

THE EMERGING JURISPRUDENCE ON THE MOST-FAVOURLED-NATION TREATMENT IN INVESTMENT ARBITRATION

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The fast-growing development of investment arbitration on the basis of investment protection treaties has contributed to the creation of an important body of case law on issues that, although familiar in the context of public international law, appear as novel in the context of investment arbitration.¹ Issues such as ‘national treatment’, the effect of ‘most-favoured-nation’ treatment, the effect of the so-called ‘umbrella’ clauses or the ‘state of necessity’ as a cause of exoneration of a State’s international responsibility are topics that remain today hotly debated and have yet to yield a consistent body of case law.

The specific example of the most-favoured-nation clause is of particular interest as, unlike in the case of the ‘umbrella’ clause,² it is not the concept as such that raises difficulty.³ The most-favoured-nation clause is perceived

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¹ On the novelty and the philosophy of investment treaty arbitration, see Emmanuel Gaillard, *L'arbitrage sur le fondement des traités de protection des investissements*, 2003 *Revue de l'arbitrage* 853. See also the introductory chapter under Emmanuel Gaillard, *La jurisprudence du CIRDI* (Pedone, 2004) 1 et seq; Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2008).

² See below the contribution by Anthony Sinclair on umbrella clauses and the references cited therein. More generally, on the interplay between the treaty and the contract mechanisms in investment arbitration, see Emmanuel Gaillard, *Investment Treaty Arbitration and Jurisdiction over Contract Claims. The SGS Cases Considered*, in *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (T Weiler ed, Cameron May, 2005) 325; James Crawford, *Treaty and Contract in Investment Arbitration*, The 22nd Freshfields Lecture on International Arbitration, 29 November 2007, available on the website of the Lauterpacht Centre for International Law.

³ On most-favoured-nation clauses in investment arbitration, see in particular Francisco

in almost straightforward terms in situations where it is sought to be applied to the provisions setting forth the investor's classic substantive protection under an investment treaty. Diverging views surface, however, in situations where it is sought to be applied to the dispute resolution mechanism of a treaty. Each of these situations will be examined in turn, with particular focus on the study and analysis of the arbitral case law.

I. THE MOST-FAVOURLED-NATION TREATMENT IN CONTEXT

Most-favoured-nation treatment is a well-known mechanism of treaty law, although it has not generated an abundance of cases in public international law. Three cases are usually referred to and are commonly accepted as having established the principles underlying the function and the operation of most-favoured-nation clauses. The question of the scope of the protection accorded to the beneficiary of a most-favoured-nation clause has, today, become particularly relevant in light of the dramatic development of investment arbitrations initiated on the basis of investment protection treaties.

A. *The Legacy of International Law*

The first decision to have addressed the most-favoured-nation treatment in a significant manner is that rendered by the International Court of Justice in the *Anglo-Iranian Oil Company Case* of 1952. The specific question brought before the Court was whether, in relation to treaty obligations undertaken by Iran towards the United Kingdom, the United Kingdom could rely on a treaty between Iran and Denmark and whether 'by the operation of the most-favoured-nation clause contained in the treaties between Iran and the United Kingdom, Iran became bound to observe towards British nationals [the principles and practice of international law which, by

Orrego Vicuña, *Bilateral Investment Treaties and the Most-Favored-Nation Clause: Implication in the Light of a Recent ICSID Case*, in *Investment Treaties and Arbitration*, ASA Special Series No. 19 (2002) 133; Rudolf Dolzer and Terry Myers, *After Tecmed: Most-Favored-Nation clauses in Investment Protection Agreements*, 19 *ICSID Review* 49 (2004); Dana Freyer and David Herlihy, *Most-Favored-Nation Treatment and Dispute Settlement in Investment Arbitration: Just How 'Favored' is 'Most-Favored'?*, 20 *ICSID Review* 58 (2005); Ruth Teitelbaum, *Who's Afraid of Maffezini? Recent Developments in the Interpretation of Most Favored Nation Clauses*, 22 *Journal of International Arbitration* 225 (2005); Meg Kinnear, Andrea Bjorklund and John Hanaford, *Investment Disputes under NAFTA—Annotated Guide to NAFTA Chapter 11*, (Kluwer Law International, 2006), at 1103-1 to 1103-25; Alejandro Faya Rodriguez, *The Most-Favored-Nation Clause in International Investment Agreements. A Tool for Treaty Shopping?* 25 *Journal of International Arbitration* 89 (2008). See also the specific commentaries on the ICSID case law by Emmanuel Gaillard in the *Journal du droit international*, nn 26, 35, 50 and 56.

her treaty with Denmark, Iran promised to observe towards Danish nationals’].⁴ The Court did not accept this contention on the ground that the treaties whose application was sought by the United Kingdom were simply excluded from the scope of Iran’s declaration of acceptance of the Court’s jurisdiction pursuant to Article 36, paragraph 2, of the Court’s Statute,⁵ while describing the operation of the most-favoured-nation in the following terms:

... in order that the United Kingdom may enjoy the benefit of any treaty concluded by Iran with a third party by virtue of a most-favoured-nation clause contained in a treaty concluded by the United Kingdom and Iran, the United Kingdom must be in a position to invoke the latter treaty. The treaty containing the most-favoured nation clause is the *basic treaty* upon which the United Kingdom must rely. It is this treaty which establishes the juridical link between the United Kingdom and a *third-party treaty* and confers upon that State the rights enjoyed by the third party. A third-party treaty, independent of and isolated from the basic treaty, cannot produce any legal effect as between the United Kingdom and Iran: it is *res inter alios acta*.⁶

In other words, the operation of a most-favoured-nation clause does not imply the application of the third-party treaty, which remains *res inter alio acta*, but the application of the basic treaty which incorporates in the relevant provision according more favourable treatment found in the third-party treaty. The operation evidently assumes that the basic treaty is applicable in the first place.

In the *Case concerning Rights of Nationals of the United States of America in Morocco*,⁷ the question brought before the International Court

⁴ International Court of Justice, *Anglo-Iranian Oil Company Case (United Kingdom v Iran)*, Preliminary objection, Judgment of 22 July 1952, [1952] ICJ Reports, 109.

⁵ The two treaties containing the most-favoured-nation clause and relied upon by the United Kingdom were the Treaty concluded between the United Kingdom and Iran on 4 March 1857 and the Commercial Convention concluded between the United Kingdom and Iran on 9 February 1903. Iran’s Declaration of acceptance of the Court’s compulsory jurisdiction, signed on 2 October 1930 and ratified on 19 September 1932, provided in turn that such jurisdiction covered “any disputes arising after the ratification of the present declaration with regard to situations or facts relating directly or indirectly to the application of treaties or conventions accepted by Persia and subsequent to the ratification of this declaration” See *ibid* 108 and 103 respectively. See also *ibid* 110: “If the United Kingdom is not entitled to invoke its own Treaty of 1857 or 1903 with Iran, it cannot rely upon the Iranian-Danish Treaty, irrespective of whether the facts of the dispute are directly or indirectly related to the latter treaty.”

⁶ *ibid* 109 (Emphasis added).

⁷ International Court of Justice, *Case concerning Rights of Nationals of the United States of America in Morocco (France v United States of America)*, Judgment of 27 August 1952, [1952] ICJ Reports, 176. See also Bing Cheng, *Rights of United States Nationals in the French*

of Justice related to the extent of the consular jurisdiction of the United States in the French Zone of Morocco and the preferential treatment granted to US nationals under two most-favoured-nation provisions of the Treaty of 16 September 1836 between the United States and the Shereefian Empire. It is worthy of note that, concerning the mechanism of the most-favoured-nation clause, the Court had no difficulty holding that such provisions 'automatically' 'entitle[d] the United States to invoke the provisions of other treaties relating to the capitulatory regime', in particular the most extensive privileges in the matter of consular jurisdiction granted by Morocco in the General Treaty with Great Britain of 1856 and in the Treaty of Commerce and Navigation with Spain of 1861: 'Accordingly, the United States acquired by virtue of the most-favoured-nation clauses, civil and criminal consular jurisdiction in all cases in which United States nationals were defendants.'⁸

A specific question was whether the renunciation of certain capitulatory rights and privileges, notably by Great Britain in 1937, had the effect of terminating the United States' claim to exercise and enjoy consular jurisdiction and other capitulatory rights in the French Zone. The Court answered in the affirmative,⁹ laying strong emphasis on the function of the most-favoured-nation standard, which is the establishment and maintenance of fundamental equality without discrimination:

The second consideration [of the US] was based on the view that the most-favoured-nation clauses in treaties made with countries like Morocco should be regarded as a form of drafting by reference rather than as a method of establishment and maintenance of equality of treatment without discrimination amongst the various countries concerned. According to this view, rights or privileges which a country was entitled to invoke by virtue of a most-favoured-nation clause, and which were in existence at the date of its coming into force, would be incorporated permanently by reference and enjoyed and exercised even after the abrogation of the treaty provisions from which they had been derived.

From either point of view, this contention is inconsistent with the intentions of the parties to the treaties now in question. This is shown both by

Zone of Morocco, 1953 *International and Comparative Law Quarterly* 354; Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-4: Points of Substantive Law, Part II*, 1955-56 *British Yearbook of International Law* 20, at 84 et seq.

⁸ *ibid* 190. See also at 187: "When the most extensive privileges as regards consular jurisdiction were granted by Morocco to Great Britain in 1856 and to Spain in 1861, these enured automatically and immediately to the benefit of the other Powers by virtue of the operation of the most-favoured-nation clauses."

