ARTICLE 1103
Most-Favored-Nation Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to 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.

2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, 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.

I. NEGOTIATING TEXT

– The first text of December 1991 did not specifically mention most-favored-nation treatment ("MFN") as a stand-alone obligation, though the U.S.-proposed "[n]ondiscriminatory treatment" was defined, in a footnote, as treatment "no less favorable than the better of national treatment or most-favored-nation treatment."[1] The U.S. proposal read:

> "Each Party shall accord nondiscriminatory treatment to nationals and companies of another Party in the making of investments in its territory, and in the management, control, operation, maintenance, or disposition of such investments."[2]

The United States also proposed that each Party extend nondiscriminatory treatment "to investments in its territory of nationals or companies of another Party, and activities associated therewith."[3]

In the December text, in the provision entitled United States–Canada or United States only, one United States proposal stated that:

> "The most-favored-nation provisions of this chapter shall not apply to advantages accorded by a Party by virtue of the Party's binding obligations under any multilateral international agreement under the framework of the General Agreement on Tariffs and Trade."[4]

The United States also included in the December text a proposed definition of most-favored-nation treatment, which it defined as "treatment no less favorable than that accorded by a Party, in like circumstances, to nationals

1. December 1991, at 2 note 1. The same language was in the proposed definition for "nondiscriminatory treatment" or "nondiscriminatory basis." *Id*. at 25.
2. *Id*. at 2.
3. *Id*.
4. *Id*. at 20.

or companies of any third-party or to investments of such nationals or companies."[5]

– Canada proposed text for an article entitled "Most-Favored-Nation Treatment" in the January 16 draft:

> "Subject to the specific exceptions listed in a Party's instrument of ratification or accession, each Party shall, immediately and unconditionally, accord to the goods, services and service providers, investors and suppliers of all other Parties treatment no less favorable than that accorded by it to the like goods, services and service providers, investors and suppliers of any other country or international entity, whether or not that country or entity is a Party to this Agreement, in respect of all matters covered by this Agreement."[6]

– In the March 6 draft, Mexico joined the United States footnote defining nondiscriminatory treatment or nondiscriminatory basis as treatment "no less favorable than the better of national treatment or most-favored-nation treatment."[7]

  Mexico also joined the U.S.-proposed language with respect to nondiscriminatory treatment. Thus, the joint U.S.–Mexican proposal referred to the obligation to afford "nondiscriminatory treatment," – the better of national treatment or most-favored-nation treatment – with respect to both investors and investments, as the United States had first proposed in December.[8] Although Mexico had joined the U.S. proposal in the main text, the definition of most-favored-nation treatment remained in the section entitled "USA Definitions Without Mexican Equivalents."[9]

  The U.S.-proposed text stating that most-favored-nation obligations should not apply to any GATT obligations was moved to the text, and Mexico joined the United States in its proposed language.[10]

  Canada's previously proposed language did not change, but it now proposed adding a paragraph that would have read "Derogations from MFN treatment are provided in the Protocols of the Canadian draft. For example:".[11] No examples were listed.

– Canada joined Mexico and the United States in the May 1 draft, but declined to support extending a nondiscriminatory treatment obligation to an investor's *management* of investments in the territory of the host Party. It did, however, support extending the host Party's obligations to the establishment, acquisition, expansion, conduct, operation and sale or other disposition of investments in its territory.[12]

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5. *Id*. at 25. This definition occurred in the section entitled "USA Definitions Without Mexican Equivalents."
6. INVEST.116, Georgetown Composite (Jan. 16, 1992) 6, Art. 108.
7. INVESTMT.06M, Washington Composite (Mar. 6, 1992) 5 n. 1.
8. *Id*. at 5.
9. *Id*. at 30.
10. *Id*. at 6.
11. *Id*. at 8.
12. INVEST.501, Chapultepec Composite (May 1, 1992) 3.

Canada also joined the Mexican–U.S. proposal with respect to investments, but declined to support the language "activities associated therewith." The obligation thus read:

> "A Party's failure to accord nondiscriminatory treatment to an investment in its territory of an investor of another Party, MEX USA[and activities associated therewith], shall be a breach of that Party's obligation under paragraph 1."[13]

Notwithstanding the Parties' adoption of nearly identical text in the substantive obligations in the May 1 draft, the definitions of nondiscriminatory treatment and most-favored-nation treatment retained the notation "USA."[14] Canada put forward its own definition: "Most favored nation treatment means treatment of investors of another Party no less favorable than that accorded by a Party in like circumstances to investors of a Party or a non-Party."[15]

The "GATT exception" remained a U.S.–Mexican proposal in the May 1 draft, but with additional language suggesting that the Parties would list other exceptions to their MFN obligations in an annex.[16]

– In the May 13 draft, Canada added a footnote to the then-existing investment provision proposing that the definitions of nondiscriminatory treatment, national treatment, and MFN be placed in the text, rather than in the definitions section.[17]

The square brackets indicating that only Mexico and the United States supported the "GATT Exception" were removed, yet square brackets, with a Canadian designation, were added to the language suggesting that more exceptions would be listed in an annex.[18]

Also in the May 13 draft, Canada proposed an alternative formulation that separated the national treatment and MFN provisions. The MFN provision read:

> "a) Each Party shall accord to investments of an investor of another Party treatment no less favourable than that which it accords, in like circumstances, to the investments of an investor of any other Party or of a non-Party.
>
> b) Each Party shall grant to an investor of another Party treatment no less favourable than that which it accords, in like circumstances, to investors of any other Party or non-Party in respect of its establishment, acquisition, expansion, conduct US MEX[management,] operation and sale or other disposition of its investment in its territory.[19]"

– On May 22, 1992, the United States and Mexico adopted in principle Canada's proposed alternative. Mexico and the United States continued to

13. *Id.*
14. *Id.* at 30–31.
15. *Id.* at 31.
16. *Id.* at 4.
17. INVEST.513, Toronto Composite (May 13, 1992) 3 note 2.
18. *Id.* at 4.
19. *Id.* at 6.

propose adding "management" to the list of activities covered with respect to investors, and they proposed substituting "accord" for "grant."[20] The United States and Mexico also proposed to add "and activities associated therewith" to investments.[21] The GATT Exception remained as it was.[22]

The United States definition for most-favored-nation treatment did not appear in the May 22 version, although it did not join Canada's proposed definition.[23]

– On June 4, 1992, Canada agreed to add management to the list of covered activities, but on the condition that the Parties should agree on an acceptable definition of management.[24] The word "grant" was changed to "accord." Canada maintained its objection to "and activities associated therewith" with respect to investments.[25] The GATT exception remained, but the Canada-only designation was removed from the language suggesting that further exceptions would be set forth in an annex.[26] The definitions section contained no reference to most-favored-nation treatment.[27]
– The GATT exception was amended in the June 15 draft. The draft discussed two annexes, A and B, in which the Parties would list, respectively, their existing non-conforming measures and those sectors or activities they proposed to exempt. The new language was:

> "Where a Party imposes or maintains a measure covered in Annexes A and B it shall nonetheless accord most-favored-nation treatment unless set forth in Annex __. The most-favored-nation obligations of paragraph 2 shall not apply to:
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> a) advantages accorded by a Party by virtue of the Party's binding obligations under any multilateral international agreement under the framework of the General Agreement on Tariffs and Trade; and
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> b) advantages accorded pursuant to agreements listed in Annex __."[28]

– The substance of the proposed MFN clause did not change in the July 10 draft, but the Parties added an apparently redundant parenthetical "Most favored nation treatment" at the end of the provision, the title of which was identical.[29]

The GATT exception changed slightly in the July 10 draft, with the wording becoming more precise:

> "a) In maintaining a measure identified in Annex A or imposing a measure as permitted in Annex B, unless stated otherwise in

