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The *Ejusdem Generis* Principle in MFN Clauses

The Stretching and Squeezing of Non-Discrimination in International Investment Law

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Content

List of Abbreviations

CETA	Comprehensive Economic and Trade Agreement
ECHR	European Convention on Human Rights
ECT	Energy Charter Treaty
MPEIL	Max Planck Encyclopedia of International Law
EU	European Union
FCN	Friendship, Commerce and Navigation
FET	Fair and Equitable Treatment
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICSID	International Centre for the Settlement of Investment Disputes
IIA	International Investment Agreement
ILC	International Law Commission
ILM	International Legal Material
IMF	International Monetary Fund
ISDS	Investor-State Dispute Settlement
ITO	International Trade Organization
LCIA	London Court of International Arbitration
MFN	Most-Favoured-Nation
NAAEC	North American Agreement on Environmental Cooperation
NAFTA	North American Free Trade Agreement
NT	National Treatment
OECD	Organization for Economic Cooperation and Development

TPP	Trans-Pacific Partnership
TTIP	Transatlantic Trade and Investment Partnership
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNC	United Nations Charter
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNTS	United Nations Treaty Series
USA / US	United States of America
VAT	Value Added Tax
WTO	World Trade Organization

Abstract

This paper argues that the current understandings and interpretations of the ejusdem generis *principle in MFN clauses do not satisfy the theoretical requirements of the principle. So far, the focus of arbitral tribunals was limited to the question, whether substantive and procedural rights can be considered to be of the same* genus*, in order to allow the application of the MFN clause. However, this distinction is largely artificial and redundant because there are no different kinds of rights under IIAs. Instead, the principle* ejusdem generis *rather requires investors or investments to be in 'like circumstances' or in 'like situations' in order for MFN clauses to be applicable. This requirement of likeness is an inherent part of MFN clauses and key in order to achieve the target of MFN treatment, which is to avoid discrimination among foreign investors and investments. In the absence of such likeness-examinations, MFN clauses have largely failed to provide protection from discrimination in international investment law.*

In der vorliegenden Arbeit wird argumentiert, dass die bisherigen Interpretationen und Anwendungen des ejusdem generis *Prinzips den theoretischen Anforderungen desselbigen nicht genügen. Internationale Schiedsgerichte waren in diesem Zusammenhang nur mit der Frage befasst, ob materielle und prozessuale Rechte in internationalen Investitionsabkommen vom gleichen* genus *sind und somit in den Anwendungsbereich von Meistbegünstigungsklauseln fallen. Diese Unterscheidung ist allerdings künstlich und überflüssig, weil es schlicht keine zwei Arten von Rechten in internationalen Investitionsabkommen gibt. Stattdessen wird dargelegt, dass das* ejusdem generis *Prinzip verlangt, dass sich Investoren oder Investments in ‚gleichen Situationen' oder ‚gleichen Umständen' befinden müssen, um die Anwendbarkeit der Meistbegünstigungsklausel zu begründen. Diese Ähnlichkeitsanforderung ist ein fester Bestandteil von Meistbegünstigungsklauseln und von zentraler Bedeutung um den Sinn und Zweck der Klauseln, nämlich die Verhinderung von Diskriminierung von ausländischen Investoren, zu erreichen. Aus dem Mangel solcher Ähnlichkeitsprüfungen in der Schiedspraxis, lässt sich folgern, dass durch die Meistbegünstigungsklauseln kein wirksamer Anti-Diskriminierungsschutz gewährleistet wird.*

A Introduction

I. Background and Hypothesis

It is certainly due to the subject matter and the illustrative reasoning of the Appellate Body, that students of international law quickly remember the WTO case *Japan – Alcoholic Beverages*.[1] It remains unknown, however, to which results the careful, repeated and worldwide tastings on various campuses led, and whether the happy tasters agree that shochu, vodka, whisky and rum and so on, can be considered "like products". What is for sure is that the reasoning of the Panel and the Appellate Body is well memorized: it was argued that in order to find a violation of the NT standard, as laid down in Art. III GATT '94,[2] the comparability of the products must be ensured. In order to do so, it must be found out, first, whether the domestic and the imported product are *like* and second, whether the taxes imposed on the latter, were in excess of those imposed on the former.[3] In determining the likeness of shochu and different spirits and liqueurs, the Panel followed the approach as proposed by the Report of the Working Party on *Border Tax Adjustments*.[4] By analysing the end-use of the product, consumers' tastes and habits and the products' properties, nature and quality, it was found that the domestic and the imported liqueurs are "like products" and that, by imposing higher taxes on the latter, Japan violated its NT obligations under Art. III GATT '94.[5] However, it was not only alcohol, but also music that increased the memorability of the *Japan – Alcoholic Beverages* case. The Appellate Body argued that there is "no one precise and absolute definition of what is 'like'" and that "the concept of likeness is a relative one that evokes the image of an accordion".[6] This accordion of likeness "stretches and squeezes" and the "width of the accordion […] must be determined by the particular provision in which the term 'like' is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply".[7] This reasoning became the blueprint in WTO dispute settlement proceedings, and nearly all Panels and Appellate Bodies followed

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[1] *Japan–Taxes on Alcoholic Beverages*, Panel Report, WT/DS8/R, WT/DS10/R, WT/DS11/R, adopted 1 November 1996, as modified by Appellate Body Report WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, DSR 1996: I, p. 125, [hereinafter "*PR Japan–Alcoholic Beverages*"]; *Japan–Taxes on Alcoholic Beverages*, Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996: I, p. 97, [hereinafter "*AB Japan–Alcoholic Beverages*"]

[2] General Agreement on Tariffs and Trade (1994), 1867 UNTS 187

[3] *AB Japan–Alcoholic Beverages*, p. 18

[4] WTO Working Party Report, *Border Tax Adjustments* (1970), BISD 18S/97

[5] *PR Japan–Alcoholic Beverages*, p. 121-122

[6] *AB Japan–Alcoholic Beverages*, p. 21

[7] *Ibid.*

the approach of the Working Party on *Border Tax Adjustments* when it came to an analysis of "like products" under the NT *and* the MFN standard. [8]

Both, MFN and NT clauses are not only "cornerstones" of international trade, they are also crucial standards in the realm of international investment law and can be found in the majority of BITs.[9] However, while the requirement of likeness has triggered profound analyses in the realm of trade, so far no such likeness-examination took place in the context of MFN clauses under BITs (although it played a role under NAFTA,[10] but only with regard to NT claims). The recent discussions rather orbited around the question, whether the MFN clauses are also applicable to dispute settlement provisions.[11] Opinions especially diverged on the proper application and interpretation of the *ejusdem generis* principle, which says that MFN clauses do only work when the clause and the treatment it aims to 'import', refer to the same subject matter. While one side argued that substantive and procedural provisions, such as dispute settlement clauses, are not of the same subject matter (or the same 'kind'), the other side basically contended that such a separation into substantive and procedural matters is not compatible with the principle *ejusdem generis*, and that MFN clauses apply to both kinds of rights. In this regard, it was in particular since the *Maffezini* case, that the application of the MFN standard has become "one of the most controversial issues in international investment law". [12]

However, as this paper will show, the discussions and consequently the decisions by arbitral tribunals do not satisfy the *ejusdem generis* principle and in the end, they also do not satisfy the whole idea of MFN treatment. This is so because the principle does not only require that the clause and the imported standard cover the same subject matter, but also that they refer to the same category of subjects, what must be found out by applying a likeness-test. This is of paramount importance in order to achieve the target of MFN clauses, which is to ensure non-discrimination among foreign investors. The lack of the likeness-examination is not therefore

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[8] van den Bossche, Peter & Zdouc, Werner: *The Law and Policy of the World Trade Organization*, 2013, 3rd edition, p. 361

[9] *Canada–Certain Measures Affecting the Automotive Industry*, Appellate Body Report, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000: VI, p. 2985, [hereinafter "*AB Canada–Autos*"]

[10] North American Free Trade Agreement (1993), 32 I.L.M. 289 and 605

[11] c.f. Gaillard, Emmanuel: *Establishing Jurisdiction through a Most-Favoured-Nation Clause* in 'New York Law Journal' (vol. 233, no. 105), 2005; Radi, Yannick: *The Application of the Most-Favoured-Nation Clause to the Dispute Settlement Provisions of Bilateral Investment Treaties: Domesticating the 'Trojan Horse'* in 'European Journal of International Law' (vol. 18, no. 4), 2007, pp. 757-774; Banifatemi, Yas: *The Emerging Jurisprudence on the Most-Favoured-Nation Treatment in Investment Arbitration* in 'International Investment Law: Current Issues III' (Bjorklund, A.; Laird, I.; Ripinsky, S.; eds.), British Institute of International and Comparative Law, 2009, pp. 241-273; Parker, Stephanie L.: *A BIT at a Time: The Proper Extension of the MFN Clause to Dispute Settlement, Provisions in Bilateral Investment Treaties* in 'The Arbitration Brief' (vol. 2, no. 1), 2012, pp. 30-63; Temnikov, Oleg & Uchkunova, Inna: *Toss out the Baby and Put the Water to Bed: On MFN Clauses and the Significance of Treaty Interpretation* in 'ICSID Review' (vol. 30, no. 2), 2015, pp. 414–436

[12] Acconci, Pia: *Most-Favoured-Nation Treatment* in 'The Oxford Handbook of International Law' (Muchlinski, Peter; Ortino, Federico; Schreuer, Christoph; eds.), 2008, p. 366-367

negligible, because the MFN clause at stake does not explicitly refer to investors in "like circumstances" or "like situations". Discrimination can only take place between things or persons that are 'like'; treating different things or persons differently, is not (necessarily) discrimination, but may be a corollary of their distinctness. The *ejusdem generis* principle is therefore an inherent part of MFN clauses and applies independently from the wording of the clause. It follows from the absence of such a test, that MFN clauses largely fail to ensure non-discrimination in the area of investment law.

II. Method

In order to underline the hypothesis, the underlying investigation will proceed as follows: first, an introduction into the character, history and scope of MFN clauses and MFN treatment will be provided. The separation into *clauses* and *treatment*, however, is certainly not a sharp one and in both chapters certain notions will overlap. Still, this approach is helpful in so far, as it allows to better extract the particularities of the form (clauses) and the content (treatment). This is true especially with regard to the non-discrimination target of MFN treatment. In a second step, the target will be to define and outline the *ejusdem generis* principle, what will certainly be the most difficult task. A major reason for the difficulty is that literature on the matter is scarce. A solution to that problem can (partly) be found in the decisions of arbitral tribunals, which will be outlined in the third part. The third part's first section will display the decisions of the ICJ and arbitral tribunals with regard to the debate about the same subject matter. Due to the absence of a likeness-test with regard to MFN clauses under BITs, the second section of the third part will seek advice from arbitral decisions in relation to NT claims and outline the major arguments. To draw analogies from NT is legitimate not only because MFN and NT are often combined in one single clause, but also because they share several key characteristics. However, due to its limited scope, this paper cannot provide more details on the NT standard or engage in a deeper comparative analysis, although this would be helpful to some extent.

With regard to the recurring references to trade law, it is important to mention that the author is aware that analogies between trade and investment law have to be handled with care, especially due to the "peculiar business nature" of an investment: while trade is normally a one-time transfer of goods and money, investments are more complex and extend from a few

years up to several decades.[13] But although WTO case law cannot serve as a blueprint for the field of investment, it still can provide important guidelines.

[13] Dolzer, Rudolf & Schreuer, Christoph: *Principles of International Investment Law*, 2012, 2nd edition, p. 19

B Most-Favoured-Nation Clauses & Treatment

This first chapter aims first of all to provide clarity about the meaning, background and scope of MFN clauses and treatment. While the first part will focus on MFN clauses, the second part will focus on MFN treatment.

I. MFN Clauses

1) Definition

The ILC held that the word 'clause' refers to "both single provisions of treaties and other agreements and any combination of such provisions, including entire treaties, when appropriate".[14] MFN *clauses* are respectively defined as:

> "[…] treaty provision[s] whereby a State undertakes an obligation towards another State to accord most-favoured treatment in an agreed sphere of relations".[15]

MFN clauses are nowadays primarily associated with international economic law. They are, however, not a mere economic phenomenon. They can rather be found in all fields of international law, such as transportation (particularly in relation to ships and airplanes), consular and diplomatic relations, or administration of justice (e.g. with regard to the access to courts). The prior consent given through MFN clauses is normally limited to a "determined sphere of relations", i.e. MFN clauses do not apply randomly across different treaties, but relate only to the matter stipulated by the basic treaty.[16]

2) History

The rather archaic term 'Most-Favoured-*Nation*' already indicates that the traces of MFN clauses reach back into the early days of international law – today, it is uncommon to use the term 'nation' in order to refer to the legal entity, which nowadays is known as the 'state'.[17] In fact, MFN clauses are old-timers of international law and are considered to be among the oldest standards of international economic relations.[18] The idea of MFN treatment goes back to the 11th century, when the Italian city of Mantova received the imperial warrant to profit

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[14] ILC: *Draft Articles on Most-Favoured-Nation Clauses* in 'Yearbook of the International Law Commission', 1978, Vol. II, Part Two, Art. 4 [emphasize added], [hereinafter "Draft Articles"]

[15] *Ibid.*

[16] Art. 4 (16) Draft Articles

[17] c.f. Art. 4 (2) Draft Articles

[18] OECD: *International Investment Law: A Changing Landscape*, 2005, p. 127 [hereinafter "OECD"]

from privileges given to "whatsoever other town".[19] In the following centuries, MFN clauses of various types became a common feature in international treaties. Since a detailed historical analysis would go beyond the scope of this paper, the following section aims to briefly outline the major steps in the development of the clause.

a) Early Examples

It was in the 17th century that bilateral MFN clauses became common practice, i.e. that states committed themselves to grant MFN treatment to *each other*.[20] Before, MFN clauses were a frequent tool in peace treaties, which only obliged the defeated states to expand most favourable treatment to the victors.[21] While the (unilateral) guarantee given to Mantova in 1055 was an imperial privilege, the (unilateral) obligation to expand MFN treatment in the peace treaties was rather a punishment.

The term *Most-Favoured-Nation* appeared for the first time in the 18th century, where the distinction between political and commercial treaties became sharper.[22] An early example is the Treaty of Utrecht from 1713. In the course of peace talks, England and France negotiated a separate commercial treaty, which already contained a "full-fledged" MFN clause.[23] The clause in Art. 8 of the Treaty reads as follows:

> "It is further agreed [that all] Subjects of each Kingdom […] shall have the like Favour in all things as the Subjects of France, or any other foreign Nation, the most favour'd, have, possess and enjoy, or at any time hereafter may have, possess or enjoy".[24]

Due to concerns of the British Parliament with regard to contractual obligations towards Portugal, the treaty was not ratified and the clause never entered into force.

b) FCN Treaties

The era of FCN treaties, which began in the late 18th century, paved the way for the modern form and understanding of MFN clauses. Generally speaking, FCN treaties promoted,

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[19] Hudec, Robert: *Tiger, Tiger in the House: A Critical Evaluation of the Case Against Discriminatory Trade Measures* in 'The New GATT Round of Multilateral Trade Negotiations: Legal and Economic Problems' (Petersmann, Ernst-Ulrich & Hilf, Meinhard; eds.), 1988, p. 177

[20] Jackson, John H.: *World Trade and the Law of GATT: A Legal Analysis of the General Agreement on Tariffs and Trade*, 1969, p. 250

[21] Geiß, Robin & Hilf, Meinhard: *Most-Favoured-Nation Clause* in 'MPEIL', 2014, para. 12

[22] Jackson, John H.: *The World Trading System – Law and Policy of International Economic Relations*, 1997, p. 158

[23] ILC: *Yearbook of the International Law Commission*, 1969, Vol. II, para. 17 [hereinafter "*YILC 1969*"]

[24] Israel, F. L. (edt.): *Major Peace Treaties of Modern History 1648-1967* (vol. I), 1967, p. 223

facilitated and regulated business relations between the contracting parties, which were mostly sea-faring nations. They are defined as

> "bilateral treaties concluded to facilitate commerce, navigation and investment between the State Parties and reciprocally to protect individuals and businesses".[25]

Until the beginning of the rise of BITs in 1959, FCN treaties were the predominant legal instruments for the governance of bilateral economic relations and some 40 remain in force until that day.[26] MFN clauses in FCN treaties were also under scrutiny of the ICJ, what will be discussed later in this paper. The very first FCN treaty, concluded between the USA and France in 1778,[27] contained several MFN clauses.[28] Art. 3 of the treaty reads for example:

> "The Subjects of the most Christian King shall pay in the Port Havens, Roads, Countries, Lands, Cities or Towns, of the United States or any 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, whether in passing from one Port in the said States to another, or in going to and from the same, from and to any Part of the World, which the said Nations do or shall enjoy".[29]

This example illustrates, that the early MFN clauses were very broad and applicable on a wide range of issues ("Rights, Liberties, Privileges, Immunities and Exemptions in Trade, Navigation and Commerce"). Another key feature of MFN clauses in the early FCN treaties is conditionality. Art. 2 of the France–USA Treaty reads as follows:

> "The Most Christian King and the United States engage mutually not to grant any particular favour to other nations, in respect of commerce and navigation, which shall not immediately become common to the other Party, who shall enjoy the same favour, freely, *if* the concession was freely made, or on allowing the same compensation, *if* the concession was conditional".[30]

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[25] Paulus, Andreas: *Treaties of Friendship, Commerce and Navigation* in 'MPEIL', 2011, para. 1

[26] Alschner, Wolfgang: *Americanization of the BIT Universe: The Influence of Friendship, Commerce and Navigation (FCN) Treaties on Modern Investment Treaty Law* in 'Goettingen Journal of International Law' (vol. 5, no. 2), 2013, pp. 455-486, p. 457

[27] Treaty of Amity and Commerce Between the United States and France (1778); available at: http://avalon.law.yale.edu/18th_century/fr1788-1.asp [accessed on 21st April 2016]

[28] Paulus, Andreas: *Treaties of Friendship, Commerce and Navigation* in 'MPEIL', 2011, para. 1

[29] [Emphasize added]

[30] [Emphasize added]

In contrast to the unconditional types, there is no automatism under conditional MFN clauses to expand the favours given to the third state also to the beneficiary. Conditional MFN clauses are rather a *pactum de contrahendo*, i.e. a commitment towards the beneficiary to *negotiate* the expansion of favours given to the third state.[31] When Great Britain and France granted each other unconditional MFN treatment in the so-called Chevalier-Cobden Treaty from 1860, the use of conditional MFN clauses came to an end.[32] The liberal spirit of the Chevalier-Cobden Treaty served as a model for many other treaties concluded between 1860 and 1914, a time when the unconditional clause was considered to be at the "height of its effectiveness".[33] It is also from that period, where the notion of MFN clauses as "cornerstones of all […] commercial treaties" originates.[34] Overall, until "the golden days before World War I" international economic affairs were largely dominated by a business-friendly climate and liberal market economy, i.e. by open markets and a significant reduction of governmental intervention into the economy.[35]

c) Between the Wars

The period between 1918 and 1939 is characterized by the painful aftermath of World War I, economic downturns and a reappearance of the conditional MFN clause. It was considered "unnatural" to treat allies and enemies in the same manner.[36] Again, MFN treatment was not considered a rational, reciprocal measure in order to enhance economic wellbeing and cooperation, but a punishment, which was imposed on the losing parties. An example is Art. 267 of the Versailles Treaty,[37] under which Germany was unilaterally obliged to grant MFN treatment to the victorious powers. It reads as follows:

> "Every favour, immunity or privilege in regard to the importation, exportation or transit of goods granted by Germany to any Allied or Associated State or to any other foreign country whatever shall simultaneously and unconditionally, without request and without compensation, be extended to all the Allied and Associated States".

