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Most favoured nation treatment and dispute resolution under bilateral investment treaties: a turning point?

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Most favoured nation treatment and dispute resolution under bilateral investment treaties: a turning point?

Two recent decisions on jurisdiction by ICSID tribunals indicate that investors will henceforward face difficulty in using "most favoured nation" (***"MFN"***) provisions in applicable bilateral investment treaties ***("BITs")*** to establish jurisdiction over their investment disputes with host States. The decisions concerned (*Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*[1] (***"Salini"***) and *Plama Consortium Ltd.v.. Republic of Bulgaria*[2] (***"Plama"***)) appear to represent a marked change in direction from the relatively expansive approach that had been adopted by ICSID tribunals in previous cases, commencing with the well-chronicled decision of January 2000 in *Emilio Augustín Maffezini v. Kingdom of Spain*[3] (***"Maffezini"***).

This article examines the tribunals' reasoning in the *Salini* and *Plama* decisions and the extent to which those tribunals have departed from the positions adopted in the previous cases on important issues of principle in the context of MFN treatment. It observes the apparent reaffirmation by the recent decisions of the distinction that must be drawn between substantive and jurisdictional issues whenever identifying the scope of protection offered by an MFN provision. It then concludes by attempting to identify the types of exceptional circumstances that will need to exist, in light of the two recent decisions, if investors are to use MFN provisions successfully in future as a basis for establishing jurisdiction in their disputes with host States.

The nature of the problem: a legitimate extension of rights or disruptive "treaty shopping"?

The vast majority of BITs in force around the world today contain some form of MFN provision. Typically, such provisions require each Contracting State to accord to investors of the other Contracting State treatment that is no less favourable than that accorded to the investors of third States. In doing so, they link BITs by requiring State parties to one treaty to provide investors with treatment that is no less favourable than the treatment provided by them to other investors under other treaties. However, critically, the wording of individual MFN clauses varies widely from treaty to treaty, with the result that the scope and extent of the protection offered by the clauses can be very different under one treaty as compared with another.

The problem addressed by each of the *Maffezini*, *Salini* and *Plama* cases (together with some of the other cases cited in this article) concerns the question of whether, and if so in what circumstances,

[1] ICSID Case No. ARB/02/13, Decision of 15 November 2004.
[2] ICSID Case No. ARB/03/24, Decision of 8 February 2005.
[3] ICSID Case No. ARB/97/7, Decision of 25 January 2000.

it is permissible for an investor to use the MFN provision in the BIT applicable to its dispute as a means of establishing jurisdiction for an arbitral tribunal where jurisdiction could not otherwise be established. This issue will commonly arise, for example, where the claimant investor fails to fulfil a requirement in the dispute resolution provisions of the applicable treaty (such as to refer a dispute to domestic procedures before commencing international arbitration) that does not bind investors from third States under the host State's other BITs.

In addressing this issue, as the tribunal stated in the *Maffezini* case, a clear distinction must be drawn between the "legitimate extension of rights and benefits by means of the operation of the [MFN] 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".[4] However, before observing how tribunals in the various cases have drawn this distinction in practice, it is necessary to identify some of the basic principles that must be kept in mind whenever interpreting the scope of a particular MFN clause.

Some basic principles of interpretation of an MFN clause

When interpreting an MFN clause, just as when interpreting any other treaty provision, the essential aim is to identify the intention of the Contracting Parties. The Vienna Convention on the Law of Treaties adopts, as the general rule of interpretation, a textual approach by way of Article 31. This provides that a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". It would appear that the approach adopted by Article 31 reflects an accepted rule of customary international law.[5]

The ICSID tribunals in the cases examined in this article have approached the interpretation of MFN provisions in accordance with this general rule, as have the parties appearing before them. However, as will be observed later, the more recent cases on the question of MFN treatment and dispute settlement appear to indicate an increased focus by tribunals upon the specific text of the treaty as the most authoritative expression of the Contracting Parties' intentions, with less emphasis being placed upon the broader object and purpose of BITs to protect international investors and their investments.

[4] *Mafezzini*, para. 63.
[5] This is evident from a number of pronouncements of the International Court of Justice (see, for example, the Advisory Opinion on the *Competence of the General Assembly for the Admissions of a State to the UN*, ICJ Rep (1950), p.8), and from the unanimity of the International Law Commission on the issue.

