Informal Reliance on Previously Rendered Awards

An Efficient Means to Promote Consistency on the MFN Question?

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### Abbreviations

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<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tr>
<td>Basic Treaty</td>
<td>The investment treaty between the investor’s home state and the host state</td>
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<tr>
<td>BIT</td>
<td>Bilateral investment treaty</td>
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<tr>
<td>Comparator Treaty</td>
<td>The investment treaty in which the investor claims there are more favourable treatment than afforded to the investor in the Basic Treaty</td>
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<tr>
<td>ECT</td>
<td>The Energy Charter Treaty</td>
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<tr>
<td>FET Standard</td>
<td>The standard of fair and equitable treatment</td>
</tr>
<tr>
<td>ICJ</td>
<td>The International Court of Justice</td>
</tr>
<tr>
<td>ICSID</td>
<td>The International Centre for Settlement of Investment Disputes</td>
</tr>
<tr>
<td>Informal Reliance</td>
<td>Reliance on previously rendered awards not mandated by the VCLT</td>
</tr>
<tr>
<td>LCIA</td>
<td>London Court of International Arbitration</td>
</tr>
<tr>
<td>MFN Cases</td>
<td>The published awards and decisions which have decided on the MFN Question</td>
</tr>
<tr>
<td>MFN Clause</td>
<td>Most favoured nation clause</td>
</tr>
<tr>
<td>MFN Debate</td>
<td>The scholarly debate regarding the MFN Question</td>
</tr>
<tr>
<td>MFN Tribunal</td>
<td>A Tribunal deciding on the MFN Question</td>
</tr>
<tr>
<td>NAFTA</td>
<td>North American Free Trade Agreement</td>
</tr>
<tr>
<td>PCA</td>
<td>Permanent Court of Arbitration</td>
</tr>
<tr>
<td>SCC</td>
<td>Stockholm Chamber of Commerce</td>
</tr>
<tr>
<td>Tribunal</td>
<td>An arbitral tribunal adjudicating an investment dispute</td>
</tr>
<tr>
<td>Acronym</td>
<td>Full Name</td>
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<tr>
<td>---------</td>
<td>-----------</td>
</tr>
<tr>
<td>UNCITRAL</td>
<td>United Nations Commission on International Trade Law</td>
</tr>
<tr>
<td>UNCTAD</td>
<td>United Nations Conference on Trade and Development</td>
</tr>
<tr>
<td>VCLT</td>
<td>The Vienna Convention on the Law of Treaties</td>
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1. Introduction

The law governing international investment treaty arbitrations contains little support for a notion that arbitrators are to follow previously rendered awards. A concept of *stare decisis*, or similar doctrines of binding precedents such as envisaged in most national litigation laws, does not exist. Arbitral tribunals resolving investment disputes (“Tribunals”) are ad hoc foras, created for the purpose of deciding within the confines of a particular dispute and without a mandate to rely on previously rendered awards as law applicable *ipso facto* on the merits of the dispute.

Nevertheless, Tribunals frequently cite, analyze and draw support from awards rendered by other Tribunals. In a study of awards and decisions issued under administration of the World Bank’s International Centre for Settlement of Investment Disputes (“ICSID”) between 1990 and 2006, the Jeffery Commission found that citations of previously rendered awards issued by other ICSID Tribunals were made in almost 78 percent of the cases. Moreover, it was observed that the awards citing other awards and the number of citations per award increased over time.¹

Some arbitrators and scholars advocate reliance on previously rendered awards as a means to promote *consistent decision making* in investment treaty arbitration (see chapter 2.1).

Given that there is a limited mandate in law to rely on previously rendered awards, there is a potential conflict between, on the one hand, the duty to decide investment disputes on a case-by-case basis and, on the other hand, the interest of achieving and maintaining consistency through reliance on previously rendered awards. While the conflict does not raise any severe difficulties when the reasoning of Tribunals is *de facto* consistent, some

¹ Jeffery P. Commission, *Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence*, Journal of International Arbitration, Vol. 24 (2007), pp. 129-158, 130 and 149-150. In a study of ICSID awards rendered between 1998 and 2006, Fauchald found that references to previously rendered awards were made in 90 of the 98 cases. Considering the frequent use of previously rendered awards, Fauchald held previously rendered awards to have been “by far the most widely used and most important interpretive argument”. See O.K. Fauchald, *The Legal Reasoning of ICSID Tribunals – An Empirical Analysis*, European Journal of International Law, Vol. 19 (2008), pp. 301-364, at 335.
regard it as problematic when there are conflicting legal reasoning and outcomes on identical and/or similar questions.

This Master of Laws thesis addresses Tribunals’ reliance on previously rendered awards in the, arguably, most well-known and most hotly debated case line in investment treaty arbitration: the awards and decisions dealing with the question whether Tribunals may assume jurisdiction of investment disputes by virtue of most favoured nation clauses (“MFN Clauses”; the question whether an MFN Clause can operate to include jurisdictional treatment be relied upon to assume jurisdiction hereinafter referred to as the “MFN Question”; the published decisions and awards dealing with the MFN Question hereinafter jointly referred to as the “MFN Cases”; the Tribunals adjudicating the MFN Cases hereinafter referred to as the “MFN Tribunals”). A study by Maupin from 2011 reveals that previously rendered awards is the second most cited legal source in the MFN Cases, outnumbered only by Article 31 and 32 of the Vienna Convention on the Law of Treaties of 1969 (“VCLT”).

Far from all citations of previously rendered awards are made in the interest of promoting consistency. However, where previously rendered awards are materially relied on, and where such reliance is not mandated by the law on treaty interpretation, it is presumed that the reliance is made in the interest of promoting consistency. Such reliance on previously rendered awards is hereinafter referred to as “Informal Reliance”.

1.1 Purpose and Delimitations of the Topic

The purpose of the thesis is to identify and evaluate the MFN Tribunals’ Informal Reliance when deciding on the MFN Question in order to address the following questions:

   I. To what extent have MFN Tribunals engaged in Informal Reliance in the course of deciding on the MFN Question?

2 Schreuer has identified three other specific situations where Tribunals have come to conflicting conclusions on the same question: conflicting meanings given to phrases referring to “all disputes concerning investments” or “any legal dispute concerning an investment”, conflicting interpretations of umbrella clauses and conflicting effects given to, so called, waiting periods in arbitration clauses. See C. Schreuer, Diversity and Harmonization of Treaty Interpretation in Investment Arbitration, Transnational Dispute Management, Vol. 3, No. 2 (2006), 16-17.

II. Resting on the notion that Informal Reliance is fuelled by the interest to achieve consistency, what are the prospects for Informal Reliance to promote consistent decision making on the MFN Question?

At the outset, it is important to emphasize that the identification of instances where Informal Reliance has been made is carried out with some carefulness. The addressees of the reasons provided by Tribunals in awards and decisions are primarily the parties of the present dispute. Investment decisions and awards are published only subject to the disputing parties’ consent. There are clear instances of Informal Reliance, there are instances where it is plausible that the MFN Tribunal has carried out Informal Reliance, and there are instances where it is uncertain whether there is Informal Reliance. As will be further clarified infra, Informal Reliance is not presumed in cases of uncertainty.

In chapter 5, the thesis touches on the question whether Informal Reliance is an efficient means to achieve consistency on the MFN Question. It does not evaluate in detail the large scale debate as to whether there is a need for consistency in investment treaty arbitration. The thesis does neither attempt to provide an answer on the question whether consistency may be promoted in investment treaty arbitration in general through reliance on previously rendered awards.

On the same theme, given that the scope of the thesis is fixed to Informal Reliance in the MFN Cases rather than the MFN Question as such, the coverage of the MFN Question is sharply limited. However, the thesis submits that there are two particular features of the MFN Question which have particular impact on the possibility to promote consistency through Informal Reliance: the MFN Question is complex and the MFN Cases are inconsistent. In order to provide a background to the evaluation of Informal Reliance as a consistency-promoting means in chapter five, these two features are closer outlined and discussed in chapter three.

The central features of the MFN Question’s complexity, namely that there are different MFN Clauses and different claims for jurisdictional treatment, will therefore be addressed. Similarly, the dealing with interpretative approaches and the legal reasoning of the MFN Tribunals when deciding on the MFN Question is heavily adjusted to the purpose of the thesis. As regards the legal reasoning carried out by MFN Tribunals, the interest of space requires that the thesis merely
points out that it has been inconsistent in some central aspects throughout the MFN Cases.

1.2 Definitions and Terminology

Investment arbitration is often based on treaties providing protection of foreign investors’ property in the host state. Such investment arbitration is normally referred to as ‘investment treaty arbitration’. It is to be distinguished from investment arbitration based on a specific contract, or other agreements not found in treaties, between host states and foreign investors.

Investment treaty arbitration is a relatively young legal practice. It was not until the late nineties that the number of investment disputes started to amount to volumes of any significance. Given its novelty, it is not surprising that there are some terms and concepts which have no commonly established content. One concept which has no clear meaning is fundamental for the purposes of this thesis, namely ‘consistency’ or, alternatively, ‘consistent decision making’.

Conflicting outcomes by different Tribunals on similar facts are often referred to as evidencing inconsistency in investment treaty arbitration. However, to engage in a fact comparing enterprise within the scope of this thesis would be much excessive at best. This is due to that the facts are never the same in investment disputes. In order to identify consistency on basis of facts, one must first determine to what degree the facts should correspond before conflicting outcomes are taken to be inconsistent. Such a ‘level of fact-correspondence’ is inevitably chosen on subjective and biased grounds, and would therefore be inaccurate and misleading for the purpose of analyzing the prospects of achieving consistency. That is not to say that the facts of the MFN Cases are not important for the purposes of this thesis. But they are so because the different set of facts in each dispute contributes to the complexity of the MFN Cases. In other words, differing facts are not discussed to demonstrate inconsistency in the MFN Cases, but to show that the facts are inconsistent throughout the MFN Cases.

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4 In this respect, the parallel proceedings in the CME/Lauder arbitrations, where two Tribunals, sitting in Stockholm and London respectively, concluded differently on virtually the same facts, have come to be a prominent example. See, e.g., K. Hobér, Selected Writings on Investment Treaty Arbitration, 1st ed., Studentlitteratur, Lund, 2013, 345-368.
Instead, what is referred to by ‘consistency’ is evidently conflicting interpretation of treaty terms. Such conflicting interpretation has been manifested in the MFN Cases through conflicting interpretative approaches and conflicting legal reasoning on specific treaty terms.

The interpretative approaches taken by the MFN Tribunals are not identified in accordance with the most common distinctions in the context of treaty interpretation, i.e. the literal, purposive and contextual approaches. Rather, the thesis draws an unconventional distinction between a “principled interpretative approach”, which heavily takes into account or carries out the interpretation on basis of the MFN Debate, and an “autonomous interpretative approach”, by which Tribunals proceed with the interpretation without any consideration of the MFN Debate. The distinction is further explained in chapter 3.1.

Another central, if not the most central, term in the thesis is ‘reliance’, as it is referred to in the phrases ‘reliance on previously rendered awards’ and ‘Informal Reliance’. What is referred to when the term ‘reliance’ is used is ‘to draw support from’. The degree of support drawn from previously rendered awards, however, can vary significantly. This is the prominent reason for maintaining the different categories of Informal Reliance in chapter 4.3. The wording ‘material reliance’ is occasionally used. This phrase is used solely to emphasize that support has to be drawn out of a previously rendered award in order for the reference to be characterized as ‘reliance’. That is, a mere mentioning of a previously rendered award does not automatically amount to ‘reliance’.

To rely on an arbitral award is not equivalent to admitting it precedential value. If the concept of precedential value is referred to by ‘reliance’, it entails a notion that the Tribunal is constrained to follow previously rendered awards. While it should be left unsaid whether such a perception of previously rendered awards exist among some arbitrators, such a meaning of ‘reliance’ is not maintained in this thesis.