20. *Id*. at 3.
21. INVEST.522, Washington Composite (May 22, 1992) 3.
22. *Id*. at 4.
23. *Id*. at 31.
24. INVEST.604, Virginia Composite (June 4, 1992) 4 & n. 7.
25. *Id*. at 4.
26. *Id*. at 5.
27. *Id*. at 35–43.
28. INVEST.615, Washington Composite (June 15, 1992) 6–7.
29. INVEST.710, All-Star Composite (July 10, 1992) 5.

the relevant annex, a Party shall accord to investors, or investments of investors, of another Party, most-favored-nation treatment.

b) Notwithstanding subparagraph (a) or the obligations of paragraph 2 a Party need not accord most-favored-nation treatment to another Party with respect to advantages accorded by a Party pursuant to:

i) that Party's obligations under any multilateral international agreement made under the framework of the General Agreement on Tariffs and Trade; or

ii) agreements or sectors listed in Annex __ (MFN).[30]"

– The redundant parenthetical reference to MFN treatment did not appear in the July 22 draft.[31] A new article, entitled "Exceptions," contained the only reference to an MFN exception:

> "Notwithstanding Article 2104, a Party need not accord most-favored-nation treatment to investors of another Party or their investments with respect to advantages accorded by that Party pursuant to agreements or sectors listed in Annex [MFN]."[32]

The former GATT-specific language was dropped.

– In the August 4 draft, brackets with the notation Canada and Mexico were placed around the "Most-Favored-Nation Treatment" article, which suggested that the United States no longer supported the article.[33] Within the article, however, the notation USA MEX continued to appear outside the brackets around ", and activities associated therewith,".[34]

– All brackets had disappeared in the August 11 draft. The language of the protection of investments changed to reflect the protections accorded investors:

> "Each Party shall accord to investments of an investor of another Party treatment no less favorable than that which it accords, in like circumstances, to the investments of an investor of any other Party or of a non-Party in respect of such investments' establishment, acquisition, expansion, management, conduct, and operation. (NB: 'sale or disposition' not needed here.)"[35]

The treatment proposed for investors did not change.

– In the August 26 draft, the provision protecting investors was placed first and the investment provision was placed afterwards, foreshadowing the final placement. The language was also changed slightly: "in respect of" became "with respect to," which is the language of the final provision.[36] The provision still referred to treatment "no less favorable than that it accords, in like circumstances, to investors of *another* Party," and to

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30. *Id*. at 7.
31. INVEST.722, Treasury Annex Composite (July 22, 1992) 5.
32. *Id*. at 7. For a complete survey of the exceptions provision, including those provisions excluded from the ambit of MFN, *see* the commentary under Article 1108.
33. INVEST.805, Watergate Daily Update (Aug. 4, 1992) 3, Art. 2104.
34. *Id*.
35. INVEST.811, Watergate Daily Update (Aug. 11, 1992) 4, Art. 2104.
36. INVEST.826, Lawyers' Revision (Aug. 26, 1992) 3, Art. 2104.

"investments of investors of *another* Party," rather than "any other Party." It also referred to treatment no less favorable than "that which it accords," rather than "that it accords." The parentheses were removed, and "sale or other disposition" was inserted into the text with respect to investments of investors (it had never been removed with respect to investors).[37]

- On August 31, 1992, the draft was renumbered and the MFN provision became Article 1103.[38]
- In the September 6 draft "that which it accords" became "that it accords" in both the investment and the investor provisions.[39]
- On December 10, the last change was made, so that "any other Party" replaced "another Party." The provision had reached its final form.[40]

II. COMMENTARY

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A. INTRODUCTION

Like national treatment, most-favored-nation treatment ("MFN") is a relative standard. Establishing a breach of Article 1103 therefore requires establishing that another investor, or investment, in like circumstances, has been accorded better treatment than the claimant. Most-favored-nation treatment is an important tool in multilateral negotiations:

> "[B]y giving the investors of all parties benefiting from a country's MFN clause the right, in similar circumstances, to treatment no less favourable than a country's closest or most influential partners can negotiate on the matters the clause covers, MFN avoids economic distortions that would occur through more selective country-by-country liberalisation."[41]

The provision becomes increasingly important as more foreign investors play a role in a country's economy.[42] NAFTA Article 1103 extends MFN protection to both investors and investments of investors, and covers a broad range

37. *Id.* (emphasis added).
38. INVEST.831, Lawyers' Revision (Aug. 31, 1992) 2, Art. 1103.
39. INVEST-F.906 (Sept. 6, 1992) 11–12, Art. 1103.
40. CHAP-11.D10 (Dec. 10, 1992) 11–12, Art. 1103.
41. OECD, MOST-FAVOURED-NATION TREATMENT IN INTERNATIONAL INVESTMENT LAW 2 (Sept. 2004).
42. UNCTAD, MOST-FAVOURED-NATION TREATMENT 8–9, UNCTAD/ITE/IIT/10 (Vol. III) (1999).

of activities – "establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments." NAFTA covers so-called "pre-establishment activity" through the words "establishment" and "acquisition," whereas many investment treaties extend MFN only to post-establishment activity.[43] Nevertheless, NAFTA contains several exceptions to MFN, including government procurement, national security, and certain intellectual property rights.[44]

Other chapters of NAFTA also have most-favored-nation provisions. Article 1203 extends most-favored-nation treatment to service providers from another Party. Article 1406 contains most-favored-nation obligations in the realm of financial services. Neither of these obligations is subject to investor-State dispute settlement.

Like national treatment, MFN has been a foundational principle in the context of trade in goods. The trade liberalization goals in GATT were effectuated by a ratchet mechanism: if a country gave better treatment to one other GATT-signatory country, it had to give the same treatment to all other GATT countries. The treatment given to all countries would thereby slowly improve as individual concessions were granted.[45]

The MFN concept has not been without criticism, or praise. While MFN has been used primarily as a mechanism to enhance the movement of goods and capital, it can have a chilling effect on negotiations as well. If countries are concerned that any concession they make to State A must also be given to States B, C, D, and E by virtue of the MFN clauses in earlier-negotiated treaties, they may be less willing to grant fresh concessions in that negotiation. There is also the "free-rider" problem. Parties to previously negotiated treaties may gain advantages via an MFN clause without making reciprocal concessions in return. One might argue that this is one of the main virtues of an MFN clause. MFN has been described as, in effect, "putting the services of the shrewdest negotiator of a third country gratuitously at the disposal of one's own country."[46]

Another issue that may gain increasing traction in investor-State cases, including those brought under Chapter 11, is the question of national identity. With multinational corporations creating and maintaining ever more complex corporate structures, identifying the nationality of a given entity is increasingly

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43. Canada and Mexico have excluded from dispute settlement under Chapter Eleven acquisitions of investments in certain sensitive sectors under their respective Foreign Investment Acts. *See* NAFTA Annex 1138.2. *See* the commentary under Article 1138 for more details.
44. For an exploration of the exceptions, *see* the commentary under Articles 1108 and 1138. For a review of the types of exceptions to MFN typically found in BITs, *see* RUDOLF DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES 71–76 (1995); UNCTAD, *supra* note 42, at 15–27; OECD, *supra* note 41, at 5–8.
45. For an excellent brief analysis of the economic and political value of the MFN concept, and its application in the sphere of trade in goods, *see* Jürgen Kurtz, *The Delicate Extension of Most-Favoured-Nation Treatment to Foreign Investors:* Maffezini v. Kingdom of Spain, *in* INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 523, 526–528 (Todd Weiler ed., 2005).
46. Georg Schwarzenberger, *The Most-Favoured-Nation Standard in British State Practice*, 96, 99 [1945] BRIT. Y.B. INT'L L.

difficult. Moreover, corporations can structure their holdings to take advantage of favorable treatment concessions. While NAFTA has a denial of benefits provision that enables a Party to deny benefits to "sham" corporations,[47] many corporate structures would not necessarily fall under the category. Rather, they will be the result of shrewd corporate structuring and restructuring. Furthermore, the identification of corporate nationality is not a settled question under international law. One may have subsidiaries that are incorporated and administered in countries different from that of the corporate parent, and those subsidiaries may have shareholders of multiple nationalities.[48]

