THE JURISDICTION-LIMITING MFN CLAUSE

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Most-favored-nation (MFN) provisions have formed the center of a jurisdictional dispute that has plagued international arbitration for the past two decades. Since the Maffezini *decision in 2000, holding that MFN clauses can be used to import jurisdictional provisions, the international arbitral system has seen a long succession of inconsistent and irreconcilable arbitral decisions, some following* Maffezini*'s approach and others rejecting it. The result is a jurisdictional crisis in international arbitration that has consumed opposing parties' time and money, undermined the international arbitral system's legitimacy, and called into question the very reasons for the system's existence.*

However, a glimmer of hope has emerged: A new variety of MFN clauses has begun to appear that explicitly specify that they do not apply to procedural issues. Despite their potential to solve one of international arbitration's most intractable problems, these jurisdiction-limiting MFN clauses have largely escaped serious analysis. This Note fills this gap in scholarship by providing the first academic analysis focused exclusively on these new jurisdiction-limiting provisions, analyzing the trend towards the increased use of these provisions, the form the provisions take, their reception in arbitrated cases, and the implications that these provisions carry.

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Introduction

Every year, hundreds of billions of U.S. dollars circulate the globe via foreign direct investments: investments made by persons or corporations of one state into corporations or projects based in another state.[1] This extensive system of investments is mediated by a vast web of international investment treaties: treaties between states that specify the conditions under which investments between the contracting states can be made and how investors of the contracting states' nationalities are to be treated.[2] These treaties are, in turn, interpreted by international arbitral tribunals. These arbitral tribunals are bodies with the power to demand that states pay vast and potentially crippling sums that have reached as high as $50 billion and have the potential to cut into the heart of states' national sovereignty.[3]

Despite its power and responsibility, the international arbitral system generally lacks a process of appellate review and is largely decentralized.[4] With no "supreme court" to resolve disputes, uncertainties, inconsistencies, and inappropriate politicization in the

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[1] *See* U.N. Conf. Trade and Dev., World Investment Report 2020: International Production Beyond the Pandemic 2 (2020) (detailing current trends of foreign direct investments and illustrating that foreign direct investments peaked at $2 trillion in 2015 and were $1.54 trillion in 2019); *see also* OECD, FDI in Figures 1 (2021) (detailing that foreign direct investments reached $870 billion in the first half of 2021).

[2] These treaties provide the law regulating disputes between investors of one state and the government of the other state. *See* Jan Wouters, Sanderijn Duquet & Nicolas Hachez, *International Investment Law: The Perpetual Search for Consensus*, *in* Foreign Direct Investment and Human Development: The Law and Economics of International Investment Agreements 33–36 (Olivier de Schutter, Johan Swinnen & Jan Wouters eds., 2013) (detailing the history of international investment law and the current significance of international investment agreements); The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flow xxxiii–xliv (Karl P. Sauvant & Lisa E. Sachs eds., 2009) [hereinafter The Effect of Treaties on Foreign Direct Investment] (describing trends and debates surrounding bilateral investment treaties).

[3] *See* Wouters et al., *supra* note 2, at 3 (describing debates surrounding the "sovereignty costs" and "loss of 'policy space'" these treaties can entail); Kyla Tienhaara, *Once BITten, Twice Shy? The Uncertain Future of 'Shared Sovereignty' in Investment Treaty Arbitration*, 30 Pol'y & Soc. 185, 187–93 (2011) (describing the monetary costs and "sovereignty costs" that Bilateral Investment Treaties (BITs) entail, the power of arbitration tribunals, and states' reactions to this decrease in sovereignty). The largest known international arbitration award on record is $50 billion. Anthony Deutsch, *Top Dutch Court to Rule on $50 Bln Yukos Oil Dispute with Russia*, Reuters (Nov. 3, 2021), https://www.reuters.com/business/energy/top-dutch-court-rule-50-bln-yukos-oil-dispute-with-russia-2021-11-03 [https://perma.cc/D8U3-CQLE].

[4] *See* Irene M. Ten Cate, *International Arbitration and the Ends of Appellate Review*, 44 N.Y.U. J. Int'l L. & Pol. 1109, 1110 (2012) ("The virtual absence of substantive review is one of the most striking features of the arbitration process.").

international arbitral system can wreak havoc.[5] This uncertainty undermines one of the primary justifications for the international investment regime: promoting greater certainty and stability in the international system.[6] If investment treaties and the ensuing arbitration process have generated even greater uncertainty, we are forced to question whether the current system should exist at all.

One of the greatest sources of uncertainty (and arguably politicization)[7] in international arbitration is the issue of jurisdiction. In international arbitration, as in U.S. domestic law, jurisdiction is a critical and fundamental aspect of a lawsuit. For the merits of a case to even be considered, the international tribunal must first ensure that it has jurisdiction, often requiring it to tread upon delicate areas of national sovereignty to determine whether it or the respondent state's national courts are entitled to resolve the dispute.[8]

The jurisdictional dispute that has plagued international investment law has its origins in a small but important clause that frequently appears in international investment treaties: the most-favored-nation provision, or "MFN" clause. Typically inserted to help level the playing field between investors operating under different investment treaties,[9] this clause specifies that the state must not treat investors of the contracting

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[5] Deep divides between arbitrators with a "pro-state" ideological leaning and arbitrators with a "pro-investor" ideological leaning are viewed to drive many decisions. *See* Catherine A. Rogers, *The Politics of International Investment Arbitrators*, 12 Santa Clara J. Int'l L. 223, 238 (2013) (stating that international arbitration is often spoken of in terms of a "dichotomy between a 'pro-investor' and a 'pro-state' orientation"); Julie A. Maupin, *MFN-Based Jurisdiction in Investor-State Arbitration: Is There Any Hope for a Consistent Approach?*, 14 J. Int'l Econ. L. 157, 178 (2011) (claiming that individual tribunals may decide based on arbitrators' personal inclinations, rather than objective applications of international law); Stephan W. Schill, *Allocating Adjudicatory Authority: Most-Favoured-Nation Clauses as a Basis of Jurisdiction—A Reply to Zachary Douglas*, 2 J. Int'l Disp. Settlement 353, 354 (2011) ("So far . . . pro-investor or pro-State ideology seems to have been the prevailing factor in arbitral decision-making.").

[6] Wouters et al., *supra* note 2, at 34 ("The proliferation of BITs most certainly goes hand in hand with the need to create legal certainty in international investment."); Markus W. Gehring & Avidan Kent, *Sustainable Development and IIAs: From Objective to Practice*, *in* Improving International Investment Agreements 285 (Armand de Mestral & Céline Lévesque eds., 2013) ("These treaties are designed to provide security and certainty for foreign investors, in order to promote FDI, with the ultimate goal of development.").

[7] *See infra* notes 42–45 and accompanying text.

[8] Andrew Tweeddale, *Jurisdiction and Admissibility in Dispute Resolution Clauses*, Int'l Bar Assoc. (Mar. 2021), https://www.ibanet.org/article/57470714-a3f7-4db9-9dab-69dfbcb156c9 [https://perma.cc/S7TG-8BMG] ("If an arbitrator decides it has no jurisdiction it cannot make an award on the merits."). *See generally* Georgios Dimitropoulos, *National Sovereignty and International Investment Law: Sovereignty Reassertion and Prospects of Reform*, 21 J. World Inv. & Trade 71, 71–103 (2020) (describing the tension between international arbitration and national sovereignty and the efforts of states to reassert their national sovereignty).

[9] *See infra* note 25.

nation any less favorably than investors from any other state.[10] Until 2000, no arbitral tribunal had interpreted the "treatment" these clauses referenced to include jurisdictional restrictions—procedural restrictions that limit when, where, and how a claim can be brought.[11] Twenty-two years ago, this suddenly changed.

The decision of *Maffezini v. Spain* shocked the international arbitration community by holding that different jurisdictional restrictions could be considered less favorable "treatment" for the purpose of the MFN clause's applicability.[12] In his request for arbitration, Emilio Agustín Maffezini, an Argentinian national, invoked the provisions of the investment treaty between Spain and Argentina. However, the treaty required investors to allow the Spanish courts eighteen months to process the claim before it was submitted to international arbitration.[13] To avoid the delay and expense of litigation in Spain's domestic courts, Maffezini argued that the MFN clause in the Argentina-Spain treaty allowed him to rely on the more favorable treatment that Spain offered to Chilean investors in the Spain-Chile treaty, which required no more than a six-month waiting period before an investor could file a claim at the provided for tribunal.[14] The tribunal agreed with him and allowed Maffezini to moderate his dispute with Spain by applying the Spain-Chile dispute resolution provision, thereby bypassing the eighteen-month waiting period.[15]

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[10] *See generally* Tanjina Sharmin, Application of Most-Favoured-Nation Clauses by Investor-State Arbitral Tribunals 2–22 (2020) (describing the role of the MFN clause and debates surrounding its use).

[11] *See* Scott Vesel, *Clearing a Path Through a Tangled Jurisprudence: Most-Favored-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties*, 32 Yale J. Int'l L. 125, 156 (2007) (noting that *Maffezini v. Spain* was "the first case to hold that an investor could import the dispute settlement provisions from a third-party treaty"). Jurisdictional provisions, also referred to as procedural restrictions or dispute settlement provisions, can take a variety of forms. Many investment treaties, for instance, specify that a claim must first be brought in the domestic legal system before being brought before an arbitral tribunal or require a certain amount of time to pass before an arbitration claim can be brought. Others provide that a claim can be brought only before specific international arbitral tribunals. *See generally* OECD, Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey (2012), https://www.oecd.org/investment/internationalinvestmentagreements/50291678.pdf [https://perma.cc/CZ6F-9V4B] (analyzing the various forms jurisdictional provisions take in international investment agreements).

[12] *See* Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Objections to Jurisdiction (Jan. 25, 2000), 5 ICSID Rep. 396; *see also* Gabriel Egli, Comment, *Don't Get Bit: Addressing ICSID's Inconsistent Application of Most-Favored-Nation Clauses to Dispute Resolution Provisions*, 34 Pepp. L. Rev. 1045, 1066 (2007) (providing an overview of *Maffezini*).

[13] *Maffezini*, ICSID Case No. ARB/97/7, ¶ 19, 5 ICSID Rep. at 399.

[14] *Id.* ¶¶ 39–40, 5 ICSID Rep. at 404.

[15] *Id.* ¶ 64, 5 ICSID Rep. at 411.

The next two decades saw a long succession of inconsistent and irreconcilable arbitral decisions, some following *Maffezini* and holding that MFN clauses do apply to jurisdictional provisions, and other decisions holding that they do not. This uncertainty has created a seemingly intractable crisis in the international community, as well as heated debate in the academic world.[16] The inconsistency crisis generated by *Maffezini* has been such that suggestions to solve it have involved proposals to entirely overhaul the international arbitral system.[17]

However, recently there has been a glimmer of hope: A new variety of MFN clauses have begun to appear in newly signed investment treaties that explicitly state that they do *not* apply to procedural issues.[18] While treaties with these provisions remain the minority of total treaties in force, these provisions have the potential to solve one of the international arbitration system's most notorious problems, and their increasing influence merits exploration. Despite this, these "jurisdiction-limiting" MFN clauses and their implications have largely escaped serious analysis, either in their contents, their reception, or in the frequency of their appearance.[19] This Note fills this gap in scholarship by providing the first academic analysis focused exclusively on these new "jurisdiction-limiting" provisions, analyzing the trend towards the increased use of these provisions, the form the provisions take, their reception in arbitrated cases, and the implications that these provisions carry.

Part I of this Note provides background and context for the dispute surrounding MFN-based jurisdiction, describing the history of MFN

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16 *See* Schill, *supra* note 5 (arguing that MFN-based jurisdiction is logical and desirable); Zachary Douglas, *The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails*, 2 J. Int'l Disp. Settlement 97, 113 (2011) (arguing that MFN-based jurisdiction "undermines the possibility of a valid and binding arbitration agreement" and causes tribunals to wreak havoc in the international investment arena).

17 *See infra* notes 93–97 and accompanying text.

18 While the focus of this paper, and the main impetus behind these clauses, involves these clauses' jurisdiction-limiting power specifically, it should be noted here that these clauses are typically worded to apply to dispute settlement or dispute resolution procedures, rather than jurisdiction specifically, *see infra* Section II.A. As such, their power extends beyond just jurisdictional issues to any other procedural areas. The impacts these clauses may have on other procedural issues may be an interesting area for future scholarship.

19 Professors Cree Jones and Weijia Rao previously documented an increasing trend towards the inclusion of jurisdiction-limiting MFN clauses in the context of an analysis of the process of "updating" treaties more generally. *See* Cree Jones & Weijia Rao, *Sticky BITs*, 61 Harv. Int'l L. J. 357 (2020) (arguing that the process of updating treaties in response to prominent arbitral decisions is slow and demonstrates a "lagged and modest" response to major decisions). Julie Maupin also noted the existence of these clauses in her analysis of various forms of MFN clauses, mentioning them "for the sake of completeness." Maupin, *supra* note 5, at 167.

clauses, the *Maffezini* decision, and subsequent decisions on the subject. Part II conducts an in-depth analysis of various aspects of jurisdiction-limiting MFN clauses: examining the form the provisions take, the trend towards the increased use of these provisions, and how they have been received in arbitrated cases. This analysis shows that jurisdiction-limiting MFN clauses have become increasingly common in international investment treaties, representing a strong rejection of *Maffezini*'s approach. The clauses take a variety of forms and include a number of linguistic variations but tend to be relatively brief and simple. Their reception in arbitration has demonstrated very little controversy over the substance of the clauses themselves; nonetheless, the clauses have been brought up in a variety of strategic contexts, to bolster arguments or shed light on the meaning of other treaty provisions. Finally, Part III examines the implications of the findings in Part II, analyzing what may be motivating states to insert these provisions, their implications for research on the state decisionmaking in international investment law, and what these provisions entail for the future of the debate surrounding *Maffezini* and MFN-based jurisdiction. In particular, this Part explores theories on state decisionmaking, including the scholarship of Lauge Poulsen and Emma Aisbett, to explore why states inserted such broad MFN provisions to begin with and why they have now reversed course. It also examines what these provisions may mean for *Maffezini*, concluding that, while *Maffezini* remains far from a dead letter, these provisions present progress towards a real solution to the issues *Maffezini* generated.

I
Background on the *Maffezini* Dispute

Most-favored-nation (MFN) provisions play a prominent role in international investment treaties and have a long and important history. The MFN clause dates to as early as the 11th century, where "early versions of the clause appeared in agreements concerning commerce and the rights of merchant guilds between medieval city-states."[20] During colonial times, MFN clauses were "used by European imperial powers as a means of securing terms of trade that would place their merchants on an equal competitive footing with one another, particularly in respect of the exploitation of resources from the

[20] Maupin, *supra* note 5, at 157; *see also* Stephan W. Schill, *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses*, 27 Berkeley J. Int'l L. 496, 509–11 (2009).

developing colonies."[21] In the modern era, they frequently appear in treaties regulating economic relations between states and are almost ubiquitous in international investment agreements.[22] These agreements are mostly bilateral, typically labeled "Bilateral Investment Treaties" (BITs) and establish the terms and conditions for private investment by nationals and companies of one state into investment opportunities in the other state (and vice versa). However, they also include regional and multilateral agreements.[23] The use of these treaties exploded in the 1990s, with the objective of "facilitat[ing] the inflow of foreign investment" into the territories of states party to the agreement.[24] Considering the "patchwork of existing investment agreements" and the lack of an overarching multilateral agreement on investments, MFN clauses are thought to play an important role in standardizing and "leveling the playing field" between investors operating under different investment treaties.[25]

MFN clauses take a variety of forms. However, they typically specify that one contracting state will not treat investors of the other contracting state less favorably than any third party.[26] This clause is occasionally combined with a National Treatment clause, which specifies that investors of the contracting state will not be treated less favorably

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[21] Maupin, *supra* note 5, at 158; *see also* NUDRAT EJAZ PIRACHA, TOWARD UNIFORMLY ACCEPTED PRINCIPLES FOR INTERPRETING MFN CLAUSES 43–47, ¶¶ 106–18 (describing the history of MFN clauses).