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5 See infra chapter 4.1.
1.3 Disposition

In chapter two and three, backgrounds and basic premises are provided as regards consistency in investment treaty arbitration and the potential role of previously rendered awards to foster a perceived need for consistent decision making. In chapter four, seven instances where MFN Tribunals have engaged in Informal Reliance are identified and described. In chapter five, the thesis proceeds to foresee and examine plausible arguments for and against the proposition that Informal Reliance promotes consistency on the MFN Question. It is suggested that three central aspects are to be addressed: the lacking mandate in applicable law to rely on previously rendered awards, the complexity of the MFN Question and the inconsistency in the MFN Cases.

1.4 Methods and Sources

The methods and sources used are favourably explained by dividing the thesis in three parts; presentation of the concept of Informal Reliance and the MFN Question, identification of Informal Reliance and evaluation of Informal Reliance prospects to promote consistency on the MFN Question.

When the presentation is made of Informal Reliance and the MFN Question, the aim has been to use the sources which provide the best explanatory value. In this respect, statements of Tribunals are used frequently as they provide the most authoritative statements on both Informal Reliance and the MFN Question. Opinions and analyses from commentators are used when they add additional explanatory value. As regards specifically the understanding of the concept of Informal Reliance, the VCLT has a fundamental importance. As mentioned earlier, the very definition of Informal Reliance is its deviation from the customary international law on treaty interpretation as reflected in the VCLT. The central documents providing the legal framework of investment treaty arbitration are also used. Among these, primacy is given to the ICSID Convention since it has governed most of the MFN Cases.
The thesis is written mainly on basis of a study of the MFN cases carried out by the author. For the purpose of analyzing how the MFN Tribunals have used previously rendered awards in the course of deciding on the MFN Question, the reasons of the MFN Cases have been thoroughly reviewed. The instances where Informal Reliance has been identified are categorized in accordance with how the MFN Tribunals have relied on previously rendered awards. In order to provide a basis for the further analysis in chapter 5, the instances of Informal Reliance have been sorted under three categories: i) Informal Reliance on legal reasoning, ii) Informal Reliance on Conclusions made in previously rendered awards and iii) Informal Reliance as the decisive argument on the MFN Question.

The evaluation of the prospects on consistency being promoted by Informal Reliance is partly carried out with inspiration drawn from general criticisms against and defenses in favour of Tribunals’ reliance on previously rendered awards in investment treaty arbitration. The materials are found in the MFN Cases as well as in scholarly comments.

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7 With the reservation for any published cases mistakenly omitted, the MFN Cases are the following: 
2. Consistency and Previously Rendered Awards

2.1 A Need for Consistency in Investment Treaty Arbitration?

Needless to say, investment treaty arbitration is a form of arbitration. However, various schools of thought are framing investment treaty arbitration to be something more than merely arbitration. Some scholars conceptualize it as an emerging ‘global administrative law’ or ‘constitutional law’. Others view investment treaty arbitration as a ‘global investment agency’. Such conceptions of investment treaty arbitration have in common that they tend to look beyond the notion of investment treaty arbitration as a private dispute settlement mechanism between two parties, and instead focus on the perceived effects of the investment treaties and investment awards on domestic policy making of host states rather than the existing legal framework of investment treaty arbitration. It falls outside the scope of the thesis to take any side as to the proper etiquette of investment treaty arbitration. However, since the purpose of the thesis is to provide a legal analysis rather than a policy evaluation, it proceeds on basis of the existing legal framework.

Given that the existing legal framework provides the starting point, a discussion on previously rendered awards as a means to promote consistency has to be carried out against the background that there are no formal mechanisms functioning to promote consistency in investment treaty arbitration. Disputes are adjudicated by different tribunals, which are most often constituted for the purpose of a single claim. Moreover, the applicable law is normally found in bilateral investment treaties (“BITs”), applicable only between the states related to the dispute. Extensive discussions as to a possible implementation of consistency-promoting mechanisms have been carried out. The most frequently forwarded proposition is to implement an appellate forum for ICSID disputes, serving to

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better maintain consistency and to promote a body of international investment law. A second suggestion is to create an organ with authority to issue preliminary rulings on investment disputes. A third proposition is to establish a permanent investment arbitration court. However, the prospects of reaching a consensus among states on implementing a consistency-promoting formal mechanism, which would necessitate termination of existing and creation of new investment treaties, are too poor to be considered as a realistic way forward. The choice, then, between accepting a certain degree of inconsistency and addressing inconsistency through the creation of a formal consistency-promoting mechanism inevitably comes in favour of the former.

When contrasted against the existing legal framework of investment treaty arbitration, the suggestion that there is or ought to be an overarching aim for consistency is rather ill-suited. The existence of the arbitral tribunal, including its adjudicatory powers, flows from the disputing parties. In addition, the disputing parties choose the rules of procedure, as well as the applicable substantive law. As will be expanded on below, public international law, applicable in investment disputes, is non-hierarchical and decentralized, without a doctrine of stare decisis or authoritative institutions. Under the formal legal framework of investment treaty arbitration, as in all arbitration regimes, consistency is simply not an aim for arbitrators to safeguard when resolving disputes. Given the absence of consistency-promoting formal mechanisms in investment treaty arbitration, the occasional inconsistencies in case law are hardly surprising. If the present international investment treaty arbitration regime can be characterized as a legal system, it is certainly not a legal system in the sense of consistency.

Still, the proposition that there is a need for consistency investment treaty arbitration is occasionally raised by some Tribunals and commentators. The general argumentation in favour hereof is much attributable to our very concept of law and the lawyer’s natural

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10 Hobér, supra note 4, 538-539.
11 Ibid.
12 Cf I.M. Ten Cate, supra note 6, 424-426.
13 See, e.g., W.M.C. Weidemaier, Towards a Theory of Precedent in Arbitration, William and Mary Law Review, Vol. 51 (2010), pp. 1895-1958, at 1930. “[T]housands of investment treaties have been concluded worldwide. To the extent treaty provisions are standardized within or across states, system users may value consistent interpretation” (footnotes omitted). See also Wintershall, para 189, Austrian Airlines, para 84 and Frank, supra note 8, 1521-1625.
bias to seek uniformity in the application of legal norms. The ‘rule of law’ requires the legal certainty following consistent judicial decision making, and coherent decision making is “a fundamental feature of any orderly decision process”.

The argumentation in favour of the proposition that there is a need for consistency in the investment treaty arbitration regime often highlights the public dimension involved in investment disputes. The rights provided to foreign investors by virtue of investment treaties constrain sovereign states in policy areas of high public interest. Such policy areas include, but are not limited to, dispositions of natural resources, environmental-, health-, safety- and economic measures. In light of the considerable policy stakes, it is argued that the need for predictability is particularly high in investment treaty arbitration. For example, states have a need of predictability when negotiating and signing investment treaties, as well as assessing the probability of violating investment treaty terms when taking measures affecting investors of the other contracting state. Meanwhile, foreign investors have a need of predictable investment treaty terms in order to structure their investments accordingly.

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14 In the words of Frank: “The rule of law is essential to those participating in the global economy. Without the clarity and consistency of both the rules of law and their application, there is a detrimental impact upon those governed by the rules and their willingness and ability to adhere to such rules, which can lead to a crisis of legitimacy. Legitimacy depends in large part upon factors such as determinacy and coherence, which can in turn beget predictability and reliability. Related concepts such as justice, fairness, accountability, representation, correct use of procedure, and opportunities for review also impact conceptions of legitimacy. When these factors are absent individuals, companies and governments cannot anticipate how to comply with the law and plan their conduct accordingly, thereby undermining legitimacy” (citations omitted). Frank, supra note 8, at 1584.

15 Schreuer, supra note 2, at 10.


17 Frank encapsulates this standpoint: “[i]nconsistency 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.” Frank, supra note 8, at 1558. The suggestion that the stakeholders of investment treaty arbitration have any expectations of consistent decision making has been opposed with reference to that there is no proof for the proposition that inconsistency is detrimental to investment behaviour. See, e.g., J.W. Yackee, supra note 8, at 433. “The only people aware of inconsistent decisions are highly sophisticated international lawyers who can appreciate that inconsistent decisions are an inevitable byproduct of any multi-court legal system, whether international or domestic.”
2.2 Consistency through Reliance on Previously Rendered Awards?

2.2.1 Limited Formal Grounds to Rely on Previously Rendered Awards

In investment treaty arbitration, a BIT is often the ground for investor claims. There are also multilateral investment treaties, such as the North American Free Trade Agreement (“NAFTA”) and the Energy Charter Treaty (“ECT”). As regards the content of investment treaties, two characteristic features of investment treaties are of relevance for present purposes. First, investment treaties contain arbitration clauses providing recourse to international investment dispute settlement governed by arbitration rules. Thus, nationals of each contracting state can initiate arbitration against other contracting states even though they are not parties to the investment treaty. Secondly, the terms of investment treaties are determined through application of the customary international law on treaty interpretation.

2.2.1.1 No Grounds to Rely on Previously Rendered Awards under the Arbitration Rules

The ICSID Convention, as well as other arbitration rules occasionally applied in international investment treaty arbitrations, is silent on the question whether Tribunals are allowed to rely on previously rendered awards. Tribunals are to “deal with every question submitted to [them] and state the reasons upon which [the award] is based”, but there are no rules providing how such questions are to be dealt with. The general understanding of the arbitration rules is, however, that they do not provide support in favour of an order where previously rendered awards are to be followed. The duty of arbitrators is to decide only on the present dispute on basis of the facts and arguments presented by the parties. Such a read of the arbitration rules can hardly be contested: Tribunals are established ad hoc by the parties; the scope of the awards’ binding effect does not extend beyond the parties; there are only narrow grounds for judicial review; and publication of awards is subject to the parties’ consent. There is neither anything in the

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19 See Article 48(3) of the ICSID Convention.
20 Hobér, supra note 4, at 31.
21 See e.g. Articles 37, 52, 53(1) and Rule 48(4) of the ICSID Convention.
travaux préparatoires of the ICSID Convention suggesting a principle of stare decisis or a similar doctrine.\textsuperscript{22}

2.2.1.2 Limited Grounds to Rely on Previously Rendered Awards under the Applicable Law: The Customary International Law on Treaty Interpretation

Given that investment treaty arbitrations are based on international treaties Tribunals deciding on investment treaty disputes are referred to public international law as regards the interpretation of treaty terms.\textsuperscript{23} Article 31 and 32 of the VCLT reflects customary international law on treaty interpretation. These provisions are frequently cited by Tribunals when engaged in interpretation of investment treaty terms as providing the proper method to ascertain the intention of the contracting states.\textsuperscript{24}

Pursuant to Article 31(1), treaty interpretation is to be carried out on basis of the treaty terms’ ordinary meaning in their context and in the light of the treaty’s object and purpose.\textsuperscript{25} Article 31 is intended to be read and applied as one rule. Consequently, the ordinary meaning of the treaty terms, the context and the purpose of the treaty is to be taken into account in the interpretation holistically rather than individually.\textsuperscript{26} Few, however, would argue against the proposition that the textual meaning of the treaty terms is the primary evidence of the parties’ intent. As stated by the International Court of Justice (“ICJ”) in \textit{Libya v. Chad}, ‘[i]nterpretation must be based above all upon the text of the treaty’.\textsuperscript{27} Tribunals have stressed the importance of not admitting other interpretative methods primacy over the textual approach. Other means of interpretation come into play when the wording of the treaty terms does not suffice to discover the intention of the contracting parties. In the MFN Case \textit{Wintershall}, for example, the Tribunal vindicated the primacy of the literal approach over the purposive approach:

\textsuperscript{22} Schreuer, \textit{supra} note 2, at 11.
\textsuperscript{23} It also follows from Article 42 of the ICSID Convention that if the parties have not made a choice of law, the dispute is to be determined in accordance with applicable international law.
\textsuperscript{24} The third rule regulating the interpretation of treaties, Article 33, headlined “[i]nterpretation of treaties authenticated in two or more languages”, is left out for present purposes.
\textsuperscript{25} See Appendix A.
\textsuperscript{26} J.R. Weeramantry, \textit{Treaty Interpretation in Investment Arbitration}, 1\textsuperscript{st} ed., Oxford University Press, Oxford, 37-38. This reading is supported by the wording of the article’s heading line: ‘General rule of interpretation’. The heading line is expressed in the singular and not in the plural. Thus, the intention is that the whole article is to be read as one rule. Cf Daimler, para 254.
“There is no room for any presumed intention of the Contracting Parties to a bilateral investment treaty, as an independent basis of interpretation; because this opens up the possibility of an interpreter (often, with the best intentions) altering the text of the treaty in order to make it conform better with what he (or she) considers to be the treaty’s ‘true purpose’.”

