

DON'T GET BIT: ADDRESSING ICSID'S INCONSISTENT APPLICATION OF MOST-FAVORED-NATION CLAUSES TO DISPUTE RESOLUTION PROVISIONS

I. INTRODUCTION

Few except gunboat makers mourn the end of gunboat diplomacy.¹ Although this traditional method of resolving investment disputes is currently obsolete,² the transformation has taken place primarily in the last few decades. Rather than waiting for customary law³ to provide security for foreign direct investment, developed nations found a quicker path, the Bilateral

¹ Gunboat diplomacy is diplomacy involving intimidation by threat or use of military force. Traditionally, stronger military powers were able to dictate terms to weaker ones. Here, an example is instructive. In 1853, United States Commodore Perry opened Japan to foreign trade after 200 years of isolation. He did so simply by demonstrating the superiority of American naval power. The increasingly infrequent use of this method to resolve international disputes is especially important given the destructive capacity of modern weaponry.

² Most nations have moved beyond the use of force to protect investments made by their citizens in foreign states. “Modern international economic relations regulated through bilateral or multilateral conventions were preceded by what then came to be known as gunboat diplomacy.” Bernard Kishoiyian, *The Utility of Bilateral Investment Treaties in the Formation of Customary International Law*, 14 NW. J. INT’L L. & BUS. 327, 329 (1994). “In order to avoid the historical difficulties associated with ‘gunboat diplomacy,’ countries have promulgated treaties to promote foreign investment and instill confidence in the stability of the investment environment.” Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1525 (2005).

³ Customary law arises when a certain practice between nations becomes widely accepted as obligatory and legally binding. See Bernard Kishoiyian, *supra* note 2, at 336-37. Because it requires the tacit consent of a majority of nations, customary law often develops slowly. The BIT movement is in part an effort to speed up the process of outlining investor rights. The movement gained momentum after World War II because international custom regarding foreign investment failed to address modern forms of investment and was often subject to varying interpretations. See Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT’L L.J. 67, 68-69 (2005).

Investment Treaty (BIT).⁴ This new type of treaty outlined the terms and conditions for private investment by individuals and companies of one state in the territory of another. Specifically, it provided substantive and procedural safeguards for investors whose investments were otherwise subject to the whims of the host country.

Nevertheless, despite the assurances given in BITs, without a neutral dispute resolution mechanism, national interests were still able to affect the security of investments.⁵ In response to the need for independent resolution of investment disputes, the International Centre for the Settlement of Investment Disputes (ICSID) was created.⁶ Now that ICSID is the preeminent arbitral organization dealing with disputes between sovereign states and individual investors, its decisions carry significant weight.⁷

Recently, ICSID arbitration panel decisions have employed conflicting approaches to applying Most-Favored-Nation (MFN) clauses in BITs to dispute resolution provisions.⁸ These

⁴ “It is this uncertainty relating to the law on state responsibility that has given an impetus to the negotiation of bilateral investment treaties.” Bernard Kishoiyian, *supra* note 2, at 332; *see also* Salacuse & Sullivan, *supra* note 3, at 76.

⁵ The intractability of national interests in investment disputes is demonstrated by the fact that the World Bank felt it necessary to create the International Centre for the Settlement of Investment Disputes as a neutral arbitration forum.

⁶ “The key purpose in establishing ICSID was to assure foreign investors of protection under international law from unilateral actions of host countries which could jeopardize their investments.” Vincent O. Orlu Nmehielle, *Enforcing Arbitration Awards Under the International Convention for the Settlement of Investment Disputes (ICSID Convention)*, 7 ANN. SURV. INT’L & COMP. L. 21, 23 (2001).

⁷ “[M]ost BITs can, and do, provide for arbitration under the ICSID Convention.” David R. Sedlak, Comment, *ICSID’s Resurgence in International Investment Arbitration: Can the Momentum Hold?*, 23 PENN. ST. INT’L L. REV. 147, 160 (2004) (citing ICSID: Introduction to Bilateral Investment Treaties, <http://www.worldbank.org/icsid/treaties/intro.htm>).

⁸ *See infra* notes 133-247 and accompanying text.

inconsistent decisions threaten to frustrate the purpose of the BIT regime – providing states and investors with confidence regarding their respective rights and obligations.⁹

This article will examine the potential effects and problems associated with this set of MFN decisions. Part II discusses the importance and historical development of international investment law and practice. It pays particular attention to the rise of the BIT and its effect on foreign direct investment. Part III discusses the effect of ICSID on international investment. After describing the reasons for creating ICSID, this part explains its structure and emphasizes its ever increasing importance. Part IV discusses ICSID’s divergent approaches toward the effect of MFN clauses on dispute resolution provisions in BITs. Part V addresses the problems associated with these inconsistent approaches. Part VI discusses potential means to remedy the conflict. Part VII concludes the comment.

II. GETTING BIT

A. The End of Gunboat Diplomacy and the Rise of Trade Agreements

When the use of force was the primary means for settling international disputes, stronger nations often imposed their will on weaker ones. Given the abrasive nature of the practice, it is not surprising that gunboat diplomacy occasionally resulted in investment-restricting practices. Perhaps the most famous such reaction was embodied in the Calvo Clause.¹⁰

Prior to 1914, Latin American countries protested being forced by demonstrations of European military power to pay debt.¹¹ On one occasion, Germany, Great Britain, and Italy

⁹ See *infra* notes 248-258 and accompanying text.

¹⁰ See Bernard Kishoiyian, *supra* note 2, at 329 & n.7.

¹¹ *Id.* at 329.

engaged in a joint naval intervention in Venezuela.¹² This practice sparked outrage in several Latin American countries.¹³ The outrage ultimately resulted in constitutional and statutory provisions, known as the Calvo Clause, that required foreign investors to waive appeal to diplomatic protection in favor of seeking redress in local courts under the law of the host state.¹⁴ Understandably, the Calvo Clause chilled foreign investment into South America.¹⁵ This chilling effect, coupled with changed views regarding the appropriate use of force in international relations after World War II, may have accelerated the end of military protection of foreign investment.

After the decline of gunboat diplomacy, the next stage in the evolution of investment protection was the bilateral Treaties of Friendship, Commerce, and Navigation.¹⁶ Although these treaties focused primarily on facilitating trade, they eventually expanded to include investment protection provisions.¹⁷ In particular, the more modern versions included guarantees of prompt,

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 329 n.7.

¹⁵ Not surprisingly, gunboat diplomacy caused much of Latin American to become hostile to foreign investment. *See* Salacuse & Sullivan, *supra* note 3, at 74-75. This hostility began to dissipate in the 1980s as emerging economies in Latin America began actively encouraging the investment necessary to finance development. *See id.*

¹⁶ *See id.* at 72-73; Franck, *supra* note 2, at 1525-26 (citing E.I. NWOGUGU, THE LEGAL PROBLEMS OF FOREIGN INVESTMENT IN DEVELOPING COUNTRIES 119-22 (1965)). In an effort to protect increasing amounts of foreign investment, the United States took a particular interest in these treaties. Salacuse & Sullivan, *supra*. Eventually, the effort lost momentum as developing countries proved increasingly reluctant to accede to U.S. demands. *Id.* at 73.

¹⁷ *See* Salacuse & Sullivan, *supra* note 3, at 72-73. In the immediate post-World War II period, the United States initiated a program of concluding Treaties of Friendship, Commerce, and Navigation in an effort to protect U.S. foreign investments. *See id.*

adequate, and effective compensation for expropriation,¹⁸ which were enforced through methods such as the International Court of Justice (ICJ).¹⁹ While the development of the guarantees proved important, Treaties of Friendship, Commerce, and Navigation still proved far from acceptable to risk-adverse investors.²⁰ In part, investors remained hesitant to make foreign investments because the successful resolution of claims required the investor's home state to espouse a claim before the ICJ.²¹ Given the politically sensitive nature of this process, state support was not always forthcoming.

Eventually, the absence of a direct method for resolving investment claims under Treaties of Friendship, Commerce, and Navigation, prompted the development of the modern BIT.²² One of the primary advantages of this new mechanism was the inclusion of provisions that allowed

¹⁸ David R. Adair, Comment, *Investors' Rights: The Evolutionary Process of Investment Treaties*, 6 TULSA J. COMP. & INT'L L. 195, 196 (1999). The early Treaties of Friendship, Commerce, and Navigation merely proposed obligations regarding expropriation and repatriation of earnings. *Id.*

¹⁹ *Id.* The International Court of Justice, also known as the World Court, is the principal judicial organ of the United Nations. International Court of Justice: General Information – The Court at a Glance, <http://www.icj-cij.org/icjwww/igeneralinformation/icjgnnot.html> (last visited Mar. 6, 2006).

²⁰ Adair, *supra* note 18, at 196-99.

²¹ Because the ICJ was established by the United Nations to resolve disputes between member nations, only states may appear before the Court. International Court of Justice: General Information – The Court at a Glance, <http://www.icj-cij.org/icjwww/igeneralinformation/icjgnnot.html> (last visited Mar. 6, 2006). Consequently, individuals are dependent on states to advocate claims at the ICJ.

²² See Franck, *supra* note 2, at 1525-26 (noting that the movement to use treaties to protect investments “began with Treaties of Friendship, Commerce, and Navigation, but soon moved beyond this as these treaties were limited commitments that did not have a forum for resolving disputes”).

investors greater autonomy over claims against a host country.²³ The greater security offered by these BITs promoted increased investment, and rendered the investment protection aspects of earlier treaties irrelevant.²⁴

B. Lead, Follow, or Get Out of the Way and Follow Later.

Although the BIT was an idea whose time had come, its adoption did not take place uniformly.²⁵ Instead, the process occurred in three distinct waves.²⁶ As will be shown, each wave was characterized by distinct motivations and goals.

1. Lead: German ingenuity.

Not surprisingly, the BIT revolution was born of necessity. Following its unmitigated defeat in the Second World War, Germany found itself economically crippled and without any significant sources of foreign investment.²⁷ As a result, it initiated a new phase of treaty-making that, “unlike the previous commercial agreements, dealt exclusively with foreign investment.”²⁸ This novel approach possessed two principle advantages over earlier initiatives. First, the specialized nature of the BIT helped avoid some of the problems associated with Treaties of

²³ *See id.* at 1529 (noting that investment treaties are special because “they offer investors direct remedies to address violations of” substantive rights).

²⁴ *See id.* at 1526-27. One of the indicators of the importance of a direct method for investors to pursue remedies is the exceptional success of the BIT movement.

²⁵ *See Salacuse & Sullivan, supra* note 3, at 73-75.

²⁶ *See id.*; Franck, *supra* note 3, at 1527 n.16.

²⁷ Salacuse & Sullivan, *supra* note 3, at 73.

²⁸ *Id.* Germany remains a world leader in BIT formation. *Id.* at 73 n.35.

Friendship, Commerce, and Navigation, which were designed primarily to facilitate trade.²⁹

Second, the bilateral nature of the approach allowed for greater flexibility in negotiating and drafting terms.³⁰

Prior to the BIT movement, investors still faced significant risk when investing in foreign countries.³¹ In the face of government expropriation of foreign property, investors had little recourse.³² Although an investor could bring a claim for recovery in the local courts, this “prove[d] to be of little value in the face of prejudice against foreigners or governmental interference in the judicial process.”³³ Moreover, host governments could easily change their domestic law at anytime after the investment was made.³⁴ Consequently, investors had to rely on the benevolence of the host country or the diplomatic support of their own government. Understandably, neither of these options proved sufficiently comforting.³⁵ Even after the

²⁹ *See id.* at 75-79 (explaining the goals of the BIT movement).

³⁰ *See id.* at 77-79 (explaining the reluctance to join multilateral agreements on investment).

³¹ *See, e.g., id.* at 75-76 (“Without a BIT, international investors are forced to rely on host country law alone for protection, which entails a variety of risks to their investments. Host governments can easily change their own domestic law after a foreign investment is made, and host country officials may not always act fairly or impartially toward foreign investors and their enterprises.”).

³² *See, e.g., id.* at 75.

³³ *Id.*

³⁴ *Id.*

³⁵ This is demonstrated by the rise and rapid proliferation of the BIT. For a detailed analysis of the success of the BIT movement in fostering investment protection, see Jesawald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT’L L.J. 67, 79-91 (2005) (noting that “[w]hile that protection is not absolute (no legal device provides absolute protection), investors and investments that are covered by a BIT certainly enjoy a higher degree of protection from the political risks of governmental intervention than those that are not”).

proliferation of Treaties of Friendship, Commerce, and Navigation, an investor still had to rely on his own government to support his claim before the ICJ.³⁶ Given that even this step failed to ameliorate the risks investors faced when deciding whether to enter foreign markets, it is not surprising that the BIT was created.

In direct response to the problems of uncertainty that surrounded foreign direct investment, the BIT provided two essential guarantees.³⁷ First, it guaranteed the application of a specific set of substantive rights.³⁸ Second, it guaranteed recourse to direct remedies for the investor.³⁹ Although these aspects of the BIT will be discussed in greater detail later, it is important to note that the success of the BIT program is in large part linked to these investment-specific protections.

It should come as no surprise that Germany was not the only nation that emerged from the Second World War seeking a means to better facilitate foreign direct investment. In fact, several attempts to do so had already failed before Germany successfully negotiated its first BIT.⁴⁰ What distinguished the German effort was a focus on bilateral rather than multilateral agreement.