⁹ *ibid* 201.

the wording of the particular treaties, and by the general treaty pattern which emerges from an examination of the treaties made by Morocco with France, the Netherlands, Great Britain, Denmark, Spain, United States, Sardinia, Austria, Belgium and Germany over the period from 1631 to 1892. These treaties show that the intention of the most-favoured-nation clauses was to *establish and maintain at all times fundamental equality without discrimination among all of the countries concerned...*¹⁰

A further step in the definition of the operation of the most-favoured-nation clause was taken in the *Ambatielos* case, which discussed the scope of the rights under a most-favoured-nation clause.¹¹ In the dispute between Greece and the United Kingdom relating to the validity of the *Ambatielos* claim arising out of a contract for the purchase of steamships and brought to arbitration in accordance with the Declaration of 16 July 1926 Accompanying the Treaty of Commerce and Navigation between Great Britain and Greece of 10 November 1886, Greece contended that its national had not received the treatment to which Greek nationals were entitled under the provisions of the 1886 Treaty. More specifically, by virtue of the most-favoured-nation clause contained in Article X of the Treaty, Greece was claiming for its national treatment in accordance with 'justice', 'right', 'equity' and the 'principles of international law' and assured to the nationals of other States. The Arbitration Commission held that:

... the most-favoured-nation clause can only attract matters belonging to the same category of subject as that to which the clause itself relates...

In the Treaty of 1886 the field of application of the most-favoured-nation clause is defined as including 'all matters relating to commerce and navigation'. It would seem that this expression has not, in itself, a strictly defined meaning. The variety of provisions contained in Treaties of commerce and navigation proves that, in practice, the meaning given to it is fairly flexible. For example, it should be noted that most of these Treaties contain provisions concerning the administration of justice. That is the case, in particular, in the Treaty of 1886 itself, Article XV, paragraph 3 of which guarantees to the subjects of the two Contracting Parties 'free access to the Courts of Justice for the prosecution and defence of their rights'. That is also the case as regards the other Treaties referred to by the Greek Government in connection with the application of the most-favoured-nation clause.

¹⁰ *ibid* 191–192 (emphasis added).

¹¹ Arbitration Commission, *Ambatielos Claim (Greece v United Kingdom)*, 6 March 1956, 1956 International Law Reports 306.

It is true that 'the administration of justice', when viewed in isolation, is a subject-matter other than 'commerce and navigation', but this is not necessarily so when it is viewed in connection with the protection of the rights of traders. Protection of the rights of traders naturally finds a place among the matters dealt with by Treaties of commerce and navigation.

Therefore it cannot be said that the administration of justice, in so far as it is concerned with the protection of these rights, must necessarily be excluded from the field of application of the most-favoured-nation clause, when the latter includes 'all matters relating to commerce and navigation'. The question can only be determined in accordance with the intention of the Contracting Parties as deduced from a reasonable interpretation of the Treaty.

Although the wording of Article X does not provide a clear and decisive indication in this respect, the Commission is of the opinion that it is difficult to reconcile the narrow interpretation submitted by the Government of the United Kingdom with the indications given in the text, in particular in the last part of the sentence: it being their (the Contracting Parties') intention that the trade and navigation of each country shall be placed, *in all respects*, by the other on the footing of the most-favoured-nation.¹²

Under this rule, known as the *ejusdem generis* principle, the most-favoured-nation standard is intended to protect beneficiaries in similar situations. This raises no difficulty when the object of the basic treaty and that of the third-party treaty are not different in nature, which is the case for two treaties on the promotion and protection of investments.¹³

The principles laid down in these international law cases as to the meaning and operation of the most-favoured-nation clause may have been of limited reach had the mechanism not been seized, as a treaty mechanism, by investment treaty arbitration.

B. The Impact of the Rise of Investment Treaty Arbitration

In the context of investment arbitration, the question of the interpretation and effect of most-favoured-nation clauses has been brought about by the dramatic increase of arbitrations based on treaties for the protection and promotion of investments. In this context, the above principles establishing the function and operation of the most-favoured-nation clause have not

¹² *ibid* 319–320.

¹³ On the application of this principle in investment arbitration, see below, in particular the developments on the *Maffezini* case.

given rise to conceptual difficulties in situations where the better treatment sought by the investor relates to the classic substantive protection accorded by the host State respectively in the basic treaty and in third-party treaties.

In the *AAPL v Sri Lanka* case, the Tribunal was requested to apply the broadly drafted most-favoured-nation clause contained in the investment treaty between Sri Lanka and the United Kingdom to incorporate the better treatment resulting from the absence, in the investment treaty between Sri Lanka and Switzerland, of a 'war clause' provision or a 'civil disturbance' exemption in relation to the full protection and security standard. The Tribunal held that the most-favoured-nation clause could not be invoked as it was not proven that the Sri Lanka-Switzerland treaty adopted a 'strict liability' standard and thus contained a more favourable treatment than that provided under the Sri Lanka-United Kingdom treaty.¹⁴ A similar situation arose in *ADF v. United States*. Because the 'minimum standard of treatment' contained in Article 1105(1) of NAFTA had received a strict interpretation by the Free Trade Commission, the investor sought to benefit from similar provisions in the United States-Albania and the United States-Estonia bilateral investment treaties that were not subject to the same restrictive interpretation. Based on the lack of evidence as to the existence of a better standard of treatment in these two treaties or their breach by the United States, the Tribunal rejected the extension of the most-favoured-nation clause to the fair and equitable treatment and the full protection and security provisions of the treaty.¹⁵ In *Impregilo v Pakistan*, the Tribunal similarly declined to apply the most-favoured-nation clause contained in the Pakistan-Italy bilateral investment treaty to the umbrella clause contained in the Pakistan-Switzerland bilateral investment treaty: even assuming that

¹⁴ *Asian Agricultural Products Limited v Republic of Sri Lanka*, ICSID Case No. ARB/87/3 (Arbitral Tribunal composed of Ahmed El-Kosheri (President), Berthold Goldman and Samuel Asante), Award of 27 June 1990, 4 ICSID Reports 246, 271–272 ('... the Tribunal has no reasons to believe that the Sri Lanka/Switzerland Treaty adopted a 'strict liability' standard, and the Tribunal is convinced that, in the absence of a specific rule provided for in the Treaty itself as *lex specialis*, the general international law rules have to assume their role as *lex generalis*. Accordingly, it is not proven that the Sri Lanka/Switzerland Treaty contains rules more favourable than those provided for under the Sri Lanka/UK Treaty, and hence, Article 3 of the latter Treaty cannot be justifiably invoked in the present case.')

¹⁵ *ADF Group Inc v United States of America*, ICSID Case No. ARB(AF)/00/01 (Arbitral Tribunal composed of Florentino Feliciano (President), Armand de Mestral and Carolyn Lamm), Award of 9 January 2003, 18 ICSID Review 195 (2003), paragraphs 194–196 (in particular paragraph 194: 'The Investor's theory assumes the validity of its own reading of the relevant clauses of the treaties with Albania and Estonia. The reading, as observed in some detail earlier, is that the "fair and equitable treatment" and "full protection and security" clauses of the two treaties establish broad, normative standards of treatment distinct and separate from the specific requirements of the customary international law minimum standard of treatment. We have, however, already concluded that the Investor has not been able persuasively to document the existence of such autonomous standards, and that even if the Tribunal assumes hypothetically the existence thereof, the Investor has not shown that the US measures are reasonably characterized as in breach of such standards.')

the most-favoured-nation clause could apply for the safeguard of the contractual commitments between Pakistan and Italian investors under the basic treaty, in this case the investor could not rely on the most-favoured-nation clause since the contracts had been concluded by a separate entity and not Pakistan itself.¹⁶

The only tribunal having given effect, on the facts of the case, to the most-favoured-nation clause as applied to fair and equitable treatment is the Tribunal constituted in *MTD Equity v Chile*. In that case, the investor sought to use the most-favoured-nation clause of the Chile–Malaysia bilateral investment treaty to incorporate the broader fair and equitable treatment provisions contained in the Chile–Croatia and the Chile–Denmark bilateral investment treaties in relation to the granting of permits. The Tribunal held that the protection offered under the Croatia and Denmark treaties was part of the better treatment reserved under the most-favoured-nation provision and, based on the facts of the case, found that Chile had breached its obligations under the most-favoured-nation clause.¹⁷

Another 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*. In *Tecmed v Mexico*, the Mexico–Spain investment treaty was applicable with prospective effect only. The claimant sought retroactive

¹⁶ *Impregilo SpA v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3 (Arbitral Tribunal composed of Gilbert Guillaume (President), Bernardo Cremades and Toby Landau), Decision on jurisdiction of 22 April 2005, available on the ICSID and the ITA websites, 223 ('In the Tribunal's view, given that the Contracts were concluded by Impregilo with WAPDA, and not with Pakistan, Impregilo's reliance upon Article 3 of the BIT takes the matter no further. Even assuming *arguendo* that Pakistan, through the MFN clause and the Swiss–Pakistan BIT, has guaranteed the observance of the contractual commitments into which it has entered together with Italian investors, such a guarantee would not cover the present Contracts—since these are agreements into which it has not entered. On the contrary, the Contracts were concluded by a separate and distinct entity.')

