

# Jurisdictional Impact of Most-Favoured-Nation Clauses

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## A. Introduction

1. The Use of the MFN Clause in Investment Arbitration: the Substantial/Procedural Dilemma
2. The Historical Evolution of the MFN Clause's Procedural Reach

## B. The *Maffezini/Plama* Opposite Presumptions

1. The Wording of the Clause
2. The *Maffezini* Case: Presuming the Procedural Impact
3. The *Plama* Case: Denying the Procedural Impact

## C. Evolution of Treaty Practice

## D. Main Arguments on the Jurisdictional Scope

1. A Matter of Textual Interpretation
  - (a) 'Treatment'
  - (b) 'All matters'
  - (b) 'Investment'/ 'Investor'
  - (c) 'In its territory'
2. Dispute Settlement Provisions as 'Specifically Negotiated Clauses'
3. Substantive/Procedural Divide
4. State Practice
6. Risks of Treaty Shopping
7. The Nature of State Consent
  - (a) Reading the Debate in the Light of the Consensual Principle
  - (b) The Applicability of the Basic Treaty as a Precondition
  - (c) Importing/Modifying Consent
  - (d) State Consent as the Starting Point for any General Assessment

## E. Sociological Approaches

1. Private/Public Law Divide
2. The Fundamental Role of the Arbitrator's Background

## A. Introduction

1. The → *Most-Favoured-Nation Clause* ('MFN clause') is 'a treaty provision whereby a State undertakes the obligation towards another State to accord most-favoured-nation treatment in an agreed sphere of relations' (Art 4 of the 1978 ILC Draft Articles on Most-Favoured-Nation Clauses). This clause, contained in a 'basic treaty', consists of the undertaking of a 'granting State' to accord to the 'beneficiary State' (or persons or things in a determined relation to it) a non-less favourable treatment than the one accorded to a third-party (ICJ, *Anglo-Iranian Oil Co. Case, United Kingdom v Iran*, 1952, 109).

2. The aim of the clause is to 'establish and to maintain at all times fundamental equality without discrimination among all of the countries concerned' (ICJ, *Rights of nationals of the United States of America in Morocco, France v United States of America*, 1952, 192). To this end, it disrupts the equilibrium of the treaty by granting to the beneficiary new rights, not included in the basic treaty but promised therein. This goal can be achieved provided that some conditions are met, such the similarity of the situations (ie Art 9 of the 1978 ILC Draft Articles concerning the principle *eiusdem generis*, only those rights that fall within the limits of the subject-matter of the clause can be claimed) and the existence of a more favoured treatment of a third-party.

### 1. The Use of the MFN Clause in Investment Arbitration: the Substantial/Procedural Dilemma

3. In investment arbitration, the MFN clause can assume different functions. It can be used as an independent cause of action, to engage the host State's international responsibility for discriminatory practices (ICSID, *Parkerings-Compagniet AS v Republic of Lithuania*, 2007, paras 366-371). The clause can also be used to broaden the scope of an investor's rights. To this effect, MFN clauses are meant to expand the perimeter of the investment protection provided by the host State, by attracting those more favourable conditions that the State offers to nationals of third countries. These conditions can be found either in a national normative instrument or in a treaty concluded with a third State. In this sense, the clause multilateralizes investment protection (Schill, 2009, 121-196), expanding the reach of the basic treaty with the inclusion of more favourable conditions from other bilateral investment treaties (hereafter BITs).

4. This importing potential is undisputed for substantive investment protection (*Berschader and Moïse Berschader v The Russian Federation*, 2006, para 179: 'it is universally agreed that the very essence of an MFN provision in a BIT is to afford to investors all material protection provided by subsequent treaties'). The main exception deals with cases where the MFN clause expressly excludes some subject matters from its reach (*ADF Group Inc v United States of America*, 2003, para 196).

5. A debate burgeoned on the possibility to extend the MFN effect to procedural rights. To date, it remains disputed and subject to contradictory case law as to whether an MFN clause can be used to override or modify conditions on access to international arbitration established in the basic treaty or even create such an access.

## 2. The Historical Evolution of the MFN Clause's Procedural Reach

6. A historical analysis of the question of the jurisdictional impact of MFN clauses shows that the problem of their procedural effect is older than investment arbitration itself (Ben Hamida, 2007, 1127). There are two subject matters in which the case law of the first half of the XIX<sup>th</sup> century had accepted a certain procedural impact of these provisions.

7. The first is consular jurisdiction. Various national courts have decided that the MFN clause extended, to the consular authorities of one of the two State parties to the basic treaty, all the procedural rights accorded by one of them to any third State in the field of consular jurisdiction. On this ground, United States courts recognised that the MFN clause could import into the basic treaty the procedural rights and privileges in the field of consular protection (United States Supreme Court, *Magno Santovincenzo v James F. Egan*, 1931, 30; New York Surrogate's Court, *In re Carizzo's Estate*, 1961, 335). French jurisdictions recognised the possibility to import consular immunity *via* the MFN clause, preventing all seizing and liquidation proceedings (Cour d'appel de Lyon [Court of Appeal of Lyon], *Loewengard v Procureur of the Republic and Bonvier-Sequestrator*, 1921, 391). These and other precedents have been used in recent ICSID arbitration to show that procedural rights are an essential part of the international protection of investors and that there should be no reason to exclude them from the scope of application of the MFN clause (ICSID, *Emilio Agustín Maffezini v The Kingdom of Spain*, 2000, para 54, footnote 22).