MFN has not been the subject of a great deal of Chapter 11 jurisprudence; nor has it figured prominently in other investment treaty cases until recently. Thus, many of the questions that arise in the national treatment context, and that could also arise in MFN, have not been answered. For example, MFN, like national treatment, is a comparative measure. An investor who brings an MFN allegation must identify the more favorable treatment given to the third-party investment or investor. Would it be sufficient to sustain an MFN claim to identify one third-party investor who had received better treatment, or must one identify a general treatment given to a set of third-party investors? The UNCTAD Working Paper suggests that a "one-off" deal, e.g., an investment contract in which a host country granted special privileges to a third-party investor, would be insufficient to sustain an MFN claim: "the treatment has to be the *general* treatment *usually* provided to investors from a given foreign country."[49] One reason for this is based on freedom of contract principles that in UNCTAD's view prevail over the MFN standard.[50] The relevant question should be whether "all foreign investors should be treated equally for purposes of being potential candidates for the special privilege or incentive which in practice could only be granted to one individual investor."[51] This view must be right as a matter of practice; it cannot be that by virtue of an MFN clause in a BIT an investor acquires the automatic right to be awarded any government contract.

Similarly, the question of "like circumstances" is also at issue in the MFN context. All third-party investors are not in like circumstances with all BIT investors. Thus, the first step in any MFN analysis would require identifying the relevant comparator(s).[52]

The recent spurt of MFN jurisprudence has dealt very little with alleged breaches of substantive MFN obligations, i.e. an allegation that a State has granted more favorable treatment to an investment of an investor of a non-treaty

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47. *See* commentary under Article 1113.
48. UNCTAD, *supra* note 42, at 10–11.
49. *Id.* at 6.
50. *Id.* at 6–7.
51. *Id*. at 7; DOLZER & STEVENS, *supra* note 44, at 66 (MFN "is assumed not to extend to individual investment agreements between the host State and private foreign investors").
52. *See* the commentary under Article 1102 for a thorough examination of the potential difficulties raised by a "like circumstances" analysis. Of particular interest in the Article 1103 context is the discussion of "like circumstances" in the context of the United States' MFN obligation under Chapter 12 of NAFTA, which was at issue in the NAFTA Chapter 20 case *Cross-Border Trucking Services* brought by Mexico against the United States. In the Matter of Cross-Border Trucking Svcs. (*Mex. v. U.S.*) (Arbitration Panel Report) (Feb. 6, 2001).

Party in the course of its quest to establish, acquire, expand, manage, conduct, operate, or sell or otherwise dispose of its investment. For example, if a Party promised to accord fair and equitable treatment, apparently untethered by the limits of customary international law, in its BIT with State A, but pledged to accord only the minimum standard of treatment under customary international law in its BIT with State B, can a national of State B invoke the apparently more favorable provision found in the BIT with State A? Rather, the juris-prudence has focused on whether the MFN obligation in Chapter 11 and other investment treaties extends to the dispute settlement provisions of other investment treaties. For example, if a Party waived the exhaustion of local remedies rule in its BIT with State A, but did not do so in its BIT with State B, can a national of State B invoke the waiver of the local remedies rule under the other BIT? The preliminary answer is that such a use of the MFN clause is possible, depending on the breadth of the clause.[53]

B. MFN Jurisprudence in the NAFTA Context

The first NAFTA case to address Article 1103 was *Pope & Talbot v. Canada*. The claimant had originally made an Article 1103 claim, but withdrew it early in the proceedings.[54] The question of Article 1103 next arose in the course of the tribunal's award on the merits of the investor's claims under Articles 1102 and 1105. The tribunal read the obligation put on the Parties by Article 1105 to be quite expansive; it concluded that the requirement under NAFTA Article 1105 to accord investments of investors "treatment in accordance with international law, including fair and equitable treatment and full protection and security," was independent of, and not subsumed by, the treatment required by customary international law.[55]

The tribunal based this decision in part on the effect of Article 1103, although the investor had not raised Article 1103 in its argument. The tribunal asserted that Canada had accorded fair and equitable treatment outside the confines of customary international law in some of its other investment treaties. Thus, an investor could resort to the provisions of those treaties under the most-favored-nation clause of the NAFTA.[56] The tribunal did not cite any Canadian FIPAs in its finding; rather, it referred to provisions of the United States Model BIT,

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53. The United States took an exception to Article 1103 "for treatment accorded under all bilateral or multilateral international agreements in force or signed prior to the day of entry into force of this Agreement," NAFTA Annex IV (U.S.), as did Mexico and Canada. *Id.* Annex IV (Can.) and Annex IV (Mex.). The United States took a much more limited sector-specific reservation under Article 1103 for treatment accorded under bilateral or international agreements entered into after NAFTA. *Id.* Canada's Model FIPA contains the same provision. Canadian Model FIPA, Annex III. Most U.S. BITs and Free Trade Agreements were signed after January 1, 1994.
54. *Pope & Talbot Inc. (U.S.) v. Canada*, (UNCITRAL) (Procedural Order No. 2) (Oct. 28, 1999).
55. *Pope & Talbot Inc. (U.S.) v. Canada*, (UNCITRAL) ¶¶ 105–118 (Award on the Merits, Phase 2) (April 10, 2001) [hereinafter *Pope & Talbot* Phase II Merits Award].
56. *Id*. at ¶ 117.

which it claimed Canada, the United Kingdom, Belgium, Luxembourg, France, and Switzerland have followed.[57]

The issue arose again after the NAFTA Free Trade Commission had issued its interpretation of Article 1105.[58] In its interpretation, the Free Trade Commission made clear that the NAFTA Parties viewed Article 1105 as requiring that investments of investors be treated in accordance with the customary international law minimum standard of treatment.[59] This interpretation was at odds with the *Pope & Talbot* tribunal's decision on the merits.

Canada referred a copy of the Free Trade Commission's interpretation to the *Pope & Talbot* tribunal. In response, the tribunal asked the parties to address whether the interpretation applied retroactively and, if it did, what implications would Article 1103 have on the *Pope & Talbo*t tribunal's earlier ruling?[60] In response, the investor suggested that the more expansive provision – fair and equitable treatment independent of customary international law – was to be found in other Canadian investment treaties. Thus, even if the tribunal were to determine that the interpretation applied retroactively and obliged it to reconsider its decision, Article 1103 would intervene to require the tribunal to apply the more favorable provision.[61] Canada argued that the tribunal was not seised with the Article 1103 claim because the investor had abandoned that claim.[62]

The *Pope & Talbot* tribunal did not reach a decision on the effect of Article 1103 in the aftermath of the interpretation. It did comment on the issue in *obiter dicta*. In the tribunal's view, it would "make no sense to deny those rights under Article 1105, only to find them revived pursuant to Article 1103."[63] The fact that the claimant had withdrawn its Article 1103 claim was, in the tribunal's view, "not material to a proper interpretation of Article 1105."[64] Nonetheless, although the tribunal questioned whether the interpretation had been a valid exercise of the Free Trade Commission's power under Article 1131, the tribunal accepted the characterization of Article 1105 as set forth in the interpretation. It then determined that Canada had breached its obligations even under that less onerous standard.[65] The Article 1103 claim was thus moot.

