INTRODUCTION

The International Law Commission (ILC) was created in 1947 by the United Nations General Assembly Resolution 174 as a means of fulfilling the General Assembly’s objective, stated in Article 13, paragraph 1.a, of the UN Charter, of “encouraging the progressive development of international law and its codification”. Through, respectively, the preparation of draft conventions on matters that do not possess regulation in international law and the more accurate formulation and systematization of rules of international law in areas where there is significant State practice, precedent and doctrine, the Commission seeks to attain its main objects – that of developing international law and that of codifying it.

According to its Statute, the Commission is competent to analyze matters not only in the field of public international law (though most of its activity has been concentrated in this area) but also in that of private and international criminal law. The main objective of the work of the ILC is to prepare a draft convention, however two other possibilities are contemplated by the Statute: the simple publication of its report or a resolution of the General Assembly taking note of or adopting the report (ILC Statute, Article 23, paragraph 1).

The ILC is composed of 34 members, which “shall be persons of recognized competence in international law” (ILC Statute, Article 2, paragraph 1). Candidates are nominated by the Governments of Member States and are elected by the UN General Assembly (ILC Statute, Article 3). Eligibility for membership is not restricted to nationals of UN Member States, however no national of non-UN Member States has ever been elected. Similarly to the judges of the International Court of Justice (ICJ), the members of the Commission sit in their individual capacity, not representing the interests of their respective governments. Nonetheless, two nationals of the same State cannot be members of the ILC at the same time.

The Commission’s annual session is held in Geneva, Switzerland, for a period of ten to twelve weeks, as approved by the General Assembly.
TOPIC A: Immunity of State Officials from Foreign Criminal Jurisdiction

Fernanda Graeff Machry
and André da Rocha Ferreira

1. HISTORICAL BACKGROUND

The practice of granting immunity to certain persons for their actions on behalf of a State dates back to cultural habits of the Ancient Greece, where messengers, called heralds, and ambassadors enjoyed immunity, in order to enable the establishment of a mutual dialogue between the cities during peace or wartime (LANNI, 2008).

In international law, the principle that a State enjoys immunity from a foreign State’s domestic courts is usually said to derive from the maxim \textit{par in parem non habet imperium}, however its origin is hard to discern. The topic of personal immunity of the sovereigns themselves was little discussed among classical international law writers, such as Hugo Grotius (SINCLAIR, 1980).

The judgment delivered by U.S. Chief Justice Marshall in \textit{The Schooner Exchange v. McFaddon} case, in 1812, is usually referred to as the first judicial expression of the doctrine of absolute immunity of the sovereign. According to his reasoning, due to the equality and independence of sovereigns, it was improper for a State to subject a foreign sovereign to its territorial jurisdiction (HARRIS, 2010).

The judgments of English courts in some mid-nineteenth century cases, however, show that there was uncertainty as to the extent of a sovereign’s immunity from jurisdiction. However, this uncertainty crystallized, in the beginning of the twentieth century, into an acceptance of the doctrine of absolute immunity (SINCLAIR, 1980).

Belgium, on the other hand, since the mid-nineteenth century, adopted the restrictive immunity theory, distinguishing \textit{iure imperii} acts and \textit{iure gestionis} acts. In the famous 1903 case of \textit{S.A. des Chemins de Fer liégeois-luxembourgeois c. l’État néerlandais}, the Belgian Cour de Cassation ruled that a foreign State could be sued before Belgian courts, just like any private individual, when the proceedings related only to a private law right (SINCLAIR, 1980).

Presently, the dissemination of the human rights doctrine and the wide aversion of the international community to massive violations of those rights have been stimulating the debate about narrowing the jurisdiction of such immunity. In some documents, this principle is already present, such as in the Principles of International Law recognized in the Charter of
the Nürnberg Tribunal, in which, in its Principle III, there is a clear limitation to the Immunity of Head of State\(^1\).

Furthermore, many cases have recently set human rights violations and immunity of Heads of State on different sides. In the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) case, the International Court of Justice developed a solid basis to the debate on the issue (CASSESE, 2002). The judgment of the Court elucidates many points on the topic of immunities, by stating that there is no evidence of a customary rule derogating the immunity of Ministers of Foreign Affairs when they are accused of international crimes (ICJ, 2002).

The decision, as a matter of fact, provided the idea that high-ranking State officials in the exercise of their functions shall be granted immunity from the jurisdiction of foreign courts. Another similar case is the Ghaddafi case before the French Cour de Cassation. Similarly to the previous case, the decision focuses on the idea that the Head of State was exercising his function in the time of the charges, so he had immunity from criminal jurisdiction (ZAPPALÀ, 2001).

Nevertheless, the idea of immunity of Heads of State has been narrowed by municipal courts in many cases (BROWLIE, 2008). Perhaps the most prominent example is the Pinochet case, in which the UK House of Lords argued that some international crimes have the power to lay off the immunity of Heads of State.\(^2\) It is worthy to highlight, however, that the House of Lords was dealing with a former Head of State, thus his arrest would not affect inter-State relations.

2. STATEMENT OF THE ISSUE

2.1. Introduction

At its 58\(^{th}\) session, in 2006, the International Law Commission decided to include the topic of immunity of State officials from foreign criminal jurisdiction in its programme of work, appointing Mr. Roman Anatolevich Kolodkin as Special Rapporteur (ILC, 2007). Until the present day, three reports were submitted to the Commission by the Special Rapporteur, as well as a Memorandum by the Secretariat.

\(^1\) “The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.” Principles of International Law Recognized in the Charter of the Nüremberg Tribunal and in the Judgment of the Tribunal, 1950.

\(^2\) “As is well known, General Pinochet entered the United Kingdom in September 1997. Just before his return to Chile, after undertaking surgery in London, he was arrested on the basis of two provisional arrest warrants issued by UK magistrates, at the request of Spanish courts, pursuant to the European Convention on Extradition. General Pinochet’s counsel immediately moved to have the two arrest warrants quashed by the High Court.” (BIANCHI, 1999, p. 239).
2.2. Jurisdiction

Jurisdiction and immunity are different concepts, independent from each other (KOLODKIN, 2008). However, when considering the topic of immunity, it is fundamental to understand the meaning of jurisdiction and its relation with immunity.

Shaw (2003, p. 572) describes jurisdiction as “the power of the state to affect people, property and circumstances”, which “reflects the basic principles of state sovereignty, equality of states and non-interference in domestic affairs”. It can also be described as the authority or competence of a State (BOWETT, 1982). According to Brownlie (2008), jurisdiction is primarily territorial, meaning that it is usually exercised with respect to facts occurred in the territory of the State exercising its jurisdiction.

2.2.1. Types of jurisdiction

A State’s jurisdiction can be exercised by its legislative, judicial and executive powers, in what we call, respectively, prescriptive, adjudicative and executive jurisdiction (KOLODKIN, 2008).

Prescriptive jurisdiction concerns the law-making powers of the State, consisting, basically, in the promulgation of laws by government authorities. Adjudicative jurisdiction consists of the judicial activity, mainly in the consideration of cases. Finally, executive jurisdiction concerns actions taken by the executive authorities of the State in the enforcement of its laws (KOLODKIN, 2008). The Special Rapporteur on the jurisdictional immunities of States and their property, S. Sucharitkul (1980), included in his definition of jurisdiction only its judicial and executive aspect.

Furthermore, jurisdiction can be divided into civil, administrative and criminal jurisdiction, depending on the substance of the laws and acts concerned (KOLODKIN, 2008). For the purposes of the Commission’s work, the focus should be on criminal jurisdiction.

