

## CONCURRING AND DISSENTING OPINION

1. This opinion concerns the question of the Tribunal's jurisdiction, which I do not consider to be capable of being created through the use of the MFN clause.

2. Having first come to the conclusion that the Tribunal had no jurisdiction over the case, I then approached the merits phase on the basis of the majority decision, *i.e.* I looked at the case as if jurisdiction existed. I do not comment in this opinion on the merits phase, but for stating that I subscribe to the results of the Award on the substantive issues raised.

3. The question of the scope of MFN clauses in BITs is a complex issue, especially when related to the provisions on dispute settlement mechanisms. In a study of UNCTAD, it is stated that "there are strong arguments both for and against applying the MFN clause to dispute settlement. In the end, this issue may need further clarification by international investment jurisprudence."<sup>1</sup> I think this is a good case to foster that clarification. Unfortunately, to take the words of my colleague arbitrator Pedro Nikken, "I have not had the intelligence or the ability to convince my colleagues in this Tribunal,"<sup>2</sup> but in pursuing the intense and thought provoking discussions we had among the members of the Tribunal, I express the hope to contribute in a modest but constructive manner to the ongoing debate on the way MFN clauses should be applied in investment arbitration.

4. The Award of the majority acknowledges the existence of conflicting decisions:

It is true that, as stated above, the jurisprudence regarding the application of MFN clauses to dispute settlement provisions is not fully consistent. Nevertheless, in cases where the MFN clause has referred to "all matters" or "any matter" regulated in the BIT, there has been near-unanimity in finding that the clause covered the dispute settlement rules. *On this basis*, the majority of the Tribunal reaches the conclusion that Impregilo is entitled to rely, in this respect, on the dispute settlement rules in the Argentina-US BIT and that the case cannot be dismissed for non-observance of the requirements in Article 8(2) and (3) of the Argentina-Italy BIT.<sup>3</sup>

5. In fact, it might be emphasized that, concerning all the cases dealing with MFN clauses and dispute settlement, it becomes apparent, if one looks at the number of arbitrators that are in favour of applying the MFN clause to dispute settlement rather than at the number of awards, that the picture looks almost balanced, because of the repeated

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<sup>1</sup> BILATERAL INVESTMENT TREATIES 1995-2006: TRENDS IN INVESTMENT RULEMAKING, UNCTAD/ITE/IIA/2006/5, UN Pub. New-York, Geneva, 2007, p. 42.

<sup>2</sup> *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, Separate Opinion of Arbitrator Pedro Nikken, § 27, as well as *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, Separate Opinion of Arbitrator Pedro Nikken, § 27.

<sup>3</sup> Award, § 108. Emphasis added.

involvement of some of the arbitrators. In any case, it does not appear to me to be a legally convincing argument to rely on former cases as if they were binding precedents.

6. This being said, it is well known that it is *Maffezini*<sup>4</sup> that opened the floodgates of this controversy, in taking an unprecedented decision.<sup>5</sup> As has been noted by Zachary Douglas, “(t)he decision in *Maffezini* was the first time that a party has been permitted to rely upon an MFN clause to modify the jurisdictional mandate of an international tribunal. Across the hundreds of years of activity of international courts and tribunals leading up to *Maffezini*, there had only been judicial pronouncements against such a device, including the International Court of Justice’s judgment in the *Anglo-Iranian Oil Company Case* and the British-Venezuelan Mixed Claims Commission’s decision in *Aroa Mines*.”<sup>6</sup> After *Maffezini*, some ICSID tribunals have however followed that path, as has the majority of this Tribunal.

7. Others have reacted to this innovation to come back to the classical interpretation of the MFN clause, the two first cases in this line of thinking after *Maffezini* being *Salini v. Jordan*<sup>7</sup> and *Plama v. Bulgaria*<sup>8</sup>, which in turn were followed by some ICSID tribunals.

8. Article 3 containing the MFN clause and Article 8 relating to the settlement of disputes of the Argentina/Italy BIT, which is the basic treaty, are cited here in their relevant parts for the convenience of reference:

*Article 3. National Treatment and Most-favored Nation Provisions*

(1) Each Contracting Party shall, in its own territory, accord to investment made by investors of the other Contracting Party, to the returns and activities related thereto and to all other matters regulated by this Agreement, a treatment not less favorable than that accorded to its own investors or to investors of third countries.

*ARTICLE 8. Settlement of Disputes between Investors and Contracting Parties*

1. Any dispute regarding an investment between an investor of one of the Contracting Parties and the other Party, regarding the issues regulated by this Agreement, shall, as far as possible, be settled through amicable consultations between the parties to the dispute.

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<sup>4</sup> *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award on Jurisdiction, 25 January 2000.

<sup>5</sup> With the exception of an *obiter dictum* of the International Court of Justice in the *Case Concerning the Rights of Nationals of the United States of America in Morocco* (France v. USA), *ICJ Reports* 1952, p. 190.

<sup>6</sup> Zachary Douglas, The MFN Clause in Investment Treaty Arbitration: Treaty Interpretation off The Rails, *Journal of International Dispute Settlement*, 2010, pp. 1–17, at p. 5, references omitted.

<sup>7</sup> *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 9 November 2004.

<sup>8</sup> *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005.

2. If these consultations do not result in a solution, the dispute may be submitted to the competent judicial or administrative courts of the Party in whose territory the investment is located.
3. If, after eighteen months from the date of notice of commencement of proceedings before the courts mentioned in paragraph 2 above, the dispute between an investor and one of the Contracting Parties continues to exist, it may be submitted to international arbitration.
9. The Claimant, wishing to avoid the obligation to submit its dispute to the courts of Argentina during 18 months, attempted – and so succeeded – to use the MFN clause of Article 3 in order to be able to present its case directly to international arbitration. In doing so, it relied on one discrete procedural aspect of a *completely different procedure* for the settlement of investment disputes set out in Article VII of the Argentina/US BIT, which is the third-party treaty, and which provides that:
2. ... in the event of an investment dispute, the parties should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution:
- (a) to the courts or administrative tribunals of the Party that is a party to the dispute; or
  - (b) in accordance with any applicable, previously agreed dispute-settlement procedures; or
  - (c) in accordance with the terms of paragraph 3.
3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:
- (i) to the International Centre for the Settlement of Investment Disputes (“Centre”) established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 (“ICSID Convention”), provided that the Party is a party to such convention: or
  - (ii) to the Additional Facility of the Centre, if the Centre is not available; or
  - (iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL): or
  - (iv) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.
10. It can be noted at the outset that the dispute settlement procedure in the basic treaty to be applied in our case, the Argentina/Italy BIT, is fundamentally different from

the one in the third-party treaty, the Argentina/US BIT, one *requiring* to go to local courts before having access to international arbitration, the other *forbidding* to go to local courts before having access to international arbitration, as was well explained by the tribunal in *Wintershall*,<sup>9</sup> when dealing with similar clauses. This being so, it is not easy, to say the least, to compare the procedures in the basic treaty and in the third-party treaty in order to decide which one is the more favorable for the investment's protection. In other words, it seems quite plain to me that importing just a time limit from one mechanism into the other does not really make any sense, as it cannot be based on a serious comparison between the two clauses whose underlying *rationale* is completely different.

11. According to the majority position, the question is “whether a *choice* between domestic proceedings and international arbitration, as in the Argentina-US BIT, is more favourable to the investor than compulsory domestic proceedings before access is opened to arbitration.” And the majority does not hesitate: “The answer to this question is in general, and certainly in this case, evident: a system that gives a choice is more favourable to the investor than a system that gives no choice.”<sup>10</sup> This seems a rather quick conclusion<sup>11</sup>: it is suggested here that it could as well be contended that a system which gives the possibility to use *cumulatively* two different fora (although one being delayed by 18 months) is more favourable than a system that obliges to elect only one possibility to the detriment of the other.

12. It can be added that the concrete result is not to grant Impregilo the most favourable existing dispute settlement mechanism, which is the purported objective of MFN clauses, but it is to grant it a *sui generis* mechanism that was constructed by the reasoning of the arbitrators forming the majority and was envisaged neither in the basic treaty nor in the third-party treaty. In fact, as was indeed also the case for example in *Siemens*, Impregilo was at the end of the day in a better position than would have been either an investor under the Argentina/Italy BIT or an investor under the Argentina US/BIT, as it was not restricted in its access to international arbitration by an 18 months waiting period on the one hand, nor in its choices by the fork-in-the road provision on the other hand. *Stricto sensu*, Impregilo was not granted by the Award the most favoured treatment, it was granted an inexistent favourable treatment. The foreign investor had the best of both treaties, but this did not correspond to any real situation under any treaty.

13. This being said, I would like to take this opportunity to present some more general remarks on the cases having dealt with this question and to propose some avenues for dealing with the question of MFN clauses in international investment law.

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<sup>9</sup> *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award of 8 December 2008, § 175.

<sup>10</sup> Award, § 101. Emphasis in the original.

<sup>11</sup> Which might be explained by the postulate, shared by investors, that international arbitration is necessarily to be preferred to national courts, which idea has been criticized in some doctrinal comments. See Campbell McLachlan, Laurence Shore & Matthew Weiniger, *INTERNATIONAL INVESTMENT ARBITRATION*, Oxford, Oxford U. Press, 2007, p. 257, where it is noted: “It would be invidious for international tribunals to be finding ... that host State adjudication of treaty rights was necessarily inferior to international arbitration.”

14. To be clear, I am very strongly convinced that MFN clauses should not apply to dispute settlement mechanisms and I therefore disagree with the result arrived at in the *Maffezini* and *al.* cases<sup>12</sup> and consequently concur with the result arrived at in the *Plama* and *al.* cases. In fact, the first line of cases is based on the presumption that dispute-resolution provisions do invariably fall within the scope of an MFN provision in a BIT, unless the contrary is plainly demonstrated, the second line of cases on the reverse presumption that dispute-resolution provisions do never fall within the scope of an MFN provision in a BIT, unless the contrary is plainly demonstrated.