³⁶ See *supra* text accompanying notes 16-22.

³⁷ See Franck, *supra* note 2, at 1529 (noting that “[i]nvestment treaties have two fundamental innovations, which represent a departure from previous international agreements”); see also Carlos G. Garcia, *All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration*, 16 FLA. J. INT’L L. 301, 311-13 (2004) (highlighting substantive and procedural issues related to BITs).

³⁸ Franck, *supra* note 2, at 1529.

³⁹ *Id.*

⁴⁰ Germany’s first BIT was concluded with Pakistan in 1959. Salacuse & Sullivan, *supra* note 3, at 73. Earlier attempts at creating investment-specific protections included the Havana Charter

The first attempt to create international rules to protect foreign direct investment was the Havana Charter of 1948.⁴¹ Intended to create the International Trade Organization, the Havana Charter failed to gain the support of a sufficient number of states.⁴² Subsequent efforts, including one by the International Chamber of Commerce, suffered similar fates.⁴³ The failure of these multilateral attempts is understandable given the marked difference between the objectives of capital-exporting states and developing ones.⁴⁴ Germany's contribution then, was

of 1948, the International Code of Fair Treatment of Foreign Investment of 1949, and the International Convention for the Mutual Protection of Private Rights in Foreign Countries of 1957. *Id.* at 72.

⁴¹ *Id.*

⁴² *Id.* The proposed International Trade Organization (ITO) would have been given the power to promulgate rules regarding international investment. *Id.* Although the effort to create the ITO failed, the World Trade Organization (WTO) is beginning to consider the possibility of creating rules governing international investment. *See* WTO, Understanding the WTO, http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey3_e.htm (last visited Jan. 28, 2005) (explaining the creation of a new working group to examine the WTO's role in investment and competition).

⁴³ Salacuse & Sullivan, *supra* note 3, at 72. The effort of the International Chamber of Commerce was called the International Code of Fair Treatment of Foreign Investment. *Id.*

⁴⁴ *Id.* at 77-78. The distinction between capital-exporting states and developing states is of unique importance in international investment. One of the reasons that BITs were created was to facilitate investment by investors from the developed world into the developing one (which had traditionally been very poor at protecting foreign investment). Although both capital-exporting states and developing ones have reasons to support the bilateral process, the reasons are different. *See id.* at 78. On the one hand, capital-exporting states want to maximize the protections afforded to their nationals who invest in other states. *See id.* On the other hand, developing states want to increase investment inflows while at the same time protect domestic industry from foreign competition. *See id.* As a result, capital-exporting states favor the bilateral process because they can maximize their bargaining power over a developing state, while developing states favor the bilateral process because they can choose the countries with which it is most beneficial for them to deal. *See id.* For a more thorough explanation of the perspectives of capital-exporting and capital-importing states, see Carlos G. Garcia, *All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration*, 16 FLA. J. INT'L L. 301, 314-16 (2004).

to recognize that the competing objectives could be addressed more effectively in a bilateral context than in a multilateral one.

2. Follow: The rest of the West catches up.

The second wave of BIT proliferation was driven by the balance of Western economic powers.⁴⁵ Although Germany was first out of the gate to begin negotiating BITs, it did not take long for other European nations to follow suit. Particularly quick to follow the trend were Switzerland, France, the United Kingdom, the Netherlands, and Belgium.⁴⁶ Recognizing the importance of this new method of investment protection, European countries had concluded approximately 130 BITs with developing countries by 1977.⁴⁷

Despite coming to the game late, the United States was also eager to play. Consequently, it launched its own BIT program in 1981.⁴⁸ As of the end of September 2004, the United States had “signed forty-five BITs with developing countries and emerging markets.”⁴⁹

Although the second wave of BIT proliferation began in the West, it continued to spread as east non-Western countries began to export increasing amounts of capital into the developing world. Encouraged by the experiences of the Western powers, countries such as Japan and Kuwait began launching their own BIT programs.⁵⁰

⁴⁵ See Salacuse & Sullivan, *supra* note 3, at 73-75.

⁴⁶ See *id.* at 73.

⁴⁷ *Id.*

⁴⁸ *Id.* at 73-74.

⁴⁹ *Id.* at 74.

⁵⁰ *Id.* (noting that “by 1997, Japan has signed four BITs, and Kuwait had signed twenty-two”).

3. Get out of the way and follow later: Latin American and former Soviet states get with the program.

In the thaw following the Cold War, developing economies became increasingly eager to court foreign investment.⁵¹ With the abandonment of the centralized economic model in many parts of the world, nations that had traditionally been hostile to foreign investment now saw it as essential for financing development.⁵² Capital-exporting states, however, were understandably reluctant to invest money in these nations given their history of expropriating foreign businesses.⁵³ In an effort to overcome their image problem, “developing countries started to assume that they should consider offering guaranties and protection to foreign investment.”⁵⁴ As a result, the governments of those countries began to pursue BITs with wealthier, industrialized nations.⁵⁵

Of particular importance to the third wave of BIT proliferation was the end of Latin American hostility to protections for foreign direct investment. After decades of subscribing to

⁵¹ *See id.*

⁵² *See id.*

⁵³ *See id.* at 75 (noting that “the number of expropriations of foreign-owned property grew steadily each year from 1960 and reached its peak in the mid-1970s”). In 2002, the World Bank Group surveyed transnational companies regarding the factors important to encouraging and discouraging foreign direct investment. Garcia, *supra* note 37, at 320. Of particular relevance to this comment, the survey noted that the existence of a BIT was considered a “very influential” factor in selecting overseas sites by ten percent of manufacturing companies and sixteen percent of service companies. *Id.*

⁵⁴ Raul Emilio Vinuesa, *Bilateral Investment Treaties and the Settlement of Investment Disputes under ICSID: The Latin American Experience*, NAFTA L. & BUS. REV. AM. 501, 504 (2002) (“Credibility went hand in hand with the acceptance by states of their international liability in the promotion and protection of foreign investments.”); *see also* Garcia, *supra* note 37, at 307 (noting that “[i]n regions like Latin America...the inadequacies in the domestic legal order...make it an undependable means of safeguarding investments”).

⁵⁵ *See* Salacuse & Sullivan, *supra* note 3, at 74-75.

the Calvo Doctrine, which limited a foreign investor's remedies to those available in the domestic court system, Latin American countries began reconsidering their approach to foreign investment.⁵⁶ Not surprisingly, at some point, it became clear that foreign direct investment would tend to flow away from states that failed to offer increasing amounts of protection. In an effort to attract some of this investment, Latin American countries began showing their newfound investment-friendly credentials by participating in the BIT program.⁵⁷ As of August 2002, they had made significant progress.⁵⁸

C. The Current Proliferation of the BIT

Although understanding the history of BIT proliferation is important, it is also important to understand its current scope. Predictably, with the lifting of the iron curtain came a renewed interest in market economics and foreign direct investment.⁵⁹ As the developing world discovered, the BIT often acted as a key to opening the golden door to foreign funds.⁶⁰

Consequently, there has been an explosion in the number of BITs concluded since the collapse of

⁵⁶ See Kishoiyian, *supra* note 2, at 366; *supra* notes 10-15 and accompanying text.

⁵⁷ See Vinuesa, *supra* note 54, at 505 & n.16.

⁵⁸ See *id.* at 505 n.16.

⁵⁹ *Supra* note 51 and accompanying text.

⁶⁰ *Supra* notes 51-55 and accompanying text. "Developing country governments that may have been reluctant to sign BITs due to concerns that BITs would prove costly and bring them little additional investment may now see evidence of increase capital flows as reason to justify treaty participation, particularly if other countries with whom they compete for foreign capital have signed BITs and obtained significant foreign investment. Although BIT critics in developing countries point to the increased number of arbitration awards against developing countries as justification for their opposition, evidence of substantially increased investment flows severely weakens their position." Salacuse & Sullivan, *supra* note 3, at 111-12 (internal citations omitted). "The proliferation of BITs was the direct consequence of new trends towards a market economy where foreign investment in developing countries was the master key to integrate those countries into fruitful global economy relationships." Vinuesa, *supra* note 54, at 504.

the Soviet Union.⁶¹ As a result of this recent explosion, a dense network of BITs links over 170 different countries.⁶² As two commentators note, “Whereas some 309 BITs had been concluded by the end of 1988, 2181 were concluded by 2002.”⁶³ When one considers that each of these BITs involves two countries, the scope of the movement’s success becomes evident.

D. The Unique Qualities of the BIT

The success of the BIT as a means for protecting foreign direct investment rightly suggests that it possesses unique and important qualities. In contrast to earlier attempts at investment protection, the BIT provides investors specific substantive rights and direct remedies.⁶⁴ The importance of these two developments can be deduced not only from the sheer number of BITs now in existence, but also from the accompanying dramatic increase in foreign direct investment.⁶⁵

1. Provision of specific substantive rights

Despite the number of BITs in existence, the general substantive provisions of each are remarkably similar.⁶⁶ Although there are differences that arise from each unique treaty-specific

⁶¹ See Salacuse & Sullivan, *supra* note 3, at 75.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Supra* notes 37-39 and accompanying text.

⁶⁵ “Over the past three decades in particular, BITs have proliferated as foreign direct investment (FDI) has experienced phenomenal growth. Total annual FDI reached \$1.1 trillion in 2000, a drastic increase from \$25 billion in 1973.” Salacuse & Sullivan, *supra* note 3, at 71 (internal citations omitted). “At the same time as the number of bilateral investment treaties quintupled, foreign direct investment has also experienced a fivefold increase.” Franck, *supra* note 2, at 1528.

⁶⁶ Franck, *supra* note 3, at 1529.

negotiation process, there are also discernable trends regarding the rights that states offer.⁶⁷ Nevertheless, the basic principle is that sovereign governments agree to protect investments made by nationals of another country.⁶⁸ To accomplish this goal, BITs delineate “the specific substantive standards that govern the host state’s treatment of an investment.”⁶⁹

Again, despite the fact that different permutations of substantive rights are the norm, “[a] typical investment treaty generally provides investors with a combination of up to seven different substantive rights.”⁷⁰ First, the treaty generally provides a guarantee that investors will receive payment of adequate compensation if their property is expropriated.⁷¹ Second, the treaty generally prohibits the contracting states from hindering the free flow of capital by enacting currency controls.⁷² Third, the treaty generally prohibits the host state from discriminating on

⁶⁷ *Id.*

⁶⁸ *Id.* “In general terms, a BIT contains provisions on guaranties for the admission of foreign investments, as well as guaranties for sums transferred abroad related to the investments.” Vinuesa, *supra* note 54, at 506.

⁶⁹ Franck, *supra* note 2, at 1529.

⁷⁰ *Id.* at 1530.

⁷¹ *Id.*; Vinuesa, *supra* note 54, at 506. The U.S. Model BIT contains the following language: “Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (“expropriation”), except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation; and (d) in accordance with due process of law and Article 5 [Minimum Standard of Treatment](1) through (3).” 2004 United States Model Bilateral Investment Treaty art. 6(1), http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf (last visited Jan. 30, 2006).

⁷² Franck, *supra* note 2, at 1530. The U.S. Model BIT contains the following language: “Each Party shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory.” 2004 United States Model Bilateral Investment Treaty art. 7(1), http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf

the basis of nationality.⁷³ Fourth, the treaty generally requires the host-state to treat investments fairly and equitably.⁷⁴ Fifth, the treaty generally requires the host-state to provide full protection and security to investments.⁷⁵ Sixth, the treaty generally requires the contracting states to guarantee that investments will not receive treatment less favorable than the “minimum standard

f (last visited Jan. 30, 2006). As two commentators note, “For any foreign investment project, the ability to repatriate income and capital, to pay foreign obligations in another currency, and to purchase raw materials and spare parts from abroad is crucial to a project’s success.” Salacuse & Sullivan, *supra* note 3, at 85. Consequently, capital-exporting states press for substantial freedom to undertake these monetary transactions. *Id.*

⁷³ Franck, *supra* note 2, at 1530-31. The non-discrimination principle generally provides that host-states cannot treat investors worse than domestic citizens (national treatment) or other foreigners (most-favored nation treatment). *Id.* The U.S. Model BIT contains the following language regarding national treatment: “Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.” 2004 United States Model Bilateral Investment Treaty art. 3(1), http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf (last visited Jan. 30, 2006). It also contains the following language regarding most-favored nation treatment: “Each Party shall accord to investors of the other Party treatment no less favorable 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.” 2004 United States Model Bilateral Investment Treaty art. 4(1), http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf (last visited Jan. 30, 2006).

⁷⁴ Franck, *supra* note 2, at 1531. The U.S. Model BIT contains the following language: “Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.” 2004 United States Model Bilateral Investment Treaty art. 5(1), http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf (last visited Jan. 30, 2006).

