Over the past fifteen years there has been a great deal of controversy within the area of international investment arbitration as regards the application of most-favored-nation (MFN) clauses of bilateral investment treaties (BITs) to dispute settlement provisions. There are basically two issues in this discussion: on the one hand, whether the MFN provision can be used to waive certain requirements established in a BIT to submit a dispute to international arbitration; on the other hand, whether the MFN provision can be used to incorporate standards of treatment not expressly foreseen in the original BIT.

This paper will basically refer to the first issue, though it will not deal in depth with the case law which has already been analyzed in detail elsewhere. It will refer to the different arguments that have been given for the diverging case law, the text of MFN clauses as well as an in depth analysis of the Ambatielos cases. Though this issue has been discussed by different authors, recent case law

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warrants a return to principles on this issue,\textsuperscript{4} which is what this paper proposes to do shedding a different light on an existing discussion. There are basically two positions that have been adopted with regard to the relationship of MFN clauses and dispute settlement provisions. In the first place, the position held following the interpretation of the Maffezini tribunal,\textsuperscript{5} which we will call a broad interpretation.\textsuperscript{6} Secondly, the position held following the interpretation of the Salini tribunal,\textsuperscript{7} which we will call a narrow interpretation.\textsuperscript{8} Generally speaking, the interpretations within each of these groups are consistent.

The cases following the broad interpretation of the MFN provision hold that the MFN clause can be used by an arbitral tribunal to waive certain requirements

\begin{footnotesize}
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    \item Emilio Agustín Maffezini v. The Kingdom of Spain (ICSID Case No. ARB/97/7) Decision of the Tribunal on Objection to Jurisdiction of January 25, 2000.
\end{itemize}
\end{footnotesize}
established in the applicable BIT prior to submission of a dispute to arbitration. The other cases consider that the MFN provision cannot be used to modify or incorporate dispute settlement provisions expressly set forth or not foreseen in the applicable treaty.

Historically, the issue of MFN has been controversial in international law in general. The most relevant ICJ cases on the issue are: *Rights of US Nationals in Morocco*, *Anglo-Iranian Oil* and *Ambatielos*. In 1978 the ILC prepared a set of Draft Articles on the MFN Clause (Draft Articles). These draft articles were submitted to the UN General Assembly, but the matter was not pursued.

Prior to the *Maffezini* decision, there was not a great deal of case law referring to the relationship between the MFN clause and dispute settlement provisions. The Draft Articles of the ILC were also not very useful as they only referred to the *ejusdem generis* principle in Articles 9 and 10, and they did not have much case law on which to fall back on. In its commentaries to the Draft Articles, the ILC referred to international and national case law. After looking through the case law it concluded: “a clause conferring most-favoured-nation rights in respect of a certain matter, or class of matter, can attract the rights conferred by other treaties (or unilateral acts) only in regard to the same matter or class of matter.”

10 *Anglo-Iranian Oil Company* (UK v. Iran) 1952 ICJ Reports 93 (22 July).
13 The GATT/WTO, for example, has been one of the main generators of case law in relation to MFN provisions. However, it has not had any cases in relation to this issue.
14 Article 9: (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.

Articles 10: (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.
15 *Anglo-Iranian Oil Company* (UK v. Iran) 1952 ICJ Reports 93 (22 July); *Ambatielos* (UK v. Greece), 23 ILR 306 (6 March 1956).
When the ILC referred to the Ambatielos decision in its Draft Articles. However it did not analyze the decision of the Commission of Arbitrators. It merely set out the relevant paragraphs of the decision, underscoring that the MFN clause “can only attract matters belonging to the same category of subject as that to which the clause itself relates.”18 The ILC did not look at the ICJ decision.

The ejusdem generis principle appears to be related, thus, to the scope of the MFN clause. The ILC then added that there has to be “a substantial identity between the subject matter of the two sets of clauses concerned.”19 This last clarification is a bit confusing. It appears that the MFN clause would be used to incorporate a better standard of treatment than that in the original treaty. However, unless the MFN clause specifically refers to which standards it may incorporate, it is difficult to think of how a standard of treatment in another clause in the treaty will have substantial identity of subject matter with the MFN clause.20

In 2015 the ILC MFN Study Group set out its Final Report on the issue.21 This report provides an in-depth analysis of MFN interpretation by investment tribunals up to that date. In the report, there is not, however, a study on the possible interpretation of GATS MFN provisions, the ILC notes that this may be an issue but that “[t]he Study Group has found no practice or jurisprudence on this.”22 Also, the report does not analyze the Ambatielos saga that provided the basis for the first of the decisions in this controversy, Maffezini. The ILC Final Report concludes the MFN provisions must be interpreted on a case-by-case basis following the interpretative rules of the Vienna Convention on the Law of Treaties.

The tribunal in Maffezini turned to general international law decisions to guide it in its decision on the scope of application of the MFN clause in the Argentina-Spain BIT.23 This approach was then followed by other tribunals.24

19 ILC Draft Articles, Commentary to Articles 9 and 10, ¶ 11 p. 30.
20 The ILC also holds that states cannot avoid application of the MFN clause by arguing that the relations between itself and the third country are “friendlier or ‘not similar’ to those existing between it and the beneficiary”. (2 Yearbook of International Law Commission 30, ¶ 12, U.N. Doc. A/CN.4/SER.A/1978/Add.1(Part 2)). I will not go into this here as it is not within the scope of this paper. However, it is interesting to note that this is contrary to some of the existing case law on MFN: Re Application to Swiss Nationals of the Italian Special Capital Levy Duty; Lloyds Bank v. De Ricqles and De Gaillard; National Provincial Bank v. Dolfus; Lukich v. Department of Labour and Industries.
23 Emilio Augusto Maffezini v. Spain (ICSID Case No. ARB/97/7), Decision on Jurisdiction of 25 January 2000, ¶ 43.
of the decisions regarding the MFN clause and dispute settlement provisions have relied on general international law decisions directly in their interpretation of the MFN clause. There are some, however, which have not.