15. Although I am in full agreement with the second line of cases, I am however not totally convinced by the reasoning on which the different decisions are based, which probably do not explain in a fully satisfactory manner the solution reached. In other words, although all the decisions refusing to use an MFN clause, in order to import a dispute settlement mechanism or to modify it, point to certain important aspects of the context to be taken into account when interpreting such a clause, none fully explains, in my view, the result arrived at.

16. The purpose of this separate opinion is to try to explain why, in principle, an MFN clause cannot import, in part or *in toto*, a dispute settlement mechanism from a third party BIT into the BIT which is the basic treaty applicable to the dispute. Ultimately, as will be explained in more details below, the core reason why an MFN clause cannot apply to dispute settlement is intimately linked with the essence of international law.

17. Naturally, an important *caveat* has to be presented here. The interpretation of the MFN clause is only necessary when the intention of the parties concerning its applicability or inapplicability to the dispute settlement mechanism is not expressly stated or clearly ascertained. It is quite evident that if there is an MFN clause expressly including the dispute settlement procedures or expressly excluding them, there is no need for an interpretation.

18. There are indeed cases where the parties expressly state that the MFN clause applies to the dispute settlement mechanism. This has been done, for example, by the drafters of the UK Model BIT, who have provided in Article 3(3) that “for avoidance of doubt MFN treatment shall apply to certain specified provisions of the BIT including the dispute settlement provision.”

19. There exists also the opposite hypothesis where the parties expressly exclude the dispute settlement mechanism from the interplay of the MFN clause. A good example of

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<sup>12</sup> See my article criticizing *Maffezini*, written before the *Plama* decision, “ICSID Arbitration and the State’s Increasingly Remote Consent : Apropos the *Maffezini* Case”, in Steve Charnovitz, Debra Steger & Peter Van den Bossche (eds), *LAW IN THE SERVICE OF HUMAN DIGNITY. ESSAYS IN HONOUR OF FLORENTINO FELICIANO*, Cambridge, Cambridge U. Press, 2005, pp. 246-260.

this position is to be found in the Free Trade of the Americas (FTAA) draft of 21 November 2003, reacting to *Maffezini*, in which footnote 13 reads:

The Parties note the recent decision of the arbitral tribunal in the *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. ... By contrast, the Most-Favored-Nation Article of this Agreement is expressly limited in its scope to matters “with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.” The Parties share the understanding and intent that this clause does not encompass international dispute resolution mechanisms ...

20. The difficult question is raised when there is no express statement in the MFN clause relating to the dispute settlement mechanism. I will first give some indication on why I feel that the current analyses which exclude the possibility to use an MFN clause to change the dispute settlement mechanism, although they provide very valuable contextual elements and arrive at what I consider the sound solution, are not fully satisfactory in legal terms, before presenting a possible generally applicable reasoning for the application of MFN clauses to dispute settlement, subject of course to the necessary taking into account of the specific language of each clause.

### **Consideration of the analysis refusing to apply the MFN clause to dispute settlement procedures based on the argument of the specially negotiated clause**

21. On the operation of the most-favoured nation clause in relation to dispute settlement arrangements, the *Plama* tribunal, while strongly criticizing *Maffezini*, laid a great emphasis on the fact that such arrangements are “specifically negotiated”<sup>13</sup> by the parties to the treaty:

It is also not evident that when parties have agreed in a particular BIT on a specific dispute resolution mechanism, as is the case with the Bulgaria-Cyprus BIT (ad hoc arbitration), their agreement to most-favored-nation treatment means that they intended that, by operation of the MFN clause, their *specific agreement on such a dispute settlement mechanism* could be replaced by a totally different dispute resolution mechanism (ICSID arbitration). It is one thing to add to the treatment provided in one treaty more favorable treatment provided elsewhere. It is quite another thing to replace a procedure *specifically negotiated* by parties with an entirely different mechanism.<sup>14</sup>

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<sup>13</sup> The same idea was put forward in *Tecmed*, although not in relation with the effect of an MFN clause on dispute settlement mechanism, but in relation with the effect of an MFN clause on the application *ratione temporis* of the BIT. The tribunal considered that the MFN clause could not apply to a provision that goes “to the core of matters that must be deemed to be specifically negotiated by the Contracting Parties.”, *Técnicas Medioambientales Tecmed, SA v. United Mexican States*, ICSID Case No.ARB(AF)/00/2, Award, 29 May 2003, § 69.

<sup>14</sup> *Plama, op. cit.* note 8, § 209. Emphasis added.

22. This line of reasoning has been more or less reiterated in the case of *Tza Yap Shum v. Republic of Peru*,<sup>15</sup> where the tribunal insisted on the specificity of the provisions concerning the dispute settlement mechanism as compared to the generality of the language of the MFN clause.

23. Although it is not to be doubted that States are very careful in accepting international arbitral mechanisms and certainly in negotiating their scope, I have difficulties being fully satisfied by the reasoning according to which dispute settlement clauses should be excluded only because they are “specifically negotiated”. As aptly underscored in an article on MFN clauses, “(t)hese statements, in a somewhat absurd manner, imply that dispute resolution provisions are more specifically negotiated than other treaty provisions. It is, however, presumed that, when entering into a treaty, the State parties intend to write what they write. There is no difference in nature, in terms of drafting, between the fair and equitable standard, the prohibition of expropriations without compensation, the prohibition of discriminatory or arbitrary conduct, or dispute resolution provisions.”<sup>16</sup>

24. I share this analysis and therefore cannot consider that the non applicability of the MFN clause to dispute settlement mechanisms can be solely justified by the argument that it has been specially negotiated – although this reasoning rightly insists on the importance of the dispute settlement mechanisms by which a State restricts its sovereignty in favor of foreign investors.

**Consideration of the analysis refusing to apply the MFN clause to dispute settlement procedures on the basis of the distinction between substantive matters and procedural matters**

25. According to this approach, the substantial rights would be the rights that grant a certain treatment either to the foreign investor or/and to the foreign investment<sup>17</sup>, while access to an international arbitration mechanism would be a different – procedural or jurisdictional – issue.

26. An example of such an analysis distinguishing between substantial and procedural rights and stating that the MFN clause concerns only the substantive rights can be found in *Telenor Mobile*:

In the absence of language or context to suggest the contrary, the ordinary meaning of ‘investments shall be accorded treatment no less favourable than that accorded to investments made by investors of any third State’ is that the investor’s *substantive rights* in respect of the investments are to be treated no less favourably than under a BIT between the host State and a third State, and there is

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<sup>15</sup> *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction, 19 June 2009 (Spanish), § 216 and § 220.

<sup>16</sup> Yas Banifatemi, The Emerging Jurisprudence on the Most-Favoured-Nation Treatment in Investment Arbitration, in Andrea Björklund, Ian Laird & Sergey Ripinsky (eds.), INVESTMENT TREATY LAW: CURRENT ISSUES III, London, BIICL, 2009, p. 269.

<sup>17</sup> Depending on the wording of the MFN clause.

no warrant for construing the above phrase as importing *procedural rights* as well.<sup>18</sup>

27. I think it cannot be contested that until the decision in *Maffezini*, “the ordinary meaning to be given” – to use the terms of Article 31 of the Vienna Convention on the Law of Treaties – to the term “treatment” concerned the protection of substantial rights, and did not encompass any access to specific procedures of settlement of disputes concerning these rights, which are always an exception in international law.

28. There are many elements that can be adduced in support of this approach, which has been adopted by some ICSID tribunals and which has some strong advocates among the legal doctrine.<sup>19</sup> The basic idea here is that substantive questions and procedural questions are of a different legal nature, which means that the *ejusdem generis* principle prevents the two to be equated and the MFN clause referring to treatment to be applied to dispute settlement mechanisms.

29. I agree with this approach, but I am not convinced that, beyond this statement, a strong legal justification for such a dichotomy has so far been presented. In other words, although I think indeed that MFN clauses should not apply to dispute settlement mechanisms, I do not consider that this is completely satisfactorily explained by merely distinguishing substantive aspects and procedural/jurisdictional aspects without more. Or, to be more precise, I consider that, while this distinction should be retained as it has a strong explanatory potential, the reason at the root of this distinction has not so far been totally elucidated.

30. In search for such an explanation, one could consider here the famous Hart’s distinction between primary rules (substantive rules) and secondary rules (rules dealing with the violation of the primary rules, including rules for the settlement of disputes on this issue).<sup>20</sup> However, there is no strong authority for such an academic distinction, as has been stated, rightly in my view, in *Renta 4*:

It may be that some international lawyers reflexively adopt the dichotomy of primary/secondary obligations made familiar by the International Law

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<sup>18</sup> *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006, § 92. Emphasis in the original.

<sup>19</sup> One of them, Zachary Douglas, has recently presented an impressive *plaidoyer* in favor of this distinction and has adduced several strong arguments to support it: the severability of the arbitration clause in private international law, which is based on the idea that this clause is of a different legal quality than the other obligations in the contract; the fact that the substantive obligations are addressed to the two States Parties to the BIT while the arbitration mechanism is addressed to the investor and the arbitral tribunal; the fact that any international tribunal can only be seized on the basis of the arbitration clause found in the basic treaty and that incorporating another arbitration clause through the MFN clause modifies the arbitration agreement on which the tribunal’s jurisdiction rests after the commencement of the proceedings. *Op. cit.* note 6. It is also worth adding a mention of the EU 1990 Rome Convention (now Rome II) which distinguishes in international law, for the purpose of EU conflict rules, between civil law contracts and civil procedural law contracts such as (expressly) arbitration agreements, which is a supplementary indication of their different legal nature.

<sup>20</sup> Herbert HART, *The Concept of Law*, Oxford, Clarendon Press, 1961, p. 77.

Commission. This might explain the temptation to consider “treatment” a matter of primary or substantive rules and thus distinct from “secondary” rules – such as remedies – in the event of a breach.