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[31] Geiß, Robin & Hilf, Meinhard: *Most-Favoured-Nation Clause* in 'MPEIL', 2014, para. 14

[32] *YILC 1969*, para. 28

[33] *Ibid.*, para. 29

[34] Hornbeck, Stanley Kuhl: *The Most-Favored-Nation Clause* in 'American Journal of International Law' (vol. 3, No. 2), 1909, pp. 395-422, p. 395

[35] Senti, Richard: *WTO – Die neue Welthandelsordnung nach der Uruguay-Runde*, 2001, 3rd edition, p. 54

[36] *YILC 1969*, para. 30

[37] Treaty of Peace between the Allied and the Associated Powers and Germany (1919), 225 CTS 188

In defiance of the spreading economic protectionism around the countries of the world, there were still several states that advocated the use of the clause; and indeed, it experienced a short renaissance. It is worth mentioning in this regard, that due to a move of the US, the conditional form of the clause nearly disappeared in that period.[38] However, the Great Depression of 1929 led to a collapse of the world economy and states took a position of all-round defence by isolating their economies with duties, import and export controls. MFN clauses became the exception, rather than the rule.[39] In particular Nazi Germany considered MFN clauses to be "vicious offshoots" of liberalism and used all kinds of trade controls to make the economy self-sufficient.[40]

d) The General Agreement on Tariffs and Trade

The catastrophic experiences of the two World Wars did not only trigger the establishment of a new political architecture in the form of the UN, but also a new economic order in the form of the Bretton Woods Institutions, World Bank and IMF. The authors of the new system, among which the economists John Maynard Keynes and Harry Dexter White can be considered the most famous ones, aimed to build the new order on the foundations that were laid during the period before 1914.[41] The dominating idea was that a successful global economy must be based on non-discrimination among trading partners and a reliance on open markets.[42] With the wisdom of hindsight, it became clear that the opposite reactions before the war, namely the discrimination of trading partners and the closing of domestic markets, further fuelled the hostilities between states, which finally led to the catastrophe of World War II. However, scepticism prevailed over too liberal policy approaches and the planned third pillar of the Bretton Woods System, the ITO, never came into being, mainly due to the non-ratification of the Havana Charter[43] by the US Congress. Instead, it was the GATT, which became the dominant legal framework for world trade in the second half of the 20th century. In many regards, it constitutes a "compromise" between unlimited free trade and state protectionism.[44] In 1994, it was embedded into the WTO system and remains a central pillar of world trade until that day.

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[38] *YILC 1969*, para. 34

[39] Snyder, Richard C.: *The Most-Favoured-Nation Clause: An Analysis with Particular Reference to Recent Treaty Practice and Tariffs*, 1949, p. 27

[40] Royal Institute of International Affairs: *Survey of International Affairs – 1938* (Vol. I), 1941, p. 33

[41] Tietje, Christian: *Internationales Wirtschaftsrecht*, 2015, 2nd edition, p. 40

[42] Lowenfeld, Andreas F.: *Bretton Woods Conference* in 'MPEIL', 2013, para. 3

[43] Havana Charter for an International Trade Organization (1948), UN Doc E/CONF.2/78

[44] Tietje, Christian: *Internationales Wirtschaftsrecht*, 2015, 2nd edition, p. 40

The WTO is based on the principles that trade should be freer, predictable, more competitive, more beneficial for less developed countries and especially: without discrimination.[45] This is also reflected in the preamble of the GATT '94. Accordingly, the GATT aims to achieve a "substantial reduction of tariffs and other barriers to trade and […] the elimination of discriminatory treatment in international commerce".[46] The latter is mainly realized by the MFN and the NT clause, as laid down in Articles I, III GATT '94. Within GATT, the MFN clause is more than a mere treaty provision. Due to its importance and central role in the trading system, it is considered the "cornerstone" of the WTO and the "defining principle" of GATT.[47] This prominent role is also reflected by the fact that it is to be found in the very first Article of the GATT '94. It reads as follows:

> "With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation […] any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties".

3) MFN Clauses in BITs

a) The Emergence of BITs

The increasing complexities of trade and investment after World War II required tailored legal frameworks for both disciplines. While it was possible to conclude a multilateral agreement for trade in the form of the GATT and later the WTO, attempts to codify multilateral standards for investment matters failed for various reasons.[48] The only significant multilateral treaty is the 1965 ICSID Convention.[49] However, it does not contain any substantive standards that establish any concrete rights for investors; instead, it is an intergovernmental treaty that 'merely' provides a procedural framework for the settlement of investment disputes. Due to the lack of multilateral rules, states – especially capital-exporting states – filled the gap by concluding bilateral investment treaties, the so-called BITs.

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[45] Available at: https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm [accessed on 27th June, 2016]

[46] Preamble GATT '94

[47] *AB Canada–Autos*, para. 69

[48] e.g. *Draft Convention on Investments Abroad (Abs-Shawcross Draft) under the auspices of the OECD*; c.f. Abs, Herman & Shawcross, Hartley: *The Proposed Convention to Protect Private Foreign Investment: A Round Table* in 'Journal of Public Law' (vol. 1), 1960, pp. 115-118

[49] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1966), 575 UNTS 159

BITs are defined as

> "reciprocal legal agreements concluded between two sovereign states for the promotion and protection of investments by investors of the one state in the territory of the other state".[50]

It was in 1959 that the first BIT was concluded between Germany and Pakistan.[51] While the number of BITs grew slowly at the beginning, their quantity exploded in the 1990s and the first decade of the new millennium. In the meanwhile, there are nearly 3,000 treaties in force.[52] But it is not only due to their number, but also because of their relevance and wide application, that they have become the "backbone" of the legal framework affording protection to foreign investors and the "most important source of contemporary investment law".[53]

BITs are decisive for the decision of investors to invest in foreign countries. Before deploying their capital, investors want to ensure that the target country provides an investment-friendly environment, which includes a stable and predictable legal framework provided for in BITs. In particular capital-importing states compete for foreign investors, which is why BITs are also seen as "admission tickets" to international investment markets.[54] Their importance derives mainly from two facts: first, BITs explicitly entitle individuals, namely investors, to bear international rights, in contrast to the traditional idea, according to which international law is the law between states. Second, they give investors the opportunity also to claim their rights, by enabling them to refer disputes to international arbitral tribunals. In this regard, it is important to emphasize that BITs helped overcoming the regime of diplomatic protection. Diplomatic protection is defined as

> "the invocation by a State […] of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility".[55]

In other words, under diplomatic protection, states make the claims of their nationals that result from a violation of international law, their own. However, this comes along with

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[50] Jacob, Marc: *Bilateral Investment Treaties* in 'MPEIL', 2014, para. 1

[51] Treaty Between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments (1959)

[52] Dolzer & Schreuer (2012), p. 13

[53] Jacob, Marc: *Bilateral Investment Treaties* in 'MPEIL', 2014, para. 1; c.f. Vandevelde, Kenneth J.: *The Political Economy of a Bilateral Investment Treaty* in 'American Journal of International Law' (vol. 92, no. 4), 1998, pp. 621-826

[54] Dolzer & Schreuer (2012), p. 14

[55] ILC: *Draft Articles on Diplomatic Protection* in 'Yearbook of the International Law Commission', 2006, Vol. II, Part Two, Art. 1

various shortcomings and significant disadvantages for both the investor and his home state. On the one hand, the investor does not enjoy any protection by the law, because he is not entitled to. The pursuit of the investor's rights therefore always depends on the goodwill of his home state, respectively on the political feasibility of diplomatic protection. By making the concerns of the investor their own, states, on the other hand, risk politicizing and therefore "seriously disrupting" their relations with the target state.[56] Although diplomatic protection is still a present and possible tool of dispute settlement, most states have given their consent to investor-state arbitration through BITs.

b) MFN Clauses in BITs

Virtually all BITs contain MFN clauses. It goes without saying, that in the BIT universe of nearly 3,000 treaties, which are all worded individually, no MFN clause is like the other. There is consequently no such thing as *the* MFN clause.[57] MFN clauses can take many different forms and nearly every formulation differs, at least slightly, from the other. And as often in the realm of law, slight differences can have major impacts on legal practice. Or to put it in the words of the Tribunal in *Tza Yap Shum v. Peru*: "Each MFN clause is a world in itself, which demands an individualised interpretation to determine its scope of application".[58] Generalizations therefore have to be handled with care. However, one may say that a 'typical' MFN clause reads as follows:

> "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 nationals or companies of any third State".[59]

A key feature of all MFN clauses in BITs is, however, that they are unconditional, reciprocal and indeterminate.[60] It is to be mentioned that only MFN *clauses* are reciprocally granted, but that the scope of MFN *treatment* can vary significantly. Without opening their markets themselves, restrictive states can, for example, profit from the policies of liberal economies. In that case, the treatment given from granting states to beneficiaries is way more 'favourable'

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[56] Dolzer & Schreuer (2012), p. 233

[57] Lord McNair: *The Law of Treaties*, 1961, p. 273

[58] *Señor Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction (2009), para. 198

[59] Art. 3 (1) Barbados–Germany BIT

[60] Acconci (2008), p. 370

than vice versa. However, this "free rider problem" should not further be addressed here.[61] Instead, the following further commonalities of MFN clauses in BITs can be extracted:

aa. Treaty Based Obligation

Despite their long history, their importance for international economic law and their use in virtually every IIA, MFN treatment remains a "conventional obligation and not a principle of international law, which applies to states as a matter of general legal obligation independent of specific treaty commitments".[62] In other words, the right to MFN treatment can only be established by a MFN clause. Art. 7 Draft Articles says accordingly:

> "Nothing in the present articles shall imply that a State is entitled to be accorded most-favoured-nation treatment by another State otherwise than on the basis of an international obligation undertaken by the latter State".

The non-customary character of MFN clauses derives mainly from the sovereignty of states and states' liberty of action.[63] This liberty also includes the freedom to favour one state over the other, without acting in violation of the general prohibition of discrimination. In order to be entitled to receive or obliged to grant MFN treatment, the existence of a MFN clause is the very precondition.

bb. Source of International Law

'Normally', treaties and treaty clauses are first negotiated and agreed, then passed and ratified, and finally they establish rights and duties for the contracting states. This is different with regard to MFN clauses: they function like mechanisms and can establish rights and duties, which are neither explicitly negotiated, nor explicitly ratified by the contracting parties. By concluding MFN clauses, states rather give their "*prior consent* to extend favours extended to third states to the contracting parties".[64] At the time of the conclusion of the treaty, both parties consequently do not know which rights and duties will result out of the clause. Only when the mechanism is triggered, i.e. when the granting state gives more favourable treatment to the third state, a duty arises for the former, while a right arises for the beneficiary of the clause. In this regard, MFN clauses are a 'pig in a poke'.

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[61] c.f. Ludema, Rodney D. & Mayda, Anna Maria: *Do Countries Free Ride on MFN?*, 2006, Georgetown University; Available at: http://faculty.georgetown.edu/amm223/LudemaMaydaJuly06.pdf [accessed on 19th July 2016]

[62] UNCTAD Series on Issues in International Investment Agreements II: *Most-Favoured-Nation Treatment*, 2010, p. 22 [hereinafter "*UNCTAD*"]

[63] Art. 7 (1) Draft Articles

[64] Ziegler, Andreas: *Most-Favoured-Nation (MFN) Treatment* in 'Standards of Investment Protection' (Reinisch, August; edt.), 2008, p. 65 [emphasize added]

cc. MFN and NT Clauses

MFN clauses are closely related to NT clauses. It is not only that their content is very similar, they are also worded similarly and frequently can be found in one provision. One example, where the MFN and the NT clause are combined, is to be found in Art. 3 of the Germany Model BIT.[65] It says:

> "Neither Contracting State shall in its territory subject investments 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*".[66]

Other examples that illustrate the close relation between MFN and NT clauses, are to be found in NAFTA and ECT. They are multilateral treaties concluded in the 1990s and are not mere investment treaties, but combine trade and investment issues and are focused on ensuring liberalization and promotion, rather than the treatment and protection of investments.[67] Another shortcoming is their limited scope of application. While NAFTA is geographically limited to Canada, Mexico and the US, the ECT, which deals with the energy industry only, is limited regarding its sectoral scope. However, it was particularly NAFTA that has triggered case law, which will be crucial for the underlying investigation.

For the sake of brevity, the MFN clauses in Art. 1103 (1), (2) NAFTA are summarized together. This is legitimate, since the only difference is that the former refers to "investors", while the latter refers to "investments". The combined version reads as follows:

> "Each Party shall accord to [investors / investments] of another Party treatment no less favourable than that it accords, *in like circumstances*, to [investors / to investments of investors] of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments".[68]

The combined version of the nearly identical NT clause in Art. 1102 (1), (2) NAFTA says:

> "Each Party shall accord to [investors / investments] of another Party treatment no less favourable than that it accords, in *like circumstances*, to [its own investors / to

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[65] Germany Model Treaty Concerning the Encouragement and Reciprocal Protection of Investments (2008), [hereinafter "*Germany Model BIT*"]

[66] [Emphasize added]

[67] Acconci (2008), p. 368

[68] [Emphasize added]

investments of its own investors] with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments".[69]

The ECT, in contrast, contains several MFN clauses, most of which are drafted broadly. One example is to be found in Art. 10 (7), where MFN and NT are combined. Art. 10 (7) reads as follows:

> "Each Contracting Party shall accord to Investments […] treatment no less favourable than that which it accords to Investments of its *own Investors* or of the *Investors of any other Contracting Party* […]".[70]

However, due to their limited practical relevance, MFN clauses in the ECT will not further be looked at in this paper.

c) Scope of Application

Some MFN clauses are drafted very broadly and have a wide range of application, while others are drafted narrowly. One example for a narrow MFN clause is to be found in Art. 3 (3) Germany–Pakistan BIT. Accordingly, the MFN clause applies only to situations, where the investment was lost due to armed conflict. The clause reads as follows:

> "Nationals or companies of either Party who owing to war or other armed conflict, revolution or revolt in the territory of the other Party suffer the loss of investments situated there, shall be accorded treatment no less favourable […] than persons […] of a third party, as regards restitution, indemnification, compensation or other considerations".

d) Exceptions

Many MFN clauses in BITs contain exceptions, which exclude certain conduct towards third states from MFN obligations. The most prominent example is certainly related to regional economic integration. Under this exception, the contracting parties are allowed to grant more favourable treatment to investors from third states "on account of [their] membership of […] a customs or economic union, a common market or a free trade area".[71] Other exceptions are related to public policy matters, such as national security and public order, matters of

[69] [Emphasize added]

[70] [Emphasize added]

[71] Art. 3 (3) Germany Model BIT

taxation, subsidies or government procurement. A major issue, particularly in the field of international trade policy, but also for arbitral investment tribunals, is to "discern between legitimate restrictions and disguised protectionism".[72]

II. MFN Treatment

1) Definition and Character

a) Definition

When MFN clauses are the form, MFN treatment is the content. It is defined 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."[73]

b) Actors

MFN treatment takes place in a triangle of actors: there is always a "granting state", a "beneficiary state" and a "third state". This does not mean, however, that the triangle is limited to three states; in fact, under multilateral treaties there can be several beneficiaries and several third states. In most cases, the recipient of MFN treatment is not the state itself, but persons or things attached to that state, as for example diplomats or export goods. In investment law, the recipient of MFN treatment is the investor or the investment, depending on the exact wording of the clause.[74] While the affiliation of the investor to the beneficiary state is determined by an effective nationality, the nationality of investments and its ties to the beneficiary are a more complex issue that is unimportant here.[75]

c) Treatment No Less Favourable

The word 'treatment' already indicates that "positive acts" are required from the granting state, i.e. that the state "interferes or affects investors by means of 'measures' or the absence thereof".[76] These measures can include the implementation of laws and regulations and any form of regulatory acts by legislative or executive organs on all state levels. But also judicial

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[72] Cottier, Thomas & Oesch, Matthias: *International Trade Regulation: Law and Policy in WTO, the European Union and Switzerland, Cases Materials and Comments*, 2005, p. 5

[73] Art. 5 Draft Articles [emphasize added]

[74] In this paper, the terms investor and investment are sometimes used interchangeably.