A more specific principle of interpretation that must be kept in mind whenever interpreting an MFN clause is the *ejusdem generis* principle.[6] By virtue of this principle, an MFN clause "can only attract matters belonging to the same category of subject as that to which the clause itself relates".[7] The inter-relationship between this principle and the general rule of interpretation contained at Article 31 of the Vienna Convention is self-evident. Consistent with this principle, Article 9.1 of the International Law Commission's 1978 Draft Articles on Most-Favoured-Nation Clauses states that MFN clauses confer "only those rights which fall within the limits of the subject-matter of the clause". Although not relied upon explicitly by tribunals in recent cases on MFN treatment and dispute resolution, it will be seen that the principle provides a common thread that runs though the reasoning adopted in their decisions.

In each of the cases examined in this article, the claimant investor has sought to rely upon the MFN provision contained within the applicable BIT as a means of importing some other benefit accorded by the host State to investors from a third State by way of a separate BIT between the host State and that third State. In examining the validity of the claimant's arguments, it is the provisions of the applicable BIT, or "basic treaty", that are of primary importance. If the MFN provision in the basic treaty does not extend to the subject matter of the relevant benefit accorded to investors from the third State (such as dispute resolution), then that will be the end of the matter. As the International Court of Justice stated in the *Anglo-Iranian Oil Company Case*,[8] the basic treaty "establishes the juridical link between the [beneficiary State] and a third party treaty and confers upon that State the rights enjoyed by the third party. A third party treaty, independent and isolated from the third party treaty, cannot produce any legal effect as between the [beneficiary State] and the [host State]: it is *res inter alios acta*".

With some of the basic principles of interpretation thus identified, an analysis of the recent cases on the scope of MFN provisions can be undertaken and, it is submitted, a relatively settled and defensible legal position can be described in light of the most recent decisions in the *Salini* and *Plama* cases.

The Maffezini *case*

The *Maffezini* case concerned an investment dispute between an Argentine claimant and the Kingdom of Spain, which the claimant submitted to arbitration under the Argentina-Spain BIT.

[6] For detailed discussion of the *ejusdem generic* principle, and the associated principle of *expressio unis est exclusio alterius*, see McNair's "Law of Treaties", ch. 22.
[7] Commission of Arbitration in the *Ambatielos case*, United Nations, *Reports of International Arbitral Awards*, 1963, p.107.
[8] ICJ Reports 1952, p. 109.

That treaty required the dispute to be submitted to "the competent tribunal" in Spain following the failure of amicable settlement procedures (Article X.2). In the absence of any agreement to the contrary, the dispute could only be submitted to international arbitration if the competent domestic tribunal rendered a decision on the merits that failed to resolve the dispute, or if no decision on the merits had been rendered within 18 months of the initiation of the domestic proceedings, whichever was the sooner (Article X.3). The claimant failed to meet this condition precedent to international arbitration, but argued before the ICSID tribunal that jurisdiction could be based upon the MFN provision contained at Article IV of the Argentina-Spain BIT. After guaranteeing fair and equitable treatment for investors, Article IV paragraph 2 read as follows:

> "In all matters subject to this agreement, this treatment shall not be less favourable than that extended by each Party to the investments made in its territory by investors of a third country."

The Chile-Spain BIT contained no condition precedent to international arbitration equivalent to that contained at Article X.3 of the Argentina-Spain BIT. The claimant therefore argued that Chilean investors in Spain were treated more favourably than Argentine investors in Spain and that, accordingly, the MFN provision in the Argentina-Spain BIT gave him the option of submitting the dispute to the ICSID tribunal without prior referral to the Spanish domestic courts.

With particular reliance upon the *Ambatielos* case,[9] where the Commission of Arbitration had found that the MFN clause at issue could be extended to matters concerning the "administration of justice" in accordance with the *ejusdem generis* rule, the tribunal held that "notwithstanding the fact that the basic treaty … does not refer expressly to dispute settlement as covered by the most favored nation clause, the Tribunal considers that there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors".[10] As a result, it concluded that "if a third-party treaty contains provisions for the settlement of disputes that are more favourable … than those in the basic treaty, such provisions may be extended to the beneficiary of the [MFN] clause as they are fully compatible with the *ejusdem generis* principle."[11] With reference also to Spain's preferred BIT practice with other States, which allowed referral of disputes to international arbitration without any prior resort to domestic procedures, the Tribunal thus allowed the claimant's argument that jurisdiction could be founded upon a combination of the MFN clause in the Argentina-Spain BIT and the dispute resolution provision of the Chile-Spain BIT.