In the recent case of *Menzies Middle East*, the investor attempted to use the MFN clause of GATS to incorporate dispute resolution provisions in the Senegal-U.K. and Senegal-Netherlands BITs. Amongst other arguments Senegal put forth that the MFN clause does not apply to dispute resolution proceedings, which claimants’ countered saying that “ce raisonnement a été écarté par la décision *Ambatielos*”. Though the tribunal declined jurisdiction in this case, it did not refer to Senegal’s argument that the MFN clause does not apply to dispute settlement proceedings holding, instead, that it did not find consent by Senegal to submit the dispute to arbitration and that, in any case, if there could be an argument that Senegal was under an obligation to provide consent to arbitration for investments under GATS article II, not having given such consent would be a breach of the GATS over which the tribunal had no jurisdiction.

In *Venezuela US*, the investor attempted to use the MFN clause to allow the investor to bring an UNCITRAL claim under the Venezuela-Barbados BIT despite the fact that article 8 of that BIT only allowed for UNCITRAL claims to be brought prior to Venezuela’s becoming a party to the ICSID Convention. Though there was no specific discussion of *Ambatielos*, Prof. Kohen’s dissenting opinion brings to the fore the issue of whether the MFN clause may be used to create consent in a treaty that does not have such consent, even when it explicitly mentions that it applies to “Articles 1 to 11”, which includes Article 8 on dispute settlement. He notes that, regardless of the issue of textual application, which he argues are not applicable because “the material conditions in paragraph (2)” were not met, using MFN clauses to establish a tribunal’s jurisdiction is “putting the

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25 Menzies Middle East and Africa S.A. and Aviation Handling Services International Ltd. v. Senegal (ICSID Case No. ARB/15/21), Award of 5 August 2016, ¶ 117.
26 Menzies Middle East and Africa S.A. and Aviation Handling Services International Ltd. v. Senegal (ICSID Case No. ARB/15/21), Award of 5 August 2016, ¶ 117.
27 Menzies Middle East and Africa S.A. and Aviation Handling Services International Ltd. v. Senegal (ICSID Case No. ARB/15/21), Award of 5 August 2016, ¶ 143.
28 Which is in many respects in line with Prof. Boisson de Chazournes’ dissenting opinion of 3 July 2013 in Garanti Koza LLP v. Turkmenistan (ICSID Case No. ARB/11/20).
cart before the horse” in Prof. Thomas’ words. That is, “MFN clauses do not possess the power to express consent, even though they would be able to impose the obligation to consent to international arbitration if their content so allows”.32

The majority opinion in that case was very much based on the Garanti Koza case,33 though they concurred with Venezuela that “the MFN clause cannot serve the purpose of importing consent to arbitration when none exists under the BIT”.34 However, it interpreted the application of the MFN clause not to “importing Venezuela’s consent to international arbitration” but to “the conditions for resorting to international arbitration”.35 Despite the fact that there is no express reference here to the Maffezini decision, given the tribunal’s previous rejection of its application due to differences in the wording of the MFN provision, implicitly the same reasoning lies in this decision as was held in Maffezini.


There have been some authors and case law that have held that the wording of the MFN clause is fundamental to their interpretation and explains the divergences in the results of these cases. However, as the examples below show, contradictory decisions have been rendered on the basis of the same text as well as the same decisions on the basis of different texts.

In Maffezini, Gas Natural and Suez the BIT at stake was the Argentina-Spain BIT. The investors invoked the MFN clause to avoid a requirement of recourse to local courts for a period of 18 months prior to submitting the dispute to ICSID arbitration. The MFN clause in this BIT is paragraph 2 of Article IV. The first paragraph of that Article refers to the guarantee of fair and equitable treatment. The second paragraph reads: “In all matters subject to this Agreement, this

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33 [Garanti Koza LLP v Turkmenistan (ICSID Case No. ARB/11/20), Decision on Jurisdiction of 3 July 2013.]
34 [Venezuela US S.R.L. v. Venezuela (PCA Case 2013-34), Interim Award on Jurisdiction of 26 July 2016, ¶105. Similarly in the Garanti Koza case the majority holds that “[t]here is no need for the Claimant to seek to import that consent into the U.K.-Turkmenistan BIT, because Article 8(1) of the U.K. BIT already achieves such result” Garanti Koza LLP v Turkmenistan (ICSID Case No. ARB/11/20), Decision on Jurisdiction of 3 July 2013, ¶75.]
treatment shall not be less favorable than that extended by each Party to the investments made in the territory by investors of a third party.”

The tribunal in *Maffezini* noted that the Argentina-Spain BIT did not refer to dispute settlement as covered by the MFN clause, but also that this BIT was the only one executed by Spain in which the MFN clause referred to “all matters covered by this agreement” and therefore included dispute settlement provisions within that clause.

The decision in *Maffezini* was followed by the *Siemens* decision. The BIT applicable in the latter case was the Argentina-Germany BIT. The MFN clause in Article III provided:

1. None of the Contracting Parties shall accord in its territory to the investments of nationals or companies of the other Contracting Party or to investments in which they hold shares, a less favourable treatment than the treatment granted to the investments of its own nationals or companies or to the investments of nationals or companies of third States;
2. None of the Contracting Parties shall accord in its territory to nationals or companies of the other Contracting Party a less favourable treatment of activities related to investments than granted to its own nationals and companies or to the nationals and companies of third States.

The tribunal also noted that the Protocol to the BIT refers to the definition of “activities,” as including: “the administration, use and benefit of an investment.”

Furthermore, in Article IV(4) there is an additional MFN clause, the tribunal

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36 Article IV(2), Argentina-Spain BIT. The text of the MFN clause in Spanish is the following: “En todas las materias regidas por el presente Acuerdo, este tratamiento no será menos favorable que el otorgado por cada Parte a las inversiones realizadas en su territorio por inversores de un tercer país.” The original text of the treaty was in Spanish.