[22] CHRISTOPHER F. DUGAN, DON WALLACE, JR., NOAH D. RUBINS & BORZU SABAHI, INVESTOR-STATE ARBITRATION 414–16 (2008) (stating that MFN clauses are "extremely common" and are "among the most ubiquitous provisions in investment protection treaties" (quoting Noah Rubins, *MFN Clauses, Procedural Rights, and a Return to the Treaty Text*, *in* INVESTMENT TREATY ARBITRATION: A DEBATE AND DISCUSSION (Weiler ed., 2008))).

[23] The United Nations Conference on Trade and Development (UNCTAD) investment treaty database reveals that that the majority of these treaties are bilateral, but that multilateral treaties (such as the Regional Comprehensive Economic Partnership (RCEP), the United States-Mexico-Canada Agreement (USMCA), and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)) are also common. *See Investment Policy Hub, International Investment Agreements Navigator*, U.N. CONF. ON TRADE & DEV. [hereinafter UNCTAD Database], https://investmentpolicy.unctad.org/international-investment-agreements [https://perma.cc/F3HC-BNK9].

[24] Maupin, *supra* note 5, at 158; KENNETH J. VANDEVELDE, BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION 15–16 (2010) (stating that "BITs profess that they seek to promote economic prosperity through facilitating foreign investment flows" and detailing the viewpoints of capital exporting states and capital importing states); THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT, *supra* note 2, at xxvii ("[T]he basic purpose[] of concluding BITs and DTTs [is] . . . to help increase FDI inflows.").

[25] Maupin, *supra* note 5, at 158–59; SHARMIN, *supra* note 10, at 4–5 ("MFN is perceived as an instrument to harmonise the level of treatments accorded to foreign investors."); *see also* PIRACHA, *supra* note 21, at 58–60, ¶¶ 148–54 (providing a full exposition of various rationales for MFN clauses).

[26] Schill, *supra* note 20, at 501–02.

than national investors.[27] A list of clarifications or exceptions to the clause typically follows.[28] A typical MFN clause may look something like this:

> (1) Neither Contracting Party shall subject investments in its territory owned or controlled by nationals or companies of the other Contracting Party to treatment less favourable than it accords . . . to investments of nationals or companies of any third State.
>
> (2) Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their activity in connection with investments, to treatment less favourable than it accords . . . to nationals or companies of any third State.[29]

While MFN clauses typically follow this general form, they can be divided into several categories.[30] In the first category are clauses that refer generally to "all matters," "all rights," or "treatment," without any express mention of dispute settlement provisions.[31] In the second are clauses that are narrower and contain non-exhaustive lists of their applicability, also making no explicit reference to dispute settlement provisions.[32] Finally, as discussed in greater detail below, we have begun to see clauses that either explicitly exclude or explicitly include dispute settlement provisions.[33]

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[27] *See id.*

[28] *See, e.g.*, Ger.-Bangl. BIT (1981), Art. 2 (combining MFN clause and National Treatment clause); Eur. Union-Angl. SIFA (2023), Art. 4 (articulating exceptions to the MFN clause after the clause itself).

[29] *See* Schill, *supra* note 20, at 502.

[30] *See, e.g.*, Maupin, *supra* note 5, at 163–67 (dividing MFN clauses into categories closely resembling these, with the addition of a fourth category tied to fair and equitable treatment); *see also* Stephanie L. Parker, *A BIT at a Time: The Proper Extension of the MFN Clause to Dispute Settlement Provisions in Bilateral Investment Treaties*, 2 Arb. Brief 30, 34–35 (2012) (describing a similar categorization).

[31] Parker, *supra* note 30, at 34; Agreement on the Reciprocal Promotion and Protection of Investments, Arg.-Spain, art. 4(2), Oct. 3, 1991, 1699 U.N.T.S. 202 [hereinafter Spain-Argentina BIT] ("In all matters governed by this Agreement, such treatment shall be no less favourable than that accorded by each Party to investments made in its territory by investors of a third country.").

[32] Parker, *supra* note 30, at 35. *See, e.g.*, Agreement on the Promotion and Mutual Protection of Investments, Kaz.-Sing., art. 5(1), 2018 [hereinafter Kaz.-Sing. BIT], https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5700/download [https://perma.cc/6CLJ-LTFF] ("Each Party shall accord to investors of the State of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of any third State with respect to the *management, conduct, operation, and sale or other disposition of investments in its territory*." (emphasis added)).

[33] This paper focuses on MFN provisions that explicitly *exclude* procedural issues. However, MFN clauses that *include* procedural matters also exist. *See, e.g.*, Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland

Despite their widespread use, the meaning and scope of MFN clauses are each controversial. As investment claims brought under international investment treaties have increased in the past several decades, claims invoking an MFN clause have become more frequent and their breadth has become a subject of dispute.[34] Scenarios in which an MFN clause may be invoked can be classified into three general categories.[35] In the first scenario, the host state's domestic legislation may grant more favorable treatment to a third state's investors. The claimant may therefore invoke the MFN clause to suggest that they should be treated equally to those investors and benefit from the same protections.[36]

In the second scenario, the claimant may "invoke[] a treaty's MFN clause . . . to import into the treaty . . . the more favorable substantive protections that have been granted by the host state to some third state's investors by means of a separate treaty concluded with the third state."[37] In this case, the MFN clause "operates to import the more favorable substantive treatment standard[]" between the host state and the third state into the treaty between the claimant investor's state and

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and The Government of [Country] for the Promotion and Protection of Investments, art. 3(3), 2005 (amended 2006) [hereinafter U.K. Model BIT], https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2847/download [https://perma.cc/SL5F-2L38] (specifying that "[f]or the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 12 of this Agreement," including the dispute settlement provision in Article 8). There are also many treaties that specifically exclude other subjects from their MFN clause. *See, e.g.*, Kaz.-Sing. BIT, *supra* note 32, art. 5(3) (excluding from its MFN clause treatment resulting from economic or customs unions and investment agreements that were concluded prior to the 2018 agreement).

34 *See* Maupin, *supra* note 5, at 159; Piracha, *supra* note 21, at 14–19, ¶¶ 31–49 (detailing the inconsistencies and controversies in interpretations of MFN clauses); Meg Kinnear, *A Further Update on Most-Favoured Nation Treatment—In Search of a Constant Jurisprudence*, *in* Contemporary Issues in International Arbitration and Mediation 15, 46 n.151 (Arthur W. Rovine ed., 2009) (bemoaning inconsistent jurisprudence surrounding MFN clauses); Vesel, *supra* note 11, at 127 ("The existing jurisprudence not only lacks coherence and clarity, it also contains much that is incorrect, misleading, and potentially dangerous.").

35 Maupin, *supra* note 5, at 159 (outlining these categories).

36 *Id.* For instance, envision a country, Country A, that has a domestic law that imposes tariffs on the importation of vegetables from Country B but not from Country C. If Country B had signed a treaty with an MFN provision with Country A, it could use this provision to argue that Country A must impose tariffs on vegetables equal to or less than that which it imposes on investors from Country C. Otherwise, it is not giving Country B the most favorable treatment.

37 *Id.* In this example, the more favorable treatment results not from domestic legislation, but from a provision of an investment treaty with a third state. To use a similar example as above, *see supra* note 36, envision a treaty between Country A and Country C that provides that vegetables imported into Country A will never be subject to a tariff. Country B could use the MFN clause to import this provision into its treaty with Country A, so that it also does not have a tariff on vegetables its investors import to Country A.

the host state.[38] Both of these two usages "involve substantive treatment of the investor," either via domestic action or via a separate treaty, and are "more or less generally accepted . . . [in international] investment arbitration."[39]

The third scenario forms the subject of this paper. In this scenario, the claimant invokes the MFN clause to import a more favorable dispute resolution provision from a separate treaty with a third state into the treaty between the claimant and the host state. In this situation, the dispute resolution provisions contained within the separate treaty—not the one between the claimant and host state—would be the basis of the arbitral tribunal's jurisdiction.[40] This has been referred to as "MFN-based jurisdiction" by Julie Maupin.[41] This form of jurisdiction is highly controversial within the investment arbitration community—both among scholars and arbitrators.[42] Scholars and arbitrators are greatly divided about whether to support MFN-based jurisdiction, some viewing MFN-based jurisdiction as legally sound and desirable and others viewing it as chaos-causing and legally unsound, with very few in-between or "it depends" viewpoints.[43]

The controversy surrounding MFN-based jurisdiction is also a relatively recent one. Prior to 2000, no tribunal had held that an MFN clause could be used to expand the jurisdictional mandate of

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38 *Id.*

39 *Id.* However, this conventional wisdom has not gone unchallenged. See Simon Batifort & J. Benton Heath, *The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization*, 111 Am. J. Int'l L. 873 (2017) (challenging the notion that MFN clauses in investment treaties can always be used to "import" substantive standards of treatment, while acknowledging that this view is "conventional wisdom"); *see also* Facundo Pérez-Aznar, *The Use of Most-Favoured-Nation Clauses to Import Substantive Treaty Provisions in International Investment Agreements*, 20 J. Int'l Econ. L. 777 (2017) (arguing that arbitral tribunals should not engage in the common practice of importing substantive provisions from MFN clauses).

40 Maupin, *supra* note 5, at 159.

41 *Id.*

42 Scholarship by Stephan Schill and Zachary Douglas well illustrates the debate on MFN-based jurisdiction. *Compare* Schill, *supra* note 5 (arguing that MFN-based jurisdiction is logical and desirable), *with* Douglas, *supra* note 16, at 113 (arguing that MFN-based jurisdiction will "undermine the possibility of a valid and binding arbitration agreement" and cause tribunals to wreak havoc in the international investment arena). *See also* Maupin, *supra* note 5, at 159 ("Scholars and investor–state arbitral tribunals have diverged particularly sharply over the third possibility, however. This involves the question as to whether an MFN clause may be used to import more favorable dispute resolution provisions from a comparator BIT into the basic treaty."); Parker, *supra* note 30, at 32 (describing the "rag[ing]" debate that *Maffezini* inspired).

43 *See* Schill, *supra* note 5, at 354 ("Either you side with the 'no school' or the 'yes school', as Zachary Douglas calls them; either you are for it or against it.").

an international tribunal.[44] In other words, no tribunal had held that a procedural provision that restricts when, where, and how a claim can be made constitutes a "less favorable" provision under an MFN clause. This changed with the decision of *Maffezini v. Spain* in 2000.[45] The decision marked the first instance of a tribunal explicitly holding that an MFN clause can be used as a basis for jurisdiction.

To understand the nature of the MFN-based jurisdiction debate, it is useful to briefly describe the facts of *Maffezini* and subsequent influential cases. Before diving into the facts of these cases, however, a brief overview of the mechanisms of international arbitration may be helpful. International arbitration is a system that is in many ways very different from that of the American judicial system. In particular, the international arbitral system is largely decentralized and generally lacks a process of appellate review: There is no "supreme court" in international arbitration. As discussed above,[46] resolving disputes surrounding investment treaties is typically the responsibility of an arbitral tribunal.[47] While other international arbitral tribunals exist, the International Centre for Settlement of Investment Disputes (ICSID) has resolved the vast majority of disputes.[48] Arbitral tribunals interpret investment treaties according to the terms of Articles 31 to 33 of the Vienna Convention on the Law of Treaties.[49] The Convention states that treaties are to 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,"[50] and that factors other than the text, including subsequent practice, preparatory work on the treaty, and the circumstances of its conclusion, may be considered.[51] Arbitral

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[44] *See* Parker, *supra* note 30, at 32 (noting that the use of MFN clauses was uncontroversial until 2000). Scholars have cited two pre-2000 instances of judicial pronouncements against using MFN clauses to expand jurisdiction: the *Anglo-Iranian Oil Company Case* before the ICJ and the British-Venezuelan Mixed Claims Commission's decision in *Aroa Mines*. *See* Ian A. Laird, Borzu Sabahi, Frédéric G. Sourgens & Nicholas J. Birch, *International Investment Law and Arbitration: 2011 in Review*, *in* Yearbook on International Investment Law & Policy: 2011–2012, at 68 (Karl P. Sauvant ed., 2013).

[45] *See* Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Objections to Jurisdiction (Jan. 25, 2000), 5 ICSID Rep. 396 (2002).

[46] *See supra* Introduction.

[47] *See* OECD, *supra* note 11, at 8 (specifying that international arbitration is provided for in 96% of treaties surveyed).

[48] *See* ICSID, 2021 Annual Report 20 (2021), https://icsid.worldbank.org/sites/default/files/publications/ICSID_AR21_CRA_bl1_web.pdf [https://perma.cc/RK2F-FXNM] ("ICSID . . . [has] administered the vast majority of all known international investment cases."). The vast majority of investment treaties also include ICSID as a potential forum location. OECD, *supra* note 11, at 18–19.

[49] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

[50] *Id.* art. 31.

[51] *Id.* arts. 31–32.

tribunals do not officially follow a system of binding precedent in their decisions; however, precedent is widely acknowledged to be of immense practical value in international arbitration.[52]

Our case discussion begins with *Maffezini v. Spain*.[53] *Maffezini* was commenced in 1997, after an Argentine national named Emilio Agustin Maffezini filed a request for arbitration against the Kingdom of Spain, concerning treatment he had allegedly received from the Spanish government in connection with an investment involving the production and distribution of chemical products in Spain.[54] In his request for arbitration, Maffezini invoked the provisions of the Spain-Argentina BIT. However, this was insufficient to establish ICSID jurisdiction, because the Spain-Argentina BIT required that the investors allow the Spanish courts eighteen months to process the claim before it was submitted to international arbitration.[55] To avoid the delay and expense of litigation in Spain's domestic courts, Maffezini argued that the MFN clause in the Spain–Argentina BIT allowed him to rely on the more favorable treatment that Spain offered to Chilean investors in the Spain–Chile BIT, which required no more than a six-month waiting period before an investor could file a claim at ICSID.[56]

Spain objected to Maffezini's argument. It argued that the MFN clause could not be used to expand jurisdiction, maintaining that "under the principle *ejusdem generis* the most favored nation clause can only operate in respect of the same matter and cannot be extended to matters different from those envisaged by the basic treaty."[57] This, according to Spain, limited the scope of the MFN clause to substantive matters and not to procedural or jurisdictional questions.

The tribunal ultimately agreed with Maffezini and assumed jurisdiction over the dispute, finding that the MFN clause could extend to procedural matters.[58] It concluded: "[I]f the goal of a BIT is to protect investors from the arbitrary and discriminatory practices of host states,

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52 *See* El Paso Energy Int'l Co. v. Argentine Republic, ICSID Case No. ARB/03/15, Decision on Jurisdiction, ¶ 39 (Apr. 27, 2006) ("[I]nternational arbitral tribunals, notably those established within the ICSID system, will generally take account of the precedents established by other arbitration organs, especially those set by other international tribunals."); Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 Arb. Int'l 357, 368 (2007) ("While tribunals seem to agree that there is no doctrine of precedent per se, they also concur on the need to take earlier cases into account.").

53 Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Objections to Jurisdiction (Jan. 25, 2000), 5 ICSID Rep. 396(2002).

54 *See id.* ¶¶ 20–26, 5 ICSID Rep. at 400–01; *see also* Egli, *supra* note 12, at 1066–68 (detailing the background facts of Maffezini).

55 *Maffezini*, ¶¶ 25–26, 5 ICSID Rep. at 401; *see also* Egli, *supra* note 12, at 1066–68.

56 Egli, *supra* note 12, at 1066–68.

57 *Maffezini*, ¶ 41, 5 ICSID Rep. at 404.

58 *Id.* ¶ 99, 5 ICSID Rep. at 418.