In *ADF v. United States*, the investor did not initially raise a claim under Article 1103.[66] Rather, the gist of the investor's claim was that it had been denied national treatment in violation of Article 1102, and it raised Article 1105 and

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57. *Id.* at ¶ 111.
58. FTC Note of Interpretation.
59. *Id.*
60. *Pope & Talbot Inc. (U.S.) v. Canada*, (UNCITRAL) 2 (Letter from Claimant to the parties) (Aug. 15, 2001).
61. *Pope & Talbot Inc. (U.S.) v. Canada*, (UNCITRAL) 7 (Letter from Appleton & Associates to Tribunal) (Sept. 10, 2001).
62. *Pope & Talbot Inc. (U.S.) v. Canada*, (UNCITRAL) 3 (Letter from Canada to Tribunal) (Oct. 1, 2001).
63. *Pope & Talbot Inc. (U.S.) v. Canada*, (UNCITRAL) ¶ 9 (Award in Respect of Damages) (May 31, 2002).
64. *Id.* at ¶ 9 note 1.
65. *Id.* at ¶¶ 67–69. For a full discussion of the issues raised by the note of interpretation, *see* the commentary on Articles 1105 and 1131.
66. *ADF Group Inc. (Can.) v. United States*, ICSID (W. Bank) ARB(AF)/00/1, ¶ 11 (Notice of Arbitration) (Aug. 1, 2000).

1110 claims as well. After the NAFTA Free Trade Commission issued its note of interpretation in July 2001, however, ADF raised an Article 1103 claim in its reply to the respondent's counter-memorial. Because ADF viewed the note of interpretation as limiting the scope of the Parties' obligations under NAFTA, it claimed that it was entitled to greater protections found in other United States BITs, such as the United States–Estonia and United States–Albania BITs, by virtue of Article 1103.[67] The tribunal permitted this late-raised claim, and also stated that the investor was entitled to the "better treatment" as between Articles 1102 and 1103 without having first to allege and prove breach of both of those obligations.[68] The tribunal also apparently found that the fact of the investor's having made a claim under Article 1102 automatically entitled it to "claim the benefit of Article 1104 by seeking to show that more favorable treatment is accorded to investors of another Party, or even of a non-Party (such as Albania and Estonia)."[69] Though the tribunal decided it would give ADF the better treatment as between Articles 1102 and 1103 as required by Article 1104, the invocation of Article 1104 was a bit of a red herring. ADF's argument was based on Article 1103, and involved comparing treatment given to Canadian and Mexican investors under NAFTA, on the one hand, and treatment given to foreign investors under other United States BITs, on the other. Because the treatment at issue was not aimed at United States investors, it did not implicate Article 1102. Thus, arguably only Article 1103 should have been considered relevant to ADF's claim regarding the allegedly enhanced Article 1105 protections.

The investor's success with respect to its Article 1103 claim proved evanescent; the *ADF* tribunal found in favor of the United States on all claims. The tribunal determined that even if the United States–Albania and United States–Estonia BITs required the United States to accord ADF a better level of treatment, an assertion the tribunal was inclined to doubt, the United States was not in breach of that standard.[70] Moreover, the tribunal found that Article 1108(7)(a) excluded the application of Article 1103 in a case involving government procurement.[71] Thus, even though the tribunal determined that it had jurisdiction to consider the Article 1103 claim, the exceptions in Article 1108 apparently prevented the investor from taking full advantage of whatever benefits that consideration might have provided. The tribunal came to this conclusion despite the fact that the function of Article 1103 was to bring in a more favorable standard under Article 1105, a provision not excluded by Article 1108 in government procurement cases.

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67. *ADF Group Inc. (Can.) v. United States*, ICSID (W. Bank) ARB(AF)/00/1, ¶ 137 (Award) (Jan. 9, 2003).
68. *Id.*
69. *Id.* at ¶ 137.
70. *Id.* at ¶ 194.
71. *Id.* at ¶ 196.

C. MFN Jurisprudence in Non-NAFTA Investor-State Arbitrations

The *ADF* and *Pope & Talbot* claims were probably inspired by *Maffezini v. Spain*, which was decided in January 2000.[72] In *Maffezini*, an Argentine investor made a claim under the BIT between Argentina and Spain. Article X of that BIT required that a claimant first seek redress in local courts before placing a claim before an international tribunal, which it could do if the local court had failed to resolve the matter within 18 months. Because the Argentine claimant had not sought local remedies, Spain argued that the tribunal lacked jurisdiction. The *Maffezini* tribunal noted that, although Article X of the BIT fell short of requiring the exhaustion of local remedies, the Parties to the BIT might well have desired local courts "[to be] given an opportunity to vindicate the international obligations guaranteed in the BIT."[73] Thus, Spain's argument would likely have prevailed but for Maffezini's invocation of the MFN clause in the Argentina–Spain BIT.

Maffezini argued that he should have the benefit of the BIT between Chile and Spain, which contained no requirement that a claimant first seek redress in local courts before submitting a claim to international arbitration. The claimant argued that Chilean investors in Spain would otherwise be treated more favorably than Argentine investors. In response, Spain argued that treaties with third countries were irrelevant to the Argentina–Spain BIT under the principle *res inter alios acta*, which "forbids the introduction of collateral acts which by their nature are incapable of affording any reasonable presumption or inference as to the principal matter in dispute."[74] Spain also invoked the principle *ejusdem generis* to argue that MFN clauses could only operate "in respect of the same matter" as envisaged by the basic treaty, which meant that it only applied to "substantive matters or material aspects of the treatment granted to investors."[75] Spain argued further that the purpose of the MFN clause was to prevent discrimination with respect to "material economic treatment" and not with regard to procedural matters.[76]

The *Maffezini* tribunal approached the issue by determining the subject matter to which the clause applied as established by the basic treaty, in this case the Argentina–Spain BIT. It surveyed the relatively few cases that had considered similar issues, and also reviewed the text of certain BITs which had dealt explicitly with the scope of MFN clauses. For example, it cited *Ambatielos*,[77] in which the issue was whether a Greek subject had been treated by English courts

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72. *Maffezini (Arg.) v. Spain*, ICSID (W. Bank) ARB/97/7 (Award) (Jan. 25, 2000), 40 I.L.M. 1129 (2001) [hereinafter *Maffezini* Award].
73. *Id*. at ¶ 36.
74. Black's Law Dictionary 1310 (6th ed. 1990).
75. *Maffezini* Award, *supra* note 72, at ¶ 41. In 1978, the International Law Commission published draft articles on most-favored-nation clauses, and suggested that MFN clauses confer "only those rights which fall within the limits of the subject-matter of the clause." Report of the International Law Commission, *Draft Articles on the Most-Favoured-Nation Clause*, U.N. Doc. A/33/10, *reprinted in* [1978] 2 Y.B. Int'l L. Comm'n Part 2, at 1, 30. The ILC adopted the draft articles, but the U.N. General Assembly took no action on that recommendation. OECD, *supra* note 41, at 8.
76. *Maffezini* Award, *supra* note 72, at ¶ 42.
77. *Ambatielos* (*Gr. v. U.K.*), 12 R.I.A.A. 83 (1956) [hereinafter *Ambatielos* Award].

in accordance with standards applied to foreigners who enjoyed most-favored-nation status.[78] *Ambatielos* involved a treaty of commerce and navigation, a forerunner to BITs, and raised the question of whether matters concerning the administration of justice were within the purview of an MFN clause, the focus of which was promoting commerce and navigation. The *Ambatielos* tribunal held:

> "It is true that the 'administration of justice,' when viewed in isolation, is a subject-matter other than "commerce and navigation," but this is not necessarily so when it is viewed in connection with the protection of the rights of traders. Protection of the rights of traders naturally finds a place among the matters dealt with by treaties of commerce and navigation."[79]

The *Maffezini* tribunal examined several BITs which contained clauses explicitly providing that MFN coverage extended to dispute settlement provisions, and noted that particularly those BITs entered into by the United Kingdom contained language making clear that the MFN provision in the treaty extended to dispute settlement procedures.[80] Some agreements contained provisions of a more ambiguous nature. The treaty at issue spoke of "all matters subject to this Agreement," which the *Maffezini* tribunal found required an inference from the practice followed by the parties, and their treatment of foreign investors and their own investors, in order to establish the breadth of the provision.[81] The tribunal went on to determine that "there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights of traders under treaties of commerce."[82] Thus, the tribunal concluded:

> "if a third party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most-favored-nation clause as they are fully compatible with the ejusdem generis principle."[83]

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78. *Maffezini* Award, *supra* note 72, at ¶ 48.
79. *Ambatielos* Award, *supra* note 77, at 107 (1956). Although the *Ambatielos* tribunal accepted that protecting the rights of traders under treaties of commerce and navigation could extend to the overall treatment of traders, it found that none of the third party treaties on which Greece relied contained provisions more favorable than those in the treaty between the United Kingdom and Greece. The tribunal in *AAPL v. Sri Lanka* came to the same conclusion. *Asian Agricultural Products Limited (U.K.) v. Sri Lanka*, ICSID (W. Bank) ARB/87/3 (Award) (June 27, 1990). Other early ICJ cases also support a determination that MFN clauses may be used to bring in more favorable treaty provisions, assuming those provisions are still in effect. *See*, e.g., *Anglo Iranian Oil Co.* (*U.K. v. Iran*), 1952 I.C.J. 93 (July 22); *Rights of United States Nationals in Morocco* (*United States v. Mor.*), 1952 I.C.J. 176 (Aug. 27). The treaty provisions at issue in those cases, however, did not relate to dispute settlement, but to substantive obligations. *See also* OECD, *supra* note 41, at 10–12 (summarizing MFN cases).
80. *Maffezini* Award, *supra* note 72, at ¶ 52.
81. *Id*. at ¶ 53.
82. *Id*. at ¶ 54.
83. *Id*. at ¶ 56.

The tribunal also noted the specific language of the MFN clause in the Argentina–Spain BIT, which was broader in its formulation, in that it required investors be given most-favored-nation treatment with respect to "all matters subject to this Agreement," than the corresponding provision in all other Spanish BITs, which provide only that "'this treatment' shall be subject to the clause."[84] The tribunal also invoked the fair and equitable and national treatment clauses in the Spanish BITs, which required a host country to provide no less favorable treatment to foreign investors than it provided to its own. The tribunal interpreted this provision as extending to the treatment a home government seeks to obtain for its own investors abroad, and concluded that the home government ought to extend the same treatment to foreign investors in the home government's territory.[85]

After making these fairly sweeping statements, the *Maffezini* tribunal attemped to limit its holding. It stated that an MFN clause could not be invoked to override any treaty provisions in which Parties had conditioned consent to arbitration on a fundamental rule of international law, such as the exhaustion of local remedies rule; in which they had specifically agreed to a "fork-in-the-road" approach to dispute settlement; in which they had selected a particular forum, such as ICSID; or finally when they had agreed to a highly institutionalized system of arbitration that incorporates precise rules of procedure, such as the North American Free Trade Agreement and similar arrangements.[86] This latter point is of particular interest; the tribunal went on to state "it is clear that neither of these mechanisms [ICSID or NAFTA arbitration] could be altered by the operation of the clause because these very specific provisions reflect the precise will of the contracting parties."[87] The *Maffezini* tribunal also noted that an MFN clause should not be able "to override public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement."[88]

The *Maffezini* decision has drawn both praise and criticism and has spawned several similar claims.[89] Not all tribunals have followed the *Maffezini* analysis, but most have followed the same general approach, and have endorsed the idea that, at least in some circumstances, an MFN clause may indeed have a very broad scope.

In *Tecmed v. Mexico*, the Spanish claimant argued that the MFN clause in the Spain–Mexico BIT allowed it to benefit from a clause in the Austria–Mexico BIT that permitted retroactive application of the treaty. The *Tecmed* tribunal rejected the argument. It implicitly adopted the public policy exception adverted to by the *Maffezini* decision, and suggested that matters such as the temporal application of

84. *Id.* at ¶ 60.
85. *Id.* at ¶ 61.
86. *Id.* at ¶ 63.
87. *Id.* at ¶ 63.
88. *Id.* at ¶ 62.
89. *See* Kurtz, *supra* note 45, at 542–549.

a treaty, including the applicability of substantive obligations, must be specifically negotiated by the contracting Parties:[90]

> "These are determining factors for their acceptance of the Agreement, as they are directly linked to the identification of the substantive protection regime applicable to the foreign investor and, particularly, to the general (national or international) legal context within which such regime operates, as well as to the access of the foreign investor to the substantive provisions of such regime. Their application cannot therefore be impaired by the principle contained in the most-favored-nation clause."[91]

The *Tecmed* tribunal also rejected the claimant's argument that the three-year limitations clause could be subject to challenge based on an MFN clause. The *Tecmed* tribunal concluded that the Parties would not have entered into the agreement without those limiting provisions, and that matters relating to substantive admissibility of claims fall outside the scope of the MFN clause.[92]

In *MTD Equity Sdn. Bhd. v. Chile*, the tribunal accepted the claimants' argument that the MFN clause in the Malaysia–Chile BIT permitted the claimant to invoke favorable provisions from the Croatia–Chile and Denmark–Chile BITs. In *MTD Equity* the claimants were seeking to invoke substantive provisions that would expand the scope of the obligation to provide "fair and equitable treatment." The tribunal's decision was based in part on the conclusion that such a determination would be consonant with the purpose of the treaty to "fulfill the objective of the BIT to protect investments and create conditions favorable to investments."[93] Its conclusion was also based on the fact that the MFN clause in the Malaysia–Chile BIT contained exclusions relating to tax treatment and regional cooperation. Because the MFN clause had explicitly excluded only those matters, one could reasonably assume that other matters were not excluded. Thus, matters that could be construed to be part of the fair and equitable treatment clause could be brought into the Malaysia–Chile BIT by means of the MFN clause.[94] *MTD Equity* seemed to suggest that one of the purposes of the MFN clause was to fulfill the goal of providing fair and equitable treatment, and a discrepancy in the treaty that permitted discriminatory treatment could undermine the provision of fair and equitable treatment.[95]

The tribunal in *Siemens A.G. v. Argentina* engaged in a thorough analysis of the MFN clause in the Argentina–Germany BIT. The provisions of that BIT required that claimants attempt to seek redress in local courts for 18 months before submitting a claim to arbitration, but Siemens argued that

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90. *Técnica Medioambientales Tecmed S.A. (Spain) v. Mexico*, ICSID (W. Bank) ARB(AF)/00/2, ¶ 69 (Award) (May 29, 2003) [hereinafter *Tecmed* Award].
91. *Id*. at ¶ 69.
92. *Id*. at ¶ 74.
93. *MTD Equity Sdn. Bhd (Malaysia) v. Chile*, ICSID (W. Bank) ARB/01/7, ¶ 104 (May 25, 2004).
94. *Id*. at ¶ 104.
95. *See* Kurtz, *supra* note 45, at 549–551; Ruth Teitelbaum, *Who's Afraid of* Maffezini*? Recent developments in the Interpretation of Most-Favored-Nation Clauses*, 22 J. INT'L ARB. 225, 234–235 (2005).

the MFN clause permitted it to invoke the provisions of the Argentina–Chile BIT, which required no submission to local courts or administrative tribunals. The Argentina–Germany BIT actually contains three MFN provisions. Two are found in Article III and provide generally that the host government will not accord "a less favorable treatment" to investments of the other Party's nationals or companies, or to the "activities related to [such] investments," than is accorded to either its own nationals or to the nationals of other countries. The *Siemens* tribunal engaged in a textual analysis of Article III, including the exceptions to MFN included therein. Argentina had argued that the treatment referred to in Article III was intended by the Parties to relate to the competitiveness of investments, but should not be extended more broadly. The tribunal rejected this argument, noting that the text of Article III, and of the Protocol, which included more exceptions to the Parties' MFN obligations, suggested a broad reading of the provision. In particular, the tribunal noted that the terms "treatment" and activities were not limited in any way. Thus, the tribunal concluded that "a plain and contextual reading of Article 3(1) and (2) does not limit the treatment to transactions of a commercial and economic nature in relation to exploitation and management of investments as alleged by Argentina."[96]