⁷⁵ Franck, *supra* note 2, at 1531-32. Like the provision for fair and equitable treatment, the provision for full protection and security is contained within article 5(1) of the 2004 United States Model Bilateral Investment Treaty. *Supra* note 74.

required by customary international law.”⁷⁶ Finally, the treaty will occasionally include provisions specifying that the contracting states agree to honor commitments that they have given regarding an investment.⁷⁷

In addition to providing specific protections, BITs must also define which investors and investments qualify to receive those protections.⁷⁸ Generally the provisions regarding the scope of a BIT’s application are found at the beginning of the treaty and address four factors: “(1) the form of the investment; (2) the area of the investment’s economic activity; (3) the time when the investment is made; and (4) the investor’s connection with the other contracting state.”⁷⁹ Despite the fact that there are several factors, BITs typically define investor and investment broadly.⁸⁰ This, in turn, enables the treaty to provide adequate protection and allow for an evolving understanding of investment.⁸¹

2. Provision of direct remedies for investors

Although BITs contain considerable substantive rights for investors and investments, they are somewhat superfluous without corresponding procedural rights. Consequently, the other essential aspect of the BIT is the provision of direct remedies for investors. Rather than

⁷⁶ Franck, *supra* note 2, at 1532. Again, like the provisions for fair and equitable treatment and full protection and security, the provision for treatment in accordance with customary international law is contained within article 5(1) of the 2004 United States Model Bilateral Investment Treaty. *Supra* notes 74, 75.

⁷⁷ Franck, *supra* note 2, at 1532.

⁷⁸ *Id.* at 1533.

⁷⁹ Salacuse & Sullivan, *supra* note 3, at 80.

⁸⁰ *Id.*; Franck, *supra* note 2, at 1533.

⁸¹ Salacuse & Sullivan, *supra* note 3, at 80.

leaving an investor to pursue his claim through the cumbersome ICJ process or the host state's domestic court system, BITs often allow an investor the ability to proceed directly to arbitration.⁸² Although BITs generally provide investors with the option of pursuing litigation in the host-state, this option is rarely used.⁸³ Instead, investors routinely choose to arbitrate their claims.⁸⁴ While dispute resolution provisions in BITs often differ in scope and content, "they are generally understood to constitute a unilateral offer by the Sovereign to settle disputes by arbitration, which the investor accepts by initiating arbitration under the treaty."⁸⁵

That BIT dispute resolution provisions grant private investors the right to bring an action against a sovereign state before an international tribunal should not be overlooked.⁸⁶ Indeed, it represents a unique departure from the customary practice of nations.⁸⁷ Rather than having to receive approval to pursue a claim, an investor is allowed to act without regard for the concerns and interests of his own state.⁸⁸ In effect, the current investment-treaty regime allows "investors

⁸² Franck, *supra* note 2, at 1540; *supra* notes 21-23 and accompanying text.

⁸³ *See* Franck, *supra* note 2, at 1541.

⁸⁴ *See id.*

⁸⁵ *Id.* at 1542; Garcia, *supra* note 37, at 312 ("No arbitration clause or further consent to arbitrate is required as the treaties themselves provide for this a priori.").

⁸⁶ Salacuse & Sullivan, *supra* note 3, at 88.

⁸⁷ *See id.* In international trade law, for example, there is no provision for private action against a sovereign state. *Id.* Despite the fact that individuals suffer harm as a result of trade law infringements, only states may bring claims before the World Trade Organization. *Id.*

⁸⁸ *See id.*; Garcia, *supra* note 37, at 312 (noting that "the government of the foreign investor (e.g., the other state party to the treaty) has no say or role whatsoever in the initiation or outcome of the proceedings"); Franck, *supra* note 2, at 1538 ("This means investors are no longer at the mercy of international politics and governmental bureaucracy when deciding to initiate dispute resolution, and can avoid their litigation being swallowed by the larger foreign relations dialogue.").

to act like ‘private attorney generals,’ and places the enforcement of public international law rights in the hands of private individuals and corporations.’⁸⁹ Given this type of autonomy, it is not surprising that investors gain significant confidence from knowing that their investments are covered by a BIT.⁹⁰

III. THE ROLE OF ICSID IN THE BIT REGIME

A. Purpose and Creation

Although the creation of the BIT allowed investors significant latitude in bringing claims against a sovereign state, this right proved rather hollow without a neutral forum for resolving disputes. Consequently, the creation of such a forum proved an essential event in the history of international investment protection.

As an international institution that provides loans to its member countries in order to foster greater production and development, the World Bank (the Bank) plays a significant role in international investment.⁹¹ In fact, the Bank’s “founders believed that its principal function would be to encourage international investment by private investors.”⁹² As a result, it is not surprising that in the early days of the BIT movement the World Bank received requests to help

⁸⁹ *Id.*; see generally Tai-Heng Cheng, *Power, Authority and International Investment Law*, 20 AM. U. INT’L L. REV. 465 (2005) (arguing that international investment law shifts power and authority from states to investors, tribunals, and other decision-makers).

⁹⁰ See Franck, *supra* note 2, at 1538 (noting that the system of allowing investors to bring claims against sovereign states “created a mechanism to bolster investors’ confidence that they will receive a ‘fair shake’ when resolving disputes with Sovereigns, thus reducing the risks associated with investment and, arguably, increasing the incentive to investment abroad”).

⁹¹ See Nmehielle, *supra* note 6, at 23.

⁹² *Id.*

settle dispute among member states by acting as a neutral advisor.⁹³ Although the Bank attempted to mediate the disputes, concerns regarding its proper role caused it to consider new solutions.⁹⁴ One of the proposed solutions, presented in 1961, examined the feasibility of creating an arbitration mechanism that could suit the needs of both investors and governments.⁹⁵ The ultimate result of this proposal was the establishment of ICSID under the International Convention for the Settlement of Investment Disputes (ICSID Convention) in 1966.⁹⁶ The purpose of this new body was to provide proceedings “for the conciliation and arbitration of investment disputes between contracting states and nationals of other contracting states.”⁹⁷ Moreover, ICSID sought to assure foreign investors that they would receive protection from the unilateral actions of a host country.⁹⁸ In other words, ICSID intended to balance the power inequity between investors and host countries by providing a “purely international dispute resolution forum.”⁹⁹

B. Composition of ICSID

⁹³ See Sedlak, *supra* note 7, at 150.

⁹⁴ See *id.*

⁹⁵ See *id.* at 150-51.

⁹⁶ See *id.* at 151. “On October 14, 1966, after years of preparatory work by legal experts from Africa, Asia, Europe, Latin America, and the United States and after approval by the Board of Governors of the World Bank, ICSID came into force as an autonomous international agency under the auspices of the World Bank.” *Id.*

⁹⁷ Vinuesa, *supra* note 54, at 502; see Sedlak, *supra* note 7, at 151 (“The role of ICSID was to arbitrate and conciliate investment disputes between signatory states and investors of those states that were signatories to the convention.”).

⁹⁸ See Nmehielle, *supra* note 6, at 23.

⁹⁹ Sedlak, *supra* note 7, at 153.

The ICSID convention provides for the creation of an Administrative Council, a Secretariat, a Panel of Arbitrators, and a Panel of Conciliators.¹⁰⁰ Although these four organs play an important role in facilitating the arbitration process, the actual work of hearing disputes and ruling on the merits is the task of individual arbitral panels assembled under the auspices and according to the rules of ICSID. For the purposes of this comment, only the administrative bodies of the organization merit further attention and explanation here.

1. The Administrative Council

The Administrative Council (the Council) is composed of one representative from each state that is a party to the ICSID Convention.¹⁰¹ In addition, the President of the World Bank serves as the Chairman of the Council.¹⁰² As the governing body of ICSID, the Council has a range of duties and is responsible for exercising whatever powers are necessary to implement the provisions of the ICSID Convention.¹⁰³

¹⁰⁰ International Convention for the Settlement of Investment Disputes arts. 3-16, Mar. 18, 1965, 17 U.S.T. 1273-77, 575 U.N.T.S. 162-170; Nmehielle, *supra* note 6, at 25.

¹⁰¹ International Convention for the Settlement of Investment Disputes art. 4, Mar. 18, 1965, 17 U.S.T. 1273, 575 U.N.T.S. 164; Nmehielle, *supra* note 6, at 25. Because the members of the Council are government representatives, they receive no remuneration from ICSID. Nmehielle, *supra*.

¹⁰² International Convention for the Settlement of Investment Disputes art. 5, Mar. 18, 1965, 17 U.S.T. 1274, 575 U.N.T.S. 164. The Chairman has no vote in the Council. *Id.*

¹⁰³ International Convention for the Settlement of Investment Disputes arts. 6(1)(a)-(g), 6(3), Mar. 18, 1965, 17 U.S.T. 1274-75, 575 U.N.T.S. 1164-65. The obligations and powers of the Council include the following: “(a) adopt[ing] the administrative and financial regulations of the Centre; (b) adopt[ing] the rules of procedure for the institution of conciliation and arbitration proceedings; (c) adopt[ing] the rules of procedure for conciliation and arbitration proceedings (hereinafter called the Conciliation Rules and the Arbitration Rules); (d) approv[ing] arrangements with the Bank for the use of the Bank's administrative facilities and services; (e) determin[ing] the conditions of service of the Secretary-General and of any Deputy Secretary-General; (f) adopt[ing] the annual budget of revenues and expenditures of the Centre; (g) approv[ing] the annual report on the operation of the Centre.” *Id.* at arts. 6(1)(a)-(g).

2. The Secretariat

The Secretariat consists of the Secretary-General, at least one Deputy Secretary-General, and staff.¹⁰⁴ The higher positions, Secretary-General and Deputy Secretary-General, are elected by the Administrative Council upon the recommendation of the Chairman.¹⁰⁵ As the principal administrative organ of ICSID, the Secretariat is responsible for the day-to-day running of the Centre.¹⁰⁶ The Secretary-General, the principal officer of the Centre, performs the function of Registrar and also has the power to authenticate awards arising from the ICSID process.¹⁰⁷ In contrast to the member of the Administrative Council, the officers of the Secretariat are non-political.¹⁰⁸

C. The Arbitration Process

The arbitral tribunals assembled under ICSID's essentially act as international investment courts. Given this role and the increasingly frequent use of ICSID to resolve investment disputes that arise under BITs, it is important to examine the arbitral process itself.

1. Jurisdiction

¹⁰⁴ International Convention for the Settlement of Investment Disputes art. 9, Mar. 18, 1965, 17 U.S.T. 1275, 575 U.N.T.S. 166; Nmehielle, *supra* note 6, at 25.

¹⁰⁵ International Convention for the Settlement of Investment Disputes art. 10(1), Mar. 18, 1965, 17 U.S.T. 1275-76, 575 U.N.T.S. 166-68; Nmehielle, *supra* note 6, at 25.

¹⁰⁶ International Convention for the Settlement of Investment Disputes art. 11, Mar. 18, 1965, 17 U.S.T. 1276, 575 U.N.T.S. 168; Nmehielle, *supra* note 6, at 25.

¹⁰⁷ International Convention for the Settlement of Investment Disputes art. 9, Mar. 18, 1965, 17 U.S.T. 1275, 575 U.N.T.S. 166; Nmehielle, *supra* note 6, at 25.

¹⁰⁸ International Convention for the Settlement of Investment Disputes art. 10(2), Mar. 18, 1965, 17 U.S.T. 1275-76, 575 U.N.T.S. 166-68; Nmehielle, *supra* note 6, at 25.

As with any formal court system, an ICSID tribunal must have jurisdiction to hear a dispute. Article 25(1) of the ICSID Convention provides the basic understanding of ICSID's jurisdiction:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.¹⁰⁹

For the purpose of this comment, it is important to note that the consent of states that have signed the ICSID Convention can be presumed if ICSID arbitration is provided for in a BIT.¹¹⁰ Consequently, once a sovereign state signs a BIT that allows for ICSID arbitration, it may not be able to withdraw from arbitration with an investor from the other signatory country. Not surprisingly, a large number of countries are effectively locked in to the ICSID system as a result of their BITs.

2. Initiating Arbitration

¹⁰⁹ International Convention for the Settlement of Investment Disputes art. 25(1), Mar. 18, 1965, 17 U.S.T. 1280, 575 U.N.T.S. 174; Vinuesa, *supra* note 54, at 503 (“ICSID Arbitration Tribunals (Tribunal) dealing with BITS assumed that article 25 of the Convention is the basic rule that determined the ICSID’s jurisdiction, and, as a consequence, that of its tribunals.”).

¹¹⁰ See Vinuesa, *supra* note 54, at 503. In an ICSID arbitration involving the U.S. and Argentina, the arbitral tribunal concluded that the relevant BIT constituted consent to arbitration before ICSID. *Id.* Consequently, “the consent of the respondent state arises from its generic offer of submission to ICSID arbitration as determined by the Convention.” *Id.* According to the United Nations Conference on Trade and Development (UNCTAD), BITs that reference ICSID may contain the host state’s offer to submit to ICSID jurisdiction. CHRISTOPH SCHREURER, UNCTAD: DISPUTE SETTLEMENT: INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES: 2.3 CONSENT TO ARBITRATION 17 (2003), available at http://www.unctad.org/en/docs/edmmisc232add2_en.pdf. Furthermore, “[c]onsent through BITs has become accepted practice.” *Id.* UNCTAD emphasizes the importance of this practice by noting that ICSID clauses can be found in the “overwhelming majority” of new BITs. *Id.*

An ICSID arbitration may be initiated by a state that is party to the ICSID Convention, or by a national of a state that is a party to the Convention.¹¹¹ Unless the case is manifestly outside the scope of the Centre’s jurisdiction, the Secretary-General will register the request for arbitration.¹¹²

3. Selection of the Arbitral Tribunal

Once the dispute is registered, the arbitral tribunal is constituted according to the agreement of the parties.¹¹³ In the absence of an agreement, the tribunal will be composed of three arbitrators.¹¹⁴ Each party to the dispute will select one arbitrator, and the third (the President of the Tribunal) is selected by agreement of the parties.¹¹⁵ In the event that the parties

¹¹¹ Nmehielle, *supra* note 6, at 28. For a detailed account of the initiation process, as well as the materials that must accompany the initiation, see ERIC SCHWARTZ & REZA MOHTASHAMI, UNCTAD: DISPUTE SETTLEMENT: INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES: 2.7 PROCEDURAL ISSUES 7-10 (2003), *available at* http://www.unctad.org/en/docs/edmmisc232add6_en.pdf.