37 Emilio Augusto Maffezini v. Spain (ICSID Case No. ARB/97/7), Decision on Jurisdiction of 25 January 2000, ¶ 60.

38 The original text of this treaty was in German and Spanish. The Spanish text of the MFN provision (Article III(1) and (2)) is as follows: “(1) Ninguna de las Partes Contratantes someterá en su territorio a las inversiones de nacionales o sociedades de la otra Parte Contratante o a las inversiones en las que mantengan participaciones de nacionales o sociedades de la otra Parte Contratante, a un trato menos favorable que el que se conceda a las inversiones de los propios nacionales y sociedades o a las inversiones de nacionales y sociedades de terceros Estados.; (2) Ninguna de las Partes Contratantes someterá en su territorio a los nacionales o sociedades de la otra Parte Contratante, en cuanto se refiere a sus actividades relacionadas con las inversiones, a un trato menos favorable que a sus propios nacionales y sociedades o a los nacionales y sociedades de terceros Estados.”


40 Article IV(1) refers to full protection and security; (2) refers to expropriation; (3) refers to compensation in cases of emergency; the text of article IV(4) states: “The nationals and companies of each Contracting
looked at the interaction between both clauses and considered that the repeated provisions were *ex abundante cautela.* Once again, the investor invoked this provision to avoid recourse to local courts for a period of 18 months prior to submitting the dispute to arbitration.

Despite the differences in the text of the MFN provision with the Argentina-Spain BIT, the tribunal held that: “the term ‘treatment’ and the phrase ‘activities related to the investments’ are sufficiently wide to include settlement of disputes.”

In *Wintershall* the tribunal also applied the Argentina-Germany BIT. The investor also attempted to apply the MFN clause to avoid recourse to local courts for a period of 18 months prior to arbitration. In this decision, the tribunal took a narrow interpretation of the MFN clause, noting, amongst other issues, that the provision did not include a reference to “all matters.”

In *Salini v. Jordan*, the investor attempted to use the MFN clause to broaden the scope of jurisdiction of the ICSID tribunal to include contractual claims, despite there being a specific contractual forum in the investment agreement. The BIT expressly established that if there were a contractually agreed forum, that forum would prevail. The MFN clause applicable in the Italy-Jordan BIT provided:

> Both Contracting Parties, within the bounds of their own territory, shall grant investments effected by, and the income accruing to, investors of the Contracting Party no less favourable treatment than that accorded to investments effected by, and income accruing to, its own nationals or investors of Third States.

The tribunal considered that this case was different from *Maffezini* as the MFN clause here did not refer to “all rights or all matters covered by the agreement.” Further, the express intention of the parties to the treaty (as established in article 9(2)) was to exclude disputes relating to investments that had their own settlement procedures.

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41 Siemens A.G. v. Argentina (ICSID Case No. ARB/02/8), Decision on Jurisdiction of 3 August 2004, ¶ 90.
42 Id., ¶ 103.
43 Wintershall A.G. v. Argentina (ICSID Case No. ARB/04/14), Award of 8 December 2008, ¶ 162.
44 Article 9(2), Italy-Jordan BIT.
45 Article 3, Italy-Jordan BIT.
In *Plama* the MFN provision of the Cyprus-Bulgaria BIT states:

Each Contracting Party shall apply to the investments in its territory by investors of the other Contracting Party a treatment which is not less favourable than that accorded to investments by investors of third states.\(^{47}\)

The tribunal in *Plama* considered that “the intention to incorporate dispute settlement provisions must be clearly and unambiguously expressed.”\(^{48}\)

In *Gas Natural* the tribunal applied the same BIT as in *Maffezini*. In looking at the text of the BIT the tribunal considered the fact that the terms of the MFN clause referred to “all matters covered” by the agreement without expressly excluding settlement of disputes.\(^{49}\)

In *Suez* (ICSID Case No. ARB/03/17) the tribunal applied the Argentina-Spain BIT (it also applied the Argentina-France BIT, but that treaty did not have an obligation to pursue local remedies prior to arbitration). The tribunal considered the text of the provision, referring to the fact that it was meant to apply to “all matters” and that dispute settlement was clearly a matter under the BIT.\(^{50}\)

In *Anglian Waters* (UNCITRAL Case) the tribunal (which was the same as in the ICSID ARB/03/17 case) applied the Argentina-UK BIT. The MFN clause text is as follows:

1. Neither Contracting Party shall in its territory subject investments or returns of investors of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own investors or to investments or returns or investors of any third State.
2. Neither Contracting Party shall in its territory subject investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own investors or investors of any third State.\(^{51}\)

\(^{47}\) Article 3(1), Cyprus-Bulgaria BIT.

\(^{48}\) Plama Consortium Ltd. et al v. Bulgaria (ICSID Case No. ARB/03/04), Decision on Jurisdiction of 8 February 2005, ¶ 204.

\(^{49}\) Gas Natural SDG, SA v. Argentina (ICSID Case No. ARB/03/10), Decision on Jurisdiction of 17 June 2005, ¶ 30.

\(^{50}\) Suez, Sociedad General de Aguas de Barcelona S.A. & Interagua Servicios Integrales de Agua S.A. v. Argentina (ICSID Case No. ARB/03/17), Decision on Jurisdiction of 16 May 2006, ¶ 55.

