fundamental rule of*

international law. Second, if the parties have agreed to a dispute settlement arrangement which includes the so-called fork in the road, that is, a choice between submission to domestic courts or to international arbitration, and where the choice once made becomes final and irreversible, this stipulation cannot be bypassed by invoking the clause. This conclusion is compelled by the consideration that it would upset the finality of arrangements that many countries deem important as a matter of public policy. Third, if the agreement provides for a particular arbitration forum, such as ICSID, for example, this option cannot be changed by invoking the clause, in order to refer the dispute to a different system of arbitration. Finally, if the parties have agreed to a highly institutionalized system of arbitration that incorporates precise rules of procedure, which is the case, for example, with regard to the North America Free Trade Agreement and similar arrangements, 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. Other elements of public policy limiting the operation of the clause will no doubt be identified by the parties or tribunals. It is clear, in any event, that a distinction has to be made between the legitimate extension of rights and benefits by means of the operation of the clause, on the one hand, and disruptive treaty-shopping that would play havoc with the policy objectives of underlying specific treaty provisions, on the other hand."[66]

Tecmed v. Mexico[67,68]

In this case, decided on 29 May 2003, the Respondent was found to have breached its obligations under the 1996 Mexico/Spain BIT as set forth in Articles 4(1) (Fair and Equitable Treatment) and 5(1) (Nationalisation and Expropriation) in respect to the Mexican government's failure to re-license the Spanish investor Tecmed's hazardous waste "Cytrar" in the state of Sonora. In considering the challenges made to the Arbitral Tribunal's jurisdiction and the timely submission by the Claimant of some of its claims, however, the Tribunal was called upon to decide whether the "most favourable conditions" foreseen in Article 8(1) of the Agreement entitled the claimant to a retroactive application of its claim in view of a more favourable treatment in connection with that matter which would be afforded to an Austrian investor under the Austria/Mexico BIT of 29 June 1998. This article reads:[69]

"If the provisions of law of one of the Contracting Parties or obligations under international law at the margins of the present Agreement, current or future, between the Contracting Parties, result in a general or specific regulation according to which it should be given to investments of investor of the other Contracting Party, a treatment more favourable than that it is envisaged in the present Agreement, such regulation shall prevail over the present Agreement, to the extent that it is more favourable."[70]

In arguing for this result, the claimant referred to the *Maffezini* judgment. The Tribunal did not examine the provisions of the Austria/Mexico BIT or the MFN provisions of the Mexico-Spain BIT and, referring to paragraphs 62 and 63 of *Maffezini*, discussed above, it specifically ruled 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 <u>the core of matters that must be deemed to be specifically negotiated by the Contracting Parties</u> (underlined added). These are determining factors for their acceptance of the Agreement, as they are directly linked to the identification of the substantive protection regime applicable to the foreign investor, and particularly, to the general (national or international) legal context within which such regime operates, as well as to the access of the foreign investor to the substantive

provisions of such regime. Their application cannot therefore be impaired by the principle contained in the most favoured national clause." [71]

Similarly, the Tribunal found that Title II (4) and (5) of the Appendix to the Mexico/Spain Agreement (relating to dispute settlement):

> *"…contains requirements relating to the substantive admissibility of claims by the foreign investor, i.e. its access to the substantive protection regime contemplated under the Agreement. Consequently, such requirements are necessarily a part of the essential core of negotiations of the Contracting Parties; it should therefore be presumed that they would not have entered into the Agreement in the absence of such provisions. Such provisions, in the opinion of the Arbitral Tribunal, therefore fall outside the scope of the most favoured nation clause contained in Article 8(1) of the Agreement."*[72]

In considering the substantive merits of the case, the Tribunal found no violation of the MFN clause of the Agreement.[73]

4.2. NAFTA

Two claimants under NAFTA's investment chapter have relied on MFN provisions. In the final awards of both cases, however, the tribunals rejected the applicability of these MFN provisions. As a result, neither case illuminates the principle subject of this article, i.e., the operation of MFN clauses.

ADF v. United States of America (2002)

The ADF case is the only completed NAFTA claim in which the claimant alleged a breach of the MFN treatment clause, Article 1103. According to the Tribunal's 9 January 2003 award, ADF's Article 1103 claim was an attempt to mitigate the impact of the NAFTA Free Trade Commission's (FTC's) Interpretation on the Article 1105 claim.[74] However, the Tribunal dismissed the Article 1103 claim. It found that, pursuant to Article 1108(7)(a), the MFN article did not apply to ADF's claim because the case involved government procurement.[75] As a result, the tribunal did not engage in a rigorous analysis of ADF's Article 1103 claim.