2.2.2. Criminal jurisdiction

Criminal jurisdiction, according to Kolodkin (2008, para. 48), “involves the adoption of laws and other orders that criminalize the acts of individuals and establish and enforce their responsibility for those acts, and the activity of government bodies in implementing the laws

---

3. Article 3. Interpretative provisions.1. In the context of the present articles, unless otherwise provided, … (b) the expression ‘jurisdiction’, as defined in article 2, paragraph 1 (g), … includes: (i) the power to adjudicate, (ii) the power to determine questions of law and of fact, (iii) the power to administer justice and to take appropriate measures at all stages of legal proceedings, and (iv) such other administrative and executive powers as are normally exercised by the judicial or administrative and police authorities of the territorial State.” (SUCHARITKUL, 1980, p. 206).
and orders”. This type of jurisdiction can be established on various grounds: territoriality, active personality, passive personality, protection and universality, the last four consisting in different basis on which extraterritorial criminal jurisdiction may be established.

2.2.2.1. Territorial criminal jurisdiction

As aforementioned, jurisdiction is primarily territorial, meaning that a State will exercise jurisdiction over acts—in the case of criminal jurisdiction, offences—committed in its territory. This is the most widely accepted legal ground for the exercise of criminal jurisdiction. That is because, on one hand, it affirms the territorial sovereignty of the State and, on the other hand, it is easier to collect evidence in the territory where the crime has been committed. The Israeli Supreme Court, in the *Eichmann* decision, considered the territorial State as the *forum conveniens*, i.e. the adequate place to trial the offender (Cassese, 2005).

2.2.2.2. Extraterritorial criminal jurisdiction: legal grounds

Nonetheless, criminal jurisdiction can also be exercised extraterritorially. When a State extends its jurisdiction beyond its borders, it does so on the basis of one or more of the following principles: active personality, passive personality\(^4\), protective or universal. The first two are sometimes referred to as “personal jurisdiction”. It applies to cases in which the act is committed abroad by a national of the State exercising jurisdiction and is criminal under its law (active personality principle) and when such a criminal act committed abroad injures one of its nationals (passive personality principle) (Kolodkin, 2008). Both of these principles are generally accepted as grounds for the establishment of criminal jurisdiction. The protective principle allows the State to exercise jurisdiction over offences committed by non-nationals when such an act is deemed to threat a fundamental national interest (O’Keefe, 2004).

Finally, when there is no other jurisdictional nexus, jurisdiction may be claimed on the basis of the universal principle (O’Keefe, 2004), usually when international crimes are concerned. The rationale for universal jurisdiction is twofold: on one hand, the gravity and magnitude of the crimes concerned is such that it allows for universal prosecution and repression; on the other hand, the exercise of universal jurisdiction does not violate the principle of sovereign equality of States, nor does it amount to undue interference in the domestic affairs of the State where the crime has been committed (Cassese, 2005).

---

\(^4\)These are sometimes referred to as “active nationality” and “passive nationality” principles (see Cassese, 2005). Our choice of terms was based on the wording used by the Special Rapporteur on the topic, Mr. Roman Anatolevich Kolodkin, on its reports submitted to the International Law Commission.
It is essential to point out that extraterritorial jurisdiction applies only to prescriptive and adjudicative jurisdiction (which sometimes are referred to in one form, as prescriptive jurisdiction, comprising both of them), and not to enforcement actions. A State is not allowed to enforce its laws in the territory of another State, unless the latter gives its consent (O’KEEFE, 2004).

2.2.2.3. Civil and criminal jurisdiction: distinguishing features

Criminal jurisdiction must be distinguished from civil jurisdiction. Whereas the latter may be exercised in relation to both individuals and States, the former can only be exercised over individuals (KOLODKIN, 2008). However, it must be acknowledged that the exercise of criminal jurisdiction over an individual can, in some situations, affect the interests of the State of which that person is a national—for instance, when the individual concerned is a State official. As it was noted in the 2005 Adamov decision by the Swiss Federal Tribunal, under international law, “a domestic criminal justice system should avoid intervening in the affairs of other states”.

Another different feature of criminal jurisdiction in relation to civil jurisdiction is that it includes a pre-trial phase. This means that the criminal procedure may begin a long time before the actual trial, with the preliminary investigations. This is a key notion in the consideration of the topic at hand, since the question of immunity may arise already in the pre-trial phase (KOLODKIN, 2008).

2.3. Immunity of State officials

2.3.1 Definition of immunity

According to Sinclair (1980, p. 198), “[i]mmunity, expressed in the maxim par in parem non habet imperium, is in principle concerned with the status of sovereign equality enjoyed by all independent States”. He goes on to define immunity as “the correlative of a duty imposed upon the territorial State to refrain from exercising its jurisdiction over a foreign State” (SINCLAIR, 1980, p. 199).

A State, however, cannot act but through natural persons, who do not ordinarily enjoy immunity from legal process and have, in many occasions, been sued by their actions on behalf of the State (TOMONORI, 2000). It is fundamental, thus, to establish to what extent State immunity benefits a State’s officials.

2.3.2. Immunity ratione materiae
Two types of immunity to which State officials are entitled to are usually distinguished: immunity *ratione materiae* and immunity *ratione personae*.

Immunity *ratione materiae*, also called “functional immunity”, covers acts performed by State officials in an official capacity (CASSESE, 2005). Acts performed in a private capacity are not included in this definition, meaning that such acts, even if performed by officials of a State, may be subjected to foreign criminal jurisdiction.

2.3.2.1. Who is entitled to immunity *ratione materiae*?

There is a general agreement in the sense that all State officials are entitled to immunity with respect to acts performed in their official capacity. Here, the status of the official does not matter, since immunity is attached to the act and not to the person. It applies to all those who have acted on behalf of the State in their official capacity. As a consequence, immunity *ratione materiae* is enjoyed by both former and serving State officials, and also by persons or bodies which, in spite of not being State officials, have acted on behalf of the State (AKANDE & SHAH, 2011).

The rationale for functional immunity is in the sense that acts performed in that capacity are attributable to the State itself, as it was agreed by both parties in the ICJ case *Certain Questions of Mutual Legal Assistance in Criminal Matters (Djibouti v. France)* (ICJ, 2008). Furthermore, the ICJ stated, in its Advisory Opinion in *Differences Relating to the Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights*, that it is a rule of customary international law that the conduct of any State organ must be considered as an act of that State (ICJ, 1999). Therefore, the State stands behind the immunity of its officials, which derives from the immunity of the State itself (KOLODKIN, 2010).

2.3.2.2. When is an act considered “official”?

In light of the aforementioned, we must establish when the conduct of a State official will be regarded as performed in an official capacity. To cast light on this subject, we refer to the commentary to article 4 of the draft articles on State responsibility, included in the International Law Commission’s report on the work of its fifty-third session. According to the Commentary (2001, para. 13), “[w]here such a person acts in an apparently official capacity, or under the colour of authority, the actions in question will be attributable to the State”, regardless of the fact that the person may have ulterior motives or may be abusing public power. The judgment of whether a specific conduct may be regarded as official or private will depend on the circumstances of each case (ILC, 2001).
2.3.2.2.1. *Ultra vires* acts

Immunity, as said, is ultimately a right of the State, rather than of the individual serving it. In this context, the question arises of whether conduct which exceeds or contravenes the instructions given by the State should be covered by immunity.

Article 7 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts provides that “[t]he conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions”. From that it is possible to conclude that functional immunity covers official acts, even when exercised *ultra vires* (KOLODKIN, 2008).

2.3.2.3. Temporal scope of immunity *ratione materiae*

Another issue to be considered by the members of the Commission is regarding the temporal scope of functional immunity. As it is attached to the act on behalf of the State and not to the status of the State official, immunity *ratione materiae* does not cease after he has left the post. Therefore, a State official must not be criminally prosecuted by an act performed in official capacity, even if he no longer holds that status (CASSESE, 2005).