Previously rendered awards have been included in Tribunals’ treaty interpretation on two grounds. The first ground is the possibility to let previously rendered awards inform the context through ‘relevant rules of international law’ in accordance with Article 31(3)(c). The second ground is to engage previously rendered awards as supplementary means of interpretation in accordance with Article 32.

Pursuant to Article 31(3)(c) “[t]here shall be taken into account, together with the context… any relevant rules of international law applicable in the relations between the parties.” It has been submitted by some commentators that Article 31(3)(c) has an important role as an instrument to better achieve consistency in the international investment law, as well as in public international law at large. As regards the question what role awards and decisions of Tribunals have to shape international rules of law, some arbitrators and commentators forward the potential law-making function of Tribunals to contribute to the emergence of new international customary law. However, as will be returned to infra, in the MFN Cases no such principle of international law has been suggested to have been created through case law.

Article 32 of the VCLT allows a Tribunal to turn to supplementary means of interpretation to either ‘confirm’ the outcome of an application of Article 31 or to ‘determine’ the meaning when the foregoing interpretation in accordance with Article 31 a) ‘leaves the meaning ambiguous or obscure’ or b) ‘leads to a result which is manifestly absurd or

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28 Wintershall, para 88. See also Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB (AF)/00/3, (NAFTA) Award, 20 April 2004, para 85. Fauchald, supra note 1, at 317, concludes “that ICSID tribunals in general preferred an objective approach to treaty interpretation”.
29 See C. McLahlan, The Principle of Systematic Integration and Article 31(3)(c) of the Vienna Convention, International and Comparative Law Quarterly, Vol. 54 (2005), pp. 279-319, at 289 and 318. McLahlan characterizes Article 31(3)(c) as the ‘neglected son of treaty interpretation’ and emphasizes the rule’s potential to mitigate fragmentation in international law as it offers Tribunals the possibility to take a more systemic approach, see McLahlan. See also Wälde’s stark articulations in favour of Tribunals as law makers in his dissent in International Thunderbird Gaming Corporation v. United Mexican States, UNCITRAL, Separate Opinion of Thomas Wälde, 26 January 2006, para 16. “While individual arbitral awards by themselves do not as yet constitute a binding precedent, a consistent line of reasoning developing a principle and a particular interpretation of specific treaty obligations should be respected; if an authoritative jurisprudence evolves, it will acquire the character of customary international law and must be respected.”
unreasonable’. The preparatory works of the treaty and circumstances of its conclusion are mentioned as included in the supplementary means of recourse.30

Albeit previously rendered awards are not explicitly mentioned in Article 32 as supplementary means of interpretation, the frequent citations, with reference to Article 32, reveal that Tribunals sometime consider previously rendered awards to be included.31 Support of such a view has been drawn from Article 38 of the Statute of the ICJ, which is commonly considered to be the most authoritative enumeration of the legal sources in public international law.32 It provides a list of legal sources that may be used in treaty interpretation, including “judicial decisions… as subsidiary means for the determination of rules of law”. Tribunals have directly linked Article 38 of the ICJ Statute to Article 32 of the VCLT. In the NAFTA case Canadian Cattlemen, the Tribunal stated that beyond the two means expressly stated in Article 32, other supplementary means of interpretation may be applied. Since Article 38 of the ICJ-Statute encompasses ‘judicial decisions’ applicable as ‘subsidiary means’, previously rendered awards, the Tribunal reasoned, are included within the meaning of Article 32 of the VCLT.33

2.2.2 Informal Reliance on Previously Rendered Awards in the Interest of Consistency

Despite the limited grounds in law, an advocacy for a heavier reliance on previously rendered awards to promote consistency has emerged. There is far from a consensus, however, on the question to what extent Informal Reliance on previously rendered awards can and/or ought to be made. While some Tribunals have ‘taken into account’ previously rendered awards,34 other Tribunals have gone further, and in some cases much further. In the ICSID case Saipem, the Tribunal forwarded a concept of a “duty to adopt solutions established in a series of consistent cases” to pursue the general aim to “move towards the rule of law”.35 Among arbitrators regularly appointed in investment

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30 See Appendix A.
31 See infra chapter 4.2.
32 See, e.g., Cheng, supra note 16, 1026-1030.
34 See, e.g., El Paso Energy International Co. v. Argentine Republic, ICSID Case no. ARB/03/15, Decision on Jurisdiction, 27 April 2006, para 39. The Tribunal referred to what it assumed was a general practice among Tribunals, particularly ICSID Tribunals, to “take into account precedents” of other Tribunals.
35 Saipem S.p.A. v. The People’s Republic of Bangladesh, ICSID Case No. ARB/05/7, Award, 30 June 2009, (“Saipem”), para 90. See also Austrian Airlines, para 84.
disputes, Kaufmann-Kohler stands out as she goes so far as to suggest integrating a "stare decisis"-principle.\textsuperscript{36}

More importantly however, there is no consensus on whether reliance on previously rendered awards can and/or ought to be made at all. A well-received articulation against Informal Reliance was made in the ICSID case \textit{SGS}, in which the Tribunal forwarded its concerns over “allowing the first tribunal in time to resolve issues for all later tribunals”.\textsuperscript{37} As will be returned to below, the \textit{Hochtief}-Tribunal provided the starkest statement against Informal Reliance among the MFN Cases. The Tribunal stressed its “responsibility” to conduct an independent legal reasoning “and \textit{not to choose} between broad doctrines or schools of thought, or to conduct a head-count of arbitral awards taking various positions and to fall in behind the numerical majority” (italics added).\textsuperscript{38}


\textsuperscript{37} See \textit{SGS Société Générale de Surveillance S.A. v. Republic of the Philippines}, ICSID Case no. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, para 97.

\textsuperscript{38} \textit{Hochtief}, para 58. See the full quote \textit{infra} chapter 4.1.1.
3. The MFN Question – Complexity and Inconsistency

For present purposes, two aspects of the MFN Question are of particular relevance. First, any attempt to seek general conclusions on the MFN Question soon encounters **complexity**. Secondly, the interpretative approaches and legal reasoning of MFN Tribunals have been **inconsistent**.

### 3.1 The MFN Question is Complex

MFN Question addresses whether the MFN Clause in an investment treaty between the investor’s home state and the host state (the “Basic Treaty”) evidences the host state’s consent to arbitrate through an arbitration clause in another investment treaty in which the host state is a signatory (the “Comparator Treaty”). If answered in the affirmative, the Tribunal’s jurisdiction is based not on the arbitration clause in the Basic Treaty, but on the arbitration clause in the Comparator Treaty (“MFN Jurisdiction”).

Much of the MFN Question’s complexity is attributable to the MFN Tribunals having interpreted differently worded MFN Clauses and they have received different claims for jurisdictional treatment.

#### 3.1.1 MFN Clauses

**3.1.1.1 Origins and Theoretical Background of Most Favoured Nation Treatment**

The standard of most favoured nation treatment originates from trade law and can be traced back to the 11th century. A few commentators claim that MFN Clauses appeared as early as Antiquity. The earliest versions were found in agreements between medieval cities. In the 17th century MFN Clauses were frequently included in treaties of friendship, commerce and navigation between the states of Europe. For example, an MFN provision in the 1654 *Treaty of Peace and Commerce between Great Britain and Sweden* reads:
“The people, subjects and inhabitants of both confederates shall have, and enjoy in each other’s kingdoms, countries, lands, and dominions, as large and ample privileges, relations, liberties and immunities, as any other foreigner at present doth and hereafter shall enjoy.”

During colonial times, European powers made use of MFN Clauses in order to ensure equal footing to each other, particularly in respect of the exploitation of resources in the colonies. It was not until the 18th century, however, the phrase ‘most favoured nation’ was first used. MFN Clauses have appeared consistently as a natural component of investment treaties. The very first BIT, concluded between Germany and Pakistan, contained an MFN Clause. In 1978, the state practice as regards the standard of most favoured nation treatment was codified through the ILC’s Draft Articles on Most-Favoured-Nation Clauses (“ILC’s Draft Articles on MFN Clauses”).

Investment treaties almost unequivocally contain MFN clauses. They have the common feature of extending the better treatment granted by the signatory states to nationals of third states to beneficiaries of the treaty. MFN Clauses prevent host states from discriminating against foreign investments or investors on the basis of nationality. In this respect, MFN Clauses function to universalize treatment of foreign investors and to create a network of investment treaties similar to a global multilateral investment treaty. The MFN Clauses thus share the fundamental purpose to “establish and maintain at all times fundamental equality without discrimination among the countries concerned”, and to establish a ‘level playing field’ for investors.

3.1.1.2 A Matter of Different MFN Clauses in the MFN Cases

There is no standard MFN Clause, but, on the contrary, a mass of different variations. While it would be futile to attempt to present every specific type, the MFN Clauses

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42 Case Concerning Rights of Nationals of the United States of America in Morocco (France v. United States), Judgment, ICJ Reports 1952, p. 176, at 192. Cf Articles 5 and 9 of the ILC’s Draft Articles on MFN Clauses, see Appendix B.
dealt with in the MFN Cases can be grossly divided into three categories: ‘broad MFN Clauses’; ‘general MFN Clauses’; and MFN Clauses included in the standard of fair and equitable treatment (“FET Standard”).

**Broad MFN Clauses** contain the wide formulation ‘all matters’. The ‘all matters-phrase’ typically indicates that MFN treatment shall be applied to investors of the other state in all matters covered by the treaty. Berschader, in which MFN Jurisdiction was denied, and Impregilo, in which MFN Jurisdiction was assumed, are the only two MFN Cases where interpretation of a broad MFN Clause was carried out.

**General MFN Clauses** do not specify the scope of their application in any precise terms. They do, however, include formulations which MFN Tribunals have deemed relevant in the course of the interpretation. Such formulations include, but are not limited to: “investments in [the host state’s] territory” and according MFN treatment to investors “as regards their management, maintenance, use, enjoyment, or disposal of their investments”. Thirteen MFN Tribunals interpreted general MFN Clauses. Five of the MFN Tribunals assumed MFN Jurisdiction and eight MFN Tribunals declined MFN Jurisdiction.

**MFN Clauses included in the FET Standard** create some confusion, as it is not certain whether the two standards are intended to interact. Typically, there is a first paragraph stipulating the FET Standard and a second paragraph providing an MFN Clause referring back to FET Standard. Five MFN Cases dealt with MFN Clauses included in the FET Standard. MFN Jurisdiction was assumed in three of these MFN Cases and denied in two.

### 3.1.2 A Matter of Different Claims for More Favourable Jurisdictional Treatment

In order to overcome jurisdictional obstacles of arbitration clauses in Basic Treaties, foreign investors have attempted to access different types of jurisdictional treatment

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44 Maupin, supra note 3, 163-168.
47 MFN Jurisdiction was assumed in Siemens, National Grid, Suez II, Rosinvest and Hochtief. MFN Jurisdiction was denied in Salini, Plama, Wintershall, Tecmed, Telenor, Austrian Airlines, ICS Inspection and Daimler.
48 Maupin, supra note 3, at 166.
49 See e.g. Article 5 of the Spain-USSR BIT (1991).
50 MFN Jurisdiction was assumed in Maffezini, Gas Natural and Suez I. MFN Jurisdiction was denied in Renta 4 and Tza Yap Shum.
provided in different Comparator Treaties. If one aims to draw any general conclusions on the MFN Question from the MFN Cases this fragmentation renders complications. The question of what jurisdictional treatment can be invoked by the operation of an MFN Clause is of dispute among different MFN Tribunals.