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There is no authority for the proposition that MFN is limited to “primary” rules. The established proper criterion is rather *ejusdem generis*.<sup>21</sup>

31. I am in agreement with this analysis. This being said, it must be admitted that rights and means of protecting rights are two different “legal animals”. For example, while there is no possibility to make a reservation to the substantive obligations accepted by States in the Genocide Convention, it is possible to make a reservation to the jurisdiction of the ICJ provided for in Article IX of the Convention to decide on the responsibility of States for the violation of the substantive rules, which demonstrates a clear distinction between substantives rules and jurisdictional rules. Also, everybody is familiar with the severability of the arbitration clause in a contract, which also points to a different legal nature of the substantive obligations undertaken in a contract and the jurisdictional means to have these obligations enforced.<sup>22</sup> Not to mention the fact that in numerous treaties on investment law, the chapter related to treatment does not include developments on the dispute settlement mechanisms, which are dealt with in a distinct chapter.

32. All this is certainly true, but I have to admit that it goes against a strong common perception that, in investment law, the availability of arbitration is probably the most important part of the “treatment” the foreign investor is looking for. In other words, it is difficult to contest that for investors and hence for the States of their nationality when they negotiate BITs, direct access to international arbitration for the settlement of investment disputes in lieu of the mechanism of diplomatic protection is a central feature of the international treatment afforded to-day by the BITs.

33. This has been recognized with slightly different justifications in several decisions: the access to arbitration was considered either as a jurisdictional protection “inextricably related” to substantive treatment,<sup>23</sup> or even considered “part of the treatment of foreign investors and investments”<sup>24</sup> or “an integral part of the investment protection regime”<sup>25</sup>, or even more, considered in itself “a substantive protection.”<sup>26</sup>

<sup>21</sup> *Renta 4 S.V.S.A et al. v. Russian Federation*, SCC No. 24/2007, Award on Preliminary Objections, 20 March 2009, §§ 99-100.

<sup>22</sup> This comparison was hinted at in *Plama*, *op. cit.* note 8, § 212: “This matter can also be viewed as forming part of the nowadays generally accepted principle of the separability (autonomy) of the arbitration clause. Dispute resolution provisions constitute an agreement on their own ...”

<sup>23</sup> In *Maffezini*, the tribunal stated that “there are good reasons to conclude that today dispute settlement arrangements are *inextricably related* to the protection of foreign investors”, *op. cit.* note 4, § 54. See also § 55: “... dispute settlement arrangements ... are also *closely linked* to the material aspects of the treatment accorded.” Emphasis added.

<sup>24</sup> The *Siemens* tribunal, in which Charles Brower, one of the members composing the majority of this Tribunal on the issue of the MFN clause, was sitting, stated that investment treaties have “as a distinctive feature special dispute settlement mechanisms not normally open to investors. Access to these mechanisms is *part of the protection* offered under the Treaty. It is *part of the treatment* of foreign investors and investments ...”, *Siemens AG v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, § 102. Emphasis added.

34. The decisions favoring extension of jurisdictional clauses by an MFN clause, based on an assimilation of substantive and procedural rights, have more often than not relied on *Ambatielos*. It is my contention that this is not a relevant reference,<sup>27</sup> as it has to be stressed that there is an usually overlooked aspect of the often cited excerpt of *Ambatielos II*: it is the fact that the MFN clause was not used to change the conditions of access to a procedure, but was used to grant the nationals of Greece the substantive protection of an administration of justice “in accordance with ‘justice’, ‘right’ and ‘equity’”, as aptly underscored by the tribunals in *Salini v. Jordan*<sup>28</sup> and in *Plama*.<sup>29</sup> Thus, the assimilation made by *Maffezini* and its followers cannot rely on *Ambatielos*, which has been completely misinterpreted.

35. If some of the premises used by international investment tribunals as a basis for their decision on the consequences of an MFN clause were to be accepted – *i.e.* the fact that dispute settlement is an integral part of treatment and the fact that any treatment not referred to in the basic treaty can be imported – then there is no logical bar to the importation of an ICSID clause into a treaty that does not provide at all for international arbitration. I am quite sure that few arbitrators, even the more favorable to the expansion of dispute settlement through the MFN clause, would welcome such a result.

36. This being said, although treatment and settlement of disputes cannot be strictly equated, I consider that it is not absurd to accept that international arbitration, on which it is well known that foreign investors rely heavily for their protection, is considered to-day by those foreign investors, *on a subjective plane*, as a significant and important aspect of the treatment their investments receive from a host State. In this sense, *i.e.* in the sense that would be given for example by an ordinary business person or a diplomat, I can subscribe to the Tribunal’s remark in § 99 of the Award, where it is stated that “(t)he Arbitral Tribunal is of the opinion that the term “treatment” is in itself wide enough to be applicable also to procedural matters such as dispute settlement.”

37. The question then is how can this subjective perception be reconciled with legal analysis? Can dispute settlement be considered as an integral part of the treatment granted to an investor, and can at the same time substantive treatment and settlement of disputes be considered as being of a different kind and therefore not capable of being

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<sup>25</sup> *Suez v. The Argentine Republic*, *op. cit.* note 2, § 57: “From the point of view of the promotion and protection of investments, the stated purposes of the Argentina-Spain BIT, dispute settlement is as important as other matters governed by the BIT and is *an integral part of the investment protection regime*.” Emphasis added.

<sup>26</sup> *Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005, § 31: “The Tribunal holds that provision for international investor-state arbitration in bilateral investment treaties is a *significant substantive incentive and protection* for foreign investors.” Emphasis added.

<sup>27</sup> The same analysis is performed by Zachary Douglas when he states that “(a)n error committed by the tribunal in *Maffezini*, and in several subsequent awards that have followed it, is the finding that the Commission of Arbitration’s award in the *Ambatielos Case* supports the application of the MFN clause to the jurisdictional provisions of a third treaty”, *op. cit.* note 6, p. 6.

<sup>28</sup> *Salini*, *op. cit.* note 7, § 112.

<sup>29</sup> *Plama*, *op. cit.* note 8, § 215.

assimilated by application of the *ejusdem generis* principle? I will try to answer this question, in showing that, in my view, there are indeed two different types of treatment *in legal terms*, two different types of treatment which do not imply the fulfillment of the same conditions for their coming into existence. In other words, I will attempt to show that the substantive treatment and the jurisdictional treatment are to be treated differently under the *ejusdem generis* principle, precisely because the qualifying conditions in order to benefit from each of this type of treatment are not the same. I came to this conclusion while trying to understand why substantial treatment and jurisdictional treatment should not be treated as being of the same nature.

38. In other words, I subscribe to the distinction substantive treatment/jurisdictional treatment, but for reasons on which I will try to elaborate later in this opinion.

**Consideration of the analysis based on the distinction between an MFN clause referring to the protection of investments and one to the protection of investors.**

39. Moreover, the distinction between substantive and procedural rights is not always self evident and has been conducive to subtle but strange ramifications, like in the case of *RosInvestCo*.<sup>30</sup> In that case, the MFN clause included in the relevant paragraphs of Article 3 of the UK/USSR BIT provided:

Treatment of Investments

(1) Neither Contracting Party shall in its territory subject *investments* or returns of investors of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of investors of any third State.

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

40. Faced with these parallel statements, it can come as a surprise – at least to me – that the first paragraph has been considered as limited to substantive rights while the second one was deemed to encompass also procedural rights, although the access to international arbitration was not mentioned in the long list of the different aspects of the treatment of investors benefiting from the MFN clause.

41. Starting with the analysis of paragraph (1) of Article 3, the tribunal asked the following question: “Can the term *treatment* include the protection by an arbitration clause?” (Emphasis in the original). The answer is in the negative as far as the treatment of investment is concerned: according to the tribunal, “while the protection by an arbitration clause covering expropriation is a highly relevant aspect of that ‘treatment’ ... it does not directly affect the ‘investment’.”<sup>31</sup> The solution is the reverse as far as the

<sup>30</sup> *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. Arb. V079/2005, Award on Jurisdiction, October 2007.

<sup>31</sup> *Id.*, § 128.

treatment of investors is concerned, although it should be stressed again that in the enumeration of the aspects of the investor's situation that are expressly mentioned in the MFN clause, the dispute settlement mechanism is absent.<sup>32</sup> In spite of this, the tribunal went on to consider that "it is difficult to doubt that an expropriation interferes with the investor's use and enjoyment of the investment, and that the submission to arbitration forms a highly relevant part of the corresponding protection for the investor by granting him, in case of interference with his 'use' and 'enjoyment', procedural options of obvious and great significance compared to the sole option of challenging such interference before the domestic courts of the host state."<sup>33</sup> On that basis, the tribunal has indeed considered that it had jurisdiction beyond that granted by Article 8 of the UK/USSR BIT.

42. If this decision is read literally, it means that when the MFN clause refers only to investments and not to investors, it should not apply to the dispute settlement mechanism as this is a jurisdictional right that can only be enjoyed by an investor and not by an investment. Applied to our case, in which the Argentina/Italy BIT grants MFN treatment to investments, this analysis would thus result in a refusal to incorporate any aspect of the dispute settlement provision of the Argentina/US BIT into the basic treaty and would render our Tribunal incompetent to hear the case.

43. It seems however to me that this is an artificial distinction, which would end up in different solutions for very similar MFN clauses, and on this specific point, I am more convinced by the conclusion adopted in *Siemens* to the effect that "for purpose of applying the MFN clause, there is no special significance to the differential use of the term investors or investments in the Treaty," this resulting from the fact that "treatment of the investment includes treatment of the investors"<sup>34</sup> as well as in *Plama*, where the same position was followed, the tribunal stating that it "does not attach a particular significance to the use of the different terms,"<sup>35</sup> and in *Renta 4*, where the tribunal declared that "(w)hether MFN treatment is stated in the relevant BIT to relate to investors rather than investments is in principle of no moment."<sup>36</sup>

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<sup>32</sup> It can be mentioned that such an enumeration was precisely considered by the Parties to the FTAA, as mentioned earlier, as not including the dispute settlement mechanism.