With respect to acts performed before the State agent has taken its post, they are usually not covered by immunity, because they were not performed in an official capacity. The only exception would be in the case that the person, even if not holding an official status, performed an act on behalf of the State.

2.3.3. Immunity *ratione personae*

Immunity *ratione personae* or “personal immunity” includes not only official acts, but also acts performed in private capacity. It is conferred on certain State officials, by both treaties and customary international law (AKANDE & SHAH, 2011).

In his vote in *Ex parte Pinochet (No. 3)*, Lord Browne-Wilkinson stated that the “immunity enjoyed by a head of state in power and an ambassador in post is a complete immunity attaching to the person of the head of state or ambassador and rendering him immune from all actions or prosecutions whether or not they relate to matters done for the benefit of the state”\(^5\).

The rationale for personal immunity is threefold. Firstly, it is based on a functional necessity, meaning that immunity is needed to ensure the performance of the State official’s

functions. This was the main argument utilized by the ICJ in *Arrest Warrant*, as it will be seen in the following sections. Secondly, it may be justified by the representative character of these State officials, especially in the case of Heads of State. Thirdly, it relies upon the principle of non-intervention in foreign States’ internal affairs (AKANDE & SHAH, 2001; CASSESE, 2002).

2.3.3.1. Who is entitled to immunity *ratione personae*?

2.3.3.1.1. Heads of State and Heads of Government

Traditionally, personal immunity is granted to the Head of State, because he is considered to personify the State, thus “the immunity accorded to him or her is in part due to the respect for the dignity of the office and of the state which that office represents” (AKANDE & SHAH, 2011, p. 824). Furthermore, the immunity enjoyed by Heads of State is necessary to the performance of the functions inherent to the post. This immunity was affirmed by the UK House of Lords in its judgment in the *Ex parte Pinochet* case, as well as by the French *Cour de Cassation* in the *Ghadafi* case (SHAW, 2003).

In addition, the immunity *ratione personae* to which Heads of State are entitled to can be justified on the basis of the principle of non-intervention, which derives from the principle of sovereign equality of States (ICJ, 1986), undoubtedly one of the cornerstones of international law. To arrest the leader of a State would have the effect of changing the government of that country, constituting a “particularly extreme form of interference with the autonomy and independence of that foreign state” (AKANDE & SHAH, 2011, p. 824).

Personal immunity is extended to the Head of Government, who is, in numerous States, the country’s effective leader (AKANDE & SHAH, 2011), as it was recognized in a number of cases. The immunity of both the Head of State and the Head of Government was acknowledged by the International Court of Justice in its decision in the *Arrest Warrant* case.

2.3.3.1.2. Ministers of Foreign Affairs

The main source to assert the immunity of Ministers of Foreign Affairs is the ICJ judgment in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*. The case concerns an arrest warrant issued by a Belgian court against the then serving Minister of Foreign Affairs of the Democratic Republic of the Congo, Mr. Abdoulaye Yerodia Ndombasi, for the alleged commitment of crimes against humanity and war crimes in

---

violation of the Geneva Conventions of 1949. The DRC claimed that, by issuing the arrest warrant, Belgium disrespected the immunity owed to Mr. Yerodia because of his post. Belgium, in its turn, claimed that immunity did not cover acts classified as international crimes (ICJ, 2002).

The Court ruled against Belgium, stating that it had violated the rule of immunity by the issuing of the arrest warrant. According to the Court’s reasoning, Ministers of Foreign Affairs enjoy full personal immunity, thus they cannot be prosecuted in foreign courts for acts either official or private, for as long as they are in office. The Court based its conclusion on the functional justification of immunity (CASSESE, 2002), by stating that “[i]n the performance of these functions, he or she [the Minister of Foreign Affairs] is frequently required to travel internationally, and thus must be in a position freely to do so whenever the need should arise” (ICJ, 2002, para. 53).

The outcome of this case generated criticism among some scholars. According to Akande & Shah (2011), the Court, by granting it to a Minister of Foreign Affairs, excessively broadened the scope of personal immunity. That is because, in their view, such immunity cannot be justified only on the grounds of functional necessity, but must also be attached to an element of significance—such as in the case of the Head of State, who symbolizes the sovereign State—and to the principle of non-intervention. According to this view, the deposition of a Minister of Foreign Affairs because of an arrest by a foreign State would not generate a change of government, as would be the case if the Head of State was arrested, not amounting to undue interference.

2.3.3.1.3. Other high-ranking State officials

In its judgment in Arrest Warrant, the ICJ made reference to the category of persons enjoying immunity ratione personae as “holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs” (ICJ, 2002, para. 51). This formulation made clear that the list of three was not exhaustive, however it is not clear who are the other officials entitled to personal immunity. To establish that, it is necessary to find out the criteria to be met by these officials in order to enjoy this kind of immunity. These may be, for instance, the importance of the functions carried out by high-ranking officials for ensuring the State’s sovereignty and participation in international relations (KOLODKIN, 2008).

2.3.3.2. Temporal scope of immunity ratione personae
Differently from functional immunity, immunity *ratione personae* is attached to the personal status of the official, and not to specific acts (AKANDE & SHAH, 2011). Consequently, while serving, his immunity covers not only official, but also private acts, and extends also to acts performed before the entry into office (CASSESE, 2005).

However, as previously stated, immunity is ultimately owed to the State he serves and not to the person of the official. Hence, it ceases at the moment the official leaves office. From that moment on, he can be prosecuted and tried for acts performed in a private capacity while in office, although acts carried out in an official capacity remain covered by the functional immunity enjoyed by all State officials (VAN ALEBEEK, 2006; KOLODKIN, 2008).

This was affirmed by the UK House of Lords in the *Ex Parte Pinochet* case, in a landmark decision on the matter of immunity of former Heads of State. The case concerned a request by Spain for the extradition of former Chilean president General Augusto Pinochet, to be prosecuted and tried by Spanish courts for torture and other heinous crimes. The House of Lords ruled that former Heads of State are to accorded immunity *ratione materiae*, i.e. only with respect to official acts.

2.3.4. Diplomatic and consular immunities

According to the Special Rapporteur, Mr. Kolodkin (2008, para. 98), “[d]iplomatic agents, consular officials, members of special missions and representatives of States in and to international organizations are State officials”. Due to their special status, a whole system of diplomatic law was developed, and it is embodied, for the most part, in the 1961 Vienna Convention of Diplomatic Relations, the 1963 Vienna Convention of Consular Relations and the 1969 Convention on Special Missions. Customary law is also an essential source, even if the 1961 and 1963 are considered to have crystallized customary rules on the subject—a result of the work of the International Law Commission.

There are special rules governing the immunity from criminal jurisdiction of diplomats and consular officials, which are laid out in the aforementioned conventions. The importance of this immunity was stressed by the International Court of Justice in its decision in the *U.S. Diplomatic and Consular Staff in Tehran (United States v. Iran)* case (DENZA, 2008).

As Wirth (2002, p. 883) notes, however, diplomats and consular agents, being State officials, “are protected not only by diplomatic immunity, but also by state immunity (*ratione materiae*)”. The same conclusion was reached by the Special Rapporteur, according to whom “State officials who are diplomatic agents, consular officials, members of special missions or representatives of States to international organizations can be said to enjoy both the
immunities common to all officials and the special immunities granted by international law to these special categories of officials” (KOLODKIN, 2008, para. 99)

The basis for diplomatic and consular immunities is the sovereign equality and independence of States, as well as the State’s need to consult and negotiate with each other. For the exercise of these functions, and due to their representative character, diplomatic and consular agents are granted immunity from foreign States’ criminal jurisdiction. The rationale for diplomatic immunity and immunity of State officials in general is, thus, the same (KOLODKIN, 2008; SHAW, 2003).