The *Siemens* tribunal also rejected Argentina's argument that the MFN clause was specially negotiated and therefore limited in its application. Rather, the tribunal looked at the agreed-upon text, and noted that "the purpose of the MFN clause is to eliminate the effect of specially negotiated provisions unless they have been excepted."[97]

The Argentina–Germany BIT contains a third MFN provision in Article IV, which stipulates that a Party must accord MFN treatment if nationals or companies of the contracting Parties suffer losses in their investments in the event of a national state of emergency or insurrection. Argentina had argued that the broad reading of Article III advocated by Siemens would render the MFN clause in Article IV superfluous, thus violating principles of treaty interpretation. The tribunal rejected this argument, noting that while there might be some overlapping protection, "the repeated provision in a particular context stresses the concern of the parties in respect of that particular matter rather than limiting the scope of clauses of general character."[98] The tribunal also rejected the textual argument put forth by Argentina that the treaty accorded certain protections only to investments, and not to the investors making the investments. The tribunal noted certain inconsistencies in usage in the treaty, e.g., that Article III conferred protection on investments, while the exceptions to Article III applied to investors. If the protections of Article III did not extend to investors, there would be no reason to refer to investors in the exclusionary provisions. Thus, the tribunal concluded that it would be more consistent with the purpose of the treaty not to accord special significance to differential usage of the words "investor" and "investments."[99]

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96. *Siemens A.G. (Ger.) v. Argentina*, ICSID (W. Bank) ARB/02/8, ¶ 86 (Decision on Jurisdiction) (Aug. 3, 2004).
97. *Id.* at ¶ 106.
98. *Id.* at ¶ 90.
99. *Id.* at ¶ 92.

The *Siemens* tribunal addressed directly the question of whether the MFN protections should be extended to jurisdictional and procedural issues, or whether they should extend only to substantive protections. It rejected Argentina's argument that *Ambatielos*, the case relied on by the *Maffezini* tribunal, should be interpreted as extending to "substantive procedural rights" such as fair and equitable treatment, and should not extend to purely jurisdictional matters. Rather, the tribunal noted that the "special dispute settlement mechanisms not normally open to investors" were a "distinctive feature" of investment protection treaties:[100] "[Access to these mechanisms] is part of the treatment of foreign investors and investments and of the advantages accessible through a MFN clause."[101]

The *Siemens* tribunal cited *Maffezini* with approval. It noted that *Maffezini* had suggested that the MFN clause in the Argentina–Spain BIT, which referred to "all matters subject to this agreement," was a broader formulation than "treatment" and thus provided a basis for extending MFN protection to dispute settlement matters. The *Siemens* tribunal concurred that "treatment" was a narrower formulation, but nonetheless found it – in conjunction with "activities related to investment" – "sufficiently wide to include settlement of investment disputes."[102]

Another question raised in *Siemens* was whether the Argentina–Germany BIT required the exhaustion of local remedies and whether such requirement was a sensitive policy matter that could not be waived tacitly. Argentina suggested that in such a case the MFN provision could not be taken to dispense with a matter that was an essential element to Argentina's consent to arbitration. The *Siemens* tribunal noted other BITs Argentina had signed in a similar period that had waived the exhaustion of local remedies rule. The tribunal thus rejected that argument in the context of the case, but did not address whether such an argument could prevail were the facts different.[103] The tribunal suggested that the application of an MFN clause could not override public policy considerations that the Parties to a treaty considered essential to their agreement.[104]

Finally, the *Siemens* tribunal rejected Argentina's argument that claiming the benefit of an MFN clause should trigger the application of the whole treaty. In other words, Argentina argued that if the MFN clause permitted Siemens to invoke one provision of the Argentina–Chile BIT, the Argentina–Chile BIT should apply *in toto*. Thus, Siemens would have to take the disadvantageous aspects of the Argentina–Chile BIT, such as the fork-in-the-road provision requiring that an investor making a claim against a host government choose either local dispute settlement or arbitration, but not both. The tribunal suggested that an MFN clause only triggered portions of the other treaty that would be beneficial to the claimant. It noted that an MFN clause works both ways, so that an investor

100. *Id.* at ¶ 102.
101. *Id.* at ¶ 102.
102. *Id.* at ¶ 103.
103. *Id.* at ¶¶ 104–105.
104. *Id.* at ¶ 109.

from Chile could claim MFN benefits under the Argentina–Spain BIT.[105] The tribunal clarified that the mere existence of an MFN clause did not necessarily mean a claimant could claim all benefits under another treaty, but that it depended on the terms of the MFN clause and other terms of the treaties involved.[106]

The tribunal in *Salini v. Jordan* came to a different conclusion about the expansiveness of an MFN provision in the Italy–Jordan BIT. The Italy–Jordan BIT contained a provision expressly excluding any contractual disputes from ICSID arbitration under the BIT if the investment agreement contained a dispute resolution clause. The claimant, an Italian company, invoked the BIT's MFN provision in an attempt to import dispute settlement provisions in the United States–Jordan and United Kingdom–Jordan BITs that did not contain such a limitation. The *Salini* tribunal distinguished *Ambatielos* as having involved substantive rights, rather than dispute settlement provisions.[107] Furthermore, it noted its concern that applying the precautions suggested by the *Maffezini* tribunal might prove difficult in practice.[108] The *Salini* tribunal noted that the terms of the MFN clause in the Italy–Jordan BIT do not explicitly extend to dispute settlement, nor does it contain expansive language covering "all rights or all matters covered by the agreement."[109] The tribunal also noted that no evidence suggested that Italy or Jordan had expected the MFN clause to apply so broadly; to the contrary, the existence of the provision expressly excluding contractual disputes suggested their intention to limit submissions to arbitration in that manner.[110]

Plama Consortium, Ltd. v. Bulgaria involved a claim based on both the Energy Charter Treaty and the BIT between Bulgaria and Cyprus. The *Plama* tribunal similarly took a more restrictive view of the expansiveness of an MFN provision. The Bulgaria–Cyprus BIT contained a very restrictive arbitration clause that permitted access to arbitration only for a determination of compensation owed to a foreign investor in the event of an expropriation. It also contained an MFN clause stating that "[e]ach 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."[111] Plama attempted under the auspices of the MFN clause to import provisions of the Bulgaria–Finland BIT. The tribunal looked at the context of the MFN provision, and noted that interpretive principles could lead it to opposing conclusions. The second paragraph of the MFN provision said: "This treatment shall not be applied to privileges which either Contracting Party accords to investors from their countries in virtue of their participation in economic communities

105. *Id*. at ¶ 108. The tribunal apparently assumed that the MFN provision in the Chile–Argentina BIT would permit a Chilean investor to import advantageous provisions.
106. *Id*. at ¶ 109.
107. *Salini Construttori S.p.A. (Italy) v. Jordan*, ICSID (W. Bank) ARB/02/13, ¶¶ 117–118 (Decision on Jurisdiction) (Nov. 9, 2004).
108. *Id*. at ¶ 115.
109. *Id*. at ¶ 118 (internal quotation omitted).
110. *Id*. ¶ 118.
111. *Plama Consortium Ltd. (Cyprus) v. Bulgaria*, ICSID (W. Bank) ARB/03/24, ¶ 187 (Decision on Jurisdiction) (Feb. 8, 2005) [hereinafter *Plama* Decision on Jurisdiction].