[75] c.f. Dolzer & Schreuer (2012), pp. 45

[76] UNCTAD (2010), p. 15

decisions can amount to 'treatment'. There are mainly "two sets of obligations" for the host state towards the investor or the investment:[77] first, it is under the duty to provide protection, e.g. by granting FET or full protection and security. Second, it is obliged to provide a certain level of treatment, in the form of NT or MFN.

Under MFN clauses the granting state is obliged to treat the beneficiary at least as 'favourable' as it treats the third state. 'Favourable' does not mean that the third state is actually treated 'good'. It simply means that no other state is treated 'better', i.e. that the third state is the recipient of the comparatively most favourable treatment. In this respect, the definition of the "third state", as provided by the ILC in its Draft Articles, is not precise. Therein it says, that the third state is "any State other than the granting State or the beneficiary State".[78] While it is true that any state can be the third state, the only third state relevant for MFN purposes is the 'most-favoured-nation', i.e. the recipient of the comparatively 'best' treatment. The behaviour towards this third state virtually becomes the benchmark for the treatment of the beneficiaries: MFN clauses ensure that the best treatment is the minimum treatment.

d) Relative Standard

The obligation to act under MFN, i.e. to grant MFN treatment, arises only, if there was an act towards the third state. This is why MFN is considered to be a relative standard, since it does not create any concrete obligations, as for example the FET standard does. In fact, MFN clauses can remain completely inoperative for decades, because they do not establish any duties to treat the beneficiary this or that way. Under the MFN standard the behaviour towards the beneficiary state is determined merely in relation to the third state. Any privilege or advantage given to that third state triggers the mechanism that requires the same performance also towards the beneficiary. Under MFN clauses, every move towards a third state is at the same time a move towards the beneficiary.

e) Substantive Scope

There are three different phases of an investment, to which MFN treatment can relate: the pre-establishment phase, the post-establishment phase and the post-expropriation phase. There is, however, no general rule that states that MFN clauses apply only to this or that phase. The concrete scope *ratione materiae* is solely determined by the wording of the respective clause.

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[77] *Ibid.*

[78] Art. 2 (1) d) Draft Articles

MFN treatment with regard to the pre-establishment phase has the effect, that the beneficiary receives the same treatment as the third state, with regard to the entry-conditions of an investment. In that case, the granting state must apply the same standards in relation to the authorization to have access to the domestic market. However, such concessions are uncommon and unusual in investment law. Under BITs, there is no entitlement and "no general right" to invest in another country.[79] The liberty of states to allow, and especially to deny the entry of an investment, is an expression of their sovereignty and states frequently make use of that rule.[80] In particular capital-importing countries, which often have a less powerful standing *vis-à-vis* investors, want to reserve the decision-making power over their resources. Exceptions are the American and Canadian BITs, which also grant MFN treatment with regard to market access. But it is also the MFN clause in Art. 9 (1) ECT that applies to the access conditions of the investment. It reads as follows:

> "Each Contracting Party shall accordingly endeavour to promote conditions for *access to its capital markets* […] on a basis no less favourable which it accords in like circumstances to its own companies and nationals or companies and nationals of any other Contracting Party or any third State, whichever is the most favourable".[81]

Investors or investments are undoubtedly entitled to MFN treatment, once the investment is established. In fact, the applicability of MFN clauses to the post-establishment phase is undisputed. In this phase, investors are granted the so-called 'substantive' treatment provided in BITs. This includes *inter alia* FET or full protection and security. A typical formulation says that MFN treatment must be granted with regard to the "management, maintenance, use, enjoyment and disposal" of an investment.[82]

In contrast, the applicability of MFN treatment with regard to the post-expropriation phase, is, as already mentioned, probably the most controversial issue in international investment law. The term 'post-expropriation' refers to situations, where the investor or the investment was directly or indirectly expropriated (in fact, direct expropriations have become rare, while indirect expropriations have gained importance[83]). The central question in this situation is,

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[79] Acconci (2008), p. 370

[80] Joubin-Pret, Anna: *Admission and Establishment in the Context of Investment Protection* in 'Standards of Investment Protection' (Reinisch, August; edt.), 2008, p. 10

[81] [Emphasize added]

[82] UK Model Agreement for the Promotion and Protection of Investments (2008)

[83] Dolzer & Schreuer (2012), p. 101

whether MFN treatment must also be granted with regard to dispute settlement provisions. This question will later be discussed in depth.

f) MFN Treatment and NT

As already mentioned previously, MFN clauses are closely related to NT clauses, which is why they are often found in one provision. Beyond that, both standards share the following characteristics: first, just like MFN, NT is a relative standard, i.e. obligations towards the beneficiary arise only if there was a move towards the comparator. While the comparator with regard to MFN treatment is the most favoured third state, respectively the investors of that most favoured third state, the comparator regarding NT claims is not a state, but the respective *domestic* investor. Under NT the central question is, whether the domestic investor has received more favourable treatment than the foreign investor. Second, and most importantly, both standards aim to avoid discrimination of the comparators on grounds of their nationality. The importance of non-discrimination will be discussed below.

2) Target of MFN: Non-Discrimination

The overwhelming target of the relative standards is to avoid discrimination on grounds of nationality.[84] The ICJ held that MFN clauses aim to "establish and maintain at all times fundamental equality without discrimination among all of the countries concerned".[85] Although the term 'discrimination' forms an integral part of the daily language, the underlying investigation requires a closer look at the meaning of the word in general, and its scope and content with regard to MFN clauses in particular.

a) Definition

'Discrimination' derives from the Latin verb *discriminare*, which can be translated as 'separating' or 'segregating'.[86] In general terms, discrimination refers to "unequal treatment" of different categories of people, which is considered to be "unjust or prejudicial".[87] This reference to "unjust" is an important constraint, as will be seen shortly. Discrimination can be based on various grounds, as for example race, origin, age, religion or sex.

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[84] UNCTAD (2010), p. 27

[85] *Case concerning rights of nationals of the United States of America in Morocco*, Judgment of 27th August 1952: ICJ Reports 1952, p. 192

[86] Available at: http://www.duden.de/rechtschreibung/diskriminieren [accessed on 27th June 2016]

[87] Available at: http://www.oxforddictionaries.com/definition/english/discrimination [accessed on 24th May 2016]

b) *Non-Discrimination in International Law*

From a mere normative perspective, discrimination, as understood under International Humanitarian Law, is actually something 'good'. According to the customary rules of the ICRC, the parties to a conflict are required to 'discriminate' between civilians and combatants and to spare the former from hostilities.[88] So far as to the exceptions. Today, non-discrimination in international law is primarily associated with the field of human rights. Numerous treaties contain provisions on non-discrimination or they are in their totality dedicated to the prevention of discriminatory conduct.[89] At the same time, the promotion of non-discrimination is among the major tasks of the UN. Art. 55 c) UNC[90] provides respectively, that the UN shall encourage "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".

With regard to international investment law, non-discrimination is considered to be "one of the fundamental goals".[91] The most crucial means to achieve this goal are the MFN and NT clauses contained in virtually all investment treaties. In this regard one may add, that the early BITs did not necessarily contain NT clauses. The relevance of the NT standard is mainly derived from the fact, that national governments are often tempted to give domestic businesses preferential treatment. By not including NT clauses, protectionist states wanted to reserve the right, to favour domestic over foreign businesses, in order to promote the national economy.[92] The danger of isolating domestic economies has been indicated earlier in this paper. The commitment or obligation to grant NT is therefore an attempt to "neutralize the protectionist tendency of governments".[93] In contrast, the inclusion of MFN clauses was less problematic, since they aim to "level the playing field" and create "equality of competitive conditions" among *foreign* investors only.[94] MFN clauses ensure that the state, where the investment was made, does not discriminate investors from one state, *vis-à-vis* their counterparts from another. If a privilege is given to one investor, the principle of non-discrimination, underlying the MFN clause, requires the extension of that privilege to the other, thereby avoiding "economic distortions that would occur through more selective

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[88] Available at: https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule1 [accessed on 15th July 2016]

[89] e.g. Convention on the Elimination of All Forms of Racial Discrimination (1969), 660 UNTS 195

[90] Charter of the United Nations (1945), 1 UNTS XVI

[91] Moltke, Konrad von: *Discrimination and Non-Discrimination in Foreign Direct Investment* in 'Summary of the OECD Global Forum on International Investment', 2002, p. 3; available at: https://www.oecd.org/env/1819921.pdf [accessed on 18th July 2016]

[92] UNCTAD (2010), p. 12

[93] Bjorklund, Andrea K.: *National Treatment* in 'Standards of Investment Protection' (Reinisch, August, edt.), 2008, p. 29

[94] UNCTAD (2010), p. 13-14

country-by-country liberalisation".[95] A result of discriminatory conduct would consequently be the disproportionate privileging of investors from one country, and the economic isolation of investors from another. The target of MFN clauses is therefore to create equality of opportunity "on the highest possible plane".[96] They aim to establish that the beneficiary is conceded "the minimum of discrimination and the maximum of favours".[97] In this regard it is to be mentioned, that the discriminatory intent is unimportant in order to establish a violation; what matters is the discriminatory effect.

c) The Precondition for 'Unjust' Discrimination: Likeness

Coming back to the definition of discrimination, it is important to emphasize that it is qualified by the term "unjust". This means in turn that "unequal treatment" of persons or things does not amount to discrimination, as long as it is not 'unjust'. As a matter of logic, discrimination can only take place between things that are 'like'. Treating different things in a different manner is not necessarily discrimination, but may be the result of the distinctness and particularities of the comparators. With regard to their ability to bear financial duties, children cannot be considered to be 'like' adults; with regard to their ability to bear human rights, they certainly are. Under the rule of law, a man from a developed country is 'like' a woman from a developing country. When it comes to the GDP per capita, however, it would be hard to argue that people from developing and developed countries are 'like'. Whether two comparators are like, is mostly situation-dependent.

As already indicated in the introductory remarks, the WTO Appellate Body has stated in *Japan – Alcoholic Beverages*, there is "no one precise and absolute definition of what is 'like'", but that answers can only be given on the basis of a case-by-case analysis, which takes into account the context and circumstances, as well as all relevant particularities.[98] In order to illustrate the flexible nature of 'likeness', the Appellate Body invoked the picture of an accordion. It held that "the accordion of likeness stretches and squeezes" and that the "width of the accordion […] must be determined by the particular provision in which the term 'like' is encountered as well as by the context and circumstances that prevail in any given case to which the provision may apply".[99] Other WTO Panels and Appellate Bodies have endorsed this reasoning and the proposed likeness-test, which is common practice under the WTO, was

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[95] OECD (2005), p. 128

[96] Schwarzenberger, Georg: *The Most-Favoured-Nation Standard in British Treaty Practice* in 'British Yearbook of International Law' (vol. XXII), 1945, pp. 96-121, p. 99

[97] *Ibid.*

[98] *AB Japan–Alcoholic Beverages*, p. 21

[99] *Ibid.*

applied in numerous cases relating to both, NT and MFN.[100] The likeness-test requires examining whether the products are "directly competitive or substitutable" and, in order to do so, the product's physical characteristics, the end-use and tariff classification must be looked at.[101]

Having the differences between trade and investment law in mind, it is still striking, that no closer analysis of 'like circumstances' took place in the context of MFN clauses in international investment law. The lack of such examination is especially surprising with regard to the *ejusdem generis* principle, under which such inquiry is obligatory.

[100] e.g. *AB Canada–Autos*; *Indonesia–Certain Measures Affecting the Automobile Industry*, Panel Report, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, Corr. 1 and Corr. 2, adopted 23 July 1998, and Corr. 3 and Corr. 4, DSR 1998: VI, p. 2201

[101] *Korea–Taxes on Alcoholic Beverages*, Appellate Body Report, WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999: I, p. 3 [hereinafter "*AB Korea–Alcoholic Beverages*"]

C The *Ejusdem Generis* Principle

The following chapter will first of all define what is understood under the *ejusdem generis* principle. In a second step, the target is to show how arbitral tribunals treated the matter.

I. Definition

It is "generally recognized and affirmed by jurisprudence" that MFN clauses are governed by the *ejusdem generis* principle, sometimes also referred to as the *ejusdem generis* 'rule'.[102] The principle or rule is not pulled on MFN clauses from the 'outside', but it "derives from [the] very nature" of the clause and is its "inherent part".[103] It follows from the principles of treaty interpretation and applies, when the MFN clause in a basic treaty is invoked to import the treatment provisions from a third party treaty. The Latin term *ejusdem generis* means "of the same kind".[104] The principle *ejusdem generis* says that "MFN clauses may only apply to issues belonging to the same subject matter or the same category of subjects to which the clause relates".[105] There are consequently two constitutive elements of the *ejusdem generis* principle with regard to MFN clauses: on the one hand, MFN clauses must relate to the *same subject matter*, on the other hand, they must relate to the *same category of subjects*.

1) Same Subject Matter

The first constitutive element of the *ejusdem generis* principle determines that MFN clauses can only work within the "same subject matter". This means that the beneficiary state can only expect to profit from a third party treaty, if this third party treaty covers the same 'topic' as the agreement entered into with the granting state. Put simply, it is not possible to invoke a MFN clause, providing MFN treatment with regard to the law of the seas, in order to import treatment provided in a third party treaty covering matters of diplomatic immunity. Otherwise, the MFN clause would be taken out of its context and the granting State would have obligations it never (previously) agreed to. Only if the third party agreement covers the same subject matter "the MFN clause *by definition* extends its benefits to the base agreement".[106] This is also laid down in Art. 9 (1) Draft Articles. It reads as follows:

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[102] Articles 9 & 10 (1), (11) Draft Articles

[103] Articles 9 & 10 (10) Draft Articles; c.f. Schmid, Michael: *Swiss Investment Protection Agreements: Most-Favoured-Nation Treatment and Umbrella Clauses*, 2007, p. 43

[104] Available at: https://www.law.cornell.edu/wex/ejusdem_generis [accessed on 24th May 2016]

[105] UNCTAD (2010), p. 24

[106] Dolzer, Rudolf & Myers, Terry: *After Tecmed: Most-Favoured-Nation Clauses in Investment Protection Agreements* in 'ICSID Review' (vol. 19, no. 1), 2004, pp. 49-60, p. 50 [emphasize added]

> "Under a most-favoured-nation clause the beneficiary State acquires, for itself or for the benefit of persons or things in a determined relationship with it, only those rights which fall within the limits of the *subject-matter of the clause*".[107]

Matters falling outside the subject matter lack the necessary "juridical link" and are *res inter alios acta*, i.e. matters between others. It is important to note, that the 'subject-matter-rule' first of all protects the will of the granting state, since it prevents the rampant abuse of the MFN clause, by containing its scope of application.

2) Same 'Kind' of Subjects

The second constitutive element of the *ejusdem generis* principle relates to the "same category of subjects". Art. 10 (1) *lit.* a) Draft Articles says accordingly:

> "The beneficiary State acquires rights under paragraph 1 in respect of persons or things in a determined relationship with it only if they:
>
> … belong to the *same category of persons or things* as those in a determined relationship with a third State which benefit from the treatment extended to them by the granting State".[108]

This means that the precondition for the applicability of MFN clauses is not only that they must relate to the same subject matter or 'topic' as the third party treaty, but also that they have to relate to the same category of persons or things. It goes without saying that in investment law, these persons or things are investors and investments.

As mentioned earlier, the *ejusdem generis* principle is considered to be an inherent part of MFN clauses, explicit references are therefore not required. Respectively, in BITs there are no explicit references stating that MFN clauses apply within the same subject matter only. With regard to the second constitutive element, matters are different. Just like the GATT refers to the "like product" (Art. I, III GATT '94) and the GATS[109] speaks about "like services" (Art. II, GATS), there are investment treaties that expressly refer to investors or investments in 'like situations' or 'like circumstances'. Accordingly, the second constitutive element of the *ejusdem generis* principle can also be described as the likeness-requirement.[110] An early

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[107] [Emphasize added]

[108] [Emphasize added]

[109] General Agreement on Trades in Services (1994), 1869 UNTS 183

[110] Ziegler (2008), p. 74

example for the requirement of likeness is to be found in the so-called Jay's Treaty[111] between the US and the UK from 1795. Art. 15 says:

> "It is agreed, that no other or higher Duties shall be paid […] than such as are paid by the *like vessels* or Merchandize of all other Nations. Nor shall any other or higher Duty be imposed in one Country on the importation of any articles, the growth, produce, or manufacture of the other than are or shall be payable on the importation of the *like article* […] of any other Foreign Country".