[9] Ambatielos Claim, Greece v. United Kingdom, XII U.N. R.I.A.A. 9, Award of 6 March 1956.
[10] Para. 54.
[11] Para. 56.

However, the Tribunal went on to identify some "important limits" to such an extension of an MFN clause in the dispute settlement context, all of which were based upon "public policy considerations". For example, a requirement to exhaust domestic remedies, since this reflected a "fundamental rule of international law", could not be by-passed by invoking an MFN clause. Nor could a "fork in the road" provision requiring a "final and irreversible choice" between submission of disputes to domestic courts or international arbitration. Nor could a clause providing for a particular arbitration forum or application of precise rules of arbitral procedure reflecting the "precise will of the Contracting Parties".[12] As will be seen below, these "public policy" exceptions to the general finding of principle in the *Maffezini* case have given rise to a degree of confusion and difficulty in later cases.

It is worthy of note that the subject matter of the MFN provision at issue in the *Maffezini* case was particularly wide, covering as it did "all matters" subject to the Argentina-Spain BIT. However, the broad statements of principle in the Tribunal's decision, which appeared to contemplate the extension of MFN protection to dispute resolution issues save where narrowly-defined "public policy" exceptions applied, caused the tribunals in the subsequent *Salini* and *Plama* cases some concern. This led those tribunals to revisit the basic legal principles and adopt a far more restrictive general approach, as described below. However, in the interim three further cases served to illustrate the approach adopted by ICSID tribunals to the question of MFN protection following the *Maffezini* case.

Three interim cases on the MFN standard

In *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*[13] (**"*Tecmed*"**), the Spanish claimant sought, at a relatively late stage of the proceedings, to invoke the MFN provision of the applicable Spain-Mexico BIT as a means of securing retroactive application of its substantive protections. Relying upon the *Maffezini* decision, the claimant submitted that Austrian investors in Mexico received favourable treatment in this regard by virtue of the provisions of the Austria-Mexico BIT. The tribunal rejected the claimant's argument by reference to the provisions of the basic treaty without even examining the relevant provisions of the Austria-Mexico BIT. It held that "matters relating to the application over time of the [Spain-Mexico BIT], 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

[12] Para. 63.
[13] ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003.

must be deemed to be specifically negotiated by the Contracting Parties".[14] Such timing issues were "determining factors" for their acceptance of the BIT and could not be impaired by the principle contained in the MFN clause.

On its face, the *Tecmed* decision was entirely consistent with the reasoning adopted in *Maffezini*. In particular, the principle of non-retroactivity of treaties, as mentioned by the tribunal with reference to Article 28 of the Vienna Convention on the Law of Treaties, constitutes a "fundamental rule of international law" that should not be by-passed by invoking an MFN clause. However, the tribunal's reference to the fact that issues concerning the temporal application of the BIT must be deemed to have been "specifically negotiated" and thus were not susceptible to tampering by reference to an MFN provision was significant. This reference to the importance of specifically negotiated provisions, which was developed further in the *Plama* case, can be seen as a tentative first step in restricting the scope of the *Maffezini* tribunal's reasoning as regards the scope of MFN provisions.

Almost exactly a year after the *Tecmed* decision, the question of the scope and application of an MFN provision arose again before an ICSID tribunal in the case of *MTD Equity Sdn. Bhd. and MTD Chile S.A. v Republic of Chile*[15] (***"MTD"***). The *MTD* case concerned a Malaysian claimant who sought to rely upon the MFN clause contained in the applicable Malaysia-Chile BIT as a means of incorporating substantive protections from the Croatia-Chile and Denmark-Chile BITs (which set out obligations to award permits subsequent to approval of an investment and to fulfil contractual obligations, respectively). Importantly, there was no dispute between the parties as to the jurisdiction of the tribunal under the Malaysia-Chile BIT. The tribunal concluded that the MFN provision (and the fair and equitable treatment provision generally) had to be interpreted in the manner most conducive to fulfil the objective of the BIT to protect investments and create conditions favourable to investments. Incorporation of the substantive protections from the Croatia-Chile and Denmark-Chile BITs was in consonance with this purpose.[16] However, the tribunal went on to decide that, on the facts, there had been no breach of the specific standards incorporated from those other BITs.