<sup>33</sup> *RosInvest*, *op. cit.* note 30, § 130.

<sup>34</sup> *Siemens*, *op. cit.* note 24, § 92.

<sup>35</sup> *Plama*, *op. cit.* note 8, § 190.

<sup>36</sup> *Renta 4*, *op. cit.* note 21, § 101.

**The proposed analysis of the MFN clause based on a distinction between qualifying conditions for access to rights and rights, which justifies legally the distinction between substantial treatment and jurisdictional treatment**

44. The main issue to be dealt with here concerns the interpretation of the Argentina/Italy BIT's MFN clause, which does not expressly refer to dispute settlement procedures. According to the Claimant, "(o)n the basis of the MFN clause, Impregilo has invoked the dispute-resolution clause in the US-Argentina BIT, which does not foresee the procedure of waiting for 18 months for local courts to decide on the dispute before the investor may resort to international arbitration. The US-Argentina BIT only provides a six-month period of consultations to try amicably to resolve the dispute. The six-month period provided by the dispute-resolution clause in the US-Argentina BIT constitutes a more-favorable treatment, since it would allow Impregilo to bypass a formalistic, futile and excessively onerous step provided by the BIT."<sup>37</sup> And the Claimant then relies on the broad wording of the clause, in order to have it apply to the dispute settlement procedure: "With respect to the first paragraph, the "all other matters regulated by the Agreement" wording in the BIT's MFN clause is notably broad. The ordinary meaning of the terms 'all other matters regulated by this Agreement' is that *all* of the matters that are dealt with in the BIT are included, and there is no limitation in the text to this broad scope."<sup>38</sup> The question thus is how to interpret this reference by the MFN clause to "all matters"?

45. It is my submission that, even if access to arbitration can broadly speaking be considered part of the treatment, as already explained, the investor does not have access to the *two aspects of the overall treatment* to which it is entitled under a BIT under the same conditions, and that this is the ultimate justification for not assimilating the two. This is because of a profound difference between the national legal orders and the international legal order. On the national level, when there exists a substantive right, there is always automatically a means to protect such a right through the jurisdictional system. In other words, on the national level, jurisdictional treatment is inherent in substantive treatment. In contrast, on the international level, most rights cannot be enforced through a jurisdictional process, it is only when, exceptionally, the State has given its consent – consent to other States for accepting the jurisdiction of the ICJ or consent to foreign investors for accepting international arbitration – that such a "jurisdictional treatment" complements the substantive treatment granted by the international rules. Contrary to the situation existing in the national legal orders, the jurisdictional treatment is never inherent in the substantive treatment on the international level. In other words, there is a substantial treatment and there is a jurisdictional treatment which are quite distinct and must be distinguished, and the *ejusdem generis* principle requires that the two are not assimilated: it is not because *per se* one treatment is substantial and the other procedural that they should be treated differently, (some procedural requirements or procedural rights in the basic treaty might well be treated in the same manner as the substantive rules) it is because the jurisdictional treatment requires a supplementary condition in order to be granted to the investor, as will now be explained.

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<sup>37</sup> Claimant's Counter Memorial on Jurisdiction, § 25.

<sup>38</sup> *Id.*, § 30. Emphasis in the original.

*- The basic distinction*

46. It is well known that many tribunals have relied on a broad wording referring to “all matters” in order to decide that the MFN clause should be applied to dispute settlement procedures, although the same reasoning was also made in the face of less broad expressions. In contrast, other tribunals have expressed doubts as to the implications that can be drawn from this broad reference, like for example the tribunal in *Berschader*, when it stated that “(w)ith respect to the construction of expressions such as “all matters” or “all rights” covered by a treaty, it should be noted that ... not even seemingly clear language like this can be considered to have an unambiguous meaning in the context of an MFN clause.”<sup>39</sup>

47. I share this comment and will show beneath that in many instances the MFN clause has indeed not been applied to all matters regulated by the treaty – and rightly so. This is because, in my view, there are two basically different types of provisions in BITs that need to be distinguished in this broad category of “all matters”, as will now be discussed. There are **rights** and there are **fundamental conditions for access to the rights**. In other words, there are rules conferring substantive and jurisdictional rights to the foreign investors for their investments, and there are rules dealing with the access of the foreign investor to the substantive and jurisdictional rights granted by the basic treaty. I contend that **an MFN clause can only concern the rights that an investor can enjoy, it cannot modify the fundamental conditions for the enjoyment of such rights, in other words, the insuperable conditions of access to the rights granted in the BIT.**

48. This distinction has been clearly expressed, more than 50 years ago, by Ustor, who was the Special Rapporteur of the International Law Commission on the MFN clause<sup>40</sup>, who stated the following:

The beneficiary State can only claim rights which belong to the subject-matter of the clause, which are within the time-limits and **other conditions and restrictions set by the agreement**, and which are in respect of persons or things specified in the clause or implied from its subject-matter.

49. This statement should not be overlooked and is in fact of crucial importance, being capable of fully explaining the way an MFN clause has to be implemented.

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<sup>39</sup> *Berschader v. The Russian Federation*, SCC Case No. 080/2004, Award, 21 April 2006, § 184. It can be noted that this jurisdictional award, as well as the award on the merits, is being challenged before the courts in Sweden, as the place of arbitration.

<sup>40</sup> Endre Ustor, Special Rapporteur of the ILC, Yearbook of the International Law Commission, 1969, Vol. II, p. 170, Document A/CN.4/ 213, April 18, 1969, Second Report on the Most-Favoured-Nation Clause, Yearbook of the International Law Commission, 1970, Vol. II, p. 204, March 9 and May 18, 1970, Document A.CN.4/228 and Add. 1. Emphasis added. See also for the same formulation, the word Most-Favoured-Nation Clause, Endre Ustor, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW*, North-Holland and al, Max Plank Institute, vol. 8, p. 415. This citation has been quoted with approval by the decision in *Telefonica S.A. v. Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, 25 May 2006, decided by a tribunal of which Charles Brower was a member, in § 99, although the decision did not draw, in my view, the necessary conclusions from it.

50. As an MFN clause cannot change the conditions of access to the rights, this has far reaching consequences on a necessary differential approach to the substantive rights and the jurisdictional rights, whose qualifying conditions are distinct, although partly overlapping.

51. In order to benefit from the substantial rights granted in a BIT, certain conditions being “matters regulated by the BIT” have to be fulfilled: these are the well known conditions *ratione personae*, *ratione materiae*, *ratione temporis*.

52. In order to benefit from the jurisdictional protection granted by an arbitration mechanism, these same conditions have to be fulfilled, but in addition there is a condition *ratione voluntatis*: the State must have given its consent to such a procedure which allows a foreign investor to sue the State directly on the international level. This consent is expressed broadly or restrictively, with conditions of exhaustion of local remedies or waiting periods, as allowing all claims or only certain claims: in other words, the consent is given under certain conditions. Just as the conditions of nationality for example must be fulfilled before an investor can have access to all the rights granted by the BIT, the conditions shaping the State’s consent to arbitration must be fulfilled before a right to arbitration can arise.

53. It has to be clarified here that the consent to arbitration is a different consent than the one given by the State to another State when it ratifies the treaty, and that the necessity of this supplementary consent is explained by the structure of international law. It is indeed not because a State has given its *consent to another State* to grant some substantive rights to the investors of that State that it automatically flows from such a consent that the State also gives its *consent to the foreign investors* to allow the latter to sue the State directly in an international arbitration. For such a right to come into existence, a specific consent has to be given inside the treaty, and the State can shape this consent as it sees fit, in providing for the basic conditions under which such a consent is given, in other words, the conditions under which such an “offer to arbitrate” is made to the foreign investors. It is of utmost importance not to forget that *no participant* in the international community, be it a State, an international organization, a physical or a legal person, has an inherent right of access to a jurisdictional recourse. Just as a State cannot sue another State, unless there is a specific consent to that effect, for example through a declaration recognizing as compulsory the jurisdiction of the International Court of Justice, in the same manner, in the framework of BITs, investors are not capable of intervening on the international level against States for the recognition of their rights, unless States grant them such a right under conditions that they determine. An arbitral tribunal – just as the ICJ or any international court – does not have a general jurisdiction, it only has a “*compétence d’attribution*”, which has to respect the limits provided for by the States.

54. This can be illustrated by different judgments of the ICJ<sup>41</sup>. In particular, it is interesting to mention the case brought by the RDC against Rwanda and decided a few years ago. In that case, Rwanda has been arguing the following:

With respect to its reservation to Article IX of the Genocide Convention, Rwanda first observes that, although, as the DRC contends, the norms codified in the substantive provisions of the Genocide Convention have the status of *jus cogens* and create rights and obligations *erga omnes*, that does not in itself suffice to ‘confer jurisdiction on the Court with respect to a dispute concerning the application of those rights and obligations’ ...

Secondly, Rwanda argues that its reservation to Article IX is not incompatible with the object and purpose of the Genocide Convention, inasmuch as the reservation relates not ‘to the substantive obligations of the parties to the Convention but to a procedural provision’.<sup>42</sup>

55. The Court followed the argumentation of Rwanda, in distinguishing without ambiguity even the most compelling substantive rules on the one hand and access to the Court on the other hand:

The Court observes, however, as it has already had occasion to emphasize, that “the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things” (*East Timor (Portugal v. Australia)*, *Judgment, I.C.J. Reports 1995*, p. 102, para. 29), and that the mere fact that rights and obligations *erga omnes* may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute. The same applies to the relationship between peremptory norms of general international law (*jus cogens*) and the establishment of the Court’s jurisdiction: the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court’s Statute that jurisdiction is always based on the consent of the parties.<sup>43</sup>

56. It does appear that on the international level no automatic assimilation can be made between substantive rights and jurisdictional means to enforce them, the qualifying conditions for access to the substantive rights and the qualifying conditions for access to the jurisdictional means being different. This distinction between the qualifying

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<sup>41</sup> *Case Concerning East Timor* (Portugal v. Australia), *ICJ Reports 1995*, Judgment of 30 June 1995, § 29. In this case, the ICJ clearly stated that even a substantive norm having the character of *jus cogens* does not imply that there exists a right to have this norm enforced in an international jurisdiction: “... the Court considers that the *erga omnes* character of a norm and the rule of consent are two different things.” See also *Case Concerning Armed Activities on the Territory of the Congo* (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), *Jurisdiction and Admissibility, Judgment, ICJ Reports 2006*, Judgment of 3 February 2006.