Pope & Talbot Inc. v. Canada (2001, 2002)

In Pope and Talbot, the claimant did not allege a breach of Article 1103, but rather a breach of Article 1105. However, the Final Merits Award of Pope and Talbot rendered on 10 April 2001 suggested that an MFN clause could lead to import into the NAFTA what the tribunal described as more favourable "fair and equitable treatment" provisions contained in some BITs.[76] The Tribunal then observed that this formulation entitles investors to fair and equitable treatment without regard to any limitations inherent in international law since these agreements provided that "investors must at all times be accorded fair and equitable treatment … and shall in no case be accorded treatment less than required by international law". The Tribunal then considered that, because NAFTA investors could benefit from this more favourable treatment by virtue of Article 1103, it would make no sense for NAFTA Parties to deny those rights under Article 1105 only to find them revived pursuant to Article 1103. The Tribunal also stated that the NAFTA Parties were unlikely to have intended, in article 1105, to treat each other's investors less favourably than those from other countries.[77] On that basis, the Tribunal found a violation of Article 1105.

Shortly after the issuance of the Merits Award, the NAFTA Free Trade Commission (FTC) issued a binding interpretive note on Article 1105.[78] This was followed some months later by the

Tribunal's issuance of the Damages Award. In that award, the Tribunal accepted, as a working basis,[79] the FTC interpretation, which clarified that Article 1105 does not require treatment in addition to or beyond that which is required by customary international law minimum standard of treatment, but maintained its prior award in favour of the claimant, concluding that Article 1105 was breached even under the FTC's interpretation. The Tribunal, however, found it "unnecessary to consider issues relating to Articles 1102 or 1103 which had been raised following upon the Interpretation."[80]

The Pope & Talbot Tribunal's reasoning in the merits phase has not been followed in subsequent NAFTA cases.[81]

5. Summing up

The main points in the present Note may be summarised as follows:

- MFN treatment has long been a core standard of international economic relations. It provides for equal competitive opportunities between nations in respect to the matters to which the particular MFN clause applies, be they in the field of trade, investment, or any field of economic co-operation. Although its application to international investment is more recent than that for international trade, it is widely accepted, together with national treatment, as one of the most important standards of treatment for investors and their investments.

- Despite their prevalence in investment treaties, MFN clauses do not have a universal meaning. Indeed, the formulation and application of MFN clauses varies widely among investment treaties. In some cases, the scope of application of the clauses extends to the entire content of the treaty; in others, the clause is limited to only some of the matters addressed by the treaty. The proper application and interpretation of a particular MFN clause in a particular case requires a careful examination of the text of that provision undertaken in accordance with the treaty interpretation rules as set out in the Vienna Convention

- The *ejusdem generis* principle has been applied in the jurisprudence of international tribunals and national courts and by diplomatic practice. According to this principle, an MFN clause can attract the more favourable treatment available in other treaties only in regard to the same "subject matter", the same "category of matter" or the same "class of matter". While the principle is clear, its application is not always simple or consistent. This principle can provide some useful guidance. However the interpretation and application of a particular MFN clause must be undertaken, as noted above, based on the text of the provision and according to the general rules of interpretation as embodied in the Vienna Convention.

ANNEX

VIENNA CONVENTION ON THE LAW OF TREATIES[*]

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 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:

- any agreement relating to the treaty which was made by one or more parties in connexion with the conclusion of the treaty;

- Any instrument which was made by one or more parties in connexion 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:

- Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

- any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

- 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 determine the meaning when the interpretation according to 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.

[*] Concluded in Vienna on 23 May, 1969. Came into force on 27 January, 1990. Ratified by 70 countries.

NOTES

1. The International Law Commission (ILC) has defined MFN treatment as follows: "Most-favoured-nation treatment is a 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 or to a third State or to persons or things in the same relationship with that third State", Article 5 of the Draft articles on most-favoured-nation clauses (ILC Draft), in *Yearbook of the international Law Commission*, 1978, Vol. II, Part Two, p. 21.

2. See, especially, the comments of some socialist countries in "Comments of Member States, organs of the United Nations, specialized agencies and other intergovernmental organizations on the draft articles on the most-favoured-nation clause adopted by the International Law commission at its twenty-eighth session", in *Yearbook of the International Law Commission*, 1978, Vol. II, Part Two, p. 162 ff.