2.4. Exceptions to the rule of immunity

An exception to the rule of immunity is considered to be “a situation where, as a general rule, an official enjoys immunity, but due to certain circumstances does not have immunity” (KOLODKIN, 2010, para. 54). It is important to differentiate this from a situation where there is not an exception, but an absence of immunity—for instance, when a low-ranking State official is not protected by immunity with respect to private acts, we have an absence of immunity, and not an exception, because normally he would not be protected by immunity ratione personae.

With the growing importance of the protection of human rights in international law and relations, the question of immunity became crucial—how to balance the need to establish individual accountability for gross violations of human rights with the principle of sovereign equality of States and the stability and predictability which are essential to inter-State relations? In this context, some authors began to advocate for exceptions to the general rule of immunity when the prosecution and punishment of international crimes is at stake. Exceptions to the rule of immunity may be based on various grounds. In this section, we will outline some of them.

2.4.1.1. Can international crimes be regarded as official acts?

One of the most widespread justifications for an exception to immunity is that “grave crimes under international law cannot be considered as acts performed in an official capacity, and immunity ratione materiae does not therefore protect from foreign criminal jurisdiction exercised in connection with such crimes” (KOLODKIN, 2010, para. 57).

---

This view was upheld by Lords Steyn and Nicholls of Birkenhead in the *Ex parte Pinochet (No. 1)* case and by Lords Hutton and Phillips of Worth Matravers in the *Ex Parte Pinochet (No. 3)* case. In the words of Lord Hutton, the alleged acts of torture by former Chilean President Augusto Pinochet “cannot be regarded as functions of a head of state under international law when international law expressly prohibits torture as a measure which a state can employ in any circumstances whatsoever and has made it an international crime”\(^8\). The same position was taken by Judge *ad hoc* Van den Wyngaert in her dissenting opinion in the *Arrest Warrant* case\(^9\).

Critics of this view argue that the lawfulness of a State official’s acts is not a requirement for the granting of immunity. Lord Goff took this view in *Ex Parte Pinochet (No. 3)*, by stating that “the fact that the head of state performs an act, other that a private act, which is criminal, does not deprive it of its governmental character. This is true of a serious crime, such as murder or torture, as it is of a lesser crime”\(^10\).

Furthermore, the question of immunity should always be considered in the preliminary stage of a case’s consideration. This means that, when immunity is considered, it has not yet been established that the act was in fact committed or that it was an illegal act. Therefore, to lift immunity before even considering the merits of the case would be in conflict with the principle of presumption of innocence (AKANDE & SHAH, 2011).

2.4.1.2. The normative hierarchy theory: is there a conflict with peremptory norms (*jus cogens*)?

Article 53 of the Vienna Convention on the Law of Treaties provides that a peremptory norm of international law, or a norm of *jus cogens*, “is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”. According to the same article, norms which conflict with *jus cogens* norms are considered void.

Therefore, the rule of immunity would be superseded when opposed to a peremptory norm, because the latter has a higher hierarchy. This view was supported by Judge Al-Khasawneh in his dissenting opinion in *Arrest Warrant*. According to him, “[t]he effective combating of grave crimes has arguably assumed a *jus cogens* character reflecting recognition by the international community of the vital community interests and values it seeks to protect

---

\(^8\) Available at: http://www.uniset.ca/other/cs5/2000AC147.html.


and enhance. Therefore when this hierarchically higher norm comes into conflict with the rules of immunity, it should prevail” (ICJ, 2002, para. 7). The same position was taken by the Italian Supreme Court in the Ferrini case (DE SENA & DE VITTOR, 2005).

However, the existence of such a conflict of norms is doubtful. That is because immunity is regarded as a procedural rule, to be considered in the preliminary stage of proceedings, whereas *jus cogens* norms are of a substantive nature. The norm of immunity does not affect the criminalization of acts, nor does it exclude criminal liability or even criminal jurisdiction. Therefore, being placed in different areas of law, peremptory norms and immunity could hardly conflict with one another (KOLODKIN, 2010).

2.4.1.3. Has a customary rule derogating immunity in relation to international crimes arisen?

There are, also, authors who defend the existence of a customary norm lifting the immunity of State officials accused of international crimes. According to Cassese (2002), the International Court of Justice failed to recognize this customary rule in its judgment in *Arrest Warrant*. He states that Article 7 of the Charter of the Nuremberg International Military Tribunal, as well as all subsequent treaties—such as the statutes of other international criminal tribunals—“clearly intended to remove the substantial defence based on the official status of the accused with regard both to incumbent and former state agents” (CASSESE, 2002, p. 865).

The International Criminal Tribunal for the Former Yugoslavia upheld this view in *Prosecutor v. Blaskic*, by saying that exceptions to the rule of immunity “arise from the norms of international criminal law prohibiting war crimes, crimes against humanity and genocide. Under these norms, those responsible for such crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity” (ICTY, 1997, para. 41).

2.5. Some procedural aspects

2.5.1. Who can invoke immunity?

As previously stated, immunity does not belong to the State official himself, but to the State which he serves or served. Therefore, the invocation of immunity will only have legal consequences when it is done by the State. An invocation by the official himself would be significant from a legal perspective, since that person is only a beneficiary of immunity owed to the State. This view is supported by the ICJ’s judgment in the *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, in which the Court placed the burden of invoking immunity with the State (KOLODKIN, 2011).
2.5.2. Waiver of immunity

In its judgment in the *Arrest Warrant* case, the ICJ (2002, para. 61) stated that State officials “will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity”. This is based on the idea that immunity belongs to the State and not to the official himself.

According to the Special Rapporteur (2011, para. 32), “[a] State’s consent to the exercise of jurisdiction over it by another State is the essence of a waiver of immunity”. The Secretariat, in its Memorandum (2008, para. 249), further stated that “[t]he rationale underlying waiver of immunity—like the rationale for immunity itself—is based on the sovereign equality of States and the principle of *par in parem non habet imperium*”.

The possibility of waiving diplomatic and consular immunities was laid out in Article 32 of the Vienna Convention on Diplomatic Relations and Article 45 of the Vienna Convention on Consular Relations, respectively. According to these provisions, it is the State who has the power to waive immunity and, in the view of the Special Rapporteur (2011), this applies to all State officials’ immunities.

Furthermore, waiver of immunity with regard to criminal proceedings—which are the object of the Commission’s work in the present topic—must always be express, taking the form of either a unilateral statement or notification by the sending State or of an international agreement concluded between the two States concerned (KOLODKIN, 2011).

3. QUESTIONS TO PONDER

When considering the topic proposed, the ILC members are recommended to bear in mind the following questions.

A. What are the requirements for a person to be considered a State official who is entitled to immunity? To what point does the immunity to which a State is entitled extends to its officials?

B. Which State officials are entitled to immunity *ratione personae*? Is the “threesome” (Head of State, Head of Government and Minister of Foreign Affairs) an exhaustive list? If not, what would be the requirements for a State official to be considered high-ranked?

C. To what type of immunity are State officials entitled to in relation to acts performed before they entered into office? And after they leave it?
D. What kind of act is covered by immunity? What are the requirements for an act to be considered official? Can *ultra vires* acts be considered official acts? Can acts amounting to international crimes or violations of norms considered as *jus cogens* be considered official acts covered by immunity?

E. Are there exceptions to the rule of immunity, as, for instance, in the case of violations of norms considered as *jus cogens*? Is this concept relevant to the discussion of the proposed topic? Is there a conflict of norms between the rules of immunity and peremptory norms of international law (*jus cogens*), in the terms of Article 53 of the Vienna Convention on the Law of Treaties?

F. Can immunity be lifted by the State of which the concerned person is an official? Who has the legitimacy to waive immunity?

The answer for these and other question that may arise in the course of the debates shall be found in norms of customary international law. It is the role of the Commission to crystallize such norms, the existence of which shall be determined by observing the existence of State practice and *opinio juris*.