The *MTD* case thus concerned the use of an MFN clause to import into a BIT claim certain substantive protections set out in BITs concluded between the Respondent State and third States. As such, it is clearly distinguishable from the remainder of the cases discussed in this article. In addition, on the point at issue it was perhaps the most straightforward of all of the cases. After all, the incorporation of the substantive protections concerned was not inconsistent with the provisions

[14] Para. 69.
[15] ICSID Case No. ARB/01/7, Award of 25 May 2004.
[16] Para. 104.

specifically negotiated between the Contracting States to the applicable BIT. Indeed, such incorporation was clearly consistent with the overriding object and purpose of the BIT, and of its MFN provision. In the words of the *Maffezini* tribunal, the *MTD* case represented a clear example of a "legitimate extension of rights and benefits" by means of the operation of an MFN clause.

The last of the three interim cases, *Siemens A.G. v. The Argentine Republic*[17] (***"Siemens"***), illustrates some of the more far-reaching consequences of the broad statements of principle made by the tribunal in the *Maffezini* case. The facts surrounding the MFN issue in the *Siemens* case were strikingly similar to those of the *Maffezini* case. The German claimant had failed to meet a condition precedent to international arbitration under the Argentina-Germany BIT that required prior submission of the dispute to the Argentine courts. The claimant argued that, by virtue of the MFN provisions of that BIT and with reference to the absence of any such condition precedent in the Argentina-Chile BIT, the ICSID tribunal nevertheless had jurisdiction to determine the dispute. The claimant thus relied squarely upon the *Maffezini* decision, even though the MFN provisions contained within the Argentina-Germany BIT were seemingly not as wide as the provision in issue in the *Maffezini* case. In particular, they did not contain any equivalent to the opening words of the MFN provision contained at Article IV, paragraph 2 of the Argentina-Spain BIT ("[I]n all matters subject to this agreement …").[18] The tribunal noted this distinction, but nevertheless allowed the claimant's argument as to incorporation of the relevant dispute settlement provisions from the Argentina-Chile BIT. It did so on the basis that access to special dispute settlement procedures was a distinctive feature of the Argentina-Germany BIT, as with so many other BITs. As such, it was part of the "treatment" accorded to investors from third States that could be incorporated through an MFN clause.[19] None of the "public policy" exceptions described in the *Maffezini* case applied, particularly as other BITs entered into by Argentina around the same time as the Argentina-Germany BIT contained no requirement to submit disputes to the domestic courts.

In response to an argument by Argentina that the relevant dispute resolution provisions of the Argentina-Germany BIT had been specially negotiated and must not therefore be subject to amendment by virtue of the MFN clause, the tribunal commented as follows:

> "… the purpose of the MFN clause is to eliminate the effect of specially negotiated provisions unless they have been excepted. It complements the undertaking of each State Party to the Treaty not to apply measures discriminatory to investments under Article 2 [of the BIT]."[20]

[17] ICSID Case No. ARB/02/8, Decision of 3 August 2004.
[18] It is notable also that Articles 3(1) and 3(2) of the Argentina-Germany BIT only required the contracting States to accord MFN treatment within the confines of their "territory".
[19] Para. 102.
[20] Para. 106.

On the face of it, this apparent disregard for the sanctity of specifically negotiated provisions would appear inconsistent with the position adopted by the tribunal in the earlier *Tecmed* case (and re-adopted subsequently in the *Salini* and *Plama* cases). It would appear inconsistent also with the intention of the parties as expressed in the dispute resolution provisions of the basic treaty in the *Siemens* case (the Argentina-Germany BIT). This express intention was overridden with reference to a wide interpretation of the object and purpose of the MFN clause in that treaty, notwithstanding the relatively narrow terms of that clause compared to the MFN clause at issue in the *Maffezini* case. It must therefore be open to doubt whether the *Siemens* decision was entirely consistent with the *ejusdem generis* principle, given the fact that the subject matter of the MFN clause in that case did not clearly extend to dispute resolution issues.