3. See Article 7 of the ILC Draft, the related comments and the doctrine here referred to, *Ibidem*, p. 24 ff. See also *Oppenheim's International Law*, edited by R. Jennings and A. Watts, and Vol. I, Harlow, 1992, p. 1326 f.

4. For a thorough history of the MFN clause up to the Second World War, including the work done by, or under the auspices of, the League of Nations, see the First Report of the ILC's Special Rapporteur, *Yearbook of the International Law Commission*, 1969, Vol. II, p. 157 ff.

5. Treaty of Amity and Commerce, February 6, 1778, France-United-States, Article 3, 8 Stat. 12 ("The Subjects of the most Christian King shall pay in the Ports, Havens, Roads, Countries, Islands, Cities or Towns, of the United States or in any part of them, no other or greater Duties or Imposts . . . than those which the Nations most favoured are or shall be obliged to pay; and they shall enjoy all the Rights, Liberties, Privileges, Immunities and Exemptions in Trade, Navigation and Commerce . . . which the said Nations do or shall enjoy."); *see also id.* Art. 4 (similar provision with respect to U.S. nationals in France).

6. United Nations Conference on Trade and Employment, Final Act and Related Documents, April 1948, Article 12 (*International Investment for Economic Development and Reconstruction*), Paragraph 2(a)(ii).

7. Of all the WTO Agreements, the General Agreement on Trade in Services (GATS) is generally considered as dealing more directly with investment issues. Mode 3 applies to the supply of trade in services through "commercial presence", which is in essence an investment activity.

8. The final draft text of the US-Central America Free Trade Agreement (CAFTA) resulting from the negotiations concluded in December 2003 and dated 28 January 2004 contains an interpretation footnote on the scope of application of the MFN treatment clause in the Investment Chapter of the Agreement (Chapter 10) which reads:

   "The Parties note the recent decision of the arbitral tribunal in Maffezini (Arg.) v. Kingdom of Spain, which found an unusually broad most-favoured-nation clause in an Argentina-Spain agreement to encompass international dispute resolution procedures. See Decision of Jurisdiction §§38-64 (Jan. 25, 2000), reprinted in 16 ICSID Rev.-F.I.L.J. 212(2002). By contrast the Most-Favoured-Nation

Treatment Article of this Agreement is expressly limited in scope to matters "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments." The Parties share the understanding and intent that this clause does not encompass international dispute resolution mechanisms such as those contained in Section C of this Chapter, and therefore could not reasonably lead to a conclusion similar to that of the Maffezini case."

This footnote would be deleted in the final text of the Agreement but the Parties agreed that it is to be included in the negotiating history as a reflection of the Parties' shared understanding of the Most-Favoured-Treatment Article and the Maffezini case.

The draft text of CAFTA is currently subject to legal review for accuracy, clarity and consistency. Under the Trade Act of 1992, the Administration must notify Congress at least 90 days before signing the Agreement. The Administration expects to notify Congress in the near future of its intent to sign the CAFTA. See http://www.ustr.gov/releases/2003/12/03-82.pdf

9. http://www.ustr.gov/new/fta/chile.htm. This agreement entered into force on January 1, 2004.

10. http://www.ustr.gov/new/fta/Singapore/final.htm. This agreement entered into force on January 1, 2004.

11. These MFN exceptions apply notably to (a) international agreements in force or signed prior to the entry into force of the NAFTA and (b) international agreements in force or signed after the date of the entry into force of NAFTA in the areas of aviation, fisheries, maritime matters, telecommunications networks and transport services (except for measures covered by the Telecommunications chapter of NAFTA or to the production, sale, licensing or radio or televisions programming) as well as (c) certain state measures or aid programmes.

12. *See* NAFTA Art. 2103 ("Except as set out in this Article, nothing in this Agreement shall apply to taxation measures.").

13. *See* NAFTA Art. 1101(3) ("This Chapter does not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter Fourteen (Financial Services.").

14. Kenneth J. Vandevelde, US Bilateral Investment Agreements, the Second Wave, in Michigan Journal of International Law, Summer 1993, p. 15.