Two types of claims have been subject of conflicting legal reasoning in the MFN Cases. The first is invocation of a Comparator Treaty arbitration clause to overcome a waiting period in the Basic Treaty, and the second is invocation of a Comparator Treaty arbitration clause to overcome a limited subject matter in the Basic Treaty.\(^\text{51}\)

*Disregard waiting periods.* The most commonly invoked claim for jurisdictional treatment in the MFN Cases involves the claimant asking the Tribunal to disregard a waiting period stipulated in the arbitration clause of the Basic Treaty through the operation of an MFN Clause. Argentina has been the respondent in all of the eleven cases dealing with this category of claims. This is due to the uniquely long time period of 18 months from submitting the dispute to domestic court proceedings before it is admissible to submit it to international arbitration, found in many arbitration clauses in Argentinian BITs.\(^\text{52}\)

Of the ten MFN Tribunals that received claims of this type, seven accepted MFN Jurisdiction and three declined.\(^\text{53}\)

*Extension of the subject matter scope.* In some BITs, Tribunals are given mandate to decide only on a limited subject matter in comparison with the BIT practice among states at large. Such BITs are primarily a product of a communist policy to exclude sub-

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\(^{51}\) There is one more claim for more favourable jurisdictional treatment. In *Tecmed*, the claimant relied on the MFN Clause in order to invoke claims which related to events that happened before the Basic Treaty came into force. The request was declined. No further expansion on this type of claim is mandated by the thesis purposes since it has not been decided on inconsistently.

\(^{52}\) See, e.g., Article 10(2) and (3) of the Germany-Argentina BIT (1991):

(2) If a dispute referred to in paragraph 1 cannot be settled within six months from the date either of the parties to the dispute formally announced it, it shall be referred upon the request of either party to the dispute to the competent courts of the Contracting Party in whose territory the investment was made.

(3) Under either of the circumstances referred to below, the dispute may be submitted to an international arbitral tribunal:

(a) at the request of a party to the dispute if, within a period of 18 months of initiation of the judicial proceeding in accordance with paragraph 2, the tribunal has not rendered a final decision or if such a decision has been rendered but the dispute between the parties continues;

(b) if both parties have so agreed.

\(^{53}\) The cases where MFN Jurisdiction was granted are *Maffezini, Siemens, Gas Natural, National Grid, Suez I / Suez II, Impregilo* and *Hochtief*. The cases where MFN Jurisdiction was denied are *Wintershall, ICS Inspection* and *Daimler*. 
stantive standards frequently included in investment treaties, and narrow international investment disputes to method and amount of compensation in cases of expropriation. Since many BITs concluded by former eastern communist states still remain in force, foreign investors have attempted to expand a limited subject matter jurisdiction provided to a Tribunal under the Basic Treaty by relying on a Comparator Treaty arbitration clause.

Eight of the MFN Cases dealt with the question whether the scope of the subject matter of the arbitration clause could be expanded through the operation of an MFN Clause. Of these cases, *RosInvest* stands out as the only MFN Tribunal that allowed MFN Jurisdiction.

### 3.2 The Interpretative Approaches and Legal Reasoning in the MFN Cases are not Consistent

#### 3.2.1 A Matter of Different Interpretative Approaches

For present purposes, a distinction is made between two interpretative approaches taken in the MFN Cases. The first approach is hereinafter referred to as a *principled approach*, where Tribunals interpret the MFN Clause on the basis of a predefined conception as to its application on jurisdictional treatment. While it was acknowledged that there is not a standard MFN Clause, some MFN Tribunals carried out the interpretation with a conception that there is an MFN standard as to MFN Clauses’ application on jurisdictional treatment. However, the MFN Tribunals that applied a principled approach on the MFN Question differed on what the content of such an MFN Standard is.

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54 Maupin, supra note 3, at 170.
55 *Salini, Plama, Berschader, Telenor, RosInvest, Renta 4, Tza Yap Shum and Austrian Airlines*. *Salini* is the only one of the cases which did not deal with a 'communist-model' arbitration clause in the Basic Treaty. The claimant sought to rely on an umbrella clause in a Comparator Treaty in order to bring contract claims to the Tribunal. See *Salini*, paras 102-119.
56 The interpretative approaches are forwarded in this thesis for the purpose of illustrating a main difference in the MFN Cases, which have implications for the prospects of achieving consistency through Informal Reliance, see infra chapter 5. As regards the common distinction of interpretative approaches in treaty interpretation, namely the literal, purposive and contextual approaches, some of the MFN Cases differ. For example, different views have been forwarded as to the proper weight put on the envisaged purpose of the Basic Treaty in the course of the treaty interpretation. See, e.g., on the one hand *ICS Inspection*, para 277, and on the other hand *Telenor*, paras 93-94.
This split among the MFN Cases is often referred to as the ‘Maffezini-line cases’ and the ‘Plama-line cases’, or in similar terms, since these two early MFN Cases formulated principled approaches to the MFN Question which conflict with each other. A striking feature of the MFN Cases has come to be that many of the MFN Tribunals have aligned with either the Maffezini-approach or the Plama-approach.\(^{58}\)

The principled approach forwarded in Maffezini entails that MFN Clauses may be extended to cover jurisdictional treatment since access to investment treaty arbitration is a substantive right. MFN Jurisdiction should not be assumed, however, if it would run afoul of public policy considerations which the signatories have regarded as fundamental conditions for their conclusion of the investment treaty. The Plama-Tribunal reversed the approach taken in Maffezini by contending that an MFN Clause does not cover the arbitration clauses unless “it leaves no doubt that the Contracting Parties intended to incorporate them”.\(^ {59}\)

Summaries of Maffezini and Plama are provided below:

In Maffezini, the claimant, an Argentinian investor, had invested in a Spanish company engaged in the production and distribution of chemical products. The dispute resolution clause in the BIT stated that any investor-state disputes was allowed to be referred to international arbitration 18 months after first having submitted the dispute to a court of the host state. Instead of submitting the dispute to a Spanish court, the Claimant requested ICSID arbitration against Spain under the Argentina-Spain BIT, invoking the arbitration clause in the Chile-Spain BIT, which contained no such waiting period. The claimant argued that Chilean investors in Spain were treated more favorably than Argentinian investors since the arbitration clause in the Chile-Spain BIT gave Chilean investors the option of seeking recourse to international arbitration without prior referral to domestic courts. The MFN-clause, the Claimant argued, thus gave rise to a possibility to base jurisdiction on the arbitration clause in the Chile-Spain BIT.

As regards the MFN Question, the Tribunal concluded that “if a thirdparty treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor’s rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause as they are fully compatible with the ejusdem generis principle”. The Tribunal then added that the Comparator Treaty “has to re-

\(^{58}\) MFN Tribunals aligning with Maffezini include, inter alia, Gas Natural, Suez I / Suez II and Natural Grid. MFN Cases aligning with Plama include, inter alia, Telenor, Wintershall and Austrian Airlines.

\(^{59}\) Plama, para 223.
late to the same subject matter as the basic treaty”. This conclusion was reached after the Tribunal had carried out the reasoning in two steps.

First, while acknowledging that MFN Clauses traditionally had referred to solely substantial matters, the Tribunal reasoned that the traditional application had no decisive importance per se as to their ability to extend to jurisdiction clauses. To support this view, the ICC case Ambatielos was cited, in which “administration of justice” was found to be included in the protection of the rights of traders. The Tribunal drew the conclusion that since administration of justice is not necessarily excluded from the field of application of the MFN Clause, when the latter includes “all matters relating to commerce and navigation”, the MFN Question could only be determined in accordance with the intention of the Contracting Parties as deduced from a reasonable interpretation of the Treaty.

Secondly, heavy emphasis was placed on observations as to the development of the dispute settlement mechanism in international investment law. The Tribunal stated that today, arrangements for resolving disputes form such a crucial part of foreign investor protection that they are inextricable to the material rights stipulated in investment treaties. Thus, jurisdictional treatment was, in the view of the Tribunal, equal to, or had developed into, substantive treatment.

However, having made the general conclusion that there was no inherent obstacles to extend dispute settlement provisions on basis of MFN Clauses, the Tribunal was careful to stress that legitimate extension of rights should not be confused with treaty-shopping violating the policy objectives of investment treaties. Thus, the MFN Clause should not override public policy considerations which the parties have deemed as fundamental conditions for signing the investment treaty.

In Plama, the claimant attempted to submit the dispute to ICSID, even though the ICSID arbitration was not provided in arbitration clause of the Basic Treaty. The claimant argued that the MFN clause should be construed to import the more generous dispute settlement provisions contained in the Bulgaria-Finland BIT. The Respondent argued that the MFN Clause could not be construed as evidencing its consent to ICSID arbitration unless there was evidence indicating otherwise.

The Tribunal concluded that the MFN Clause could not operate to replace the agreed arbitral proceeding (ad hoc arbitration under the UNCITRAL arbitration rules) with ICSID arbitration. It criticized Maffezini on numerous grounds and proceeded to state the following principle:

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60 Maffezini, para 56.
61 Ibid, paras 46-49.
62 Ibid, paras 54-55.
“[T]he principle with multiple exceptions as stated by the tribunal in the Maffezini case should instead be a different principle with one, single exception: an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.”

The second interpretative approach in the MFN Cases does not proceed from a general conception of how MFN Clauses operate as regards jurisdictional treatment, but focuses more attention on the specific MFN Clause subject of interpretation and the facts and backgrounds of the present dispute. In other words, the interpretation is carried out autonomously from the MFN Debate. Such an approach is hereby referred to as an autonomous approach. In RosInvest, for example, the Tribunal chose not to engage in discussions on the Maffezini-line and Plama-line cases adduced by the parties since no identical MFN Clauses and arbitration clauses had been subject of interpretation. In this respect, the Tribunal referred to its “primary function… to decide the case before it rather than developing further the general discussion on the applicability of MFN clauses to dispute-settlement-provisions”.

3.2.1.1 Particularly about that the MFN Question is a Matter of Deciding on Jurisdiction

A central element of the MFN Debate is the question whether the principle of clear consent to arbitrate is to be applied in the treaty interpretation of MFN Clauses. The Plama-Tribunal found that an agreement to arbitrate “should be clear and unambiguous”. Thus, the Plama-Tribunal put a higher burden of persuasion on the claimant to show consent to arbitration.

This approach, however, has been convincingly attacked on two grounds by other MFN Tribunals. First, it has been questioned whether such a principle still exists in arbitration. Secondly, a restrictive approach to interpret consent to arbitration is not mandat-

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64 Plama, para 223.
65 See, e.g. Siemens, RosInvest and Renta 4.
66 RosInvest, para 137.
67 Plama, para 199.
68 Cf Maupin, supra note 3, 179-188.
69 See, e.g., Berschader, para 177. “[T]he traditional view that arbitration clauses should be construed restrictively now tends to be replaced by a more neutral approach to the effect that arbitration agreements are construed much in the same manner as other agreements.”
ed by the VCLT. If consent to arbitration is to be found in a treaty provision, the consent is to be found by application of the law on treaty interpretation.\(^70\)

It has also been argued that MFN Clauses are incapable of evidencing consent to arbitration, absent explicit consent. In an influential dissent to the Impregilo-decision, Stern argued, *inter alia*, that consent to arbitration (*ratione voluntatis*) is not a substantive right in an investment treaty, but rather a fundamental condition for access to the substantive rights provided in the investment treaty. Thus, if MFN Clauses does not expressly include jurisdictional treatment, Stern argued, they cannot provide consent to arbitration.\(^71\)

### 3.2.2 Conflicting Legal Reasoning

Numerous legal arguments have been forwarded by the MFN Tribunals. They vary, naturally, with the specific circumstances of every dispute. They are, however, far too many to address exhaustively. Some examples of conflicting legal reasoning include conflicting meanings given to terms frequently included in MFN Clauses, such as the phrase “in its territory”.\(^72\)

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\(^70\) See, e.g., *Suez I*, para 64. “[D]ispute resolution provisions are subject to interpretation like any other provision of a treaty, neither more restrictive nor more liberal.” See also *Daimler*, para 169. “Since all international treaty commitments arise from the same source (consent) all must logically be interpreted according to the same basic interpretive principles without distinction as to the type of treaty or type of commitment.”