'it would be illogical to exclude from the scope of such protection . . . procedural justice.'"[59]

Maffezini did not prove to be a one-off, aberrational decision. Instead, it was followed by a series of other decisions that followed a similar line of reasoning. *Siemens v. Argentina*, a 2004 ICSID decision, reinforced *Maffezini*,[60] applying the same reasoning in a case in which the MFN clause was less broadly worded than in *Maffezini*.[61] As in *Maffezini*, the case involved an Argentinean BIT with a required waiting period to give time for the case to be resolved in domestic courts before an international arbitral tribunal considered it. In *Siemens* it was the Argentina-Germany BIT (1991), which the claimant, a German national, sought to avoid by reference to a third-party treaty that Argentina had signed with Chile. The Tribunal interpreted the MFN clause to include the dispute settlement provisions.[62] "The principal difference . . . was that the wording of the applicable MFN clause in the Germany-Argentina BIT was less explicitly broad in scope" than the one at issue in *Maffezini*.[63] Argentina attempted to argue that this distinction was relevant, but the Tribunal rejected this.[64] The Tribunal stated that it "concurs that the formulation is narrower but . . . it considers that the term 'treatment' and the phrase 'activities related to the investments' are sufficiently wide to include settlement of disputes."[65] While the outcome

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[59] Egli, *supra* note 12, at 1068 (quoting Katja Scholz, *Having Your Pie . . . And Eating It with One Chopstick – Most Favoured Nation Clauses and Procedural Rights*, Transnat'l Econ. L. Rsch. Ctr., no. 5, 2004, at 2, 3); *Maffezini*, ¶¶ 54–64, 5 ICSID Rep. at 407–11.

[60] Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8, Decision on Jurisdiction, ¶ 103 (Aug. 3, 2004), https://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C7/DC508_En.pdf [https://perma.cc/5JSX-MX36].

[61] *See* Vesel, *supra* note 11, at 164 ("The *Siemens* case was in many respects a repeat of *Maffezini* and reinforced its interpretive approach by applying the same reasoning even in a case in which the MFN clause was less broadly-worded than in *Maffezini*.").

[62] *Siemens A.G.*, ¶ 103.

[63] Vesel, *supra* note 11, at 164. The provision in *Maffezini* was Article IV of the Argentina-Spain BIT: "In all matters governed by this Agreement, such treatment shall be no less favourable than that accorded by each Party to investments made in its territory by investors of a third country." Spain-Argentina BIT, *supra* note 31, art. 4. The *Siemens* case involved Articles 3(1) and 3(2) read in combination with Article 4. Article 3(1) required neither contracting party to "subject investments in its territory by or with the participation of nationals or companies of the other Contracting Party to treatment less favourable than it accords to investments of its own nationals or companies or to investments of nationals or companies of any third State," and Article 3(2) required neither contracting party to "subject nationals or companies of the other Contracting Party, as regards their activity in connection with investments in its territory, to treatment less favourable than it accords to its own nationals or companies or to nationals or companies of any third State." Treaty on the Encouragement and Reciprocal Protection of Investments, Arg.-Ger., art. 3, Apr. 9, 1991, 1910 U.N.T.S. 198.

[64] *Siemens A.G.*, ¶¶ 33–59, 103; *see also* Vesel, *supra* note 11, at 164.

[65] *Siemens A.G.*, ¶ 103.

and rationale are very similar to *Maffezini*, the *Siemens* Tribunal also provided a more elaborate explanation of the methodology and rationale behind its decision.[66]

After *Maffezini* and *Siemens*, it may have appeared that proponents of an interpretation of MFN clauses that includes dispute settlement mechanisms were winning the day. Soon, however, came a series of cases that pointed in the opposite direction.[67] The first of these was *Salini v. Jordan*, an ICSID case from 2004.[68]

Salini involved a dispute over the final payment due to two Italian companies after the completion of a dam in Jordan.[69] The Jordan–Italy BIT provided for ICSID arbitration over disputes surrounding treaty violations but provided that, when an investment was made pursuant to an investment contract, the contractual dispute settlement procedures were controlling. The dam project was governed by an investment contract requiring disputes be settled in Jordanian courts unless the parties agreed to refer the dispute to arbitration.[70] The Italian claimants brought their claim before ICSID, arguing that Jordan's BIT with the United States and other countries allowed investors to bring contractual claims to arbitration and that, due to the presence of the MFN clause, the Italian investors should be allowed to do the same.[71] The Tribunal rejected this argument. Its reasoning attempted to distinguish the case from *Maffezini* and *Siemens*, an attempt which scholars have described as unconvincing.[72] Instead, scholars have argued that the difference is not the cases themselves but "the tribunals' respective starting points": In *Maffezini*, the Tribunal assumed that the MFN clause was intended to apply broadly, absent limiting language or a compelling reason to the contrary. In *Salini*, the Tribunal started from the assumption that the MFN clause does not apply unless it can be specifically demonstrated that the parties intended it to apply to the specific issue in question.[73] In other words, the differences between the cases came from the different assumptions the tribunals began with, which in turn find their origin in the different perspectives of the arbitrators.

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66 *Id.* ¶¶ 80–110. *See* Vesel, *supra* note 11, at 164–69 for an analysis of this decision.

67 *See* Vesel, *supra* note 11, at 169–81 for a more detailed description of these cases.

68 Salini Costruttori S.p.A. v. Hashemite Kingdom of Jordan, ICSID Case No. ARB/02/13, Decision on Jurisdiction (Nov. 9, 2004), 20 ICSID Rev.—FILJ 148 (2005).

69 *Id.* ¶¶ 14–17, 20 ICSID Rev.—FILJ at 151–52.

70 *Id.* ¶ 19, 20 ICSID Rev.—FILJ at 153.

71 *Id.* ¶ 21, 20 ICSID Rev.—FILJ at 153.

72 *Id.* ¶¶ 115–19, 20 ICSID Rev.—FILJ at 185–86; *see* Vesel, *supra* note 11, at 170–72 (criticizing the tribunal's attempt to draw meaningful distinctions between *Maffezini* and *Salini*).

73 Vesel, *supra* note 11, at 171.

The rebuke of *Maffezini* continued in *Plama v. Bulgaria*, a case decided by an ICSID tribunal in 2005.[74] The Tribunal in *Plama* expanded on the reasoning in *Salini*, arguing in favor of a presumptively narrow interpretation of MFN clauses.[75] The dispute concerned Bulgaria's treatment of an oil refinery owned by a Cyprus corporation, which the claimant accused Bulgaria of expropriating. The claimants sought to resolve the dispute through international arbitration rather than through the Bulgarian court system. The BIT in question allowed for arbitration only after the domestic legal system had concluded that an expropriation had occurred and only to resolve a dispute about the amount of compensation due to the claimant.[76] The claimant nevertheless argued that it should have access to ICSID arbitration by way of the MFN clause. The MFN clause was similar to those at issue in *Siemens* and *Salini*, providing that "[e]ach Contracting Party shall apply to the investments in its territory by investors of the other Contracting Party a treatment which is not less favorable than that accorded to investments by investors of third states."[77] The Tribunal rejected jurisdiction, holding that the MFN provision could not be interpreted as providing consent to submit a dispute to ICSID arbitration.[78] The Tribunal couched its language in sweeping terms, strongly denouncing *Maffezini*.[79]

This was far from the end of the story. A number of cases following these have addressed whether an MFN clause entitled a claimant to jurisdictional or procedural benefits. In many of these cases, including *Camuzzi v. Argentina*,[80] *Gas Natural v. Argentina*,[81] *Suez v. Argentina*,[82]

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74 Plama Consortium v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction (Feb. 8, 2005), 20 ICSID Rev.—FILJ 262 (2005).

75 *Id.* ¶¶ 183–227, 20 ICSID Rev.—FILJ at 320–33.

76 *Id.* ¶ 186, 20 ICSID Rev.—FILJ at 321.

77 *Id.* ¶ 26, 20 ICSID Rev.—FILJ at 270 (quoting Agreement on Mutual Encouragement and Protection of Investments, Bulg.-Cyprus, art. 3, Nov. 12, 1987, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/522/download [https://perma.cc/C9LW-LP2V]).

78 *Id.* ¶ 227, 20 ICSID Rev.—FILJ at 333.

79 *Id.* ¶¶ 203–27, 20 ICSID Rev.—FILJ at 326–33 ("[*Maffezini*'s] interpretation went beyond what State Parties to BITs generally intended to achieve by an MFN provision in a bilateral or multilateral investment treaty.").

80 Camuzzi Int'l v. Argentine Republic, ICSID Case No. ARB/03/7, Decision on Exceptions to Jurisdiction (June 10, 2005), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C227/DC643_Sp.pdf [https://perma.cc/YDP4-EMAV].

81 Gas Natural SDG v. Argentine Republic, ICSID Case No. ARB/03/10, Preliminary Questions on Jurisdiction (June 17, 2005), https://www.italaw.com/sites/default/files/case-documents/ita0354.pdf [https://perma.cc/TP5F-FALB].

82 Suez v. Argentine Republic, ICSID Case No. ARB/03/17, Decision on Jurisdiction (May 16, 2006), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C18/DC514_En.pdf [https://perma.cc/76NA-8VS2].

and *National Grid v. Argentina*,[83] all involving the question of whether an MFN clause entitled a claimant to circumvent the eighteen-month domestic litigation period favored by Argentina, the outcome was essentially the same as in *Maffezini*. These decisions concurred that the *Maffezini* tribunal was correct in its central holding.[84] However, other cases have largely followed the reasoning of *Salini* and *Plama*, including *Telenor v. Hungary*,[85] *Berschader v. Russia*,[86] and *Wintershall v. Argentina*.[87]

The result is an inconsistent and unpredictable system where arbitrators may choose to follow either the reasoning of *Maffezini* and its progeny, holding that the MFN clause can indeed be used to expand jurisdiction, or of *Salini* and *Plama*, holding the opposite. There is little regularity or consistency in which approach is chosen. It has been argued that the prevailing factor in arbitral decisionmaking on this issue is, more than anything else, whether the arbitrator inclines towards pro-investor or pro-state ideology.[88]

A 2011 study by Julie Maupin supports this worrisome view of arbitral decisionmaking.[89] Maupin analyzed publicly available decisions by arbitral tribunals on the issue of MFN-based jurisdiction and concluded that neither the type of MFN clause, nor the type of MFN question, nor the set of reasons supposedly considered by the

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[83] *In re* Nat'l Grid v. Argentine Republic, UNCITRAL Arbitration, Decision on Jurisdiction (June 20, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0553.pdf [https://perma.cc/8G7V-U3DC].

[84] *See* Vesel, *supra* note 11, at 181 (describing these cases).

[85] Telenor Mobile Commc'ns A.S. v. Hungary, ICSID Case No. ARB/04/15, Award, ¶¶ 17–19 (Sept. 13, 2006), https://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C240/DC652_En.pdf [https://perma.cc/BC39-W9NK].

[86] Berschader v. Russian Federation, SCC Case No. 080/2004, Award, ¶¶ 159–208 (Apr. 21, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0079_0.pdf [https://perma.cc/B6HN-QBDP].

[87] Wintershall Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/04/14, Award, ¶¶ 190, 197 (Dec. 8, 2008), https://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C39/DC1492_En.pdf [https://perma.cc/3WKE-CP4X]; *see* Schill, *supra* note 20, at 545–47 (analyzing this case).

[88] Schill, *supra* note 5, at 354. Arbitrators who align with *Maffezini* are typically viewed as "pro-investor" while those who reject it are viewed as "pro-state," as the approach taken by the tribunal in *Maffezini* allows investors to essentially override provisions such as mandatory periods of domestic litigation, which are inserted by states to protect their interests and their sovereignty. *See* discussion and sources cited *infra* notes 203–05.

[89] The notion that arbitrators are making decisions not based in sound legal analysis but in their own pre-conceived pro-state or pro-investor ideology contributes to the delegitimization of the international arbitral system, discussed in greater detail *infra* notes 93–100. This would mean that the resulting decisions both carry a sense of unfairness and are arguably substantively unfair, neither of which are desirable qualities for a functioning legal system. Inconsistency and incoherence also waste resources and lead to difficulties in planning and decisionmaking. *See infra* notes 93–100.

tribunal determined the outcome of MFN-based jurisdiction decisions.[90] Instead, her study shows that the legal approach of arbitral tribunals appears to be outcome-determinative. While some tribunals state that it is sufficient that an MFN clause can be plausibly interpreted to apply to more favorable grants of jurisdiction, others require that such application be "*affirmatively* established."[91] Maupin concluded that ultimately what lies behind this supposedly doctrinal debate about treaty interpretation is nothing more than a pro-investor and pro-state dichotomy. She suggests that these debates are "clouded by the growing perception . . . that the approach adopted by individual tribunals may be more closely linked to the personal predispositions of select arbitrators than to an objective appreciation of the proper interpretative approach to be applied under international law."[92]

This inconsistent approach has challenged the heart of the international arbitral system, causing "concern about whether the current ad hoc system of international arbitrations is [even] appropriate for resolving treaty disputes."[93] International arbitral tribunals lack some "familiar and important aspects of a classic judicial system," including the "finality and comparative uniformity of traditional court rulings," which means that inconsistent decisions on MFN-based jurisdiction can wreak havoc.[94] The debate surrounding *Maffezini* also presents a serious threat of a legitimacy crisis. Coherence is a core element of legitimacy, requiring "consistency of interpretation and application of rules in order to promote perceptions of fairness and justice."[95] When judicial bodies embrace an incoherent approach, their legitimacy is seriously undermined. Clear inconsistencies also call into question the

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[90] Maupin, *supra* note 5, at 172–75.

[91] *Id.* at 179.

[92] *Id.* at 178.

[93] *See* Egli, *supra* note 12, at 1078–79.

[94] *Id.* at 1079. Scholars have discussed the possibility of creating an appellate review system. *See* Ten Cate, *supra* note 4, at 1111 (discussing various proposals); William H. Knull, III & Noah D. Rubins, *Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?*, 11 Am. Rev. Int'l Arb. 531, 533–34 (2000) (arguing for a procedure of substantive appellate review by a second arbitration tribunal). However, it would require immense international cooperation, and many question whether it is a feasible solution to the MFN dilemma. *See* Egli, *supra* note 12, at 1082. Many in the international arbitration community are also skeptical about the benefits of an appellate system. *See* Bryan Cave Leighton Paisner LLP, Annual Arbitration Survey 2020: A Right of Appeal in International Arbitration 10 (2020), https://www.bclplaw.com/images/content/1/8/v2/186066/BCLP-Annual-Arbitration-Survey-2020.pdf [https://perma.cc/MW7M-ZXD2] (finding that 71% of survey respondents felt that an appeal process would make international arbitration less attractive).

[95] Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 Fordham L. Rev. 1521, 1585 (2005).

premises of the current international investment regime: One of the primary objections behind the international investment treaty system is to increase certainty surrounding investment protection, a goal that is vitiated by a blatantly inconsistent approach.[96] Inconsistencies such as these also raise the specter that decisions are made based upon the individual views and biases of the arbitrator, rather than on principled legal rules, as discussed by Maupin—further undermining the system's legitimacy and calling into question the international arbitral system's status as a fair and equitable judicial system.[97]

One potential—and perhaps the easiest—solution to this crisis is for states simply to specify in their treaties whether they would like the MFN clause to be interpreted as applying to jurisdiction or not.[98] Indeed, scholars and international bodies both supportive of and opposed to *Maffezini* have called on states to clarify whether their MFN provision can be used to expand jurisdiction.[99] At least some states have begun to respond to this suggestion: Several scholars have noted the presence of MFN clauses in post-*Maffezini* investment treaties that include a provision specifying that they cannot be used to expand jurisdiction.[100] However, these provisions have been dismissed as analytically uninteresting—unlike open-ended MFN clauses that fail to specify whether or not they apply to jurisdictional matters, they have not been subject to much dispute and have not been seen as highly

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96 Egli, *supra* note 12, at 1079–80; *see* Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 Harv. Int'l L.J. 67, 75–76 (2005) ("The impetus behind the rapid expansion of BITs rests in the desire of companies of industrialized states to invest safely and securely in developing countries, as well as the consequent need to create a stable international legal framework to facilitate and protect those investments."); Wouters et al., *supra* note 2, at 34 ("The proliferation of BITs most certainly goes hand in hand with the need to create legal certainty in international investment."); Gehring & Kent, *supra* note 6, at 285.