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 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".[21] As a result, the fork-in-the-road provision could not be incorporated by operation of the MFN clause.

The tribunal was thus not concerned with whether the "treatment" accorded as a whole to Chilean investors under the dispute resolution provisions of the Argentina-Chile BIT was favourable to that accorded to German investors under the Argentina-Germany BIT. Rather, the tribunal allowed the claimant effectively to "cherry pick" those benefits that could be extracted from the Argentina-Chile BIT without considering the counterbalances to those benefits set out in that treaty. It did so in the interests of "harmonisation" of the dispute resolution procedures available to investors under Argentina's BITs. However, 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. As we shall see, the tribunal in the *Plama* case was unwilling to entertain this prospect.

But to return to the central thrust of this article, the *Siemens* decision thus adopted the wide statements of principle made in the *Maffezini* case and applied them in the context of a more narrowly drafted MFN provision. This offered claimants the possibility of using MFN clauses to establish jurisdiction in BIT arbitrations by reference to the more generous dispute resolution provisions of other treaties, even in the absence of any clear indication that the MFN clause

[21] Para. 120.

concerned was intended to override the specific dispute resolution provisions of the basic treaty. The *Salini* and *Plama* decisions re-examined this position with reference to the older well-established authorities on MFN clauses and some of the basic principles of interpretation set out above. The result has been a marked swing away from the expansive position adopted by the *Maffezini* and *Siemens* tribunals.

Salini: a turning point?

The *Salini* case arose out of an alleged failure to pay amounts owed to the Italian claimants in connection with a dam project in Jordan. The claim was brought before an ICSID tribunal under the dispute resolution provisions of the Italy-Jordan BIT. The tribunal reached its decision on jurisdiction only around 3 months after the decision in the Siemens case.

The main jurisdictional issue arose out of Jordan's argument that the essential basis of the claim concerned a contractual dispute and that the Contracting States had agreed at Article 9(2) of the Italy-Jordan BIT that such contractual disputes should be governed by the dispute settlement provisions of the contract. One of the claimants' counter-arguments in favour of jurisdiction relied upon the MFN clause of the Italy-Jordan BIT, which the claimants sought to use as a means of importing certain provisions of the Jordan-US and Jordan-UK BITs that allowed investors to bring treaty claims regardless of the existence of any separate contract-based dispute resolution mechanism.

Following detailed submissions from the parties as to the question of whether the MFN clause could be invoked for dispute settlement purposes, the tribunal embarked upon a review of the *Ambatielos* case, which had formed a basis for the tribunal's decision in *Maffezini*. The tribunal noted that the Commission of Arbitration in that case had confirmed the basic (*ejusdem generis*) principle that an MFN clause can only attract matters belonging to the same category of subjects as that to which the clause itself relates. The clause at issue in Amabatielos had extended to "all matters relating to commerce and navigation". The Commission of Arbitration found that the clause was therefore intended to apply to the "administration of justice" insofar as concerned the protection of the rights of those engaged in commerce and navigation. But the tribunal in *Salini* observed that the question of whether substantive provisions relating to the "administration of justice" could be incorporated from other treaties by virtue of an MFN clause was very different to the question of whether dispute settlement provisions could be so incorporated. The tribunal thus

concluded that the solution adopted in *Ambatielos* could not be directly transposed into the case before it.[22]

The tribunal then proceeded to examine the *Maffezini* decision, on which the claimants had principally relied. The tribunal expressed considerable concern about the approach adopted in that case. In particular, it commented that the public policy-based exceptions to the general rule allowing extension of an MFN clause to dispute resolution procedures might be difficult to apply, thus increasing the risk of "treaty shopping" by claimants.[23] The tribunal observed that some MFN clauses, such as those contained in many UK BITs, provide expressly that they extend to dispute resolution issues, whereas others, such as the clause in *Maffezini*, contain broad language referring to "all matters" subject to the agreement. The wording of MFN clause contained in the Italy-Jordan BIT was not so wide. Nor was there any evidence of a common intention of the parties to have that clause apply to dispute resolution issues (indeed, quite the contrary given the terms of Article 9(2)). Nor, in contrast to *Maffezini*, had any State practice been cited in support of the claimants' arguments. Therefore, the tribunal concluded that the MFN clause of the Italy-Jordan BIT did not extend to dispute resolution issues and contractual disputes between the claimants and Jordanian State entities had to be governed by the applicable contractual procedures. The tribunal had no jurisdiction to entertain them.