8. The second subject matter dealt with the possibility for merchants to invoke a general MFN clause, not including an explicit mention to the right of access to justice, to establish the jurisdiction of local courts or to derogate to the obligation of establishing a security to ensure compliance (*cautio iudicatum solvi*). The case law is not univocal in this respect. Some courts and tribunals accepted that the MFN clause imported the privilege of exclusion of the *cautio iudicatum solvi* (Tribunal de commerce de la Seine (Commercial Tribunal of the Seine), *Comptoir Tchecoslovaque and Liebken v New Callao Gold Mining Co.*, 1930; Rechtbank Amsterdam (District Court of Amsterdam), *Asia Trading Co. Ltd. v Biltimex*, 1951), whereas many others have refused it because the MFN clause did not refer explicitly to procedural matters (District Court – Eastern District of New York, *Dobrin v Mallory S.S. Co. et al.*, 1924, 389; Supreme Court of Washington, *Lukich v The Department of Labor and Industries*, 1934; Cour d'appel de Paris (Court of Appeal of Paris), *National Provincial Bank v Dolfus*, 1947, 49). Some scholars also used this argument to reject the jurisdictional impact thesis. According to them, for the MFN clause to have implications on matters such as access to courts, their text had to include specific references to those procedural issues (Hazard, 1958, 498). Many others had nevertheless claimed the opposite, stating that there was no reason to restrict the scope of MFN clauses and that 'States may thus find themselves obliged to arbitrate

cases they had never contemplated submitting (and would not normally have agreed to submit) to arbitration' (Fitzmaurice, 1951, 85).

9. International case law had not directly addressed the question before the investment arbitration case law started dealing with it. PCIJ or ICJ case law never dealt with the impact of MFN clauses on dispute settlement procedures. The pertinent case law provided indirect and contradictory hints. The Umpire of the British-Venezuelan Mixed Claims Commission in *The Aroa Mines* case decided that the MFN clause invoked by the United Kingdom, which extended to the administration of justice, only applied to procedures before national jurisdictions and not to the right of access to international mixed claims commission (British-Venezuelan Mixed Claims Commission, *Aroa Mines Ltd. case*, 1903, 407). The position taken in the → *Ambatielos Case* award was different. The tribunal considered that 'it is true that 'the administration of justice', when viewed in isolation, is a subject-matter other than 'commerce and navigation', but it 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'. The commission concluded that the question had nevertheless to be resolved 'in accordance with the intention of the Contracting parties as deduced from a reasonable interpretation of the Treaty' (*The Ambatielos Claim, Greece, United Kingdom and Northern Ireland*, 1956, 107).

## B. The *Maffezini/Plama* Opposite Presumptions

10. A diverse case law arose on the question of the jurisdictional impact of MFN clauses. As the tribunal in *Renta4* clearly summarised nine years after the beginning of the debate with the *Maffezini* case, the different arguments 'are of uneven persuasiveness and relevance. The present Tribunal would find it jejune to declare that there is a dominant view; it is futile to make a head-count of populations of such diversity. What can be said with confidence is that a *jurisprudence constante* of general applicability is not yet firmly established. It remains necessary to proceed BIT by BIT' (*Renta 4 SVSA and ors v Russian Federation*, 2009, para 94).

### 1. The Wording of the Clause

11. The need to proceed BIT by BIT entails focussing first on the wording of every single MFN clause. Indeed, the type of treatment due to the beneficiary depends primarily upon the language of the provision, as underlined by the 1978 ILC Draft Articles. This results from Article 9 (2), which makes clear that the beneficiary State acquires the rights 'only in respect of persons or things which are specified in the clause or implied from its subject-matter', as well as from Article 29 according to which 'the present articles are without prejudice to any provision on which the granting State and the beneficiary State may otherwise agree'. This is also confirmed by the fact that the Commission originally took up the codification project on MFN clauses as an aspect of the general law of treaties (Yearbook of the International Law Commission, 1978, para 59): as for treaty law, if general rules exist to set the framework, they can be derogated by a *lex specialis* and an in-depth analysis of the text of the provision is the starting point of treaty interpretation.

12. Moreover, the 2015 Final Report of the Study Group of the International Law Commission on the Most-Favoured Nation Clause clearly stated that MFN clauses could in principle apply to dispute settlement provisions (Final Report, 2015, para 162). Nevertheless, it clarified that their jurisdictional impact depends on the will of the negotiating States. The problem must be solved primarily through an interpretation of the wording of the clause, which can explicitly allow or deny such a procedural reach. Absent this explicit language, tribunals have to carry out a case-by-case analysis (para 216). This position had already been taken by the *Institut du droit international* in Article 12 of the 2013 Tokyo Resolution: ‘Most favoured nation treatment requires interpretation of the specific wording of the clause of the treaty in which it is inserted, in order to respect the intentions of the States parties. This is of particular significance when the MFN clause is claimed to encompass dispute settlement provisions’.

13. The clauses whose scope of application is not clearly spelt out lend themselves to conflicting interpretations. Notwithstanding this heterogeneity of positions, arbitral awards can be schematically organised around a dichotomy. In some cases, arbitrators believed that the MFN clause applies to jurisdictional provisions unless the contrary is clearly stated in its wording. The → *Maffezini v Spain Case* award first enunciated this presumption of jurisdictional impact (ICSID, *Emilio Agustín Maffezini v The Kingdom of Spain*, 2000). Other cases took the opposite stance, considering that MFN clauses are not supposed to have any jurisdictional impact unless plainly stipulated in their text (see ICSID, *Plama Consortium Limited v Republic of Bulgaria*, 2005).