\(^71\) *Impregilo*, Concurring and Dissenting Opinion, para 52. “Just as the conditions of nationality for example must be fulfilled before an investor can have access to all the rights granted by the BIT, the conditions shaping the State’s consent to arbitration must be fulfilled before a right to arbitration can arise.”

\(^72\) An example of where the “in its territory-phrase” was taken to limit the scope of the MFN Clause was provided in *Daimler*: “[I]t seems that the very concept of extra-territorial dispute resolution and a Host State’s consent thereto are both ill-fitted to the clear and ordinary meaning of the words “treatment in its territory”. See *Daimler*, para 230. See also *ICS Inspection*, para 309. An example of where the “in its territory-phrase” was not given any relevance as to the scope of the MFN Clause was provided in *Hochtief*: The ‘international’ nature of this Tribunal does not alter the position. It does not deprive the conduct of the Respondent of its intra-territorial character.” See *Hochtief*, para 110.
4. Informal Reliance on Previously Rendered Awards: A Study of the MFN Cases

To date, the MFN Cases amount to nineteen awards and decisions decided during a time period of over 12 years, stretching from *Maffezini*, issued on 25 January 2000, to *Daimler*, issued on 22 August 2012. In the interest of presenting an accurate reflection of the use of previously rendered awards in the MFN Cases, however, *Suez I* and *Suez II* are treated as one. This is due to the fact that both addressed similar facts and were rendered by identically composed Tribunals.

The MFN Cases contain numerous citations of previously rendered awards. Far from all citations, however, were relied on materially. In addition, when reliance on previously rendered awards was made, it was often done in a manner which the Tribunals considered to be in accordance the VCLT. The chapters 4.1 and 4.2 serve to illustrate examples of references to previously rendered awards which are not to be characterized as Informal Reliance. The study thereafter proceeds to present the instances where Informal Reliance has been made in chapter 4.3.

The study of the MFN Cases comes with two important caveats. First, it is refrained from speculating on issues which cannot be read from the Tribunals’ reasons with a sufficient degree of certainty. Some of the quoted extracts of MFN Tribunals’ reasoning are not fully clear as to how and/or to what extent reliance has been made on previously rendered awards. In situations of such uncertainty, material reliance has not been presumed.

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73 See the MFN Cases outlined supra note 7. See also Appendix C.
74 In *Camuzzi International S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Objections to Jurisdiction, 11 May 2005 and *Camuzzi International S.A. v. Republic of Argentina*, ICSID Case No. ARB/03/7, Decision of the Tribunal on Objections to Jurisdiction, 10 June 2005, the claimant relied on an MFN Clause in order to overcome the 18-month waiting period. However, both cases are excluded from the study since the MFN Question was not addressed in substance by the Tribunals. In neither case, the respondent objected to MFN Jurisdiction.
75 For example, a common expression throughout the MFN Cases is “as noted in” followed by a reference to one or several previously rendered awards, without any further expansion on whether the present Tribunal relies on the cited previously rendered awards or not. Cf infra chapter 4.1.2.
On the same theme, speculations on the ‘true’ influence previously rendered awards have on Tribunals are left out. Persuasive legal reasoning in previously rendered awards naturally has the ability to influence subsequent Tribunals’ reasoning. But in such cases it is not the form of the legal reasoning, i.e. the fact that it is carried out by a Tribunal, but solely its substance that is influential. Thus, if previously rendered awards are not explicitly relied on in the reasons, it is difficult to find compelling motives to differentiate them from persuasive legal reasoning provided by commentators and other non-members of Tribunals.

Finally, it should be mentioned that the MFN Cases contain frequent citations of a few state-state decisions dealing with issues related to the MFN Question. While acknowledging that these decisions have played a significant role in MFN Tribunals’ legal reasoning on the MFN Question, they fall outside the scope of the present study. Therefore, their part will not be further discussed.

4.1 No Material Reliance on Previously Rendered Awards

The common denominator of the extracts of references to previously rendered awards presented under this section is that the previously rendered awards were not weighed into the legal analysis or otherwise applied in such a manner that they had a material impact on the legal reasoning on the MFN Question.

Professor Domingo Bello Janeiro’s concurring statement in Daimler provides an example of such discrepancy between an arbitrator’s mind and the written reasons. Janeiro served as an arbitrator first in Siemens and later in Daimler. Even though these MFN Cases involved interpretation of the same BIT (Germany-Argentina, concluded in 1991) they came to different conclusions on the MFN Question. In Siemens, the Tribunal unanimously accepted MFN Jurisdiction while the Daimler Tribunal declined MFN Jurisdiction (with one dissent). It follows from the opposing outcomes in the decisions and from the concurring statement Janeiro attached to the Daimler-decision that he, in his own words, had a “change of heart” on the MFN Question sometime during the eight year time period between Siemens and Daimler. It also follows from his explanation of his changed position that he was considerably influenced by reasoning in other MFN Cases. Inter alia, he was “very favorably impressed and initially influenced by the arguments adduced by the Wintershall tribunal”. In the Daimler-decision, however, the Tribunal did not rely materially on Wintershall, or on any other MFN Case. Furthermore, Janeiro stated that the Siemens decision was “directly based” on Maffezini. However, as will be outlined below in this chapter, no material reliance on Maffezini, or on any other MFN Case, can be read out of the reasons provided in Siemens. See Daimler, Opinion of Professor Domingo Bello Janeiro. Cf infra, chapter 5.1.1.

The most prominent decisions cited in the MFN Cases are: Ambatielos case (Greece v. United Kingdom), Judgment, ICJ Reports 1953, p. 10; Ambatielos Claim (Greece, United Kingdom of Great Britain and Northern Island), Decision of the Commission of Arbitration, 6 March 1956, United Nations Reports of International Arbitral Awards, vol. XII, p. 83; Anglo-Iranian Oil Co. Case (Jurisdiction) (Iran v. United Kingdom), Judgment, ICJ Reports 1952, p. 93; and Case Concerning Rights of Nationals of the United States of America in Morocco (France v. United States), Judgment, ICJ Reports 1952, p. 176.

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4.1.1 No Citations of Previously Rendered Awards

To date, *Hochtief* is the only MFN Case not containing any citations of previously rendered awards in the reasoning on the MFN Question. The lack of references to previously rendered awards was not due to the fact that parties did not rely on case law in their submissions but, rather, the result of an active choice made by the Tribunal. In the reasons, attention was drawn to the parties’ “heavy reliance” on previously rendered awards. The inconsistencies in the MFN Cases enabled, in the view of the Tribunal, both parties to support their positions by relying on previously rendered awards. The Tribunal then stated the following:

“The Tribunal has given very careful consideration to this jurisprudence, and is conscious of the advantages of consistency in the approaches of different tribunals to similar questions. It is also aware of the significance that other tribunals have attached to differences between the formulations of MFN provisions in various treaties. That said, it is the responsibility of this Tribunal to interpret to the best of its ability the specific provisions of the particular treaties that are applicable in this case, and not to choose between broad doctrines or schools of thought, or to conduct a head-count of arbitral awards taking various positions and to fall in behind the numerical majority.”

The Tribunal subsequently carried out a thorough interpretation of the MFN Clause without any citations of previously rendered awards. The MFN Question was held in the affirmative.

4.1.2 Previously Rendered Awards ‘Noted’ or ‘Outlined’

The common feature of the following extracts is that the citations of previously rendered awards were separated from the legal reasoning on the MFN Question. Thus, no material relevance was admitted to previously rendered awards.

In *Tecmed*, the Tribunal acknowledged a previously rendered award, but then proceeded without any further discussions related to it. The claimant had brought claims arising from events that had occurred before the basic treaty came into force. According to the arbitration clause in the Basic Treaty it was only possible to submit disputes to investor-state arbitration which had arisen after the treaty entered into force. The claimant invoked a retroactive application clause of a third party BIT and referred to the MFN

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78 *Hochtief*, para 57.
Clause of the basic treaty. In support of the claim, the claimant relied on *Maffezini*. The Tribunal stated that it was “aware that the [c]laimant” had relied on Maffezini and that it was referring to the MFN Clause in order to enable retroactive application. The Tribunal then rejected the claimant’s argument.\(^81\)

In *RosInvest*, the Tribunal took note of the previously rendered awards referred to by the parties before stating that its primary function was to “decide the case before it rather than developing further the general discussion on the applicability of MFN clauses to dispute-settlement-provisions”. However, the Tribunal implied that it would be prepared to expand on the reasoning and conclusions of previously rendered awards had they considered MFN Clauses and jurisdiction clauses of the same wordings as those in question in the present dispute. Due to the lack of previously rendered awards “identical” to “the combined wording in Article 3 and 7 of the UK-Soviet BIT” the Tribunal found that the previously rendered awards did not motivate a change of its foregoing interpretation of the MFN Clause.\(^82\) The Tribunal held the MFN Question in the affirmative.

**4.1.3 Previously Rendered Awards Rejected**

The numerous criticisms of reasoning by other Tribunals on the MFN Question are one of the more salient ingredients in the MFN Debate. They are not to be restated here. For the purposes of this thesis, it suffices to point out that citations of previously rendered awards which are subsequently rejected by the Tribunal have not materially affected the Tribunals’ reasoning on the MFN Question.\(^83\)

**4.2 Reliance on Previously Rendered Awards Mandated by the VCLT**

**4.2.1 Previously Rendered Awards Cited to Confirm the Interpretation**

As described above, some Tribunals refer to Article 32 of the VCLT as allowing previously rendered awards to be relied on as a supplementary means to confirm the interpretation carried out under Article 31. The confirmatory character of such reliance on previously rendered awards was carefully pronounced by some MFN Tribunals, and sepa-

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\(^81\) *Tecmed*, para 69.
\(^82\) *RosInvest*, paras 136-137.
\(^83\) See, e.g., *Salini*, para 115.
rated from the interpretation of the MFN Clause carried out in accordance with Article 31 of the VCLT. In Daimler, for example, the Tribunal carried out an interpretation of the treaty terms pursuant to Article 31 of the VCLT. The interpretation rendered the conclusion that MFN Jurisdiction was to be declined. The Tribunal then turned to “[a]n examination of relevant supplementary materials pursuant to Article 32 of the [VCLT]” to “confirm [the] conclusion” under the separate headline “Supplementary indications from state practice and international jurisprudence”. Inter alia, the Tribunal reviewed case law on the MFN Question for the purpose of finding whether the phrase “treatment in its territory” had evolved over time.84

In some awards the confirming character of references to previously rendered awards can be deduced from the circumstances in which they were made. In Siemens, the Tribunal, after initially having proclaimed its intention to carry out the interpretation in accordance with the interpretative method provided in Article 31 of the VCLT, thoroughly interpreted the invoked MFN Clause taking literal, contextual and purposive approaches.85 The interpretation resulted in a finding that access to dispute settlement mechanisms was a part of the MFN protection offered to investors.86 The Maffezini-decision was referred to on two occasions in the reasons. First, when the question whether “treatment” covered the dispute resolution clause was addressed, the Tribunal concluded that the term treatment was wide enough to include access to dispute resolution. The Tribunal stated that its conclusion concurred with Maffezini.87 Secondly, the Tribunal concurred with Maffezini on the view that the beneficiary of an MFN Clause ought not to be able to override public policy considerations of the investment treaty. In the present dispute, however, the Tribunal found that no public policy considerations were applicable to prevent the Tribunal from assuming MFN Jurisdiction.88

In Austrian Airlines, the Tribunal addressed the split in the MFN Cases as to the question whether state consent to arbitration is to be interpreted restrictively. The strict Plama approach was rejected as the Tribunal found it did not reflect international law. In support of its position, the Tribunal referred to the Suez I-decision and some other decisions and awards. The reference had the character of confirmation rather than an attempt

84 Daimler, paras 261-278. The Tribunal discussed previously rendered awards under a separate headline in order to confirm the foregoing interpretation.
85 Siemens, paras 80-81 and 82-110.
86 Ibid, para 102.
87 Ibid, para 103.
to demonstrate the correct content of international law. Such a reading of the reasoning is supported by the fact that the reference to the previously rendered awards was initiated by the wording “[a]s noted by other strand of decisions” and was then followed by the Tribunal’s own perception of what was international law on the issue.\textsuperscript{89}

4.3 Informal Reliance on Previously Rendered Awards

The study found seven instances of Informal Reliance in the MFN Cases. The support drawn out of previously rendered awards varied, and the instances of Informal Reliance have been categorized accordingly. One distinction is made between reliance on reasoning and reliance on conclusions in previously rendered awards. The \textit{Impregilo}-decision is distinguished due to its reliance on previously rendered awards as the decisive argument for assuming MFN Jurisdiction.