\(^{51}\) Article III, Argentina-UK BIT.
The tribunal considered that despite the difference in language between this MFN clause and that in the Argentina-Spain BIT, "an interpretation of each leads to the same result."52

In Telenor Mobile the tribunal applied the Norway-Hungary BIT, whose MFN provision was as follows:

Investments made by Investors of one Contracting Party in the territory of the other Contracting Party, as also the returns therefrom, shall be accorded treatment no less favorable than that accorded to investments made by Investors of any third State.53

The investor attempted to broaden the scope of disputes that could be settled through ICSID, which was originally limited to expropriation claims. The tribunal, following the rules of interpretation of the Vienna Convention on the Law of Treaties of 1969, considered that the ordinary meaning to be given to a phrase “investments shall be accorded treatment no less favorable than that accorded to investments made by investors of any third states” had to refer to an investors substantive rights.54 Further, the MFN provision should not be used to bypass limitations in the same BIT when the parties had not chosen to do so expressly as is sometimes the case.55

In RosInvest v. Russia the tribunal interpreted the MFN provisions of the UK-Soviet BIT, whose text was as follows:

1. Neither Contracting Party shall in its territory subject investments or returns of investors of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of investors of third States.
2. Neither Contracting Party shall in its territory subject investors of the other Contracting Party, as regards, their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to investors of any third State.56

52 Suez, Sociedad General de Aguas de Barcelona S.A. & Interagua Servicios Integrales de Agua S.A. v. Argentina (ICSID Case No. ARB/03/19), AWG Group Ltd. v. Argentina (UNCITRAL Case) Decision on Jurisdiction of 3 August 2006, ¶ 57.
53 Article IV(1), Norway-Hungary BIT.
56 Article III, UK-Soviet BIT (Article VII of the BIT excludes customs unions, organizations for mutual economic assistance, or similar international agreements as well as agreements relating to taxation from the provisions of this Article).
The investor invoked these provisions in order to broaden the scope of the international arbitration to include the legality and existence of an expropriation and not be limited to the amount of compensation. The tribunal accepted the investor’s attempt and held that “the combined wording in Articles 3 and 7 of the UK-Soviet BIT is not identical to that in these other decisions. Therefore, they must be interpreted by themselves as was done above.”

In *Renta 4 v. Russia* the applicable BIT was the Russia-Spain BIT. The investor invoked the MFN provision in order to expand the scope of the dispute resolution mechanism, which originally was limited to the determination of compensation for expropriation and transfers. The MFN provision in that case read:

1. Each Party shall guarantee fair and equitable treatment within its territory for the investments made by investors of the other Party.
2. The treatment referred to in paragraph 1 above shall be no less favourable than that accorded by either Party in respect of investments made within its territory to investors of any third State.

The majority of the tribunal decided that the “specific MFN promise contained in Article 5(2) of the Spanish BIT cannot be read to enlarge the competence of the present BIT. … Ultimately however their view is that the terms of the Spanish BIT restrict MFN treatment to the realm of FET as understood in international law.”

In *Austrian Airlines v. Slovakia* the majority of the tribunal adopted a narrow approach to the MFN provision, interpreting that “access to arbitration does not fall within the scope of the MFN clause in Article 3(1).” The MFN provision at issue here states:

1. Each Contracting Party shall accord to investors of the other Contracting Party and to their investments treatment that is no less favourable than that which it accords to its own investors or to investors of any third states and their investments.

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58 Article V, Spain-Russia BIT.
60 Austrian Airlines v. Slovakia (UNCITRAL Arbitration), Final Award of 9 October 2009, ¶ 140.
(2) The provisions of para. 1 above, however, shall not apply to present or future benefits and privileges granted by one Contracting Party to investors of a third state or their investments in connection with
a. Any membership in an economic or customs union, a common market, a free trade zone or an economic community;
b. An international agreement or a bilateral agreement or national laws and regulations concerning matters of taxation;
c. A regulation to facilitate border traffic.\(^{61}\)

Despite the fact that relevance has been given, in some cases, to the text of the applicable MFN clauses, given the contradictory awards issued based on similar MFN texts it seems difficult to justify that this is a determining factor in the application of MFN clauses to dispute resolution provisions.

2. All about Ambatielos: What really happened in Ambatielos?

In *Ambatielos* the Greek government argued that the UK had violated the MFN clause in according *Ambatielos* treatment that was not “in accordance with the general rules of international law, justice, right and equity, relative to the administration of justice.”\(^{62}\) The MFN clause of the Treaty of Commerce and Navigation of 1886 between Greece and the UK set out the obligation “in all matters relating to commerce and navigation” to accord “any privilege, favour, or immunity whatever which either Contracting Party has actually granted…”\(^{63}\)

The Commission explained, as noted by the ILC, that a “most-favoured-nation clause can only attract matters belonging to the same category of subject as that to which the clause itself relates.”\(^{64}\) The UK had argued that that meant it could not extend, in this particular case, to issues of administration of justice. The Commission, however, stated that the meaning of “all matters related to commerce and navigation” must be flexible, noting that this specific treaty on commerce and navigation did have a provision on the administration of justice.\(^{65}\)

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\(^{61}\) Article III, Austria-Slovakia BIT.
\(^{64}\) Ambatielos (UK v. Greece), 23 ILR 306, 319 (6 March 1956).
\(^{65}\) Id.
Finally, the Commission stated that the administration of justice is not necessarily a subject matter other than commerce and navigation “when it is viewed in connection with the protection of the rights of traders. Protection of the rights of traders naturally finds a place among the matters dealt with by Treaties of commerce and navigation.”66 Thus, in order to determine whether the administration of justice was included, the Commission turned to the intention of the parties. It discarded the UK’s interpretation, holding that it was too narrow, particularly in light of the terms of the MFN clause which concluded that it was their intention “that the trade and navigation of each country be placed, in all respects, by the other on the footing of the most-favoured-nation.”67

The Commission concluded that the administration of justice may be included in the MFN provision of the Treaty of 1886 “in so far as concerns the protection by the courts of the rights of persons engaged in trade and navigation.”68 However, the MFN provision did not allow the Greek Government to seek protection based on justice, right, equity—as distinct from those deriving from English law—or international law as those were not protected by the treaties that it invoked under the MFN clause.69