The tribunal in *Salini* thus did not disagree with the conclusions reached in the *Maffezini* case, but rather sought to distinguish that case on a number of grounds. In essence, it did so by application of the basic principles of interpretation set out above. It found that the there was no evidence that the parties had intended the MFN provision to extend to dispute resolution issues. It did so having distinguished the wording of the provision concerned from the wider wording of the MFN provision at issue in *Maffezini*. Pursuant to the *ejusdem generis* principle, the MFN provision could only attract matters belonging to the same category of subject as that to which the provision itself related. Since dispute resolution fell outside the subject matter of the provision, it was inappropriate to look beyond the terms of the "basic treaty" to the dispute resolution provisions of any other treaties that had been entered into by Jordan.

However, the tribunal in *Salini* clearly had difficulty with certain of the broader statements of principle that had been made in *Maffezini* about the extension of MFN clauses to dispute resolution. It expressed concerns about the workability of the general approach adopted by the *Maffezini* tribunal, with particular reference to the public policy-related exceptions described in that case. These concerns were to be further elaborated in the *Plama* case. But the *Salini* decision marked a

[22] Para. 112. A similar appraisal of the limited relevance of the *Ambatielos* case was made by the tribunal in the *Plama* case (see para. 215 of the tribunal's decision of 8 February 2005).
[23] Para. 115.

decisive step away from the expansive approach that had been adopted in *Maffezini* and back towards application of basic principles of international law to the facts of each individual case.

It is unfortunate that the tribunal in *Salini* did not have an opportunity to comment on the *Siemens* decision. Indeed, it is difficult to envisage the tribunal being able to support that decision, given that none of the distinguishing features of *Maffezini* applied in that case. After all, the MFN clause there did not contain expansive language as to its subject matter and there was no other evidence of any intention that the clause should extend to granting ICSID tribunals jurisdiction in cases where this would otherwise be denied by the terms of the basic treaty. Such difficulties with the decision in *Siemens* were to be confirmed subsequently in the *Plama* case.

Plama: a reassertion of control over MFN clauses in the context of dispute resolution

In the *Plama* case, the Cypriot claimant sought to establish the ICSID tribunal's jurisdiction over its dispute with Bulgaria with reference both to the Energy Charter Treaty and the Bulgaria-Cyprus BIT. Although the tribunal's examination of the Energy Charter Treaty arguments will be of great interest to investment arbitration academics and practitioners, this aspect of the decision lies well beyond the scope of the present article. Suffice to say that the tribunal concluded that it did have jurisdiction to decide on the merits of the claimant's claims under that treaty.

As regards its separate BIT claim, the claimant was faced with the difficulty that the Bulgaria-Cyprus BIT (which was entered into during Bulgaria's communist era) contains extremely narrow dispute resolution provisions. In particular, under Article 4 the legality of any expropriation is to be "checked at the request of the concerned investor through the regular administrative and legal procedure of the Contracting Party that had taken the expropriation steps". That provision envisages only limited questions as to the "amount of the compensation" being referred ultimately to international arbitration. The claimant thus sought to rely upon the MFN provision set out at Article 3 of the BIT as a means of incorporating the more generous dispute resolution provisions of the (post-communist) Bulgaria-Finland BIT. The wording of the pertinent MFN provision was as follows:

> "Each Contracting Party shall apply to the investments in its territory by investors of the other Contracting Party a treatment which is not less favorable than that accorded to investments by investors of third states. …"

The tribunal rejected the claimant's argument. It observed that the Bulgaria-Cyprus BIT had been entered into at a time when Bulgaria had favoured BITs with limited protections for foreign investors and with very limited dispute resolution provisions. Indeed, subsequent negotiations between the Contracting States had demonstrated that they had not intended the MFN provision to

extend to incorporating more generous dispute resolutions procedures from Bulgaria's more recent BITs. Equally, if not more, important to the tribunal's conclusion was the well-established principle, both in domestic and international law, that an agreement to arbitrate must be "clear and unambiguous".[24] If an MFN clause was to be used to incorporate into a BIT an agreement to arbitrate contained in another BIT, the parties' intentions in this regard must thus be clear and unambiguous. This requirement was not met by Article 3 of the Bulgaria-Cyprus BIT, since it was unclear whether that provision was intended to extend to dispute settlement issues.