15. Costa Rica has reserved for all sectors, "measures granted under bilateral treaties for the promotion and protection of investment designed to encourage in a preferential manner the investments of certain countries covered by such agreements". Jordan has notified that "measures extending preferential treatment are pursuant to bilateral investment treaties". Kuwait extends the exemption to multilateral agreements related to the promotion and protection of investment by notifying "measures taken to promote and protect investments applied in conformity with bilateral, multilateral agreements and undertakings to which Kuwait is a party". Poland has notified provisions on "commercial presence contained in promotion and protection of foreign investments agreements that go beyond limitations embodied in Poland's schedule of specific commitments. Trinidad and Tobago pre-empted all existing and future bilateral investment and protection treaties. The United Sates has an MFN exemption for BIT entry and stay obligations pertaining to the movement of personnel." Uruguay has notified as measure inconsistent with Article II "the provisions of bilateral investment promotion and protection agreements which guarantee investors from the other contracting party freedom to transfer and invest capital and any other sum related to investments, and also guarantee investors against the non-commercial risks to which their investment is exposed". Singapore has also listed exemptions for preferential treatment resulting from Investment Guarantees Agreements.

Canada, Chile and Poland have, in addition, invoked an exemption for procedural measures in their BITs. Chile's exemption concerning measures establishing dispute settlement procedures contained in existing or future bilateral treaties on the protection of investment applies in principle to all countries. Canada and Poland indicated that they "accept compulsory arbitration of investor/state investment disputes brought by or in respect of service suppliers of countries with which Canada/Poland have or may have agreements providing for such procedure".

In some other cases, country exemptions to Article II of GATS refer to preferential treatment under sectoral or regional agreements. Bulgaria has notified an MFN exemption for present and future bilateral agreements concerning the provision of legal services through established presence; Thailand for the investment provisions in the bilateral Treaty of Amity and Economic Relations with the United States; and Venezuela for bilateral agreements relating to petroleum-related services.

With regard to regional agreements, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Panama and Venezuela have notified entries for preferences accorded under the General Treaty of Central American Economic Integration; Côte d'Ivoire for preferences for insurance firms based in signatories of the CIMA and preferences for financial service providers based in WAEMU Member States; Cyprus for market access restrictions for firms based in the EU and EFTA countries; EC 12 for existing and future Euro-Med agreements; Finland, Iceland, Norway, Sweden for measures aimed at promoting Nordic co-operation; Pakistan for favourable treatment for financial institutions set up to undertake Islamic financing transactions; Senegal for preferences accorded to insurance and financial service providers based in signatories to ECOWAS, WAEMU and WAMU; South Africa for an exemption on exchange controls for persons based in the CMA; and the United Arab Emirates for preferential treatment for service providers based in members of the Gulf Co-operation Council.

16. The following section is drawn from the *Report of the International Law Commission to the General Assembly on the Work of Its Thirtieth Session*, [1978], Yearbook of the International Law Commission, A/CN.4/SER.A/1978/Add.1 (Part 2) ("ILC Report") and "Most-Favoured-Nation Clause", Yearbook of the International Law Commission, 1970, Vol. II, pp 201-213.

17. The International Law Commission was established by the General Assembly in 1947 to promote the progressive development of international law and its codification. The Commission, which meets annually, is composed of 34 members who are elected by the General Assembly for five-year terms and who serve in their individual capacity, not as representatives of their Governments. Most of the Commission's work involves the preparation of drafts on topics of international law. Some topics are chosen by the Commission and others referred to it by the General Assembly or the Economic and Social Council. When the Commission completes draft articles on a particular topic, the General Assembly usually convenes an international conference of plenipotentiaries to incorporate the draft articles into a convention which is then open to States to become parties: http://www.un.org/law/ilc.

18. See Introduction to the 1978 ILC Report, para. 15.

19. *Idem,* para. 59.

20. *Idem,* para. 17.

21. *Idem,* paragraph 61.

22. See the following acts of the General Assembly: Res. 33/139 (1978), 35/161 (1980), and 40/65 (1985), and Decision 43/429 (1988).

23. The ILC's work has been regarded by some countries as reflecting international law. See, for example, the comments of Colombia, Netherlands, Sweden in "Comments of Member States, organs of the United Nations, specialised agencies and other intergovernmental organisations on the draft articles on

the most-favoured-nation clause adopted by the International Law Commission at its twenty-eighth session", in *Yearbook of the International Law Commission*, 1978, Vol. II, Part Two, and Germany in "Analytical compilation of comments and observations from Governments, organs of the United Nations which have competence in the subject-matter and interested intergovernmental organizations: report of the Secretary-General", UN A/35/443, p. 9. However, it should be borne in mind that to grant MFN treatment is not an obligation of customary international law.