97 Maupin, *supra* note 5, at 178.

98 *See* Egli, *supra* note 12, at 1081–82 (discussing and rejecting other potential solutions, such as the annulment of awards via Article 52 of the ICSID convention or amending to ICSID Convention to create a provision that either expressly endorses or rejects MFN-based jurisdiction).

99 *See* Parker, *supra* note 30, at 59 n.181 ("[I]t is better for States to clarify either way, rather than leave the scope of their treaties ambiguous."); Schill, *supra* note 5, at 371 ("Zachary Douglas and I seem to agree . . . [that states must] clarify and settle this vexed and heavily contested point."). The United Nations has also echoed this call. U.N. Conf. Trade & Dev., Most-Favored Nation Treatment 56–57 (2010), https://unctad.org/system/files/official-document/diaeia20101_en.pdf [https://perma.cc/K5L4-Y9E6] (noting the debate surrounding MFN-based jurisdiction and advising "negotiators to craft the MFN treatment clause very carefully" and to "pay attention to possible broad or unexpected interpretations").

100 *See, e.g.*, Parker, *supra* note 30, at 48–51 (discussing "narrow" MFN clauses that do not apply to dispute settlement provisions); Maupin, *supra* note 5, at 167–68; Jones & Rao, *supra* note 19, at 372 (noting the increasing popularity of such clauses after *Maffezini*).

relevant to the heated discussion of whether open-ended MFN clauses can be used to expand jurisdiction.[101] As a result, they have not been subject to much serious analysis.

However, jurisdiction-limiting MFN clauses are highly relevant to the study of international arbitration. First, their use may be an indicator of the international community's sentiments towards MFN-based jurisdiction—the increased use of jurisdiction-limiting MFN clauses may demonstrate a growing repudiation of *Maffezini*'s approach and the inconsistency it generates. It may also raise the question of why clearer clauses were not inserted to begin with. Second, and perhaps most critically, these provisions have the potential to solve the inconsistency crisis surrounding MFN-based jurisdiction. A genuine trend towards their increased use would carry major implications for the *Maffezini* dispute. Third, the fact that these clauses have become an increasingly common feature of investment treaties makes them worthy of analysis in and of themselves. What do these clauses look like? How frequent is their use? And what role have they played in arbitrated cases?

II
Analysis of Jurisdiction-Limiting MFN Clauses: Forms, Trends, and Reception

The following analysis attempts to analyze and draw conclusions about the nature of jurisdiction-limiting MFN clauses by exploring several components of these clauses. Section II.A examines the forms these clauses take and the language they use, as well as the common linguistic and formulaic differences that appear across clauses. Section II.B examines the trend towards the increasing usage of jurisdiction-limiting MFN clauses, using the approaches of four different nations and the EU as case studies.[102] Section II.C investigates how these clauses have been received in arbitration, particularly when they have been subject to dispute or used to bolster other arguments.

A. The Forms of Jurisdiction-Limiting MFN Clauses

What do these clauses look like? The wording and format of a treaty provision can tell us a great deal—about the motivations of its creators, about the provision's potential impact on its subject, and, most

[101] *See* Maupin, *supra* note 5, at 167–68 ("This type of MFN clause has not yet been the subject of contention . . . . Nevertheless, I mention it here both for the sake of completeness and because it is not impossible that MFN-based jurisdiction might, at some point, be claimed notwithstanding the apparent limitations of this type of MFN clause.").

[102] *See* Rao & Jones, *supra* note 19, at 393 figs. 3 & 4 (documenting the increasing use of these provisions).

importantly, about the substance of the provision itself. Thus, before diving deeper into our analysis of these MFN clauses, it is critical to begin by examining the forms these MFN clauses take.[103] These clauses are typically quite simple. They are usually one sentence and specify that the relevant provisions of the clause do not apply to procedural matters.[104] However, the clauses vary both in their structural form within the treaty and in their precise wording.

Structurally, jurisdiction-limiting MFN clauses can be divided into four general categories: the "footnote / annex" approach, the "in-clause" approach, the "limitations clause" approach, and the "dispute settlement clause" approach. These categories sometimes overlap and have a number of variations within them, but they provide a general rough categorization of the structures these clauses take.

In the "footnote / annex" approach, the MFN clause is written in a typical form[105] (with no jurisdictional limits specified) and a footnote or annex is appended to the MFN clause stating that, for "greater certainty,"[106] the treatment specified above does not apply to jurisdiction. An example of this can be seen in the MFN clause in the Colombia-United States Trade Promotion Agreement (TPA) of 2006.[107] The MFN clause uses typical language, specifying that both parties "shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party . . . with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory."[108] A footnote is appended stating that: "For greater certainty, treatment 'with respect to the establishment, acquisition, expansion,

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[103] Please note that this Section does not aim to provide a complete and comprehensive overview of all existing forms and linguistic variations of jurisdiction-limiting MFN clauses. Rather, it aims to provide a general overview of the most common forms that these clauses take and language the clauses use.

[104] As described below, the precise wording used to represent dispute resolution procedures, among other terms, varies. *See infra* notes 115–19 and accompanying text.

[105] *See supra* notes 19–33 and accompanying text (discussing the forms MFN clauses typically take).

[106] Language here varies. Sometimes "for greater clarity" is used instead. *See* Agreement for the Promotion and Protection of Investments, Can.-Peru, Annex B.4, Nov. 14, 2006 [hereinafter Canada-Peru BIT], https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/626/download [https://perma.cc/5QS9-WT49].

[107] It should be noted here that this treaty is a "Trade Promotion Agreement," rather than a "BIT." Similar agreements also commonly use the name "Free Trade Agreement," abbreviated to "FIT," or another acronym such as "Comprehensive Economic Partnership Agreement" or "Economic Cooperation and Trade Agreement." Such agreements are broader than BITs and typically include chapters on other aspects of trade or the economy, but include a sub-section specifically on investment that functions essentially as a BIT.

[108] United States-Colombia Trade Promotion Agreement, Colom.-U.S., art. 10, Nov. 22, 2006, Office of the United States Trade Representative [hereinafter U.S.-Colombia TPA],

management, conduct, operation, and sale or other disposition of investments' referred to . . . does not encompass dispute resolution mechanisms . . . that are provided for in international investment treaties or trade agreements."[109]

Other treaties in this category use an annex or other appendage specifying the limitation. The Canada-Peru BIT, for example, includes a footnote pointing to Annex B.4, where the jurisdiction-limiting provision can be found.[110]

The "in-clause" approach involves appending additional language onto the MFN clause itself. For instance, the 2011 Azerbaijan-Montenegro BIT adds a paragraph at the end of its MFN clause, stating: "For the avoidance of doubt, the present Article shall apply only in respect of the kinds of treatment offered in Articles 2 to 6 of this Agreement, and shall not apply in respect of an Investor's rights to submit disputes arising under this Agreement to any dispute settlement procedure."[111]

A third category of formulations is what this Note labels the "limitations clause" approach: Here, the jurisdictional limitations on the MFN clause are included in the same clause as other limitations on the MFN clause, such as limitations on its applicability to fair and equitable treatment or substantive obligations. The 2016 Argentina-Qatar BIT provides an example, combining the jurisdictional limits with limits on fair and equitable treatment:

> The provisions of paragraphs 1 and 3 of this Article shall not apply in order to invoke the fair and equitable treatment and the dispute settlement provisions accorded to investors of any Third State under treaties signed by one of the Contracting Parties prior to the entry into force of this Treaty.[112]

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https://ustr.gov/sites/default/files/uploads/agreements/fta/colombia/asset_upload_file630_10143.pdf [https://perma.cc/DKC9-JTQH].

109 *Id.* art. 10 n.2.

110 The text of Annex B.4 is almost exactly the same as Article 10, note 2 of the United States-Colombia Trade Promotion Agreement. *Compare* Canada-Peru BIT, *supra* note 106, Annex B.4, *with* U.S.-Colombia TPA, art. 10 n.2. An interesting variation on this can be seen in the 2019 CARIFORUM-U.K. EPA, in which most-favored-nation treatment applies to "measures which affect commercial presence." At the beginning of the chapter, the parties specify that dispute settlement provisions are not deemed to "affect commercial presence." Economic Partnership Agreement Between the CARIFORUM States, of the One Part, and the United Kingdom of Great Britain and Northern Ireland, of the Other Part, Part II, ch. 2, Mar. 22, 2019, MS No.18/2019 (U.K.).

111 Agreement on Promotion and Reciprocal Protection of Investments, Azer.-Montenegro, art. 3, Sept. 16, 2011 [hereinafter Montenegro-Azerbaijan BIT], https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5520/download [https://perma.cc/75TD-4EFC].

112 The Reciprocal Promotion and Protection of Investments, Arg.-Qatar, art. 4, June 11, 2016, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5383/

Often the jurisdictional limits on the MFN clause are in the same Article as the MFN clause itself. However, in several cases, the jurisdictional limits on the MFN clause are found elsewhere. For instance, the Turkey-Ghana BIT (2016) includes a separate article specifying "exceptions" to the MFN clause, where the jurisdictional limitations of the MFN clause are included alongside other limitations.[113]

A fourth common way of structuring this provision is through the "dispute settlement clause" approach. In this approach, the jurisdictional limitations of the MFN clause are not mentioned in or appended to the MFN clause itself but are instead stated in the part of the treaty focused on dispute settlement. The 2011 Oman-Viet Nam BIT and the 2013 Jordan-Iraq BIT, for instance, use this approach.[114]

In addition to these structural variations, these clauses also include linguistic variations. There are typically several ways to word exactly what procedural matters the clause excludes. The two most common wordings specify that the MFN clause does not apply to "dispute settlement procedures" or "dispute settlement mechanisms."[115] Sometimes, rather than "dispute settlement," the term "dispute resolution" is used.[116] Some clauses take an additional step and specify that the MFN clause does not apply to any "procedural or judicial matter."[117] Some clauses

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download [https://perma.cc/4QVB-CQYR]; *see also* Agreement for the Promotion and Reciprocal Protection of Investments, Hung.-Kyrg., art. 4, Sept. 29, 2020, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6037/download [https://perma.cc/RQ5V-EJYP] (specifying jurisdiction limits in the same paragraph as limits to substantive obligations under the MFN clause).

113 Agreement for the Reciprocal Promotion and Protection of Investments, Ghana-Turk., art. 6, Mar. 1, 2016, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5844/download [https://perma.cc/KZ2K-FT3U].

114 Agreement for the Promotion and Reciprocal Protection of Investments, Oman-Viet., art. 9, Jan. 10, 2011 [hereinafter Oman-Viet Nam BIT], https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5437/download [https://perma.cc/9PTE-5PT5]; Agreement for the Promotion and Reciprocal Protection of Investments, Iraq-Jordan, Dec. 25, 2013, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5485/download [https://perma.cc/K4KP-6LL3]. For instance, the Oman-Viet Nam Treaty appends this language at the end of the clause focused on dispute settlement: "For greater certainty, the Most Favored Nation Treatment provision in this Agreement does not encompass a requirement to extend to the investors of the other Contracting Party dispute settlement procedures other than those set out in this Agreement." Oman-Viet Nam BIT, *supra*, art. 9.

115 Sometimes both are used. *E.g.*, Investment Protection Agreement, Eur. Union-Viet., art. 3.41, June 30, 2019, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5868/download [https://perma.cc/YU82-BAUJ] ("Multilateral Dispute Settlement Mechanisms"); *id.* at 32 ("Sub-Section 3: Dispute Settlement Procedures").

116 *E.g.*, Peru – United States Trade Promotion Agreement, Peru-U.S., art. 10.4 n.2, Apr. 12, 2006, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2721/download [https://perma.cc/NVH8-TZ4C].

117 Agreement on the Promotion and Reciprocal Protection of Investments, Azer.-U.A.E., art. 4, Nov. 20, 2006 [hereinafter United Arab Emirates-Azerbaijan BIT],

specifically state that the provision does not apply to "*investor-to-state* dispute settlement procedures."[118]

A second common linguistic variation involves whether the clause emphasizes (1) the investor's *right* to submit the proceeding to specific dispute settlement procedures, (2) its *obligation* to do so, or (3) whether it simply states that the clause itself does not apply to dispute settlement procedures.[119] The 2016 Morocco-Rwanda BIT provides an example of the first formulation, emphasizing a "*right to submit dispute[s]*."[120] The 2011 Azerbaijan-Serbia BIT instead alludes to an obligation.[121] The 2016 Japan-Kenya BIT provides an example of the third formulation, which does not include an allusion to either rights or obligations of specific parties, instead simply stating that "[i]t is understood that the 'treatment' referred to in this Article does not include dispute settlement procedures provided for in other international agreements, including those provided for in other investment agreements."[122]

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https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/243/download [https://perma.cc/KNB4-7GU8]; *see, e.g.*, Agreement on Promotion and Reciprocal Protection of Investments, Est.-U.A.E., art. 4, Apr. 20, 2011, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5749/download [https://perma.cc/7EXR-QWUV]; Agreement for the Promotion and Reciprocal Protection of Investment, Bangl.-U.A.E., art. 4, Jan. 17, 2011, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/276/download [https://perma.cc/3B4L-YNQW]; Agreement on the Reciprocal Promotion and Protection of Investments, Nigeria-U.A.E., art. 5, Jan. 18, 2016, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5478/download [https://perma.cc/FUM2-CNAC].

118 *E.g.* Trade and Cooperation Agreement, Eur. Union-U.K., art. 130, Dec. 30, 2020 (emphasis added), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6039/download [https://perma.cc/9J7W-9YF2].

119 These linguistic variations obviously should not be understood as mutually exclusive categories, but two different ways in which the wording of these provisions varies.

120 Agreement on the Reciprocal Promotion and Protection of Investments, Morocco-Rwanda, art. 3.3, Oct. 19, 2016 (emphasis added), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5417/download [https://perma.cc/P4HM-QJAY] ("[T]he most favoured nation treatment shall not apply in respect of an investor's *right to submit dispute* [sic] arising under this Agreement to any dispute settlement procedure other than that provided by this Agreement.").

121 Agreement on the Promotion and Reciprocal Protection of Investments, Azer.-Serb., art. 4.5, June 8, 2011 (emphasis added), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3174/download [https://perma.cc/LEE7-SRGA] ("The provisions of paragraphs 1 and 2 of this Article shall not be construed so as to *oblige* one Contracting Party to be submitted to any other mechanism of dispute settlement with investor of other Contracting Party except those explicitly provided in the Article 11 of this Agreement.").

122 Agreement for the Promotion and Protection of Investment, Japan-Kenya, art. 4, Aug. 28, 2016, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5374/download [https://perma.cc/7VA8-BWXK]. This formulation can also be seen in many of the provisions discussed above.

A third common variation on wording includes an explicit reference to other international agreements. For instance, Article 4 of the 2016 Moldova-Turkey BIT states: "[T]his Article shall not apply in respect of dispute settlement, [sic] provisions between an investor and the hosting Contracting Party *laid down simultaneously by this Agreement and by another similar international agreement to which one of the Contracting Parties is signatory*."[123] By contrast, other clauses simply specify that most-favored-nation treatment "shall not apply in respect of an Investor's rights to submit disputes arising under this Agreement to *any dispute settlement procedure*."[124]

Have states preferred one formulation over another? Of the treaties signed since 2020, the vast majority of treaties have taken the "in-clause" approach, listing the jurisdiction limitations directly in the MFN clause.[125] There has also been a strong preference for language specifying that the clauses apply to dispute resolution (or settlement) procedures or mechanisms, as opposed to "procedural or judicial matters."[126] There is no clear evidence about why the treaty drafters have preferred this formulation;[127] it may merely be a stylistic choice, or they may have concluded that this formulation is the clearer alternative.