Is this enough to find out whether Ambatielos is compatible with the interpretation of Maffezini or the interpretation of Plama? To answer this question, it is important to go back to the facts of the case. Ambatielos was brought before the English courts because of his alleged failure to comply with the agreements to purchase certain ships.70 In this instance he argued that the UK had guaranteed that those ships would be delivered at a certain time, and they had not complied.71 He did not call as a witness a key player in the transaction, assuming that this player had been subpoenaed by the Government.72 The witness did not testify and the Government did not present certain documents that were within its poss-

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68 Id., p. 322. This was contrary to what had been held by the dissenting judges in the ICJ: “[t]he most-favoured-nation clause in Article X cannot be extended to matters other than those in respect of which it has been stipulated. We do not consider it possible to base the obligation on which the Court has been asked to adjudicate, on an extensive interpretation of this clause.” Ambatielos case (UK v. Greece) 1953 ICJ Reports 10 (19 May) 34 (Dissenting Opinion of Sir Arnold McNair, President and Judges Basdevant, Klaestad and Read).
70 Id., p. 308.
71 Id., p. 326.
72 Id., p. 337.
session and which, allegedly, would have favored *Ambatielos*’ position.\textsuperscript{73} While *Ambatielos* appealed requesting the presentation of this witness, the appeal was denied.\textsuperscript{74} The claim by the Greek government relied on the lack of “justice,” “right” and “equity” in the treatment by the UK of *Ambatielos*.

The breach which the Greek government was claiming was not that *Ambatielos* did not have access to local courts, which he did (even under Article XV of the treaty).\textsuperscript{75} The alleged breach by the UK was, it appears, a claim of denial of justice.\textsuperscript{76} Denial of justice is not a jurisdictional issue; it is a substantive standard under a treaty. The Commission held that administration of justice was a subject matter within the treaties of commerce and navigation, when “it is viewed in connection with the protection of the rights of traders.”\textsuperscript{77} The issue at stake here was not a procedural element or a jurisdictional issue, the key to the claim lied in the treatment given to *Ambatielos* by the English courts, in accordance with English law.\textsuperscript{78} The Commission found that issues of administration of justice, when related to the protection of the rights of traders could be within the realm of the MFN provision. It did not refer to international dispute settlement procedures.

3. **Relevance of *Ambatielos* in Investment Case Law**

In order to see the relevance of this decision to the diverging case law on the issue, we will look at the reasoning in the relevant decisions. We will not refer to the specifics of the cases in as far as they are not relevant to this discussion.

**Maffezini v. Spain**

The tribunal in *Maffezini* referred to many of the cases as are reflected in the ILC Draft Articles. First, it referred to *Anglo-Iranian Oil* in order to determine which the “basic treaty that governs the right of the beneficiary of the most favored nation clause” was.\textsuperscript{79} Secondly, the tribunal considered “whether the provisions on dispute settlement contained in a third-party treaty can be considered reasonably related to the fair and equitable treatment to which the most favored

\begin{itemize}
\item \textsuperscript{73} *Id.*, p. 308.
\item \textsuperscript{74} *Id.*
\item \textsuperscript{75} *Id.*, p. 331.
\item \textsuperscript{76} *Id.*, p. 312.
\item \textsuperscript{77} *Id.*, p. 319.
\item \textsuperscript{78} *Id.*, p. 322.
\item \textsuperscript{79} Emilio Augusto Maffezini v. Spain (ICSID Case No. ARB/97/7), Decision on Jurisdiction of 25 January 2000, ¶¶ 44-45. It concluded that it was the Argentina-Spain BIT.
\end{itemize}
nation clause applies” that is, the *ejusdem generis* rule, referring for this to the *Ambatielos* case.\(^\text{80}\) The tribunal went on to note that a number of BITs “provided expressly that the most favored nation treatment extends to the provisions on settlement of disputes.”\(^\text{81}\)

However, basing itself on the analysis in *Ambatielos* the tribunal stated that it considered “that there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights of traders under treaties of commerce.”\(^\text{82}\) It concluded that “if a third-party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor’s rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause as they are fully compatible with the *ejusdem generis* principle.”\(^\text{83}\)

The tribunal in *Maffezini* read the *Anglo-Iranian Oil* case only as providing the basic rule that the tribunal must first determine the basic treaty on which the claimant was relying to invoke the MFN clause.\(^\text{84}\) The tribunal did not consider that this decision provided any insight into the relationship between the MFN clause and jurisdictional clauses. As regards the *Ambatielos* arbitration, the tribunal held that “[t]he Commission accepted the extension of the clause to questions concerning the administration of justice and found it to be compatible with the *ejusdem generis* rule. It concluded that the protection of the rights of persons engaged in commerce and navigation by means of dispute settlement provisions embraces the overall treatment of traders covered by the clause.”\(^\text{85}\)

**Siemens v. Argentina**

The decision in *Maffezini* was followed by the decision on jurisdiction in the *Siemens* case.\(^\text{86}\) In light of the arguments of the parties, the tribunal once again looked at *Anglo-Iranian Oil*. It determined that, in that case, the ICJ did not consider whether the MFN provision would extend to settlement of disputes as the Court’s decision was “without considering the meaning and scope” of the MFN clause.\(^\text{87}\) The tribunal did not consider that the ICJ then analyzed a sec-

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80 Id., ¶¶ 46-50.
81 Id., ¶ 52.
82 Id., ¶ 54.
83 Id., ¶ 56.
84 Id., ¶¶ 44-45.
85 Id., ¶ 50.
87 Id., ¶ 96.
ond argument of the UK with regard to MFN, in which they decided that “the most-favoured-nation clause in the Treaties of 1857 and 1903 between Iran and the United Kingdom has no relation whatever to jurisdicational matters between the two Governments.”

As regards the Rights of US Nationals in Morocco case, the arbitral tribunal read the ICJ’s decision as: “evident that the ICJ accepted that MFN clauses may extend to provisions related to jurisdicational matters, but this was not really the issue between the parties.”