<sup>42</sup> *Op cit.* note 41, §§ 60-61.

<sup>43</sup> *Id.*, § 64. This was commented upon by Zachary Douglas in his article, *op. cit.* note 6, p. 7: “In other words, the status of the substantive obligation to desist from acts of genocide in the Genocide Convention has no impact upon the jurisdictional mandate of the Court in resolving disputes arising out of the Convention. Each treaty provision addresses different things. They are not *ejusdem generis*.”

conditions and the rights, in fact, explains the solutions that have been adopted in different cases involving MFN clauses, whether dealing with substantive or jurisdictional matters.

***- The general explanatory potential of the distinction***

57. I will now show that there are many cases in which the conditions for access to a substantive right, although included in all the matters regulated by the BIT, have not been considered as being capable to be expanded by an MFN clause. In fact, I suggest that the mainly non-controversial decisions applying MFN clauses to substantive rights can indeed be explained by such an analytical framework, based on a distinction between the access to the right and the right itself. In other words, it is my submission that a reference in an MFN clause to all matters never means that it is indeed applicable to all matters, as the conditions of access to the rights granted by the BIT are not included in that expression.

58. It is not contested that all **the substantive rights** granted under an investment protection treaty can only be granted if the conditions *ratione personae*, *ratione materiae*, and *ratione temporis* provided for in the treaty are satisfied. These conditions are clearly matters regulated by the treaty, but it has never been suggested that they could be modified by the MFN clause.

59. This has been acknowledged by Yas Banifatemi, in an article on MFN clauses:<sup>44</sup>

Indeed, each treaty sets forth its own conditions and scope of application *ratione personae*, *ratione materiae* and *ratione temporis*. ... the requirements of an 'investment' made by an 'investor' within the meaning of the relevant investment treaty are **qualifying conditions** which, if not met, constitute **an obstacle to the applicability of the treaty** ...

60. This excerpt is interesting as it points to the distinction between the rights granted to the investors and the qualifying conditions to be met for being able to benefit from these rights. However, in my view, the mentioned conditions are not conditions that have to be met before the treaty can apply at all, as stated in this article. To be more accurate, it should be said that the conditions *ratione personae*, *ratione materiae* and *ratione temporis* are conditions that precisely result from the applicability of the treaty. They are conditions regulated by the BIT, which sets forth the pre-requisites for *the enjoyment of the rights under the treaty*, the conditions for the application of the treaty depending on the rules of general international law concerning the consent of the States. If for example, a condition *ratione materiae* regulated by the treaty is not fulfilled, the treaty indeed applies – were it only for the interpretation of the meaning of the condition *ratione materiae* stated in the treaty at stake – with the result that the concerned investor cannot benefit from the rights granted by the treaty. In other words, an MFN clause cannot be used to bypass the requirements for having access to the substantive rights granted by the treaty.

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<sup>44</sup> *Op. cit.* note 16, p. 250. Emphasis added.

61. The same is true for **the procedural/jurisdictional rights** concerning access to ICSID jurisdiction, which are also granted only to the investor when the same conditions *ratione personae*, *ratione materiae*, and *ratione temporis* plus a condition *ratione voluntatis* is fulfilled. If the conditions posed by the State for giving its consent to international arbitration in the basic treaty are not fulfilled, the investor cannot benefit from the jurisdictional right granted by the treaty.

62. These qualifying conditions are reflected in the Argentina/Italy BIT, which requires:

- first, a condition *ratione personae*: the dispute must oppose a Contracting State and a national of another Contracting State (this is stated in Article 8 (1) and Article 1);
- second, a condition *ratione materiae*: there must exist a dispute regarding an investment (this is stated in Article 8 (1) and Article 1);
- third, a condition *ratione voluntatis*, *i.e.* the Contracting State must present an “offer to arbitrate”, which can then be accepted at will by a foreign investor (this offer is found in Article 8 (3))
- fourth, a condition *ratione temporis*: the BIT must have been applicable at the relevant time (this is stated in Article 11 and Article 12).

63. All these conditions are conditions provided for by the BIT, entering as such in “all the matters” regulated by the BIT. As will be developed beneath, it has never been admitted that the conditions *ratione personae*, *ratione materiae*, and *ratione temporis* could be modified by reliance on an MFN clause. It is my contention that it would not be logical to admit that these conditions could not be modified by the MFN clause – which is not contested – while the condition *ratione voluntatis*, for an unknown reason, could be so modified by the MFN clause.

***- The explanatory potential of the distinction as far as substantive rights are concerned***

*- The definition of “investor” is certainly included in “all matters” regulated by the BIT, but cannot be modified by the use of an MFN clause, as this definition conditions the access to BIT protection.*

64. It is not contested that an MFN clause cannot change the condition *ratione personae*, which is a condition for the enjoyment of all treaty rights, whether substantive or jurisdictional. For example, if the basic treaty applies to national companies only if there is a 70% foreign control, an MFN clause cannot be used to introduce a provision according to which a national company can be protected as soon as there is a 20% foreign ownership, if such a clause exists in another treaty. In the same manner, if the basic treaty excludes international arbitration for dual nationals, an MFN clause could not be used to include dual nationals. More generally, it can be said that an MFN clause cannot enlarge the scope of the basic treaty to grant the rights of the treaty to investors that are not protected under the basic treaty.

65. In the Argentina/Italy BIT, the term “investor is defined in Article 1 (2) in the following manner:

“Investor” means any individual or legal entity of a Contracting Party who has made, makes, or has undertaken to make investments in the territory of the other Contracting Party.

— “individual” means, in respect of each one of the Contracting Parties, an individual who is a citizen of that State in accordance with its laws.

— “legal entity” means, in respect of each one of the Contracting Parties, any entity established and recognized under the laws of a Contracting Party, having its seat in the territory of that Party, such as a public entity engaged in economic activities, partnerships or corporations, foundations and associations, whether with limited or unlimited liability.

66. In conclusion, an MFN clause could not be utilized, for example, to change that definition – although it is clearly a matter regulated by the treaty – and grant the rights under the treaty to companies that are established under the law of the State but do not have their seat in its territory.

*- The definition of “investment” is certainly included in “all matters” regulated by the BIT, but cannot be modified by the use of an MFN clause, as this definition conditions the access to BIT protection.*

67. Also, it is not contested that an MFN clause cannot change the condition *ratione materiae*, which is a condition for the enjoyment of all treaty rights, whether substantive or jurisdictional. For example, if the basic treaty applies only to investment in agriculture, an MFN clause cannot be used to introduce a provision according to which the treaty should also apply to investments in industry.<sup>45</sup>

68. This has been stated in an UNCITRAL case,<sup>46</sup> *Société Générale v. Dominican Republic*, in the following terms:

“The Claimant has also made the argument that the most-favored-nation (“MFN”) clause contained in Article 4 of the Treaty entitles it to treatment not less favourable than that accorded to investors of other nations that have entered into treaties with the Dominican Republic. The Claimant believes in particular that the definition of investment included in the General American Free Trade Agreement-Dominican Republic with the United States, which includes among other features the “expectation of gain or profit”, extends to Société Générale as the

<sup>45</sup> This was stated for example in the Commentary on Article 9 of the Draft Articles on Most-Favoured-Nation Clauses with commentaries, 1978, *ILC Report* Vol. II, Part 2, A/CN.4/SER.A/1978/Add.1 (Part 2), p. 30: “The essence of the rule is that the beneficiary of a most-favoured-nation clause cannot claim from the granting State advantages of a kind other than that stipulated in the clause. For instance, if the most-favoured nation clause promises most-favoured-nation treatment solely for fish, such treatment cannot be claimed under the same clause for meat.”

<sup>46</sup> *Société Générale v. Dominican Republic*, UNCITRAL, LCIA Case No. UN 7927, Preliminary Objections to Jurisdiction, 19 September 2008.

beneficiary of the clause under the Treaty here concerned. The Tribunal does not believe this to be the case.

Each Treaty defines what it considers a protected investment and who is entitled to that protection, and definitions can change from treaty to treaty. In this situation, resort to the specific text of the MFN Clause is unnecessary because it applies only to the treatment accorded to such defined investment, but not to the definition of “investment” itself.”<sup>47</sup>

69. In sum, an MFN clause cannot be utilized in order to enlarge the scope of the basic treaty concerning the investments that can benefit from the rights granted by the treaty.

- *The definition of the temporal application of the BIT is certainly included in “all matters” regulated by the BIT, but cannot be modified by the use of an MFN clause, as this definition conditions the access to the BIT protection.*

70. It is also more than evident that an MFN clause cannot change the condition *ratione temporis*, which is a condition for the enjoyment of all treaty rights, whether substantial or jurisdictional. If the basic treaty applies only to investments made after its entry into force, an MFN clause cannot be used to introduce a provision according to which investments made before the entry into force of the BIT should also be protected. This has been noted in an already quoted article on MFN clauses, where it is stated that “(a)nother situation where no difficulty arises in the application of the most-favoured nation clause is where the investor seeks to use the provision in order to bypass the requirements for the treaty’s application *ratione temporis*.”<sup>48</sup> And precisely, there is no difficulty here, as the application in time is a condition of existence of the rights under the treaty.