¹¹² Nmehielle, *supra* note 6, at 28.

¹¹³ *See id.*; SCHWARTZ & MOHTASHAMI, *supra* note 111, at 11. Although the parties have broad discretion in designating arbitrators, three restrictions may apply. First, the majority of arbitrators must be nationals of states other than the states represented in the suit. International Convention for the Settlement of Investment Disputes art. 39, Mar. 18, 1965, 17 U.S.T. 1286, 575 U.N.T.S. 184. “This prohibition does not apply if each arbitrator has been chosen by agreement of the parties.” SCHWARTZ & MOHTASHAMI, *supra* at 14. Second, the arbitrators must meet the qualifications of Article 14(1). *Id.*; International Convention for the Settlement of Investment Disputes art. 40(2), *supra*, 17 U.S.T. 1286, 575 U.N.T.S. 184. Consequently, they must have high moral character; recognized competence in law, commerce, industry, or finance; and reliability to exercise independent judgment. International Convention for the Settlement of Investment Disputes art. 14(1), *supra*, 17 U.S.T. 1277, 575 U.N.T.S. 168. Third, the arbitrators must be independent of the parties to the dispute. SCHWARTZ & MOHTASHAMI, *supra* at 14-15.

¹¹⁴ International Convention for the Settlement of Investment Disputes art. 37(2)(b), Mar. 18, 1965, 17 U.S.T. 1285, 575 U.N.T.S. 184; *see* Nmehielle, *supra* note 6, at 28.

¹¹⁵ International Convention for the Settlement of Investment Disputes art. 37(2)(b), Mar. 18, 1965, 17 U.S.T. 1285, 575 U.N.T.S. 184; *see* Nmehielle, *supra* note 6, at 28.

cannot agree on the appointment of the arbitrators, the Chairman of the Administrative Council, after consulting with the parties, will appoint the remaining arbitrators.¹¹⁶

4. Recognition and enforcement of awards

The effectiveness of an arbitration ultimately depends on whether the winning party can enforce its claim against the losing party.¹¹⁷ As a result, Article 54(1) of the ICSID Convention contains the following language:

Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.¹¹⁸

Although execution of ICSID awards is the norm, it should not be taken for granted.¹¹⁹ While the ICSID Convention does provide for recognition of the award, Article 55 contains the following condition: “Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.”¹²⁰ Unfortunately, this language leaves a loophole in favor of states party to a

¹¹⁶ See International Convention for the Settlement of Investment Disputes art. 38, Mar. 18, 1965, 17 U.S.T. 1285-86, 575 U.N.T.S. 184; Nmehielle, *supra* note 6, at 28. “The appointments made by the Chairman of the Administrative Council must be made from the Panel.” SCHWARTZ & MOHTASHAMI, *supra* note 111, at 15; International Convention for the Settlement of Investment Disputes art. 40(1), *supra*, 17 U.S.T. 1286, 575 U.N.T.S. 184.

¹¹⁷ Nmehielle, *supra* note 6, at 29.

¹¹⁸ International Convention for the Settlement of Investment Disputes art. 54(1), Mar. 18, 1965, 17 U.S.T. 1291, 575 U.N.T.S. 184.

¹¹⁹ See Nmehielle, *supra* note 6, at 29-30. Here, it is important to note that the ICSID Convention treats execution as a distinct aspect of enforcement. *Id.* at 29.

¹²⁰ International Convention for the Settlement of Investment Disputes art. 55, Mar. 18, 1965, 17 U.S.T. 1292, 575 U.N.T.S. 194.

dispute.¹²¹ The problem arises when a state's domestic law prevents execution of the award because of its provisions providing for sovereign immunity.¹²² Again, despite this loophole, execution of awards remains the rule rather than the exception.¹²³

D. From Neglect to Preeminence

Although ICSID was established in 1966, it did not assemble its first arbitral tribunal until 1972.¹²⁴ The pace of cases brought before the Centre remained slow for decades, and it is only recently that the number of cases has increased sharply.¹²⁵ In fact, more half of ICSID's total caseload "has been launched in the last five years."¹²⁶ To illustrate, filings have increased from "approximately one per year in the 1980s to one or two per month in 2001."¹²⁷ While the

¹²¹ See Vincent O. Orlu Nmehielle, *Enforcing Arbitration Awards Under the International Convention for the Settlement of Investment Disputes (ICSID Convention)*, 7 ANN. SURV. INT'L & COMP. L. 21, 31 (2001).

¹²² "The reason for this disparity in enforcing an ICSID arbitral award is that the ICSID Convention does not alter or supersede the rules of immunity from execution against a state which fails to comply with an ICSID award." Nmehielle, *supra* note 6, at 30-31. For a detailed discussion of the problems inherent in executing an ICSID award, see *id.* at 31-39.

¹²³ See *supra* note 119 and accompanying text. Whether this trend in execution is the result of contractual provisions waiving sovereign immunity or the result of efforts by states to avoid international condemnation is unclear.

¹²⁴ See ICSID, List of Concluded Cases, <http://www.worldbank.org/icsid/cases/conclude.htm> (last visited Feb. 4, 2006).

¹²⁵ ICSID, About ICSID, <http://www.worldbank.org/icsid/about/about.htm> (last visited Feb. 4, 2006).

¹²⁶ Calvin A. Hamilton & Paula I. Rochwerger, *Trade and Investment: Foreign Direct Investment Through Bilateral and Multilateral Treaties*, 18 N.Y. INT'L L. REV. 1, 55 (2005); see Franck, *supra* note 2, at 1521.

¹²⁷ Franck, *supra* note 2, at 1538.

reasons for this explosion are unclear, it may be tied to the recent growth in foreign-direct investment and the increasingly large network of BITs.¹²⁸

In addition to the increased caseload, the importance of ICSID in international investment arbitration is also demonstrated by the number of states that are party to the ICSID Convention and the number of instruments that provide for it as a dispute resolution mechanism. Currently, 143 nations have signed and ratified the Convention, and another twelve have signed but not ratified.¹²⁹ Moreover, “advance consents to submit investment disputes to ICSID arbitration are found in about twenty national investment laws, in over 900 BITs, and under four recent multilateral trade and investment treaties.”¹³⁰

Given the importance of ICSID arbitration to the international investment protection regime, it is necessary and appropriate to examine inconsistencies in the decisions and interpretations of ICSID tribunals. The lack of customary international law governing the treatment of international investments makes the current BIT regime essential to the protection of international investors and investments. Considering that BIT provisions are enforced through arbitration, it follows that the practice of arbitral tribunals should face significant scrutiny.¹³¹ Although no tribunal is bound by the precedents of earlier arbitrations,

¹²⁸ *See id.*

¹²⁹ *See* ICSID, List of Contracting States, <http://www.worldbank.org/icsid/constate/c-states-en.htm> (last visited Feb. 4, 2006).

¹³⁰ Sedlak, *supra* note 7, at 152 (citing ICSID, About ICSID, <http://www.worldbank.org/icsid/about/about.htm>). The four multilateral agreements are the North American Free Trade Agreement (NAFTA), the Energy Charter Treaty (ECT), the Cartagena Free Trade Agreement and the Colonia Investment Protocol of Mercosur. ICSID, About ICSID, <http://www.worldbank.org/icsid/about/about.htm> (last visited Feb. 4, 2006).

¹³¹ “Although some commentators suggest that an occasional ‘wrong’ decision is a small price to pay for promoting aggregate gain through investment arbitration, the magnitude and the

inconsistencies could frustrate the purpose of the BIT and investment arbitration regimes by fostering uncertainty regarding rights and obligations.¹³²

IV. ICSID'S CONFUSED DECISIONS REGARDING THE EFFECT OF MOST-FAVORED-NATION CLAUSES ON DISPUTE RESOLUTION PROCEDURES

Despite the fact that ICSID has been around since the 1960s, it has only recently begun to address the scope of Most-Favored-Nation (MFN) clauses within BITs.¹³³ Unfortunately, now that it has, the results are inconsistent.¹³⁴

A. MFN Clauses in BITs

MFN treatment has been an important feature of international trade policy for centuries.¹³⁵ More recently, however, MFN clauses have extended into international investment policy.¹³⁶ In fact, the majority of BITs currently in force around the world contain some form of

increasing frequency of the inconsistency suggests that this conclusion should be reconsidered.” Franck, *supra* note 2, at 1558 (internal citation omitted).

¹³² “Inconsistency creates uncertainty and damages the legitimate expectations of investors and Sovereigns. Investors that have structured their investments in a manner to take advantage of coverage afforded by investment treaties suddenly discover they will not receive those benefits. Likewise, Sovereigns find themselves in an untenable position of explaining to taxpayers why they are subject to damage awards for hundreds of millions of U.S. dollars in one case but not another.” *Id.*

¹³³ *See supra* note 96 and accompanying text; *infra* notes 141-247 and accompanying text.

¹³⁴ *See infra* notes 141-247 and accompanying text.

¹³⁵ ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, MOST-FAVORED-NATION TREATMENT IN INTERNATIONAL INVESTMENT LAW 3 (2004), *available at* <http://www.oecd.org/dataoecd/21/37/33773085.pdf>. “[MFN treatment] can be traced back to the twelfth century, although the phrase seems to have first appeared in the seventeenth century. MFN treaty clauses spread with the growth of commerce in the fifteenth and sixteenth centuries.” *Id.*

¹³⁶ “The inclusion of MFN clauses became a general practice in the numerous bilateral, regional and multilateral investment-related agreements which were concluded after...1950.” ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *supra* note 135, at 3.

MFN clause.¹³⁷ Generally, the clauses require each contracting state to provide to investors of the other contracting state treatment that is “no less favourable than that accorded to the investors of third states.”¹³⁸ Consequently, any favorable provision provided for in a BIT will be available to every other country with which the host country has a BIT containing an MFN clause.¹³⁹ In effect, an MFN clause raises the “level of protection guaranteed by each BIT concluded by a country to the level guaranteed by that country’s most protective BIT.”¹⁴⁰

B. Interpreting the scope of MFN clauses

Given that the inclusion of an MFN clause in a BIT can effectively raise the level of protection to that of the most protective BIT, it is not surprising that investors and host states would argue over the proper scope of such clauses. Investors, of course, argue for the greatest possible protection; host states argue for the least possible protection. Although well recognized methods of interpretation exist, tribunals may still reach different conclusions.¹⁴¹ In fact, several

¹³⁷ Stephen Fietta, *Most Favoured Nation Treatment and Dispute Resolution Under Bilateral Investment Treaties: A Turning Point?*, 8 INT’L ARB. L. REV. 131, 131 (2005).

¹³⁸ *Id.*

¹³⁹ *See id.* By including MFN clauses in BITs states require “parties to one treaty to provide investors with treatment that is no less favourable than the treatment provided by them to other investors under other treaties.” *Id.*

¹⁴⁰ FEDERICO GODOY, BILATERAL INVESTMENT TREATIES: MOST FAVORED NATION TREATMENT 1-2 (2002), available at <http://www.bkgfirm.com/admin/pixAdmin/pubs/162FEN.pdf>.

¹⁴¹ When interpreting treaty provisions, the primary aim is to identify the intent of the contracting parties. *See Fietta, supra* note 137, at 132. This approach is adopted by Article 31 of the Vienna Convention on the Law of Treaties. Generally accepted as a rule of customary international law, Article 31 states that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 340; *see Fietta, supra* at 131. Another important principle of interpretation is that of *ejusdem generis*.

ICSID arbitral tribunals already have. These MFN clause arbitrations can be divided into two distinct classes. The first deals with expansive interpretations of the scope of MFN clauses; the second deals with narrow interpretations of the scope of MFN clauses. Although the cases mentioned do not constitute an exhaustive list of ICSID tribunal decisions on the issue, they are representative.

C. Expansive Interpretations

In both cases in this section, investors attempted to avoid specific language within a BIT that required a waiting period to expire before a case could be submitted to ICSID arbitration. Arguing that the MFN clauses should be interpreted broadly, the investors asserted that they were entitled to select individual BIT provisions provided for in other BITs. In particular, the investors argued that the MFN clause in the BIT that applied to their dispute entitled them to the procedures that existed in one of the host state's other BITs. In both cases, the arbitral tribunals interpreted the scope of the MFN clauses expansively.