24 Some OECD Member countries, without denying the relevance of the ILC exercise, stressed that the peculiarities of each MFN clause and of its context put into serious question the utility of codification through a Convention. See, for example, the comments by Luxembourg, in "Comments of Member States, organs of the United Nations, specialised agencies and other intergovernmental organisations on the draft articles on the most-favoured-nation clause adopted by the International Law Commission at its twenty-eighth session", in *Yearbook of the International Law Commission*, 1978, Vol. II, Part Two, p. 168 ff., or by the UK in "Analytical compilation of comments and observations from Governments, organs of the United Nations which have competence in the subject-matter and interested intergovernmental organisations: report of the Secretary-General", UN A/35/443, p. 11. Other countries, for example the United States, supported the Commission's draft articles and favoured their adoption by the Commission, but they took position against their final codification through an international convention (see *ibidem*, p. 14).

25. While the ILC studied practically all aspects of the MFN treatment clauses including the issues of exceptions, and termination or suspension of MFN rights, the present section focuses on the general interpretation of MFN clauses.

26. Unless otherwise stated, paragraphs 24-47 reproduce the views of the ILC.

27. In this sense, see also *Oppenheim's International Law*, *op. cit.*, p. 1328.

28. In Article 31.2, the word "context" is held to include the preamble and annexes of the treaty as well as any agreement or instrument made by the parties in connexion with the conclusion of the treaty. Article 31.3 further states that there shall be taken into account, together with the context, any subsequent agreement or practice relating to the treaty together with any relevant rules of international law. According to Article 31.4, a special meaning can also be given to a term "if it is established that the parties so intended". Where the interpretation according to the provisions of Article 31 needs confirmation, or determination since the meaning is ambiguous or obscure or leads to a manifestly absurd or unreasonable result, recourse can be made to the supplementary means of interpretation under Article 32. These means include the preparatory works (*travaux préparatoires*) of the treaty and the circumstances of its conclusion. The Annex reproduces the text of Articles 31 and 32 in full.

29. Usually, the beneficiary State also makes an MFN pledge in a reciprocal way. See *Idem* Article 4 and Commentary (5).

30. *Idem* Article 8 (2), and Commentary (1).

31. *Idem* Article 8 Commentary (1).

32. *Idem* Article 5, Commentary (5).

33. *Idem* Article 8, Commentary (1).

34. *Anglo-Iranian Oil Co. case (Preliminary objection), Judgment of 22 July 1952 (I.C.J. Reports 1952, p. 109).* The decision of the Court contributed greatly to the clarification of the legal theory. Before the Court's decision, several legal writers presented the operation of the MFN treatment clause as an exception to the rule *pacta tertiis nec nocent nec prosunt* (i.e. that treaties produce effects only as

between the contracting parties). Legal theory is now unanimous in endorsing the findings of the majority of the Court in the *Anglo-Iranian* case. As the ILC said, rather than being an exception to this rule, it confirms it, see *ILC Report*, Article 8, Commentary (2).

35. *Idem* Article 8, Commentary (2).

36. G. Schwarzenberger also wrote regarding the relation between the *pacta tertiis* rule and the MFN clause: "This drafting device … contributes greatly to the rationalization of the treaty-making process and leads to the automatic self-revision of treaties which are based on the most-favoured-nation standard. It makes unnecessary the incorporation in the treaty between grantor and the beneficiary of the most-favoured-nation treatment of any of the relevant treaties between the grantor and third States and their deletion whenever such treaties cease to be in force. So long as this last-mentioned aspect of the matter is kept in mind, most-favoured-nation clauses are correctly described as drafting (and deletion) by reference". G. Schwarzenberger, *International Law as applied by International Courts and Tribunals*, London, 3rd ed, 1957, p. 243 and *Yearbook of the International Law Commission*, 1970, Vol. II, p. 204.

37. ILC Report, Article 8, Commentary (8).

38. *Idem* p. 26.

39. ICJ Reports, 1952, p. 93 and http://www.icj-cij.org/icjwww/idecisions/isummaries/ifussummary

40. The Court found that it would have had jurisdiction only when a dispute related to the application of a treaty or convention concluded by Iran after its Declaration of acceptance of the jurisdiction of the Court, under Article 36(2) of its Statute. This Declaration was made on 19 September 1932, *i.e*. after the UK/Agreements of 1857 and 1903. This case was, nevertheless, mentioned by the ILC because it analysed MFN clauses by comparing the rights of a beneficiary State under a basic agreement with a granting State, with those provided by the granting State to third States.