Examples with regard to modern investment law, can be found for example in the MFN clause of Art. 1103 NAFTA ("investors/investments in like circumstances"), but also in several BITs. Art. 4 (1) of the US Model BIT runs as follows:

> "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 in its territory".[112]

From these observations it follows, that another precondition for the applicability of MFN clauses is that the investors or the investments, invoking the clause in the basic treaty, must be in like circumstances (or like situations) as those investors or investments, receiving the most favourable treatment under the third party agreement. With regard to the purpose of MFN treatment, this second element is of paramount importance in order to ensure the effectiveness of non-discrimination. As already pointed out, treating different persons or things differently is not necessarily discrimination, but a corollary of distinctness. Only a closer examination can reveal factors "that may justify differential treatment on the part of the State among foreign investors, such as legitimate measures that do not distinguish, (neither *de jure* nor *de facto*) between nationals and foreigners".[113] It is therefore crucial to identify the appropriate comparators "against which to measure the allegedly less favourable treatment" – otherwise, the claim will fail.[114] With that in mind one may conclude, that a proper application of MFN clauses requires a *cumulative* application of the first *and* the second constitutive element. However, in the practice of arbitral tribunals, this contention has received only very limited attention.

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[111] Treaty of Amity Commerce and Navigation, between His Britannick Majesty; and The United States of America, by Their President, with the advice and consent of Their Senate (1795); available at: http://avalon.law.yale.edu/18th_century/jay.asp [accessed on 27th May 2016] [emphasize added]

[112] US Treaty Concerning the Encouragement and Reciprocal Protection of Investment (2004)

[113] UNCTAD (2010), p. 27

[114] Bjorklund (2008), p. 30

II. Decisions by Arbitral Tribunals

MFN clauses were invoked before arbitral tribunals in several cases. The first case under a BIT was *AAPL v. Sri Lanka,*[115] where the investment of the Hong Kong based company *AAPL* was destroyed in the course of the Sri Lankan civil war in 1987. *AAPL* claimed compensation and invoked the MFN clause in Art. 3 (2) of the UK–Sri Lanka BIT[116] in order to profit from the allegedly more favourable treatment granted to Swiss investors. The Tribunal did not find that the Switzerland–Sri Lanka BIT provided better protection and rejected the claim.[117]

Unlike in NAFTA, MFN clauses in BITs have rarely been invoked before arbitral tribunals in order to import substantive treatment provisions. One example is *MTD v. Chile*,[118] where the Malaysian company *MTD* invoked the MFN clause in Art. 3 (1) of the Chile–Malaysia BIT, in order to import the FET standard as contained in the Chile–Denmark[119] and the Chile–Croatia BIT.[120] The Tribunal argued that the FET standard must be interpreted in the "most conducive" way in order to protect investments and consequently found the MFN clause to be applicable.[121] However, the invocation of MFN clauses was more or less limited to the import of more favourable dispute settlement provisions, contained in third party BITs. The question of the applicability of the MFN standard to arbitration clauses has divided arbitral tribunals, scholars and practitioners in the past and is likely to continue to do so in the near future. The major issue was whether the applicability of MFN clauses to dispute settlement provisions contravenes the rule that states must give their consent to arbitration, as for example laid down in Art. 25 ICSID Convention. In this regard, it is particularly due to the decision in the *Maffezini* case that the application of MFN clauses has become "one of the most controversial issues in international investment law".[122]

The first part of the following chapter will consequently concentrate on arbitral awards where it was for tribunals to decide, whether MFN clauses allow the import of more favourable dispute settlement provisions contained in other treaties. Special attention will be paid to

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[115] *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3

[116] Agreement between the United Kingdom of Great Britain and Northern Ireland and the Government of the Socialist Republic of Sri Lanka for the Promotion and Protection of Investments (1980)

[117] *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award (1990), para. 54

[118] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7

[119] Agreement Between the Government of the Republic of Chile and the Government of the Kingdom of Denmark Concerning the Promotion and Reciprocal Protection of Investments (1993)

[120] Agreement Between the Government of the Republic of Chile and the Government of the Republic of Croatia on the Reciprocal Promotion and Protection of Investments (1994)

[121] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award (2004), para. 104

[122] Acconci (2008), p. 366

statements with regard to the *ejusdem generis* principle, be it explicitly or implicitly. As will be seen, arbitral tribunals were rather reluctant to use the term *ejusdem generis* or to make statements regarding the character and cope of this principle. Due to the lack of relevant case law, the second part of the chapter will have a look at arbitral decisions under NT clauses, where the requirement of likeness was investigated before arbitral tribunals. Due to the earlier mentioned close relationship between MFN and NT, it appears legitimate to seek advice from NT claims in order to suggest some answers that appear also in the context of the MFN standard. Also in the context of the WTO, it is suggested that NT case law "should be considered carefully, even though one should be cautious regarding a wholesale transfer".[123] The legitimacy of this approach increases parallel to the equality in wording, as well as the relationship of the clauses.

1) Subject Matter

The reasons why MFN claims have been focused on dispute settlement provisions are twofold: first of all, foreign investors generally prefer their claims to be arbitrated by international tribunals. This priority stems primarily from the weaknesses and disadvantages of arbitration or litigation before domestic courts.[124] Therefore, foreign investors always seek direct or indirect ways to submit their case to an international tribunal. Second, investors' priority is fuelled by the fact, that the scope of rights contained in dispute settlement clauses of different BITs, varies significantly. While under some BITs "all matters" can be submitted to arbitration, others' scope is narrowed down to expropriation claims only; while some require prior referral to a domestic court, others allow for direct submission. Hence, the temptation is high to invoke the MFN clause in order to profit from more favourable dispute settlement provisions. A frequent argument – forwarded mainly by those who deny the applicability of MFN clauses to dispute settlement provisions – is that MFN relates to substantive standards only. It is argued that substantive and procedural rights are distinct subject matters and that, according to the *ejusdem generis* principle, the clause applies only within the same subject matter. However, this was not always stated explicitly.

The following chapter will provide brief summaries of the most important cases where MFN clauses were invoked for the import of dispute settlement provisions. In order to do so, the relevant reasoning of arbitral tribunals and disputing parties will be highlighted, particularly

[123] van den Bossche & Zdouc (2013), p. 327

[124] c.f. Dolzer & Schreuer (2012), p. 235 et seqq.

with regard to interpretations of the *ejusdem generis* principle. The order of the cases will be chronological, beginning with the oldest case.

a) Ambatielos[125]

In the *Ambatielos* case Greece invoked the MFN clause of the 1886 FCN Treaty with the UK,[126] in order to profit from the more favourable dispute settlement provisions contained in the FCN treaties with several other states. Greece exercised diplomatic protection before the ICJ for its national Nicolas Eustache Ambatielos, who had suffered significant financial losses in connection with the purchase of nine steamships, he had ordered from the British Government in 1919. In 1951 Greece instituted proceedings against the UK. During the proceeding on the merits, the Court dealt with the arguments forwarded with regard to the applicability of the MFN clause, as contained in Art. X of the 1886 Treaty. The MFN clause reads as follows:

> "The Contracting Parties agree that, in *all matters* relating to commerce and navigation, any privilege, favour, or immunity whatever which either Contracting Party has actually granted or may hereafter grant to the subjects or citizens of any other State shall be extended immediately and unconditionally to the subjects or citizens of the other Contracting Party; it being their intention that the trade and navigation of each country shall be placed, in all respects, by the other on the footing of the most favoured nation".[127]

Greece argued that by operation of the MFN clause it was entitled to profit from the more favourable dispute settlement provisions as contained in FCN treaties with *inter alia* Denmark and Sweden. This position was rejected by the UK, which reasoned that the MFN "clause cannot be invoked to claim benefits […] concerning judicial proceedings, which […] form the subject of a separate article".[128] Greece responded that "litigation arising out of a commercial contract may be considered as a matter relating to commerce and thus falling within the term '*all matters* relating to commerce and navigation'", to which the MFN clause applies.[129] The Court did not further deal with the arguments forwarded by the parties and ruled that the UK

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[125] *Ambatielos case (merits: obligation to arbitrate)*, Judgement of May 19th, 1953: ICJ Reports 1953, p. 10, [hereinafter "*Ambatielos*"]

[126] Treaty of Commerce and Navigation between the United Kingdom and Greece (1886)

[127] [Emphasize added]

[128] *Ibid.,* p. 21

[129] *Ibid.* [emphasize added]

was obliged to set up a Commission of Arbitration ('Commission'), as demanded by Greece.[130] The Commission was set up in 1955.

In the proceeding before the Commission, Greece insisted that by operation of the MFN clause in Art. X of the 1886 Treaty, its nationals were entitled to the (allegedly) more favourable treatment granted to nationals of third states regarding their access to courts. The UK contested and argued first, that Art. X of the 1886 Treaty grants MFN treatment with regard to a "privilege, favour or immunity" and not to treatment "accorded as a right".[131] Second, it held that MFN clauses can "only attract matters belonging to the *same category of subject* as the clause itself relates to".[132] Third, the UK argued that the MFN clause in Art. X of the 1886 Treaty relates to commerce and navigation only "and not to the administration of justice".[133]

In its analysis the Commission reiterated, "most-favoured-nation clauses can only attract matters belonging to the same category of subject as that to which the clause itself relates".[134] Due to the variety of provisions in FCN treaties, the Commission reasoned that there is "no strictly defined meaning" about what is covered by the wording 'all matters relating to commerce and navigation', but that the meaning is "fairly flexible".[135] In most cases, however, provisions regarding the administration of justice form part of FCN treaties. When viewed in isolation, the Commission held that 'administration of justice' belongs to a different subject matter other than 'commerce and navigation'. When viewed "in connection with the protection of the rights of traders", matters are different: such protection "naturally finds a place among the matters dealt with" by FCN treaties".[136] The Commission concluded timidly that administration of justice – in so far as it is concerned with the protection of the rights of traders – is "not necessarily" excluded from the field of application of MFN clauses, when the wording of the clause refers to 'all matters subject to commerce and navigation'.[137] The key criterion for a final assessment is the "intention of the Contracting Parties as deduced from a reasonable interpretation of the Treaty".[138]

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[130] *Ibid.,* p. 22

[131] *Greece v. United Kingdom*, United Nations Reports of International Arbitral Awards (1963), Vol. XII, pp. 83-153, p. 106, [hereinafter *Greece v. UK*]

[132] *Greece v. UK*, p. 106 [emphasize added]

[133] *Ibid.*

[134] *Ibid.,* p. 107

[135] *Ibid.*

[136] *Ibid.*

[137] *Ibid.*

[138] *YILC (1969)*, para. 28

b) *Anglo-Iranian Oil Company*[139]

In another proceeding before the ICJ, the UK, exercising diplomatic protection, invoked the MFN clause in Art. IX of the 1857 UK–Persia Treaty in order to import more favourable procedural rights of the Iran–Denmark BIT.[140] The dispute arose due to a nationalization of Iranian oil in 1951. The measure also hit the Anglo-Iranian Oil Company, which was given a 60-year mining concession, the so-called D'Arcy Concession, in 1933. On behalf of the company, the UK brought the case before the ICJ in the same year.[141]

A major obstacle to the jurisdiction of the Court was that Iran ratified a declaration under Art. 36 (2) ICJ Statute,[142] wherein it recognized the compulsory jurisdiction of the ICJ "on condition of reciprocity" and in matters "relating directly or indirectly to the application of treaties or conventions", only in 1932.[143] The major disagreement between the parties orbited around the question, whether the declaration was applicable to *subsequent* treaties or conventions only, or whether the declaration covered treaties or conventions adopted at *any time*. Iran held that its declaration applied to successive treaties only. In contrast, the UK argued, that even if the Court found that the Iranian declaration applied to subsequent agreements only, the Court still had jurisdiction to hear the case. This was due to the operation of the MFN clause contained in Art. IX of the UK–Iran Treaty, which allowed the importation of the more favourable dispute settlement provisions as provided to investors *inter alia* under the Denmark–Iran FCN Treaty. The MFN clause reads as follows:

> "The High Contracting Parties engage […] that the treatment of their respective subjects, and their trade, shall also, in every respect, be placed on the footing of the treatment of the subjects and commerce of the most-favoured nation".

The Court was not convinced by both arguments. First, it held that the Iranian declaration applied to subsequent treaties only. Second, it rejected the UK's reliance on the MFN clause. It argued that the applicability of a MFN clause depends on the ability to invoke the basic treaty, in which the MFN clause is laid down, and which establishes the "juridical link" between beneficiary and the third state.[144] Third-party treaties that stand independently and in isolation from the basic treaty do not produce any legal effects and are *res inter alios acta*.

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[139] *Anglo-Iranian Oil Co. case (jurisdiction)*, Judgement of July 22nd, 1952, ICJ Reports 1952, p. 93 [hereinafter "*Anglo-Iranian Oil*"]

[140] Treaty of Peace between the United Kingdom and Persia (1857); Treaty of Friendship, Establishment and Commerce between Denmark and Iran (1934)

[141] Orakhelashvili, Alexander: *Anglo-Iranian Oil Company Case* in 'MPEIL', 2007, para. 1

[142] Statute of the International Court of Justice (1946), 3 Bevans 1179; 59 Stat. 1031

[143] *Anglo-Iranian Oil*, p. 103

[144] *Anglo-Iranian Oil*, p. 109

The Court held that the Iranian declaration was subsequent to the ratification of the basic treaties in 1857 and 1903 respectively, and that the UK was therefore "not entitled to rely upon [the rights provided therein] for the purpose of establishing jurisdiction of the court".[145]

The UK argued that if Denmark is entitled to bring claims before the Court and the UK is not, then the "UK would not be in a position of the most-favoured-nation".[146] The Court replied that the MFN clause in the basic treaty has "no relation whatever to jurisdictional matters" and that Denmark's right to bring disputes before the Court is because the Denmark–Iran Treaty is "subsequent to the ratification of the Iranian Declaration".[147] The Court concluded that the UK is not entitled to invoke the basic treaties from 1857 and 1903 and the MFN clauses provided therein, since they were concluded "before the ratification of the Declaration in 1932", and that consequently "no treaty concluded by Iran with any third party can be relied upon by the UK in the present case".[148]

c) Maffezini v. Spain[149]

The *Maffezini* case has given the international investment law community quite a good shake and has received wide attention due to several reasons. It was, for example, the first case where a (partly) successful claim was brought against an OECD member country.[150] However, the *Maffezini* case is first of all the most well known example and stands exemplary, when it comes to the inclusion of dispute settlement provisions by operation of a MFN clause.

In 1999, the Argentinian businessman Emilio Maffezini (Claimant) claimed damages from the Kingdom of Spain (Respondent), due to financial losses in connection with the operation of a joint venture company named *EAMSA*. Claimant alleged that he had suffered financial losses, due to an agreement concluded with the minority shareholder *SODIGA*, which, in fact, was found to be a "state entity acting on behalf of the Kingdom of Spain".[151] Respondent challenged the jurisdiction of the Tribunal since Claimant "failed to comply with the requirements of Art. X of the Argentina–Spain BIT".[152] Art. X (3) a) provides that submission

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[145] *Ibid.*

[146] *Ibid.*, p. 110

[147] *Ibid.*

[148] *Ibid.*

[149] *Emilio Augustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7

[150] Reinisch, August: *Maffezini v Spain Case* in 'MPEIL', 2007, para. 1

[151] *Emilio Augustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction (2000), para. 89, [hereinafter "*Maffezini*"]

[152] Agreement Between the Argentine Republic and the Kingdom of Spain on the Reciprocal Promotion and Protection of Investments (1991)

to international arbitration is only allowed when domestic courts did not render a decision on the merits within eighteen months or if the dispute continues thereafter. The Tribunal noted in this regard, that Art. X (3) a) does not require the exhaustion of local remedies, "as understood under international law".[153] Beyond that, it held that even if Art. X (3) a) was a requirement to exhaust local remedies, investors still retain the right appeal to international arbitration, "because the international tribunal rather than the domestic court has the final say on the meaning and scope of international obligations – in this case the BIT".[154] With regard to Art. X (2) of the BIT, which requires the submission of disputes to local courts first, the Tribunal rejected Claimant's contention that it was not obliged to comply. It held that "had this been the Claimant's sole argument", the Tribunal would have had to deny jurisdiction.[155]

However, Claimant invoked the MFN clause in Art. IV (2) of the Argentina–Spain BIT, in order to profit from the more favourable dispute settlement provisions granted to investors under the Chile–Spain BIT.[156] Under the latter, there is no obligation to refer the matter to domestic courts first. Art. 10 (2) merely requires a six-month negotiation period, before submission to international arbitration is allowed. The MFN clause reads as follows:

> "In *all matters* subject to this Agreement, this treatment shall not be less favourable than that extended by each Party to the investments made in its territory by investors of a third country".[157]

Spain rejected the applicability of the clause and held that "under the principle *ejusdem generis* the most favoured nation clause can only operate in respect of the same matter and cannot be extended to matters different from those envisaged by the basic treaty".[158] It understood the word "matter" of the MFN clause to encompass "substantive and material" treatment only, while "procedural or jurisdictional" questions are excluded.[159] Respondent argued that this is so because discrimination, which MFN clauses aim to avoid, "can only take place in connection with material economic treatment and not with regard to procedural matters".[160] Only if it can be proven that different procedural obligations actually amount to "objective disadvantages" – here: submission to Spanish courts instead of direct submission –

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[153] *Maffezini*, para. 28
[154] *Ibid.*
[155] *Ibid.*, para. 36
[156] Acuerdo entre La Republica de Chile y el Reino de España Para la Proteccion y Fomento Reciprocos de Inversiones (1991)
[157] [Emphasize added]
[158] *Maffezini,* para. 41
[159] *Ibid.*
[160] *Ibid.*, para. 42

MFN clauses can be invoked also with regard to procedural questions.[161] Claimant did not further specify in relation to whom this "objective disadvantage" must exist.