## 2. The *Maffezini* Case: Presuming the Procedural Impact

14. In the *Maffezini* case, the investor successfully relied on the MFN provision to avoid certain prerequisites imposed by the Argentine-Spain BIT dispute settlement resolution clause. This clause provided for a period of eighteen months to be spent before domestic courts as a precondition of arbitrability, whereas Article 10(2) of the Chile-Spain BIT imposed no such condition. Instead, it included a → Fork in the road clause [EiPro] and a → Cooling off period [EiPro] of six-months. Accordingly, Chilean investors in Spain would be treated more favourably than Argentine investors in Spain, were it not for the MFN clause (ICSID, *Emilio Agustín Maffezini v The Kingdom of Spain*, 2000, paras 39-40).

15. The tribunal considered that the provisions on dispute settlement contained in a third-party treaty were a subject matter covered by the MFN clause. First, even if the treaty did not expressly manifest the intention of the parties to include dispute settlement in the scope of the MFN clause, this intention could be inferred from the broad wording of the MFN provision, which covered ‘all matters subject to this agreement’ (ICSID, *Emilio Agustín Maffezini v The Kingdom of Spain*, 2000, paras 52-53). There is no ground to consider that the term ‘matters’ only includes the substantial protection (para 41). Second, this was confirmed by the fact that such a broad wording was peculiar to that specific BIT, unusual in the Spanish treaty practice (para 60). The tribunal finally considered that the access to arbitration was a fundamental part of the treatment of the foreign investor using a historical argument: ‘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' (paras 54-55).

16. That being said the award hastened to clarify the limits to the jurisdictional impact of the provision. The beneficiary of the clause would not be, in any case, enabled to 'override public policy considerations' (para 62). These public policy considerations included, *inter alia*, the exhaustion of local remedies (reflecting, according to the arbitrators, a fundamental rule of public international law), the fork-in-the-road provisions or the choice of a particular arbitration forum (para 63). This part of the reasoning seems to point out a certain contradiction lying in such a position: what is the legal basis of these public policy considerations? Why should the exhaustion of local remedies be considered a fundamental rule of public international law, preventing its eviction through the MFN clause, whereas what can be considered as reshaping the consent of the State to a dispute resolution mechanism should not?

17. The subsequent cases adopting the *Maffezini* approach have considered that dispute settlement conditions are at the core of the treatment granted to the foreign investor. A first phase concerned the Argentinian litigation, where tribunals allowed investors to do away with the requirement of prior recourse to local jurisdictions (ICSID, *Siemens AG v Argentine Republic*, 2005, paras 102-103) or the eighteen months waiting period before submitting the case to international arbitration (ICSID, *Gas Natural SDG, SA v Argentine Republic*, 2005, paras 26-49; ICSID, *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v The Argentine Republic*, 2006, paras 55-57) via the MFN clause. A second phase arose under the former Soviet Union treaties, whose dispute settlement clauses were strictly limited to the calculation of damages for expropriation. This litigation took a step further in the sense of the jurisdictional reach of the MFN clause. The arbitrators admitted that, beyond erasing some procedural obstacles to international arbitration, the clause could even substitute a very restrictive dispute settlement clause with a broader one (*RosInvestCo UK Ltd v Russian Federation*, 2007, paras 130-132).

### 3. The *Plama* Case: Denying the Procedural Impact

18. In the *Plama* case, arbitrators openly expressed their divergence from the *Maffezini* award. Accordingly, the question had to be solved in the opposite way: '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 MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them' (ICSID, *Plama Consortium Limited v Republic of Bulgaria*, 2005, para 223).

19. The tribunal rejected the arguments of the investor concerning the jurisdictional scope of the clause. First, the MFN clause only applied to substantive matters, as a textual analysis would demonstrate. Unlike other BITs, the clause did not expressly state its jurisdictional scope. Quite to the contrary, the parties used a restrictive wording, for instance only referring to 'privileges' (ICSID, *Plama Consortium Limited v Republic of Bulgaria*, 2005, para 191). Second, the tribunal recalled the general principle, of both national and international

law, according to which consent to arbitration must be clear and unambiguous. Thus, 'doubts as to the parties' clear and unambiguous intention can arise if the agreement to arbitrate is to be reached by incorporation by reference' (paras 198-199). Third, the award affirmed the peculiarity of dispute settlement clauses, as 'it is quite another thing to replace a procedure specifically negotiated by parties with an entirely different mechanism' (para 209).

20. Even if the arguments present flaws, the award summarised all the different positions taken by previous case law on the matter. The third argument on the special character of dispute settlement clauses, being 'specifically negotiated procedures', had already been used in the *Tecmed* decision (ICSID, *Técnicas Medioambientales Tecmed, S.A. v The United Mexican States*, 2003, para 69). The argument concerning the need for a clear and unambiguous intention of the parties had been put forward in the *Salini* case (ICSID, *Salini Costruttori S.p.A. and Italstrade S.p.A. v The Hashemite Kingdom of Jordan*, 2004, paras 106-119). Moreover, Ian Brownlie had advocated the idea, in a separate opinion, that the concept of 'treatment' did not include procedural issues but only substantive privileges (*CME Czech Republic BV v The Czech Republic*, 2003, Separate Opinion of Ian Brownlie, para 11). It is perhaps because of the synthetic and comprehensive overview it offered that the *Plama* case is considered the first landmark decision against the jurisdictional impact of MFN clauses.

### C. Evolution of Treaty Practice

21. As already noted, the problems concerning the jurisdictional impact of MFN clauses stem mainly from their uncertain wording, not specifying their ambit of application. This is nevertheless not true for all international investment agreements. Some of them clearly provide that the MFN clause would extend to dispute settlement provisions. Such is the case for the UK BIT model. In its Article 3 (National Treatment and Most-favoured-nation provisions), paragraph 3 clarified 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 Articles 1 to 12 of this Agreement', Article 8 being the dispute settlement clause. Despite what is foreseen by the model, UK practice is not consistent as the 'for the avoidance of doubt' wording is included in the UK-Honduras BIT but excluded from the UK-Venezuela BIT (*National Grid plc v The Argentine Republic*, 2006, footnote 71).