41. Morocco Case (France v. U.S.A), ICJ *Pleadings*, 1952, Vol. I.

42. The United States invoked the Peace Treaty between Morocco and the United Sates of 1836. That treaty dealt with a variety of matters including navigation, trade and consular jurisdiction. It explicitly provided for the United States consular jurisdiction in all disputes between United States citizens or protégés. The United States claimed additional rights to consular jurisdiction on the basis of an MFN clause in that Treaty, for all cases in which a United States citizen or protégé was merely a defendant. The third party treaties of Morocco, invoked by the United States, were the General Treaty with Great Britain of 1856 and the Treaty of Commerce and Navigation with Spain of 1861. These treaties granted jurisdiction in all cases in which the respective nationals were merely defendants. The Court found that "the United States acquired by virtue of the most-favoured nation clauses, civil and criminal jurisdiction in all cases in which the United States were defendants," but that those jurisdictional benefits were extinguished upon termination by Spain and Great Britain of their respective treaties with Morocco. See http://www.icj-cij.org/icjwww/idecisions/isummaries/ifussummary520827.htm. The full text of the treaty is available at http://www.yale.edu/lawweb/avalon/diplomacy/barbary/bar1836t.htm.

43. IC.J Reports 1952.

44. ICJ Reports 1953.

45. United Nations, *Reports of International Arbitral Awards*, Vol. XII, United Nations, 1963.

46. The submissions of the parties and the opinions expressed in this case also provide useful insights into the operation of the MFN clause and the *ejusdem generis* rule. For instance, in invoking this principle, the counsel for the United Kingdom stated that "the clauses conferring most favoured nation rights in respect of a certain matter, or class of matter, can only attract the rights conferred by other treaties in regard to the same matter of class of matter. … This furnishes the conclusive answer to any suggestion that Article X can attract any provisions in other treaties except provisions about commerce and navigation. It cannot attract provisions dealing with the administration of justice and related matters". The Counsel of Greece argued on the other hand that access to the courts and administration of justice in commercial matters is not outside the "genus" of the favours referred to in the MFN clause of the Greek/UK treaty. They are part of "in all matters relating to commerce". See Yearbook of the International Law Commission, 1970, Vol. II, para. 69.

47. See "Digest of decisions of national courts relating to the most-favoured-nation clause", prepared by the UN Secretariat for the ILC, A/CN.4/269, 29 March 1973.

48. This description is drawn from the ILC Report, Article 10 Commentary (4).

49. This summary of the case is based on the ILC Report, Article 10, Commentary (5).

50. In other words, in this case as well as the previous one, the Tribunals adopted the view that MFN clauses could not be invoked to compare treatment provided under two treaties dealing with different subjects.

51. *Idem* Commentary (6) to articles 9 and 10.

52. *Idem* Commentary (15) to articles 9 and 10.

53. Supra note 18, p. 27.

54. By the latest account, 32 new cases have been registered by the Centre in 2003 and 13 in 2004, as compared to 15 such claims in 2002 and only 12 and 5 in 2001 and 2000.

55. Emilio Agustin Maffezini v. Kingdom of Spain (ICSID No. Apr/97/7), Decision on Jurisdiction of 25 January 2000 and Award of the Tribunal of 13 November 2000. These decisions are available at http://www.worldbank.org/icsid/cases.

56. Decision on Jurisdiction of 25 January 2000, http://www.worldbank.org/icsid/cases/emilio_DecisiononJurisdiction.pdf

57. The Tribunal noted that the Argentine-Spain BIT provides domestic courts with the opportunity to deal with a dispute for a period of eighteen months before it may be submitted to arbitration. Article 10(2) of the Chile-Spain BIT, however, imposes no such condition. It provides merely that the investor can opt for arbitration after the six-month period allowed for negotiations has expired. See *Supra* note at paragraph 39.

58. *Idem* at paragraph 38. The Spanish original of the clause reads as follows: "En todas la materias regidas por el presente Acuerdo, este tratamiento no sera menos favorable que el ortorgado por cada Parte a las inversions realizadas en su territorio por inversores de un tercer pais."

59. *Idem* at paragraph 56.