1. *Maffezini v. Kingdom of Spain*

On July 18, 1997, ICSID received a formal request for arbitration against the Kingdom of Spain (Spain) from an Argentine national, Mr. Emilio Agustín Maffezini.¹⁴² Maffezini's request concerned treatment that he allegedly received from the Spanish government in connection with

See Fietta, supra at 132. According to this principle, "an MFN clause 'can only attract matters belonging to the same category of subjects as that to which the clause itself relates.'" *Id.*

¹⁴² *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, Jan. 25, 2000, ¶1, *available at* http://www.worldbank.org/icsid/cases/emilio_DecisiononJurisdiction.pdf.

an investment in an enterprise involving the production and distribution of chemical products in Spain.¹⁴³

In his request for arbitration, Maffezini invoked the provisions of the Argentina-Spain BIT.¹⁴⁴ This, however, was insufficient to establish that ICSID had jurisdiction over the dispute because the Argentina-Spain BIT required that an investor allow the Spanish courts eighteen months to process the claim before being allowed to submit the claim to international arbitration.¹⁴⁵ To avoid the delay and the expense of litigating in Spain, Maffezini asserted that the MFN clause in the Argentina-Spain BIT “allowed him to rely upon the more favorable

¹⁴³ *Id.*

¹⁴⁴ *Id.* The formal name of the BIT between Argentina and Spain concluded in 1991 is the “Agreement for the Reciprocal Promotion and Protection of Investments between the Kingdom of Spain and the Argentine Republic.” *Id.*

¹⁴⁵ *See id.* ¶19. Article X.3 of the Argentina-Spain BIT, which addresses the “Settlement of Disputes Between a Contracting Party and an Investor of the other Contracting Party,” reads as follows: “The dispute may be submitted to international arbitration in any of the following circumstances: a) at the request of one of the parties to the dispute, if no decision has been rendered on the merits of the claim after the expiration of a period of eighteen months from the date on which the proceedings referred to in paragraph 2 of the Article have been initiated, or if such decision has been rendered, but the dispute between the parties continues.” *Id.*

treatment Spain offered to Chilean investors in the Spain-Chile BIT.”¹⁴⁶ The Spain-Chile BIT required a mere six-month waiting period before an investor could file a claim at ICSID.¹⁴⁷

Not surprisingly, Spain maintained that the provisions of the Argentina-Spain BIT were controlling and prevented ICSID from exercising jurisdiction over the claim.¹⁴⁸ In particular, Spain objected to Maffezini’s expansive interpretation of the MFN clause in the Argentina-Spain BIT.¹⁴⁹ It maintained that “under the principle *ejusdem generis* the most favored 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.”¹⁵⁰ According to Spain, this principle limited the scope of the MFN clause to substantive matters of treatment granted to investors and not to procedural or jurisdictional questions.¹⁵¹ In addition, Spain argued that the discrimination that MFN clauses

¹⁴⁶ Barry Appleton, *MFN and International Investment Treaty Arbitration: Have we Lost Sight of the Forest Through the Trees?*, 1 APPLETON’S INT’L INVESTMENT L. & ARB. NEWS, Feb. 2005, at 10, 12. The MFN clause in the Argentina-Spain BIT is found in Article IV.2 and reads as follows: “In all matters subject to this Agreement, this treatment shall not be less favorable than that extended by each Party to the investments made in its territory by investors of a third country.” *Maffezini*, ICSID Case No. ARB/97/7 ¶38. Commentators have noted that the MFN clause in the Argentina-Chile BIT is a broad one: “It is worthy of note that the subject matter of the MFN provision at issue in the *Maffezini* case was particularly wide, covering as it did ‘all matters’ subject to the Argentina-Spain BIT.” Fietta, *supra* note 137, at 133.

¹⁴⁷ Maffezini relied specifically on Article X.2 of the Chile-Spain BIT. *Maffezini*, ICSID Case No. ARB/97/7 ¶39.

¹⁴⁸ *See id.* ¶19.

¹⁴⁹ *See id.* ¶41.

¹⁵⁰ *Id.* ¶41.

¹⁵¹ *See id.* ¶41.

were intended to protect against could only “take place in connection with material economic treatment and not with regard to procedural matters.”¹⁵²

Ultimately, the tribunal agreed with Maffezini.¹⁵³ Consequently, it granted itself jurisdiction over the dispute.¹⁵⁴ Relying in part on the *Ambatielos* case, the Tribunal found that the MFN clause could extend to procedural matters including the provisions for dispute resolution.¹⁵⁵ In the *Ambatielos* case, the Commission of Arbitration determined that the MFN clause at issue could, in conformity with the *ejusdem generis* principle, extend to matters concerning the “administration of justice.”¹⁵⁶ Similarly, the *Maffezini* Tribunal concluded that dispute resolution provisions are “inextricably related” to the substantive rights granted under the BIT.¹⁵⁷ In effect, the Tribunal asserted that if the goal of a BIT is to protect investors from the

¹⁵² *Id.* ¶42.

¹⁵³ *See id.* at ¶64. “In light of the above considerations, the Tribunal is satisfied that the Claimant has convincingly demonstrated that the most favored nation clause included in the Argentine-Spain BIT embraces the dispute settlement provisions of this treaty.” *Id.* Not surprisingly, this decision caused immediate controversy. Appleton, *supra* note 146, at 13.

¹⁵⁴ *Maffezini*, ICSID Case No. ARB/97/7 ¶99.

¹⁵⁵ *Id.* ¶¶99; ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *supra* note 135, at 13.

¹⁵⁶ *Id.* ¶¶49-50; Fietta, *supra* note 137, at 133. The Commission of Arbitrators conceded that when viewed in isolation, dispute resolution procedures are a different subject matter than the substantive rights. *Maffezini*, ICSID Case No. ARB/97/7 ¶49. The situation changes, however, when the dispute resolution provision is viewed in connection with protecting rights generally. *Id.*

¹⁵⁷ *Maffezini*, ICSID Case No. ARB/97/7 ¶54. “Notwithstanding the fact that the basic treaty containing the clause does not refer expressly to dispute settlement as covered by the most favored nation clause, the Tribunal considers that there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights of traders under treaties of commerce.” *Id.*

arbitrary and discriminatory practices of host states, “it would be illogical to exclude from the scope of such protection the field of procedural justice.”¹⁵⁸

The Tribunal found further support for its decision by examining the practice of both Argentina and Spain with respect to their BITs with other countries.¹⁵⁹ Although at the time of the negotiation of the BIT at issue Argentina still sought to require some form of prior exhaustion of remedies, the Tribunal noted that Argentina had since abandoned that policy in favor of providing for direct submission of disputes to arbitration.¹⁶⁰ The Tribunal also noted that Spain’s preferred practice was to allow for arbitration after a six-month negotiation period.¹⁶¹ Because the Chile-Spain BIT also provided for a six-month negotiation period, the Tribunal suggested that “there were no public policy considerations that would be contravened by allowing the claimant to submit the dispute to arbitration without previously submitting it to the local courts.”¹⁶²

Perhaps realizing the potential reach of its decision, the Tribunal attempted to set “important limits” to the extension of an MFN clause in the dispute resolution context.¹⁶³ In particular, it noted that an investor should not be able to use an MFN clause to override public

¹⁵⁸ KATJA SCHOLZ, *HAVING YOUR PIE... AND EATING IT WITH ONE CHOPSTICK – MOST FAVOURED NATION CLAUSES AND PROCEDURAL RIGHTS 3* (2004), available at <http://www2.jura.uni-halle.de/telc/PolicyPaper5.pdf>.

¹⁵⁹ *Maffezini*, ICSID Case No. ARB/97/7 ¶¶57-60.

¹⁶⁰ *Id.* ¶57.

¹⁶¹ *Id.* ¶58.

¹⁶² Stephen D. Sutton, *Emilio Augustin Maffezini v. Kingdom of Spain and the ICSID Secretary-General’s Screening Power*, 21 *ARB. INT’L* 113, 120 (2005).

¹⁶³ *Maffezini*, ICSID Case No. ARB/97/7 ¶¶56, 62.

policy considerations that might have been considered fundamental conditions to agreement by the contracting states.¹⁶⁴ The Tribunal then identified four situations where its general rule regarding MFN clauses might not apply.¹⁶⁵ Finally, the Tribunal asserted that “a distinction has to be made between the legitimate extension of rights and benefits by means of the operation of the clause, on the one hand, and disruptive treaty-shopping that would play havoc with the policy objectives of underlying specific treaty provisions, on the other.”¹⁶⁶

2. *Siemens A.G. v. Argentine Republic*

In August 1996, the Argentine Republic (Argentina) began soliciting bids for the development of a system of migration control and personal identification.¹⁶⁷ Siemens’s Argentine affiliate won the bid and signed a contract with Argentina on October 6, 1998.¹⁶⁸

¹⁶⁴ *Id.* ¶62.

¹⁶⁵ *Id.* ¶63. The Tribunal set forth the following list of exceptions to the operation of an MFN clause: “i) The local remedies rule because it is a ‘fundamental rule of international law.’ ii) The fork in the road rule because otherwise it ‘would upset the finality of arrangements that many countries deem important as a matter of public policy.’ iii) Provision for a particular arbitration forum, such as ICSID. . . . iv) ‘A highly institutionalized system of arbitration that incorporates precise rules of procedure,’ such as in the NAFTA because ‘these very specific provisions reflect the precise will of the contracting parties.’” Appleton, *supra* note 146, at 14 (quoting *Maffezini*, ICSID Case No. ARB/97/7 ¶63). Interestingly, the Tribunal failed to provide any authority for the limitation to the scope of the MFN clauses. *Id.* (noting that “at least on commentator has accepted that the limitation was ‘invented’”).

¹⁶⁶ *Maffezini*, ICSID Case No. ARB/97/7 ¶63. These exceptions to the extension of an MFN clause appear problematic. As one commentator noted, “It seems incongruous to conclude that such provisions are so fundamentally important to the host state that they should never be avoided through the operation of an MFN clause if the state has voluntarily excluded them in another treaty.” Appleton, *supra* note 146, at 14.

¹⁶⁷ *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, Aug. 3, 2004, at ¶23, available at http://www.asil.org/ilib/Siemens_Argentina.pdf.

¹⁶⁸ *Id.* ¶25.

After a change in government in 1999, the contract was suspended.¹⁶⁹ Fewer than two years later, Argentina terminated the contract.¹⁷⁰ On May 23, 2002, ICSID received Siemens's request for arbitration against the Argentine Republic.¹⁷¹

In the request for arbitration, Siemens relied on the provisions of the Argentina-German BIT.¹⁷² Just as in *Maffezini*, this was insufficient to establish ICSID jurisdiction because the BIT required that an investor allow the domestic courts of the host state eighteen months to process the claim before being allowed to submit it to international arbitration.¹⁷³ In order to avoid the delay and expense of litigating in Argentina, Siemens asserted that the MFN clause in the Argentina-Germany BIT allowed it to receive the more favorable treatment available in the Argentina-Chile BIT.¹⁷⁴ This treatment permitted an investor to avoid first submitting a claim to the local courts before initiating arbitration.¹⁷⁵

In challenging ICSID's jurisdiction over the dispute, Argentina first argued that reliance on *Maffezini* was inappropriate because it had involved the significantly broader MFN clause of

¹⁶⁹ *Id.* ¶26. The contract was allegedly suspended because of technical problems. *Id.*

¹⁷⁰ *Id.* ¶26.

¹⁷¹ *Id.* ¶1.

¹⁷² *Id.* ¶27. Siemens is a corporation based in the Federal Republic of Germany. Siemens A.G., About Us, http://www.siemens.com/index.jsp?sdc_p=cfi1327885lmo1327903ps7t6uz1&sdc_bcpath=1327885.s_0,&sdc_sid=3800911433 (last visited Feb. 8, 2006).

¹⁷³ Appleton, *supra* note 146, at 20.

¹⁷⁴ *See Siemens*, ICSID Case No. ARB/02/8 ¶32.

¹⁷⁵ Luke Eric Peterson, *Tribunal Upholds Jurisdiction in Siemens v. Argentina; MFN Plays Procedural Role*, INVESTMENT L. & POL'Y WKLY. NEWS BULL., Aug. 23, 2004, available at http://www.iisd.org/pdf/2004/investment_investsd_aug23_2004.pdf.

the Argentina-Spain BIT.¹⁷⁶ Argentina also argued that the “relevant dispute resolution provisions of the Argentina-Germany BIT had been specifically negotiated and must not therefore be subject to amendment by virtue of the MFN clause.”¹⁷⁷ Moreover, Argentina suggested that when parties intended the scope of an MFN clause to encompass the dispute resolution system, they stated so expressly.¹⁷⁸ Later, Argentina asserted that limitations to state sovereignty should be interpreted restrictively.¹⁷⁹ Argentina further argued that Siemens’s interpretation of the scope of the MFN clause would deprive the dispute resolution provision in the Argentina-Germany BIT of any meaning – a result incompatible with generally accepted principles of treaty interpretation.¹⁸⁰

Argentina’s final argument was perhaps the most inspired. It maintained that if Siemens was “entitled to use the MFN clause to import advantageous aspects of the dispute resolution

¹⁷⁶ See *Siemens*, ICSID Case No. ARB/02/8 ¶34. As one commentator noted, “the MFN provisions contained within the Argentina-Germany BIT were seemingly not as wide as the provision in issue in the *Maffezini* case.” Fietta, *supra* note 137, at 134. Article III of the Argentina-Germany BIT contains the following MFN clause: “(1) None of the Contracting Parties shall accord in its territory to the investments of nationals or companies of the other Contracting Party or to investments in which they hold shares, a less favourable treatment than the treatment granted to the investments of its own nationals or companies or to the investments of nationals or companies of third States. (2) None of the Contracting Parties shall accord in its territory to nationals or companies of the other Contracting Party a less favourable treatment of activities related to investments than granted to its own nationals and companies or to the nationals of third States.” Appleton, *supra* note 146, at 20.