22. An increasing number of international investment agreements expressly deny any jurisdictional impact to MFN clauses. These measures, known as 'anti-Maffezini clauses', can take different forms. As a reaction to that decision, States have promptly included in their investment agreements interpretative footnotes excluding dispute settlement from the scope of the MFN clause. This is the case of the Central American-United States Free Trade Agreement. In its 28 January 2004 Draft, a footnote stated that the MFN clause of that agreement had to be intended strictly and not apply to procedural issues. A similar objective has been pursued by means of 'interpretative declarations'. The Argentine Republic and Panama, for instance, after the *Siemens* decision on jurisdiction, provided for

an authentic interpretation of the MFN clause inserted in their 1996 agreement as not extending to dispute resolution clauses (*National Grid plc v Argentina*, 2006, para 85).

23. In recent free trade agreements, States set out to do so clarifying what they mean by ‘treatment’. For instance, Article 8.7 (4) of the CETA project, Article X.2 (4) of the TTIP project clarified: ‘For greater certainty, the ‘treatment’ referred to in paragraph 1 and 2 does not include procedures for the resolution of investment disputes between investors and states provided for in other international investment treaties and other trade agreements’. This very same wording can alternatively be inserted in a footnote (see Art 131.2 of the China-Peru FTA). In any case, States seem to be aware of the importance of a careful formulation of the clause in their recent Treaty practice (Šturma, 2016, 97).

## D. Main Arguments on the Jurisdictional Scope

### 1. A Matter of Textual Interpretation

24. A hermeneutic trend in case law relied on the interpretation of the words used by the States’ Parties in the MFN clause to solve the riddle of its possible application to jurisdictional questions. The basic idea was to verify whether the different textual components of the clause allowed a narrower or broader scope. All these solutions remain unsatisfactory. Indeed, it is quite paradoxical to rely on the text of an ambiguous clause in order to solve a problem that is not dealt with in its wording.

#### (a) ‘Treatment’

25. Some tribunals have tried to solve the debate relying on the broad terminology used by clauses generically referring to a ‘treatment’ due by the host State. These arbitrators relied on the literal interpretation of such general term to conclude that States did not intend to introduce any difference between procedural and substantial privileges, but agreed on the potential extension of any kind of right (ICSID, *Siemens AG v Argentina*, 2004, para 85; ICSID, *Suez v Argentina*, 2006, para 55). This simplistic deduction is not satisfactory, as it is difficult to consider that a dictionary-based interpretation of the word ‘treatment’ can solve this subtle problem (ICSID, *Plama Consortium Limited v Republic of Bulgaria*, 2005, para 189).

#### (b) ‘All matters’

26. As mentioned, the *Maffezini* tribunal stressed the fact that the MFN of the Spanish/Argentina BIT was peculiar insofar as it extended to ‘all matters subject to this Agreement’, which seemed to be unique to the Spanish BIT practice (ICSID, *Emilio Agustín Maffezini v The Kingdom of Spain*, 2000, para 60). The *Teinver* award clarified this point. Here the tribunal considered that, even if the ‘all matters’ or ‘all rights’ phrase is unambiguously inclusive, this element is not decisive *per se*. The mention becomes crucial if, compared to other BITs concluded by the host State, the basic treaty results uncommonly extensive (ICSID, *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v The Argentine Republic*, 2012, paras 159-165).

27. Other tribunals have considered that an MFN clause extending to ‘all matters’ necessarily encompassed the dispute settlement clauses. For instance, in *Gas Natural* the tribunal found that, unless the clause excluded dispute settlement textually as an exception, the ‘all matters’ expression attracted jurisdiction under the scope of application of the clause (ICSID, *Gas Natural SGD SA v The Argentine Republic*, 2011, para 30). Various dissenting opinions advocated that the ‘all matters’ formulation witnessed a very broad scope of the MFN provision (*Berschader v Russian Federation*, Dissenting opinion of Todd Weiler, 2006, paras 15-17). *E contrario*, even some awards refusing the jurisdictional impact of MFN clauses stressed that the absence of the ‘all matters’ mention excluded the intention of the parties to cover the largest scope possible (ICSID, *Salini v Jordany*, 2004, paras 116-118; *ICS Inspection and Control Services Limited v The Republic of Argentina*, 2012, paras 299-302; ICSID, *Daimler Financial Services AG v Argentine Republic*, 2012, para 236).

28. The *Berschader* award openly contested this argument for being too formalistic. The arbitrators noticed that, even if the ‘all matters’ phrase proves the breadth of the clause, the wording was not sufficiently ‘clear and unambiguous’ to cover the jurisdictional provisions of the treaty (*Berschader v Russian Federation*, 2006, paras 193-194). Likewise, even where arbitrators considered that the ‘all matters’ phraseology constituted a clear proof of the intention of State parties, that position was harshly criticised in a dissenting opinion (ICSID, *Impregilo S.p.A. v Argentine Republic*, Dissenting Opinion of Brigitte Stern, 2011, paras 45-46). It appears clearly therefore that this argument proved to be highly controversial. Thus, it should be considered, like the *Maffezini* and the *Teinver* awards did, that in any event the ‘all matters’ formulation is not a conclusive ground.