¹⁷ *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile*, ICSID Case No. ARB/01/7 (Arbitral Tribunal composed of Andrés Rigo Sureda (President), Marc Lalonde and Rodrigo Oreamuno Blanco), Award of 25 May 2004, 44 ILM 91 (2005), paragraphs 100–104 (at 103–104: 'The question for the Tribunal is whether the provisions of the Croatia BIT and the Denmark BIT which deal with the obligation to award permits subsequent to approval of an investment and to fulfillment of contractual obligations, respectively, can be considered to be part of fair and equitable treatment. The Tribunal considers the meaning of fair and equitable treatment below and refers to that discussion. The Tribunal has concluded that, under the BIT, the fair and equitable standard of treatment has to be interpreted in the manner most conducive to fulfill the objective of the BIT to protect investments and create conditions favorable to investments. The Tribunal considers that to include as part of the protections of the BIT those included in Article 3(1) of the Denmark BIT and Article 3(3) and (4) of the Croatia BIT is in consonance with this purpose. The Tribunal is further convinced of this conclusion by the fact that the exclusions in the MFN clause relate to tax treatment and regional cooperation, matters alien to the BIT but that, because of the general nature of the MFN clause, the Contracting Parties considered it prudent to exclude. *A contrario sensu*, other matters that can be construed to be part of the fair and equitable treatment of investors would be covered by the clause.')

application of the Mexico–Spain treaty through the operation of the most-favoured-nation clause of that treaty and the ‘application’ provision of the Mexico–Austria investment treaty which provided that it applied to ‘investments made in the territory of either Contracting Party in accordance with its legislation by investors of the other Contracting Party prior to as well as after the entry into force of this Agreement’. The Tribunal rejected the claimant’s request, holding that:

...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 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.¹⁸

In the same way, the Tribunal in *MCI v Ecuador* rejected the investor’s attempt to use the most-favoured-nation clause as a ground to import the entry into force provision of another treaty. In that case, the facts complained of had occurred prior to the entry into force of the Ecuador–US investment treaty in May 1997. The claimant sought the protection offered as of December 1, 1995, which was the date of entry into force of the Ecuador–Argentina investment treaty. The Tribunal rejected the claimant’s argument based on the most-favoured-nation clause:

From the wording of Article VII of the Argentina–Ecuador BIT, the Tribunal concludes that, in accordance with the interpretation rules of article 31 of the Vienna Convention, the references made in the text of that Article to ‘either Contracting Party,’ ‘between the Contracting Parties,’ ‘an investor of one Contracting Party and the other Contracting Party,’ and ‘the other Contracting Party’ unquestionably refer to the Contracting Parties of the Argentina–Ecuador BIT.

¹⁸ *Técnicas Medioambientales Tecmed SA v United Mexican States*, ICSID Case No. ARB(AF)/00/02 (Arbitral Tribunal composed of Horacio Grigera Naón (President), José Carlos Fernandes Rozas and Carlos Bernal Vereá), Award of 29 May 2003, 19 ICSID Review 158 (2004) in Spanish and 43 ILM 133 (2004) in English, paragraph 69 (emphasis added).

Consequently, the Tribunal rejects the possibility of considering the application of the most-favored-nation clause, in the terms, and with the effects, claimed by the Claimants.¹⁹

By not even entering into a discussion on the most-favoured-nation clause as invoked by the claimant, the Tribunal in these cases clearly established that such a provision is not an excuse to bypass the requirements that must be met before the treaty can apply at all. Indeed, each treaty sets forth its own conditions and scope of application *ratione personae*, *ratione materiae* and *ratione temporis*. In the same way that 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, the requirements relating to the temporal application of the treaty must be met in order for the claimant to be in a position to benefit from the treaty, including its most-favoured-nation clause. The same rationale underlies the decision of the International Court of Justice in the *Anglo-Iranian* case, the Court having emphasised that 'the most-favoured-nation clause contained in [the 1857 and 1903] Treaties [could not] ... be brought into operation' because those treaties were outside the scope of the Court's jurisdiction and could not be invoked.²⁰

By contrast, the much debated question of the application of the most-favoured-nation clause to the dispute resolution mechanism of the relevant investment treaty shows that the subject is not as straightforward. An analysis of the diverging views and the positions taken by each arbitral tribunal in relation to the decisions of other tribunals shows the extent to which this area reflects one's underlying philosophy of investment arbitration in general.

II. THE APPLICABILITY OF THE MOST-FAVORED-NATION TREATMENT TO THE TREATY'S DISPUTE RESOLUTION MECHANISM

The question whether the beneficiary of a most-favoured-nation clause may benefit from the more favourable dispute settlement provisions contained in a third-party treaty covers different situations. For example, when the basic treaty contains no dispute settlement provision at all, can the treaty's most-favoured-nation clause be invoked by its beneficiary to confer a right of access to international arbitration contained in a third-party treaty? When

¹⁹ *MCI Power Group LC and New Turbine, Inc v Republic of Ecuador*, ICSID Case No. ARB/03/6 (Arbitral Tribunal composed of Raúl Vinuesa (President), Benjamin Greenberg and Jaime Irrázabal), Award of 31 July 2007, 22 *International Arbitration Report*, No. 8 at Sec. B (August 2007), paragraphs 127–128.

²⁰ See *Anglo-Iranian Oil Company Case* (n 4) 110.

the basic treaty contains a dispute settlement clause but no choice is given to the investor as regards the type of arbitration, notably institutional arbitration such as ICSID, can the most-favoured-nation clause be invoked to seek the benefit of the options offered in a third-party treaty? When the basic treaty—such as many of the bilateral investment treaties entered into by China—provides for international arbitration only as regards the determination of the amount of compensation for expropriation and not regarding the principle of the host State's responsibility, can a most-favoured-nation clause contained in that treaty be invoked to benefit from a broad dispute settlement provision contained in a third party treaty—for example Article 10 of the Netherlands–China BIT that entered into force on 1 August 2004, or Article 9 of the Germany–China bilateral investment treaty that entered into force on 11 November 2005? When the basic treaty provides for particular conditions before an international arbitration proceeding can be initiated, for example the observance of a cooling off period varying from three to six months or the exhaustion of local remedies, can a most-favoured-nation clause be invoked to benefit from the more favourable conditions of a third-party treaty? Almost all these situations have been addressed in the emerging case law, although not in a uniform manner. The divergence in the solutions is often related to the question whether there should be limitations to the operation of the MFN clause.

A. The Maffezini-Plama 'Precedents'

The question of the applicability of the most-favoured-nation clause to dispute settlement mechanisms was addressed for the first time, in the context of investment arbitration, in *Maffezini v Spain*.²¹ In that case the claim was based on the Argentina–Spain bilateral investment treaty, whose dispute settlement clause for investment disputes provided for a six-month negotiation phase before the dispute could be submitted to the competent courts of the host State and, failing the settlement of the dispute after the expiration of a period of 18 months, to international arbitration. The claimant invoked the most-favoured-nation standard of the Argentina–Spain bilateral investment treaty contained in the clause providing for fair and equitable treatment and according to which 'in all matters subject to this Agreement, this treatment shall not be less favorable than that extended by each Party to the investments made in its territory by investors of a third country.' On the basis of this clause, the claimant sought to benefit from the

²¹ *Emilio Agustín Maffezini v Kingdom of Spain*, ICSID Case No. ARB/97/7 (Arbitral Tribunal composed of Francisco Orrego Vicuña (President), Thomas Buergenthal and Maurice Wolf), Decision on jurisdiction of 25 January 2000, 16 ICSID Review 212 (2001).

more favourable dispute resolution mechanism contained in the Chile-Spain bilateral investment treaty which did not provide for the settlement of disputes through domestic courts for a period of 18 months, but rather for international arbitration after a six-month negotiation period.

After an analysis of the international law cases that had dealt with most-favoured-nation clauses and having examined the language of the clause at hand, which provided for more favourable treatment regarding 'all matters' subject to the treaty, the *Maffezini* Tribunal held that:

Notwithstanding the fact that the basic treaty containing the clause does not refer expressly to dispute settlement as covered by the most favored nation clause, *the Tribunal considers that there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights of traders under treaties of commerce ...*²²

The *Maffezini* Tribunal therefore clearly established the principle that dispute settlement mechanisms form part of the treatment accorded to investors under the treaties for the promotion and protection of international investments, bearing in mind that the third-party treaty has to relate to the same subject matter as the basic treaty, in keeping with the *ejusdem generis* principle.²³ The *Maffezini* Tribunal, however, narrowed the operation of the clause based on 'public policy considerations':

Notwithstanding the fact that the application of the most favored nation clause to dispute settlement arrangements in the context of investment treaties might result in the harmonization and enlargement of the scope of such arrangements, there are some important limits that ought to be kept in mind. 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 will often be the case. The scope of the clause might thus be narrower than it appears at first sight.²⁴

²² *ibid* paragraph 54 (emphasis added).

²³ *ibid* paragraph 56 ('it can be concluded that if a third-party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause as they are fully compatible with the *ejusdem generis* principle. Of course, the third-party treaty has to relate to the same subject matter as the basic treaty, be it the protection of foreign investments or the promotion of trade, since the dispute settlement provisions will operate in the context of these matters; otherwise there would be a contravention of that principle.')

²⁴ *ibid* paragraph 62.

The limitations defined by the *Maffezini* Tribunal concern such public policy considerations as the exhaustion of local remedies, the stipulation of a fork-in-the-road clause (ie an irreversible option offered to the investor between the courts of the host State and international arbitration), the provision of a particular arbitration forum such as ICSID, or the parties' agreement to have a highly institutionalized system of arbitration.²⁵

The *Maffezini* decision is generally contrasted with the decision rendered five years later in *Plama v Bulgaria*.²⁶ Where the *Maffezini* Tribunal had recognized that 'dispute settlement arrangements are inextricably related to the protection' accorded under an investment treaty, the *Plama* Tribunal considered that the most-favoured-nation clause could not apply to the 'procedural provisions' relating to dispute settlement.