When the tribunal considered the Ambatielos arbitration, it followed the interpretation proposed by Maffezi. Citing to the paragraphs of the decision that state that “it cannot be said that administration of justice, in so far as it is concerned with the protection of these rights, must necessarily be excluded from the field of application of the” MFN clause. It then paralleled this decision in its own applicable treaty, holding that: “Access to [the special dispute settlement] mechanisms is part of the protection offered under the Treaty. It is part of the treatment of foreign investors and investments and of the advantages accessible through an MFN clause.”

Salini v. Jordan

The tribunal considered the MFN discussion in light of the decisions in Maffezi and Ambatielos. It concluded that the case before it was different from those cases as the text of the MFN clause it had to consider did not refer to “all rights or all matters covered by the agreement.” Further, the express intention of the parties to the treaty (as established in article 9(2)) was to exclude disputes relating to investments that had their own settlement procedures.

As regards the decision in Ambatielos, the tribunal stressed both the different text of the MFN provision, as well as the fact that the commission “sought to ascertain the common intent of the Parties.” It considered that the Commission found the intent of the parties reflected in the wording of the MFN clause, which contained the “in all respects” turn of phrase.

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88 Anglo-Iranian Oil Company (UK v. Iran) 1952 ICJ Reports 93, 110 (22 July).
90 Id., ¶ 101.
91 Id., ¶ 102.
93 Id., ¶¶ 118-119.
94 Id., ¶ 117.
95 Id.
Plama v. Bulgaria

The tribunal looked at the international cases as well, although it considered that they were inconclusive. In *Anglo-Iranian Oil* it noted that the ICJ had stated “[w]ithout considering the meaning and scope of the” MFN clause, but had then concluded that this provision “had no relation whatsoever to jurisdictional matters.” As to the *Ambatielos* decision, it noted that the ICJ did not come to a decision regarding the incorporation of jurisdictional matters in MFN clauses. In referring to the decision of the Commission of Arbitrators, it explained that the Commission considered that administration of justice was included in the term commerce and navigation, but that this “ruling relates to provisions concerning substantive protection in the sense of denial of justice in domestic courts. It does not relate to the import of dispute resolution provisions of another treaty into the basic treaty.”

Wintershall v. Argentina

The tribunal also referred to the international cases that we have already gone through, although its interpretation was different. In the *Anglo-Iranian Oil* case, it read the ICJ as stating: “that the rule that treaties produce effects only as between Contracting States applied also to treaties containing MFN clauses.” In the case of *Rights of US Nationals in Morocco* it read the ICJ only as restating “the generally accepted view that the most-favored-nation-clause represented the principle of equality of treatment in the field of foreign trade.”

In addressing the *Ambatielos* case, the tribunal noted that the dissenting judges in the ICJ decision held that “Article X promises most-favoured-nation treatment only in matters of commerce and navigation; it makes no provision concerning the administration of justice,” and that the MFN clause “cannot be extended to other matters than those in respect of which it has been stipulated.” The tribunal also noted that the joint dissenting opinion referred to the *Phosphates in Morocco* PCIJ case which held that a narrow interpretation of a jurisdiction

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96 Plama Consortium Ltd. et al v. Bulgaria (ICSID Case No. ARB/03/04), Decision on Jurisdiction of 8 February 2005.
97 Id., ¶ 217.
98 Id., ¶ 214.
99 Id., ¶ 215.
100 Wintershall A.G. v. Argentina (ICSID Case No. ARB/04/14), Award of 8 December 2008.
101 Id., ¶ 97.
102 Id.
103 Id., ¶ 100.
clause must be preferred, adding that this was particularly the case of “an interpretative extension of an obligation of a State to have recourse to arbitration.”

In addressing the decision of the Commission of Arbitration, the tribunal underscored the Commission’s references to the need to refer to the intention of the Contracting Parties which it considered reflected in the phrase “in all respects.” Finally, the tribunal noted that the decision discarded the application of the MFN clause to the dispute as the Treaties relied upon by the Greek government did not provide for more favorable treatment than the UK-Greece Treaty. This conclusion seems to be a consequence of considering that the provisions which Greece was trying to import through the MFN clause were substantive provisions, i.e., relating to the administration of justice, which is “very different to the question of whether dispute-settlement provisions from other treaties could be incorporated.” This coincides with the analysis carried out in Salini and Plama.

**Renta 4 v. Russia**

The majority of the tribunal in Renta 4 looked at the ICJ decision in Rights of US Nationals in Morocco, which it interpreted as stating that “[t]he ICJ was satisfied that the MFN provisions in the basic treaty created an entitlement to the same advantage for US nationals. It was not necessary that there be explicit mention of jurisdictional advantages.” Further, upon looking to the Ambatielos case, the majority of the tribunal considered that the commissioners in that case had rejected the UK’s argument that the “scope of jurisdiction was not among the matters that could be considered common objects of the treaties under comparison [under the MFN clause].” In the end, however, the majority of the tribunal, based on the text of the MFN provision, rejected the broadening of its jurisdiction.