REFERENCES


1. HISTORICAL BACKGROUND

The most-favoured-nation clause is one of (if not the most) basic rule in international commerce (OECD, 2004). According to this rule, a country must give any other country a treatment at least as good as that given to the country it favors the most (UNCTAD, 1999). That is, each State must extend the benefits it gives to a particular country to all the others in the same conditions. To better understand the role played by this clause in the present, it is important to understand in what contexts it gained importance and how it evolved through time.

The origins of the widespread of the utilization of most-favoured-nation clauses in treaties can be traced back to the treaties of Friendship, Commerce and Navigation (FCN) in the Modern Age (OECD, 2004; ILC, 2008). The 1654 treaty between Sweden and Great Britain is an example. This treaty aimed at providing to the nationals of each State, when in the territory of the other country, the same treatment granted to the other foreigners. The main objective of said treaty was to ensure the economic freedom to the nationals of those States abroad. At that time, the principle of equality of States had not yet been formulated, and would only appear centuries later (ILC, 2008).

In the 19th century, FCN treaties and unilateral most-favoured-nation clauses were used as an instrument of domination of the European States over more fragile nations, mostly colonized or newly independent ones (VESEL, 2007). Examples of this situation can be found in the history of most Latin American and Asian countries. These unequal treaties, as they would later be called, helped perpetuate the condition of economic dependence of these regions in relation to developed industrialized countries (VESEL, 2007).

In the years following the Second World War, the nations that were involved in the conflict engaged in an effort of prevention of similar wars in the future, through the normalization and improvement of the relations between them. In this process, some institutions were created—one of which was the General Agreement on Tariffs and Trade (GATT) - whose main objective was the liberalization of world trade. One of the main instruments by means of which liberalization would be achieved was the principle of non-discrimination in world commerce (WTO, 1947), and, in this framework, non-conditional and multilateral most-favoured-nation treatment became one of the cornerstones of the GATT system (ILC, 2008).
Developing countries, however, were still in an unfavorable situation given their economic conditions. As a consequence, for many years, they pressed for special treatment under GATT and attempted, through the United Nations and related organizations, to create new rules to embody their concept of how world economy should operate (JACKSON, 2002). In the 1970s, the GATT created the Generalized System of Preferences (GSP), a permanent exemption to the most-favoured-nation clause. Using this measure, developed countries could create systems of benefits (lower duties on imports, for example) to developing countries products, as long as they were generalized, non-discriminatory and non-reciprocal (JACKSON, 2002).

Recently, most-favoured-nation standard has been incorporated in the vast majority of international investment agreements, figuring among the grounds for a growing number of dispute settlement cases in this area of law (ACCONCI, 2008). The application of the MFN treatment in this case, however, is different and still somewhat unclear (DOLZER; SCHREUER, 2008).

2. STATEMENT OF THE ISSUE

Ever since the widespread of MFN clauses in international investment law, many issues regarding its interpretation and scope have arisen. The straightforward, almost mechanical application of MFN clauses in international trade law has been found to be inadequate to the needs of international investment arbitrations (DOLZER; SCHREUER, 2008). After all, such mechanical application of MFN could, in the context of investment agreements, lead to *treaty shopping*, as states might be tempted to, through MFN clauses, replace the negotiated content of their basis treaty with provisions negotiated by the host state with third parties.

Since the *Maffezini* case was arbitrated by the International Center for the Settlement of Investment Disputed (ICSID) in 2000, the issue of the scope of most-favoured-nation clauses has engaged the interest of scholars (ACCONCI, 2008). The uncertainty about which approach is most compatible with the field of investment law's reality is reflected in the inconsistency of the interpretations made by investment tribunals on the scope of MFN in investment agreements. While some precedents, such as the *Maffezini* case, advocate the applicability of MFN to dispute settlement clauses, others consider that MFN's scope is solely in regards to clauses with substantive content in the treaty. In this section, a comprehensive analysis of the modern issues concerning MFN clauses shall be provided, as well as some basic concepts and definitions regarding the theme.
2.1 Definition of most-favoured-nation clause

According to the ILC's Draft Articles on most-favoured-nation clauses, the most-favoured-nation clause consists in a treaty provision by means of which a certain standard of treatment is granted to a beneficiary. Article 5 of the Draft Articles provides a definition for the treatment thereby accorded:

Most-favoured-nation treatment is treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favourable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State (ILC DRAFT ARTICLES, art. 5).

Alongside the rule of national treatment, most-favoured-nation is one of the typical non-discriminatory treatment standard generally included in all international treaties in the area of international economic law (ACCONCI, 2008). As put Grierson-Weiler and Laird (2008), such standards of treatment are not absolute, but rather of a comparative nature. That is, in the case of application of a most-favoured-nation clause, the claimant must be able to undergo a comparative test by identifying a comparable counterpart from a third state that is receiving more favourable treatment from the granting state. In other words, the benchmark in most-favoured-nation treatment is the rights granted by the host state to a third state, or its nationals, whilst national treatment qualifies one for the treatment given by the host state to its nationals (ACCONCI, 2008).

The International Court of Justice has affirmed, in its ruling in the case Rights of Nationals of the United States of America in Morocco, that a MFN clause's objective is the establishment and maintenance at all times “of fundamental equality without discrimination among all of the countries concerned.” Largely employed in the areas of trade, investment and intellectual property, this provision seeks to prevent discrimination against foreigner investors on the grounds of their nationality (UNCTAD, 1999), as well as to ensure uniformity and equality in the treatment bestowed by the host state to its foreign investors—thus balancing the competition in that state's domestic market (ACCONCI, 2008; VESEL, 2007).

However, in order for MFN treatment to be successfully invoked, the *ejusdem generis* principle requirement must be respected (OECD, 2004; ACCONCI, 2008). This principle, which establishes that MFN treatment is only due “in like cases”, is further elucidated by the ILC (1978) in Articles 9 and 10 of its Draft Articles on most-favoured-nation clauses, which provide that the rights acquired by means of a MFN clause are “only those which fall within the limits of the subject-matter of the clause”. In other words, the treaty containing the MFN

---

11 The ILC Draft Articles on most-favoured-nation clauses were never ratified and are, thus, a non-binding, albeit comprehensive of the rules governing MFN, instrument of international law.
clause—the basic treaty—must concern the same subject as the treaty providing more favourable treatment—the third party treaty. That is why, for example, a commercial treaty containing an MFN clause between states A and B would not entitle A to require that B grants it the same treatment it accorded C in the matter of extradition of criminals.

2.2 Types of MFN clauses

It has been said that the problem encountered in delimiting the scope of most-favoured-nation clauses is that there is no such thing as one most-favoured-clause per se, but there are rather as many such clauses as there are treaties that contain them (ANZILOTTI, 2008). Therefore, the scope determined by the characteristics of each MFN clause might vary from treaty to treaty. There are some traits that allow the classification of MFN clauses according to their characteristics, namely being conditional or unconditional, reciprocal or non-reciprocal and limited or unlimited.

In regards to reciprocality, early forms MFN clauses were mostly formulated as unilateral clauses by means of which only one of the parties was granted MFN treatment. These provisions usually benefited powerful European states at the expense of their non-European counterparts, which received no reciprocal benefit (VESEL, 2007). Nowadays, the majority of clauses are reciprocal—that is, entitle both parties to the treaty to MFN treatment—, for unilateral clauses were found to be incompatible with the principle of sovereign equality of states (VESEL, 2007).