In its analysis the Tribunal held first, that the basic treaty determines the subject matter of MFN clauses, and consequently their scope of application. When the subject matters of the basic and the third-party treaty do not coincide, the matter is *res inter alios acta* in respect of the beneficiary of the clause".[162] Second, the Tribunal investigated the question, whether provisions on dispute settlement and substantive standards "can be regarded as a subject matter covered by the clause" and that "this issue is directly related to the *ejusdem generis* rule".[163]

In its analysis, the Tribunal took guidance particularly from the reasoning of the Commission in the *Ambatielos* case. The question to answer was mainly, whether the wide scope of the wording of the MFN clause in the Argentina–Spain BIT, which refers to "all matters", also covered dispute settlement provisions. The Tribunal held that "there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors" and that jurisdictional rights are "essential for [their] adequate protection".[164] Investors "have traditionally felt that their rights are better protected" by recourse to international arbitration.[165] The Tribunal concluded that if a third-party treaty contains more favourable dispute settlement provisions, "such provisions may be extended to the beneficiary of the MFN clause as they are fully compatible with the *ejusdem generis* principle".[166] However, the *ejusdem generis* principle would be contravened, if the third-party treaty and the basic treaty would cover different subject matters. When both treaties purport the protection of investors or investments, substantive and procedural matters cannot be regarded as referring to different subject matters. Still, the Tribunal stressed that this contention is not unlimited, but subject to "important limits arising from public policy considerations".[167] Such limits mainly derive from the explicit will of the parties. For example, the requirement to exhaust local remedies or fork in the road clauses cannot be bypassed by operation of the MFN clause.[168] In this regard the Tribunal found that prior resort

[161] *Ibid.*
[162] *Ibid.*, para. 45
[163] *Ibid.*, para. 46
[164] *Ibid.*, para. 54
[165] *Ibid.*, para. 55
[166] *Ibid.*, para. 56
[167] *Ibid.*
[168] *Ibid.*, para. 63

to domestic courts, as laid down in the Argentina–Spain BIT, "does not reflect [such a] question of public policy".[169]

Altogether, the Tribunal was convinced by the arguments forwarded by Claimant, according to which the MFN clause "embraces the dispute settlement provisions of this treaty" and affirmed the jurisdiction of ICSID.[170]

d) Tecmed v. Mexico[171]

Tecmed differs form the other examples in so far, as the question was not whether MFN clauses allow the import of more favourable dispute settlement provisions in other BITs, but the import of provisions regarding the retroactive application of treaties in order to establish jurisdiction of the Tribunal.

The Spanish investor *Tecmed* (Claimant) instituted proceedings against Mexico (Respondent) due to the latter's alleged violations of the Mexico–Spain BIT.[172] In 1996 Claimant acquired property, buildings and facilities of a controlled landfill of hazardous industrial waste in the State of Sonora, Mexico. After Claimant has received a license to operate the landfill until 1998, Mexican authorities denied the renewal of the license beyond 1998. Claimant contended that Respondent's refusal to extend the license amounted to expropriation without compensation, as well as to a denial to grant FET and full protection and security. A prior question for the Tribunal to decide was, whether provisions of the Mexico–Spain BIT are applicable on Respondent's conduct prior to the BIT's entry into force, i.e. whether provisions of the BIT apply retroactively. Claimant contended that this was the case, since Austrian investors enjoyed such (more favourable) treatment under the Austria–Mexico BIT.[173] Relying in its reasoning on *Maffezini*, Claimant aimed to import this treatment by invoking the "fairly complicated" MFN clause in Art. VIII (1) Mexico–Spain BIT, which reads as follows:[174]

> "If a general or special regulation between the Contracting Parties emerges from present or future legal provisions of one of the Contracting Parties or from obligations under International Law that fall outside the scope of this Agreement,

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[169] *Ibid.*, para. 64

[170] *Ibid.*

[171] *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID CASE No. ARB (AF)/00/2

[172] Agreement for the Reciprocal Promotion and Protection of Investments Between the United Mexican States and the Kingdom of Spain (1995), Unofficial Translation

[173] Agreement Between the United Mexican States and the Republic of Austria on the Promotion and Protection of Investments (1998)

[174] Dolzer & Myers (2004), p. 57

pursuant to which the investments of investors of the other Contracting Party should be accorded a more favourable treatment than that accorded under this Agreement, such regulation will prevail over this Agreement insofar as it is more favourable".[175]

The Tribunal held, however, that "matters relating to the application over time of the Agreement […] due to their significance and importance, go to the core of matters that must be deemed to be specifically negotiated by the Contracting Parties".[176] In other words, it said that questions *ratione temporis* are too delicate as to allow them to be overruled by MFN clauses.

Here it is to mention, that a MFN claim under Art. IV (2) Mexico–Spain BIT would have given the Tribunal the opportunity to examine whether the investment of a Mexican or Spanish investor is *in like circumstances* as an investment from a third country. The provision reads as follows:

"[The] treatment will be no less favourable than the one granted in *like circumstances* by each Contracting Party to investments made in its territory by investors of a third State".[177]

The lack of such an examination is especially regrettable with regard to the fact, that the Mexico–Spain BIT is one of only a few treaties, where the MFN clause explicitly refers to investments "in like circumstances".

e) Siemens v. Argentina[178]

In *Siemens v. Argentina*, the German company Siemens (Claimant) instituted arbitral proceedings against Argentina (Respondent) due to alleged violations of the Argentina–Germany BIT.[179] In 1999, Siemens won a tender where Argentina called for bids related to technology systems for immigration control, personal identification and electoral information. Two years after the initial contract was signed, the Argentinian Government submitted a new, non-negotiable contract 'proposal', which was not accepted by Siemens. As a result of the non-acceptance, Argentina prematurely terminated the six-year contract. Claimant held *inter*

[175] No official translation of the Spanish original is available.

[176] *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID CASE No. ARB (AF)/00/2, Award (2003), para. 69, [hereinafter "*Tecmed*"]

[177] [Emphasize added]

[178] *Siemens AG v The Argentine Republic*, ICSID Case No. ARB/02/8

[179] Treaty between the Federal Republic of Germany and the Argentine Republic on the Encouragement and Reciprocal Protection of Investments (1991)

alia, that the termination amounted to expropriation without compensation and that Respondent breached its obligations to grant FET and full protection and security.

In order to circumvent prior submission of the dispute to Argentinian courts, Claimant has invoked the MFN clause in Art. 3 (1) Argentina–Germany BIT in order to profit from the more favourable dispute settlement provisions as contained in the Argentina–Chile BIT.[180] The MFN clause reads as follows:

> "Neither Contracting Party shall subject investments in its territory by or with the participation of nationals or companies of the other Contracting Party to treatment less favourable than it accords to investments of its own nationals or companies or to investments of nationals or companies of any third State".

Respondent rejected Claimant's reliance on the reasoning in the *Maffezini* case, because it considered the MFN clause in the Argentina–Spain BIT to be "substantially different" from that contained in the Argentina–Germany BIT.[181] It held that MFN clauses generally constitute "a sort of legal anomaly", since they "extraordinarily condition" the principle *res inter alios acta*.[182] Respondent stressed compliance with the *ejusdem generis* principle and quoted from Art. 2 (2) Draft Articles, according to which the beneficiary acquires rights "only in respect of persons or things which are specified in the clause or implied from *its subject-matter*".[183] In the present case, it considered the preconditions not to be fulfilled. Respondent held that "the principle *ejusdem generis* is even more restrictive regarding procedural and jurisdictional matters".[184] This contention was based on French case law, according to which the MFN clause "does not implicitly extend to procedural matters".[185] However, a deeper analysis of Respondent's positions fails due to the lack of availability of the memorial.

In contrast, Claimant argued that the "*ejusdem generis* principle does not preclude the application of the MFN clause" and that Respondent "misconstrues this principle and its effects".[186] It held that the ILC's positions do not provide "a basis for a restrictive interpretation with respect to the *ejusdem generis* principle", which "requires only that the MFN clause and the clause relied on in the third-party treaty both relate to jurisdiction".[187]

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[180] Tratado Entre La Repulica Argentina y La Republica de Chile Sobre Promocion y Protecction Reciproca de Inversiones (1991)

[181] *Siemens AG v The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (2002), para. 34, [hereinafter "*Siemens*"]

[182] *Ibid.*

[183] [Emphasize added]

[184] *Siemens,* para. 46

[185] *Ibid.*

[186] *Ibid.*, para. 69

[187] *Ibid.*

In its own analysis, the Tribunal stated first, that the interpretation must be guided by the purpose of the BIT and not by liberal or restrictive dogmas. It held that the purpose of the BIT was to "create favourable conditions for investments".[188] The analysis of the word 'treatment' revealed that it refers "to treatment under the Treaty in general and not only under that article" and that the MFN clause in Art. 3 is *not* limited "to transactions of a commercial and economic nature in relation to exploitation and management of investments".[189] With regard to the question whether dispute settlement provisions form part of the protection of investors, the Tribunal considered the reasoning in *Anglo-Iranian Oil*, *Rights of Nationals in Morocco*, *Ambatielos* and *Maffezini*. It found that the "term 'treatment' and the phrase 'activities related to the investments' are sufficiently wide to include settlement of disputes".[190] However, the Tribunal evaded explicit statements with regard to the *ejusdem generis* principle. Implicitly it found that the subject matter referred to by the MFN clause in Art. 3 of the Argentina–Germany BIT covers also the dispute settlement provisions as contained in the Argentina – Chile BIT.

f) Salini v. Jordan[191]

In 1993, the Italian companies *Salini Costruttori* and *Italstrade* (Claimants) were awarded a contract for the construction of a dam in the Kingdom of Jordan (Respondent). The project was finished in 1997. Two years later, Claimants informed Respondent that an amount of nearly US$ 30 million was still due. Respondent rejected this claim and held that Claimants were entitled to an amount of approximately US$ 50,000 only. After the failure of negotiations on the business and political level, Claimants instituted proceedings against Jordan before ICSID, contending that Jordan has breached its obligations under the initial investor-state contract and the Italy–Jordan BIT.[192]

In order to establish jurisdiction of the Tribunal, Claimants invoked the MFN clause in Art. 3 (1) of the BIT to import the allegedly more favourable dispute settlement provisions contained in the BITs with the US and the UK. The clause reads as follows:

> "Both Contracting Parties, within the bounds of their own territory, shall grant investments effected by, and the income accruing to, investors of the other

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[188] *Ibid.*, para. 81

[189] *Ibid.*, para. 85

[190] *Ibid.*, para. 103

[191] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13

[192] Agreement Between the Government of the Hashemite Kingdom of Jordan and the Government of the Italian Republic on the Promotion and Protection of Investments (1996)

> Contracting Party no less favourable treatment than that accorded to investments effected by, and income accruing to, its own nationals or investors of Third States".

Claimants contended that US investors enjoyed more favourable treatment under the Jordan–US BIT,[193] since their right to submit disputes to international arbitration, was not limited by requirements as provided in Art. 9 of the Italy–Jordan BIT. Under Art. 9 (2), individually negotiated dispute settlement provisions of a contract prevail over those contained in the treaty. And the contract between Claimants and Respondent provides respectively, that the disputing parties are obliged to submit the case to local courts first. Claimants underscored their positions by pointing to the reasoning of the tribunals in *Maffezini* and *Ambatielos*, where the application of MFN clauses was also extended to procedural rights. Respondent objected and held that the intent of Italy and Jordan was expressed in Art. 9 (2) of the BIT and that the MFN clause "cannot override the clear intent of the Parties with respect to jurisdiction".[194]

In turn, the Tribunal quoted the *Maffezini* Tribunal, which held that "a distinction has to be made between the legitimate extension of rights and benefits by means of the operation of the clause, on the one hand, and disruptive treaty shopping that would play havoc with the policy objectives of underlying treaty provisions, on the other hand".[195] With that in mind, the Tribunal noted that both MFN clauses at issue in the *Ambatielos* and the *Maffezini* case, referred to "all rights" or "all matters" of the agreement.[196] In contrast, Art. 3 of the Italy–Jordan BIT is more narrow, since it does not contain a reference to "all rights" or "all matters". With regard to Art. 9 (2) of the Italy–Jordan BIT, the Tribunal observed that the explicit intention of the Contracting Parties was to "exclude contractual disputes between an investor and *an* entity of a State Party".[197] It concluded that the MFN clause "does not apply insofar as dispute settlement clause are concerned" and that the "dispute must be settled under the procedure set forth in the [contract]".[198]

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[193] Treaty between the Government of the United States of America and the Government of the Hashemite Kingdom of Jordan Concerning the Encouragement and Reciprocal Protection of Investment (1997)

[194] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction (2004), para. 103, [hereinafter "*Salini*"]

[195] *Salini,* para. 63

[196] *Ibid.*, para. 117

[197] *Ibid.*, para. 118, [emphasis in original]

[198] *Ibid.*, para. 119

g) *Plama v. Bulgaria*[199]

In 2002, the Cypriot company *Plama Consortium Limited* (Claimant) instituted proceedings against Bulgaria (Respondent), due to alleged violations of the Bulgaria–Cyprus BIT[200] and the ECT, to which both states are parties. The object of dispute was a Bulgarian oil refinery, which was purchased by Claimant in 1998, while the dispute itself concerned the alleged deliberate creation of "grave problems" for the investor by Bulgarian authorities, as well as the "refused or [unreasonable] delay of the adoption of adequate corrective measures".[201] Claimant contended that Bulgaria's conduct was in breach of its duties under the BIT, *inter alia* because of expropriating Claimant without paying compensation.

In order to establish jurisdiction of the Tribunal, Claimant invoked the MFN clause in Art. 3 (1) of the Bulgaria–Cyprus BIT to import the more favourable treatments as provided *inter alia* under the Bulgaria–Finland BIT.[202] The MFN clause reads as follows:

> "Each Contracting Party shall apply to the investments in its territory by investors of the other Contracting Party a *treatment* which is not less favourable than that accorded to investments by investors of third states".[203]

Respondent objected to the jurisdiction of the Tribunal, since it found the MFN clause to be inapplicable to dispute settlement provisions. Referring to Art. 4 Draft Articles, Respondent emphasized that under the *ejusdem generis* rule, MFN clauses apply "in an *agreed* sphere of relations" only.[204] It held that the scope of MFN treatment is limited by the "framework set by the clause" and that it relates "only to the subject matter for which the clause has been stipulated".[205] The subject matter of the underlying MFN clause, however, did not to encompass matters relating to dispute resolution.[206] By contrast, Claimant argued that the MFN provision in the Bulgaria–Cyprus BIT applies to all aspects of "treatment", since the term "covers settlement of disputes provisions [also] in other BITs".[207]

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[199] *Plama Consortium Limited v. The Republic of Bulgaria*, ICSID Case No. ARB/03/24

[200] Agreement between the Government of the People's Republic of Bulgaria and the Government of the Republic of Cyprus on Mutual Encouragement and Protection of Investments (1988)

[201] *Plama Consortium Limited v. The Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (2005), para. 21, [hereinafter "*Plama*"]

[202] Agreement between the Government of the Republic of Finland and the Government of the Republic of Bulgaria on the Promotion and Protection of Investments (1997)

[203] [Emphasize added]

[204] [Emphasize added]

[205] *Plama,* para. 36

[206] *Ibid.*, para. 37

[207] *Ibid.*, para. 183

The Tribunal was not convinced by Claimants submissions and concluded, that neither the wording, nor the content of the MFN clause can be "interpreted as providing consent to submit a dispute under the Bulgaria–Cyprus BIT".[208] Referring to the word "treatment", the Tribunal held that it is "not clear whether the ordinary meaning of the word 'treatment' […] includes or excludes dispute settlement provisions" and that an "inclusion or exclusion may or may not satisfy the *ejusdem generis* principle".[209] It stressed: "when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items *of the same type* a those listed".[210] Regrettably, it found it "not relevant to address this question".[211]

In its further analysis, the Tribunal rejected Claimants contention that the "context" of the BIT, namely the "creation of favourable conditions for investments", as accepted by the *Maffezini* Tribunal, supports an inclusion of dispute settlement provisions.[212] It found that the Contracting Parties of the Bulgaria–Cyprus BIT intended to limit "the specific investor-state dispute settlement to provisions set forth in the BIT [without the] intention of extending those provisions through the MFN clause".[213] Such intent to incorporate dispute settlement provisions "must be clearly and unambiguously expressed" as for example in Art. 3 (3) of the UK Model BIT.[214]

h) Gas Natural v. Argentina[215]

The dispute between *Gas Natural* (Claimant) and Argentina (Respondent) was again triggered by the measures adopted by latter's government during the financial and economic crisis between 2001 and 2002. And just like in *Maffezini*, the basic treaty was again the Argentina–Spain BIT. It was in 1992 when the Spanish company *Gas Natural* acquired the majority of shares in an Argentinian company. By the end of the decade, the economy of Argentina was in a downward spiral and the Argentinian Peso under heavy pressure. As a result, the Government depreciated the currency and prohibited the transfer of foreign exchange. According to Claimant, these measures resulted in substantial financial losses, *inter alia* because the original contract with Respondent foresaw the calculation of tariffs in US$.