#### (c) ‘Investment’/ ‘Investor’

29. Some arbitral decisions have stressed that, if dispute settlement clauses concern the procedural rights of an *investor*, many MFN clauses only deal with the treatment of an *investment* in their wording. As a result, tribunals notably in the *RosInvest* and *ICS* cases have considered that the MFN should apply to dispute settlement mechanisms only if it referred to investors and not to investments (*RosInvestCo UK Ltd v Russian Federation*, 2007, paras 128-130; ICSID, *ICS v Argentina*, 2012, para 284). This highly formalistic and artificial position has to be rejected: ‘for the purpose of applying the MFN clause, there is no special significance to the differential use of the term investors or investments in the Treaty’ (ICSID, *Siemens v Argentina*, 2004, para 92; ICSID, *Plama v Bulgaria*, 2005, para 190; *Renta4 v Russian Federation*, 2009, para 101). This reasoning would accord to a terminological choice an importance that it was certainly not intended to have. It would moreover create confusion inferring from very similar clauses opposite results, based on a peripheral and rather stylistic drafting choice.

#### (d) ‘In its territory’

30. Some awards have stressed that the wording of the clause provided that the Host State engaged to guarantee MFN treatment ‘in its territory’ (*ie.* ‘Neither Contracting Party shall subject investments in its territory to a treatment less favourable than ...’ / ‘Neither

Contracting Party shall subject nationals or companies of the other Contracting Party, as regards their activity in connection with investments in its territory, to treatment less favourable than ...'). The use of this expression would amount to excluding any application of the MFN clause to international dispute settlement procedures. In fact, according to some tribunals, as international arbitration is *per se* independent of any State legal order, the obligation of the State stemming from the MFN clause would not extend to it but would only include domestic dispute resolution (*Berschader v Russian Federation*, 2006, para 185; ICSID, *Daimler v Argentina*, 2012, paras 225-231). The basic idea is that 'the very concept of extra-territorial dispute resolution and a host State's consent thereto are both ill-fitted to the clear and ordinary meaning of the words 'treatment in its territory' as used in the Treaty's MFN clause' (ICSID, *ICS v Argentina*, 2012, para 309). Therefore, an MFN clause containing this phrase could not be applied to international arbitration proceedings because of the territorial limitation of the scope of the provision.

31. The *Hochtief* case openly criticised this stance, affirming that the expression did not relate to the territorial situation of the arbitral tribunal but of the territorial scope of the treatment (ICSID, *Hochtief AG v The Argentine Republic*, 2011, para 109). Indeed the criticised argument appears beside the point for several reasons. First, international arbitration is not *per se* grounded outside the legal order of the State. This is the case for ICSID arbitration, but the opposite is true for UNCITRAL tribunals that operate as part of the jurisdictional apparatus of the *locus arbitri*. Second, the expression seems to limit *ratione loci* the scope of the State's international obligations of protection more than addressing the circle of jurisdictions that are bound to respect the MFN provision.

## 2. Dispute Settlement Provisions as 'Specifically Negotiated Clauses'

32. One of the main arguments put forward by the *Plama* award for excluding the jurisdictional impact of MFN clauses was the peculiarity of the dispute settlement clauses, entailing a 'procedure specifically negotiated'. This idea goes back to the position taken by the tribunal in the *Tecmed* case, according to which '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' (ICSID, *Tecmed SA v United Mexican States*, 2003, para 69).

33. This idea of a difference in nature between jurisdictional clauses and substantive provisions, only the former being specifically negotiated, was harshly criticised. All clauses are specifically negotiated: 'when entering into a treaty, the State parties intend to write what they write' (Banifatemi, 2009, 269).

34. Nevertheless, in the *Telenor* case, the arbitrators used the specifically negotiated clause argument to stress the need for particular attention to their interpretation, in order 'not to displace, by reference to general policy considerations concerning investor protection, the dispute resolution mechanism specifically negotiated by the parties' (ICSID, *Telenor Mobile Communications A.S. v The Republic of Hungary*, 2006, para 95). Even if not clearly stated, the

idea of specifically negotiated clauses is therefore implicitly linked to the peculiar status of State consent in international dispute resolution.

### 3. Substantive/Procedural Divide

**35.** In a large number of awards, arbitrators have used the distinction between substantive and procedural rights to refuse the jurisdictional impact of MFN clauses. The basic idea lies in the fact that substantive and procedural clauses are two different legal categories. Therefore, a MFN clause referring generically to ‘treatment’ should not be applied to a completely different category of provisions because of the *eiusdem generis ac qualitatis* principle (ICSID, *Telenor Mobile Communications A.S. v The Republic of Hungary*, 2006, para 92). More recently, in the *Kiliç* case, the arbitrators strongly emphasised that the treaty structure distinguished between substantive rights and remedial procedures. This proved that the drafters were led by such a distinction when addressing the meaning of ‘treatment’ in the MFN clause (ICSID, *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v Turkmenistan*, 2013, para 7.3.9). The well-established severability doctrine could be seen to confirm this argument (Douglas, 2011, 97-113).