In *Plama*, the Tribunal was requested to decide whether the claimant could rely, through the most-favoured-nation clause contained in the Bulgaria-Cyprus bilateral investment treaty, on the dispute settlement provision contained in the Bulgaria-Finland treaty which provided for ICSID arbitration for any type of dispute whereas the arbitration clause contained in the Bulgaria-Cyprus treaty provided only for ad hoc arbitration for disputes relating to the amount of compensation for expropriation. Referring to the interpretation rules under the Vienna Convention on the

²⁵ *ibid* paragraph 63 ('Here it is possible to envisage a number of situations not present in the instant case. First, 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 since the stipulated condition reflects a fundamental rule of international law. Second, if the parties have agreed to a dispute settlement arrangement which includes the so-called fork in the road, that is, a choice between submission to domestic courts or to international arbitration, and where the choice once made becomes final and irreversible, this stipulation cannot be bypassed by invoking the clause. This conclusion is compelled by the consideration that it would upset the finality of arrangements that many countries deem important as a matter of public policy. Third, if the agreement provides for a particular arbitration forum, such as ICSID, for example, this option cannot be changed by invoking the clause, in order to refer the dispute to a different system of arbitration. Finally, if the parties have agreed to a highly institutionalized system of arbitration that incorporates precise rules of procedure, which is the case, for example, with regard to the North America Free Trade Agreement and similar arrangements, it is clear that neither of these mechanisms could be altered by the operation of the clause because these very specific provisions reflect the precise will of the contracting parties. Other elements of public policy limiting the operation of the clause will no doubt be identified by the parties or tribunals.')

²⁶ *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24 (Arbitral Tribunal composed of Carl Salans (President), Albert Jan van den Berg and VV Veeder), Decision on jurisdiction of 8 February 2005, 20 ICSID Review 262 (2005), see commentary by Emmanuel Gaillard, 133 *Journal du droit international* 251 (2006). It is worthy of note that the first decision, after *Maffezini*, to have refused the extension of a most-favoured-nation clause to dispute resolution mechanisms was the decision in *Salini v Jordan* (see above). A stronger contrast seems, however, to have been perceived between *Maffezini* and *Plama* if one considers the underlying philosophy in each case and the fact that all subsequent tribunals have almost systematically referred to *Maffezini* and *Plama* either to adopt or to distance themselves from the reasoning in each of these two decisions.

Law of Treaties, the Tribunal first referred to the language and the context of the most-favoured-nation clause invoked by Plama:

It is not clear whether the ordinary meaning of the term ‘treatment’ in the MFN provision of the BIT includes or excludes dispute settlement provisions contained in other BITs to which Bulgaria is a Contracting Party. Inclusion or exclusion may or may not satisfy the *ejusdem generis* principle ... but as it will be seen below, it is not relevant to address that question. ...

The second paragraph of Article 3 of the Bulgaria-Cyprus BIT contains an exception to MFN treatment relating to economic communities and unions, a customs union or a free trade area. This may be considered as supporting the view that all other matters, including dispute settlement, fall under the MFN provision of the first paragraph of article 3 (on the basis of the principle *expressio unius est exclusio alterius*). However, the fact that the second paragraph refers to ‘privileges’ may be viewed as indicating that MFN treatment should be understood as relating to substantive protection. Hence, it can be argued with equal force that the second paragraph demonstrates that the first paragraph is solely concerned with provisions relating to substantive protection to the exclusion of the *procedural provisions relating to dispute settlement*.²⁷

As regards the circumstances of the conclusion of the BIT, i.e. the existence of a communist regime in Bulgaria at that time limiting the protection of foreign investors, the Tribunal concluded that the Contracting Parties did not intend to extend the dispute settlement provisions through the most-favoured-nation clause.²⁸ The *Plama* Tribunal also considered that a State’s agreement to arbitrate its investment disputes had to be clear and unambiguous and that accordingly the incorporation by reference of dispute resolution mechanisms had also to be clear and unambiguous, something that could not be established in the circumstances of the case:

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

²⁷ *ibid* paragraphs 189–191 (emphasis added).

²⁸ *ibid* paragraphs 195–197.

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. The Claimant argues that the MFN provision produces such effect, stating that in contractual relationships the incorporation by reference of an arbitration agreement is commonplace...

... the reference must be such that the parties' intention to import the arbitration provision of the other agreement is clear and unambiguous. A clause reading 'a treatment which is not less favourable than that accorded to investments by investors of third states' as appears in Article 3(1) of the Bulgaria-Cyprus BIT, cannot be said to be a typical incorporation by reference clause as appearing in ordinary contracts. ...²⁹

On the operation of the most-favoured-nation clause in relation to dispute settlement arrangements, the Tribunal laid further emphasis on the fact that such arrangements are 'specifically negotiated' 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-favoured-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.³⁰

In relation to the *Maffezini* decision, the *Plama* Tribunal distanced itself from that decision's rationale and the tribunal's method of adopting a principle with a number of limitations based on public policy considerations.³¹

²⁹ *ibid* paragraphs 198–200.

³⁰ *ibid* paragraph 209.

³¹ *ibid* paragraphs 219–222 ("The tribunal in *Maffezini* further referred to 'the fact that the application of the most favoured nation clause to dispute settlement arrangements in the context of investment treaties might result in the harmonization and enlargement of the scope of such arrangements' (decision at paragraph 62). The present Tribunal fails to see how harmonization of dispute settlement provisions can be achieved by reliance on the MFN provision. Rather, the 'basket of treatment' and 'self-adaptation of an MFN provision' in relation

In *Maffezini* the tribunal pointed out: 'It is clear, in any event, that a distinction has to be made between the legitimate extension of rights and benefits by means of the 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'. The present Tribunal agrees with that observation, albeit that 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.³²

As a result of the foregoing analysis, the *Plama* Tribunal held that the most-favoured-nation clause could not be interpreted 'as providing consent to submit a dispute under the Bulgaria-Cyprus BIT to ICSID arbitration'.³³

B. *The Meaning of 'Treatment': Where is the Split in the Case Law?*

The analysis of the case law on the application of the most-favoured-nation clause to dispute resolution mechanisms shows that there is no consensus on this question, but rather an apparent split between those tribunals having adhered to the *Maffezini* reasoning and those tribunals having adopted the *Plama* view. Although not always clearly defined, the focus of the examination seems to be the concept of 'treatment' and whether access to dispute resolution mechanisms is part of the treatment accorded under the relevant treaty. It is in relation with this concept that the various tribunals have adopted positions on whether dispute resolution arrangements constitute a 'substantive' right that can benefit from the operation of a most-favoured-nation clause, or a 'procedural' right excluded from such benefit.

to dispute settlement provisions (as alleged by the claimant) has as effect that an investor has the option to pick and choose provisions from the various BITs. If that were true, a host State which has not specifically agreed thereto can be confronted with a large number of permutations of dispute settlement provisions from the various BITs which it has concluded. Such a chaotic situation—actually counterproductive to harmonization—cannot be the presumed intent of Contracting Parties... The present Tribunal was puzzled as to what the origin of [the *Maffezini*] 'public policy considerations' is. When asked by the Tribunal at the Hearing, counsel for the Claimant responded: 'They just made it up.' The present Tribunal does not wish to go that far in its appraisal of the *Maffezini* decision. Rather, it seems that the effect of the 'public policy considerations' is that they take away much of the breadth of the preceding observations made by the tribunal in *Maffezini*.")

³² *ibid* paragraph 223 (emphasis added).

³³ *ibid* paragraph 227.

In line with the *Maffezini* decision, a number of subsequent tribunals have decided that dispute settlement arrangements are part of the treatment granted under investment treaties.³⁴ In *Siemens v. Argentina*,³⁵ the claimant sought to avoid the requirement of prior recourse to the local courts for a period of eighteen months as provided by the dispute resolution clause of the Argentina-Germany bilateral investment treaty. The Tribunal endorsed the *Maffezini* decision and decided that the claimant could, through the operation of the most-favoured-nation clause, submit the dispute directly to arbitration notwithstanding the lack of prior submission of the dispute to local courts:

... the Tribunal finds that the Treaty itself, together with so many other treaties of investment protection, has 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 and of the advantages accessible through a MFN clause.*

This conclusion concurs with the findings of the arbitral tribunal in *Maffezini* ... The arbitral tribunal in *Maffezini* noted that Spain had used the expression 'all matters subject to this Agreement' only in the case of its BIT with Argentina and 'this treatment' in all other cases. The said tribunal commented that the latter was 'of course a narrower formulation'. The Tribunal concurs that the formulation is narrower but, as

³⁴ Subsequent to *Maffezini*, the first tribunal seized of the question of the application of a most-favoured-nation clause to the dispute resolution procedure of the treaty was in *PSEG v Turkey: PSEG Global Inc et al v Republic of Turkey*, ICSID Case No. ARB/02/5 (Arbitral Tribunal composed of Francisco Orrego Vicuña (President), Yves Fortier and Gabrielle Kaufmann-Kohler), Decision on jurisdiction of 4 June 2004, 44 ILM 465 (2005). The Tribunal decided that the question did not arise in light of the wording of the dispute resolution provision contained in the Turkey-United States bilateral investment treaty, which provided for a multi-layer procedure comprised of a consultations and negotiations phase, followed by a non-binding third party procedure, followed by an ICSID arbitration procedure after one year from the date of occurrence of the dispute, provided that the dispute had not been submitted to a previously agreed procedure or to the courts or administrative tribunals or agencies of the host State, something that the claimants argued was equivalent to a fork-in-the-road provision. As an alternative argument, the claimants sought, through the operation of the most-favoured-nation provision of the treaty, to rely on a number of other treaties concluded by Turkey which did not include recourse to a previously agreed procedure. Having determined that the dispute resolution provision contained a 'step by step search for a dispute resolution mechanism', the Tribunal decided that, 'based on the interpretation of the Treaty, the Tribunal does not consider it necessary to discuss the issue in terms of the operation of the most favored nation clause. If the right to resort to ICSID arbitration in the terms discussed is embodied in the Treaty itself, there is no need to look for it under other treaties.' (paragraph 163).