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[208] *Ibid.*, para. 184
[209] *Ibid.*, para. 189
[210] *Ibid.*
[211] *Ibid.*
[212] *Ibid.*, para. 193
[213] *Ibid.*, para. 197
[214] UK Model Agreement for the Promotion and Protection of Investments (2008)
[215] *Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/10

Respondent did not deny that the emergency measures hit Claimant, as well as "all other participants in the Argentine economy" hard.[216] It argued, however, that the Tribunal was not competent to hear the case.

Just like in *Maffezini*, Respondent argued that it has not given its consent to arbitration and that Art. X of the Argentina–Spain BIT obliged Claimant to pursue its claims before Argentinian courts, before submission to international arbitration is allowed. Claimant responded that it is "not bound by the requirement of prior resort to national jurisdiction in Art. X", since the MFN clause in Art. IV (2) of the BIT allows the import of more favourable dispute settlement provisions, as, for example, contained in the Argentina–US BIT.[217,218] In support of his position, Claimant referred to Respondent's treaty practice and held that out of fifty BITs to which Argentina is a party, "only ten […] contain a requirement of prior resort to national courts".[219] Again, Respondent argued that the MFN clause in the Argentina–Spain BIT "relates to substantive matters", whereas the "requirement of prior resort to national courts is addressed to procedural matters concerning dispute settlement".[220] Not surprisingly, Claimant responded that dispute settlement provisions are an "essential element of investor protection" and that the MFN clause must be read "as entitling a national of Spain to all of the investment protections of other BITs concluded by Argentina".[221]

In its analysis "whether or not dispute settlement provisions […] constitute part of the bundle of protections granted to foreign investors", the Tribunal held first that international arbitration is "perhaps *the* most crucial element" of BITs.[222] The provisions about dispute settlement are "universally regarded […] as essential to a regime of protection of foreign direct investment".[223] The Tribunal stressed that the MFN clause in Art. IV (2) of the Argentina–Spain BIT refers to "all matters" and that, while certain matters are expressly excluded, "there is no exclusion for the resolution of disputes".[224] In the eyes of the Tribunal, dispute settlement provisions are a "significant substantive incentive and protection for foreign investors" and that requiring prior submission to local courts constitutes a "less

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[216] *Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction (2005), para. 18 [hereinafter "*Gas Natural*"]

[217] *Gas Natural,* para. 26

[218] Treaty between the USA and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment (1991)

[219] *Gas Natural,* para. 26

[220] *Ibid.,* para. 27

[221] *Ibid.,* para. 28

[222] *Ibid.* [emphasize added]

[223] *Ibid.,* para. 29

[224] *Ibid.,* para. 30

favourable degree of protection".[225] Accordingly, the Tribunal found that Claimant is entitled to invoke the MFN clause in order to profit from the more favourable treatment provided to investors under the Argentina–US BIT.

After analysing the decisions in *Siemens, Maffezini* and *Salini*, the Tribunal concluded that the applicability of MFN clauses to dispute settlement provisions is "not free from doubt", but that in the present case it remains "persuaded that assurance of independent international arbitration is […] perhaps the most important element in investor protection".[226] As long as it is not clear that the contracting parties intended to agree on other modes of settlement, MFN clauses in BITs "should be understood to be applicable to dispute settlement".[227] As a result, the Tribunal found that it has jurisdiction to hear the case.

i) Telenor v. Hungary[228]

In 1990 the Norwegian telecommunications company *Telenor* (Claimant) acquired the majority of shares in a telecommunications company in Hungary (Respondent). Due to subsequent Government interventions in the market, which were implemented as a result of the EU accession process, Claimant faced increasing costs, in deviation of the agreed terms provided in the concessions agreement. The claims brought against Hungary were at first difficult for the Tribunal to identify. This was partly because they were "put differently at different stages", partly because they have remained "very diffuse" upon 'clarification'.[229] However, it was found that the claims related to indirect expropriation and the failure to grant FET, in violation of Articles VI, III of the Hungary–Norway BIT.[230]

Respondent argued first that Claimant failed to substantiate that an expropriation actually took place and that disputes under the FET standard in the BIT are outside the Tribunal's jurisdiction. Under Art. XI of the BIT it is only possible to bring claims in relation to expropriation to international arbitration ("expropriation-only-clause").[231] Claimant objected to the latter and held that by virtue of the "procedural link" of the MFN clause in Art. IV of

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[225] *Ibid.,* para. 31

[226] *Ibid.,* para. 49

[227] *Ibid.*

[228] *Telenor Mobile Communications A.S. v. The Republic of Hungary*, ICSID Case No. ARB/04/15

[229] *Telenor Mobile Communications A.S. v. The Republic of Hungary*, ICSID Case No. ARB/04/15, Award (2006), para. 33, [hereinafter "*Telenor*"]

[230] Agreement between the Government of the Kingdom of Norway and the Government of the Republic of Hungary on the Promotion and Reciprocal Protection of Investments (1991)

[231] *Telenor,* para. 56

the Hungary–Norway BIT, it is entitled to enjoy the benefits of the "widest dispute clauses" contained in BITs with other states.[232] The MFN clause reads as follows:

> "Investments made by Investors of one Contracting Party in the territory of the other Contracting Party, as also the returns therefrom, shall be accorded treatment no less favourable than that accorded to investments made by Investors of any third State".

Much to the regret of the Tribunal, Claimant failed to specify on which BITs it relied. However, Hungary responded that MFN clauses are "limited to substantive rights" and that they apply to dispute settlement provisions only if the clause leaves "no doubt that such incorporation [of procedural standards] was intended". [233]

While Claimant particularly referred to the arbitral decisions in *Maffezini* and *Siemens*, the Tribunal "wholeheartedly endorsed the analysis and statement of principle furnished by the *Plama* tribunal".[234] In fact, it found "four compelling reasons" why MFN should not apply to dispute settlement provisions.[235] First, it held that the ordinary meaning of the MFN clause does not allow an application to procedural rights. In the eyes of the Tribunal, "it is one thing to stipulate that the investor is to have the benefit of MFN investment treatment but quite another to use an MFN clause in a BIT to bypass a limitation in the very same BIT" when the language of the clause does not show an intention to do so.[236] Without explicitly mentioning it, the Tribunal held that the word "treatment" refers to substantive treatment only. Second, the Tribunal also shared the concerns expressed in *Plama* with regard to the threat of treaty-shopping. It argued that a wide interpretation of the clause "exposes the host state to treaty-shopping by the investor among an indeterminate number of treaties".[237] Third, a wide interpretation would result in back and forth motions of the BIT, thereby jeopardizing legal certainty and stability. Last but no least, the Tribunal emphasized the importance of state practice with regard to the formulation of the dispute settlement clauses. It held that its task was to identify the intention of the contracting states as laid down in the BIT, and "to apply ordinary canons of interpretation not to displace […] the dispute resolution mechanism specifically negotiated by the parties".[238] It stressed that the intended, specifically negotiated

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[232] *Ibid.*, para. 20
[233] *Ibid.*, paras. 20, 56
[234] *Ibid.*, para. 90
[235] *Ibid.*, para. 91
[236] *Ibid.*, para. 92
[237] *Ibid.*, para. 93
[238] *Ibid.*, para. 95

content of a BIT is "not to be inferentially extended by an MFN clause".[239] The Tribunal concluded that the invocation of the MFN clause in order to import dispute settlement provisions "is to subvert the intention of the parties to the basic treaty, who have made it clear that this is not what they wish".[240] As a result, *Telenor's* claim was rejected.

j) Suez v. Argentina[241]

Another case where the Argentinian economic crisis has triggered an international arbitration is *Suez*. Due to the significant depreciation of the Argentine Peso, companies from France, Spain and the UK (Claimants), who invested in the water supplier *Aguas*, claimed to have suffered significant financial losses in violation of the respective BITs, their countries of origin had with Argentina (Respondent).[242] In particular Claimants alleged that they have been expropriated without adequate compensation and that Respondent failed to accord FET to their investments.

Not surprisingly, Respondent challenged the jurisdiction of the Tribunal and raised several objections. Respondent argued *inter alia* that Claimants failed to comply with their obligations under the Argentina–Spain BIT and the Argentina–UK BIT respectively. Under both BITs the contracting parties are obliged to refer the dispute to local courts first, before submission to international arbitration is allowed. Claimants objected, however, that due to the MFN clauses in the Argentina–Spain BIT and the Argentina–UK BIT, they were entitled to the more favourable treatment provided in the Argentina–France BIT, under which no prior referral to domestic courts is required.[243] Respondent countered that the MFN clauses in both treaties do not apply to matters of dispute settlement. The MFN clause in Art. 3 of the Argentina–UK BIT reads as follows:

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

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[239] *Ibid.*

[240] *Ibid.*

[241] *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19

[242] Agreement Between the Government of the French Republic and the Government of the Argentine Republic on the Reciprocal Promotion and Protection of Investments (1991); Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments (1991)

[243] *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Jurisdiction (2006), para. 52, [hereinafter "*Suez*"]

(2) Neither Contracting Party shall in its territory subject investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own investors or to investors of any third state".[244]

Focusing on the interpretation of the ordinary meaning of the MFN clause in the Argentina–Spain BIT, which is already known from *Maffezini* and *Gas Natural*, the Tribunal held that the clear reference to "all matters" allows only the conclusion that "dispute settlement is certainly a 'matter' governed by the [BIT]".[245] 'Treatment no less favourable' implies that "Spanish investments [are] able to invoke international arbitration against Argentina on the same terms as the holders of French investments".[246] Since French investors are not obliged to refer the matter to local courts first, it found that the rights under the Argentina–France BIT are indeed more favourable than those contained in the Argentina–Spain BIT. Despite the differences in wording, the Tribunal concluded that both MFN clauses lead to the same result. In both cases the term 'treatment' is to be understood to refer to the "rights and privileges granted and the obligations and burdens imposed by a Contracting State on investments made by investors covered by the treaty".[247] It stated that the "right to have recourse to international arbitration is very much related to investors' 'management, maintenance, use, enjoyment or disposal' of their investments", as guaranteed under Art. 3 (2) of the Argentina–UK BIT. After consideration of the substantive provisions of the underlying BITs, the Tribunal found "no basis for distinguishing dispute settlement matters from other matters".[248] In contrast, in regard of the purposes of BITs, namely the promotion and protection of investments, "dispute settlement is as important as other matters governed by the BITs and an integral part of the investment protection regime".[249]

The Tribunal rejected Respondent's contention that the parties intended to exclude dispute settlement provisions from the operation of the MFN clause. In contrast, it found that the text of the BITs "strongly implies just the opposite", since the lists of exceptions do not contain any referral to dispute settlement.[250] Respondent argued that the application of the *ejusdem generis* principle leads to the conclusion, that dispute settlement provisions and substantive

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[244] [Emphasize added]
[245] *Suez,* para. 55
[246] *Ibid.*
[247] *Ibid.*, para. 57
[248] *Ibid.*, para. 59
[249] *Ibid.*
[250] *Ibid.*, para. 58

standards are not of the same "*genus*" and that therefore the MFN clauses must remain inoperative.[251] Without further addressing the issue, the Tribunal rejected Respondent's argument and held that it "finds no basis for applying the *ejusdem generis* principle to arrive at that result".[252] With regard to Respondent's contention that MFN clauses must be interpreted "strictly", the Tribunal responded that there is "no rule and no reason for interpreting the [MFN clause] any differently from any other clause in the two BITs".[253] As a result, the Tribunal rejected Respondent's objections and declared that it has jurisdiction to hear the case.

2) Same Category of Subjects – Likeness

The search for enlightenment with regard to the likeness-requirement in MFN clauses is a frustrating endeavour. So far, there is no case, where such an investigation was undertaken. As the last chapter has shown, the likeness of investors or investments was neither part of the wordings of the MFN clauses under scrutiny, nor forwarded by the parties or presupposed by the tribunals. Due to the difficulty to analyse things that do not exist, the underlying analysis is therefore compelled to seek advice from arbitral decisions with regard to NT claims and to draw analogies on MFN within the limits imposed by the particularities of NT. However, the examples of likeness-tests under NT clauses in BITs are scarce, too. The only case where likeness has triggered a deeper analysis by an arbitral tribunal, is *Occidental v. Ecuador*. In all the other examples that will be provided in this chapter, the clause at stake was Art. 1102 NAFTA. The *Occidental* case is also relevant and helpful for the underlying investigation for two further reasons: first, the MFN and the NT standard in the Ecuador–US BIT[254] are combined in one clause. Having the differences between MFN and NT in mind, it still can be argued that the analysis of a combined clause allows drawing analogies on MFN with a higher normative power. Second, and probably most importantly, the wording of the clause explicitly refers to investments in "like situations". As already pointed out, the wordings in BITs do not always explicitly impose the condition of likeness. In both regards, *Occidental* therefore sets a precedent.

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[251] *Ibid.*, para. 59

[252] *Ibid.*

[253] *Ibid.*, para. 61

[254] Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment (1993)

a) Occidental v. Ecuador[255]

The US investor *Occidental* (Claimant) was engaged in the production and exploration of oil in Ecuador (Respondent). From 2000 to 2001, Respondent has reimbursed Claimant the VAT, the latter has paid on purchases required for its activities. In 2001, however, Ecuadorian tax authorities denied a further reimbursement and also requested Claimant to return VAT benefits from previous years. As a result, Claimant instituted arbitral proceedings, claiming *inter alia* that Respondent has breached its NT obligations under Art. II (1) Ecuador-US BIT. It reads as follows:

> "Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favourable than that accorded *in like situations* to investment or associated activities of its *own* nationals or companies, *or* of nationals or companies of any *third* country, whichever is the most favourable …".[256]

According to Claimant, Respondent has breached its NT obligations, since companies involved in the export of other goods, "particularly flowers, mining and seafood products" continued to receive the VAT refund.[257] Claimant emphasized that the meaning of 'like situations' "does not refer to those industries or companies involved in the same sector of activity, such as oil producers, but to companies that are engaged in exports even if encompassing different sectors".[258] It was added that Respondent has also violated its MFN obligations under the basic treaty, since the NT clauses in the Ecuador–Spain BIT[259] and the Argentina–Ecuador BIT[260] were considered to be more favourable, since they were not qualified and constrained by the reference to 'like situations'.[261] In contrast, Respondent argued that the reference to 'like situations' requires that "all companies in the same sector are to be treated alike".[262] Respondent rejected the applicability of the MFN clause, as there is no Argentine or Spanish company in the oil sector, "or any other sector, receiving a more favourable treatment to which the clause would apply".[263]

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[255] *Occidental Exploration and Production Company v The Republic of Ecuador*, LCIA Case No UN 3467

[256] [Emphasize added]

[257] *Occidental Exploration and Production Company v The Republic of Ecuador*, LCIA Case No UN 3467, Award (2012), para. 168, [hereinafter "*Occidental*"]

[258] *Ibid.*

[259] Acuerdo para la Promoción y Protección Recíproca de Inversiones entre el Reino de España y la República des Ecuador (1996)

[260] Convenio entre el Gobierno de la República del Ecuador y el Gobierno de la República Argentina para la Promoción y Protección Recíproca de Inversiones (1994)

[261] *Occidental*, para. 170

[262] *Ibid.*, para. 171

[263] *Ibid.*, para. 172

The Tribunal followed the arguments of Claimant and held that the term 'in like situations' "cannot be interpreted in the narrow sense advanced by Ecuador as the purpose of national treatment is to protect investors as compared to local producers, and this cannot be done by addressing exclusively the sector in which that particular activity is undertaken".[264] It referred to WTO case law and rejected the position of the Appellate Body in *Korea – Alcoholic Beverages*, according to which the concept of likeness "must" be applied narrowly.[265] The Tribunal found, however, that the reasoning of the Appellate Body was not "pertinent" for the underlying case, since the purpose of the NT standard is "the opposite of that under GATT/WTO".[266] According to the Tribunal, the purpose of the NT clause in Art. III GATT '94 is "to avoid imported products being affected by a distortion of competition with similar domestic products because of taxes and other regulations in the country of destination".[267] The purpose of the NT clause in the Ecuador–US BIT, however, is to "avoid exporters being placed at a disadvantage in foreign markets because of the indirect taxes paid in the country of origin".[268] The Tribunal pointed to the text of the treaties and held that the "reference to 'like situations [in the BIT] seems to be different from that to 'like products' in the GATT/WTO".[269] While "the '*situation*' can relate to all exporters that share such condition, the '*product*' necessarily relates to competitive and substitutable products".[270] In order for situations to be alike, competitiveness and substitutability is redundant. After finding that Claimant indeed has received a less favourable treatment in comparison to Ecuadorian companies, the Tribunal considered it unnecessary to investigate whether there were MFN obligations involved, too. With regard to the parties' discussion about the *Maffezini* case, the Tribunal clarified that the case is "not pertinent" since procedural, not substantive questions were the matter.[271] The Tribunal concluded that Respondent has breached its NT obligations under Art. II (1) Ecuador–US BIT.[272]

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[264] *Ibid.*, para. 173
[265] *AB Korea–Alcoholic Beverages*, p. 34
[266] *Occidental*, para. 175
[267] *Ibid.*
[268] *Ibid.*
[269] *Ibid.*, para. 176
[270] *Ibid.* [emphasize added]
[271] *Ibid.*, para. 178
[272] *Ibid.*, para. 179

b) *S.D. Myers v. Canada*[273]

In *S.D. Myers*, the US company *SDMI* (Claimant) brought a claim against Canada (Respondent) under Chapter 11 NAFTA. *SDMI* engaged in the treatment of polychlorinated biphenyl (PCB), which is an environmentally hazardous chemical compound. In November 1995, Canada prohibited the export of PCB, allegedly due to environmental obligations under the NAAEC, thereby precluding the investor from carrying out the business it intended to do (the import of PCB into the US). Although the ban was revoked 16 months later, *SDMI* claimed compensation for financial losses and held *inter alia*, that the closing of the boarder was in violation of Canada's NT obligations under Art. 1102 NAFTA.