¹⁷⁷ Fietta, *supra* note 137, at 134; see *Siemens*, ICSID Case No. ARB/02/8 ¶¶48-50.

¹⁷⁸ See *Siemens*, ICSID Case No. ARB/02/8 ¶48. In support of this position, Argentina referred to several examples of countries specifically addressing whether MFN clauses should extend to affect dispute resolution provisions. See *id.*

¹⁷⁹ See *id.* ¶51.

¹⁸⁰ See *id.* ¶59. In particular, Argentina suggested that depriving the provision of any meaning would fall afoul of the Vienna Convention on the Law of Treaties. *Id.*

provisions of the Argentina-Chile BIT, then it should also be required to import the disadvantageous aspects of those provisions.”¹⁸¹ That is, one cannot pick and choose advantageous BIT clauses, but must instead take the BIT as a whole. In this case, importing the disadvantageous provisions of the Argentina-Chile BIT might have precluded Siemens’s claim.¹⁸² Failure to do so, Argentina asserted, would offer Siemens treatment more favorable than that available to Chilean investors under their BIT.¹⁸³ Therefore, Argentina bluntly stated that MFN clauses “do not serve to create a super investment treaty that includes the main benefits of each different treaty.”¹⁸⁴

Ultimately, the Tribunal agreed with Siemens.¹⁸⁵ Consequently, it granted itself jurisdiction over the dispute.¹⁸⁶ To begin, the Tribunal found interpretive guidance in the BIT’s object and purpose – “to create favorable conditions for investments and to stimulate private initiative.”¹⁸⁷ In response to Argentina’s contention that reliance on *Maffezini* was inappropriate,

¹⁸¹ Fietta, *supra* note 137, at 134; *see Siemens*, ICSID Case No. ARB/02/8 ¶124.

¹⁸² The Argentina-Chile BIT might have excluded the type of indirect claim that Siemens was bringing against Argentina. *See Siemens*, ICSID Case No. ARB/02/8 ¶124. Because Siemens had acted through a wholly-owned affiliate in Argentina, its claim could have been considered indirect for the purposes of the Argentina-Chile BIT. *See id.* ¶¶23, 123. The Argentina-Germany BIT, on the other hand, allowed indirect claims against the host country.

¹⁸³ *See Siemens*, ICSID Case No. ARB/02/8 ¶124. Argentina claimed that providing this more favorable treatment was contrary to the operation of the MFN clause. *Id.*

¹⁸⁴ *Id.* To do so would frustrate the reasonable expectations of the parties when they drafted their BIT. Moreover, it would provide economically weaker countries with benefits disproportionate to their bargaining power; thereby, giving weaker states a windfall.

¹⁸⁵ *See id.* ¶184.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* ¶81. The Tribunal notes that this approach is appropriate in light of Article 31(1) of the Vienna Convention on the Law of Treaties. *Id.* That article requires that a treaty “be interpreted

the Tribunal noted the difference between the MFN clauses involved but still accepted Siemens's position.¹⁸⁸ It did so on the basis that access to certain dispute resolution procedures was considered a distinctive feature of the Argentina-Germany BIT.¹⁸⁹ In fact, the status of the dispute resolution provisions indicated that they were considered part of the protections offered by the treaty.¹⁹⁰ As a result, access to such provisions was considered part of the "treatment" that the MFN clause guaranteed to investors.¹⁹¹ Moreover, the Tribunal noted that the use of the term "treatment" in the clause was so general that it was inappropriate to limit the application of the MFN clause except where specifically agreed by the parties.¹⁹² Finding no specific exceptions, the Tribunal decided that the MFN clause would apply to dispute resolution provisions.¹⁹³ Having defined the scope of the MFN clause, the Tribunal addressed Argentina's argument regarding importing both advantageous and disadvantageous provisions of a treaty when relying on such a clause. Despite recognizing that "the disadvantages may have been a

in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." *Id.* (quoting Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331, 340).

¹⁸⁸ *See id.* ¶103.

¹⁸⁹ *See Fietta, supra* note 137, at 134; *Siemens*, ICSID Case No. ARB/02/8 ¶102.

¹⁹⁰ *See Siemens*, ICSID Case No. ARB/02/8 ¶102.

¹⁹¹ *See id.* Both provisions in Article III of the Argentina-Germany BIT required that investors receive "treatment" no less favorable than that extended to nationals or companies of third states. *See supra* note 176.

¹⁹² *Siemens*, ICSID Case No. ARB/02/8 ¶106.

¹⁹³ *See id.*

trade-off for claimed advantages,” the Tribunal asserted that, as the name indicates, MFN clauses relate only to “more favorable treatment.”¹⁹⁴

D. Narrow Interpretations

In both cases in this section, investors relying on the *Maffezini* decision claimed rights provided for in a BIT other than the one that governed their dispute. Arguing that MFN clauses should be interpreted broadly, the investors asserted that they were entitled to select specific rights equivalent to those most advantageous to the investors’ aims provided in other BITs. In particular, the investors argued that fulfilling the purpose of the BIT at issue required interpreting the MFN clause so as to encompass dispute resolution provisions because they were essential to the protection that the BIT intended to provide. In both cases, the arbitral tribunals interpreted the scope of the MFN clauses narrowly.

1. *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*

In 1992, the Hashemite Kingdom of Jordan (Jordan) requested bids for a public works contract called “Construction of the Karameh Dam Project.”¹⁹⁵ Two Italian companies, Salini Costruttori S.p.A. (Salini) and Italstrade S.p.A. (Italstrade), jointly submitted an offer in May

¹⁹⁴ *Id.* ¶120. The Tribunal also noted that it concurred with *Maffezini* that MFN clauses could not be used to override certain public policy considerations that the contracting parties had thought essential to agreement. *See id.* ¶109. Taking the analysis one step further, the Tribunal stated that it would view a requirement essential to the agreement if it had been consistently included in other treaties made by the host country. *See id.* ¶105. At least one commentator has noted two problems with this approach. *See* Appleton, *supra* note 146, at 21. First, looking to other treaties for consistent practice seems inconsistent with the Vienna Convention on the Law of Treaties which fails to list such treaties as relevant to assist in interpreting treaties. *Id.* Second, the Tribunal fails to address why a provision might be left out of a treaty if it represented an important public policy. *Id.*

¹⁹⁵ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICISD Case No. ARB/02/13, Decision on Jurisdiction, Nov. 29, 2004, ¶14, *available at* <http://www.worldbank.org/icsid/cases/salini-decision.pdf>.

1993 and were awarded the contract on November 4, 1993.¹⁹⁶ Having completed the work in October 1997, Salini and Italstrade submitted a final statement setting forth the amount owed them.¹⁹⁷ Following Jordan's refusal to pay, Salini and Italstrade filed a request for arbitration that ICSID received on August 12, 2002.¹⁹⁸

In the request for arbitration, Salini and Italstrade relied on the provisions of the Italy-Jordan BIT.¹⁹⁹ Reliance on the BIT, however, may have required Salini and Italstrade to resort to the less favorable dispute resolution provisions of the contract.²⁰⁰ In an attempt to avoid these less favorable provisions, Salini and Italstrade invoked the MFN clause in the Italy-Jordan BIT.²⁰¹ In effect, Salini and Italstrade asserted that the MFN clause should apply to procedural rights as decided in *Maffezini*.²⁰² The result of such an application was to grant the investors

¹⁹⁶ *Id.* The two companies acted as a joint venture for the purposes of the contract with Jordan. *Id.*

¹⁹⁷ *See id.* ¶15. Salini and Italstrade claimed an amount equivalent to approximately \$28 million. *Id.*

¹⁹⁸ *See id.* ¶¶17, 1. On September 12, 2000, Salini and Italstrade received a letter from Jordan's Secretary General of the Ministry of Water and Irrigation that stated Jordan's refusal to pay a sum in excess \$49,140. *Id.* ¶17, 15. This sum was the amount that Jordan's Engineer calculated as necessary to pay the contractors. *See id.* ¶15.

¹⁹⁹ *See id.* ¶17.

²⁰⁰ Article 9(2) of the Italy-Jordan BIT contained the following provision: "In case the investor and an entity of the Contracting Parties have stipulated an investment Agreement, the procedure foreseen in such investment Agreement shall apply." *Id.* ¶66.

²⁰¹ *See id.* ¶21. Article 3 of the Italy-Jordan BIT contains the following MFN provisions: "1. Both Contracting Parties, within the bounds of their own territory, shall grant investments effected by, and the income accruing to, investors of the other 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." *Id.* ¶104.

²⁰² *See id.* ¶¶36, 102.

access to the more favorable dispute resolution provisions of the Jordan-USA BIT and the Jordan-UK BIT.²⁰³ Under those BITs, investors are “entitled to refer to ICSID any dispute arising from their construction contracts.”²⁰⁴

In response to the MFN argument, Jordan asserted that the clause could not apply to procedural obligations.²⁰⁵ Jordan further maintained that the clause could not override the clear intent of the parties.²⁰⁶ Moreover, Jordan noted that the *Maffezini* decision could not bind the Tribunal and should not be followed.²⁰⁷

Ultimately, the Tribunal agreed with Jordan.²⁰⁸ Consequently, it dismissed the claim for lack of jurisdiction.²⁰⁹ Before announcing its decision, the Tribunal “observed that some MFN clauses, such as those contained in many [United Kingdom] BITs, provide expressly that they extend to dispute resolution issues, whereas others, such as the clause in *Maffezini*, contain broad

²⁰³ *See id.* ¶102. Article IX of the Jordan-USA BIT gives investors “the right to submit investment disputes with the host State to ICSID regardless of any clause in the investment agreement providing for a different dispute settlement mechanism.” *Id.* ¶21.

²⁰⁴ *Id.* ¶102.

²⁰⁵ *See id.* ¶103.

²⁰⁶ *See id.* The clear intent of the parties was expressed in Article 9(2) of the Italy-Jordan BIT. *Id.* Jordan further asserted that ““even assuming that the most-favoured-nation clause could, in theory, apply to dispute settlement provisions, it is subject to overriding public policy considerations’ recognized by the ICSID Tribunal itself in the *Maffezini* case.” *Id.*

²⁰⁷ *See id.*

²⁰⁸ *See id.* ¶119. “[T]he Tribunal concludes that Article 3 of the BIT does not apply insofar as dispute settlement clauses are concerned. . . . In the event that, as in this case, the dispute is between a foreign investor and an entity of the Jordanian State, the contractual disputes between them must, in accordance with Article 9(2), be settled under the procedure set forth in the investment agreement.” *Id.*

²⁰⁹ *Id.*

language referring to ‘all matters’ subject to the agreement.”²¹⁰ The Tribunal then proceeded to highlight four factors supporting its decision.²¹¹ First, the Italy-Jordan BIT did not expressly provide that the MFN clause would apply to dispute resolution.²¹² Second, the wording of the MFN clause at issue was significantly narrower than that in *Maffezini*.²¹³ Third, there was no indication that the parties intended the clause to apply to dispute resolution issues.²¹⁴ In fact, the Tribunal noted that Article 9(2) of the Italy-Jordan BIT demonstrated the parties’ express intention that very specific dispute resolution provisions should apply to investors covered by the BIT.²¹⁵ Fourth, the Tribunal noted that Salini and Italstrade had failed to provide evidence of any Jordanian or Italian practice that would support their claim.²¹⁶

In reaching its decision, the Tribunal sought to distinguish *Maffezini* rather than reject it.²¹⁷ It did so by suggesting that the *Maffezini* decision, like the *Ambatielos* decision, was

²¹⁰ Fietta, *supra* note 137, at 135.

²¹¹ *See Salini*, ICSID Case No. ARB/02/13 ¶118.

²¹² *See id.* “Indeed, Article 3 of the BIT between Italy and Jordan does not include any provision extending its scope of application to dispute settlement.” *Id.*

²¹³ *See id.* “[The BIT] does not envisage ‘all rights or all matters covered by the agreement.’” *Id.*

²¹⁴ *See id.* “[T]he Claimants have submitted nothing from which it *might* be established that the common intention of the Parties was to have the most-favored-nation clause apply to dispute settlement.” *Id.*

²¹⁵ *See id.* “[T]he intention as expressed in Article 9(2) of the BIT was to exclude from ICSID jurisdiction contractual disputes between an investor and *an* entity of a State Party in order that such disputes might be settled in accordance with the procedures set forth in the investment agreements.” *Id.*

²¹⁶ *See id.* “[T]he Claimants have not cited any practice in Jordan or Italy in support of their claims.” *Id.*

²¹⁷ *See Fietta, supra* note 137, at 135.

justifiable because of the broad wording of the MFN clause.²¹⁸ It is important to note, however, that the *Maffezini* Tribunal did not base its decision on the breadth of the MFN clause in the Argentina-Spain BIT.²¹⁹ Instead, it asserted that “there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors.”²²⁰ This language implies that the *Maffezini* Tribunal might have been more sympathetic to Salini and Italstrade’s claim for protection under the more favorable dispute resolution provisions of other Jordanian BITs. Following closer examination, it seems that *Salini* marked “a decisive step away from the expansive approach that had been adopted in *Maffezini* and back towards application of basic principles of international law to the facts of each individual case.”²²¹

Although the *Salini* Tribunal did not have the opportunity to comment on the case, commentators suggest that it would have rejected the rationale behind the *Siemens* decision.²²² In particular, it seems likely that the *Salini* Tribunal would have rejected an expansive interpretation because of the more restrictive language of the MFN clause in the Argentina-Germany BIT.