³⁵ *Siemens AG v Argentine Republic*, ICSID Case No. ARB/02/8 (Arbitral Tribunal composed of Andrés Rigo Sureda (President), Charles Brower, Domingo Bello Janeiro), Decision on jurisdiction of 3 August 2004, 44 ILM 138 (2005), see commentary by Emmanuel Gaillard, 132 *Journal du droit international* 142 (2005).

concluded above, it considers that the term ‘*treatment*’ and the phrase ‘activities related to the investments’ are *sufficiently wide to include settlement of disputes*.³⁶

The same solution was adopted in *Gas Natural v Argentina*,³⁷ rendered following *Plama*, where the Tribunal was requested to apply the more favourable condition under the Argentina–United States bilateral investment treaty, consisting of bypassing the 18-month waiting period before submission of the dispute to international arbitration, through the most-favoured-nation clause of the Argentina–Spain bilateral investment treaty. The Tribunal ruled that the most-favoured-nation clause applied to dispute resolution arrangements:

The Tribunal holds that a provision for international investor-state arbitration in bilateral investment treaties is a *significant substantive incentive and protection for foreign investors*; further, that access to such arbitration only after resort to national courts and an eighteen-month waiting period is a less favorable degree of protection than access to arbitration immediately upon expiration of the negotiating period. Accordingly, the Claimant is entitled to avail itself of the dispute settlement provision in the United States–Argentina BIT in reliance on Article IV(2) of the Bilateral Investment Treaty between Spain and Argentina.³⁸

The same question was again brought before the *Suez v Argentina* Tribunal in relation to the same type of dispute settlement provision.³⁹ There too, the Tribunal ruled that dispute settlement mechanisms are included in the treatment covered by a most-favoured-nation clause:

[The Treaty provision] clearly states that ‘in all matters’ (*en todas las materias*) a Contracting party is to be given a treatment no less favorable than that which it grants to investments made in its territory by investors from any third country. Article X of the Argentina–Spain BIT specifies in detail the process for the ‘Settlement of Disputes between a Party and Investors of the other Party.’ Consequently, dispute settlement is

³⁶ *ibid* paragraphs 102–103 (Emphasis added).

³⁷ *Gas Natural SDG SA v Argentine Republic*, ICSID Case No. ARB/03/10 (Arbitral Tribunal composed of Andreas Lowenfeld (President), Henri Alvarez and Pedro Nikken), Decision on preliminary questions on jurisdiction of 17 June 2005, available on the ITA website.

³⁸ *ibid* paragraph 31 (emphasis added).

³⁹ *Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales del Agua SA v Argentine Republic*, ICSID Case No. ARB/03/17 (Arbitral Tribunal composed of Jeswald Salacuse (President), Gabrielle Kaufmann-Kohler and Pedro Nikken), Decision on jurisdiction of 16 May 2006, available on the ICSID and ITA websites.

certainly a ‘matter’ governed by the Argentina-Spain BIT. *The word ‘treatment’ is not defined in the treaty text. However, the ordinary meaning of that term within the context of investment includes the rights and privileges granted and the obligations and burdens imposed by a Contracting State on investments made by investors covered by the treaty.*⁴⁰

In relation to the concept of treatment, the *Suez Tribunal* laid further emphasis on the equality of treatment underlying the notion of most-favoured-nation treatment:

Moreover, after an analysis of the subsequent provisions of the BITs in question, the Tribunal finds no basis for distinguishing dispute settlement matters from any other matters covered by a bilateral investment treaty. 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* that two sovereign states, Argentina and Spain, have agreed upon. ...⁴¹

The same reasoning was again adopted in *National Grid v Argentina*.⁴² Upon an extensive examination of previous cases, the Tribunal applied the most-favoured-nation clause to the applicable treaty’s dispute resolution mechanism:

The Tribunal concurs with *Maffezini’s* balanced considerations in its interpretation of the MFN clause and with its concern that MFN clauses

⁴⁰ *ibid* paragraph 55 (Emphasis added). The Tribunal continued, on the operation of the most-favoured-nation clause: ‘In the present situation, Argentina concluded a BIT with France which permits aggrieved investors, after six months of attempting to resolve their disputes to have recourse to international arbitration without the necessity of first bringing a case in the local courts of a contracting State. Consequently, French investors in Argentina, as a result of the Argentina-France BIT, receive a more favorable treatment than do Spanish investors in Argentina under the Argentina-Spain BIT. That being the case, by virtue of Article IV, para 2, Spanish investors are entitled to a treatment with respect to dispute settlement no less favorable than the one accorded to French investors. In specific terms, *granting a treatment to Spanish investors that is no less favorable than that granted to French investors would mean that Spanish investors would be able to invoke international arbitration against Argentina on the same terms as French investors.* That is to say, Spanish investors, like French investors, may have recourse to international arbitration, provided they comply with the six months negotiation period but without the need to proceed before the local courts of Argentina for a period of eighteen months’ (emphasis added).

⁴¹ See *ibid.*, paragraph 57 (Emphasis added).

⁴² *National Grid plc v Argentine Republic*, UNCITRAL case (Arbitral Tribunal composed of Andrés Rigo Sureda (President), Whitney Debevoise and Alejandro Garro), Decision on jurisdiction of 20 June 2006, available on the ITA website.

not be extended inappropriately. It is evident that some claimants may have tried to extend an MFN clause beyond appropriate limits. For example, the situation in *Plama* involving an attempt to create consent to ICSID arbitration when none existed was foreseen in the possible exceptions to the operation of the MFN clause in *Maffezini*. But cases like *Plama* do not justify depriving the MFN clause of its legitimate meaning or purpose in a particular case. The MFN clause is an important element to ensure that foreign investors are *treated on a basis of parity* with other foreign investors and with national investors when they invest abroad.

To conclude, the Tribunal considers that, in the context in which the Respondent has consented to arbitration for the resolution of the type of disputes raised by the Claimant, *'treatment' under the MFN clause of the Treaty makes it possible for UK investors in Argentina to resort to arbitration without first resorting to Argentine courts*, as is permitted under the US-Argentina Treaty.⁴³

It is not clear whether the *National Grid* Tribunal, in an attempt to strike a balance between the recognition that most-favoured-nation treatment is intended to guarantee a 'basis of parity' between investors and the inclination to contain the operation of the clause within 'appropriate limits' (or, in the *Maffezini* wording, in conformity with public policy considerations), admitted that the most-favoured-nation clause may also operate as regards dispute resolution arrangements other than those that would, in the *Plama* view, constitute a 'procedural' prerequisite. The decision in *Suez & Vivendi v Argentina*⁴⁴ adopts, in this respect, a more general approach. Although the question in that case was, once again, the circumvention of the 18-month procedure initiated in the local courts, the Tribunal held that:

... The word *'treatment'* is not defined in the treaty text. However, *the ordinary meaning of that term within the context of investment includes the rights and privileges granted and the obligations and burdens imposed by a Contracting State on investments made by investors covered by the treaty*. In the present situation, Argentina concluded a BIT with France which permits aggrieved investors, after six months' of attempting to resolve their disputes to have recourse to international

⁴³ *ibid* paragraphs 92–93 (Emphasis added).

⁴⁴ *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v The Argentine Republic*, ICSID Case No. ARB/03/19 (Arbitral Tribunal composed of Jeswald Salacuse (President), Gabrielle Kaufmann-Kohler and Pedro Nikken), Decision on jurisdiction of 3 August 2006, and *AWG Group v The Argentine Republic*, UNCITRAL case, Decision on jurisdiction of 3 August 2006, available on the ICSID and IIA websites.

arbitration without the necessity of first bringing a case in the local courts of a Contracting State. Consequently, French investments in Argentina, as a result of the Argentina-France BIT, receive a more favorable treatment than do Spanish investments in Argentina under the Argentina-Spain BIT. ...

... the Tribunal finds *no basis for distinguishing dispute settlement matters from any other matters covered by a bilateral investment treaty*. From the point of view of the promotion and protection of investments, the stated purposes of both the Argentina-Spain BIT and the Argentina U.K. BIT, dispute settlement is as important as other matters governed by the BITs and is *an integral part of the investment protection regime that the respective sovereign states have agreed upon*.⁴⁵

In all decisions which, following *Maffezini*, admitted the application of the most-favoured-nation clause to dispute resolution mechanisms, the more favourable treatment sought by the claimants consisted in allowing recourse to international arbitration without the need to proceed before the local courts for a period of eighteen months. The case law seemed rather consistent on this question, leaving unanswered the question whether the clause could be invoked to benefit from other arrangements included in dispute resolution mechanisms. The determining step in this respect was taken in *RosInvestCo v Russia*.⁴⁶ In that case, the claimant relied on the most-favoured-nation provision contained in the USSR–United Kingdom treaty to benefit from the broader arbitration provision under the Russia–Denmark investment treaty, given that the dispute resolution clause contained in the USSR–United Kingdom bilateral investment treaty was limited to a procedure determining solely the amount due or payment of compensation in case of expropriation. Having examined the wording of the most-favoured-nation provision relating the treatment to be granted to ‘investors’⁴⁷, the Tribunal concluded that such treatment included the protection granted in case of expropriation and that arbitration formed a ‘highly relevant part’ of this protection:

... it is difficult to doubt that an expropriation interferes with the investor’s use and enjoyment of the investment, and that the *submission*

⁴⁵ *ibid* paragraphs 55–59 (Emphasis added).