The Tribunal began its analysis with emphasizing that Art. 1102 (1), (2) NAFTA refers to comparators in "like circumstances". It found the phrase to be "open to a wide variety of interpretations in the abstract and in the context of a particular dispute".[274] By referring to WTO dispute resolution panels, the Tribunal argued that there is no static definition of what is 'like' and that case law suggests that the interpretation depends "on all the circumstances of each case".[275] Particular attention must be paid to the "legal context" in which the word appears.[276] After invoking the Appellate Body's reasoning and its image of the accordion in the *Japan – Alcoholic Beverages* case, the Tribunal considered that the "legal context of Article 1102 includes the various provisions of NAFTA", including relevant companion agreements, such as the NAAEC.[277] Under the NAAEC, states basically have the right to high environmental protection standards.

The Tribunal pointed out that according to OECD practice, the evaluation of 'like situations' in the investment context "should take into account *policy objectives* in determining whether enterprises are in like circumstances".[278] The comparison between foreign controlled enterprises, however, is valid only between companies operating in the "same sectors".[279] By referring to a decision of the Supreme Court of Canada, the Tribunal emphasized the importance of a case-by-case analysis when it comes to the determination of 'like circumstances'. The application of a "purely mechanical test" was found to be

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[273] *S.D. Myers Inc. v. The Government of Canada*, UNCITRAL

[274] *S.D. Myers Inc. v. The Government of Canad*a, UNCITRAL, Partial Award (2000), 30 ILM (2001) 1408, para. 243, [hereinafter "*SD Myers*"]

[275] *Ibid.*, para. 244

[276] *Ibid.*

[277] *Ibid.*, para. 247

[278] *Ibid.*, para. 248 [emphasize added]

[279] OECD Negotiating Group on the Multilateral Agreement on Investment; Drafting Group No. 2 on Selected Topics Concerning Treatment of Investors and Investment: *Discussion of Draft Articles on National Treatment, Non-Discrimination and Transparency* (1995); DAFFE/MAI/DG2(95)1, [emphasize added]

inappropriate.[280] Instead, whether or not individuals are in 'like circumstances' depends on the "context in which the measure is established and applied and the specific circumstances of each case".[281] The Tribunal went on by stating that the interpretation of 'like circumstances' must take into account "general principles that emerge from the legal context of NAFTA", which range from the need to avoid trade distortions, to environmental concerns.[282] Beyond that, the "assessment of 'like circumstances' must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest".[283] According to the Tribunal, the concept of 'like circumstances' "invites an examination of whether a non-national investor complaining of less favourable treatment is in the same 'sector' as the national investor".[284] The word 'sector' has a "wide connotation that includes the concepts of 'economic sector' and 'business sector'".[285]

The Tribunal argued that it is "clear" from a business perspective, that Claimant was in 'like circumstances' as Canadian operators, which were engaged in PCB waste, too.[286] It reasoned that this was "precisely because *SDMI* was in a position to take business away from Canadian competitors" and "to attract customers that might otherwise have gone to the Canadian operators because it could offer more favourable prices".[287] Due to that competition, the Tribunal found that the competitors *Chem-Security* and *Cintec* successfully "lobbied" the Canadian Government in order to achieve the export ban in their favour.[288] After finding that the circumstances were 'like', the Tribunal concluded that the "practical effects of [Canada's] measure created a disproportionate benefit for nationals over non-nationals" and that although "the indirect motive was understandable, [the] method contravened Canada's international commitments under the NAFTA".[289]

c) *Pope & Talbot v. Canada*[290]

In *Pope & Talbot v. Canada*, the US wood products company *Pope & Talbot* (Claimant) instituted proceedings against Canada (Respondent), due to alleged violations of Chapter 11

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[280] *S.D. Myers*, para. 249
[281] *Ibid.*
[282] *Ibid.*, para. 250
[283] *Ibid.*
[284] *Ibid.*
[285] *Ibid.*
[286] *Ibid.*, para. 251
[287] *Ibid.*
[288] *Ibid.*
[289] *Ibid.*, para. 255
[290] *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL

NAFTA, in connection with the implementation of the so-called *Softwood-Lumber-Agreement*. Under the Softwood-Lumber-Agreement Canada committed itself to limit the export of softwood lumber from four provinces, namely Alberta, British Columbia, Quebec and Ontario, that were traditionally among the major exporters into the US. Exporters from other provinces did not face such restrictions. According to Claimant, the way Canada implemented the Agreement lead to a more favourable treatment of producers from the non-covered provinces. Claimant invoked *inter alia* the MFN clause of Art. 1103 (1) NAFTA, in order to import the more favourable FET standards Canada grants to third countries. The claim was withdrawn, however, and subsumed under the NT claim.[291]

The Tribunal argued, that a violation of the NT standard requires, after establishing a difference in treatment, that the beneficiary of the clause and the domestic comparator are in "like circumstances" and that it is therefore necessary to find the "domestic entities whose treatment should be compared with".[292] In order to do so, a definition of "like circumstances" was required. The term 'circumstances' was found to be context dependent "by [its] very nature", while the term 'like' "can have a range of meanings, from 'similar' all the way to identical".[293] The proper application of the "like circumstances *standard*" requires evaluating "the entire fact setting surrounding, in this case, the genesis and application of the Regime".[294] Following the reasoning in *S.D. Myers v Canada*, the Tribunal argued that the consideration of like circumstances requires keeping in mind "the overall legal context in which the phrase appears".[295] It found that the legal context includes the "trade and investment-liberalizing objectives of the NAFTA", as well as the "entire background of [Canada's] disputes with the US concerning softwood lumber trade".[296]

In its likeness-test the Tribunal found first, that all producers in the non-restricted provinces, Canadian and foreign alike, indeed enjoyed a more favourable treatment than producers from the restricted regions, since they could freely export softwood lumber to the US without quantitative restrictions or the payment of any fees. However, it was only the producers from the restricted provinces that faced a threat of countervailing duty actions by the US Department of Commerce. The Tribunal followed the analysis of Respondent and found that

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[291] *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Procedural Order No. 2 (1999)

[292] *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Awards on the Merits of Phase 2 (2001), 122 ILR (2002) 352, [hereinafter "*Pope & Talbot*"]

[293] *Pope & Talbot*, para. 75

[294] *Ibid.*, para. 75 [emphasize added]

[295] *S.D. Myers*, para. 245

[296] *Pope & Talbot*, para. 77

the restrictive measures were "reasonably related to the rational policy of removing the threat of countervailing duty actions".[297] It argued that since more than 500 Canadian wood producers were affected in the same manner as the Claimant, the measure "cannot reasonably be said to be motivated by discrimination outlawed by Art. 1102".[298] The Tribunal concluded that producers in affected and non-affected provinces were *not* in like circumstances and that Canada did consequently not break its obligations under the NT standard. Second, the Tribunal found that the more favourable treatment of producers from Quebec *vis-á-vis* producers from British Columbia was justified. The analysis of the assignment of quotas to new entrants revealed that it was due to the underlying economic circumstances of the lumber industry that "placed the investment and other producers in British Columbia in *unlike* circumstances to those in other covered provinces".[299] Again, it found that the measure had a "reasonable nexus" with a "rational policy of providing for new entrants" and that there were "no elements of discrimination against foreign-owned producers".[300] The Tribunal concluded that the "investment was not in like circumstances to new entrants" and that therefore Canada did not breach its NT obligations under Art. 1102 NAFTA.

d) The Loewen Group v. USA[301]

Loewen Group was a "notorious case" that has attracted a lot of attention.[302] It was the first Chapter 11 arbitration that was based on allegations that judicial proceedings were "so deficient as to amount to a denial of justice under NAFTA and international law".[303] However, the decision of the Tribunal was described as "schizophrenic" and the case itself is not only considered a bad precedent for the access to justice, but also a "bad precedent for the investment community".[304] The Canadian investor *Loewen Group* (Claimant) claimed damages from the US (Respondent), primarily due to denial of justice, but also due to alleged violations of the NT standard in Art. 1102 NAFTA. Claimant asserted that the ruling of a court in Mississippi, in which the company was sentenced to pay $ 625 million in a litigation case with a domestic competitor, was also in violation of Respondent's NT obligations. It

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[297] *Ibid.*, para. 87

[298] *Ibid.*, para. 87

[299] *Ibid.*, para. 93 [emphasize added]

[300] *Ibid.*

[301] *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3

[302] Francioni, Francesco: *Access to Justice, Denial of Justice and International Investment Law* in 'European Journal of International Law' (vol. 20, no. 3), 2009, pp. 729-747, p. 734

[303] Matiation, Stefan: *Arbitration with Two Twists: Loewen v. United States and Free Trade Commission Intervention in NAFTA Chapter 11 Disputes* in 'University of Pennsylvania Journal of International Law' (vol. 24, issue 2, article 3), 2003, p. 458

[304] Francioni (2009), p. 735

argued that the trial court admitted "extensive anti-Canadian and pro-American testimony and prejudicial counsel comment".[305]

In its analysis the Tribunal examined the question, whether the conduct before the Mississippi court was so "flawed as to violate NAFTA Articles 1102" and if the judgement of the Mississippi court can be considered "a measure adopted or maintained by a Party" within the meaning of NAFTA.[306] The Tribunal agreed with the position of Respondent that the effect of the NT provisions in Art. 1102 NAFTA, is that Claimant may not have been treated less favourable *vis-à-vis* domestic comparators "by reason of its Canadian nationality" in a "similar case" and in a "similar lawsuit".[307] Art. 1102 NAFTA requires a comparison between the "treatment accorded to a claimant and the most favourable standard of treatment accorded to a person in like situation to that claimant".[308] It found, however, that there is no example of how a domestic comparator is treated in a similar case or lawsuit, and that the circumstances of Claimant and Respondent in the litigation case before the Mississippi court do not qualify as comparators since they were "very different".[309] In other words, it found that plaintiff and defendant in a litigation case are not appropriate comparators and that due to the lack of comparability, the NT standard was inapplicable.

It is worth mentioning, however, that the Tribunal was sympathetic for Claimant's position. It held that a reader of the Award could be "well troubled" to find that, in the light of the "injustices" and "judicial wrongs" that were suffered by *Loewen* before the US courts, no remedy was granted.[310] The Tribunal has no doubt that "there was unfairness here towards the foreign investor".[311] It did no allow, however, that "human reactions" control its decision and that by acting in an "appellate function" the Tribunal would "damage both the integrity of the domestic judicial system and the viability of NAFTA itself".[312]

e) Feldman v. Mexico[313]

In *Feldman v. Mexico* the US entrepreneur Marvin Feldman (Claimant) alleged that Mexico's (Respondent) refusal to repay certain taxes to his company *CEMSA* constituted a breach *inter*

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[305] *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (2003), para. 39, [hereinafter "*Loewen*"]

[306] *Ibid.*, para. 47

[307] *Ibid.*, para. 139

[308] *Ibid.*, para. 140

[309] *Ibid.*

[310] *Ibid.*, para. 241

[311] *Ibid.*

[312] *Ibid.*, para. 242

[313] *Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1

alia of the NT standard in Art. 1102 NAFTA. *CEMSA* is a reseller and exporter of cigarettes. According to Claimant, Mexican competitors have received a refund for taxes paid, while *CEMSA* did not.

The Tribunal began its analysis stating that the "national treatment / non-discrimination provision is a *fundamental obligation* of Chapter 11 [NAFTA]".[314] It held that the "concept is not new with NAFTA" and that "analogous language" in Art. III GATT '94 has been applied between the parties since 1947, 1985 respectively.[315] The Tribunal went on stating that the simple language of Art. 1102 NAFTA is "deceptive" and that there are several "interpretative hurdles" to take.[316] Accordingly, it must first be found out, which domestic investors are in 'like circumstances' as the foreign investor; second, whether there was *de jure* or *de facto* discrimination; third, whether the discriminatory measures were implied due to the foreign nationality of the investor and fourth, whether the investor must receive the most favourable treatment "given to *any* domestic investor or to just some of them".[317] Analysing the first interpretative hurdle, the Tribunal held that in the investment context, the "concept of discrimination has been defined to imply *unreasonable* distinctions between foreign and domestic investors in like circumstances".[318] It held that there are "at least some rational bases for treating producers and resellers differently", as for example the discouragement of smuggling or better control over tax revenues.[319] Therefore, such "producer-reseller discrimination" was not found to be a violation of international law.[320] Claimant and Respondent agreed that *CEMSA* is in like circumstances as Mexican resellers, although Respondent denies that there has been any discrimination. According to the Tribunal, "the 'universe' of firms in like circumstances are those foreign-owned and domestic-owned firms that are in the business of reselling/exporting cigarettes".[321] In contrast, cigarette *producers* cannot claim to be in like circumstances. The Tribunal determined in this regard "that the companies which are in like circumstances, domestic and foreign, are the *trading* companies, those in the business of purchasing Mexican cigarettes for export".[322] After analysing the further interpretative hurdles, the Tribunal found that Respondent's acts were inconsistent

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[314] *Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (2002), para. 165 [emphasize added], [hereinafter "*Feldman*"]

[315] *Ibid.*

[316] *Ibid.,* para. 166

[317] *Ibid.,* para. 166

[318] *Ibid.,* para. 170, [emphasis in original]

[319] *Ibid.*

[320] *Ibid.*

[321] *Ibid.,* para. 171

[322] *Ibid.,* para. 172 [emphasize added]

with its obligations under Art. 1102 NAFTA and that Respondent has failed to meet its "burden of adducing evidence to show otherwise".[323]

f) GAMI v. Mexico[324]

In *GAMI v. Mexico* the US investor *GAMI* (Claimant) alleged that Mexico (Respondent) breached its obligations under Art. 1102 NAFTA. The issue at stake was a nationalization of sugar mills by the Mexican Government. Since not all operators of sugar mills were expropriated, the question was whether Claimant was in like circumstances with the operators of non-expropriated mills.

The question whether "*GAMI's* mills could not be expropriated without violating Art. 1102 NAFTA simply because *GAMI* has US minority shareholders" was answered negatively by the Tribunal.[325] It held that it was not convinced that the circumstances of non-expropriated mills were so "like […] that it was wrong to treat GAM differently".[326] By expropriating the mills, what was considered a measure in the public interest, the Government of Mexico might have been "misguided" and "clumsy", but "ineffectiveness is not discrimination".[327] The Tribunal found it sufficient that a reason existed for the expropriation, "which was not itself discriminatory".[328] It found that the "measure was plausibly connected with a legitimate goal of policy […] and was applied neither in a discriminatory manner nor as disguised barrier to equal opportunity".[329]

g) ADF v. USA[330]

The *ADF Group* (Claimant) is a Canadian company that engineers and fabricates steel. It claimed damages from the US (Respondent) due to the *Buy America Act* and the related *Surface Transportation Assistance Act*. According to this legislation, governmentally funded highway projects in the US must use domestically produced steel only. According to Claimant, these measures were in breach of Respondent's obligations under Chapter 11 NAFTA. In particular, Claimant argued that Respondent *inter alia* breached its obligations under the NT standard of Art. 1102 NAFTA and failed to provide a Minimum Standard of

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[323] *Ibid.,* para. 187

[324] *Gami Investments v The United Mexican States*

[325] *Gami Investments v The United Mexican States*, Award (2004), 44 ILM (2005) 545, para. 112, [hereinafter "*Gami*"]

[326] *Ibid.*, para. 114

[327] *Ibid.*

[328] *Ibid.*

[329] *Ibid.*

[330] *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1

Treatment, as provided under Art. 1105 NAFTA. Regarding the latter, Claimant invoked the MFN clause in Art. 1103 NAFTA in order to profit from the allegedly more favourable provisions on FET and Full Protection and Security in the Albania–US,[331] and the Estonia–US BIT.[332]

Claimant argued that the treatment provided in Art. II (3) a), b) US–Albania BIT and in Art. II (3) b) US–Estonia BIT, was more favourable and went far beyond the customary international law minimum standard of treatment of Art. 1105 NAFTA. The Tribunal did not share this view and held that Claimant was unable to show that the provisions in the third-party treaties were "distinct and separate from the specific requirements of the customary international law minimum standard", i.e. that the treatment provided in the BITs was more favourable than the treatment accorded under NAFTA.[333] But even if it was shown that the BITs provide such autonomous standards, the Tribunal was of the view that Claimant did not succeed showing that the measures of Respondent were in breach of these standards or that they were "arbitrary or discriminatory".[334] Beyond that, the Tribunal assumed that even if it was found that these standards were breached, the measures by Respondent were legal under Art. 1108 (7) a) NAFTA, according to which MFN and the NT standard are not applicable on Government procurement.[335] The Tribunal consequently rejected the claim that Respondent's measures were inconsistent with Art. 1103 NAFTA.