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104 *Id.*, ¶¶ 102, 161.
105 *Id.*, ¶ 103.
106 *Id.*, ¶ 104.
107 *Id.*, ¶ 183.
109 *Id.*, ¶ 88.
110 *Id.*, ¶ 89.
111 *Id.*, ¶¶ 104-120.
Austrian Airlines v. Slovakia\textsuperscript{112}

In this case, the tribunal merely referred to \textit{Ambatielos} in a footnote when it established that “[a]s a general matter, the Tribunal observes that it sees no conceptual reason why an MFN clause should be limited to substantive guarantees and rule out procedural protections, the latter being a means to enforce the former.”\textsuperscript{113}

ICS v. Argentina

While the tribunal in \textit{ICS v. Argentina} held that the MFN clause did not apply to dispute settlement provisions, amongst other issues because of its references to “treatment” and “in the territory”,\textsuperscript{114} paragraph 293 of this award is particularly relevant to the discussion in this paper. There, the tribunal held:

The \textit{Ambatielos} case meanwhile dealt with procedural rights relating to the “administration of justice”. As noted above, the decisions, both before the ICJ and the Arbitration Commission, can thus be taken to support the idea that treaty rights of a procedural (as opposed to substantive) nature are not inherently excluded by their nature from the “treatment” guaranteed by a broadly-worded MFN clause. However, the rights in question still clearly formed the object of the treaty in question. The “treatment” examined comprised the measures taken by municipal courts as an organ of the State vis-à-vis a foreign national. The guidance offered by the \textit{Ambatielos} case is therefore limited and does not contradict the statements of the ICJ in the \textit{Anglo-American Oil Company} case [sic]. The same can be said for the other precedent in this area, the \textit{Case Concerning the Rights of Nationals of the United States of America in Morocco}, where the United States claimed expanded rights of consular jurisdiction, rather than any expansion of the jurisdiction of the ICJ by virtue of the MFN clause in the basic treaty.\textsuperscript{115}

4. Contradictory interpretations of \textit{Ambatielos}?

Other than, the interpretation of the tribunal in \textit{ICS v Argentina}, this all seems to come down to two genuinely incompatible interpretations of the \textit{Ambatielos} decision. On the one hand there is the interpretation of \textit{Maffezini} and \textit{Siemens}.

\textsuperscript{112} Austrian Airlines v. Slovakia (UNCITRAL Arbitration), Final Award of 9 October 2009.
\textsuperscript{113} Id., § 124.
\textsuperscript{114} Similar arguments were also put forth by Prof. Kohen in his dissenting opinion in Venezuela US S.R.L. v. Venezuela (PCA Case 2013-34), Dissenting Opinion of Prof. Kohen of 26 July 2016.
\textsuperscript{115} ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina (UNCITRAL, PCA Case No. 2010-9) Award on Jurisdiction of February 10, 2012, ¶ 293.
Under this interpretation, the Commission of Arbitration concluded that administration of justice was part of “all matters related to commerce and navigation” as the protection of the rights of these persons were matters related to the activities. Additionally, they assumed that administration of justice is the same thing as dispute settlement provisions.  

In *Salini* the tribunal read the decision of the arbitrators in *Ambatielos* as allowing for administration of justice to be included in the specific MFN provision of the UK-Greece Treaty through focusing on the language of the BIT and the intent of the parties.  

In *Plama*, where the tribunal also decided that the MFN provision cannot be used to incorporate dispute settlement issues, it considered that the Commission of Arbitrators had accepted that the substantive provision of administration of justice could be included in the MFN provision, but that this was different from purporting to include dispute settlement provisions.  

In *Wintershall* the tribunal looked at both the decision of the Commission of Arbitrators as well as the ICJ decision. Although the majority of the ICJ did not refer to the issue of the MFN clause, the dissenting judges did, interpreting that the MFN provision did not concern the administration of justice. Further, in looking at the decision of the Commission of Arbitrators, the tribunal noted the need to look at the intention of the parties and that the MFN clause was finally not applied to the dispute.  

Oddly enough, at the end of its analysis the tribunal noted that the decision in *Maffezini* was in line with the decision of the Commission of Arbitrators in *Ambatielos* in the sense that “the subject matter of ‘administration of justice’ though not seemingly part of the same genus as ‘commerce and navigation’ would be covered or included (only) by the reason of the words preceding the words ‘commerce and navigation’: viz. ‘all matters relating to.’” This final explanation seems somewhat out of place and, as we have seen, may not be correct.

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119 Wintershall A.G. v. Argentina (ICSID Case No. ARB/04/14), Award of 8 December 2008, ¶ 100.
120 Id., ¶ 104.
121 Wintershall A.G. v. Argentina (ICSID Case No. ARB/04/14), Award of 8 December 2008, ¶ 172.
122 Particularly as the tribunal in *Maffezini* tried to justify that the dispute settlement provisions were within the scope of fair and equitable treatment in order to apply the *ejusdem generis* principle. Emilio Augusto Maffezini v. Spain (ICSID Case No. ARB/97/7), Decision on Jurisdiction of 25 January 2000, ¶ 46.
5. Is this all about Ambatielos?

How relevant is the interpretation that the tribunals give to the decision of the Commission of Arbitrators in *Ambatielos*? Both Prof. Douglas and the tribunal in the *ICS v. Argentina* case have held that the decision is not relevant for the interpretation of MFN provisions, a look in further depth at the decisions in that case seem to confirm this position.\(^{123}\)

Prior to the decision in *Ambatielos* the ICJ decided the *Anglo-Iranian Oil* case,\(^{124}\) also mentioned above. It could be argued that both these decisions, in fact, have influenced ICSID decisions.\(^{125}\) However, there is a fundamental distinction between the two cases that allows us to focus on the *Ambatielos* decision as fundamental instead of the *Anglo-Iranian Oil* case. That is the similarity of the treaties relied on in the former decision to BITs, rather than the latter. In *Anglo-Iranian Oil* the Court refers to the fact that the MFN clauses in the Treaties “ha[ve] no relation whatever to jurisdictional matters between the two Governments.”\(^{126}\) The texts of the MFN clauses were distinct from the MFN clauses of BITs.\(^{127}\)