4.3.1 Informal Reliance on the Legal Reasoning in Previously Rendered Awards

4.3.1.1 \textit{Tza Yap Shum}: Carrying out Legal Reasoning and Subsequently Admit Relevance to Previously Rendered Awards

In \textit{Tza Yap Shum}, the Tribunal initially carried out an analysis of the MFN Question without any references to previously rendered awards and held that the MFN Clause did not extend to cover the arbitration clause.\textsuperscript{90} After having reached its conclusion the Tribunal continued to examine previously rendered awards under the separate headline “Analysis of the decisions in other arbitration cases”. The Tribunal stated that its conclusion on the MFN Question was reached after it had “considered carefully several awards thoroughly explained in prior disputes wherein an interpretation of an MFN clause was needed”. Since both parties had relied on previously rendered awards, the Tribunal deemed it fit to analyze “key differences and concepts particularly relevant for

\textsuperscript{89} \textit{Austrian Airlines}, para 119. The full quote reads: “As noted by other strand of decisions and awards, including \textit{Amco v. Indonesia}, \textit{Mondev v. United States}, \textit{Suez and Interaguas v. Argentina} and \textit{Suez and Vivendi v. Argentina}, there is no principle of either restrictive or extensive interpretation of an agreement to arbitrate in international law (it being specified that this may indeed be different under certain national arbitration laws)” (footnotes omitted). Notably, the \textit{Austrian Airlines}-Tribunal also stated that there is a duty to follow consistent lines of cases, see \textit{Austrian Airlines}, para 84.

\textsuperscript{90} \textit{Tza Yap Shum}, paras 199-216. The Tribunal concluded that “the specific wording of Article 8(3) [the jurisdiction clause] should prevail over the general wording of the MFN clause in Article 3”.
The Tribunal found the facts of the present dispute being akin to the facts of the *Plama*-decision. “Following a similar reasoning”, the Tribunal concluded that the MFN clause in the Basic Treaty could not override what had been specifically agreed upon in the arbitration clause. The disposition of the reasons is similar to some of the cases which using previously rendered awards as confirming. That is, the analysis of previously rendered awards was not integrated in the legal reasoning on the MFN Question but discussed after, under a separate headline, the Tribunal had reached its conclusion. However, the Tribunal expressly stated that it was influenced by *Plama* when carrying out the legal reasoning. This indicates that something more than merely confirmation was drawn out of *Plama*. The Tribunal did not carry out an autonomous legal reasoning and then considered previously rendered awards in order to confirm, but considered previously rendered awards and was influenced by the legal reasoning of another MFN Tribunal when carrying out its own legal reasoning.

### 4.3.2 Informal Reliance on Conclusions in Previously Rendered Awards

#### 4.3.2.1 Telenor and Suez I / Suez II: Aligning with a ‘Principled Approach’ Formulated in Previously Rendered Awards

The *Telenor*-Tribunal denied MFN Jurisdiction after initially having rejected the *Maffezini* and the *Suez I* reasoning by, *inter alia*, aligning “wholeheartedly [with] the analysis and statement of principle” in *Plama*. The Tribunal distinguished the facts of the present dispute from the *Suez I*-decision. It found that the facts in *Suez I* differed from the facts of the present dispute on some important areas. The Tribunal then, noting that the *Suez I*-tribunal had dissented from the *Plama* principle, stated that it “[b]y contrast… fully support[ed] the *Plama* formulation”. The alignment with the principled approach stated in *Plama* was not conclusive for the outcome on the MFN Question,

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91 *Tza Yap Shum*, para 217.
92 *Tza Yap Shum*, para 220. The claimant argued that the Tribunal had jurisdiction to resolve the dispute regarding whether there was a breach of the BIT. The jurisdiction clause, however, provided that only disputes regarding expropriation or compensation could be submitted to ICSID. Any other dispute could be submitted only if the parties so agreed. The Tribunal especially emphasized the *Plama*-Tribunal’s rejection of the claimant argument that the MFN-clause could function to replace the forum of the arbitral proceedings agreed upon by the contracting parties.
93 *Telenor*, para 90.
since it was combined with other arguments which the Tribunal deemed as compelling for not assuming MFN Jurisdiction.\(^{95}\)

In *Suez I / Suez II*, the Tribunal commenced the interpretation by stating that the term “all matters” covered the dispute settlement provision.\(^{96}\) It continued to state that it had found “strong support for this conclusion in previous ICSID cases”, *Maffezini* in particular. Subsequently the Tribunal quoted the “relevant parts” of the Maffezini decision, *viz.* the principled approach entailing that dispute settlement provisions today are a part of the substantive protection of foreign investors and that dispute settlement may be extended to the beneficiary of the MFN Clause. The Tribunal clearly admitted material relevance to the extracts of the previously rendered awards and considered them to “well show the rationale behind the application of the most-favored nation clause to dispute settlement”.\(^{97}\) The MFN Question was held in the affirmative.

### 4.3.2.2 Plama and Wintershall: Drawing Conclusions from Previously Rendered Awards

In the course of arguing that the conclusions reached in *Maffezini* went beyond what state parties typically intend the scope of the MFN Clause to be, the *Plama* Tribunal made a brief comment regarding the ‘all matters-phrase’. Unlike the MFN Clause subject of interpretation in *Plama*, the MFN Clause in *Maffezini* contained the ‘all matters-phrase’. The Plama-Tribunal reasoned that even such a phrase as “all matters” “does not alleviate the doubt as pointed out in *Siemens*”.\(^{98}\) No further comments were made as to the reference to *Siemens* or on the question of the significance of the ‘all matters-phrase’.

In *Wintershall*, the Tribunal outlined the different approaches in the *Maffezini*-line and *Plama*-line cases under a separate headline. In the course of presenting the previously rendered awards the Tribunal particularly highlighted criticism against the *Maffezini*-approach made by other Tribunals and commentators.\(^{99}\) When discussing the *Berschader*-decision the Tribunal criticized the dissenting opinion. The Tribunal first addressed the dissent’s reliance on “prior jurisprudence”, referring to the fact that “there

\(^{95}\) *Ibid*, paras 91-100.

\(^{96}\) *Suez I / Suez II*, para 59.

\(^{97}\) *Ibid*, para 60.

\(^{98}\) *Plama*, para 205. See also *infra* chapter 5.2.2.

\(^{99}\) *Wintershall*, para 179, note 151, and 182.
are no binding decisions in ICSID arbitration”. However, in the following sentence the Tribunal stated what appears to have been their conclusion drawn from Berschader; “[i]t appears that the most-favoured-nation-clause in a BIT does not extend to the dispute settlement provision in that BIT, except where expressly so provided or clearly indicated”.100

4.3.2.3 National Grid: Carrying out Legal Reasoning on Basis of Previously Rendered Awards

The National Grid-Tribunal found that the term “treatment” in the MFN Clause extended to cover the arbitration clause. This conclusion, however, was not reached after an interpretation of the term “treatment” as it appeared in the present MFN Clause. Rather, the conclusion was based solely on an examination of previously rendered awards presently available, including Maffezini, Siemens, Gas Natural, Plama and Salini.

The Tribunal stated that Maffezini and Gas Natural, together with two state-state decisions, “all concurred that the element of dispute settlement at issue was a part of the protection – treatment – of investors”. As regards the two cases where MFN Jurisdiction was not assumed, Plama and Salini, the Tribunal reasoned that they “considered extensions of the MFN clause widely different from the situation considered here”. Thus, it was found that those two cases concerned extending the subject matter scope and not disregarding a waiting period, as was the jurisdictional treatment presently at issue.101

The Tribunal, finally, expressed its support of “Maffezini’s balanced considerations in its interpretation of the MFN clause”. The MFN Question was held in the affirmative.102

4.3.3 Impregilo: Informal Reliance on ‘Clear Case Law’ as the Decisive Argument on the MFN Question

In Impregilo, the Tribunal initially stated that it deemed the phrases “treatment” and “all matters regulated in this Agreement” in the MFN Clause to cover the arbitration clause. However, it did not motivate this conclusion any further.103

100 Ibid, para 187.
101 National Grid, paras 89-91.
102 Ibid, paras 92-93.
103 Impregilo, para 99.
Subsequently, attention was placed on the MFN Cases which had interpreted MFN Clauses containing the phrase “all matters”. The Tribunal reasoned in terms of “massive volume of case law”, referring to cases where the ‘all matters-phrase’ had been included in the MFN Clause subject of interpretation. The cases referred to were Maffezini, Gas Natural, Suez I/Suez II and Camuzzi International S.A. v. Argentine Republic. The Tribunal also noted Siemens, National Grid and RosInvest, in which MFN Jurisdiction had been assumed even in the absence of an “all matters-phrase”.104

The Tribunal acknowledged that the “case law [was] not fully consistent” and referred to Berschader. In Berschader, MFN Jurisdiction was declined despite an ‘all matters-phrase’ in the MFN Clause. However, the Tribunal toned down the importance and applicability of Berschader on the present dispute on the basis of two observations. First, the Berschader-decision was “strongly dissented” on the MFN Question. Secondly, there were “some special elements [in Berschader] which contributed to the outcome”.105

The Tribunal concluded by assuming MFN Jurisdiction on the basis of that there was “near unanimity” in granting MFN Jurisdiction among the MFN Cases which had dealt with an ‘all matters-phrase’. A full quotation is warranted:

“Nevertheless, the Arbitral Tribunal finds it unfortunate if the assessment of these issues would in each case be dependent on the personal opinions of individual arbitrators. The best way to avoid such a result is to make the determination on the basis of case law whenever a clear case law can be discerned. It is true that, as stated above, the jurisprudence regarding the application of MFN clauses to settlement of disputes provisions is not fully consistent. Nevertheless, in cases where the MFN clause has referred to “all matters” or “any matter” regulated in the BIT, there has been near-unanimity in finding that the clause covered the dispute settlement rules. On this basis (italics added), the majority of the Tribunal reaches the conclusion that Impregilo is entitled to rely, in this respect, on the dispute settlement rules in the Argentina-US BIT and that the case cannot be dismissed for non-observance of the requirements in Article 8(2) and (3) of the Argentina-Italy BIT.”106

104 Ibid, paras 104-105.
105 Ibid, para 106.
106 Ibid, para 108.
4.4 Appraisal

The study of the MFN Cases identifies seven instances where Informal Reliance has been made. Some observations can be made for our purposes.