71. The necessity not to modify the condition *ratione temporis* for the existence of the treaty rights has been acknowledged for example in *Tecmed v. Mexico*: in that case, the Mexico-Spain BIT precisely provided that it was only applicable to investments made after its entry into force, and the tribunal refused to utilize the MFN clause relied on by the claimant in order to introduce a provision of the Mexico-Austria BIT according to which investments made before the entry into force of the BIT are also be protected:

... matters relating to the application over time of the Agreement, which involve more the time dimension of application of its substantive provisions rather than matters of procedure or jurisdiction, due to their significance and importance, go to the core of matters that must be deemed to be specifically negotiated by the Contracting Parties. These are determining factors for their acceptance of the Agreement, as they are directly linked to the identification of the substantive protection regime applicable to the foreign investor and, particularly, to the general (national or international) legal context within which such

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<sup>47</sup> *Id.*, §§ 40-41.

<sup>48</sup> Yas Banifatemi, *op. cit.* note 16, p. 248.

regime operates, as well as to *the access of foreign investor to the substantive provisions* of such regime. Their application cannot therefore be impaired by the principle contained in the most favored nation clause.<sup>49</sup> (Emphasis added)

72. The solution adopted is entirely coherent with the analysis presented here. I have however developed earlier why I do not think that the argument advanced by the tribunal – the argument that the MFN clause does apply to “the core of matters that must be deemed to be specifically negotiated by the Contracting Parties” – is a sufficiently explanatory analysis.<sup>50</sup>

73. In the Argentina/Italy BIT, the *ratione temporis* scope of the existence of the rights granted by the treaty are defined in Article 11 and 12:

#### ARTICLE 11

##### Investments made before the Effective Date of this Agreement

This Agreement shall also apply to investments made before the effective date of this Agreement by investors of one Contracting Party in the territory of the other Party and recorded by the latter as a foreign investment in accordance with its statutory provisions.

In any case, it shall not apply to disputes pending or settled before it came into force or to any claims pending or arising before such date.

#### ARTICLE 12

##### Effective Date

This Agreement shall enter into force on the date on which the Contracting Parties shall have notified each other that their respective constitutional requirements for the execution of this Agreement have been fulfilled.

74. These articles delimit the temporal scope of existence of the treaty’s rights, and as they embody the qualifying conditions for having access to such rights, they cannot be modified by an MFN clause. For example, the treaty could not apply to a pending dispute, if such a possibility would exist in another BIT entered into by Argentina.

75. In conclusion, an MFN clause cannot be utilized in order to enlarge the scope of the basic treaty concerning the existence *ratione temporis* of the rights granted by the treaty.

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<sup>49</sup> *Tecmed, op. cit.* note 13, § 69. Emphasis added.

<sup>50</sup> The same analysis applicable to the *ratione temporis* condition relating to investments applies of course to the *ratione temporis* condition relating to the coming into force of the treaty itself, although this is not a matter regulated by the treaty, but by general principles of international law. In *MCI v. Ecuador*, the tribunal refused to utilize the MFN clause to set aside the date of the entry into force of the Ecuador-US investment treaty in May 1997, and to import the earlier date of entry into force of the Ecuador-Argentina BIT which was the date of December 1, 1995, *MCI Power Group LC and New Turbine, Inc v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award of 31 July 2007, §§ 127-128.

76. The fact that the expression “all matters” does not cover really “all” matters, and clearly not the qualifying conditions of access to the substantive rights granted to the foreign investors, has been also acknowledged by the tribunal in *Berschader*, where it stated that “the expression ‘all matters covered by the present Treaty’ certainly cannot be understood literally.”<sup>51</sup>

77. As just presented, it is generally accepted that these conditions *ratione personae*, *ratione materiae* and *ratione temporis*, which undoubtedly are included in “all matters regulated” by the BIT and are conditioning the treatment to be granted to foreign investments under the basic treaty, cannot be modified by the use of an MFN clause. As stated in *Tecmed*, matters relating to “the access of foreign investor to the substantive provisions ... cannot ... be impaired by the principle contained in the most favored nation clause.”<sup>52</sup> I consider this approach eminently correct. The same holds true, in my view, for the conditions for the access of foreign investors to the jurisdictional provisions, which cannot either be by-passed by an MFN clause.

**- *The explanatory potential of the distinction as far as jurisdictional rights are concerned***

*- The conditions shaping the State consent to arbitration are certainly included in “all matters” regulated by the BIT, but cannot be modified by the use of an MFN clause, as they condition the access to the BIT arbitration mechanism*

78. Just as an MFN clause cannot change the conditions *ratione personae*, *ratione materiae*, and *ratione temporis*, as has just been demonstrated, it must be equally true that an MFN clause cannot change the condition *ratione voluntatis*, which is a qualifying condition for the enjoyment of the jurisdictional rights open for the protection of substantial rights.

79. In other words, before a provision relating to the dispute settlement mechanism can be imported into the basic treaty, the right to international arbitration – here ICSID arbitration – has to be capable of coming into existence for the foreign investor under the basic treaty, in other words the existence of this right is conditioned on the fulfillment of all the necessary conditions for such jurisdiction, the conditions *ratione personae*, *ratione materiae*, and *ratione temporis* as well as a supplementary condition relating to the scope of the State’s consent to such jurisdiction, the condition *ratione voluntatis*.

80. As long as the qualifying conditions expressed by the State in order to give its consent are not fulfilled, there is no consent, in other words no access of the foreign investor to the jurisdictional treatment granted by ICSID arbitration. An MFN clause cannot enlarge the scope of the basic treaty’s right to international arbitration, it cannot be used to grant access to international arbitration when this is not possible under the conditions provided for in the basic treaty.

<sup>51</sup> *Berschader*, *op. cit.* note 39, § 192. See also § 184.

<sup>52</sup> *Tecmed*, *op. cit.* note 13, § 69.

81. If the qualifying conditions of access to a right could be modified this would completely change the scope of the BIT. As explained in the Draft Articles on Most-Favoured-Nation Clauses of 1978:

The effect of the most-favoured-nation process is, by means of the provisions of one treaty, to attract those of another. Unless this process is strictly confined to cases where there is a substantial identity between the subject matter of the two sets of clauses concerned, the result in a number of cases may be to impose upon the granting State obligations it never contemplated. Thus the rule follows clearly from the general principles of treaty interpretation. States cannot be regarded as being bound beyond the obligations they have undertaken.<sup>53</sup>

*- Are all conditions shaping the State's consent to be treated in the same manner or is there a distinction to be made between conditions of admissibility and conditions of jurisdiction?*

82. A delicate question needs however to be raised here, *i.e.* whether a distinction should be made between the different conditions shaping the State's consent to international arbitration. This raises the issue of a possible distinction between conditions of admissibility and conditions of jurisdiction.

83. There appears to be no legal reason to treat differently these two types of requirements that condition the State's consent.<sup>54</sup> On this issue, I am in agreement with my co-arbitrator Charles Brower, who explained in his Separate opinion in *Renta 4*, that “... there is no reason to differentiate between admissibility-related aspects of accessing investor-State arbitration and matters of jurisdiction ...”<sup>55</sup>

84. This position has already been adopted by several ICSID tribunals, in the general context of the exercise of their *compétence-compétence*.<sup>56</sup> For example in *Enron*, the tribunal declared:

<sup>53</sup> Draft Articles on Most-Favoured-Nation Clauses with commentaries, 1978, *ILC Report* Vol. II, Part 2, A/CN.4/SER.A/1978/Add.1 (Part 2), p. 30.

<sup>54</sup> This has been confirmed less than a month ago by the ICJ in the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation), Judgment of 1 April 2011. The Court had to interpret Article 22 of the the International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”) of 21 December 1965, which reads: “Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.” The Court considered that the terms of Article 22 “establish preconditions before the seisin of the Court.” § 141.

<sup>55</sup> Separate opinion in *Renta 4*, *op. cit.* note 21, § 10.

<sup>56</sup> As well as by legal doctrine. See for example, Andrew Newcombe & Lluís Paradell, *LAW AND PRACTICE OF INVESTMENT TREATIES*, The Hague, Kluwer, 2009, pp. 220-221: “IIA tribunals have consistently applied MFN clauses to allow investors to avoid requirements that disputes be submitted to local courts before resorting to arbitration. On the other hand, to date, all tribunals except one have rejected the use of an MFN clause in a basic treaty to confer greater subject matter jurisdiction provided for in a third-party treaty.” ... It might be suggested that the conflicting approaches of tribunals to the application of MFN clauses can be

The Tribunal wishes to note in this matter, however, that the conclusion reached is not because the six-month negotiation period could be a procedural and not a jurisdictional requirement as has been argued by the Claimants and affirmed by other tribunals. Such requirement is in the view of the Tribunal *very much a jurisdictional one*. A failure to comply with that requirement would result in a determination of lack of jurisdiction.<sup>57</sup>

85. In the same manner, the tribunal in *Burlington* was very clear in its analysis of a 6 months negotiation requirement, which was considered as a jurisdictional requirement:

... by imposing upon investors an obligation to voice their disagreement at least six months prior to the submission of an investment dispute to arbitration, the Treaty effectively accords host States the right to be informed about the dispute at least six months before it is submitted to arbitration. The purpose of this right is to grant the host State an *opportunity* to redress the problem before the investor submits the dispute to arbitration. In this case, Claimant has deprived the host State of that opportunity. That suffices to defeat jurisdiction.<sup>58</sup>

86. The same approach has been followed in cases implying the consequences of an MFN clause, like for example in *Telefónica*:

In this respect, the Tribunal notes that this requirement, or precondition, is best qualified as a temporary bar to the initiation of arbitration. The objection is therefore technically an exception of inadmissibility raised by Argentina against the Claimant for not having complied with the requirement. The Tribunal notes that the inadmissibility of the claim would result in the Tribunal's temporary *lack of jurisdiction* ...<sup>59</sup>

87. And the same analysis again was performed in *Wintershall*:

And the eighteen-month requirement of a proceeding before local courts (stipulated in Article 10(2)) is an essential preliminary step to the

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explained by the distinction between questions of admissibility and jurisdiction ... Although this argument is appealing on its surface, there would not appear to be a principled basis upon which to decide that an MFN clause applies to issues of admissibility but not jurisdiction. Further, from a practical standpoint, the distinction between admissibility and jurisdiction is very difficult to apply. Indeed, the *Maffezini* tribunal stated that failure to comply with the local remedies requirement, if applicable, would mean that the tribunal lacked jurisdiction.”, p. 216.

