

THE SCOPE AND APPLICABILITY OF MOST-FAVOURLED-NATION (MFN) CLAUSE IN INVESTMENT TREATIES: A SURVEY OF THE JURISPRUDENCE OF THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Abstract

This paper surveys the interpretation that has been given to the word ‘treatment’ in the jurisprudence of the International Centre for Settlement of Investment Disputes (ICSID) with a view of promoting a common vision about the scope and contours of the MFN clause contained in a number of bilateral investment treaties (BITs).

Keywords: MFN, BIT, Most-Favoured Nation, investment treaties

1. Introduction

Nowadays, arbitration is the generally accepted forum for resolving disputes between foreign investors and host States.¹ A general feature in International Bilateral Treaties (BIT) is the so-called ‘most-favoured-nation’ treatment (MFN) clause which seeks to grant to an investor from country A treatment in country B (the host state) on a footing not inferior to that of the most favoured third State C.² One of the questions that investment arbitral tribunals have been called to adjudicate on is the meaning of the word ‘treatment’ contained in such MFN clauses. Specifically, the question is whether ‘treatment’ extends to both substantive treatment, such as compensation in case of expropriation, and dispute settlement provisions such as those that dispense foreign investors of a third State with the requirement of exhausting local remedies before submitting a claim before an international arbitral tribunal. This paper surveys the interpretation that has been given to the word ‘treatment’ in the jurisprudence of the International Centre for Settlement of Investment Disputes (ICSID)³ with a view of promoting a common vision about the scope and contours of the MFN clause contained in a number of BITs.

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¹ *Plama Consortium Limited vs Republic of Bulgaria* (ICSID Case No. ARB/03/24), paras 198-199.

² Fietta S, “Most Favoured Nation Treatment and Dispute Resolution Under Bilateral Investment Treaties: A Turning Point?” 8 *International Arbitration Law Review* (2005), p. 131

³ ICSID is the world’s leading institution devoted to international investment dispute settlement. ICSID was established in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). The ICSID Convention is a multilateral treaty formulated by the Executive Directors of the World Bank to further the Bank’s objective of promoting international investment. ICSID is an independent, depoliticized and effective dispute-settlement institution. Its availability to investors and States helps to promote international investment by providing confidence in the dispute resolution process. It is also available for state-state disputes under investment treaties and free trade agreements, and as an administrative registry.

ICSID provides for settlement of disputes by conciliation, arbitration or fact-finding. The ICSID process is designed to take account of the special characteristics of international investment disputes and the parties involved, maintaining a careful balance between the interests of investors and host States. Each case is considered by an independent Conciliation Commission or Arbitral Tribunal, after hearing evidence and legal arguments from the parties. A dedicated ICSID case team is assigned to each case and provides expert assistance throughout the process. More than 600 such cases have been administered by ICSID to date.

ICSID also promotes greater awareness of international law on foreign investment and the ICSID process. It has an extensive program of publications, including the leading *ICSID Review-Foreign Investment Law Journal* and it regularly publishes information about its activities and cases. ICSID staff organize events, give numerous presentations and participate in conferences on international investment dispute settlement worldwide.

This paper is structured as follows: part 2 defines the MFN clause and underscores its relevance. Part 3 examines the meaning of the word ‘treatment’ in MFN clauses and analyses its applicability to procedural issues like dispute settlement arrangements. The paper ends with a conclusion (part 4).

2. Meaning and importance of MFN clause under investment treaties

Article 5 of the International Law Commission (ILC) Draft Articles on MFN Clause⁴ defines a ‘most-favoured-nation’ clause as: ‘treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that third State, not less favourable than treatment extended by the granting state to a third State or to persons or things in the same relationship with that third State’. To paraphrase, an MFN clause in an investment treaty is a promise between two States party to the treaty, the capital-exporting State and the capital-importing State that neither State will give to investors from any third State more favourable treatment than that given to investors from the other State party to the treaty.⁵ However, while MFN clauses are potentially a means of reducing the level of inequalities and disparities in treatment in investment law, they carry a significant risk of over interpretation by their beneficiaries and arbitral tribunals. It is therefore necessary to interrogate the scope and ambit of the word ‘treatment’ employed in MFN clauses in order to have a grasp over such a clause and its applicability in an investment law.

3. The concept of ‘treatment’ and its scope in MFN clauses

As stated above, the purpose of MFN clause in a treaty is to guarantee treatment that an investor finds more favourable in the State where he is investing. While considering the scope of ‘treatment’ three possible questions may arise in the context of investment treaties. First, does ‘treatment’ require a comparison of the entire clause conferring treatment or merely part of the provision conferring favourable treatment? Secondly, is a favourable treatment in a third-party treaty a ‘claim’ in itself or simply a ‘right to claim’? And, finally, does the word ‘treatment’ refer only to substantive treatment or also to dispute settlement regimes set forth in investment treaties? These questions are considered below.

Does treatment refer only to ‘favourable’ treatment?

With respect to the question whether or not the word treatment contained in MFN clauses refers only to favourable treatment, two possible interpretations are possible. Firstly, it may be argued that MFN clause attracts only favourable treatments and not disadvantages of a third party-treaty. But, this may be a problematic view. For example, suppose that an agreement between State A and State B requires the parties to submit investment disputes to an *ad hoc* arbitral tribunal in accordance with the Arbitration Rules of the UNCITRAL 1976; whereas a treaty between State A and State C provides that the disputes arising from the treaty shall be referred to ICSID forum in accordance with the ICSID Convention.⁶ If an investor from State B invokes MFN clause in the basic treaty to claim a favourable dispute settlement provision from the Agreement between State A and State C i.e. ICSID forum to settle disputes but wants to retain the applicable rules i.e. UNCITRAL Arbitration Rules, would such a partial claim be permissible under the MFN clause?