2. Plama Consortium Limited v. Republic of Bulgaria

²¹⁸ See *Salini*, ICSID Case No. ARB/02/13 ¶117.

²¹⁹ See Appleton, *supra* note 146, at 22.

²²⁰ See *id.* (quoting *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, Jan. 25, 2000, ¶1); *supra* notes 157-58 and accompanying text.

²²¹ Fietta, *supra* note 137, at 136.

²²² See *id.* (“Indeed, it is difficult to envisage the tribunal being able to support [the *Siemens*] decision, given that none of the distinguishing features of *Maffezini* applied in that case.”); Appleton, *supra* note 146, at 22 (“The *Salini v. Jordan* decision is difficult to reconcile with that in *Siemens v. Argentina*.”).

In 1998, a Cypriot company, which eventually became Plama Consortium Limited (Plama), purchased an equity interest in a Bulgarian company that owned an oil refinery.²²³ Plama later claimed that the Republic of Bulgaria (Bulgaria) deliberately interfered with the operation of the refinery in such a way as to cause material damage to the investment.²²⁴ In response to this interference, Plama, by a letter of December 24, 2002, filed a request for arbitration with ICSID.²²⁵

In the request for arbitration, Plama relied on the Energy Charter Treaty (ECT)²²⁶ and the Cyprus-Bulgaria BIT.²²⁷ Although the ICSID Tribunal eventually found jurisdiction under the ECT, this comment is concerned with the Tribunal's decision regarding the BIT claim.²²⁸ Notwithstanding Plama's reliance, the express provisions of the Cyprus-Bulgaria BIT were insufficient to establish ICSID jurisdiction.²²⁹ In fact, the BIT contained a very narrow

²²³ See *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, Feb. 8, 2005, ¶19; Appleton & Associates International Lawyers, *Plama Consortium Limited v. Republic of Bulgaria*, 1 APPLETON'S INT'L INVESTMENT L. & ARB. NEWS, Mar. 2005, at 11.

²²⁴ See *Plama*, ICSID Case No. ARB/03/24 ¶21; Appleton & Associates International Lawyers, *supra* note 223, at 11; *Judicial and Related Documents: International Centre for the Settlement of Investment Disputes (ICSID): Plama Consortium Limited v. The Republic of Bulgaria, Decision on Jurisdiction (February 8, 2005)*, INT'L L. IN BRIEF (The American Society of International Law), Feb. 28, 2005, <http://www.asil.org/ilib/2005/02/ilib050228.htm>.

²²⁵ See *Plama*, ICSID Case No. ARB/03/24 ¶1.

²²⁶ Energy Charter Treaty, Dec. 17, 1998, 2080 U.N.T.S. 100.

²²⁷ See *Plama*, ICSID Case No. ARB/03/24 ¶1; Fietta, *supra* note 137, at 136.

²²⁸ See *Plama*, ICSID Case No. ARB/03/24 ¶240 (“Under Article 26 ECT and the ICSID Convention, the Tribunal has jurisdiction to decide on the merits the Claimant’s claims against the Respondent for alleged breaches of Part III of the ECT.”); Appleton & Associates International Lawyers, *supra* note 223, at 11.

²²⁹ See *Plama*, ICSID Case No. ARB/03/24 ¶26.

arbitration clause that permitted ad hoc arbitration²³⁰ only in cases involving the amount of compensation owed to foreign investors affected by expropriation.²³¹ To avoid the dispute resolution provisions of the governing BIT, Plama asserted that the BIT's MFN clause provided a means of incorporating the more favorable provisions of other Bulgarian BITs.²³²

In response to Plama's MFN clause interpretation, Bulgaria made three basic arguments.²³³ First, it maintained that in the absence of evidence to the contrary an MFN clause cannot provide a basis for jurisdiction where it would not exist under the governing BIT.²³⁴ Second, it asserted that dispute resolution did not fall within the scope of the MFN clause in the

²³⁰ “Ad hoc arbitrations are not conducted under the auspices or supervision of an arbitral institution. Instead, parties simply agree to arbitrate, without designating any institution to administer their arbitration.” GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 12 (2d ed. 2001).

²³¹ See *Plama*, ICSID Case No. ARB/03/24 ¶26; Fietta, *supra* note 137, at 136; *Judicial and Related Documents, supra* note 224; Luke Eric Peterson, *Tribunal Finds Jurisdiction Under Energy Charter, but Reigns in MFN Shopping*, INVESTMENT L. & POL'Y WKLY. NEWS BULL., Mar. 10, 2005, available at http://www.iisd.org/pdf/2005/investment_investsd_mar10_2005.pdf. In addition to allowing international arbitration only for expropriation issues, Article 4 of the Cyprus-Bulgaria BIT specified that the arbitration procedure was determined by the UNICTRAL Arbitration Rules. See *Plama*, ICSID Case No. ARB/03/24 ¶26.

²³² See *Plama*, ICSID Case No. ARB/03/24 ¶183. “The mechanism for arriving at that conclusion is, according to the Claimant, the following: (a) the Claimant qualifies as an investor under the Bulgaria-Cyprus BIT; (b) the Bulgaria-Cyprus BIT contains an MFN provision; (c) the MFN provision in the Bulgaria-Cyprus BIT applies to all aspects of “treatment;” and (d) “treatment” covers settlement of disputes provisions in other BITs to which Bulgaria is a Contracting Party. In that connection, the Claimant relies, *inter alia*, on the Bulgaria-Finland BIT.” *Id.* The MFN clause in Article 3 of the Cyprus-Bulgaria BIT includes the following language: “1. Each Contracting Party shall apply to the investments in its territory by investors of the other Contracting Party a treatment which is not less favorable than that accorded to investments by investors of third states.” *Id.* ¶26.

²³³ *Id.* ¶37.

²³⁴ *Id.*

Cyprus-Bulgaria BIT.²³⁵ Third, it stated that Plama could not override the clear policy considerations expressed in the BIT by invoking the MFN clause.²³⁶

Ultimately, the Tribunal agreed with Bulgaria regarding the proper scope of the MFN clause.²³⁷ In rejecting an expansive interpretation of the clause, the Tribunal first addressed the *Maffezini* decision.²³⁸ In particular, it asserted that the *Maffezini* Tribunal’s declaration that “dispute settlement arrangements are inextricably related to protection of foreign investors,” was legally insufficient to demonstrate that the parties to the BIT intended the MFN clause to cover dispute resolution.²³⁹ The Tribunal then went on to discuss the negotiating history between the parties.²⁴⁰ Following the collapse of the communist regime in Bulgaria, the parties tried and failed to revise the dispute resolution provisions in the Cyprus-Bulgaria BIT.²⁴¹ The Tribunal inferred from these negotiations that the parties did not consider that the MFN clause would extend to dispute settlement.²⁴² As the Tribunal noted, “Doubts as to the parties’ clear and unambiguous intention can arise if the agreement to arbitrate is to be reached by incorporation

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.* ¶184.

²³⁸ *See id.* ¶193.

²³⁹ *Id.*

²⁴⁰ *See id.* ¶195.

²⁴¹ *See id.*

²⁴² *See id.* If Cyprus and Bulgaria believed that the MFN clause would extend to dispute settlement provisions, further negotiation would have been unnecessary and unhelpful.

by reference.”²⁴³ Next, the Tribunal asserted that the fact that instruments like the North American Free Trade Agreement (NAFTA)²⁴⁴ specifically excluded dispute resolution provisions from the scope of an MFN clause did not indicate that if such an exclusion was lacking, then dispute resolution provisions should be deemed incorporated.²⁴⁵ Instead, “the intention to incorporate dispute settlement provisions must be clearly and unambiguously expressed.”²⁴⁶

Although the Tribunal stopped short of expressly rejecting the *Maffezini* decision, it proposed a drastically different approach to MFN clauses: rather than assuming that the MFN clause applied to dispute settlement provisions unless certain exceptions applied, the Tribunal asserted that such clauses should *not* apply to dispute settlement except where it was the clear intention of the parties.²⁴⁷ As at least one commentator noted, “This effectively reversed the statements of principle set out in the *Maffezini* decision,” which held that MFN clauses *should*

²⁴³ *Id.* ¶199.

²⁴⁴ North American Free Trade Agreement, U.S.-Can.-Mex., Jan. 1, 1994, 107 Stat. 2057.

²⁴⁵ *See Plama*, ICSID Case No. ARB/03/24 ¶203

²⁴⁶ *Id.* ¶204. An example of such practice is found in the UK Model BIT. *See id.* Article 3(3) of the Model BIT expressly includes dispute settlement within the scope of the MFN clause. *See id.*

²⁴⁷ A recent jurisdiction hearing before an ICSID tribunal affirmed the *Maffezini* approach by ruling that “[u]nless it appears clearly that the state parties to a BIT or the parties to a particular investment agreement settled on a different method for dispute resolution of disputes that may arise, most-favored-nation provisions in BITs should be understood to be applicable to dispute settlement.” Luke Eric Peterson, *Tribunal OKs Treaty-Shopping for Better Arbitration Options in Gas Natural Case*, INVESTMENT L. & POL’Y NEWS BULL., July 13, 2005 (quoting *Gas Natural SDG, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions of Jurisdiction, June 17, 2005, <http://www.asil.org/pdfs/GasNat.v.Argentina.pdf>), http://www.bilaterals.org/article.php3?id_article=2427.

apply to dispute settlement in the absence of the clear intention of the parties.²⁴⁸ The Tribunal further tipped its hand by commenting that the *Siemens* decision “illustrates the danger caused by the manner in which the *Maffezini* decision has approached the question.”²⁴⁹

V. THE PROBLEM WITH UNCERTAINTY

Given that the number of arbitrations involving investment treaties has exploded over the last five years, the existence of some inconsistent decisions is understandable.²⁵⁰ Unfortunately, the increasing number of inconsistencies has caused concern about whether the current ad hoc system of international arbitrations is appropriate for resolving treaty disputes.²⁵¹ Although international arbitration has largely replaced domestic courts in settling investment disputes, it lacks some of the more familiar and important aspects of a classic judicial system.²⁵² Specifically, international arbitration decisions often lack the finality and comparative uniformity of traditional court rulings.²⁵³

²⁴⁸ Fietta, *supra* note 137, at 137. Fietta further notes that “had the tribunal agreed with the general approach taken in the *Maffezini* case, it could have rejected the claimant’s arguments on the basis of one of the public policy-related exceptions to the general rule identified in that case. Instead, it went much further by reversing the general rule.” *Id.*

²⁴⁹ *See Plama*, ICSID Case No. ARB/03/24 ¶226; Fietta, *supra* note 137, at 137.

²⁵⁰ *See Franck*, *supra* note 2, at 1521. “A single act or measure of a host State may adversely affect more than one investor. The investors, in turn, may each submit the resulting disputes to arbitration under the terms of an investment treaty of the State that covers the investors. There may as a result be as many arbitration proceedings as affected investors. The scope for inconsistent decisions in regard to essentially the same situation is obvious.” Antonio R. Parra, *Provisions on the Settlement of Investment Disputes in Modern Investment Law, Bilateral Investment Treaties and Multilateral Instruments on Investment*, 12 ICSID REV. – FOREIGN INVESTMENT L.J. 287, 352 (1997).

²⁵¹ *See Franck*, *supra* note 2, at 1582.

²⁵² *See Charles N. Brower*, *A Crisis of Legitimacy*, NAT’L L.J., Oct. 7, 2002, at B9.

²⁵³ *See id.*

Not surprisingly, the ICSID arbitration system shares these shortcomings. As the four cases addressed here demonstrate, ICSID arbitral tribunals do not present a unified approach to deciding the appropriate effect of MFN clauses on dispute settlement provisions.²⁵⁴ This type of inconsistency causes two problems worthy of further attention.

First, inconsistent ICSID tribunal decisions regarding essentially the same issue may foster a loss of legitimacy.²⁵⁵ One of the primary elements of legitimacy is coherence.²⁵⁶ Coherence “requires consistency of interpretation and application of rules in order to promote perceptions of fairness and justice.”²⁵⁷ Unfortunately, the different approaches to and interpretations of the scope of MFN clauses adopted by ICSID tribunals demonstrate a marked lack of coherence. Not surprisingly, this lack of coherence threatens to raise “the specter of a legitimacy crisis.”²⁵⁸

Second, inconsistent ICSID tribunal decisions foster a loss of certainty. Without question, different approaches and interpretations will result in a lack of certainty regarding the meaning and application of MFN clauses. This, in turn, will result in confusion regarding both

²⁵⁴ See *supra* notes 141-249 and accompanying text.