<sup>57</sup> *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, § 88. Emphasis added.

<sup>58</sup> *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, § 315. Emphasis in the original. See also, *Murphy v. Ecuador*, where the tribunal considered that the waiting period was a jurisdictional requirement, and that the non respect of such waiting period had as its consequence the lack of jurisdiction of the tribunal, *Murphy Exploration and Production Company International c. Ecuador*, ICSID case No. ARB/08/4, Decision on Jurisdiction, 15 December 2010, §§ 140-157.

<sup>59</sup> *Telefónica, op. cit.* note 40, § 93. Emphasis added. Footnote omitted.

institution of ICSID Arbitration, under the Argentina-Germany BIT; it constitutes an integral part of the “standing offer” (“consent”) of the Host State, which must be accepted on the same terms by every individual investor who seeks recourse (ultimately) to ICSID arbitration for resolving its dispute with the Host State under the concerned BIT.

...

The requirement of recourse to local courts for an eighteen-month period in Article 10(2) is *fundamentally a jurisdictional clause*, not a mere procedural provision.<sup>60</sup>

88. If therefore all conditions shaping the State’s consent are considered jurisdictional prerequisites to the existence of a right to international arbitration, it follows that an MFN clause will never be able to change the parameters of such consent to a mechanism of international arbitration. All the conditions – whether a waiting period or a condition of exhaustion of local remedies, whether a restriction of consent to a certain type of arbitration, whether a restriction on the scope of the arbitration – are jurisdictional conditions to the State’s consent to arbitration, that cannot be displaced by an MFN clause.

*- The fact that the MFN clause does not allow to change the conditions for the State’s consent given in the basic treaty is in coherence with the importance of the consent of the State in international arbitration*

89. The conclusion reached is reinforced by some more general considerations relating to the States’ consent to international arbitration. The inapplicability of MFN clauses to dispute settlement mechanisms is the more so warranted that “consent is the cornerstone of ICSID arbitration.” Indeed, the analysis based on a distinction between the granted rights and the qualifying conditions for access to these rights, which leads to the unavoidable conclusion that the MFN clause cannot modify the conditions put by a State for granting to foreign investors access to ICSID arbitration, is considerably reinforced, as far as the condition *ratione voluntatis* is concerned, by the importance of the State’s consent to international arbitration.

90. It should be kept in mind that if an MFN clause is used to import a dispute settlement procedure from a third party treaty into the basic treaty, it appears as a means of establishing jurisdiction for an arbitral tribunal where jurisdiction could not otherwise be established under the basic treaty.

91. This importance of the State’s consent has been underscored in numerous decisions of international jurisdictions, among which the PCIJ and the ICJ.<sup>61</sup> It is worth

<sup>60</sup> *Wintershall, op. cit.* note 9, § 160 and § 172. Emphasis added.

<sup>61</sup> *Status of Eastern Carelia* case, (1923), PCIJ, Series B, No. 5, p. 27; *Ambatielos Case* (Greece v. United Kingdom), Merits: Obligation to Arbitrate, Judgment of May 19, 1953, *ICJ Reports*, 1953; *Ambatielos I*”, Dissenting Opinion by Sir Arnold McNair, President, and Judges Basdevant, Klaestad and Read, *ICJ Reports*, 1953, p. 33, where reference is made to the *Phosphates in Morocco* case (Italy v. France).

quoting what the ICJ has to say on the fundamental principle of consent in the *Armed Activities* case:

[The Court's] jurisdiction is based on the consent of the parties and is confined to the extent accepted by them . . . . When that consent is expressed in a compromissory clause in an international agreement, *any conditions to which such consent is subject must be regarded as constituting the limits thereon.*"<sup>62</sup>

92. The same can be said concerning the conditions to which a unilateral offer in an international agreement is subject, which are consubstantial with that consent and cannot be distinguished from it.

93. The importance of consent has always been stressed in international arbitration cases and especially in ICSID cases. *Plama*, of course, has laid a great emphasis on the necessity of a clear and unambiguous consent:

In the view of the Tribunal, the following consideration is equally, if not more, important. ... Nowadays, arbitration is the generally accepted avenue for resolving disputes between investors and states. Yet, that phenomenon does not take away *the basic prerequisite for arbitration: an agreement of the parties to arbitrate*. It is a well-established principle, both in domestic and international law, that *such an agreement should be clear and unambiguous*. In the framework of a BIT, the agreement to arbitrate is arrived at by the consent to arbitration that a state gives in advance in respect of investment disputes falling under the BIT, and the acceptance thereof by an investor if the latter so desires.

Doubts as to the parties' clear and unambiguous intention can arise if the agreement to arbitrate is to be reached by incorporation by reference.<sup>63</sup>

94. *Plama* has been criticized for having allegedly adopted a restrictive interpretation of the State's consent, because it stated that such consent should be "clear and unambiguous", and that an MFN clause can only apply to dispute settlement mechanism if this provision "leaves no doubt" that the parties to the BIT so intended. It might well be that the formula was somewhat overstated and that it could give rise to such criticism, as was done for example by the tribunal in *Berschader*:

The *Plama* tribunal states that an arbitration clause in a BIT is an agreement to arbitrate, and such agreements should be clear and unambiguous. If this means that generally speaking, arbitration

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Emphasis added. In the *Phosphates in Morocco* (Italy v. France), 1938, the PCIJ observed that it was advisable in case of doubt, to give a restrictive interpretation of a clause in a treaty because such a clause "must on no account be interpreted in such a way as to exceed the intention of the States that subscribed to it", *PCIJ Reports*, Ser. A/B No. 74, 1938, p. 14. See also, *Armed Activities on the Territory of the Congo* (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), *Jurisdiction and Admissibility*, Judgment of 3 February 2006, *I.C.J. Reports* 2006.

<sup>62</sup> *Ibid.* § 88. Emphasis added.

<sup>63</sup> *Plama, op. cit.* note 8, §§ 198-199. Emphasis added.

agreements should be construed in a manner which is different in principle from that applied to the construction of other agreements, this tribunal finds it doubtful whether such principle can be said to exist.<sup>64</sup>

95. However, it is one thing to use a restrictive interpretation to find a consent, which is certainly not warranted and which, in my view, the *Plama* tribunal does not seem to have done<sup>65</sup>, and a different thing to consider that any given consent to arbitration must be clear and certain, which cannot be contested.<sup>66</sup> Who would argue that an uncertain and ambiguous consent to arbitration is sufficient to confer jurisdiction to an arbitral tribunal?

96. The decision in *Wintershall* has insisted again on the idea that the State must have given its consent and that this consent is a condition for the access to international arbitration:

In the present case, therefore the BIT between Argentine/and Germany is a treaty undoubtedly providing for a right of access to international arbitration (ICSID) for foreign investors, who are German nationals – but this right of access to ICSID arbitration is not provided for unreservedly, but upon condition of first approaching competent Courts in Argentina ... a local-remedies rule may be lawfully provided for in the BIT – under the first part of Article 26; once so provided, as in Article 10(2), *it becomes a condition of Argentina's "consent" – which is, in effect, Argentina's "offer" to arbitrate disputes under the BIT, but only upon acceptance and compliance by an investor of the provisions inter alia of Article 10(2); an investor (like the Claimant) can accept the "offer" only as so conditioned.*<sup>67</sup>

97. In our case, it seems evident to me that there is NO UNCONDITIONAL OFFER TO ARBITRATE given by Argentina to the Italian investors – and reciprocally by Italy to the Argentine investors – in the Argentina/Italy BIT, there is only an offer to arbitrate under a condition, *i.e.* to have first tried to have the case settled in the local courts for 18 months.

98. If the offer to arbitrate under certain conditions, which is already made to a broad category of investors which are not known in advance by the State, could also be

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<sup>64</sup> *Berschader, op. cit.* note 39, § 177.

<sup>65</sup> See the case of *Amco*, where the Tribunal noted that: “In the first place, like any other conventions, a convention to arbitrate is not to be construed restrictively, nor, as a matter of fact, broadly or liberally. It is to be construed in a way which leads to find out and to respect the common will of the parties [...] Moreover - and this is again a general principle of law – any convention, including conventions to arbitrate, should be construed in good faith, that is to say by taking into account the consequences of their commitments the parties may be considered as having reasonably and legitimately envisaged.”, *Amco Asia et al. v. Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983, § 14.

<sup>66</sup> This is very generally accepted. See for example the ICC award in the *SPP* case, which recognized this requirement: “We accept the principle that acceptance of an arbitration clause should be clear and unequivocal.” ICC Award No. 3493, 16 February 1983, *Yearbook Com. Arb.* 1984, vol. IX, p. 115. The award was annulled by the French courts, precisely because, on the facts of the case, the consent of Egypt was not clear and unequivocal.

<sup>67</sup> *Wintershall, op. cit.* note 9, § 116.

modified as far as the conditions shaping such consent are concerned, the “cornerstone of ICSID arbitration” would look as a completely inchoate consent. A consent that is given by a State to a defined but undetermined category of investors, which would moreover also be undefined as far as the conditions under which it is given or its scope are concerned, and would depend on the vagaries of possible other treaties entered into by the State, would not be a clear consent at all, it would be a versatile consent, it could even be said that it would not be a consent at all.

99. Unless specifically stated to the contrary, the qualifying conditions put by the State in order to accept to be sued directly on the international level by foreign investors cannot be displaced by an MFN clause, and a conditional right to ICSID cannot magically be transformed into an unconditional right by the grace of the MFN clause. The access to the right as provided in the basic treaty cannot be modified through an MFN clause. Any other solution comports in my view great dangers.