The interpretative value admitted to Informal Reliance varies considerably among the MFN Cases in question. For example, while the Informal Reliance in *Tza Yap Shum* consisted of the Tribunal being influenced by a previously rendered award when carrying out the legal reasoning, the Informal Reliance in *National Grid* was the only argument expressed in the reasons in favour of assuming MFN Question. In *Impregilo*, the Informal Reliance was one of several arguments forwarded, but the Tribunal held it to be the decisive argument for the outcome of the MFN Question.

The fact that Informal Reliance was made should not automatically render the conclusion that the Tribunals considered themselves to deviate from the law on treaty interpretation VCLT. On the contrary, all MFN Tribunals that engaged in Informal Reliance but the *Impregilo*-Tribunal explicitly stated their loyalty to Article 31 and 32 of the VCLT.  

On the other hand, the fact that Informal Reliance was made only in seven MFN Cases does not necessarily render the conclusion that the other Tribunals actively refrained from making Informal Reliance. In *Austrian Airlines*, the Tribunal was prepared to rely on previously rendered awards if it had found a consistent line of cases.

The *Impregilo*-Tribunal was the only MFN Tribunal which explicitly included the interest of consistency in the Informal Reliance. It was also the only MFN Tribunal claiming to have found a consistent case line.

There is no distinguishable trend suggesting that the occurrence of Informal Reliance is increasing or decreasing over time. The different approaches taken in two relatively recent MFN Cases *Impregilo* and *Hochtief* may serve as an illustration. Both decisions were rendered in 2011, merely over four months from each other. While *Impregilo* relied on previously rendered awards as the decisive argument on the MFN Question, the

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108 *Austrian Airlines*, para 84.
*Hochtief*-Tribunal made an active choice to not make any references to other MFN Cases.
5. Efficiency of Informal Reliance on Previously Rendered Awards

The thesis now turns to the question whether Informal Reliance efficiently can achieve its purpose to foster consistency on the MFN Question. In order to do so, it is argued that three significant arguments against such a proposition must be overcome. The first argument may be characterized as a general argument against the proposition that Informal Reliance has the ability to promote consistency, namely that Tribunals differ on whether they are to follow previously rendered awards. This argument is partly examined on basis of the specific implications and criticisms Informal Reliance has attracted in the MFN Cases.

The two following arguments have closer ties to the special features of the MFN Question. In light of the MFN Question’s complexity, the second argument entails concerns as to Informal Reliance on previously rendered awards with non-corresponding facts. Finally, there is a third argument to be made that Informal Reliance is ill-fit to remedy inconsistency on the MFN Question since the existing body of MFN Cases have taken different interpretative approaches and carried out conflicting legal reasoning.

5.1 Continuity in the Light of Differing Conceptions on Legality and Proper Use of Informal Reliance

If the aim of this thesis was to evaluate the legality of Informal Reliance it would have sufficed to simply present the conclusive argument that Informal Reliance should not be made since it is not mandated in law. Such an approach, however, would fail to explain why Tribunals engage in Informal Reliance despite the lack of support in law. If one seeks to evaluate the concept of Informal Reliance from the perspective of its prospects to promote consistency on the MFN Question, one must proceed from the starting point that there is a lack of mandate in law but in practice Tribunals make Informal Reli-
If consistency on the MFN Question is to be achieved by virtue of Informal Reliance, however, it is reasonable to assume that a central prerequisite for this is that Tribunals agree on the proper use of Informal Reliance. Only then will the reasoning and conclusions relied on be fixed through several awards and decisions.

The relevant question is thus what the prospects are for MFN Tribunals to reach consistency as to the correct use of Informal Reliance. On this issue, it is assumed that the more persuasive arguments are in favour of Informal Reliance, the more likely it is that Tribunals reach consensus as to its proper use. Four plausible arguments in favour of Informal Reliance are suggested and evaluated in the following.

5.1.1 ‘Previously Rendered Awards have Persuasive Value’

In practice, Tribunals draw support from previously rendered awards if they find them persuasive. The argument may be put in the following terms. There is nothing hindering a Tribunal from applying the legal reasoning of a previously rendered award, which in the arbitrators’ opinion is persuasive, without making a reference to it in the reasons. Why, then, should it matter whether there is an explicit reference to the persuasive reasoning in previously rendered award or not?

In order to address this argument, a distinction must be made between Informal Reliance on legal reasoning and Informal Reliance on conclusions. On its face, the argument is inapplicable on Informal Reliance on conclusions of previously rendered awards. If a previously rendered award is relied on due to its persuasiveness, it is the substance of the legal reasoning in the previously rendered award which is relied on, not the form, i.e. the fact that it is a Tribunal that have rendered the legal reasoning.

As regards Informal Reliance on persuasive legal reasoning, it may convincingly be argued that such reliance can be restructured in conformity with the VCLT by either: i) leaving out any citation and adopting the legal reasoning of the persuasive previously rendered award or ii) carrying out the legal reasoning under influence of the persuasive

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109 Cf Cheng, supra note 16, at 1016. Cheng proceeds from the thesis that “there is an informal, but powerful, system of precedent that constrains arbitrators to account for prior published awards and to stabilize international investment law”.

110 Cf, e.g., Wälde’s dissent, supra note 28, with accompanying text.

111 See, e.g., Berschader, para 97. The Tribunal stated that it did not consider itself precluded “from having regard to international investment case law as a persuasive source of law”.

112 Cf supra note 63, with accompanying text.
previously rendered awards and subsequently citing the previously rendered award to confirm the legal reasoning. Thus, in *Tza Yap Shum*, where Informal Reliance was made on the *Plama*-Tribunal as to its legal reasoning on the MFN Question,\(^{113}\) the same result, it may be argued, would have been achieved if the Tribunal either had omitted to refer to *Plama*, or omitted to state that its legal reasoning was influenced by *Plama* and, instead, had admitted it solely confirmatory value.

5.1.2 ‘The Parties Rely on Previously Rendered Awards’

MFN Tribunals often emphasized that the parties of the present dispute had relied on case law in their submissions before addressing previously rendered awards.\(^{114}\) An argument may be made that the disputing parties’ reliance on previously rendered awards justifies the Tribunals’ Informal Reliance as it is in conformity with the disputing parties’ expectations.

The argument is difficult to evaluate since there is no clear answer on what parties generally expect. It is not completely unreasonable to assume that the stakeholders of investment treaty arbitration expect consistent decision making.\(^{115}\) On the other hand, the members of the Tribunal are appointed in accordance with the disputing parties’ agreement to arbitrate. Under such circumstances, it is neither unreasonable to assume that the parties expect the dispute to be resolved by the arbitrators they have appointed, not by earlier Tribunals appointed by other parties and under different circumstances.\(^{116}\)

Furthermore, it is difficult to imagine a situation where Informal Reliance would meet the expectations of both parties given that the parties typically draw support from different MFN Cases, or draw different conclusions from the same MFN Case. Given that reliance on previously rendered awards can meet the expectations of both parties, the fact that the disputing parties rely on previously rendered awards may be taken as an argument against Informal Reliance. Such a view was taken in *Hochtief*. As described above, the *Hochtief*-Tribunal considered the fact that both parties could rely on MFN

\(^{113}\) See *supra* chapter 4.3.1.
\(^{114}\) See, e.g., *Tza Yap Shum*, para 217,
\(^{115}\) Cf *supra* chapter 2.1.
\(^{116}\) Ten Cate, *supra* note 6, at 459.
Cases in support of their position as a reason not to address previously rendered awards at all.\textsuperscript{117}

5.1.3 ‘No Other Jurisdictional Proofs’

A third foreseeable argument in favour of Informal Reliance is the proposition that it is necessary to rely on previously rendered awards since there are insufficient proofs of the parties’ consent to arbitration. No MFN Tribunal, however, gave such a reason for making Informal Reliance. On the contrary, all MFN Tribunals that engaged in Informal Reliance but the \textit{National Grid}-Tribunal relied on several other legal sources when interpreting the MFN Clause; primarily the text of the treaty. The reasons stated in \textit{Impregilo} serve well as an illustration. As described above, the \textit{Impregilo}-Tribunal relied on “clear case law” as the decisive argument to assume MFN Jurisdiction. Before reaching this conclusion, however, the Tribunal had already stated that it deemed the term “treatment” and the ‘all matters-phrase’ to be sufficiently wide to include jurisdictional treatment. Thus, the Tribunal would have assumed MFN Jurisdiction also by relying on jurisdictional proof mandated by VCLT; namely the terms of the MFN Clause. Viewed in this light, granting MFN Jurisdiction on basis of “clear case law” was the least plausible ground.\textsuperscript{118}

Moreover, even if one accepts the proposition that there are insufficient jurisdictional proofs in order to decide the parties’ intent, this situation is foreseen by Article 32 of the VCLT. If the interpretation in accordance with Article 31 of the VCLT does not provide a clear outcome, or where the outcome would be “manifestly absurd or unreasonable” a Tribunal may turn to supplementary means of interpretation. As described in chapter 2.2.1.2, previously rendered awards have been taken as a supplementary means of interpretation by some Tribunals.

\textsuperscript{117} See supra chapter 4.1.1.

\textsuperscript{118} In this context, warnings entailing that an excessive focus on previously rendered awards may distort the interpretation of consent to arbitration should be noted. See, e.g., F.G. Sourgens, \textit{By Equal Contest of Arms: Jurisdictional Proof in Investor-State Arbitrations}, North Carolina Journal of International Law and Commercial Regulation, Vol. 38, No. 4 (2013), pp. 101-180, at 108. “As a matter of common sense, the current paradigm’s focus on the development of legal rules and formal jurisdictional precedent is leading investor-state arbitration down the wrong path. Common sense requires that disputes be resolved on their merits; the parties are entitled to a decision interpreting the key legal instruments and making findings of fact supporting the ultimate determination of the case.” See also, Ten Cate, supra note 6, at 457. “The “correctness” of a decision, under this view, is determined by the extent to which it is connected to the cases that precede and follow it... What gets lost in this notion of “correctness,” however, is the adjudicator’s independent judgment about the “right” interpretation or application of the law.”
5.1.4 ‘Informal Reliance Remedies Complexity and Inconsistency’

Naturally, if Informal Reliance has the ability to promote clarity and consistent decision making, the chances of the investment arbitration community to accept it as a desirable means of interpretation would increase. Given that these arguments will be addressed in the following two chapters, this argument is not evaluated here, but returned to in chapter 5.4.

5.2 Clarity through Informal Reliance in the Face of Complexity

In chapter 3.1, the MFN Question’s complexity was highlighted: the MFN Cases have been dealing with different MFN Clauses and different jurisdictional treatment has been sought by the investors. Given the complexity of the MFN Question, there is an evident danger of Informal Reliance being made on previously rendered awards with non-corresponding facts. If Informal Reliance is to promote consistency, it is submitted that it needs to either offer an overall answer to the MFN Question or appreciate its complexity by operating only when the facts of previously rendered awards correspond with those facts in the present dispute.

5.2.1 ‘There is an MFN standard’

The first defence of Informal Reliance in this respect is the suggestion that the MFN Question is not complex since there is an ‘MFN standard’.\textsuperscript{119} It may be argued that the MFN Question may be answered in principle and therefore fact comparing enterprises are of less significance for the applicability of previously rendered awards on the present dispute.\textsuperscript{120}

However, the argument can be convincingly attacked on two grounds. First, the argument rests on the assumption that there is a consensus on whether there is an MFN standard. As described above, some MFN Tribunals carried out an autonomous interpretation without adhering to any predefined principle. Thus, since there is no agreement on the existence of an MFN standard, there is no clear leading case or consistent case line to follow. Secondly, even if there was consensus on whether there is an MFN

\textsuperscript{119} See supra chapter 3.2.1.
\textsuperscript{120} Cf Douglas, supra note 57.
standard, the content of such a standard is heavily disputed. The split between the Maffezi-line cases and the Plama-line cases remains the most diametric in the MFN Cases.