What do these various formulations entail in practice? Are there better and worse ways to formulate these clauses? As discussed further in Section C of this Part, the variations between these provisions have not yet been subject to obvious dispute.[128] However, hints of possible issues surrounding the formulations have begun to arise. The broad wording of many of these clauses indicates that the infamously hazy distinction between substance and procedure may become an area of contestation. At least one party has attempted to argue that importing an umbrella clause via an MFN clause would constitute a "procedural" matter, as it would be tantamount to "extend[ing] the Tribunal's jurisdiction so that

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123 Agreement Concerning the Reciprocal Promotion and Protection of Investment, Mold.-Turk., art. 4, Dec. 16, 2016 (emphasis added), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6103/download [https://perma.cc/7SHW-MYDD]; *see also* Agreement Concerning the Reciprocal Promotion and Protection of Investments, Som.-Turk., art. 4, June 3, 2016, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6106/download [https://perma.cc/SSV7-PC4T].

124 Montenegro-Azerbaijan BIT, *supra* note 111, art. 3 (emphasis added).

125 This is based on an analysis of the roughly seventy-five treaties uploaded on the UNCTAD Treaty Database from this time period. UNCTAD Database, *supra* note 23; *see also infra* notes 143–44 and accompanying text.

126 UNCTAD Database, *supra* note 23.

127 I have found very little in the way of draft agreements or external statements that indicate why one formulation was chosen over another. As such, we are left to speculate on why these variations exist and what, if anything, they signify.

128 *See infra* Section II.C.

it can hear any contractual claim . . . ."[129] Some treaties have addressed this issue in part by referencing specific dispute resolution matters that are intended to be excluded, through pointing to those listed in their own treaty. For instance, the Australia-Uruguay BIT states that "the treatment referred to in this Article does not encompass international dispute resolution procedures or mechanisms, *such as those included in Article 14*."[130] However, exactly how the line between procedure and substance should be drawn in this context may be a ripe area for further scholarship.

The choice to include a particular form of MFN clause may also be another potential point of dispute. In one case, the claimant argued that the fact that the treaty did include a jurisdiction-limiting MFN clause in one section of the treaty (Section 10, on investment) but did not in an MFN clause in the relevant part of the treaty (Section 12, on financial services) implied that this second MFN clause *was* intended to include jurisdiction.[131] As more cases arise, issues relating to the precise expression of MFN clauses and the *expressio unius* canon may present potential ambiguities that states may need to take into account. Ultimately, careful drafting likely will remain critical.

B. Trends Towards Increased Use of Jurisdiction-Limiting MFN Clauses

Cree Jones and Weijia Rao first empirically documented the trend towards the increasing usage of jurisdiction-limiting MFN clauses in their 2020 article, *Sticky BITs*.[132] Looking specifically at BITs,[133] they demonstrated that the use of jurisdiction-limiting MFN clauses in BITs

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[129] Amec Foster Wheeler USA Corp. v. Republic of Colombia, ICSID Case No. ARB/19/34, Memorial on Preliminary Objections, ¶ 234 n.466 (July 1, 2021), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C8193/DS16743_En.pdf [https://perma.cc/W37T-SCPT]; *see* discussion *infra* notes 182–85 and accompanying text.

[130] Agreement on the Promotion and Protection of Investments, Austl.-Uru., art. 5.2, 2019 (emphasis added), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6953/download [https://perma.cc/26L4-KY8M].

[131] Astrida Benita Carrizosa v. Republic of Colombia, ICSID Case No. ARB/18/5, Award, ¶ 182 (Apr. 19, 2021), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C7047/DS16934_En.pdf [https://perma.cc/L278-VYK3]. It is common for investment agreements, particularly the typically larger trade promotion agreements (TPAs), to include multiple sections that are each specific to a category or sector. These agreements may contain multiple MFN clauses that appear in different sections of the agreement, as was the case for the Colombia-USA TPA (2012) at issue in *Carrizosa*.

[132] Jones & Rao, *supra* note 19.

[133] As discussed *supra* notes 2, 21–23, BITs, short for "bilateral investment treaties," are investment treaties made between two states that specify the terms and conditions on which investments by a national of one state can be made in projects in the other state.

has had a stark increase from 2000 to 2018.[134] They examined the trend surrounding the use of these clauses through three different angles: the total count of BITs, the cumulative share of BITs, and the annual share of BITs signed in a given year.[135] They found that the final point, the annual share of BITs with jurisdiction-limiting clauses, peaked to a stunning 100% of MFN clauses in 2017 and that all three metrics showed a strong upward trend.[136]

In this Section, I build on the Jones and Rao analyses and diverge from them. In recognition of the increasing significance of investment treaties other than BITs, I analyze both BITs and other treaties with investment provisions. Non-BITs, such as multi-lateral investment agreements and "free trade" agreements, include far more states than BITs and have begun to occupy an increasingly large proportion of the universe of investment treaties.[137] I also update their analysis to include the most recently available data.[138] Using this information, I zoom in on the adoption trends of certain specific nations and economic groups, examining on a more granular level when and with what frequency certain states choose to include jurisdiction-limiting MFN clauses. These countries provide case studies that allow us to understand the global trend towards the increased adoption of jurisdiction-limiting

134 Jones & Rao, *supra* note 19, at 372 (describing this limitation as an "ISDS Exception").

135 *Id.* at 393.

136 *Id.*

137 From 1997 to 2004, for example, based on the information in UNCTAD's database, non-BITs constituted only roughly 9.2% of total investment treaties signed. *See* UNCTAD Database, *supra* note 23 (analyzing the proportion of BITs versus non-BITs in investment treaties in UNCTAD's database during this time period). By contrast, during the past seven years, non-BITs constituted 31.5% of total investment treaties signed. *Id.* BITs are, by definition, almost always agreements between two countries only. Non-BITs on the other hand include trade agreements that set the conditions of investment among more than two countries; this includes "bilateral" treaties that set the conditions of investment (and sometimes trade) between a multinational body and another country, such as a trade agreement between the EU and Singapore, or an investment treaty that sets the conditions for investment between multiples countries individually, such as the North American Free Trade Agreement (NAFTA), which set the conditions for investment between the United States, Canada, and Mexico. Non-BITs also include agreements between two countries that are broader than just investment; such agreements, often called Free Trade Agreements (FTA) or Trade Promotion Agreements (TPA), include a subsection on investment that functions similar to a BIT but also include sections on trade and economic relations in general that are broader than what is typically covered by a BIT. Including non-BITs allows us to examine these broader investment and trade agreements made by the EU and other multinational bodies, as well as multilateral agreements such as USMCA. Certain nations have also signed far more non-BITs than they have BITs. Peru, for instance, has signed only seven BITs since 2000. By contrast, it has signed twenty-seven non-BIT investment agreements. *Id.* (selecting "Peru"). Thus, examining only BITs risks a skewed analysis.

138 Jones and Rao's analysis ends at 2018. *See* Jones & Rao, *supra* note 19, at 393. I update to include information from 2019, 2020, 2021, and, where available, 2022.

MFN clauses from the perspective of individual nations and view how dramatic the increased usage of these clauses has become. Both my analyses and Jones and Rao's analyses support the same conclusion: The use of jurisdiction-limiting MFN clauses have become extremely common in recent years and are close to ubiquitous in newly signed treaties.

For this analysis, I used the International Investment Agreements Navigator database supplied by UNCTAD Investment Policy Hub.[139] This is a United Nations database built primarily on information supplied by member states on a voluntary basis and includes treaties that have been formally concluded. UNCTAD states that "every effort is made to ensure the accuracy and completeness of its content."[140]

I initially conducted a broad preliminary analysis to determine if the trend Jones and Rao observed in BITs holds when we include non-BITs. My analysis showed that this does appear to be the case: In 2006, 10% of treaties included jurisdiction-limiting MFN clauses; in 2011, 40%; in 2016, 65.5%; and in 2019 and 2020, 82.8%.[141]

Updating this analysis to include data from 2021, 2022, and 2023, essentially all investment treaties analyzed specify that they do not include dispute settlement provisions, with every investment treaties analyzed (23 out of 24) including an explicit jurisdiction-limiting MFN clause.[142] It is apparent that the trend in favor of jurisdiction-limiting MFN clauses remains extremely strong.

Having determined that this is the case, this Section analyzes in more detail the approaches of certain specific countries in their usage of jurisdiction-limiting MFN clauses.[143] The analysis examines the

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139 *See* UNCTAD Database, *supra* note 23.

140 *Id.*; *see also id.*, *Methodology*. While the possibility of bias or incompleteness in UNCTAD's data cannot be eliminated, it includes 3,289 treaties (including both in-force and not in-force) and is the most comprehensive source of these treaties we have.

141 I randomly selected thirty international investment treaties (both BITs and non-BITs) signed during each year at five-year intervals. Treaties were selected if they had an unambiguous MFN clause and the text of the treaty was available on the UNCTAD database in English. The total amount of treaties signed each year varies: for instance, ninety-nine were signed in 2006, while twenty-four were signed in 2020. In some cases, a limited number of treaties for a particular year restricted the sample size to twenty-nine, rather than thirty, treaties.

142 The remaining treaty (the Angola-EU SIFA) also implicitly excludes dispute resolution provisions. Taking a broader approach, it excludes from the MFN clause *all* provisions included in other international agreements, not just dispute settlement provisions. *See* Angola-EU SIFA (2023), Art. 4.

143 Using the UNCTAD Treaty Database, this analysis looks at all treaties signed by a given country that includes an unambiguous MFN clause and has searchable text (English or non-English) posted on UNCTAD. The analysis for all countries but the U.K. begins in 2004, the year of the first signing of a treaty with a jurisdiction-limiting MFN clause. The analysis for the U.K. begins in 2002, when the U.K. began to include jurisdiction-expanding MFN clauses.

behaviors of four different countries—two capital-importing countries (the United Arab Emirates and Peru), two capital-exporting countries (the United Kingdom and the United States)—and the behavior of the European Union.[144]

The analysis begins with the United Arab Emirates (U.A.E.). The U.A.E. is likely the originator of the jurisdiction-limiting MFN clause.[145] The first time this clause was seen in an international investment agreement was the BLEU (Belgium-Luxembourg Economic Union)-U.A.E. BIT, signed in 2004, several months before the *Siemens* decision was released.[146] The following graph shows the usage of jurisdiction-limiting MFN clauses and non-jurisdiction-limiting MFN clauses by the treaties (both BITs and non-BITs) signed by the U.A.E. over time.[147]

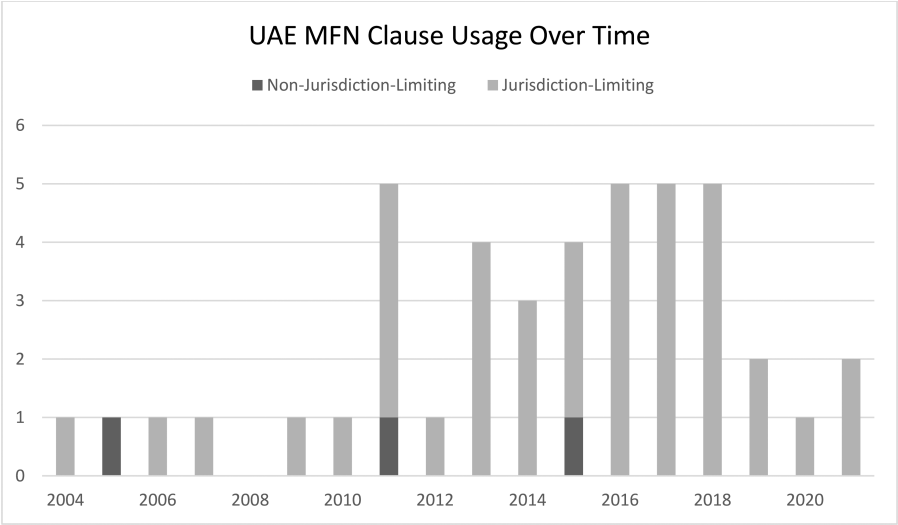
144 In addition to the size of its economy, the EU's behavior can also tell us when consensus is building in Europe on a particular issue. The EU's mechanisms for concluding treaties are complex; however, and importantly for the purpose of this Note, the EU acts as a unified entity and concludes treaties with third parties in a manner similar to independent nations. *See generally* Jan Wouters et al., *Treaty Making Procedures*, *in* The Law of EU External Relations 57 (Oxford Univ. Press 2021) (describing the EU's treaty-making process). Also of note, my selections include a combination of capital-importing and capital-exporting countries. This is to account for the important distinctions between the approaches of these nations: As described more *infra* note 208, capital-exporting countries such as the United States are typically thought to have a greater interest in protecting investors, who tend to be their nationals, and thus prefer expansive treaty interpretations, such as broad MFN clauses; capital-importing countries, on the other hand, are concerned with protecting their own national interests from foreign investors and thus tend to prefer narrow interpretations that interfere the least with state autonomy, embracing a more "protectionist" approach. My "case study" selections were otherwise intended to capture reasonably broad economic and geographic diversity, as well as specifically examine nations that concluded a relatively high number of investment treaties during the relevant time period.

145 *See* Jones & Rao, *supra* note 19, at 378.

146 Agreement Between the United Arab Emirates, on the One Hand, and the Belgian-Luxemburg Economic Union, on the Other Hand, on the Reciprocal Promotion and Protection of Investments, Belg.-Lux. Econ. Union-U.A.E., art. 4.1, Mar. 8, 2004, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/425/download [https://perma.cc/J7NV-MP7V] ("The most favourable nation treatment shall not be applied to matters related to procedural or juridical matters.").

147 Each treaty reflected in the graph has an MFN provision, but only some have clauses that limit jurisdiction.

FIGURE 1. U.A.E. MFN CLAUSE USAGE, 2004–2021



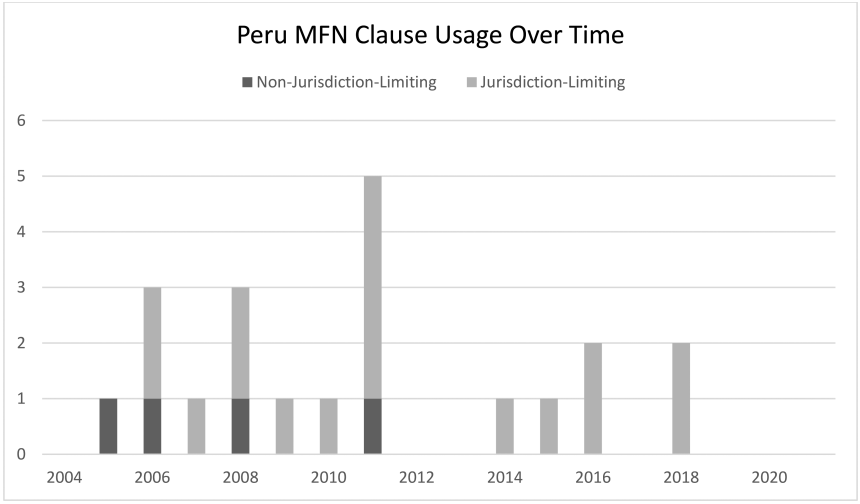
The U.A.E. has signed forty-three treaties since 2004 that meet the analysis's criteria. As the above graph shows, the U.A.E. has displayed remarkable consistency in using jurisdiction-limiting MFN clauses. With only three exceptions, every treaty it has signed since 2004 has included a jurisdiction-limiting MFN clause. Moreover, every treaty it has signed since 2016 has included one of these clauses. This illustrates the response of a state that chose to take a strong, consistent, and early reaction to *Maffezini*, and that may have served as an "originator" and inspired other states to follow suit.[148]

The U.A.E.'s response can be compared with the response of Peru. As shown in the graph below, Peru's response has been somewhat more tempered, but still enthusiastic. Peru did not insert a jurisdiction-limiting MFN clause into one of its agreements until 2006,[149] two years after the U.A.E. but well before the clauses gained a majority. For the first several years, Peru's usage was inconsistent, using jurisdiction-limiting MFN clauses only about half the time. However, as time went on, Peru's usage became increasingly consistent, with every treaty signed since 2014 including one of these clauses.