The tribunal observed that the fact that instruments such as NAFTA and the Free Trade Area of the Americas (FTAA) draft of 21 November 2003 explicitly excluded dispute resolution from the scope of their MFN provisions did not mean that if such an exclusion was lacking from an MFN clause then dispute resolution matters should be deemed to be incorporated. Indeed, the tribunal commented that the exclusion in the FTAA draft represented a "reaction by States to the expansive interpretation made in the Maffezini case".[25] Rather, any intention to incorporate dispute settlement provisions into a BIT by way of an MFN clause must be clearly and unambiguously expressed, as in Article 3(3) of the UK Model BIT, which provides:

> "For avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement".

[Articles 8 and 9 of the UK Model BIT provide for dispute settlement].

The tribunal also placed emphasis upon the fact that "dispute resolution provisions in a specific treaty have been negotiated with a view to resolving disputes under that treaty. Contracting States cannot be presumed to have agreed that those provisions can be enlarged by incorporating dispute resolution provisions from other treaties negotiated in an entirely different context."[26] This was particularly the case where, as in that case, the enlargement sought by the claimant would require the replacement of one specifically negotiated dispute resolution mechanism with an entirely different mechanism.

Turning to the *Maffezini* case, the tribunal took its analysis even further. It made reference to the apparent objective in *Maffezini* of "harmonising" dispute settlement arrangements through the application of MFN clauses. The tribunal observed that it cannot be the presumed intention of Contracting States that investors should have the option, by way of an MFN clause, to pick and choose dispute resolution provisions from the various BITs that they have concluded. Such a "chaotic situation" would be plainly counterproductive to harmonisation.[27] Furthermore, the

[24] Para. 198.
[25] Para. 203.
[26] Para. 207.
[27] Para. 219.

tribunal was "puzzled" as to the nature of the public policy-related limits that the *Maffezini* tribunal had placed upon its general approach.

The tribunal concluded as follows:

> "… the principle with multiple exceptions as stated by the tribunal in the Maffezini case should instead be a different principle with one, single exception: an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them".[28]

Again, the tribunal stopped short of denouncing the conclusion reached in *Maffezini*, which it described as being a case where "exceptional circumstances" had been present. However, it did comment that the *Siemens* decision "illustrates the danger caused by the manner in which the Maffezini decision has approached the question".[29]

The claimant was thus prevented from using the MFN provision in the Bulgaria-Cyprus BIT as a means of incorporating more favourable dispute settlement provisions from Bulgaria's other BITs.

The *Plama* decision thus broadly followed, and in some important respects elaborated upon, the approach taken in *Salini*. First of all, as regards the overriding importance of ascertaining the intention of the parties by reference to basic rules of treaty interpretation at international law, the tribunal commented that any intention to incorporate dispute settlement provisions into a BIT by way of an MFN clause must be "clearly and unambiguously" expressed, as in the UK Model BIT. This must be the case where, as in *Plama* itself, a claimant is seeking to use an MFN provision to replace specifically negotiated, but disadvantageous, dispute resolution provisions in the basic treaty with more advantageous provisions contained within another of the respondent State's BITs. In the absence of such a clear and unambiguous statement of consent, dispute resolution provisions will, consistent with the *ejusdem generis* principle, be deemed to fall outside of the scope of the MFN clause.

The approach adopted by the *Plama* and *Salini* tribunals is summarised in the broad statement of principle set out at paragraph 223 of the Palma tribunal's decision (cited above). This effectively reversed the statements of principle set out in the *Maffezini* decision. As opposed to there being a presumption that an MFN clause extends to dispute resolution matters, subject to a number of public policy-based exceptions, the *Plama* tribunal indicated that there should be a presumption that such clauses do not extend to dispute resolution matters, subject to an exception where there is some clear expression of the Contracting States' intent to the contrary.

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[28] Para. 223.
[29] Para. 226.