⁴⁶ *RosInvestCo UK Ltd v Russian Federation*, SCC Arbitration Institute Case No. 080/2004 (Arbitral Tribunal composed of Karl-Heinz Böckstiegel (President), Johan Steyn and Franklin Berman), Award on jurisdiction of October 2007, available on the ITA website.

⁴⁷ Article 3(2) of the USSR–UK bilateral investment treaty provides that: “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.”

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.⁴⁸

Following this conclusion, the *RosInvestCo* Tribunal decided that, based on the most-favoured-nation clause taken together with the broad dispute resolution clause found in the Russian Federation–Denmark investment treaty, its jurisdiction extended beyond that granted in the dispute resolution clause of the USSR–United Kingdom treaty:

While indeed the application of the MFN clause of Article 3 widens the scope of Article 8 and thus is in conflict to its limitation, this is a normal result of the application of MFN clauses, the very character and intention of which is that protection not accepted in one treaty is widened by transferring protection accorded in another treaty.

If this effect is generally accepted in the context of substantive protection, the Tribunal sees no reason not to accept it in the context of procedural clauses such as arbitration clauses. Quite the contrary, it could be argued that, if it applies to substantive protection, then it should apply even more to 'only' procedural protection. However, the Tribunal feels that this latter argument cannot be considered as decisive, but that rather, as argued further above, *an arbitration clause, at least in the context of expropriation, is of the same protective value as any substantive protection* afforded by applicable provisions such as Article 5 of the BIT.⁴⁹

The *RosInvestCo* decision thus appears to be the first to fully give effect to the most-favoured-nation treatment in relation to dispute resolution mechanisms.

The opposite line of cases seems, following *Plama*, to have adopted an interpretation based on a distinction between 'procedural' rights and 'substantive' rights within the same dispute resolution mechanism. In rejecting the effect of the most-favoured-nation clause, the Tribunal in *Salini v Jordan*⁵⁰ did not provide particular guidance in this respect, simply decid-

⁴⁸ *RosInvestCo v Russia* (n 46) paragraph 130 (emphasis added).

⁴⁹ *ibid* paragraphs 131–132 (emphasis added).

⁵⁰ *Salini Costruttori SpA and Italstrade SpA v Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13 (Arbitral Tribunal composed of Gilbert Guillaume (President), Bernardo Cremades and Ian Sinclair), Decision on jurisdiction of 29 November 2004, 20 ICSID Review 148 (2005), see commentary by Emmanuel Gaillard, 132 *Journal du Droit International* 182 (2005).

ing that the most-favoured-nation clause contained in the Jordan–Italy investment treaty could not apply to the dispute settlement mechanism in a situation where the claimant was seeking to establish an alternative ground for ICSID jurisdiction over contractual claims whereas, under the Jordan–Italy treaty, disputes relating to investment contracts were to be resolved through the procedure foreseen in such contracts:

[T]he Claimants have submitted nothing from which it *might* be established that the common intention of the Parties was to have the most-favoured-nation clause apply to dispute settlement. Quite on the contrary, the intention as expressed in Article 9(2) of the BIT was to exclude from ICSID jurisdiction contractual disputes between an investor and *an* entity of a state Party in order that such disputes might be settled in accordance with the procedures set forth in the investment agreements.⁵¹

The distinction between ‘procedural’ and ‘material’ rights was discussed in more explicit terms in *Berschader v Russia*.⁵² The claimant in that case sought to avail itself of the broad dispute resolution provision contained in the Russian Federation–Denmark investment treaty through the operation of the most-favoured-nation clause contained in the USSR–Belgium/Luxembourg investment treaty, whose dispute resolution clause provided for international arbitration only as regards the amount or mode of compensation in the event of expropriation. The Tribunal specifically rejected the solution adopted in *Gas Natural* where investor-State arbitration was held to be a ‘significant substantive incentive and protection for foreign investors’. It held that a most-favoured-nation provision can incorporate by reference an arbitration clause from another investment treaty only where the terms of the basic treaty so provide clearly and unambiguously:

There is a fundamental difference as to how an MFN clause is generally understood to operate in relation to the material benefits afforded by a BIT, on the one hand, and in relation to dispute resolution clauses, on the other hand. While it is universally agreed that the very essence of an MFN provision in a BIT is to afford investors all *material protection* provided by subsequent treaties, it is *much more uncertain whether such provisions should be understood to extend to dispute resolution clauses*. It is so uncertain, in fact, that the issue has given rise to different outcomes in a number of cases and to extensive jurisprudence on the subject. ...

⁵¹ *ibid* paragraph 118.

⁵² *Berschader v The Russian Federation*, SCC Arbitration Institute Case No. 080/2004 (Arbitral Tribunal composed of Bengt Sjövall (President), Sergei Lebedev and Todd Weiler (dissenting)), Award of 21 April 2006, available on the ITA website.

This general uncertainty about the scope of MFN clauses leaves little room for any general assumption that the contracting parties to a BIT intend an MFN provision to extend to the dispute resolution clause. ...

... the present Tribunal will apply the principle that an MFN provision in a BIT will only incorporate by reference an arbitration clause from another BIT where the terms of the original BIT clearly and unambiguously so provide or where it can otherwise be clearly inferred that this was the intention of the contracting parties.⁵³

On the question of the extension of most-favoured-nation treatment to access to arbitration as an important element of investment protection, the Tribunal further observed that a distinction was to be made between ‘the conclusion that an MFN provision is generally capable of incorporating by reference a dispute resolution clause and that such incorporation would typically advance the purpose of BITs’ and the question ‘whether, in a specific case, the contracting parties to a treaty, which already provides for arbitration in certain types of disputes, actually intended the arbitration clause to be extended in the future to other kind of disputes.’⁵⁴ It is worthy of note that the Tribunals in both *Berschader* and *RosInvestco* were concerned with the operation of the most-favoured-nation clause in relation to the less favourable dispute resolution provision under the Soviet Union treaty model which restricted arbitration to the amount or calculation mode of compensation. The Tribunal in *RosInvestco* found that the more favourable treatment could be applied to incorporate a broad arbitration clause whereas the Tribunal in *Berschader* rejected the operation of the most-favoured-nation clause to reach a similar result notwithstanding the broad language of the clause which referred to ‘all matters’.⁵⁵

⁵³ *ibid* paragraphs 179–181 (emphasis added).

⁵⁴ *ibid* paragraph 197.

⁵⁵ In *Berschader*, Article 2 of the USSR–Belgium/Luxembourg investment treaty provided that: ‘Each Contracting Party guarantees that the most favoured nation clause shall be applied to investors of the other Contracting Party in *all matters* covered by the present Treaty, and in particular in Articles 4 [fair and equitable treatment], 5 [expropriation] and 6 [transfer of currency], with the exception of benefits provided by one Contracting Party to investors of any third country on the basis of its participation in a customs union or other international economic organisations, or of an agreement to avoid double taxation and other taxation issues’ (emphasis added). In *RosInvestCo*, Article 3 of the USSR–UK investment treaty provided that: ‘(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. (3) Each Contracting Party shall, to the extent possible, accord, in accordance with its laws and regulations, the same treatment, as mentioned in paragraphs (1) and (2) of this Article and in Article 4 of this

The Tribunal in *Telenor v Hungary*⁵⁶ similarly took strong views as to the principle of the application of a most-favoured-nation clause to dispute resolution mechanisms. The claimant in that case was faced with a narrow dispute resolution in the Hungary–Norway investment treaty that provided for arbitration only in the event of expropriation, thus excluding arbitration in cases of an alleged breach of the fair and equitable treatment obligation. It sought to rely on the ‘widest of the dispute resolution clauses under other BITs entered into by Hungary with other States’, although without specifically identifying the provisions of such other bilateral investment treaties.⁵⁷ In rejecting the claimant’s request, the Tribunal ‘wholeheartedly endorse[d] the analysis and statement of principle furnished by the *Plama* tribunal’ and found four ‘compelling reasons why an MFN clause in a BIT providing for most favoured nation treatment of investment should not be construed as extending the jurisdiction of the arbitral tribunal to categories of disputes beyond those set out in the BIT itself in the absence of clear language that this is the intention of the parties’.⁵⁸ The first reason related to the textual interpretation of the most-favoured-nation clause:

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 no warrant for construing the above phrase as importing *procedural* rights as well. It is one thing to stipulate that the investor is to have the benefit of MFN investment treatment but quite another to use an MFN clause in a BIT to bypass a limitation in the very same BIT when the parties have not chosen language in the MFN clause showing an intention to do this, as has been done in some BITs.⁵⁹

The three other reasons put forward by the *Telenor* Tribunal to restrict the operation of the most-favoured-nation clause were: the danger of a ‘wide interpretation’ of the most-favoured-nation clause resulting in ‘treaty-shopping by the investor among an indeterminate number of treaties to find a

Agreement, to the investments and returns of investors of the other Contracting Party as it accords to the investments and returns of its own investors.’