Conditional MFN clauses were created as a response to the "free rider" issue (UNCTAD, 1999). Since MFN treatment obliges a contracting party to extend to its counterpart all benefits that it grants to any other country in any future treaty, such clauses were thought to imbalance the contractual balance of the basic treaty containing the MFN clause, because the contracting party might be able to claim for itself additional rights to substitute those previously negotiated in the treaty (RADI, 2007)—becoming, thus, a “free rider”. Based on the principle of reciprocity, conditional MFN were thought to contour that possibility by requiring that the country benefiting from the operation of the MFN clause renegotiate the original agreement in order to correct the potential contractual imbalance. In other words, “[t]he idea was that each privilege or concession granted by, for example, the United States was bargained for and paid for with a corresponding concession on the other side.” (VESEL, 2007, p. 3). However, as this model, well-suited to the objectives of a protectionist commercial policy, deprived MFN clauses of automatic effect and, indeed, rendered them mostly ineffective, conditional MFN clauses were substituted by unconditional ones as the general preference.
In their applicability—which may be either *ratione materiae, ratione personae* or *ratione temporis*—MFN clauses may be classified as limited or unlimited (ACCONCI, 2008; UNCTAD, 1999). That is, MFN's scope of application may either include the entire content of the treaty or be limited to only some of the matters included in it (OECD, 2004).

### 2.3 Most-favoured nation in trade and investment law

Though the fields of international trade and international investment are deeply connected—for one is the international flow of goods and services and the other that of capital and other factors of production—international law handles both topics differently and separately (DIMASCIO; PAUWELYN, 2008).

Despite their common origin in the protection and treatment of aliens (DIMASCIO; PAUWELYN, 2008), today the regimes of international trade and international investment differ in several points. The first one is that international trade has been multilaterally regulated since 1947—with the signature of the General Agreement on Tariffs and Trade (GATT), which is today the core of the World Trade Organization (WTO) system. International investment law, on the other hand, is governed by a web of almost 2600 separate bilateral investment treaties (BIT) (DIMASCIO; PAUWELYN, 2008). Secondly, whilst trade, through the WTO system, is addressed by a plethora of detailed rules, international investment law relies only on a few principles, most of which derive from custom (DIMASCIO; PAUWELYN, 2008). Thirdly, while the enforcement of trade agreements happens exclusively between states; in the case of investment treaties, private companies possess standing to request monetary compensation from host countries (DIMASCIO; PAUWELYN, 2008). Furthermore, in international trade MFN is applicable only to measures at the border—mostly tariffs—whereas in international investment MFN is applied generally after the investment enters the territory (though there are some MFN clauses that operate also in regards to treatment received in the pre-entry stage) (UNCTAD, 1999). Finally, these areas differ on their objectives which concern, for trade, the liberalization of trade flows and, in the case of investments, the protection and promotion of foreign investment (DIMASCIO; PAUWELYN, 2008).

#### 2.3.1 Most-favoured-nation in international trade

Historically one of the cornerstones of international trade policies, the most-favoured-nation clause is set at the very core of the WTO system, which is the organization currently regulating international trade. Indeed, Article I of the General Agreement on Tariffs and Trade (GATT) contains the provision:
With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties (WTO, 1947, Art. I).

This obligation to accord MFN treatment “immediately and unconditionally” at the border to goods of other GATT members, alongside the provision that prescribes the obligation of national treatment, is the core of the non-discrimination principle in the WTO system (ILC, 2008).

2.3.2 Most-favoured-nation clauses in the context of investment agreements

The most-favoured-nation clauses, a provision typical of the area of international trade law, have been incorporated into the majority of investment agreements. According to Acconci (2008), a possible explanation for this phenomenon has to do with the fact that foreign investment has grown in importance to the process of economic integration, as well as the growing need to provide predictability, transparency and coherence in the legal framework regulating international investments. However, as demonstrated above, international investment law differs greatly from international trade law. Some particularities of international investment law have presented some difficulties in the application of the MFN.

According to Acconci (2008), two main types of treaties may be identified in modern international investment law: multilateral agreements, which deal with the liberalization and promotion of trade and investment, (such as NAFTA or MERCOSUR); and bilateral investment treaties (BITs), which focus on the treatment and protection of private foreign investments. However, differently from the situation in international trade, in international investment law there is no broad multilateral agreement and, therefore, “rather than convergence toward a single MFN clause applicable to all, analogous to GATT Article 1, international investment law presents a multiplicity of differently worded MFN clauses embedded in different treaties, with the result that the MFN clauses are subject to a broad range of interpretations” (VESEL, 2007, p.1).

Regarding multilateral instruments, the NAFTA agreement contains an MFN clause under Article 1103, which prescribes NAFTA contracting parties shall accord, in like circumstances, most-favoured-nation treatment to both “investors of another Party” and “investments of investors of another Party” in what concerns “the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”
This clause, which covers both the pre-entry and post-entry stage of an investment,\(^\text{12}\) can be construed to be unconditional, reciprocal and indeterminate (ACCONCI, 2008).

An unconditional, reciprocal and indeterminate MFN clause may also be found in MERCOSUR’s Protocol of Colonia for the Promotion and Reciprocal Protection of Investments within MERCOSUR. However, this clause does not provide for the protection of investments in the pre-entry.

In BITs, on the other hand, MFN clauses are usually reciprocal, since they prescribe a mutual obligation; unconditional, since they automatically and immediately applicable to investments of the Contracting Parties, without the requirement of compensation or renegotiation; and unlimited, since they generally contain no restriction *ratione materiae*, *ratione personae* or *ratione temporis* (ACCONCI, 2008; UNCTAD, 2004). Except for American and some Canadian BITs, this type of agreements usually do not grant MFN for the pre-entry phase, since “BITs per se do not grant a general right to make foreign investments” (ACCONCI, 2008, p. 370).

Indeed, according to Acconci (2008) a typical MFN clause for BITs goes as follows:

Neither Contracting Party shall subject investments in its territory owned of controlled by nationals or companies of the other Contracting Party to treatment less favourable than it accords, in equivalent circumstances, to nationals or companies of any third State (BARBADOS, GERMANY, 1994, Art. 3.1).

Though this model might be typical, a wide arrange of different constructions and wording have been incorporated in the MFN clauses contained in each of the almost 2600 BITs currently in existence. To illustrate this matter, while recent United State’s BITs include a footnote precluding the application of MFN treatment to dispute settlement mechanisms and the United Kingdom’s model BIT expressly provide for the application of MFN to dispute settlement, most BITs include no specific turn of phrase regarding the application or not of MFN to dispute settlement provisions. The centrality of dispute settlement provisions to international investment law transforms this into a most urgent issue. As highlights Vesel (2007), “the relationships between these varied MFN clauses and dispute settlement mechanisms have presented a unique set of problems”, since the plethora of provisions concerning when, how and in which forum a investor is able to bring claims against the host state appears to be in contradiction to the principle of MFN, which provides for the equal treatment of all investors.

\(^{12}\) The vast majority of investment agreements do not cover the admission phase of an investment, prescribing the obligation to accord MFN treatment only once the investment is indeed made. This model of MFN clause is known as post-entry, since the protection of the clause will only operate after the entrance of the investment in the host country's territory. Though a minority in international practice, the pre- and post-entry model of MFN clauses extends MFN treatment to both the pre-establishment and the post-entry phases of an investment (UNCTAD, 1999).
Indeed, on such matter, that is, in determining whether MFN clauses allow an investor to claim dispute settlement provisions of third party's treaties, investment tribunals have been highly divergent.

2.4 Previous Interpretations by International Tribunals
2.4.1 General Rules of Treaty Interpretation

As MFN clauses are treaty provisions, one must look first to the rules of treaty interpretation in order to construe its meaning and scope (VESEL, 2007). The general rule for the interpretation of treaties is laid down in Article 31 of the 1969 Vienna Convention on the Law of Treaties, which establishes that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” As the ILC itself clarified in 1966 in its report to the General Assembly, this rule “emphasizes the primacy of the text as the basis for the interpretation of a treaty, while at the same time giving a certain place to extrinsic evidence of the intentions of the parties and to the objects and purposes of the treaty as means of interpretation.”