**36.** Besides, numerous awards have adopted the opposite position. These decisions argue that there is no reason to rely on such a strict dichotomy, as the procedural access to arbitration constitutes one of the most important components of the substantive treatment owed to the investor. That is why the *Maffezini* decision stated that the *eiusdem generis* principle did not obstruct the jurisdictional impact of the MFN clause (ICSID, *Emilio Agustín Maffezini v The Kingdom of Spain*, 2000, para 56). From this standpoint, denying the jurisdictional reach of the MFN clause entails voiding the clause of its *effet utile*, as the possibility to claim in front of an international tribunal is indispensable to access any more favoured treatment (Radi, 2007, 757). Moreover, MFN clauses have long been conceived as ‘instrument to allocate adjudicatory authority between different dispute settlement bodies’ by the ICJ, ILC and State practice (Schill, 2011, 362), therefore their procedural impact would be an intrinsic feature of their regime. In the same vein, tribunals accepting the procedural reach did not see any legal difference between substantive treatment provisions, dispute resolution clauses and MFN clauses: they are all valid and legally binding treaty commitments based on the consent of the State (ICSID, *Daimler v Argentina*, 2012, paras 168-169). The only award having tried to conceptualise the divide is the *Renta4* one, where the tribunal applied the Hartian primary/secondary rules paradigm, concluding that there was no reason to limit the MFN scope to primary rules (*Renta 4 v Russian Federation*, 2009, paras 99-100).

**37.** More interestingly, various dissenting opinions have considered that this divide is not conclusive *per se* but is simply the logical consequence of the public international law analysis of State consent. ‘Rights and means of protecting rights are two different legal animals’ (ICSID, *Impregilo v Argentina*, Dissenting Opinion of Brigitte Stern, 2011, para 31) only because extending the scope of generally drafted MFN clauses to remedial procedures would amount to ignoring the contours of State consent as the fundamental rule of international dispute settlement (ICSID, *Ambiente Ufficio S.P.A. and Others (Case formerly*

known as *Giordano Alpi and Others*) v *Argentine Republic*, Dissenting Opinion of Santiago Torres Bernardez, 2013, paras 354-377).

#### 4. State Practice

38. The evolution of treaty practice could witness the will of State parties to the basic treaty. Using the example of UK treaty practice, whose model specifies that *'for avoidance of doubt* MFN treatment shall apply to certain specified provisions of the BIT including the dispute settlement provision', some tribunals deduced from this textual detail that unless so clarified the will of parties cannot be presumed (ICSID, *Wintershall Aktiengesellschaft v Argentine Republic*, Award, 2008, para 167). The *Daimler* tribunal confirmed this stance by systematically analysing all relevant State practice (ICSID, *Daimler v Argentina*, 2012, para 271). Therefore, the tribunal analysed the reactions of various States to the approach taken in the *Maffezini* award. It referred to statements by Argentina, Panama, Colombia, the CAFTA countries, the EU Commission and Switzerland which all seemed to converge in signalling that MFN clauses were never intended to reach the dispute resolution provisions of the applicable treaties (ICSID, *Daimler v Argentina*, 2012, paras 273-276).

39. State practice arguments have also been used in order to defend the procedural reach of MFN clauses. Indeed, some investors have tried to affirm that if the State had specified the will to exclude the procedural reach in one treaty, the opposite presumption applied for all those where it had remained silent. Nevertheless, the tribunal in *Kiliç* rejected this argument, stressing that one cannot deduce so much from a single treaty concluded in a different context and before the *Maffezini* decision (ICSID, *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v Turkmenistan*, 2013, para 7.8).

#### 5. Risks of Treaty Shopping

40. Some arbitrators also saw in the jurisdictional impact of the MFN clause a reason of concern for the risks of 'treaty shopping' (ICSID, *Salini Costruttori S.p.A. and Italstrade S.p.A. v The Hashemite Kingdom of Jordan*, 2004, para 115). These risks are clearly evident in the *Menzies* case, where a Luxembourgish investor tried to use the MFN clause of Article II GATS to access investment arbitration, in the absence of any BIT between the State of nationality and the host State. The investor claimed to be a 'service supplier' according to the terms of the article, and that Senegal was therefore obliged by WTO law to offer Luxembourgish nationals a non-less favourable treatment than the one recognised to British and Dutch investors in their respective BITs. The WTO treaty would create an individual right of access, by extending a different offer of arbitration (ICSID, *Menzies Middle East and Africa SA and Aviation Handling Services International Ltd v Republic of Senegal*, 2016, paras 102-121). The tribunal rejected such an argument that could have consecrated a major hypothesis of forum shopping. First, in the tribunal opinion, the consent was not clear and unequivocal at all. Second, even admitting this line of reasoning, the host State has not expressed a present consent but would simply have been in the obligation to consent to investment arbitration in the future for that particular kind of investors. Third, it was not demonstrated

that GATS provisions applied to arbitration (ICSID, *Menzies Middle East and Africa SA and Aviation Handling Services International Ltd v Republic of Senegal*, 2016, paras 129-151).

## 6. The Nature of State Consent

41. The strongest argument that should be taken into account to reject any possibility of a jurisdictional impact of the MFN clause lies in the way public international law conceives the consensual structure of dispute settlement (→ *Consensual Principle* [EiPro]). Indeed, all the other arguments against the procedural reach seem to converge on the fundamental question of the nature of sovereign consent to international litigation.

### *(a) Reading the Debate in the Light of the Consensual Principle*

42. If one sticks to the way PCIJ and ICJ case law interpreted the notion of consent to jurisdiction, any MFN procedural use could be qualified as 'heretical' (McLachlan, 2007, 254-257). Since the Advisory opinion in the *Eastern Carelia* case, State consent has been considered the fundamental pillar of any international dispute settlement mechanism (PCIJ, *Statuts of Eastern Carelia*, 1923, 27: 'it is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement'). This has been confirmed by the monetary gold principle (→ *Monetary Gold Arbitration and Case*) as well as by evolution of ICJ case law on the concept of consent to international jurisdiction. Therefore, State consent to jurisdiction has to be interpreted strictly and the intention of the sovereign subject cannot be presumed, allowing the investor to pick and choose the jurisdictional conditions from a plethora of other treaties.