⁵⁶ *Telenor Mobile Communications AS v Republic of Hungary*, ICSID Case No. ARB/04/15 (Arbitral Tribunal composed of Roy Goode (President), Nicholas Allard and Arthur Marriott), Award of 13 September 2006, 21 ICSID Review 603 (2006), see commentary by Emmanuel Gaillard, 134 *Journal du Droit International* 298 (2007).

⁵⁷ *ibid* paragraph 20.

⁵⁸ *ibid* paragraphs 90–91.

⁵⁹ *ibid* paragraph 92.

dispute resolution clause wide enough to cover a dispute that would fall outside the dispute resolution clause the base treaty'; the further danger of 'uncertainty and instability in that at one moment the limitation in the basic BIT is operative and at the next moment it is overridden by a wider dispute resolution clause in a new BIT entered into by the host State'; and the importance of advocating the perspective of the host State and the 'specifically negotiated' dispute resolution mechanism.⁶⁰

Leaving aside these considerations which, in reality, show the Tribunal's underlying philosophy and preconceptions about the perceived dangers of so-called 'general policy considerations concerning investor protection',⁶¹ the *Telenor* decision confirms that, in all cases where the tribunals have rejected the application of the most-favoured-nation clause to a more favourable dispute resolution arrangement (choice among different dispute resolution mechanisms and possibility of arbitrating the entire dispute in *Plama*, extension of the matters submitted to arbitration in *Berschader* and *Telenor*), the most-favoured-nation clause under consideration was interpreted to be limited to 'substantive' rights in contrast to 'procedural' rights or provisions relating to dispute resolution mechanisms. By contrast, the opposing line of cases has adopted—in relation to the possibility of bypassing the investor's obligation to have recourse, for a period of 18 months, to the courts of the host State before initiating an international arbitration—the reasoning that dispute resolution mechanisms form part of the protection granted under investment treaties. The decisions vary, in this respect, between those tribunals holding generally that dispute settlement is part of the protection granted in investment treaties (*Maffezini*, *Siemens*, *Suez*, *National Grid*), those taking an additional step and deciding that investor-State arbitration is itself a 'significant substantive incentive and protection' (*Gas Natural*), and those determining that most-favoured-nation clauses extend to 'procedural clauses such as arbitration clauses' and incorporating, by the operation of the most-favoured-nation clause, the broader dispute resolution clause contained in a third-party treaty (*RosInvestCo*).

In relation to the measure of protection benefiting an investor by virtue of the operation of most-favoured-nation clauses, it is worthy of note that the two cases often referred to as the most authoritative are not essentially incompatible. The *Maffezini* Tribunal, although holding that dispute settlement arrangements are 'inextricably related to the protection' accorded under investment treaties, introduced important limitations based on what the Tribunal characterised as 'public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in question'.⁶² Based on the examination

⁶⁰ *ibid* paragraphs 93–95.

⁶¹ *ibid* paragraph 95.

⁶² *Maffezini v Spain* (n 21) paragraph 62.

of the examples provided by the *Maffezini* Tribunal (exhaustion of local remedies, the stipulation of a fork-in-the-road clause, the provision of a particular arbitration forum such as ICSID, or the parties' agreement to have a highly institutionalized system of arbitration) it is unclear whether that Tribunal would have found differently from the *Plama* or the *Telenor* Tribunals in different circumstances. The *Plama* Tribunal, for its part, observed that:

The decision in *Maffezini* is perhaps understandable. The case concerned a curious requirement that during the first 18 months the dispute be tried in the local courts. The present Tribunal sympathizes with a tribunal that attempts to neutralize such a provision that is nonsensical from a practical point of view. However, such exceptional circumstances should not be treated as a statement of general principle guiding future tribunals in other cases where exceptional circumstances are not present.⁶³

This observation begs the question as to what is to be considered as 'nonsensical' and what type of 'exceptional circumstances' would warrant the application of a most-favoured-nation clause to dispute resolution mechanisms. Some may argue that the Soviet and classic Chinese model arbitration clauses that limit international arbitration to the amount of compensation due in the event of expropriation are nonsensical to the extent that, in the absence of a neutral forum, no one can expect the courts of the respondent State to make a determination on its responsibility for expropriatory conduct and that, as a result, the rights granted under the treaty are a dead letter absent such neutral forum. In such circumstance, it is presumed that the reasoning in both *Maffezini* and *Plama* would result in a negative response, albeit on different grounds. The absence of a fundamental divergence between these cases may be the reason why other tribunals such as the *Suez* Tribunal could strike a balance between the broad definition of 'treatment' as including 'the rights and privileges granted and the obligations and burdens imposed by a Contracting State on investments made by investors covered by the treaty' akin to the *Maffezini* decision, while distinguishing its position from that in *Plama* in the following terms:

... as a further distinguishing factor, one may refer to the effect of the MFN provision. In *Plama*, the Claimant attempted to replace the dispute settlement provisions in the applicable Bulgaria-Cyprus BIT *in toto* by a dispute resolution mechanism 'incorporated' from another treaty. Without expressing an opinion on whether an MFN clause may achieve

⁶³ *Plama v Bulgaria* (n 26) paragraph 224.

such a result, this Tribunal distinguishes that *radical effect* from the much more limited one cause here, which *merely consists in waiving a preliminary step in accessing a mechanism*, i.e., ICSID arbitration, offered in both the Spanish and the French treaties.⁶⁴

The distinction between the ‘radical effect’ of replacing dispute resolution provisions and the position of ‘merely ... waiving a preliminary step in accessing a mechanism’ is, however, not entirely compatible with the Tribunal’s earlier determination that there is ‘no basis for distinguishing dispute settlement matters from any other matters covered by a bilateral investment treaty.’⁶⁵ Indeed, what is the basis for a distinction, within the same provision, between what is considered as a ‘procedural’ requirement and the remainder of the provision? Is there a difference in nature between admissibility requirements (such as compulsory negotiations, prior recourse to the local courts, waiting period) and provisions relating to access to international arbitration (such as the investor’s option between institutional and ad hoc arbitration or the limitation of matters that can be submitted to international arbitration)? In other words, if dispute resolution provisions are determined to be part of the ‘treatment’ granted in investment treaties, what is the basis for the segregation, in a given dispute resolution clause, between arrangements considered as innocuous and that can therefore be replaced and those that cannot be supplanted by more favourable mechanisms because they are considered as more fundamental to the parties’ consent to arbitrate the disputes under the treaty? Is there an objective limitation to the applicability of most-favoured-nation clauses based on the ‘specifically negotiated’ provisions of the treaty?

C. The Question of the Limits to the Benefit of the More Favourable Treatment: Are Not All Treaty Provisions ‘Specifically Negotiated’?

The above cases show that the apparent split in the case law is not on the question whether the most-favoured-nation treatment may apply at all to dispute resolution mechanisms. All tribunals have accepted, either explicitly or implicitly, that the answer is in the affirmative. The question is in reality whether there should be a limit to the applicability of the most-favoured-nation clause to jurisdictional issues, such limits being based on ‘public policy considerations’, on the notion of States’ consent to arbitration or on the notion of a ‘specific agreement’.

⁶⁴ *Suez, Sociedad General de Aguas de Barcelona SA and InterAguas Servicios Integrales v The Argentine Republic* (n 39) paragraph 63.

⁶⁵ *ibid* paragraph 57.

The common feature between *Maffezini* and *Plama* is the emphasis put on the contracting parties' intention when entering into the treaty. In *Maffezini*, the Tribunal's justification of the public policy considerations is that 'the contracting parties might have envisaged [them] as *fundamental conditions* for their acceptance of the agreement in question'.⁶⁶ It further decided, in situations where public policy considerations would narrow the scope of the most-favoured-nation clause, that these situations would correspond to 'specific provisions reflect[ing] the precise will of the contracting parties.'⁶⁷ For its part, the *Plama* Tribunal observed that, if the investor could 'pick and choose provisions' from various investment treaties, 'a host state which has not *specifically agreed* thereto can be confronted with a large number of permutations of dispute settlement provisions from the various BITs which it has concluded. Such a chaotic situation—actually counterproductive to harmonization—cannot be the presumed intent of Contracting Parties.'⁶⁸ The *Telenor* Tribunal similarly determined that its task was to 'interpret the BIT and for that purpose to apply ordinary canons of interpretation, not to displace, by reference to general policy considerations concerning investor protection, the dispute resolution mechanism *specifically negotiated* by the parties.'⁶⁹

These 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. Nor can an artificial distinction be made between all these provisions as regards their 'substantive' or 'procedural' nature, in particular absent a uniform case law on what constitutes a 'procedural' arrangement within a dispute resolution provision.⁷⁰ As indicated by the *Siemens* Tribunal, 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

⁶⁶ *Maffezini v Spain* (n 21) paragraph 62 (emphasis added). The Tribunal constituted in *Tecmed*, expressly referring to this aspect of the *Maffezini* decision, observed that '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', thus making a distinction between what goes to the scope of application of the treaty on the one hand, and matters of procedure or jurisdiction on the other hand (*Tecmed v Mexico* (n 18) paragraph 69 (emphasis added)).

⁶⁷ *ibid* paragraph 63.

⁶⁸ *Plama v Bulgaria* (n 26) paragraph 219 (emphasis added).

⁶⁹ *Telenor v Hungary* (n 56) paragraph 95 (emphasis added).