Supplementary means of interpretation are provided for in Article 32 of the mentioned Convention, and include reference to the travaux préparatoires—that is, documents recording the negotiations occurred before the drafting of a treaty. As Dolzer and Schreuer (2008) mention, the utilization of travaux préparatoires is not common, but has been known to happen, namely in the Plama v. Bulgaria arbitration, in which the it was ruled that direct negotiations between the two parties to a BIT were relevant to enlighten the meaning of the original BIT.

In regards to MFN clauses which contain an exclusion from applicability in certain areas (such as economic communities and free trade areas), two possible interpretations are possible: one that takes into account the principle “expression unius est exclusio alterius”—that is, the expression of one thing is the exclusion of another—to the effect that all other areas not expressly excluded from applicability are under the scope of the clause (DOLZER; SCHREUER, 2008); and one that considers that certain matters, such as dispute settlement provisions, are excluded from the scope of MFN by the application of the ejusdem generis principle (RADI, 2007).

As mentioned supra, the majority of MFN clauses do not explicit whether the intention of parties to the BIT was that the clause apply to dispute settlement mechanisms or not. Therefore, when confronted with such issue, tribunals have utilized considerations of
purpose, surrounding circumstances, and pragmatic considerations to decide on cases (VESEL, 2007).

2.4.2 Cases regarding the application of MFN clauses to procedural matters
2.4.2.1 ICJ cases on MFN clauses and matters of jurisdiction

In the cases Anglo-Iranian Oil and Rights of U.S. Nationals in Morocco, the International Court of Justice, albeit indirectly, approached the subject of MFN clauses in order to interpret their scope in regards to the jurisdiction of the ICJ or other fora. The interpretative questions dealt with by the ICJ might possess especial importance to investment disputes (VESEL, 2007).

In the Anglo-Iranian Oil case concerned the claim by United Kingdom that the court had basis for jurisdiction through the application of the MFN clause contained in its longstanding treaty with Persia to claim the for itself the same treatment granted to Denmark in a later treaty, where the jurisdiction of the PCIJ was provided for. The Persia-United Kingdom treaty, however, was previous to the declaration in which Iran accepted the compulsory jurisdiction of the Permanent Court of International Justice (PCIJ). When deciding on the jurisdiction, the successor to the PCIJ, the ICJ, held that treaty between United Kingdom and Persia could not provide basis for jurisdiction, since it was entered before Iran's declaration. However, as put Vesel (2007), the reasoning in order to reach this conclusion of the ICJ remains unclear, since

The Court first states that it is not necessary to consider the “meaning and the scope” of the MFN clause and that the Court may “confine itself” to the dates in order to conclude that the United Kingdom cannot invoke the jurisdiction of the court. Then [...] the Court appears to hold that the jurisdiction of the Court is outside the scope of the MFN clause itself - stating that the MFN clause “has no relation whatever to jurisdictional matters” - but then immediately returns to the dates as if their recitation were enough to resolve the matter (VESEL, 2007, p.12).

In this case, the ICJ decided, by majority, that an MFN clause, alongside the host country's consent to jurisdiction over disputes with a third state, was not sufficient to constitute consent. On the other hand, in the case concerning the Rights of U.S. Nationals in Morocco, the ICJ held that rights obtained through an MFN clause depend on the continuing existence of the third-party treaty from which they are derived. In this case, the United States, who had enjoyed the same consular rights in Morocco as Spain and the UK through a MFN provision, wished to maintain those rights even after the treaties with Spain and the UK were no longer in force. The ICJ rejected both the claim that those provisions had been incorporated in the U.S. treaty and the allegation that those rights were founded in custom,
reaffirming the dependence of rights attained through an MFN clause on the existence of the third party treaty.

2.5.2.2 International Investment Tribunals cases on MFN and dispute settlement provisions

Though the *stare decisis* principle is not applicable to the ICSID legal framework, a very wide array of interpretations of one matter is bound to affect the predictability and stability of the international investment law system. Thus, a certain level of coherence between the decisions is desirable.

The 2000 ICSID Decision on the *Maffezini* case initiated the polemics surrounding the applicability of MFN clauses to dispute settlement provisions. In this case, the investor, Mr. Emilio Agustín Maffezini, a national of Argentina, requested arbitration against the Kingdom of Spain. The request concerned the application of the MFN clause in the BIT between Argentina and Spain in order to avoid a “period of eighteen months in domestic courts” (a procedural requirement of the aforementioned BIT), on the grounds that that provisions was less favourable treatment than that accorded in the Spain-Chile BIT, according to which the investor could bring a claim before ICSID at once. In this case, the tribunal interpreted the most-favoured-nation provision in the Argentina-Spain BIT as to allow the application of the dispute settlement provision of the Spain-Chile BIT. The tribunal reasoned as follows:

Notwithstanding the fact that the basic treaty containing the clause does not refer expressly to dispute settlement as covered by the most favored nation clause, the Tribunal considers that there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors [...] Such [dispute settlement] arrangements, even if not strictly a part of the material aspect of the trade and investment policy pursued by treaties of commerce and navigation, were essential for the adequate protection of the rights they sought to guarantee [...] (ICSID, 2000, p. 54-55).

From the above considerations it can be concluded that if a third party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor’s rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause as they are fully compatible with the *ejusdem generis* principle. Of course, the third-party treaty has to relate to the same subject matter as the basic treaty, be it the protection of foreign investments or the promotion of trade, since the dispute settlement provisions will operate in the context of these matters; otherwise there would be a contravention of that principle (ICSID, 2000, p. 56).

Though the tribunal, as stated, accepted that the MFN clause's application might be legitimately extended to dispute settlement provisions, it also drew a distinction between "the legitimate extension of rights and benefits by means of operation of the clause" and "disruptive treaty-shopping that would play havoc with the policy objectives of underlying specific treaty provisions" (ICSID, 2000, p. 63). In order to illustrate this distinction, the tribunal affirmed a number of exceptions in which the most-favoured-nation treatment would not be applicable to dispute settlement provisions—namely:
(a) if one contracting party has stated, as a condition to its consent to arbitration, that local remedies must be exhausted, this requirement cannot be bypassed through the invocation of an MFN clause in relation to a third-party agreement that does not contain this element, for this condition derives from a fundamental rule of international law;

(b) if the parties' agreed upon dispute settlement arrangement including an irreversible and final choice between submission either to domestic courts or to international arbitration, this stipulation cannot be bypassed by invoking the clause;

(c) if the agreement establishes a particular arbitration forum as competent, this option cannot be changed by invoking the clause, in order to submit the dispute to a different forum.

(d) if the parties have agreed to a highly institutionalized system of arbitration that incorporates precise rules of procedure, which is the case, for example, with regard to the North America Free Trade Agreement and similar arrangements, it is clear that neither of these mechanisms could be altered by the operation of the clause because these very specific provisions reflect the precise will of the contracting parties.

(e) other elements of public policy limiting the operation of the clause that might be identified by the parties or tribunals. (ICSID, 2000, p.63)

In the Siemens case, the ICSID tribunal followed the same line of reasoning of Maffezini. This case concerned whether, by means of a most-favoured-nation provision included in the 1991 Germany-Argentina BIT (the basic treaty), the claimant, a german national, might claim for himself dispute settlement provisions of the 1991 Argentina-Chile BIT, which allowed for direct arbitration, without the prior 18 months of domestic courts required by the basic treaty. Interpreting the basic treaty in accordance with Art. 31 of the Vienna Convention on the Law of Treaties, that is, in light of the objectives of the treaty, which were held to be "the promotion and protection of foreign investments", the ICSID tribunal established that the MFN was sufficiently broad to include dispute settlement. This conclusion was reached taking into consideration that the MFN clause in question did not specify whether it was applicable to dispute settlement provisions, and indeed explicitly included in its scope only the term "treatment" and "activities related to the investment".