43. This idea was already present in the *Plama* award, when recalling the agreement to arbitrate should be clear and unambiguous, as established by a general principle of both national and international law (ICSID, *Plama Consortium Limited v Republic of Bulgaria*, 2005 para 198). This is the central point defended by Brigitte Stern in her dissenting opinion (ICSID, *Impregilo v Argentina*, Dissenting Opinion of Brigitte Stern, 2011, paras 53-55). International jurisdictions have a '*compétence d'attribution*'; therefore, the fact that a State has consented to grant rights to the investors of another State does not mean that it also gave consent to arbitrate disputes relating to them. The ICJ's case law on the distinction between substantive and jurisdictional matters demonstrates this point: irrespective of the *erga omnes* or *ius cogens* status of a rule, this does not mean that the State had consented to adjudicate those issues (ICJ, *East Timor Case, Portugal v Australia*, 1995, para 29; ICJ, *Case Concerning Armed Activities on the Territory of the Congo, Democratic Republic of the Congo v Rwanda*, 2006, para 64).

### *(b) The Applicability of the Basic Treaty as a Precondition*

44. Another argument linked to State consent conceives the applicability of the basic treaty as a precondition. The arbitral tribunal's jurisdiction relies on this instrument. Therefore, the respect of the clauses setting the scope of its applicability qualifies as a preliminary

condition that cannot be subsequently changed *via* the MFN clause. The investor has to meet the original conditions to be able to invoke the treaty protection as a whole and therefore the MFN clause too (Douglas, 2011, 97-113). As the protection of the basic treaty has not been activated, this one not being applicable either *ratione personae* or *materiae* or *temporis*, the MFN clause included in the treaty cannot be invoked either. Therefore, the MFN clause cannot change the definition of the investment or of the investor, or even the temporal scope of application of the treaty (*Yaung Chi Oo Trading Pte. Ltd. v Government of the Union of Myanmar*, 2003, para 83; ICSID, *Rafat Ali Rizvi v Republic of Indonesia*, 2013, para 225). This is the core reasoning of Laurence Boisson de Chazourne's dissenting argumentation in the *Garanti Koza* case. Even if the MFN textually stated, in the UK model tradition, that it applied to the dispute settlement clause, the limitations to access the tribunal of the original dispute settlement clause remain to bar the jurisdiction of the seised tribunal. Therefore, the tribunal constituted on the basis of the basic treaty has originally no jurisdictional power and the MFN clause cannot be activated. The MFN is seen as 'subordinated or conditioned' to the prior applicability of the dispute settlement clause of the basic treaty (ICSID, *Garanti Koza LLP v Turkmenistan*, Dissenting Opinion of Laurence Boisson de Chazourne, 2013, paras 35-45; see also *ST-AD GmbH v Bulgaria*, 2013, para 344).

#### ***(c) Importing/Modifying Consent***

45. Some awards had distinguished the cases in which the MFN clause was only used to modify the conditions of consent given by the host State from those cases where the clause would have been used to create a new gateway to investment arbitration (*National Grid plc v Argentina*, 2006, para 92; ICSID, *Hochtief AG v Argentina*, 2011, para 79). The *Venezuela US s.r.l.* case dealt explicitly with such question. The majority accepted the jurisdictional impact of the clause, as it did not imply importing jurisdiction but only modifying the conditions applicable to an already existing consent (*Venezuela US S.R.L. (Barbados) v Bolivarian Republic of Venezuela*, 2016, para 105). This kind of reasoning was criticised by dissenting arbitrator Marcelo Kohen, according to whom, while stating that the MFN could not allow to import a non-existing consent, the tribunal precisely did so using a consent that had since disappeared with the Venezuelan denunciation of the ICSID Convention. The case at hand confirmed the converging opinion on the fact that the MFN clause should not be used to import consent *eo ipso* but, at best, to modify its conditions. This last configuration remains debated, and a public international law approach would tend to deny even this possibility.

#### ***(d) State Consent as the Starting Point for Any General Assessment***

46. From the above summarised discussions, it results that the use of the MFN clause to modify limitations on arbitral recourse or to establish a direct access to an international tribunal is highly controversial. In light of the conflicting positions expressed in the case law and by doctrinal reflections, no general solution to this question can be found. Nevertheless, rigorous legal reasoning must be followed when applying the MFN clause, having regard to the general principles of international law. The starting point must be the analysis of the wording of the clause, as it results clearly from the customary rules of treaty

interpretation. Unlike some have stated (Douglas, 2011, 110), general principles do not allow arbitral tribunals to proceed without a BIT by BIT analysis or a rigorous interpretation of the text of the instrument providing the consent to arbitration. Indeed, if the dispute settlement clause is expressly mentioned beneath the scope of application of the MFN clause, the jurisdictional impact should be in principle accepted. In this regard, States have started being increasingly more careful when drafting this kind of clauses to identify what they mean by treatment and to indicate the eventual exceptions to this procedural reach. If the clause does not say so, a clear war of presumptions has divided arbitrators. In such case, only the *Plama* position reflects the general principle of international law according to which dispute settlement mechanisms are of a consensual nature. Adopting the public international law vision of international litigation, one must conclude that the need for an explicit and unambiguous consent of the State, progressively built by PCIJ and ICJ case law, invalidates the *Maffezini* presumption. State consent should in no case be presumed in the international legal order, where no inherent right to a judge exists but where all courts and tribunals have a *compétence d'attribution* (*ST-AD GmbH v Bulgaria*, 2013, para 361). This is why, according to the author, Brigitte Stern's position in the *Impregilo* case seems to be the preferable solution to assess this controverted question.