[148] It is interesting to note that the U.A.E. itself was not the respondent state in *Maffezini* and has generally not been a respondent state in cases involving a *Maffezini* dispute as of 2020. Jones & Rao, *supra* note 19, at 401–02.

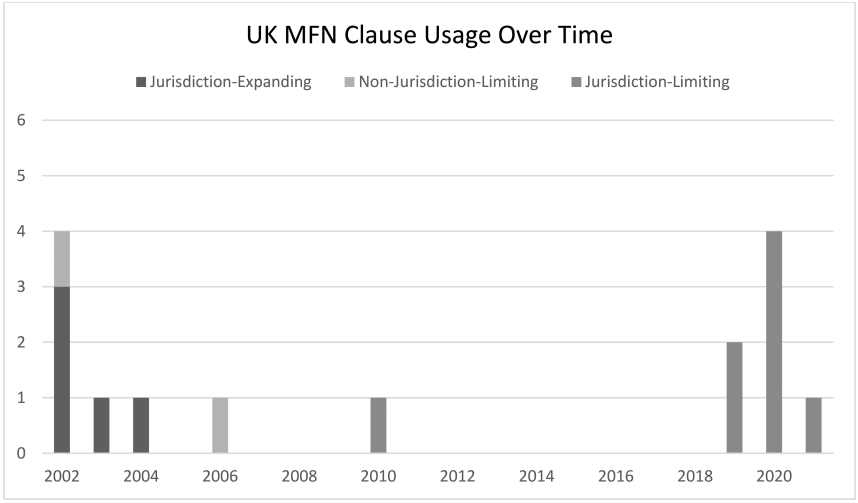
[149] Canada-Peru BIT, *supra* note 106, art. 4.

FIGURE 2. PERU MFN CLAUSE USAGE, 2004–2021



These two states can be compared with the U.K. Unlike most states, the U.K. explicitly embraced a jurisdiction-*expanding* MFN clause before the *Maffezini* decision. Thus, a separate category represents jurisdiction-expanding MFN clauses.[150]

FIGURE 3. U.K. MFN CLAUSE USAGE, 2002–2021

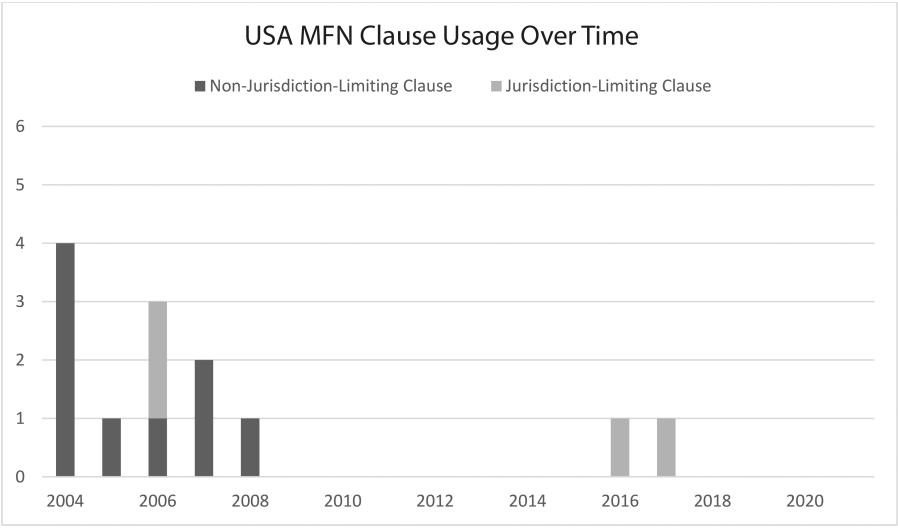


150 To properly visualize the use of these clauses, this chart includes data going back to 2002 (rather than 2004).

The case study of the U.K., a major capital-exporting state, represents a much slower and more reluctant response to these provisions than the U.A.E. and Peru. It is interesting to note that the use of jurisdiction-expanding MFN clauses drops off quite quickly in the early 2000s, with the last appearing in 2004. However, the U.K. continued to nominally support jurisdiction-expansion, with their 2005 Model BIT embracing this approach.[151] However, the U.K. seems to have had a major change of heart in recent years. Every single treaty signed since 2019 has included a jurisdiction-limiting MFN clause.[152] This uniformity may speak to the broad acceptance that jurisdiction-limiting MFN clauses have received in the past several years, as seen in the trends presented at the beginning of this Section.

The U.K. can be compared with the United States, another major capital-exporting country. The United States has signed comparatively very few investment treaties with MFN clauses in recent years, resulting in limited data. As this chart below shows, the United States, unlike the U.K., expressed some early support for jurisdiction-limiting MFN clauses.

FIGURE 4. U.S.A. MFN CLAUSE USAGE, 2004–2021



151 U.K. Model BIT, *supra* note 33, art. 3. Please note that the Model BIT is not included on this chart, as my analysis includes only treaties signed between two countries. Neither Peru nor the U.A.E. have model BITs authored in the relevant time period. For a discussion of the United States's Model BIT, see *infra* note 155.

152 The U.K.'s conclusion of a number of trade agreements in 2019 corresponds with its departure from the European Union at the start of 2020.

In its inclusion of jurisdiction-limiting MFN clauses in two treaties in 2006, the United States was among the first states to embrace these clauses, along with Peru and the U.A.E.[153] The United States was also quick to rebuke *Maffezini* in ways not apparent from this graph: The United States included a note in the draft Free Trade Agreement of the Americas (F.T.A.A.) and other draft post-*Maffezini* treaties in the early 2000s explicitly stating that the narrow wording of the MFN clause meant that it was not intended to apply to dispute resolution mechanisms and precluded *Maffezini*'s interpretation.[154]

Despite this, the United States's use of jurisdiction-limiting MFN clauses seems to have been somewhat slow and inconsistent. Interestingly, however, the United States's two most recent treaties to include an MFN clause, the TPP and the USMCA, both included a jurisdiction-limiting MFN clause,[155] which may indicate that the United States is embracing jurisdictional limitations to the extent that it is signing treaties with MFN clauses at all.

Finally, we turn to the European Union. As the body that represents the collective will of twenty-seven separate member nations and forms the third largest economy in the world, the EU's approach to treaties is

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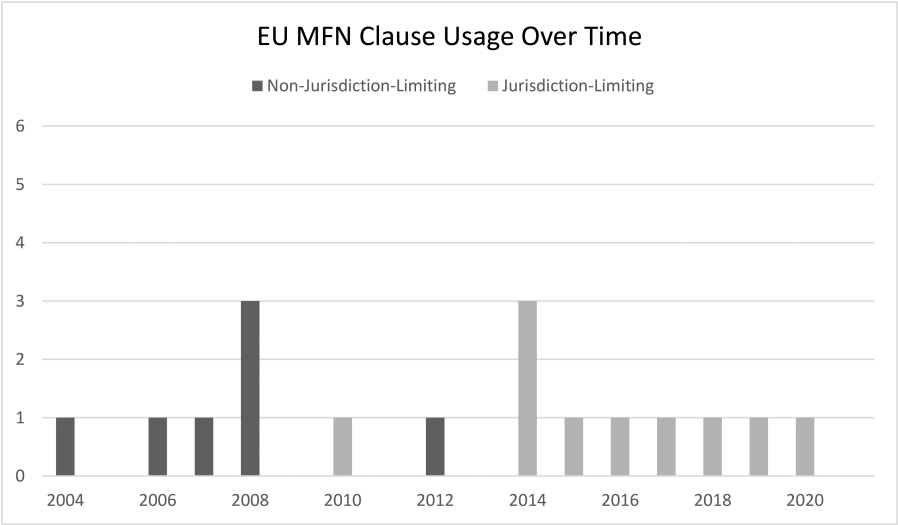
153 As described above, the U.A.E. was the first to use this provision in 2004. However, after this first instance, the provision is not seen until 2006 and is only seen by a handful of treaties. *See* U.S.-Colombia TPA, *supra* note 108, art. 10.4; Canada-Peru BIT, *supra* note 106, Annex B.4; United Arab Emirates-Azerbaijan BIT, *supra* note 117, art. 4. It is interesting to note that, shortly before 2006, several important cases on MFN-based jurisdiction had been decided, including *Siemens*, ICSID Case No. ARB/02/8; *Salini*, ICSID Case No. ARB/02/13, 20 ICSID Rev.—FILJ 148; and *Plama*, ICSID Case No. ARB/03/24, 20 ICSID Rev.—FILJ 262.

154 Vesel, *supra* note 11, at 133. These clauses are not jurisdiction-limiting MFN clauses as I have defined them, but are "narrow" MFN clauses, according to Maupin's taxonomy. *See* Maupin, *supra* note 5, at 167; Draft Free Trade Area of the Americas, Draft Agreement, Chapter XVII, art. 5 n.13, Nov. 21, 2003 [hereinafter Draft Free Trade Area of the Americas], http://www.ftaa-alca.org/FTAADraft03/ChapterXVII_e.asp [https://perma.cc/E7EF-FSD3]; Draft Dom. Rep.-Central America Free Trade Agreement, Chapter 10, art. 10.4, Jan. 28, 2004; Draft U.S.-Thai. Free Trade Agreement, Chapter 17, art. 4.2 (2003), https://www.bilaterals.org/?investment-text-proposed-by-us-to#nhl [https://perma.cc/S74T-ULRQ]; *see* Julien Chaisse & Sufian Jusoh, The ASEAN Comprehensive Investment Agreement 99–100 (2016); Andrea K. Bjorklund & August Reinisch, International Investment Law and Soft Law 264–67 (2012) (discussing these amendments).

155 Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada, art. 14.5, Nov. 30, 2018, https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/USMCA_Protocol.pdf [https://perma.cc/JR79-4QDS]; Comprehensive and Progressive Agreement for Trans-Pacific Partnership, art. 9.5, Feb. 4, 2016. It should be noted that the USA's Model BIT, dating from 2012, does not include a jurisdiction-limiting provision. *See* Office of the United States Trade Representatives, 2012 U.S. Model Bilateral Investment Treaty (2012), https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf [https://perma.cc/HW3A-39ZR].

especially important to consider. The following graph displays the EU's changing approach towards MFN clauses:

FIGURE 5. EU MFN CLAUSE USAGE, 2004–2021



As this graph shows, the EU was slower than some of its counterparts in accepting jurisdiction-limiting MFN clauses, with its first jurisdiction-limiting MFN clause not appearing until 2010. However, in the early 2010s, the EU seems to have had a sharp and sudden change in its approach. Since 2014, it has consistently included a jurisdiction-limiting clause in every treaty with an MFN clause that it has signed.[156] This further bolsters the trends we observed earlier in this Section and in the behavior of the states analyzed, especially the U.K.: Jurisdiction-limiting MFN clauses seem to be quickly gaining acceptance, even among countries who previously rejected them.

The research presented in this Section indicates that a strong international consensus is emerging in favor of jurisdiction-limiting MFN clauses. The embrace of these clauses not only encompasses countries such as the U.A.E. and Peru, who adopted these provisions early and relatively consistently and may have helped to spread the

[156] The sole possible exception is the Angola-EU SIFA (2023), which takes a slightly different approach: It excludes from the MFN clause *all* provisions included in other international agreements, not just dispute settlement provisions. *See* Sustainable Investment Facilitation Agreement Between the European Union and the Republic of Angola, Nov. 17, 2023, art. 4.

provisions in the international system; but the consensus now also includes capital-exporting nations and economic groups who originally were opposed to or indifferent to jurisdiction-limiting clauses, such as the EU and the U.K., both of which have been using these clauses with complete consistency in recent years.

C. The Reception of Jurisdiction-Limiting MFN Clauses in Arbitrated Cases

The following analysis explores how these clauses have been received by arbitral tribunals and adversarial parties during arbitration, based on publicly available materials. The fact that many arbitral awards and decisions are not published makes it difficult to determine with completeness the true nature of the international arbitration landscape.[157] ICSID, for instance, publishes only a fraction of their decisions (and only those for which both parties consent).[158] A scroll through ICSID's website reveals the large portion of concluded cases for which no published decisions have been made available.[159]

Whether or not these provisions would serve their intended purpose has been a subject of speculation. Julie Maupin surmised in her 2010 article that "it is not impossible that MFN-based jurisdiction might, at some point, be claimed notwithstanding the apparent limitations of this type of MFN clause."[160] Fourteen years later, I have been unable to locate a published decision in which a seemingly jurisdiction-limiting MFN clause has been held, nonetheless, to be a basis for MFN-based jurisdiction or where such a possibility has been in serious dispute. This does not mean that no such decisions exist or that no such decisions could ever, in the future, be made. It may still be the case that, as Maupin observed in 2010, "the jury remains out on the clarity of this category of clauses with respect to the MFN-based jurisdiction debate."[161] However, the lack of dispute surrounding these provisions in published materials is striking in itself.

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157 *See* N.Y.C. Bar, Comm. on Int'l Com. Disp., Publication of International Arbitration Awards and Decisions (2014) (summarizing practices on major international arbitral institutions with respect to publication of their decisions and detailing the rationale for not consistently publishing decisions).

158 *Award - ICSID Convention (2006 Rules)*, ICSID, https://icsid.worldbank.org/services/arbitration/convention/process/award [https://perma.cc/XF6F-F4J3] (summarizing and explaining ICSID procedures on publication of awards).

159 *Cases: Concluded Cases*, ICSID, https://icsid.worldbank.org/cases/concluded [https://perma.cc/8CWF-SBN3] (selecting a case and then selecting the "materials" tab, where decisions and awards are listed if published). I have not quantified how many concluded cases are not publicly available, but the fact that most are not is easily observable. *See id.*

160 Maupin, *supra* note 5, at 167.

161 *Id.*

Nevertheless, even though jurisdiction-limiting MFN clauses have not been directly in dispute, they have come up in published arbitration materials with some frequency, in a variety of strategic contexts. Their existence has been used to bolster arguments, provide context, and shed light on the immediately relevant issues.

For example, *Kiliç v. Turkmenistan* involved a BIT between Turkey and Turkmenistan.[162] A Turkish company filed a claim against Turkmenistan alleging breaches of the treaty. This BIT was signed in 1992 and did not include a jurisdiction-limiting MFN clause.[163] The Turkey-Turkmenistan BIT required that, before a dispute can be submitted to international arbitration, the dispute must first be submitted to national courts of the host state, which then have one year to issue a decision.[164] The Turkish claimant attempted to use the BIT's MFN clause to displace this requirement and instead apply a lower bar for jurisdiction available in the Switzerland-Turkmenistan BIT.[165] The claimant pointed to Turkey's use of jurisdiction-limiting MFN clauses in other treaties to argue that Turkey had a "practice" of explicitly stating when it did not want an MFN clause to apply to procedural mechanisms.[166] It specifically referred to Turkey's 2011 BIT with Azerbaijan, which stated that the MFN clause "shall not apply in respect of dispute settlement provisions between an investor and the hosting Contracting Party laid down simultaneously by this Agreement and by another similar international agreement to which one of the Contracting Parties is signatory."[167] The Tribunal rejected this argument, stating that "the BIT in question makes no such showing."[168] The Tribunal also found it especially significant that the Turkey-Azerbaijan treaty had been concluded twenty years after the BIT at issue and three years after the commencement of arbitration.[169]

To support its point, the claimant also pointed to the Turkmenistan-U.K. BIT, which states that, "[f]or the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall

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[162] Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan, ICSID Case No. ARB/10/1, Award (July 2, 2013), https://www.italaw.com/sites/default/files/case-documents/italaw1515_0.pdf [https://perma.cc/5WJE-QP3Q].

[163] *Id.* app. ¶ 2.17.

[164] *Id.* app. ¶ 2.25.