and unions, a customs union or a free trade area."[112] The fact that these specific privileges were excluded could lead one to conclude that MFN treatment applied in all other instances.[113] On the other hand, focusing on the word "privileges" could lead one to conclude that MFN applied only to *substantive* protections, rather than to provisions, such as investor-state dispute settlement, that might better be construed as privileges.[114] The tribunal noted the claimant's reliance on the overarching goals of the Bulgaria–Cyprus BIT and of BITs generally, but concluded they were legally insufficient to conclude that the contracting Parties intended the MFN provision to bring in the arbitration provisions in other BITs. The tribunal considered the fact that Bulgaria, after its Communist government had fallen, had negotiated several BITS with more expansive provisions. The tribunal also noted, however, that Bulgaria and Cyprus started negotiations to revise their BIT in 1998. The negotiations failed, but the negotiators had before them the question of incorporating more expansive dispute settlement provisions. Thus, "[i]t can be inferred from these negotiations that the Contracting Parties to the BIT themselves did not consider that the MFN provision extends to dispute settlement provisions in other BITs."[115]

The *Plama* tribunal also stated its conviction that, notwithstanding the explosive growth in the number of bilateral investment treaties with associated investor-state dispute resolution, a basic prerequisite for arbitration was the existence of an agreement to arbitrate.[116] The tribunal expressed concern that doubts about the parties' intention would arise if an agreement to arbitrate were incorporated by reference.[117] The *Plama* tribunal pointed to the MFN provision in the NAFTA, and noted that the same provision was included in the proposed Free Trade Area of the Americas ("FTAA").[118] After remarking that the FTAA negotiators had added a footnote that made clear their view that *Maffezini* did not apply to the MFN provision of the FTAA, the tribunal said "This shows that in NAFTA and

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112. *Id*. at ¶ 187.
113. *Id*. at ¶ 191.
114. *Id*. at ¶ 191. This determination could itself cut both ways. Many have noted that the greatest privilege accorded investors by BITs is the availability of investor-state arbitration. N. Gallus, Plama v. Bulgaria *and the Scope of Investment Treaty MFN Clauses,* 2:3 TRANSNAT'L DISP. MGM'T 15–16 (June 2005). Furthermore, a plain-language interpretation of the word privilege would support such an approach. *Id*. at 16.
115. *Plama* Decision on Jurisdiction, *supra* note 114, at ¶ 195.
116. *Id*. at ¶ 198.
117. *Id*. at ¶ 199. This could lead to enforcement difficulties under the New York Convention, which requires that Parties have consented in writing to the agreement to arbitrate. The International Law Commission's work on most-favored-nation clauses suggests a similar concern:

> "The effect of the most-favoured-nation process is, by means of the provisions of one treaty, to attract those of another. Unless this process is strictly confined to cases where there is a substantial identity between the subject matter of the two sets of clauses concerned, the result in a number of cases may be to impose upon the granting State obligations it never contemplated."

International Law Commission, *supra* note 75, at 30.
118. *Plama* Decision on Jurisdiction, *supra* note 111, at ¶¶ 201–202. The same provision was included in DR-CAFTA. *See infra* note 130 and accompanying text.

probably in the FTAA the incorporation by reference of the dispute settlement provisions set forth in other BITs is explicitly excluded."[119]

The *Plama* tribunal also noted that certain BITs explicitly included dispute settlement within the purview of the MFN clause. In the absence of explicit exclusion or inclusion, doubts could well arise as to whether an MFN clause in one BIT could lead to the incorporation of the dispute settlement provisions found in another: "Contracting states cannot be presumed to have agreed that those provisions can be enlarged by incorporating dispute resolution provisions from other treaties negotiated in an entirely different context."[120]

It also remarked upon the occasional difficulty one might have in determining which dispute settlement provisions were more favorable. For example, the tribunal suggested that one BIT might permit only UNCITRAL dispute settlement, while the other permitted parties to go to ICSID. Which should be considered more favorable?[121] The tribunal commented that in none of the cases in which MFN clauses were used to import more favorable provisions did the tribunal import wholesale a dispute settlement mechanism, but that the claimants in *Plama* were asking to have ICSID arbitration replace *ad hoc* arbitration.[122] Despite voicing this concern, the tribunal went on to suggest that dispute resolution provisions usually have interrelated provisions and "constitute an agreement on their own."[123] The *Plama* tribunal, doubting that the principle of harmonization of dispute settlement provisions could be achieved by reliance on the MFN provision, criticized *Maffezini*, and suggested that permitting claimants to pick and choose from various BITs would actually be "counterproductive to harmonization" by resulting in "a large number of permutations from the various dispute settlement provisions from the various BITs [a country] has concluded."[124] The *Plama* tribunal recognized that the potential breadth of the *Maffezini* decision was limited somewhat by the public policy exceptions set forth by the *Maffezini* tribunal.[125] Nonetheless, the *Plama* tribunal determined that "an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them."[126] The tribunal thus determined that it had no jurisdiction based on the Bulgaria–Cyprus BIT.

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119. *Id*. at ¶ 203.
120. *Id*. at ¶ 207.
121. *Id.* at ¶¶ 204–208. The UNCTAD issue paper on MFN also has an interesting discussion on the topic of what constitutes "more" favorable treatment. *See* UNCTAD, *supra* note 42, at 31–32.
122. *Plama* Decision on Jurisdiction, *supra* note 111, at ¶ 210.
123. *Id.* at ¶ 212.
124. *Id.* at ¶ 219.
125. *Id*. at ¶¶ 220–221. During the hearing, the *Plama* tribunal asked counsel for claimants the origin of the public policy exception employed by the Maffezini tribunal, and were told in respone "They just made it up." *Id*. at ¶ 221. The *Plama* tribunal then stated that it did not wish to go that far in its appraisal of the *Maffezini* decision. Indeed, later the *Plama* tribunal suggested that the 18-month provision at issue in *Maffezini* was "nonsensical from a practical point of view" and that it was not surprising that the tribunal would try to neutralize the existence of such a provision. *Id*. at ¶ 224.
126. *Id*. at ¶ 223.

The most recent case to have considered the issue was brought against Argentina. Like *Maffezini*, the *Gas Natural* case involved the Argentina–Spain BIT. In *Gas Natural*, however, the claimant was Spanish. Again at issue was the question of whether the MFN clause in that BIT permitted a claimant to circumvent the requirement of initial resort to local courts. The Spanish claimant invoked the MFN clause to import more favorable provisions of, *inter alia*, the Argentina–United States BIT. For the *Gas Natural* tribunal, the critical question was whether the dispute settlement protections of the Argentina–Spain BIT "constitute part of the bundle of protections granted to foreign investors by host states."[127] It answered the question affirmatively:

> "The vast majority of bilateral investment treaties, and nearly all the recent ones, provide for independent international arbitration of investor-state disputes, . . . and such provisions are universally regarded – by opponents as well as by proponents – as essential to a regime of protection of foreign direct investment."[128]

The *Gas Natural* tribunal rejected Argentina's argument that the BIT provision respecting recourse to local courts required the exhaustion of local remedies, and was thus an important public policy concern of the Argentine government. The tribunal noted the possibility that local remedies would not have been exhausted within the 18-month period, and also noted the large number of BITs concluded by Argentina which contained neither an exhaustion of local remedies rule nor the requirement of recourse to local courts in the first instance. Those two factors, concluded the tribunal, proved that exhaustion of local remedies was not a serious public policy concern of the Argentine government.[129] The tribunal reviewed several of the recent MFN cases and determined its conclusion was consistent with them; it also suggested that the efficacy of an MFN clause in bringing in the provisions of other treaties was not "free from doubt, and that different tribunals faced with different facts and negotiating background may reach different results."[130]

Potential defendants in BIT cases have already reacted to the implications of *Maffezini*. For example, the recently passed trade agreement among Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, and the United States ("DR-CAFTA") specified in its negotiating history:

> "[T]he Most-Favored-Nation Treatment Article of this Agreement is expressly limited in its scope to matters 'with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.' The Parties share the understanding and intent that this clause does not encompass international dispute resolution mechanisms such as those contained in Section C of this chapter, and

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127. *Gas Natural SDG, S.A. (Ger.) v. Argentina*, ICSID (W. Bank) ARB/03/10, ¶ 29 (Decision on Jurisdiction) (June 17, 2005) [hereinafter *Gas Natural* Decision on Jurisdiction].
128. *Id.* at ¶ 29.
129. *Id.* at ¶ 30.
130. *Id.* at ¶ 49.