It might, of course, be argued that this more restrictive approach was in part dictated by the particular facts of the *Plama* case, where the claimant effectively attempted to replace one specifically negotiated dispute resolution mechanism in the applicable BIT with another, entirely separate mechanism. But it is clear that, had the tribunal agreed with the general approach taken in the *Maffezini* case, it could have rejected the claimant's arguments on the basis of one of the public policy-related exceptions to the general rule identified in that case. Instead, it went much further by reversing the general rule. In so doing, it reasserted the overriding importance of ascertaining the intention of the parties whenever examining the scope of any MFN clause, with primary reference to the wording of the clause itself as opposed to the broader object and purpose of BITs generally (which had been so important to the decision in *Maffezini*). It is submitted that the approach adopted by the tribunal in the *Plama* case must be preferred, particularly where (as is normally the case) claimants seek to rely upon MFN clauses as a means of incorporating provisions that are plainly inconsistent with the dispute resolution provisions that have been specifically negotiated in the basic treaty concerned.

However, in one important respect the *Plama* decision perhaps went too far in its appraisal of the *Maffezini* case. The tribunal did not classify that case as falling within the single exception to its general rule, which applies where the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate dispute resolution provisions. Rather, it sought to distinguish the case on the rather flimsy ground that the dispute resolution provisions of the basic treaty were "nonsensical from a practical point of view."[30] In a sense, this might cast doubt over whether there truly is only one exception to the general rule set out at paragraph 223 of the tribunal's decision. It is submitted that the tribunal erred in this respect. The terms of the MFN provision at issue in the basic treaty in the *Maffezini* were very wide, applying to "all matters subject to" that treaty. Investor/State dispute resolution was clearly one such matter. Therefore, in the same way as the UK Model BIT, the MFN provision in *Maffezini* did fall squarely within the scope of the single exception to the general rule identified in the *Plama* decision. By way of the opening words of Article IV of the Argentina-Spain BIT, the Contracting States had expressed a clear intention that dispute resolution was to be included within the subject matter of the MFN clause.

The revival of the substantive/jurisdictional distinction in the context of MFN clauses

An important aspect of the *Salini* and *Plama* decisions is that they have re-asserted the traditional distinction between the incorporation by way of MFN clauses of, on the one hand, substantive

[30] Para. 224.

protections from BITs with third States and, on the other, the dispute settlement provisions of those treaties. The confirmation of that distinction comes out most clearly in the respective tribunals' analyses of the *Ambatielos* case. The revised general rule set out at paragraph 223 of the *Plama* decision applies only to the incorporation of dispute resolution provisions.

By contrast, the *MTD* case constitutes a clear example of the legitimate extension of substantive investor rights by means of the operation of an MFN clause. Such extension strikes at the heart of the very object and purpose of MFN provisions. However, the precise scope for incorporation of substantive investor rights that are directly contradictory to the specific negotiated provisions of the basic treaty remains to be seen. The *Tecmed* case, although not concerned with incorporation of substantive rights as such but rather the "time dimension" of application of those rights, perhaps offers a clue as to the limits of MFN clauses in this context. Where limits placed by the basic treaty upon the substantive rights granted to investors "go to the core of matters that must be deemed to be specifically negotiated by the Contracting Parties", it is likely that tribunals will continue to hesitate before allowing MFN provisions to be used to override those limits by incorporating more generous rights from treaties with third States.

Conclusion: a settled approach to MFN treatment and dispute resolution

It is to be hoped that the general approach adopted by the ICSID tribunals in the recent cases of *Salini* and *Plama* will be followed by tribunals in future investment arbitrations. This approach is best summarised by the statement of principle set out at paragraph 223 of the *Plama* decision.

As a result, claimants will only be able to use MFN clauses as a means incorporating the more favourable dispute resolution provisions of BITs with third States in exceptional cases: namely, where the circumstances indicate that the State parties to the basic treaty clearly intended this to be possible. As *Plama* points out, this will most often be the case where such an intention is clearly and unambiguously expressed by the wording of the MFN clause concerned (as in Article 3(3) of the UK Model BIT or, possibly, the clause at issue in the *Maffezini* case). However, such an intention may be established also by reference to any of the remaining factors identified at Articles 31 and 32 of the Vienna Convention on the Law of Treaties. It is submitted that this approach is consistent with the applicable principles of international law, the most basic of which provides that the intention of the parties is paramount whenever interpreting the scope of any given treaty provision.