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124 Anglo-Iranian Oil Company (UK v. Iran) 1952 ICJ Reports 93 (22 July).
125 In fact there have been contradictory interpretations of this case as well. In *Siemens* the tribunal held that “it is clear that the ICJ did not consider the ‘meaning or scope of the MFN clause’, including whether that clause would extend to settlement of disputes.” Siemens A.G. v. Argentina (ICSID Case No. ARB/02/8), Decision on Jurisdiction of 3 August 2004, ¶ 96. Conversely, the tribunal in *Plama* noted that “[t]he Court concluded that the MFN provisions in the Iran-United Kingdom treaties ‘had not relation whatsoever to jurisdictional matters’ between those two States.” Plama Consortium Ltd. et al v. Bulgaria (ICSID Case No. ARB/03/04), Decision on Jurisdiction of 8 February 2005, ¶ 214.
126 Anglo-Iranian Oil Company (UK v. Iran) 1952 ICJ Reports 93, 110 (22 July).
127 The text of the MFN clause of the 1857 Treaty stated: “The High Contracting Parties engage that, in the establishment and recognition of Consuls-General, Consuls, Vice Consuls, and Consular Agents, each shall be place in the dominions of the other on the footing of the most favoured nation; and that the treatment of their respective subjects, and their trade, shall also, in every respect, be placed on the footing of the treatment of the subjects and commerce of the most favoured nation.” Treaty of Peace between Great Britain and Persia, signed at Paris, 4 March 1857, in 10 Herstlet’s Commercial Treaties: A Complete Collection of the Treaties and Conventions, and Reciprocal Regulations at Present Subsisting Between Great Britain and Foreign Powers 947, 949 (1859).

The MFN clause of the 1903 Treaty stated, in the relevant part: “It is formally stipulated that British subjects and imports into Persia as well as Persian subjects and Persian imports into the British Empire, shall continue to enjoy under all conditions most-favoured nation treatment; it is understood that a British Colony, having a special Customs Tariff, and which may cease to grant the most-favoured-nation treatment to Persian imports, will no longer have the right to claim the same treatment for its own imports into Persia.” Commercial Convention between the United Kingdom and Persia, signed in Tehran on 9 February 1903, in Treaty Series No. 10 (1903) 1, 32-33.
Further—although the Court did not say so explicitly—these treaties were distinct from BITs in that there was no dispute settlement provision in either of them.128

The *Ambatielos* decision was relied upon by most of these tribunals as precedent for their decisions, either accepting or rejecting that dispute resolution provisions can be brought under MFN clauses. The new discussion that is incorporated in the recent decisions of *Venezuela US, Garanti Koza*, and *Menzies Middle East* is whether, regardless of the application of MFN clauses to dispute settlement provisions these can be used to incorporate consent to jurisdiction. All the members of these tribunals agreed that MFN clauses cannot be used to create consent. However, the majority of the first two tribunals held that they were using the MFN provision, not in order to create consent, but rather, where consent existed in the BIT, to remove certain conditions or obstacles to international arbitration. The minority opinion in both these cases, as well as Prof. Thomas’ opinion in *Hochtief*, put forth that this is, in fact, putting the cart before the horse, as using MFN to override those obstacles means changing the conditions upon which consent was given.

How, therefore, is *Ambatielos* relevant here? Aside from the fact that the underlying discussion, i.e., whether a tribunal can establish the existence of consent even where the conditions contained in the instrument of consent are not met, is the same in *Maffezini* as in these last cases, it is useful to go back to the basics of the initial discussion to understand what the bases where then. Note that in *Ambatielos* this was not an issue of consent to arbitration, which the ICJ established existed, but the administration of justice was within the substantive provisions protected in the agreement, and therefore considered within the rights and obligations of traders.

If one takes into account the facts of *Ambatielos* it appears that the tribunals in *Maffezini* and *Siemens* got it wrong, as the tribunal in *Plama* explained. The Greek government was complaining because of the treatment given to *Ambatielos* before English Courts. It was not attempting to incorporate other dispute settlement mechanisms in the treaty. This is a substantive issue, that was discarded by the Commission of Arbitrators and which does not lend itself to precedent for decisions like *Maffezini*. If one considers, as advanced in *Maffezini* and *Gas Natural*, that the protection of the rights of investors is a substantive issue in the treaty, that issue is reflected is the standard of denial of justice or

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access to courts, as explained in Ambatielos. To use that standard to change the jurisdictional requirements for dispute settlement negotiated by the parties does not make sense, at least not following the reasoning in Ambatielos.129

There is an additional reason to be cautious in this regard. Arbitration agreements, such as those providing for ICSID jurisdiction, allow for a jurisdiction other than the jurisdiction of local courts for a specific dispute. In diplomatic protection, the respondent state is given the chance to resolve any possibility of international responsibility prior to bringing the claim to international fora through the exhaustion of local remedies requirement. Although the prior submission to local courts requirement, considered for example in Maffezini, Gas Natural, and Wintershall, which contained a temporal limit of 18-months, cannot be equated to an exhaustion of local remedies requirement,130 it is nonetheless a chance for local courts to resolve disputes without the state incurring international responsibility. When the treaty provides for this possibility, it should not be excluded lightly.

In the end, it appears that the interpretation of Ambatielos may be important to the reasoning of MFN clauses in the future. In this sense, the decision in Ambatielos can provide a useful precedent for the application of the ejusdem generis principle. However, the interpretation of Ambatielos must be complemented by useful guidance, such as the Anglo-Iranian Oil decision and the dissenting opinion of the ICJ in the Ambatielos case.

129 In this regard, the reference that the Wintershall case makes to the compatibility between the Maffezini decision and the Ambatielos decision is curious. The tribunal in Maffezini does rely, like the Commission in Ambatielos, on the terms “all matters”. However, it also tries to include the 18-month requirement in the dispute settlement provisions within the fair and equitable treatment standard. It does this without acknowledging that, in fact, the fair and equitable treatment standard is more closely related to denial of justice, as explained in Ambatielos.

130 Gas Natural SDG, SA v. Argentina (ICSID Case No. ARB/03/10), Decision on Jurisdiction of 17 June 2005, ¶ 30; Emilio Augusto Maffezini v. Spain (ICSID Case No. ARB/97/7), Decision on Jurisdiction of 25 January 2000, ¶ 28.