**The dangers of the *Maffezini* approach which, for some, were recognized in the decision itself**

100. It has to be reminded that in *Maffezini*, the tribunal was conscious of the far reaching consequences of its decision to use the MFN clause to modify the dispute settlement procedures and felt compelled to state that “a distinction has to be made between the legitimate extension of rights and benefits by means of operation of the clause, on the one hand, and disruptive treaty-shopping that would play havoc with the policy objectives of underlying specific treaty provisions, on the other hand.”<sup>68</sup> Therefore, the tribunal in trying to keep things under control, added that “there are some important limits that ought to be kept in mind.”<sup>69</sup> These limits have been summarized in the following manner:

As a matter of principle, the beneficiary of the clause should not be able to override public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in question, particularly if the beneficiary is a private investor, as is often the case.<sup>70</sup>

101. Examples of such necessary limits were given in the decision: the consent of the State should not be set aside through the MFN clause: when the State has conditioned its consent on the exhaustion of local remedies; when it is stated in the BIT that once a choice is made between domestic courts and international arbitration this choice is final and irreversible (this is the so-called “fork-in-the-road” provision); when there is a selection of a specific forum like ICSID; or when a reference is made to a highly institutionalized system of arbitration with precise rules of procedures like NAFTA. As can be seen, among the examples of situations where the MFN clause could not be used, the Tribunal gave the rule of exhaustion of local remedies, that in its view could not

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<sup>68</sup> *Maffezini*, *op. cit.* note 4, § 63.

<sup>69</sup> *Id.*, § 62.

<sup>70</sup> *Ibidem.*

be set aside by an MFN clause: “... if one contracting party has conditioned its consent to arbitration on the exhaustion of local remedies, which the ICSID Convention allows, this requirement could not be bypassed by invoking the most favored nation clause in relation to a third-party agreement that does not contain this element.”<sup>71</sup> I must say that I cannot see the *rationale* according to which the condition of exhaustion of local remedies could not be set aside by an MFN clause, but the condition of exhaustion of local remedies only during a certain limited period of time<sup>72</sup> could be set aside, as was decided in *Maffezini*.

102. Another very profound concern raised by the application of the general rule stated in *Maffezini* has already been pointed out in the decision itself, it is the risk of “treaty shopping”. Several tribunals have raised that concern. For example, in *Salini v. Jordan*,<sup>73</sup> the tribunal refused to extend the conditions of existence of a right to ICSID arbitration provided for in Article 9 of the 1999 Italy/Jordan BIT<sup>74</sup> and stated that it “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’.”<sup>75</sup>

103. There are also some other difficult problems raised, if the holding in *Maffezini* were to be accepted with its exceptions, which were necessary in the view of the tribunal to render the extension of jurisdiction brought about by the MFN clause acceptable.

104. Let us take the example concerning the situation in which it is stated in the basic BIT that once a choice is made between domestic courts and international arbitration this choice is final and irreversible, *i.e.* the situation where a BIT provides for what has become to be known as a “fork-in-the-road” provision. For some unexplained reason, this is said by the tribunal in *Maffezini* to be a situation that cannot be modified by an MFN clause. If we admit this for the sake of reasoning, it is my submission that it would lend to very bizarre conclusions, if we take, for example, the two BITs at stake in our case. The Argentina/Italy BIT provides for a limited recourse to national courts for a period of 18 months before the case can possibly be submitted to arbitration. The Argentina/US BIT on the contrary has a fork-in-the-road provision and therefore does not allow submission

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<sup>71</sup> *Maffezini, op. cit.* note 4, § 64.

<sup>72</sup> Which has been described as “a moderation of the exhaustion of local remedies rule”, *Siemens, op. cit.* note 24, § 51.

<sup>73</sup> *Salini, op. cit.* note 7.

<sup>74</sup> Article 9 – Settlement of Disputes between Investors and Contracting Parties

1. Any disputes which may arise between one of the Contracting Parties and the investors of the other Contracting Party on investments, including disputes relating to the amount of compensation, shall be settled amicably, as far as possible.

2. In case the investor and an entity of the Contracting Parties have stipulated an investment Agreement, the procedure foreseen in such investment Agreement shall apply.

3. In the event that such dispute cannot be settled amicably within six months from the date of the written application for settlement, the investor in question may submit at his choice the dispute for settlement to:

(a) the Contracting Party’s court having territorial jurisdiction;

(b) to the International Center for the Settlement of Investment Disputes (the Center) ...

<sup>75</sup> *Salini, op. cit.* note 7, § 115.

of the case to the national courts if the investor wants to submit its case to international arbitration, which he can do on the sole condition that 6 months have elapsed since the date on which the dispute arose. According to *Maffezini*, an investor under the Argentina/Italy BIT could benefit from the direct submission to international arbitration, after 6 months have elapsed since the dispute has arisen, imported from the Argentina/US BIT, while an investor under the Argentina/US BIT, who would have first submitted the case to national courts but still would not want to be prevented to go to international arbitration by the fork-in-the-road provision, could not invoke Article 8 (2) and (3) to deport that provision. I really do not see how this kind of application of the MFN clause, required if we were to follow *Maffezini*, would bring about the intended goal of an MFN clause which is to accord the same treatment to all investors.

105. Another difficult theoretical problem is raised in the *Maffezini* approach by the fact that the MFN clause may be invoked not in the request for arbitration, but much later, often only in the answer to the State's objections to jurisdiction. As the request for arbitration stands for the investor's consent, the reciprocal consents of the State and the investor have created the jurisdictional basis for the tribunal's jurisdiction at that point in time. Is it acceptable that this arbitration agreement is thereafter upset by an arbitration offer in the incorporated BIT under the MFN clause? In other words, the *Maffezini* approach permits, after beginning one arbitration in regard to one offer in one BIT to subsequently change the arbitration agreement, and could even allow an investor after initiating an ICSID arbitration, to "accept" an offer in another BIT for UNCITRAL arbitration ...<sup>76</sup>

106. The problems are even more serious, as it appears that in the trend favorable to the use of MFN clause to expand jurisdiction, the position is not only to import from the third party treaty into the basic treaty the *jurisdictional clause as a whole*, but to import only *such or such aspect of a jurisdictional clause* which appears more favorable, as has been done in the majority Award: in other words there can be a "pick and choose" policy in the implementation of the MFN clause. This aspect has been underlined in an article on MFN clauses, where the author puts forwards the concerns raised by such an approach: "But perhaps the most adventurous and far-reaching aspect of the *Siemens* decision was the tribunal's rejection of Argentina's further argument that, if the claimant was entitled to import the advantageous aspects of the dispute resolution provisions of the Argentina-Chile BIT, then it should also be required to import the disadvantageous aspects of those provisions. These included, in particular, a "fork-in-the-road" provision that was absent

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<sup>76</sup> Zachary Douglas considered these considerations to be "fatal" to the application of an MFN clause to dispute settlement, *op. cit.* note 6, pp. 11-12: "There is another important consideration that is fatal to such a claim ... The claimant must assert a right to more favourable treatment by claiming through the MFN clause in the basic treaty. It can only do so by instituting arbitration proceedings and thus by accepting the terms of the standing offer of arbitration in the basic treaty. At that point an arbitration agreement between the claimant and the host state comes into existence ...

Hence there is a logical fallacy underlying the claim under consideration. The claimant can only assert the claim for MFN treatment by entering into an arbitration agreement on the terms offered by the host state in the basic treaty. But it is the terms of that arbitration agreement that the claimant is seeking to displace or modify by asserting the claim."

from the Argentina-Germany BIT. The tribunal recognised that ‘the disadvantages may have been a trade-off for the claimed advantages’, but concluded that an MFN clause ‘relates only to more favorable treatment’. As a result, the fork-in-the-road provision could not be incorporated by operation of the MFN clause ... in allowing claimants this possibility the tribunal opened the door to a potentially infinite variety of dispute resolution permutations and combinations that different investors might rely upon so as best to meet their individual circumstances.’<sup>77</sup>

107. It is quite evident that a jurisdictional clause is often a complex arrangement, balancing various requirements. It does not make sense to “de-structure” these jurisdictional clauses, and to “pick-and-choose” just one element that could make sense in the global framework of the third party treaty, but does not have the same meaning in the basic treaty. The dangers of such a situation have been underscored by the legal doctrine:

... it is essential when applying an MFN clause to be satisfied that the provisions relied upon as constituting more favourable treatment in the other treaty are properly applicable, and will not have the effect of fundamentally subverting the carefully negotiated balance of the BIT in question. It is submitted that this is precisely the effect of the heretical decision of the Tribunal on objections to jurisdiction in *Maffezini v Spain*.

...

It is not to be presumed that this can be disrupted by an investor selecting at will from an assorted menu of other options provided in other treaties, negotiated with other State parties and in other circumstances.<sup>78</sup>

108. As aptly pointed by *Plama*, this would create a chaotic situation.<sup>79</sup> I suggest to avoid such a chaotic situation, in endorsing the principle that an MFN clause cannot displace any of the conditions under which a State gives its consent to arbitration to a foreign investor and would therefore endorse the *Plama* proposal, according to which the principle that should be applied to MFN clauses with regard to jurisdictional clauses

... should instead be a different principle [than in *Maffezini*] with one, single exception: an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.<sup>80</sup>

109. In conclusion, for all the reasons stated above, I consider that no separate basis of jurisdiction lying in Article VII of the Argentina/US BIT can be imported through the

<sup>77</sup> Stephen Fietta, Most Favoured Nation Treatment and Dispute Resolution under Bilateral Investment Treaties: a Turning Point?, *Int.A.L.R.*, 2005, pp. 131-138 and also *TDM*, June 2005, Vol. 2 - Issue 3.

<sup>78</sup> See Campbell McLachlan and *al.*, *op. cit.* note 11, p. 254 and p. 257.

<sup>79</sup> *Plama*, *op. cit.* note 8, § 219.

<sup>80</sup> *Id.*, § 223.

MFN clause into the Argentina/Italy BIT. As a result, the Tribunal had no jurisdiction to entertain the case.

110. Having come to the conclusion that the Tribunal had no jurisdiction over the case, I reiterate that I do not comment on the results of the merits phase, but for stating that I subscribe to them.

Brigitte Stern.

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Professor Brigitte Stern