Any attempt to draw support from previously rendered awards in favour of the existence and content of an MFN standard would therefore have more the character of taking side in the MFN-Debate, rather than a finding that such a standard has evolved in case law. This observation seems to have been made by the RosInvest-Tribunal. As described above, the RosInvest-Tribunal emphasized that absent interpretation of identically worded MFN Clauses and arbitration clauses in previously rendered awards, it found no reason “developing further to the general discussion on the applicability of MFN clauses to dispute-settlement-provisions.\(^{121}\)

### 5.2.2 ‘There are MFN Cases with Corresponding Facts’

The second defence of Informal Reliance appreciates the complexity of the MFN Question by maintaining that Informal Reliance can promote consistency where there are similar facts. This argument has the merit of clarification since it takes into account the complexity of the MFN Question. However, such an approach inevitably fragments the MFN Question into different fact situations. If one accepts this argument one must consequently also accept that Informal Reliance is incapable to promote full consistency on the MFN Question.

Moreover, the argument presupposes that previously rendered awards are not misread or otherwise incorrectly relied on. While it falls outside the scope of this thesis to evaluate whether previously rendered awards have been correctly applied, it should be noted that it is not uncommon for Tribunals to criticize other Tribunals for incorrect reliance on previously rendered awards.\(^{122}\) It is also reasonable to assume that there is a risk of misreading the facts or the reasoning of previously rendered awards and that this risk increases where there is more complexity. One example of an irregular use of Informal Reliance is justified to attend for illustrative purposes.

As described in chapter 4.3.2.2, the Plama Tribunal relied on Siemens to support its conclusion that the ‘all matters-phrase’ in an MFN clause does not cover the arbitration clause.

\(^{121}\) Rosinvest, para 137. Cf Hoctief, para 58. The Hoctief-Tribunal refrained from choosing “between broad doctrines or schools of thought”.

\(^{122}\) See, e.g., Renta 4, para 95.
Two observations relating to the citation are to be made here. First, when studying the reasoning in Siemens, the reference emerges as peculiar. In Siemens, the Respondent had argued that the absence of an ‘all matters-phrase’ indicated that the MFN clause was narrower in its scope. The Siemens-Tribunal admitted that the absence of an ‘all matters-phrase’ resulted in the MFN clause being narrower in its scope. However, it concluded that the term “treatment” and “activities related to the investments” were sufficiently wide per se to cover the arbitration clause. Thus, it is correct that the Siemens-Tribunal addressed the ‘all matters-phrase’. But it did so to discuss the question what effect was to be admitted the MFN clause due to the absence of the term “all matters”, not, as suggested in Plama, the question of whether the ‘all matters-phrase’ was able to conclusively determine the MFN Question. Moreover, the Siemens Tribunal clearly expressed that it deemed an ‘all matters-phrase’ to expand the scope of an MFN clause.

5.3 Finding Consistency through Informal Reliance in the Face of Inconsistency

In chapter 3.2, the inconsistent interpretative approaches and legal reasoning in the MFN Cases was discussed: MFN Tribunals have taken different interpretative approaches and carried out conflicting legal reasoning. One first possibility to defend Informal Reliance as consistency-promoting is to look beyond the formal constitution of the ‘Tribunal’ and argue that there is overwhelming support in favour of a certain view among the arbitrators appointed in investment disputes at large. Since some arbitrators have participated repeatedly in MFN Cases it might be argued that the MFN Cases do not necessarily reflect the true legal opinion of the investment arbitration community. However, there are compelling reasons to consider such an argument invalid. The authority to adjudicate investment claims is given from the disputing parties to the Tribunal in its entirety. As mentioned above, what individual arbitrators submit on the MFN Question outside a Tribunal deciding on an investment dispute has no more legal authority than submissions of other commentators. Furthermore, even upon review of

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123 Siemens, para 103.
124 This type of argument was forwarded by Stern in her dissent in Impregilo. Stern, however, argued that the arbitrators in favour and against MFN Jurisdiction respectively were roughly the same in numbers. See Stern’s dissent, supra note 71, para 5.
125 See, e.g., Article 42(1) of the ICSID Convention, providing that “[t]he Tribunal shall decide the dispute in accordance with such rules of law as may be agreed by the parties” (italics added).
the substance of the argument, it is found that there are clear inconsistencies also among
the arbitrators which have participated in MFN Tribunals.\textsuperscript{126}

Is it possible, then, to find consistent decision making in the MFN Cases? It is difficult

to find support in favour of an affirmative answer. Of the MFN Tribunals engaging in
Informal Reliance, only the \textit{Impregilo}-Tribunal expressly declared to have found a con-
sistent case line. But even in \textit{Impregilo} the Tribunal had to make a reservation; the case
law was not fully consistent.\textsuperscript{127}

\subsection*{5.4 Appraisal}

There is nothing hindering an MFN Tribunal to draw support of legal reasoning in pre-
viously rendered awards which it considers to be persuasive. However, when facing the
options as to how such reliance is to be manifested in the reasons, there are few valid
reasons as to why Informal Reliance ought to be chosen instead of alternatives which do
not run contrary to the VCLT.

It is difficult to justify Informal Reliance on the assumption that the disputing parties
expect Tribunals to rely on previously rendered awards. It is more plausible that the
party expectations conform better to an interpretation of the treaty terms in accordance
with the VCLT. The documents governing the parties’ consent to arbitration have pro-
vided sufficient material for Tribunals to decide on the MFN Question.

There are two possible ways to address the complexity of the MFN Question. The first
option is rely on previously rendered awards providing a conclusive answer on how the
MFN Question is to be approached. A significant number of the MFN Tribunals have
aligned with either the \textit{Maffezini}-approach or the \textit{Plama}-approach. Given that these two
approaches conflict with each other, however, such Informal Reliance contributes little
to consistency. The second option is to seek consistent decisions through a search of

\textsuperscript{126} The following was found after the author’s review of the MFN Cases. Forty-five arbitrators have par-
ticipated in MFN Tribunals. Of the arbitrators which have participated only in one MFN Tribunal, thir-
teen decided in favour of MFN Jurisdiction and twenty-five declined. Out of the seven arbitrators who
have adjudicated on the MFN Question more than once, three have consistently been in favour of MFN
Jurisdiction and two have consistently been against. The remaining two arbitrators have decided once in
favour of MFN Jurisdiction and once in the negative. However, one of these two arbitrators is to be
referred to the group declining MFN Jurisdiction since it follows from his latest submission on the issue
that he has changed side, see \textit{supra} note 76.

\textsuperscript{127} \textit{Impregilo}, para 106.
similar facts. In doing so, claims on finding a conclusive answer on the MFN Question are abandoned. Nevertheless, such an approach has better prospects to be withheld by future MFN Tribunals and is better adapted to the reality of the legal framework governing investment treaty arbitration, *viz.* that each dispute is to be resolved on its own merits.

The MFN Question remains in dispute in the MFN Cases and in the investment arbitration community at large. As a result, successful attempts to find consistency have been few. To date, no fully consistent case line has been found. In the light of such inconsistency, it is difficult to imagine how future Tribunals are to respect and follow previously rendered awards which they consider to be wrongly determined.
6. Conclusions and Final Remarks

An envisaged need for consistent decision making in investment treaty arbitration has resulted in an order where some Tribunals engage in Informal Reliance. This thesis has identified and outlined instances where MFN Tribunals have carried out Informal Reliance when deciding on the MFN Question. Furthermore, the thesis has foreseen and evaluated plausible arguments for and against the proposition that Informal Reliance is a viable means to promote consistency on the MFN Question.

The study of the MFN Cases found seven instances where Informal Reliance was carried out. The weight admitted to Informal Reliance in the interpretation varied significantly. The Impregilo-Tribunal was the only MFN Tribunal which explicitly included the interest of consistency in the course of carrying out an Informal Reliance. It was also the only MFN Tribunal that claimed to have found consistency in case law, albeit it concerned a particular aspect of the MFN Question.

There were few explicit statements in the MFN Cases on the question whether previously rendered awards ought to be followed or not. The Hochtief-Tribunal was the only MFN Tribunal which declined to make any reference to previously rendered awards. On the other side of the spectra, the Impregilo-Tribunal was the only MFN Tribunal which explicitly relied on previously rendered awards as the decisive ground to assume MFN Jurisdiction. Any conclusion suggesting that there is a predominant view among the MFN Tribunals on the permissibility and/or desirability of Informal Reliance would be speculative. What can be concluded, however, is that there is no consensus on the question whether Informal Reliance is allowed or ought to be made.

The fundamental argument against the proposition that Informal Reliance is an efficient means to promote consistent decision making on the MFN Question entails that even if future case law on the MFN Question provides consistent interpretative approaches and legal reasoning, there are no guarantees that such consistent patterns will be followed subsequent MFN Tribunals. As regards the proposition that Informal Reliance can function to provide consistency on the MFN Question, it has been submitted that there has to be a consensus among future MFN Tribunals on the proper use of Informal Reliance. Presently, such a consensus does not exist.
Persuasive legal reasoning in future MFN Cases has potential of promoting consistency. However, there are no strong reasons as to why such persuasive legal reasoning ought to be followed in a manner not mandated by the VCLT. If persuasive answers on the MFN Question are provided and followed in future MFN Cases, they are followed more because of the convincing substance of the legal reasoning and less because they form case law directly applicable in subsequent investment disputes.

Moreover, if persuasive legal reasoning is to promote consistency, it has to be followed by all, or at least a vast majority of future MFN Tribunals. The thesis has submitted two aspects of the MFN Question which decreases the chances of the investment arbitration community to reach consensus on the MFN Question. First, there are no clear cut answers on the MFN Question. Each MFN Case involves a distinct MFN Clause in a distinct investment treaty, with parties submitting different claims for jurisdictional treatment. These factors decrease the value of turning to previously rendered awards to support a certain interpretation of the MFN Clause, unless the facts are corresponding. Full consistency on the MFN Question through reliance on previously rendered awards can therefore not be achieved.

Secondly, since MFN Tribunals differ on what the proper application of MFN Clauses on jurisdictional treatment is, it is unlikely that a consensus will be reached on the MFN Question in the near future. Given this situation, the option to seek the answer on the MFN Question in each investment dispute, through interpretation in close conformity with the VCLT, appears attractive.
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Appendix A: Article 31 and 32 of the Vienna Convention on the Law of Treaties

Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

   (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

   (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

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

   (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

   (a) leaves the meaning ambiguous or obscure; or

   (b) leads to a result which is manifestly absurd or unreasonable.
Appendix B: Extracts of the ILC Draft Articles on Most-Favoured-Nation Clauses

Article 4

Most-favoured-nation clause

A most-favoured-nation clause is a treaty provision whereby a State undertakes an obligation towards another State to accord most-favoured-nation treatment in an agreed sphere of relations.

Article 8

The source and scope of most-favoured-nation treatment

1. The right of the beneficiary State to most-favoured-nation treatment arises only from the most-favoured-nation clause referred to in article 4, or from the clause on most-favoured-nation treatment referred to in article 6, in force between the granting State and the beneficiary State.

2. The most-favoured-nation treatment to which the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, is entitled under a clause referred to in paragraph 1 is determined by the treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State.

Article 9

Scope of rights under a most-favoured-nation clause

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

2. The beneficiary State acquires the rights under paragraph 1 only in respect of persons or things which are specified in the clause or implied from its subject matter.

Article 10

Acquisition of rights under a most-favoured-nation clause

1. Under a most-favoured-nation clause the beneficiary State acquires the right to most-favoured-nation treatment only if the granting State extends to a third State treatment within the limits of the subject matter of the clause.
2. The beneficiary State acquires rights under paragraph 1 in respect of persons or things in a determined relationship with it only if they:

   (a) belong to the same category of persons or things as those in a determined relationship with a third State which benefit from the treatment extended to them by the granting State and

   (b) have the same relationship with the beneficiary State as the persons and things referred to in subparagraph (a) have with that third State.
## Appendix C: Table of the MFN Cases

* The Tribunal engaged in Informal Reliance

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