²⁵⁵ It is not hard to believe that “any system where diametrically opposed decisions can legally coexist cannot last long.” Michael D. Goldhaber, *Wanted: A World Investment Court*, AM. LAW./FOCUS EUR., Summer 2004 (quoting Nigel Blackaby of Freshfields Bruckhaus Deringer), <http://www.americanlawyer.com/focuseurope/investmentcourt04.html>. In discussing the status of international arbitration generally, Charles Brower has suggested that inconsistent decisions and the shortcomings of arbitration systems are causing a growing crisis of legitimacy. See Brower, *supra* note 252.

²⁵⁶ See Franck, *supra* note 2, at 1585.

²⁵⁷ *Id.* Although “[e]stablishing such a coherent jurisprudence is difficult . . . with new and relatively untested standards,” the need for it is clear. *Id.*

²⁵⁸ *Id.* at 1586.

investor rights and host-state obligations regarding dispute settlement. Ultimately, this type of confusion frustrates one of the primary objectives behind the BIT movement – eliminating uncertainty regarding the substantive and procedural aspects of investment protection.²⁵⁹

Although the effects of the loss of both legitimacy and certainty in the ICSID regime are speculative at this point, they bear mentioning. Perhaps the most likely effect of the loss of legitimacy is an increased number of challenges to ICSID tribunal decisions. Whether this occurs through ICSID mechanisms or through a host state’s domestic courts when an investor attempts to collect an award, it will challenge belief in ICSID’s utility.²⁶⁰ Another potential, although less likely, effect is an exodus of states from the ICSID Convention. If the enforcement mechanism of the Convention no longer enjoys legitimacy or fails to provide certainty, it is reasonable to suspect that some states might withdraw consent to ICSID arbitration.

VI. APPROACHES TO LIMITING THE EFFECT OF INCONSISTENT MFN CLAUSE DECISIONS

Although there are several potential approaches to limiting the negative effects of inconsistent MFN clause decisions by ICSID tribunals, some are more practical than others. The purpose of this section is to highlight a number of solutions and address the feasibility of each.

²⁵⁹ See Salacuse & Sullivan, *supra* note 3, at 76. “The lack of consensus on the customary international law applicable to foreign investments also created uncertainty in the minds of investors as to the degree of protection they could expect under international law. To gain greater *certainty* and to counter the threat of adverse national law and regulation, the host countries of these investors sought to conclude a series of BITs that would provide clear rules and effective enforcement mechanisms, at least with regard to their treaty partners.” *Id.* (emphasis added).

²⁶⁰ Facing a potential deluge of adverse ICSID judgments following its economic crisis of early 2002, “Argentina executive branch authorities have already indicated to the press that any attempt to enforce an ICSID award within Argentina will likely be challenged on constitutional grounds in Argentine courts.” Paolo Di Rosa, *The Recent Wave of Arbitrations Against Argentina Under Bilateral Investment Treaties: Background and Principal Legal Issues*, 36 U. MIAMI INTER-AM. L. REV. 41, 73 (2004).

A. Impractical Approaches

1. Annulment of inconsistent decisions

One of the purposes of international investment arbitration is to “keep dispute resolution out of the courts of one of the parties and protect litigants from the costs of plodding through the long corridors of national judicial bureaucracies.”²⁶¹ Accordingly, the ICSID Convention provides a self-contained control mechanism which prevents domestic courts from reviewing ICSID tribunal decisions.²⁶² Article 52 of the ICSID Convention contains this mechanism and allows for annulment of awards in only a very limited number of circumstances.²⁶³ Here, it is important to note that an annulment proceeding does not allow review of the legal merits of a decision.²⁶⁴ Rather, it provides for an ad hoc committee of three arbitrators appointed by ICSID to examine the procedural propriety of the award.²⁶⁵ In the event that the committee finds one of the enumerated defects, it may annul the award completely or in part.²⁶⁶

²⁶¹ Nmehielle, *supra* note 6, at 41-42 (2001) (quoting Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 1989 DUKE L.J. 739, 743).

²⁶² *See id.* at 42; CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 889 (2001) (noting that “domestic courts have not power of review over ICSID awards).

²⁶³ International Convention for the Settlement of Investment Disputes art. 52(1), Mar. 18, 1965, 17 U.S.T. 1290, 575 U.N.T.S 192. Annulment of an award is permitted on one or more of the following grounds: “(a) the Tribunal was not properly constituted; (b) the Tribunal has manifestly exceeded its powers; (c) there was corruption on the part of a member of the Tribunal; (d) there has been a serious departure from a fundamental rule of procedure; or (e) the award has failed to state the reasons on which it is based.” *See id.*

²⁶⁴ *See* Franck, *supra* note 2, at 1547.

²⁶⁵ *See id.*; International Convention for the Settlement of Investment Disputes art. 52(3), Mar. 18, 1965, 17 U.S.T. 1290, 575 U.N.T.S 192.

²⁶⁶ Franck, *supra* note 2, at 1547.

Ultimately, although the annulment mechanism is a useful aspect of the protection offered by ICSID, it lacks the ability to review inconsistent decisions for errors of substantive law.²⁶⁷ Consequently, it is inappropriate as a forum for resolving the inconsistency regarding whether MFN clauses should encompass dispute resolution provisions.²⁶⁸

2. Amending the ICSID Convention

Another potential approach to limiting the effect of the inconsistent MFN clause decisions is to amend the ICSID Convention. Although it is unclear how such an amendment might look, it seems that careful drafting would create a provision that either expressly endorsed or rejected the application of MFN clauses to dispute resolution provisions in the absence of an expression by the parties.²⁶⁹ Despite the relatively straightforward nature of this solution, the amendment provisions of the ICSID Convention make it impractical.²⁷⁰ According to Article 66(1), “each amendment shall enter into force 30 days after . . . all Contracting States have ratified, accepted or approved the amendment.”²⁷¹ Considering that the number of Contracting

²⁶⁷ See *supra* note 264 and accompanying text.

²⁶⁸ Further evidence of the inability of the annulment mechanism to address inconsistent decisions is the fact that even if the committee found a reason to annul an inconsistent decision, a new decision on the merits of the case is available only after the claim is submitted to a new tribunal. See Nmehielle, *supra* note 6, at 43. Considering that there is no guarantee that a new tribunal would rule differently or act to harmonize inconsistent decisions, the annulment mechanism proves unhelpful in this context. In fact, one commentator noted that “because legal errors cannot be corrected in ICSID awards, the possibility of inconsistent awards is an accepted reality at ICSID, and the correctness of decisions has been sacrificed for the sake of finality.” Franck, *supra* note 2, at 1548.

²⁶⁹ For example: Unless otherwise expressly agreed by the parties, no MFN clause shall apply to the express dispute settlement provisions contained in their bilateral investment treaty.

²⁷⁰ See Sedlak, *supra* note 7, at 157.

²⁷¹ International Convention for the Settlement of Investment Disputes art. 66(1), Mar. 18, 1965, 17 U.S.T. 1295, 575 U.N.T.S. 200.

States is approaching 150, this process appears prohibitively unwieldy.²⁷² Moreover, as the number of Contracting States continues to grow, the chance of a successful amendment continues to shrink.²⁷³

3. Creating an appellate system

Although several suggestions for creating an appellate system exist, one stands out.²⁷⁴

The creation of an Investment Arbitration Appellate Court appears uniquely suited to successfully addressing the inconsistent decisions of arbitral tribunals. Among its attractions is the fact that “a single, unified, permanent body charged with developing international law and creating consistent jurisprudence will promote legitimacy more than disaggregated arbitrations that come to different conclusions on the same issue.”²⁷⁵ The ultimate effect of such an appellate body would be the harmonization of decisions regarding disputed legal interpretations.²⁷⁶

Despite the potential utility of an Investment Arbitration Appellate Court, its creation seems unlikely. Although it would not require the unanimous consent of all parties to the ICSID Convention, creating such an appellate court would require a significant number of signatories.

²⁷² See ICSID, List of Contracting States, <http://www.worldbank.org/icsid/constate/c-states-en.htm> (last visited Feb. 13, 2006); Sedlak, *supra* note 7, at 157 (noting that “logistically [the amendment] process becomes unwieldy to the point of being impractical”). In fact, as of 2001, no amendment proposal had even been made. SCHREUER, *supra* note 260, at 1265.

²⁷³ See Sedlak, *supra* note 7, at 157.

²⁷⁴ See Franck, *supra* note 2, at 1606-1610, 1617-1625.

²⁷⁵ See *id.* at 1617.

²⁷⁶ See *id.* at 1619-20. Considering the remarkable similarity of investment treaty provisions, this type of harmonization would go a long way toward granting investors and host countries certainty regarding their respective rights and obligations. See *id.* See generally Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 *FORDHAM L. REV.* 1521, 1548 (2005), for an extensive discussion of the utility and organization of an Investment Arbitration Appellate Court.

Failure on this point would prevent the court from achieving the sort of international credibility needed to meet its objective of unifying standards of investment treaty jurisprudence.

B. A Practical Approach

In contrast to other approaches that require the assent of a prohibitively large number of states, the legislative (better drafting) approach requires the assent of only two.²⁷⁷ In essence, the approach requires the parties to a BIT to expressly state the proper scope of the applicable MFN clause. Whether the parties decide to expand the clause to encompass dispute settlement provisions is irrelevant. In fact, evidence of both expansive and narrow interpretations already exists. For example, the United Kingdom includes expansive language in its BITs,²⁷⁸ while the United States includes narrow language.²⁷⁹

²⁷⁷ It is important to remember that the difficulties with creating multilateral investment treaties eventually led to the emergence of the bilateral negotiation of investment treaties. *Supra* notes 41-44 and accompanying text. Similarly, here, the difficulties inherent in amending the ICSID Convention or in creating an Investment Arbitration Appellate Court seem to have already driven parties to reevaluate and retool their approach to BITs.

²⁷⁸ Article 3(3) of the U.K. Model BIT, which is part of the MFN clause, contains the following language: “For avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement. [Articles 8 and 9 of the UK Model BIT provide for dispute settlement].” Fietta, *supra* note 137, at 136.

²⁷⁹ Articles 4(1) and 4(2) of the U.S. Model BIT, which contain the MFN clause, expressly provide that the clause applies only with “respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.” 2004 United States Model Bilateral Investment Treaty arts. 4(1), (2) http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf (last visited Feb. 13, 2006). Noticeably absent from the list of things covered by the MFN clause is dispute settlement provisions. Given its express language, it is clear that the United States intends to exclude such provisions from the scope of the MFN clause. Further evidence of this U.S. preference is found in the draft text of the Central American Free Trade Agreement (CAFTA). In the draft, a footnote attached to the MFN clause in article 10.4 expressly excludes the expansion of the clause to issues involving dispute settlement. The Dominican Republic – Central America – United States Free Trade Agreement art. 10.4, http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/asset_upload_file328_4718.pdf (last visited Feb. 13, 2006); see *CAFTA: Effect*

In addition to resolving any ambiguity regarding the scope of MFN clauses in future treaties, the adoption of an express policy by one of the signatories may help resolve the issue for BITs that are already in force.²⁸⁰ Specifically, the adoption of a policy to define the scope of the MFN clause within the provisions of the BIT itself demonstrates a state's public policy. This, in turn, may prove sufficient to meet the public policy exception set forth in the *Maffezini* decision.²⁸¹ As a result, when faced with a claim, a host state that opposes an expansive interpretation may credibly rely on its demonstrable expression of public policy.²⁸²

VII. CONCLUSION

Currently, international investment protection depends almost exclusively on a complex and growing web of BITs. Although the treaties themselves provide for significant substantive and procedural protection, these rights are of questionable value without a neutral and well-respected forum for dispute settlement. Fortunately, such a forum exists in ICSID. Unfortunately, a series of conflicting decisions regarding the proper scope of MFN clauses threatens to cause a crisis of legitimacy and frustrate the BIT regime's goal of providing

on Investment Arbitrations, PUB. INT'L L. NEWS (Freshfields Bruckhaus Deringer), Mar./Apr. 2004, at 1, 2, http://www.freshfields.com/practice/pil/publications/pil_news/7996.pdf (last visited Feb. 13, 2006).

²⁸⁰ This possibility is essential to the practicality of the legislative approach. Without it, the approach would require renegotiating thousands of BITs in order to effectively remedy the prospect of inconsistent decisions. Such a renegotiation is understandably impractical. Franck, *supra* note 2, at 1589.

²⁸¹ See *supra* notes 163-66 and accompanying text.

²⁸² Although this position is far from failsafe, it seems credible enough to qualify as a public policy exception under both the *Maffezini* and *Siemens* decisions. The best that can be said is that it is likely to work under *Maffezini* because an express policy is evidence of state practice. Moreover, it is likely to work under *Siemens* because it is also evidence of consistent state practice.

certainty for both host states and investors. While much ink has been spilled attempting to outline an effective approach for resolving, or at least limiting the effect of, such inconsistent decisions, only one approach seems practical. Like the BIT regime, the legislative approach to addressing the scope of MFN clauses relies primarily on bilateral negotiation and express agreement between the specific parties to the BIT. Although some notable countries already employ this approach, it is hardly widespread. Ultimately, with greater attention to the drafting of MFN clauses in BITs, host states and investors may continue to enjoy the level of certainty regarding rights and obligations that BITs and ICSID were created to provide, and the gunboats can remain in dry dock.