## E. Sociological Approaches

47. Many attempts have been made to theorise the reasons for the *Maffezini/Plama* divide. A popular position aimed, for instance, at reconciling the two different outcomes by stressing that the jurisdictional impact was accepted only when the investor tried to circumvent certain procedural obstacles (such as waiting periods), whereas it was refused when it aimed at creating a jurisdictional power that would not have existed otherwise (Kaufmann-Kohler, 2007, 370). Other scholars have tried to demonstrate statistically that the outcome largely depended on the typology of the MFN clause at stake, some wording allowing larger flexibility and inherent powers of the arbitral tribunal (Crépet-Daigremont, 2015, 367). Nevertheless, all these empirical studies do not seem to be conclusive, as the evolution of case law showed a more complicated reality (Maupin, 2011, 157-190).

48. Looking at the evolution of case law, it is quite clear that, starting from 2009, in a majority of cases where the tribunal took a position on the jurisdictional impact of MFN clauses a dissenting opinion was drafted to challenge this stance. Therefore, it should be investigated whether this divergence depended on social dynamics within the arbitration milieu that a sociological analysis may help teasing out.

### 1. The Private/Public Law Divide

49. Some sociological analyses of international investment law scholarship have shown that different epistemic communities will have different perceptions of the discipline. Oversimplifying the issue, public international lawyers' analysis would generally tend to see international investment law as a branch of their field of expertise, underlining the importance of the sovereign State as a defendant in the arbitration. On the other hand, academics coming from the commercial arbitration field would be less responsive to public

international legal problems and to the fact that the respondent embodies the general interest. Therefore, one could wonder whether this method is suitable to explain the diverging positions existing within the procedural use of MFN clauses' debate.

50. A broad correlation seems to exist between the rejection of MFN clauses procedural effects and the public international law analysis of State consent. It can be remarked that the large majority of dissenting opinions opposing the jurisdictional impact comes from either public international law professors (Brigitte Stern in *Impregilo*, Laurence Boisson de Chazournes in *Garanti Koza*, Marcelo Kohen in *Venezuela US s.r.l.*, Santiago Torres Bernardez in *Ambiente Ufficio* who has been several times *ad-hoc* judge at the ICJ) or practitioners having previously worked in other public international law jurisdictions (Kamal Hossain in *Teinver* who has worked several times as UNCLOS annex VII arbitrator). The intellectual influence of ICJ case law on State consent shapes the argumentation in all these cases, especially in dissenting opinions where it is largely quoted. The same holds true for numerous awards having stood against the procedural function of MFN clauses, whose presidents were public international lawyers (Gibert Guillaume was the president of the *Salini* tribunal, Pierre Marie Dupuy of the *ICS* and *Daimler* tribunals and Brigitte Stern of the *ST-AD* tribunal).

51. Nevertheless, this sociological approach should be nuanced. On the one hand, the classification cannot be based on clear-cut distinctions in many cases. For instance, although Charles Brower was a judge at the Iran-US tribunal, he abundantly practised as a commercial arbitrator and consistently defended the jurisdictional reach of MFN clauses in his dissenting opinions (see separate opinions in *Renta4*, *Austrian Airlines* and *Daimler*). On the other hand, a division exists even among public international law scholars, as clearly demonstrated by the impossibility of the *Institut du droit international* to reach an undisputed position on the matter, even though a 'preference was expressed for a more restrictive use of the MFN clause' (see the *travaux préparatoires* of the Tokyo Resolution, 39). Finally, the influence of a single scholar among the tribunal should not be overestimated.

## 2. The Fundamental Role of the Arbitrator's Background

52. Bearing this kind of sociological analysis in mind, it has to be questioned whether this kind of personal conviction on the MFN procedural reach can have an impact on procedure. In fact, it has been discussed whether the fact of having published in one's scholarly capacity on the topic of MFN procedural impact, could qualify as an → *Issue conflict (international arbitration)* [EiPro], biasing the capacity of that scholar to decide impartially on the case as an arbitrator. This qualification would have a major sociological impact on the way investment arbitration would evolve.

53. In the *Urbaser* case, two members of the tribunal had to decide whether the opinions expressed in the scholarly works by the third arbitrator, Professor Campbell McLachlan, against the jurisdictional impact of the MFN clause could be qualified as 'issue conflict' (ICSID, *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, 2010). The claimant's arguments were based on the fact that the

arbitrator had published, in a book he co-authored on international investment arbitration, opinions on this issue whereby he had prejudged an essential element lying at the heart of the on-going dispute. More precisely, the fact that he had preferred the *Plama* position and qualified the *Maffezini* arguments as 'heretical' was argued as evidence of an 'issue conflict' (paras 21-22). The two arbitrators refused to qualify these scholarly works as constituting a lack of independence or impartiality. This decision was based on the institutional position of ICSID according to which prior opinions expressed on the general question of the MFN clause's jurisdictional scope by arbitrators did not constitute an issue conflict. A similar point of view was expressed by national jurisdictions in the framework of UNCITRAL arbitration. Indeed, the Court of appeal of Thüringen, seized as *iudex loci arbitri* in the *ST-AD* case, refused to consider the opinions expressed by Brigitte Stern in relation to the issue of the MFN procedural impact as an issue conflict (Thüringer Oberlandesgericht, 1. Zivilsenat – Jena (Thuringia Appellate Court, 1. Civil Division – Jena), *Republik Bulgarien v ST-AD GmbH*, 2013, 9).

**54.** To conclude, if the case law does not help to clarify once and for all the state of the law on the jurisdictional impact of MFN clauses, parties have to be aware that it is maybe the selection process of the arbitrators that plays a major impact on the outcome of this problem.

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