⁷⁰ See *supra*, under point (2).

investors and investments and of the advantages accessible through a MFN clause'. Access to international arbitration as a neutral forum covers, in this respect, a variety of aspects and not only the requirement of first recourse to local courts. It is unquestionable that, in the Soviet model treaties or in the classic Chinese model treaties, access to an international and neutral arbitral body is more favourable than access to the local courts or to no forum at all. In that sense, access to arbitration is part of the rights granted under the treaty and there is hardly any difference in nature between the right to arbitrate one's dispute and the right to be treated fairly and without discrimination. In effect, the protection accorded in investment treaties would not be of great value without the right to arbitrate one's dispute before a neutral judge.

As a result, the question is not whether most-favoured-nation treatment creates 'consent to ICSID arbitration'⁷¹ or 'embrace[s] arbitration issues' where no such consent exists.⁷² By definition, the most-favoured-nation clause itself is specifically negotiated by the parties. The question is whether, by equally agreeing to most-favoured-nation treatment, the contracting parties to an investment treaty can be presumed to have consented to extend more favourable treatment (by definition given to a particular investor under a particular treaty) to investors under other treaties. As established by the International Court of Justice in the case of the *US Nationals in Morocco*, the operation of most-favoured-nation clauses by definition implies that when more extensive rights and privileges are granted by a State, 'these enur[e] automatically and immediately' to the benefit of other beneficiaries of a most-favoured-nation clause.⁷³ The entire purpose of this standard is to prevent discrimination among nationals of different countries and ascertain equality of treatment regardless of nationality. In the context of international investments, most-favoured-nation clauses thus contribute to the harmonization of the level of protection accorded to foreign investors and their investments. This principle was emphasised in a report prepared by the United Nations Conference on Trade and Development, which has defined the most-favoured-nation standard as 'a core element of international investment agreements... The MFN

⁷¹ See *National Grid v Argentina* (n 42) paragraph 92.

⁷² See *Berschader v Russia* (n 52) paragraph 208.

⁷³ *Case concerning Rights of Nationals of the United States of America in Morocco* (n 7). See, however, the *Plama* decision, which restricts such effect to the sole situation where the language of the most-favoured-nation clause explicitly refers to the dispute resolution clause ('states cannot be expected to leave [dispute resolution] provisions to future (partial) replacement by different dispute resolution provisions through the operation of an MFN provision, unless the States have explicitly agreed thereto', *Plama v Bulgaria* (n 26) paragraph 212). See also see *Berschader v Russia* ("... whether, in a specific case, the contracting parties to a treaty, which already provides for arbitration in certain types of disputes, actually intended the arbitration clause to be extended *in the future* to other kind of disputes" (n 52) paragraph 197).

standard gives investors a guarantee against certain forms of discrimination by host countries, and it is crucial for the establishment of equality of competitive opportunities between investors from different foreign countries'.⁷⁴

Undeniably, the question of the applicability of a most-favoured-nation clause to dispute settlement arrangements is chiefly determined by the language of the clause. When a most-favoured-nation clause expressly provides for limitations, such limitations must be given effect. For example, Article 1103(2) of NAFTA provides for more favourable treatment 'with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.' The settlement of disputes not being part of this enumeration, it is thus excluded from the scope of the clause. Similarly, the most-favoured-nation clause contained at Article 5 of the US Draft Model FTAA of November 2003, which is formulated in similar words, is also accompanied by a footnote 13 clarifying the contracting parties' intention as follows:

the Parties note the recent decision of the arbitration tribunal in *Maffezini*... 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... and therefore could not reasonably lead to a conclusion similar to that of the *Maffezini* case.⁷⁵

Similarly, the Canada model bilateral investment treaty limits the better treatment accorded to investors under the most-favoured-nation clause to the 'establishment, acquisition, expansion, management, conduct, operation and

⁷⁴ UNCTAD, *Most-Favoured-Nation Treatment*, 1999, 1. See also OECD, *Most-Favoured-Nation Treatment in International Investment Law*, September 2004.

⁷⁵ FTAA—Free Trade of the Americas, Third Draft Agreement, 21 November 2003, available on the website of the FTAA. Some may argue that this language has no bearing when it is ultimately to be deleted from the final text as adopted. The argument is far from convincing. The footnote is introduced by the following text: 'One delegation proposes the following footnote to be included in the negotiating history as a reflection of the Parties' shared understanding of the Most-Favored-Nation Article and the *Maffezini* case. This footnote would be deleted in the final text of the Agreement.' As a result, the footnote is conceived precisely as a text designed to be deleted in the final text of the treaty and to reflect the intention of the contracting parties in drafting the most-favoured-nation clause, in accordance with the customary rules of treaty law as codified in articles 31 and 32 of the Vienna Convention on the Law of Treaties providing that recourse may be had to supplementary means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion.

sale or other disposition of investments in [the host State's] territory' (article 4 of the model treaty). By way of further limitation, this better treatment does not apply to treatment 'accorded under all bilateral or multilateral international agreements in force or signed prior to the date of entry into force' of a given bilateral investment treaty' (Article 1 of Annex III titled 'Exceptions from Most-Favoured-Nation Treatment').

Equally, when the contracting parties have expressly included dispute settlement arrangements in the scope of a most-favoured-nation clause, such intention must be given effect. For example, the most-favoured-nation clause contained at Article 3(3) of the model United Kingdom bilateral investment treaty provides that 'for the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Article 1 to 11 of this Agreement', thereby expressly including the dispute settlement provision contained at Article 8 of the bilateral investment treaty. In reality, the interpretative question of whether dispute settlement arrangements constitute a substantive right that can be extended to the beneficiary of a most-favoured-nation clause arises in situations where the clause is broadly phrased and the contracting parties to the treaty have neither expressly excluded dispute resolution mechanisms nor clarified their intention of including such mechanisms in the protection that is accorded to the beneficiaries of the clause. In situations where the most-favoured-nation provision refers to 'all matters' or indicates that each State 'shall apply to the investments in its territory by investors of the other Contracting Party a treatment which is not less favourable than that accorded to investments by investors of third states',⁷⁶ especially when the

⁷⁶ This was the case, for example, in *Plama v Bulgaria* (see Article 3 of Bulgaria-Cyprus investment treaty: 'Each Contracting Party shall apply to the investments in its territory by investors of the other Contracting Party a treatment which is not less favourable than that accorded to investments by investors of third states. 2. This treatment shall not be applied to the privileges which either Contracting Party accords to investors from third countries in virtue of their participation in economic communities and unions, a customs union or a free trade area'), in *Telenor v Hungary* (see Article IV of the Hungary-Norway investment treaty: '1. Investments made by Investors of one Contracting Party in the territory of the other Contracting Party, as also the returns therefrom, shall be accorded treatment no less favourable than that accorded to investments made by Investors of any third State. 2. The treatment granted under paragraph 1 of this Article shall not apply to:—any advantage accorded to Investors of a third State by the other Contracting Party based on any existing or future customs or economic union, or similar international agreement, or free trade agreement to which either of the Contracting Parties is or becomes a Party;—any advantage accorded to Investors of a third State by the other Contracting Party by virtue of a double taxation agreement or other agreements regarding matters of taxation or any domestic legislation relating to taxation.), and in *Berschader v Russia* (see Article 2 of the USSR-Belgium/Luxembourg investment treaty: "Each Contracting Party guarantees that the most favoured nation clause shall be applied to investors of the other Contracting Party in all matters covered by the present Treaty, and in particular in Articles 4, 5 and 6, with the exception of benefits provided by one Contracting Party to investors of any third country on the basis—of its participation in a customs union or other international economic organisations, or—of an agreement to avoid double taxation and other taxation issues").

clause is a stand-alone provision as opposed to being included in a provision on the standard of fair and equitable treatment,⁷⁷ the intention of the contracting parties can reasonably be interpreted to include the whole range of the rights accorded to the investors of a third country, including the right to the neutral and effective settlement of their investment disputes through international arbitration rather than through the judicial organs of the host State itself.

It follows that the applicability of most-favoured-nation clauses to the dispute resolution provisions of a treaty hardly raises any issue of limits to the benefits ensuing from more favourable treatment or any issue of 'wide interpretation'⁷⁸ that would presumably serve 'general policy considerations concerning investor protection'.⁷⁹ The only relevant question is what the parties to the treaty wrote. In that respect, a tribunal constituted on the basis of a specific treaty is under the duty to apply the provisions of that treaty, including the undertaking to apply to an investor or to an investment a treatment not less favourable than that accorded to investors of third states or to their investments, and to give such provisions full effect. In the context of investment protection treaties, the effect of a most-favoured-nation clause is to make accessible the better treatment a State decides to offer to other investors, including in relation to dispute resolution mechanisms. A State is undeniably at liberty not to offer better treatment to other investors or not to enter into a most-favoured-nation clause. However, once it has freely embarked on both paths, it must abide by its obligations.

⁷⁷ For example, the most-favoured-nation standard in *Maffezini*, *Gas Natural* or *Suez* was included in the fair and equitable treatment clause entitled 'treatment'. By contrast, there was a stand-alone most-favoured-nation clause both in cases where the tribunals did not extend the benefit of the clause to dispute resolution provisions (in *Plama*, *Telenor*, *Berschader*) and in cases where the tribunals had no difficulty with respect to such extension (*Siemens*, *National Grid*).

⁷⁸ This terminology is repeatedly used in the *Telenor* decision, see *Telenor v Hungary* (n 56) paragraphs 93 et seq.

⁷⁹ *ibid* paragraph 95.