However, Claimant argued that obligations under the *Buy America Act* were in violation of the NT standard of Art. 1102 NAFTA, since Canadian steel was being discriminated against US steel. According to the Tribunal, the violation of the NT standard required an assessment, whether the steel produced by the investor was treated in a manner less favourable than steel produced by US investors "in like circumstances".[336] Respondent denied a violation of the NT standard and argued that requirements of the *Buy America Act* equally apply to all steel manufacturers. Both, US and foreign investors were required to produce the steel in the US in order to meet the requirements of the *Buy America Act*. According to Respondent, Claimant failed to identify an appropriate comparator "which, by virtue of its nationality, was exempted

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[331] Treaty between the United States of America and the Government of the Republic of Albania Concerning the Encouragement and Reciprocal Protection of Investment (1995)

[332] Treaty between the United States of America and the Government of the Republic of Estonia Concerning the Encouragement and Reciprocal Protection of Investment (1994)

[333] *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award (2003), para. 194, [hereinafter "*ADF Group*"]

[334] *Ibid.*

[335] *Ibid.*, para. 196

[336] *Ibid.*, para. 155

from the requirements of *Buy America*".[337] The Tribunal followed the reasoning of Respondent and held that Claimant did not show that US companies, "similarly situated as the investor, had been accorded different from and more favourable than that given to the investor".[338] The Tribunal still considered the possibility that the *Buy America* requirements could hide *de facto* discrimination. However, it found itself unable to make such a determination since Claimant failed to provide respective evidence. The NT claim was therefore dismissed.

[337] *Ibid.*, para. 156
[338] *Ibid.*

D Conclusion

This last chapter aims to shortly summarize the main findings of this paper and to draw conclusions from the definitions and arbitral decisions provided therein. This shall be done through the lens of MFN treatment, while also paying special attention to the *ejusdem generis* principle. As this paper has shown, MFN clauses have undergone a long development. On the one hand, they were tools of repression, obliging defeated states not to give more preferential treatment to third states, while no such privilege was given in exchange. On the other hand, they were and nowadays continue to be crucial tools of economic openness and consequently for well-being, peace and development. When states start to isolate themselves and when they start taking without giving, the benefits and advantages of *mutual* cooperation begin falling into oblivion, thereby not only causing economic decline, but also creating favourable conditions for a (more) hostile international order. Sure, the destiny of the world does not depend on MFN clauses. However, international economic law does, to a certain extent. Without a more or less proper functioning of the clause in the context of the WTO, what includes the creation of parity between industrial and developing states through exceptions from MFN treatment, the world trading system would forfeit a lot of its legitimacy and support. With regard to investment law, it became obvious that MFN clauses play quite a different role, although their "sparse application […] provides insufficient precedent for general pronouncements".[339]

I. Subject Matter

With regard to the subject matter discussion, it can be held that both, opponents and proponents, have forwarded good arguments for their positions. On the one hand, it is indeed questionable why abstract clauses should simply overrule specifically negotiated treaty provisions. Without a clear and unambiguous clause it is difficult to decide against the parties will. In *Salini*, Art. 9 (2) of the Italy–Jordan BIT stated explicitly that the dispute settlement provisions of the investor-state contract prevail. It is therefore understandable that the Tribunal gave preference to the clearly expressed will of the parties – although it cannot be ignored, that the MFN clause is also an expression of the parties' will, even though it is more abstract. One argument in favour of still prioritizing the concrete clause is the *lex specialis* rule, according to which the specific law overrules the general. The same is true for the 'expropriation-only-clause' in Art. X of the Hungary–Norway BIT, which was under scrutiny

[339] Dolzer & Myers (2004), p. 59

before the *Telenor* Tribunal. An arbitral tribunal's function is first of all to apply the law at hand and not to look after legal principles or other more 'suitable' provisions that would justify another decision. In international investment law and arbitration, party autonomy is still a dominating principle: there is no other legislator apart from the parties themselves. This aspect is also important with regard to legal security and predictability. Neither states, nor investors want that 'pig in a poke', this is why they have agreed on certain rules in the first place. In this regard, it is also worth mentioning that the *Plama* Tribunal stated some sympathy for the decision in *Maffezini* and held that it "sympathized with a tribunal that attempts to neutralize such a provision that is *nonsensical from a practical point of view*".[340] Last but not least it must be observed, particularly with regard to WTO jurisprudence, that in the loose web of BITs, there is no comparable responsibility towards third parties as in multilateral systems. The GATT applies equally to all members and explicitly establishes rights and duties among them. BITs, in contrast, are by definition *bilateral*.

However, the decisions of the tribunals were also deficient in several regards. First of all, the interpretations of the wordings of MFN clauses were occasionally astonishing. It remains unclear why the lack of a referral to 'all matters' is to be interpreted as to exclude dispute settlement provisions. Particularly the narrow interpretation of the word 'treatment', as undertaken by the Tribunal in *Plama* for example, is not convincing. It is to some extent plausible to argue that 'treatment' requires a positive act. However, there are first of all enough cases where a dispute arose out of the omission to act. Second, there is nothing in the word 'treatment', understood as the behaviour towards an investor, that indicates that access to international justice is not covered. This author therefore fully endorses the reasoning of the *Gas Natural* Tribunal, according to which the access to international arbitration is "perhaps *the* most crucial element" of an investor's treatment.[341] A main driver behind the development of international investment law was the idea that commercial disputes should be depoliticized and accelerated and that therefore investors should have a legal standing *vis-à-vis* states. This development was also a corollary of the development in the field of human rights. In the recent decades the individual pushed into the centre of international law, which traditionally was occupied by the sovereign state, and more and more private actors were granted the right to internationalize their claims and bring action against domestic and foreign

[340] *Plama*, para. 224

[341] *Gas Natural*, para. 28 [emphasize added]

countries.[342] Traditional notions of the treatment of aliens, under which the access to justice was "problematic" at its best, fade away.[343] In other words: the general trend goes towards a stronger protection of the individual, which absolutely includes the access to international justice. And in contrast to other, more 'sensitive' international legal issues such as criminal responsibility, there is no need to be that cautious towards states, which have partially given generous dispute settlement rights to investors from third states. BITs would fail to meet their own standards, when the access to justice is denied. It is not evident why jurisdictional proceedings should that rigorously bar theoretically legitimate claims: justice is not being served, when arbitral tribunals do not even hear the claim. The *Loewen* case is a striking example where the lack of courage has paved the way for injustice. However, with this in mind, one may conclude that the dogmatic separation between 'substantive' and 'procedural' rights is artificial and largely redundant, since both 'kinds' of rights form part of the *same* standards providing protection to foreign investors. This means with regard to the arguments forwarded in relation to the *ejusdem generis* principle, that there is no need to apply this rule, since there are no two 'kinds' of rights in a BIT. This view also dominated the decisions in *Ambatielos* and *Maffezini*.

The last observations with regard to the subject-matter discussion relate to the MFN clause. One logical weakness was the opponent Tribunals' caution towards 'specifically negotiated' dispute settlement clauses. One may reply, that *every* clause in a BIT is specifically negotiated – and there are not only broad and narrow dispute settlement clauses, but also broad and narrow FET provisions. If the MFN clause itself does not limit the scope of MFN treatment, as for example the 'war-MFN-clause' in Art. 3 (3) of the Germany–Pakistan BIT does, then it is not obvious why a specific provision should be able to do so. It is the very job of MFN clauses, which are by the way also a clear expression of the will of the parties, to overrule agreements through which more favourable treatment is granted. The concerns regarding "disruptive treaty shopping" are largely unjustified, because the states themselves opened their shops by including MFN clauses into their BITs.[344] Giving preference to a contrary clause means depriving MFN of its effectiveness.

Second, and most importantly, it is striking, that the object and purpose of MFN treatment, namely non-discrimination, was no matter at all. It was only in the *Maffezini* case that

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[342] In this regard, the European Court of Human Rights is certainly the most progressive example. Under Art. 34 ECHR, every individual is entitled to bring claims against the Contracting Parties.

[343] Francioni (2009), p. 730

[344] *Salini,* para. 63

Respondent argued that discrimination can only take place with regard to substantive, and not to procedural rights.[345] However, this contention, which was not further considered, is not convincing. It is surprising though, that no tribunal has considered the fact, that direct access to international arbitration comes along with several advantages, especially because there is no need to abandon oneself to the weaknesses of domestic courts.[346] Investors generally prefer to avoid long legal disputes with uncertain outcomes before (probably) biased national courts, which cost a lot of effort, time and money, while international arbitration, where the parties themselves choose the arbitrators, allows a comparably fast and transparent way to settle disputes. Since there are such significant differences with regard to investors' access to arbitral tribunals, it is also little surprising that mainly procedural rights have been invoked by operation of MFN clauses. Anyway, it is clear that there is a disequilibrium in investors' rights and the lack of opportunity to have legal standing before an arbitral tribunal puts one investor in a far more disadvantageous position *vis-à-vis* his counterpart from another state. In other words, if investors from one state are allowed to refer their matter to an arbitral tribunal, while others are not, it is actually beyond doubt that the one is treated more favourably than the other. Such different treatment therefore *can* amount to discrimination, as long as there are no reasons that justify it. However, *categorically* excluding dispute settlement provisions from the reach of MFN clauses is a blank cheque for discrimination.

II. Likeness

The look at arbitral tribunals' decisions on the likeness-requirement was inevitably unsatisfying, since there are no decisions in international investment arbitration that relate to MFN clauses. Every conclusion on MFN is therefore to some extent hypothetical. However, it is with good conscience that one can draw some analogies from the decisions in relation to NT. In this regard, it is particularly the *Occidental* case that is significant for the underlying investigation. This is first of all due to the proximity of NT and MFN in one clause, which additionally requires investments to be in "like situations". But the significance is also derived from the fact, that it is the only case, which was not based on NAFTA, but on a BIT.

The following points can be highlighted: first of all, the Tribunal held that term 'like situations' must be interpreted with regard to the *purpose* of NT, which is to "protect investors as compared to local producers" and to avoid that the investor is being "placed at a

[345] *Maffezini*, para. 41

[346] c.f. Dolzer & Schreuer (2012), p. 235 et seqq.

disadvantage in foreign markets".[347] It rejected the contention of the Appellate Body in *Korea–Alcoholic Beverages*, according to which the concept of likeness must be applied narrowly. Due to the differences between a like *product* and a like *situation*, it found the requirement of competiveness and substitutability, as postulated by WTO jurisprudence, to be inadequate. Instead, it found it sufficient that the investor was being "placed at a disadvantage" in a foreign market in order to find a violation of the NT standard. With regard to MFN this would mean, that any foreign investor could serve as the comparator, regardless of the sector. For the standard to be violated, it would consequently be sufficient that one of the two investors receives less favourable treatment than his counterpart. It is questionable though whether such an approach would satisfy the purpose of non-discrimination. The 'situations' of two foreign investors from two different countries can vary significantly and depend on many different factors. It would, for example, be hard to argue that a large, multi-billion company from the mining sector, can be considered to be in a like situation as a small entrepreneur investing in the textile production: there may be good reasons to impose higher taxes on the former, while relieving the latter. In this regard, it was the *Feldman* Tribunal, which emphasized that discrimination requires "*unreasonable* distinctions" between the comparators and that there can be "some rational bases" to treat them differently.[348] A too generous stretching of the likeness-accordion therefore runs the risk of becoming a gateway for illegitimate claims.

It is for this reason that the sectoral approaches in *S.D. Myers*, *Pope & Talbot*, *Feldman* and partly *ADF* appear more adequate tools to achieve a proper balancing of non-discrimination. While the *Occidental* Tribunal has rather mechanically opened the scope of likeness, it was the Tribunal in *S.D. Myers*, which rejected a "purely mechanical test" and which emphasized the importance of a case-by-case analysis.[349] This analysis finally revealed the fact, that the less favourable treatment of the foreign investor can directly be attributed to his capacity to take business away from national competitors – what would be hard to achieve when the comparators operate in different sectors. In this regard it is also important to emphasize that discrimination rarely takes place openly. Instead, discriminatory state measures are mostly disguised and therefore difficult to identify at first glance. Similarly, it was the *Pope & Talbot* Tribunal, which also emphasized the wide range of likeness from "similar all the way to

[347] *Occidental*, paras. 173, 175

[348] *Feldman*, para. 170 [emphasize in original]

[349] *S.D. Myers*, para. 249

identical" and which also widened the scope by considering the overall legal context in order to determine the likeness.[350]

The *Feldman* Tribunal squeezed the accordion and concluded that due to the particularities of the respective businesses, even cigarette producers and resellers cannot be considered to be in like circumstances. However, it is particularly the decision in *Loewen* that highlights the dangers of a too narrow application. In light of the Tribunal's clear positioning, it is more than surprising that the Tribunal applied the likeness-requirements so narrowly. While it is understandable that plaintiff and defendant in a litigation case cannot *per se* be considered to be in like circumstances, the facts of the underlying case leave some room for a broader application of the likeness test. First of all, Claimant and Respondent were from the same sector, the funeral industry, and competed in the same market, the State of Mississippi. Requiring that the national company experiences the same (mal-) treatment by the same court as the foreign comparator in order to see the demands of likeness fulfilled, is a precondition that can nearly never be fulfilled. Second, the reasoning and comments of the jury in the Mississippi trial would have allowed to conclude that the court's decision in favour of *O'Keefe Funeral Homes* was motivated by the Canadian nationality of the investor and that the NT standard was therefore violated. According to the jury, Claimant "was a rich, dumb Canadian politician who thought he could come down and pull the wool over the eyes of a good ole Mississippi boy".[351] However, the decision with regard to the NT violation was of minor importance for the Tribunal's final decision to dismiss the claim.

Two final observations can be made here: first of all, it is striking that the arbitral tribunals clearly emancipated themselves from WTO jurisprudence. The WTO decisions served merely as a guideline and not as a blueprint, and the tribunals were keen to emphasize the autonomy and particularity of investment law. It is therefore that the decisions constitute good precedents and a solid basis for the further development of the likeness-test in international investment arbitration. Second, and most importantly, it is striking that the *ejusdem generis* principle, understood as requiring the likeness of the comparators, was not mentioned at all. The reason for this is certainly that the *principle* is underdeveloped and immature – apart from the decisions in the subject-matter discussions, it played nearly no role in international law and there is also a very limited number of academic literature on the matter. And also the recourse to national law does not provide any suggestions that would allow a further shaping

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[350] *Pope & Talbot*, para. 75

[351] Available at: http://www.nytimes.com/1996/01/27/us/brash-funeral-chain-meets-its-match-in-old-south.html?pagewanted=all [accessed on 12th May 2016]

and better definition of *ejusdem generis*. One can state, however, that by conducting the likeness-test, the arbitral tribunals did rather apply the second constitutive element of the principle without mentioning it. But being satisfied with a silent application bears the danger, that a likeness-investigation only takes place when the MFN (or NT) clause explicitly refers to it. The conclusion, that the lack of such referral makes a likeness-test redundant, opens the door to treat unequal comparators equally and consequently to legitimize discrimination among foreign investors. The *ejusdem generis* is an inherent part of MFN clauses, because the logics of non-discrimination require so. Sure, states are generally free to discriminate and to treat one state better than the other. But their liberty is constrained from the moment on, when they have agreed to grant each other MFN treatment.

The proper application of MFN clauses is a balancing act, which requires a careful consideration of a number of issues. It seems, however, that arbitral tribunals fell short to do so. Instead, much ink has been spilled on the question, whether 'substantive' provisions and dispute settlement provisions can be considered to be of the same kind. The way more interesting, and for MFN purposes more important question would have been, whether there are good reasons that investors from one state have direct access to international arbitration, while the others must refer the dispute to local courts first. In light of the foregoing analysis, the suspicion remains that the *ejusdem generis* principle, understood as applying to the same subject matter only, is rather unimportant in order to achieve the MFN-purpose of non-discrimination – while the second constitutive element, namely the likeness requirement, is key to do so. Coming back to the definition of UNCTAD, one must conclude in the light of the foregoing findings, that applicability of MFN clauses is not limited to issues "belonging to the same subject matter *or* the same category of subjects", but to the same subject matter *and* the same category of subjects.[352]

III. Outlook

The relevance of the topics covered in this paper, is mainly derived from the dynamics and growing importance of international investment law. Although the ICSID Convention was already signed and ratified in the 1960s, it is only since the beginning of the new millennium that ISDS begins gaining relevance. Recent attempts to further intensify economic cooperation by establishing new free trade and investment areas, such as CETA, TPP or TTIP, indicate that the importance of ISDS will further increase in the coming decades. A

[352] UNCTAD (2010), p. 24 [emphasize added]

major strength of the legal framework providing protection to international investors is that it provides legal security and predictability to investors and states likewise. This legal framework is not only composed of treaty law in IIAs, but also of the decisions and interpretations of arbitral tribunals. However, especially with regard to MFN clauses, arbitral tribunals have failed to provide stability and predictability.[353] In contrast: arbitral decisions have often generated contradictory decisions. But passing the buck solely to arbitral tribunals would also be unjust. Arbitrators also suffer the consequences of the systemic weaknesses of a system, in which there simply is no common set of rules and in which these rules are frequently drafted badly, often without undergoing any amendments. A common set of rules would allow a more stringent application of investment standards and ensure that discrimination is opposed effectively. However, such common set of rules would be ineffective without a common judge: an international arbitral system therefore requires the streamlining of arbitral decisions, in order to ensure that justice is being served. In this regard, it is again the WTO system that can serve as a good guideline. However, it is also the responsibility of scholars to provide clarifications. As this paper has shown, not only MFN clauses require a closer analysis, but particularly the academically and practically underdeveloped *ejusdem generis* principle. In fact, clarification on a number of issues is needed.

[353] *Ibid.*, p. 6

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Wien, den 9. August 2016