[165] *Id.* ¶ 4.2.3.

[166] *Id.* ¶¶ 4.2.24–.25.

[167] *Id.* (citing Agreement on the Reciprocal Protection and Promotion of Investments, Azer.-Turk., art. 3.5(c), Oct. 25, 2011, 2958 U.N.T.S. 401).

[168] *Id.* ¶ 7.8.1.

[169] *Id.* ¶ 7.8.2.

apply to [dispute resolution provisions],"[170] and to similar language in the Turkey-U.K. BIT.[171] The claimant argued that this clause demonstrated that both parties always considered dispute resolution procedures to be covered by MFN treatment.[172] The Tribunal rejected this as well, stating that it established no more than the fact that these countries "went out of their way in those BITs to express the view that they wanted the relevant MFN provisions to encompass and apply to the DRPs [dispute resolution provisions] of those BITs."[173]

In *Carrizosa v. Colombia*, the claimant, Carrizosa, used a somewhat analogous argument.[174] The MFN provision at issue in the case was contained in Article 12.3 of the Colombia-United States TPA's financial services chapter.[175] However, the treaty also contained an independent MFN provision in Article 10.4.[176] Carrizosa pointed out that the provision in Article 10.4 explicitly specified (via a footnote) that it was "not intended to 'encompass dispute resolution mechanisms.'"[177] However, the parties (Colombia and the United States) included no such footnote or other restrictive wording in Article 12.3.[178] The claimant argued that the logical consequence of this omission is that Article 12.3, unlike Article 10.4, *does* apply to dispute resolution mechanisms.[179] In addition to this, the claimant also pointed to a number of treaties signed by the contracting parties that included jurisdiction-limiting MFN clauses.[180] She used this to argue that the parties "have expressly excluded dispute resolution from MFN provisions, whenever they intended to do so."[181] The Tribunal mentioned the argument in its award but ultimately did not engage with the issue, concluding that Article 12.3 itself was outside of the Tribunal's jurisdiction.[182]

The case of *Amec Foster Wheeler v. Colombia* is a wonderful illustration of the ways these clauses are being used in strategic contexts in investment arbitration. In its reply on preliminary objections, the

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170 *Id.* ¶ 4.2.26 (citing Agreement for the Promotion and Protection of Investments, Turkm.-U.K., art. 3.3, Feb. 9, 1995, 2269 U.N.T.S. 187).

171 *Id.*

172 *Id.*

173 *Id.* ¶ 7.8.8.

174 Astrida Benita Carrizosa v. Republic of Colom., ICSID Case No. ARB/18/5, Award, ¶¶ 178–79 (Apr. 19, 2021), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C7047/DS16934_En.pdf [https://perma.cc/YK8P-6MCZ].

175 *Id.* ¶ 172.

176 *Id.* ¶¶ 181–82.

177 *Id.* ¶ 182.

178 *Id.*

179 *Id.*

180 *Id.* ¶ 183.

181 *Id.*

182 *Id.* ¶¶ 198–225.

respondent, Colombia, used the Colombia-U.S. TPA's jurisdiction-limiting MFN clause to argue that it could *not* be used to import an umbrella clause from a different treaty.[183] Colombia argued that importing the umbrella clause would be "tantamount to expanding the type of contractual claims that could be submitted to arbitration beyond those concerning breaches of an investment agreement."[184] Pointing to the jurisdiction-limiting MFN clause, Colombia argued that such an approach would be impermissible and would amount "to extend[ing] the Tribunal's jurisdiction so that it can hear any contractual claim, which is expressly forbidden by the Treaty."[185]

Conversely, the claimants argued that the MFN's jurisdiction-limiting provision meant the clause could be used to import that substantive provision by relying on an *expressio unius* argument. In the transcript for the Hearing on Preliminary Objections, counsel for the claimants argued that "if the drafters excluded those procedural mechanisms, it necessarily follows that substantive provisions were included."[186] Claimants also pressed this argument in their Counter-Memorial and their Rejoinder on Preliminary Objections, stating in the latter that their interpretation of Article 10.4—that it can be used to import substantive provisions—"is further confirmed by the footnote in the TPA which specifies that dispute resolution mechanism[s] cannot be imported through Article 10.4, meaning that substantive protections can. Applying the principle of *expressio unius* . . . leads to the conclusion that substantive protections, as opposed to dispute resolution provisions, can be incorporated."[187] In a different case, *Gramercy Funds Management*

183 Amec Foster Wheeler USA Corp. v. Republic of Colombia, ICSID Case No. ARB/19/34, Memorial on Preliminary Objections, ¶ 234 n.466 (July 1, 2021), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C8193/DS16743_En.pdf [https://perma.cc/W37T-SCPT]; *see also Amec Foster Wheeler*, ICSID Case No. ARB 19/34, Reply on Preliminary Objections, ¶ 172 n.301 (Dec. 13, 2021), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C8193/DS17239_En.pdf [https://perma.cc/3E47-FEU8] (reiterating this argument). An umbrella clause in the context of a BIT is a broad "clause that obliges the host state to observe specific undertakings towards its foreign investors." *Umbrella Clause*, Thomson Reuters Prac. L. UK Glossary (2023); *see also* Katia Yannaca-Small, *Interpretation of the Umbrella Clause in Investment Agreements* (OECD, Working Paper No. 2006/03, 2006) (providing background on umbrella clauses, as well as stating that they provide extra protection to the investor).

184 *Amec Foster Wheeler*, ICSID Case No. ARB/19/34, Memorial on Preliminary Objections, ¶ 234 n.466.

185 *Id.*

186 *Amec Foster Wheeler*, ICSID Case No. ARB/19/34, Video Conference: Hearing on Preliminary Objections, 203 (May 19, 2022), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C8193/DS17655_En.pdf [https://perma.cc/53TK-RCZ8].

187 *Amec Foster Wheeler*, ICSID Case No. ARB/19/34, Claimants' Rejoinder on Preliminary Objections, ¶ 104 n.203 (Feb. 11, 2022) (citations omitted), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C8193/DS17386_En.pdf [https://perma.

v. Peru,[188] the claimant used a similar line of reasoning. The claimant, a U.S. company called Gramercy, argued that the fact that the United States-Peru TPA's MFN clause explicitly does not encompass dispute resolution mechanisms "strongly indicates that it *does* encompass substantive provisions describing the 'treatment' owed to investors."[189] None of these arguments were ultimately discussed or decided upon by the tribunals, but they illustrate how MFN clauses can be invoked for strategic purposes by claimants.

At least one tribunal has found it significant that a jurisdiction-limiting MFN clause existed in the treaty from which the plaintiff sought to *borrow* the jurisdiction-expanding device, not the treaty with the MFN clause itself. In *Itisaluna Iraq LLC v. Iraq*,[190] the claimants argued that a jurisdictional provision in the Iraq-Japan BIT could be imported into the treaty at issue in the case, the OIC Agreement, via the OIC Agreement's MFN clause.[191] The Court considered the fact that the Iraq-Japan BIT had a jurisdiction-limiting MFN clause important, even though the OIC Agreement was not itself jurisdiction-limiting.[192] The Iraq-Japan BIT's MFN clause provided that "[i]t is understood that the treatment referred to in [the MFN clause] does not include treatment accorded to investors of a non-Contracting Party . . . by provisions concerning the settlement of investment disputes."[193] The Tribunal described this provision as "straightforward."[194] In its interpretation of the provision, it stated that the effect of the provision was "to preclude a qualifying investor [bringing a claim] under the Iraq-Japan BIT from relying on the MFN clause in the BIT to invoke the dispute settlement provisions in some other investment treaty."[195] While the provision was

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cc/9KSS-W4JL]; *see also Amec Foster Wheeler*, ICSID Case No. ARB/19/34, Claimants' Counter-Memorial on Preliminary Objections ¶ 76 (Oct. 14, 2021), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C8193/DS17035_En.pdf [https://perma.cc/ZZA7-2ELP] (reiterating the argument).

188 Gramercy Funds Mgmt. LLC v. Republic of Peru, ICSID Case No. UNCT/18/2, Claimants' Second Amended Notice of Arbitration and Statement of Claim (Aug. 5, 2016), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C7291/DS11288_En.pdf [https://perma.cc/7MW4-P33J].

189 *Id.* ¶ 202.

190 Itisaluna Iraq LLC v. Republic of Iraq, ICSID Case No. ARB/17/10, Award (Apr. 3, 2020), https://www.italaw.com/sites/default/files/case-documents/italaw11410.pdf [https://perma.cc/M4DZ-VPPU].

191 *Id.* ¶ 4.

192 *Id.* ¶¶ 204–05.

193 *Id.* ¶ 204.

194 *Id.*

195 *Id.* ¶ 205. It elaborated that "[a] Japanese investor in Iraq, for example, could not rely on the MFN clause in the Iraq-Japan BIT to incorporate into the Iraq-Japan BIT the dispute settlement provisions of, for example, the Iraq-Jordan BIT or of the OIC Agreement or of any other international agreement."

"not *directly* engaged by the case at hand," the Tribunal considered it and other provisions relevant as it "shine[d] a light on the intent, effect and limitations of the MFN clause, and what might be described as its public policy framework, on which the Claimants are seeking to rely."[196] Interestingly, with respect to the jurisdiction-limiting MFN clause in the Iraq-Japan treaty specifically, the Tribunal stated:

> They also raise the question of whether investors of a non-contracting party are at liberty to ignore the bargain that was struck in the treaties to which they wish to have resort, but by which they are not bound, to put themselves (even if only hypothetically) in a more privileged position than qualifying investors under those treaties. To crystallize the point, if the Claimants' invocation of the Iraq-Japan BIT were to be accepted, they would (at least hypothetically) be in a more privileged position than Japanese investors in Iraq relying on the Iraq-Japan BIT.[197]

The Tribunal concluded that "it is difficult to escape the whiff of overreach that casts a pall over the Claimants' case,"[198] and ultimately determined that the MFN clause in the OIC Agreement could not be used to import the provision from the Iraq-Japan BIT.[199]

The aforementioned examples indicate that the challenges surrounding these clauses in arbitration may result because the clauses can shed light on related issues, such as what is (or is not) implied by their absence, whether their presence indicates through *expressio unius* that other potentially exclusionary provisions were left out intentionally, or whether their presence implies an exclusion of broad substantive provisions such as umbrella provisions that may cut too close to procedural issues. The meaning of the clauses themselves seems, so far, to be subject to little dispute; nonetheless, the clauses are a novel influence on arbitration strategy and arbitral awards. The ways in which these clauses are shaping international arbitration may become an interesting area for future research as more decisions are published and more treaties with such clauses are subject to dispute.

196 *Id.* ¶ 207.
197 *Id.*
198 *Id.* ¶ 208.
199 *Id.* ¶¶ 223–25.

III
Implications of Jurisdiction-Limiting MFN Clauses

Part II analyzed the trend towards the increased use of these provisions, examined what these clauses look like, and discussed how they have been treated in arbitrated cases. The following Part examines possible implications of these provisions. Why have we seen such a stark increase in these provisions in international investment treaties? Why were these provisions not inserted to begin with, and what does this trend signify about the international investment regime as a whole? Finally, what does the increased prevalence of these provisions mean for the future of *Maffezini* and the debate surrounding MFN-based jurisdiction?

It is clear that the use of jurisdiction-limiting MFN clauses has increased dramatically, becoming the norm in newly signed investment treaties. What has spurred this? This Part posits three theories: dissatisfaction with *Maffezini* and its progeny; desire for increased predictability and certainty in the international investment system; and "social pressure" on states to accept these provisions when they otherwise might not have, as their peer states have increasingly accepted jurisdiction-limiting MFN clauses.

It is most likely that these provisions were inserted as a reaction to *Maffezini* and the cases which followed from its reasoning. Before *Maffezini* was decided in 2000, no arbitral tribunal had ever concluded that an MFN clause could be used as a basis for jurisdiction. *Maffezini* and its progeny "stunned the international investment community" and came as a surprise to both states and academics.[200] Thus, a strong reaction to *Maffezini* is unsurprising. The trends observed in Part II, which show that these provisions have gradually increased in frequency after *Maffezini*, seem to support this.

The specific actions of individual countries in response to *Maffezini* also indicate that many states were dissatisfied with the decision and began to propagate jurisdiction-limiting provisions to prevent future decisions that reached a similar conclusion. As discussed in Part II, the United States responded to the *Maffezini* award very quickly by insisting on including a note in the draft Free Trade Agreement of the Americas (F.T.A.A.) and other post-*Maffezini* draft treaties that stated that the wording of the MFN clause "precluded its applicability to dispute resolution mechanisms."[201] Many of these notes directly referenced *Maffezini* as the impetus for the insertion and repudiated *Maffezini*'s

200 Parker, *supra* note 30, at 32.
201 Vesel, *supra* note 11, at 133.

interpretation of MFN clauses. For instance, the text of the note included in footnote 13 of the 2003 Draft F.T.A.A. Agreement specifies that "[t]he Parties note the recent decision of the arbitral tribunal in Maffezini (Arg.) v. Kingdom of Spain, which found an unusually broad most favored nation clause in an Argentina-Spain agreement to encompass international dispute resolution procedures," and specified that, given the intent expressed in the footnote, the MFN clause in the drafted agreement "could not reasonably lead to a conclusion similar to that of the *Maffezini* case."[202]

Other actions of states in response to *Maffezini*-like decisions also indicate the strength of states' displeasure with the result in *Maffezini*. After the *Siemens* decision, for instance, Argentina and Panama took the step of exchanging diplomatic notes that clarified that they did not intend for the MFN clause to apply to dispute settlement provisions.[203]

While dissatisfaction with *Maffezini* is likely playing a strong role, another powerful reason for the insertion of these provisions may be the desire to avoid uncertainty.[204] Regardless of whether they support or oppose *Maffezini*, scholars agree that the inconsistent and unpredictable present system is untenable.[205] States likely feel the same way: A major reason for the creation of a system of international arbitration was to provide states and their investors with greater coherency, consistency, and predictability.[206] The separate lines of decisions on MFN clauses leave jurisdiction, an essential component of international arbitration, inconsistent. This strikes at the core of the international arbitral regime's purpose and threatens its legitimacy. It also costs states and

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[202] Draft Free Trade Area of the Americas, *supra* note 154, at n.13; *see also* Central America Free Trade Agreement Draft Subject to Legal Review for Accuracy, Clarity, and Consistency, Jan. 28, 2004, Organization of American States, art. 10.4 n.1 ("The Parties share the understanding and intent that this clause does not encompass international dispute resolution mechanisms such as those contained in Section C of this Chapter, and therefore could not reasonably lead to a conclusion similar to that of the Maffezini case."); Draft US-Thailand Free Trade Agreement, note to Art. 4.2, 2004.

[203] *See* Yannick Radi, *The Application of the Most-Favoured-Nation Clause to the Dispute Settlement Provisions of Bilateral Investment Treaties: Domesticating the 'Trojan Horse*,' 18 Eur. J. Int'l. L. 757, 769 (2007).

[204] Of course, these two motivations should not be understood as mutually exclusive.

[205] *See* Gabriel Egli, *Don't Get Bit: Addressing ICSID's Inconsistent Application of Most-Favored-Nation Clauses to Dispute Resolution Provisions*, 34 Pepp. L. Rev. 1045, 1080 (2007) (describing the possibilities that the maintenance of the current system could lead to "an increased number of challenges to ICSID tribunal decisions" or states deciding to "withdraw consent to ICSID arbitration"); Parker, *supra* note 30, at 62 (describing the "current state of uncertainty in the international investment community").