60. Footnote omitted.

61. Supra note 56 at 56.

62. The Tribunal also referred to the 1992 Agreement between Chile and the Belgian-Luxembourg Economic Union as an example of other MFN treaty clauses applying to "all rights contained in the present Agreement". Supra Note 56 at 53, footnote 21.

63. *Idem* at 15.

64. The Tribunal cited in this connection the investment treaties concluded by the United-Kingdom.

65. *Idem* at paragraphs 52, 53.

66. At pp. 23-24. Footnotes omitted.

67. Técnicas Medioambientales Tecmed, S.A. v. United Mexican States [ICSID Case No. ARB(AF)/00/2] http://www.worldbank.org/icsid/cases/laudo-051903%20-English.pdf

68. It has also been reported that the German investor claimant in Siemens AG v. Argentine Republic, ICSID case No. ARB/02/08 may also use the Mafezzini construction in this case. See "Investor-State Arbitration: A Hot Issue in Latin America, Guido Santiago Tawil, M. & M. Bomchil, Buenos Aires. Horacio D. Rosatti makes a similar observation on the implications of the Mafezzini case in "*Bilateral Investment Treaties, Binding International Arbitration and the Argentine Constitutional System"*, in La Ley, *15 October 2003.*

69. Article 8(1) is a separate article from the MFN treatment clause in Article 4(2) of the Agreement.

70. The Spanish original of the clause is as follows: « 1.Si de las disposiciones legales de una de las Partes Contratantes, o de las obligaciones emanadas del Derecho Internacional al margen del presente Acuerdo, actuales o futuras, entre las Partes Contratantes, resultare una reglamentación general o especial en virtud de la cual deba concederse a las inversiones de inversores de la otra Parte Contratante un trato más favorable que el previsto en el presente Acuerdo, dicha reglamentación prevalecerá sobre el presente Acuerdo, en cuanto sea más favorable. ».

71. Paragraph 69 ends with a footnote making a cross reference to paragraphs 25-26 and 62-63 of the Maffezini Decision on Jurisdiction.

72. *Idem* p. 24, paragraph 74.

73. "The Claimant has failed to furnish convincing or sufficient evidence to prove, at least *prima facie*, that the Claimant's investment received, under similar circumstances, less favourable treatment than that afforded to nationals of the State receiving the investment of a third State, or that said investment was subject to discriminatory treatment upon the basis of considerations relative to nationality or origin of the investment or the investor." *Ibid*, p. 73, paragraph 181.

74. *ADF Group Inc. v. United States of America (Award, 9 January 2003),* paragraph 136. http://www.state.gov/documents/organization/16586.pdf.

75. *Idem* paragraph 196.

76. See *Pope & Talbot Inc. v. Government of Canada (Tribunal Decision – 10 April 2001),* paragraphs 111, 115. The Tribunal appears to have relied on the BITs of "at least Canada and the United States". However it did not cite in the award any provisions of Canadian BITs or any secondary sources that cite Canadian FIPA provisions while the US BITs that it cited predated the NAFTA. http://www.dfait-maeci.gc.ca/tna-nac/documents/Award_Merits-e.pdf. Since both the USA and Canada have taken exceptions from MFN for all prior agreements, (NAFTA Annex IV), it is not clear how prior BITs of the United States could be relevant to interpreting the MFN clause in relation to Canada.

77. *Idem* paragraphs 105-118.

78. Paragraph 2 of the FTC's Interpretation provides that the concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by customary international law minimum standard of treatment. Paragraph 3 states that a determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105.

79. While the Tribunal noted that "it might appear" that its own interpretation was different from the one adopted by the FTC, it concluded that even applying this "restrictive interpretation" to the facts of the case, would lead to the exact same conclusions it reached in its previous Award. See *Pope & Talbot Inc. v. Government of Canada (Tribunal Decision – 31 May 2002, at 47, 56 and 69* http://www.dfait-maeci.gc.ca/tna-nac/documents/damage_award.pdf

80. *Idem* at 66.

81. In the *Loewen* case, the Tribunal said that, to the extent that the *Pope & Talbot* Tribunal had suggested an interpretation of Article 1105 different from that adopted by the FTC, it should be disregarded (*The Loewen Group, Inc and Raymond L. Loewen v. United States of America*, ICSID case no. ARB (AF)98/3), Final Award 23 June 2003, see http://www.state.gov/documents/organization/22094.pdf).