> therefore could not reasonably lead to a conclusion similar to that of the Maffezini case."[131]

There is, however, no such provision in either the 2003 Canadian Model FIPA or the 2004 United States Model BIT, although each was released after *Maffezini*. With respect to NAFTA Chapter 11 itself, Annex IV explicitly excludes from the purview of Article 1103 only treaties signed before the entry into force of NAFTA.[132]

The *Maffezini/Siemens* approach permits investors to "cherry-pick" among investment treaties to create a hypothetical treaty that may have more advantageous provisions than any treaty actually extant.[133] An investor's opportunity to make those choices, however, is at least theoretically limited, and the case law is still in flux. One commentator has suggested that the recent decisions in *Salini* and *Plama* effectively reversed the presumption set forth in *Maffezini* and *Siemens*. Under the approach taken by *Salini* and *Plama*, an MFN clause would not apply to dispute settlement provisions absent a clear expression of the Parties' intent to the contrary; under *Maffezini* and *Siemens*, the presumption was that an MFN clause would extend to dispute settlement provisions unless considerations of public policy dictated otherwise.[134] The tribunal in the recent *Gas Natural* decision, however, came to the opposite conclusion: "Unless it appears clearly that the state parties to a BIT or the parties to a particular investment agreement settled on a different method for resolution of disputes that may arise, most-favored-nation provisions in BITs should be understood to be applicable to dispute settlement."[135]

D. Questions Raised by MFN Jurisprudence

The best starting point for any analysis, as prescribed by the Vienna Convention on the Law of Treaties, is the language of the MFN provision itself. As the cases have indicated, however, the language alone, even when read in the light of its context and purpose, is often insufficient to give an unequivocal answer as to what the Parties intended. In *Maffezini*, the MFN clause was unquestionably broad, yet for the *Siemens* tribunal even a narrower formulation was adequate to bring in dispute resolution provisions. Some tribunals have attempted to divine what the Parties intended when they entered into the treaty: does the subject matter

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131. This provision was included in a footnote to the MFN provision in DR-CAFTA. The footnote was subsequently deleted, but by agreement of the Parties was to remain part of the negotiating history. *See* CAFTA Draft of Jan. 28, 2004, available at <www.asil.org/ilib/ilib0703.htm#t1>. *See also supra* note 113, at 7. A similar provision is in the MFN provision in the proposed FTAA. Free Trade Area of the Americas, Third Draft Agreement, Ch. 17, Art. 5, note 13, available at <www.ftaaalca.org/FTAADraft03/ChapterXVII_e.asp>.
132. NAFTA Annex IV. As noted earlier, Annex IV also contains certain sector-specific exceptions taken with respect to treaties signed after the NAFTA's entry into force.
133. S. Fietta, *Most-Favoured-Nation Treatment and Dispute Resolution under Bilateral Investment Treaties: A Turning Point?,* 2:3 Transnat'l Disp. Mgm't 8 (June 2005).
134. *Id.* at 13.
135. *Gas Natural* Decision on Jurisdiction, *supra* note 126, ¶ 49.

of the clause which the claimant is attempting to import go to the heart of the Party's consent to arbitration? If so, one might conclude that the Party could not have intended to dispense with such protection by virtue of an MFN clause that could import a contrary provision. Another question is whether the ability to resort to investor-state arbitration is inevitably more favorable treatment. The *Maffezini* tribunal assumed that bypassing the 18-month period during which the Argentina–Spain BIT required that a claimant seek redress in local courts was unquestionably more favorable treatment, but it did so without explaining why.[136] Subsequent tribunals have also failed to address that issue. The *Plama* tribunal alluded to it tangentially, but in the context of comparing different types of investment treaty arbitration – UNCITRAL and ICSID, and noting that it would be difficult to determine which was more favorable.

The *Siemens* case raised another interesting issue – can certain treaty provisions be read entirely in isolation from other provisions of the treaty? The Argentine government suggested that the answer was no; if the MFN clause permitted the German claimant to rely on a clause in the Argentina–Chile BIT, it could do so only by subjecting itself to the entire BIT. While such an approach would probably be contrary to the traditional way MFN clauses have operated, the degree to which clauses can be isolated from their immediate context is extremely interesting. For example, assume that in negotiating the Argentina–Chile BIT Chile had given up the requirement that claimants seek local remedies for 18 months in return for a more limited standing provision that conferred rights only on investors that directly own or control an investment in Chile. If Siemens owned its Argentine company through a subsidiary in a country that did not have a BIT with Argentina, could the Siemens claimant take advantage of the more favorable 18-month provision without also subjecting itself to the less favorable standing provision? Realistically speaking, treaty negotiation is so complicated that such a clear-cut *quid pro quo* would usually not exist, and even if it did, the negotiating history might very well be insufficiently clear about the trade-offs that were made to secure agreement on a treaty. Yet the hypothesis does illustrate the difficulty associated with importing clauses in isolation when they have been negotiated as part of a careful balancing of interests.

It is too early to know whether one approach will eventually prevail. Both investors and host governments are likely to be frustrated for some time by the inability to predict with any certainty which line of argument will succeed in any given case. Indeed, given that the starting point of the analysis is the language of the MFN clause in a treaty, and given the divergent views already expressed as to the scope of nearly identical clauses, predicting the outcome of any case will be difficult. Negotiators of future investment treaties have the benefit of *Maffezini* and related decisions and may tailor the treaty language accordingly. The language in

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136. Kurtz, *supra* note 45, at 546–547, 554. Professor Kurtz notes:

> "The *Maffezini* approach is to simply assume that access to the Spanish courts in the eighteen month period is 'less favourable treatment' than direct arbitral proceedings. This view in itself seems almost reflective of an epistemological belief in the superiority of investment arbitration."

Id. at 546–547.

DR-CAFTA is but one example. Given the large number of investment treaties concluded since NAFTA's entry into force by Canada, Mexico, and the United States, the proper scope of Article 1103 may continue to provide fertile ground for argument.[137]

III. CROSS-REFERENCES

- Article 1102 requires that Parties give national treatment to covered investments and investors.
- Article 1104 requires that Parties give the better of national treatment or MFN to covered investments and investors.
- Article 1106 requires that Parties not impose performance requirements on investments of investors of a Party or a non-Party. Article 1106(2) specifies that requirements to use certain technology for health, safety, or environmental reasons do not violate NAFTA, but specifies that Articles 1102 and 1103 apply to the measure.
- Article 1108 permits certain exceptions to most-favored-nation treatment.
- Article 1112 requires that the Parties extend most-favored-nation treatment to service providers of another Party.
- Article 1114 requires that the Parties extend most-favored-nation treatment to investors of another Party and to investments of investors of another Party in the area of financial services.
- Article 1138 excludes from the obligations the Parties undertook in Chapter 11 certain decisions taken pursuant to Article 2102 (National Security).
- Annex 1138.2 excludes from dispute settlement under Chapter 11 certain decisions on acquisition taken by Canada pursuant to the Investment Canada Act and and by Mexico's National Commission on Foreign Investment.
- In Annex I the Parties took reservations to their obligation to accord MFN treatment for certain existing measures, which are listed in the annex.
- In Annex II the Parties took reservations with respect to certain activities and sectors for future measures.
- In Annex III Mexico took reservations with respect to certain activities reserved to the state.
- Annex IV sets out exceptions on the part of all three Parties to most-favored-nation obligations.

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137. One commentator has noted that investment tribunals have yet to look at WTO jurisprudence for guidance as to the proper interpretation of MFN, a surprising omission given the frequency with which such tribunals have looked to the WTO for guidance in the national treatment context. Gallus, *supra* note 113, at 17–18.

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