[206] *See, e.g.*, Salacuse & Sullivan, *supra* note 96, at 76.

investors additional time and money in litigating the issue of whether MFN clauses can be used to expand jurisdiction.[207]

The desire for increased certainty may also explain why certain capital-exporting countries, notably the United States, were relatively quick to embrace jurisdictional limitations. The conventional understanding of state motivations predicts that capital-exporting states have a greater interest in protecting investors, who tend to be their nationals, and thus prefer expansive treaty interpretations—such as broad MFN clauses—that are favorable to investor claimants.[208] Capital-importing countries, on the other hand, are more concerned with protecting their own national interests *from* foreign investors; they therefore tend to prefer narrow interpretations that interfere the least with state autonomy and embrace a more "protectionist" approach.[209] According to this understanding, the inclusion of jurisdiction-limiting provisions in MFN clauses can be viewed as stemming not so much from a dissatisfaction with *Maffezini* itself as from a desire to reduce uncertainty and unpredictability in the system.[210]

There may be an additional reason for the insertion of these clauses and for the vast acceptance they have received in recent years. A vast body of research demonstrates the influence of norms and "social pressure" on state behavior, illustrating that pressures from the international system convince states to comply with the majority view even when they might not otherwise be inclined to do so.[211] While much of this research focuses on human rights norms, it also convincingly illustrates the strong tendency of states to conform with majority viewpoints in the international system; for example, some scholars demonstrate that

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[207] *See* Diana Rosert, The Stakes Are High: A Review of the Financial Costs of Investment Treaty Arbitration (2014) (detailing costs associated with international investment arbitration).

[208] As we have seen, broad interpretations of MFN clauses allow investors to get around jurisdictional restrictions and import provisions more favorable to their interests.

[209] *See* Vesel, *supra* note 11, at 132 ("[Historically] countries who were net importers of goods favored the most restrictive interpretation of the MFN clause, whereas net exporters favored the most expansive interpretation.").

[210] Parker, *supra* note 30, at 57 n.175 (citing Vesel, *supra* note 11, at 132–33).

[211] *See* Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 Duke L.J. 621, 626–27 (2004) (arguing that state behavior can be explained in part by "pressures to assimilate"); Vaughn P. Shannon, *Norms Are What States Make of Them: The Political Psychology of Norm Violation*, 44 Int'l Stud. Q. 293, 294 (2000) (explaining that certain state behavior can be explained by "norm conformity," which is "the default option: norms provide simple organizing and decision rules for acting safely in one's milieu, and conformity helps one maintain positive social reinforcement and self-esteem"); *see also* Vaughn P. Shannon, *International Norms and Foreign Policy*, *in* Oxford Encyc. Foreign Pol'y Analysis (Cameron Thies et al. eds., 2017) ("Research has demonstrated how norms restrain foreign policy choice and behavior, and even alter state conceptions of national interests.").

state behavior can be a response to "acculturation," which provides a mechanism that "induces behavioral changes through the pressure to assimilate."[212] According to this understanding, as jurisdiction-limiting provisions have become increasingly common, states that did not feel strongly one way or the other may have been more reluctant to go against the grain and opt for a clear jurisdiction-expanding provision in their MFN clause.[213] Likewise, states who previously embraced the *Maffezini* view of MFN-based jurisdiction may have been convinced to change their position in the face of a strong majority that rejected *Maffezini*. This may explain why states such as the U.K. seem to have recently changed their views towards *Maffezini* and have accepted jurisdiction-limiting MFN clauses.

Other questions follow from this third hypothesis: If states never intended their MFN clauses to include procedural issues, why did they not write their MFN clauses in a way that made this clear from the outset? Similarly, if states disliked the uncertainty that broad, open-ended MFN clauses would generate, why did they not specify with more precision what they intended to be included and excluded by the MFN clause to begin with?[214] Did states truly fail to foresee that disputes would arise, and that the breadth of these provisions would become problematic?

The answer for why states chose to include such expansive and unclear language for their MFN clauses relates to why states chose to sign broad and potentially costly investment treaties in the first place. BITs with investor-state arbitration clauses proliferated rapidly in the 1990s.[215] Many states signed and ratified treaties with extremely broad and vague language—including the expansive MFN clauses at issue in *Maffezini*. The treaties interfered with states' abilities to regulate sensitive areas, restricted their national sovereignty and autonomy, and opened up states to potentially vast liability. In other words, signing these treaties entailed significant costs, especially to capital-importing countries.[216] These costs have borne out: States have found themselves

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212 Goodman & Jinks, *supra* note 211, at 626–27.

213 An example of this is the jurisdiction-expanding clause used by the U.K. *See supra* notes 152–53 and accompanying text.

214 The U.K. is the exception to this, explicitly specifying in its treaties that the MFN *does* include dispute settlement procedures. *See supra* notes 149–51.

215 *See* Lauge N. Skovgaard Poulsen & Emma Aisbett, *When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning*, 65 World Pol. 273, 277 (2013) (charting the BITs signed per year and total number of BIT claims from 1990 to 2010).

216 *See id.* ("BITs have exposed some countries to costly arbitration proceedings with sometimes far-reaching ramifications . . . ."); *cf.* Lauge N. Skovgaard Poulsen, *Bounded Rationality and the Diffusion of Modern Investment Treaties*, 58 Int'l Stud. Q. 1, 1 (2014) (noting, for instance, that "developing countries adopted treaties that restrict their discretion

responding to an ever-increasing number of arbitral disputes that have entailed hundreds of millions of dollars in damages and have interfered with delicate areas of public regulation.[217] Capital-importing state governments have been the subject of the vast majority of disputes.[218] Just as MFN clauses have grown clearer and more restrictive, BIT participation itself has slowed considerably as the number of investment treaty disputes has grown.[219]

Research by Lauge Poulsen and Emma Aisbett on state behavior and decisionmaking in international investment treaty creation may help us answer why states chose to include such broad MFN provisions. Poulsen and Aisbett's research indicates that states chose to sign these treaties without fully understanding their consequences, which may imply that many states included these broad provisions not due to carefully thought-out reasons but from not fully comprehending the meaning and consequences of their open-ended text.[220] Poulsen and Aisbett postulate that as states' experiences with arbitration claims increased, so did their understanding of the undesirable impacts of broad provisions of investment treaties, such as MFN clauses. This increased understanding led them to reverse course: States opted to modify and restrict broad provisions and became much more conservative in their willingness to sign investment treaties in general.[221]

Poulsen and Aisbett note that an "alternative explanation for the slowdown in BIT participation comes out of the bounded rationality

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to regulate and expose them to expensive compensation damages" and questioning "why countries would constrain their sovereignty for the benefit of foreign investors, if the economic benefits are minuscule").

217 Poulsen & Aisbett, *supra* note 215, at 273.

218 *Id.* at 275.

219 *Id.* at 277 (showing the slowing pace of investment treaty signage).

220 *See id.* at 278–79; Poulsen, *supra* note 216, at 12 (asserting that developing country governments "systematically overestimated the economic benefits of BITs" while also "ignor[ing] their costs"). Additional research by other scholars has largely supported Poulsen's work: Research by Alexander Thompson, Tomer Broude, and Yoram Z. Haftel demonstrates that exposure to investment claims leads either to the renegotiation of international investment agreements in the direction of more restrictive clauses or to their termination. Alexander Thompson, Tomer Broude & Yoram Z. Haftel, *Once Bitten, Twice Shy? Investment Disputes, State Sovereignty, and Change in Treaty Design*, 73 INT'L. ORG. 859 (2019). The research of Jones & Rao, *supra* note 19, at 379–81, problematizes this research somewhat, demonstrating through an empirical analysis that a state being hit with a claim from an investor invoking *Maffezini* to argue for a jurisdiction-expanding interpretation of the MFN clause did *not* seem to encourage that state to insert a jurisdiction-limiting MFN clause.

221 Poulsen & Aisbett, *supra* note 215, at 279, 301 (noting that certain states have behaved in a "narcissistic" fashion in that they "seriously consider[ed] the risks of BITs only after having been subject to a BIT claim *themselves*").

literature."[222] This theory suggests that state decisionmakers tend to rely on "whatever information is [most] salient at a given time," "rather than considering all relevant and available information."[223] Decisionmakers use an "availability heuristic," which can lead to ignoring information that is relevant and attaching great value to information that is not relevant; additionally, decisionmakers tend to either greatly exaggerate or ignore low-probability events, depending on whether they can bring specific and vivid instances to mind.[224] This means that, in the absence of highly available information, decisionmakers often fail to give low-probability events sufficient consideration until they happen to the decisionmaker themselves.[225] Poulsen and Aisbett suggest that the early scarcity of investment treaty claims against a government could have led to the erroneous belief that BITs may have been far-reaching in theory but entailed no risks in practice. This would imply that states seriously considered the risks of BITs only after they were subject to a BIT claim themselves.[226] Rather than underestimating the risks due to imperfect information, Poulsen and Aisbett suggest that the risks BITs presented were largely regarded as nonexistent.[227]

Poulsen and Aisbett present a variety of evidence demonstrating how this happened in practice, which informs our understanding of how investment treaties came to include such broad MFN provisions. BITs were initially instruments signed during visits of high-level delegations to "provide for photo opportunities."[228] In Pakistan, for instance, numerous interviews with officials demonstrated that BITs had been considered merely a piece of paper—"something for the press" or a "token of goodwill."[229] "Practically all officials" that Poulsen and Aisbett interviewed "noted that they had been unaware

222 *Id.* at 278.

223 *Id.*

224 *Id.* (defining "availability heuristic" as the "tendency of people to evaluate the probability of events based on the ease with which relevant information comes to mind" (internal citations omitted)).

225 *Id.*

226 One could expand on this research to argue that states also began to seriously consider the risk of BITs after observing *another* state being subject to a problematic claim. The research of Jones & Rao, *supra* note 19, at 379–81, demonstrating that states were not inclined to alter their MFN provision after being subject to a *Maffezini* claim themselves, in combination with the research in this Note, supports the argument that states were making decisions based on what they observed happening to other states, rather than themselves alone.

227 Poulsen & Aisbett, *supra* note 215, at 279, 301 (finding evidence that "rather than merely underestimating the risks of BITs due to imperfect information . . . risks were *entirely* ignored [by developing countries] until a claim hit").

228 *Id.* at 280 (internal citations omitted).

229 *Id.*

of the far-reaching scope and implications of BITs during the 1990s, when the treaties proliferated."[230] Additionally, Poulsen suggests that international organizations, legal professionals, and Western states played an "availability-enhancement" role by presenting states with short, pre-defined, and simple treaty text as an easy solution to attract foreign investment—texts that included broad provisions favorable to investors, such as open-ended MFN clauses.[231] These factors contributed to a situation in which states were willing to accept potentially harmful provisions, such as broad investor-favorable MFN clauses, with relatively little discussion or negotiation.[232] According to this understanding, these broad MFN clauses were included initially not out of a desire for them to include jurisdiction, but out of insufficient consideration of the consequences of their open-ended text.

A second question that follows from the research in Part II pertains to the future of *Maffezini* and the debate surrounding MFN-based jurisdiction. As described earlier in this Note, many have expressed concern about the current inconsistency and unpredictability surrounding MFN-based jurisdiction, with scholars on both sides of the debate agreeing that a consistent approach in either direction would be preferable to the current state of affairs.[233] The future of *Maffezini* itself has also been the subject of heated debate in international investment scholarship: Some scholars, analyzing recent jurisprudence, have declared that the end of *Maffezini* is at hand—an argument that led to a fierce rebuke from Professor Francisco Orrego Vicuña, one of the arbitrators who presided over the *Maffezini* case.[234]

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230 *Id.* at 282.

231 Poulsen, *supra* note 216, at 5. The evolving views of the international community towards international investment have undoubtedly also influenced this. The majority of BITs were signed in the decade following the end of the Cold War, when neo-liberal economic theories influenced governments into believing that foreign investment and economic liberalism would bring greater prosperity. Celine Yan Wang, Note, *Mine-Golia: Integrated Perspectives on the History and Prospects of International Investment Law and the Investor-State Dispute Settlement Regime*, 53 N.Y.U. J. Int'l L. & Pol. 631, 635 (2021). In more recent decades, the international investment regime has faced increased scrutiny, especially among governments in the Global South, with a "legitimacy crisis" at hand. *Id.* at 637. *See generally* Kenneth J. Vandevelde, *The Political Economy of a Bilateral Investment Treaty*, 92 Am. J. Int'l L. 621 (1998) (describing the intersection of theories of political economy and the development of bilateral investment treaties).

232 Poulsen, *supra* note 216, at 7–10. Negotiations between South Africa and the U.K., for instance, lasted only two days. Only one provision was thoroughly discussed, and the two versions matched almost word for word. *Id.*

233 *See supra* notes 204–07.

234 *See* Francisco Orrego Vicuña, *'Reports of [*Maffezini*'s] Demise Have Been Greatly Exaggerated*,' 3 J. Int'l Disp. Settlement 299 (2012) (arguing that views about the fall of *Maffezini* are overstated).

Does the research presented in this Note indicate that *Maffezini* and the approach it embodies may be on its way out? In a sense, yes. The trends illustrated in Section II.B demonstrate a clear and increasing rejection of the *Maffezini* approach in the international community. Whether this reaction represents a rejection of *Maffezini* itself or is fueled by a desire for increased certainty, the outcome is the same: The *Maffezini* approach of using MFN clauses as a basis for jurisdiction is being explicitly and consistently repudiated. Furthermore, these provisions have generated strikingly little controversy in published arbitration decisions, which may indicate that they have been received by tribunals and adversary parties as relatively unambiguous. If current trends continue as projected in Part II, MFN clauses that explicitly disallow the possibility that they be used to expand jurisdiction may become the norm in international investment treaties. This may mean that the inconsistency dilemma surrounding MFN-based jurisdiction will, at some future point, be solved.[235]

However, there are important reasons to temper this optimism. Despite the clear trend towards acceptance of jurisdiction-limiting provisions in newly signed treaties, a tremendous number of treaties with vague MFN clauses remain in force. A huge portion of these treaties were signed decades ago. Indeed, based on the UNCTAD Database, of the 2,576 investment treaties currently in force, 1,569 treaties (approximately 60%) were signed in 2000 or earlier.[236] As a result, the total number of treaties with jurisdiction-limiting MFN clauses remain a minority. Of course, this ratio will likely change as more treaties expire or are abrogated and more treaties are created in their stead. However, the massive number of old treaties currently in force indicates that it will be some time before a majority of international investment treaties include jurisdiction-limiting MFN clauses. This is especially so given the decline in BIT-creation in recent years.[237] Thus, while the strong increase in jurisdiction-limiting MFN clauses presents hope for a solution to the uncertainty *Maffezini* has engendered, the debate surrounding *Maffezini* remains far from a dead letter.

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235 There remains the possibility that these seemingly clear provisions will become the subject of a *Maffezini*-like dispute themselves. However, there has, as yet, been no evidence of this happening. *See supra* Section II.C.

236 UNCTAD Database, *supra* note 23.

237 For instance, 240 BITs were signed between 2015 and 2020. By comparison, 841 were signed between 2000 and 2005, and 1,201 were signed between 1994 and 1999. *Id.*

Conclusion

Jurisdiction-limiting MFN clauses have become nearly ubiquitous in newly signed investment treaties, even being embraced by countries and economic groups that previously rejected them. They promise to influence international arbitration in new and interesting ways, providing greater consistency in arbitral decisionmaking while opening the door to new and unexplored questions—such as those we have already seen in the cases explored in Part III. The near-consensus surrounding the insertion of these clauses in recently concluded treaties presents a decisive rebuke of *Maffezini* and provides a reason for optimism for those looking for a solution to the jurisdictional crisis *Maffezini* engendered.

However, this is far from the end of the story. The research in this Note is intended to provide a launchpad and foundation for future scholarship on jurisdiction-limiting MFN clauses. Numerous questions remain to be explored: How will the use of these clauses shape arbitral decisions going forward? Can these clauses be used to restrict the importation of seemingly substantive provisions, as Colombia argued in *Amec Foster Wheeler*? Should arbitral tribunals take to heart the global rebuke of *Maffezini* in making jurisdictional decisions? If not, how can states more speedily update their treaties to include jurisdiction-limiting provisions and abrogate the numerous treaties with broad MFN clauses? Whatever they may entail for the future of the international system, it is clear these clauses cannot be ignored.