Likewise, in the Gas Natural ICSID case, in which the applicability of a MFN clause in order to bypass the requirement of the 18 months in domestic courts was also in question, the ICSID tribunal reached a similar conclusion. In this case, the tribunal rejected Argentina's claim that the requirement of 18 months was equivalent to the international law requirement of exhaustion of local remedies. The tribunal noted the practice of Argentinean BITs, the majority of which did not include this requirement of 18 months, in order to reach the
conclusion that the granting, through the MFN clause, of direct access to arbitration would not hurt any public policy concern.

In the *Suez* case, another case which deals with the usage of a MFN clause in order to bypass the requirement of the 18 months in domestic courts, the ICSID tribunal interprets the *ejusdem generis* principle to the conclusion that it may not be construed as to exclude dispute settlement matters from the scope of MFN clauses.

However, different conclusions were reached by the ICSID tribunal in the *Salini* case. In this case, the claimant's request to, through the MFN clause on the 1999 Italy-Jordan BIT, base jurisdiction on the dispute settlement provisions contained in the 1997 US-Jordan BIT was rejected by the tribunal. The tribunal expressed its reservations with the *Maffezini* findings thusly:

> The current Tribunal shares the concerns that have been expressed in numerous quarters with regard to the solution adopted in the *Maffezini* case. Its fear is that the precautions taken by authors of the award may in practice prove difficult to apply, thereby adding more uncertainties to the risk of “treaty shopping.” (ICSID, 2004, p. 115).

The tribunal, however, also underlined the many differences between the factual situations of *Salini* and *Maffezini*, stating that, differently from what happened in the latter, in *Salini* the most-favoured-clause of the basic treaty did not contain reference to "all matters covered by this treaty".

In the same line, the *Plama* case, which regarded whether or not a MFN clause might be used to extend consent to arbitration manifested in other investment treaties, also criticized the tribunal's findings in *Maffezini*. In this case, the ICSID tribunal declined jurisdiction over the case, which the claimant, a Cyprus national, had attempted to establish through the MFN clause in the 1987 Bulgaria-Cyprus BIT (the basic treaty). According to the claimant, the MFN clause in the basic treaty included "all aspects of the treaty" and, therefore, also dispute settlement provisions. The claimant wished to invoke the dispute settlement provisions of other Bulgarian BITs in order to establish the jurisdiction of ICSID over the case. However, his claims proved unsuccessful. The tribunal rejected the claimants teleological interpretation of the clause, focused on the "objects and purposes" of the BIT (namely, to promote and protect foreign investment), and upheld that the contracting states had no intention of extending the MFN BIT clause to dispute settlement provisions in other BITs. As an evidence of that the tribunal pointed out that, at the time of the signing of the 1987 BIT with Cyprus, Bulgaria was under a communist regime that preferred BITs containing limited dispute resolution provision and limited protections for foreign investors.
The ICSID tribunal underlined in *Plama* the great difference existent between adding to the treatment provided for in one treaty provisions of other treaties that accord more favourable treatment, on the one hand, and, on the other hand, replacing a procedure specifically negotiated by parties with an alien mechanism. Indeed, the tribunal considered in *Plama* that the conclusions reached in *Maffezini* led to "a chaotic situation" which was actually harmful to harmonization and was completely alien to the intention of the contracting parties.

3. PREVIOUS WORK BY THE COMMISSION

In 1964, acknowledging the importance of MFN clauses in international trade, but not wishing, however, to limit itself to this area only, the ILC undertook the project of creating a set of draft articles on MFN clauses. The result were the 1978 Draft Articles on Most-Favoured-Nation Clauses, which, though never ratified by the United Nations General Assembly, provide a comprehensive analysis of the operation of MFN clauses, including elucidation of the *ejusdem generis* principle.

The 1978 Draft Articles, by means of its Article 4, define MFN clause as a treaty provision whereby the granting State undertakes the obligation to accord MFN treatment to a beneficiary State in an agreed sphere of relations. Though Article 5 defines MFN treatment as treatment “not less favourable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State”, the Draft Articles provide that the content and extent of each specific MFN obligation is to be determined by the text of the MFN clause in question. In this sense, Article 29 states that “[t]he present articles are without prejudice to any provision on which the granting State and the beneficiary State may otherwise agree”- that is, the granting and beneficiary States might, for instance, choose to stipulate the sphere of relations in which they undertake most-favoured-nation obligations or restrict the extent of this obligation *ratione materiae*.

Article 8 sets forth the basic structure of the operation of the most-favoured-nation clause. It establishes that the MFN clause of the basic treaty, as the source of the right of the beneficiary State to receive from the granting State, must be in force for both the granting and beneficiary States. Furthermore, this provision also states that the extent of the benefits which the beneficiary State may claim for is determined by the treatment extended by the granting State to a third State. According to ILC commentaries to Article 8, this “rule is important and its validity is not dependent on whether the treatment extended by the granting State to a third State [...] is based upon a treaty, another agreement or a unilateral, legislative, or other act, or
mere practice.” In other words, the operation of an MFN clause is triggered by the mere
extension to a third State of favours that constitute the MFN treatment according to the clause.

Finally, the *ejusdem generis* principle, contained in Article 9 of the Draft Articles, lays
down the rule that an MFN clause can only attract matters that fall within the same subject
matter or the same category of subject as that to which the clause relates. Article 10 further
indicates that if the beneficiary State claims rights in respect of persons or things, it will
acquire such rights only in the case that the persons or things in question are either of the
same category of persons or things as those persons or things of a third State which benefit
from the treatment extended to them by the granting State, or related in the same way to
beneficiary State as those persons or things are related to that third State.

4. QUESTIONS TO PONDER

When deciding how to best deal with the issue of MFN clauses, be it issuing draft
report, a model clause or adopting draft recommendations, ILC Members are asked to
consider the following questions during the debates:

A. In which points are the existing norms and case law regarding MFN clauses lacking
in regards to their application in the field of international investments?

B. When an BIT include no specific provision regarding the application or not of MFN
to dispute settlement provisions, may the principle *"expression unius est exclusio
alterius"*—that is, the expression of one thing is the exclusion of another— be
interpreted to the effect that all other areas not expressly excluded from applicability
are under the scope of the clause?

C. May the *ejusdem generis* principle be interpreted as to exclude the application of
MFN clauses to dispute settlement provisions within, for instance, a bilateral
investment treaty?

D. In the case that MFN clauses be deemed to apply to dispute settlement provisions,
would the use of this clause be sufficient to fulfill the requirement of consent to
jurisdiction, *i.e.* in the case of a MFN clause used to extend consent to arbitration
manifested by the granting state in investment treaties with third States?

E. The ICSID tribunal underlined in *Plama* the great difference existent between
adding to the treatment provided for in one treaty provisions of other treaties that
accord more favourable treatment, on the one hand, and, on the other hand, replacing a
procedure specifically negotiated by parties with an alien mechanism.

The aforementioned topics, whose implications are central to the discussions, must be
carefully weighted by the ILC Members. The Members are, thus, asked to prepare comments
to contribute to the ILC’s commitment of preventing fragmentation in international law and assuring greater coherence in the interpretations delivered by arbitral decisions in investment law.

REFERENCES


INTERNATIONAL LAW COMMISSION. Report on the work of its sixtieth session. (5 May to 6 June and 7 July to 8 August 2008). Supplement No. 10 (A/63/10), Annex B.


WORLD TRADE ORGANIZATION. General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 194
WORLD TRADE ORGANIZATION. **Principles of the trading system.** Available at: <http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm#nondiscrimination>. Access: 10 may 2012