⁴ ILC, Draft Articles on most-favoured-nation clauses with commentaries (Yearbook of the International Law Commission, 1978, vol. II, Part Two).

⁵ Cole T “The boundaries of most favored nation treatment in international investment law” 3 *Michigan Journal of International Law* (2012), p. 539.

⁶ The *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (or ICSID Convention) is a treaty ratified by 153 Contracting States. It entered into force on October 14, 1966, 30 days after ratification by the first 20 States.

Such a situation came before the ICSID Tribunal in *Siemens v. Argentina*.⁷ The case involved a dispute between a German investor on the one hand and the Argentine Republic on the other. Article 10 of the Argentina-Germany BIT, 1991 provided that a dispute shall be settled amicably between the parties within a period of six months; and in the absence, the dispute shall be submitted to the domestic courts and tribunals of the host State for settlement over a period of eighteen months; and if the dispute continues, then to an international arbitration. However, the claimant invoked the MFN clause in the basic treaty (Argentina-Germany BIT, 1991) to circumvent the eighteen months waiting period before domestic courts by importing a more favourable dispute settlement provision from a third-party BIT (Argentina-Chile BIT, 1991) which did not impose any such condition before reaching an international arbitration. Article X of the Argentina-Chile BIT also contained a fork-in-the-road provision,⁸ which the Argentina-Germany BIT did not contain.

While considering the provisions, Argentina argued that since the claimant had already initiated a local administrative proceeding against the host State, the claimant, in accordance with the fork-in-the-road provision, should not be allowed to initiate an international arbitration. However, the Tribunal rejected the argument of importing dispute settlement clause as a whole, rather than claiming only favourable provisions, in the following terms:

This understanding of the operation of the MFN clause would defeat the intended result of the clause which is to harmonise the benefits agreed with a party with those considered more favourable granted to another party. It would oblige the party claiming a benefit under a treaty to consider the advantages and disadvantages of that treaty as a whole rather than just the benefits. The Tribunal recognises that there may be merit in the proposition that, since a treaty has been negotiated as a package, for other parties to benefit from it, they also should be subjected to its disadvantages. However, this is not the meaning of an MFN clause. As its own name indicates, it relates only to more favourable treatment. There is also no correlation between the generality of the application of a particular clause and the generality of benefits and disadvantages that the treaty concerned may include. Even if the MFN clause is of a general nature, its application will be related only to the benefits that the treaty of reference may grant and to the extent that benefits are perceived to be such. As already noted, there may be public policy considerations that limit the benefits that may be claimed by the operation of an MFN clause, but these pleaded by the Respondent have not been considered by the Tribunal to be applicable in this case.⁹

It is submitted that the above reasoning of the arbitral tribunal is correct. Since the purpose of the MFN clause is to extend any most favourable treatment from a third-party treaty to the beneficiary of the clause in the basic treaty, only favourable clauses may be imported; not corresponding disadvantages or disadvantages contained in the provision as a whole. Otherwise, the clause would be emptied of its meaning.

The next question to be considered now is whether an MFN clause is a claim in itself or a right to claim.

⁷ *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8.

⁸ A fork in the road clause in a treaty requires an investor to make an irreversible choice between international arbitration and the host State's domestic court.

⁹ *Siemens A.G. v. The Argentine Republic*, *supra* note 7, para 120.

4. MFN clause: a ‘claim in itself’ or a ‘right to claim’?

Another question about the legal nature of the MFN clause is whether the clause is a ‘claim’ in itself or simply a ‘right to claim’. The answer will bring about different legal consequences. If it is a ‘claim’, then the host State will be under an obligation to grant favourable treatment to the investor beneficiary of the clause from the moment when the BIT is entered into or the State has granted such a treatment to an investor from a third-country.¹⁰ Under this understanding, the host State would be required to provide back date compensation for the claimants for not providing such treatment from the date of its original grant to the date of the claim.¹¹ Considering the number and overlapping nature of international investment agreements, it is hardly practicable for any host State to determine which treatments are more favourable, for whom and under what circumstances.¹² This clearly is an interpretation that no host State would want to see adopted by investment arbitral tribunals. In contrast, the ‘right to claim’ approach limits the responsibility of the host State to extend a most favourable treatment to the investor beneficiary of an MFN clause only when he makes such a claim.¹³ This would ensure maximum predictability of MFN obligations and minimise the impact of such clauses on the policy-making freedom of the host States and the legal liabilities that may arise therefrom.¹⁴ This interpretation is the most consistent with logic and should be preferred to the other interpretation discussed before.

5. MFN clause and dispute settlement provisions

The last question to be answered in relation to the meaning and ambit of the MFN clause is whether ‘treatment’ refers only to ‘substantive’ rights or also to ‘dispute settlement’ provisions of third-States BITs which are deemed more favourable by an investor beneficiary of the clause. The views expressed by investment arbitral tribunals on this question diverge.

The approach and outcome of the ICSID tribunals are divided between two different groups. The tribunals in *Maffezini v. Spain*,¹⁵ *Siemens v. Argentina*,¹⁶ ruled that the MFN clause is applicable to all matters including dispute settlement provisions within a treaty framework. In contrast, the ICSID tribunals in *Salini v. Jordan*,¹⁷ *Plama v. Bulgaria*,¹⁸ and *Wintershall v. Argentina*¹⁹ rejected the possibility of applying MFN clause over procedural issues.

In order to arrive at a better understanding as to the relationship between MFN clause and dispute settlement provisions in the context of BITs, it is imperative to consider the findings of the tribunals in some of these cases.

Cases in favor of extending MFN clause to dispute settlement provisions

Maffezini v. Spain

The award in this case was rendered on 9 November 2000. The claimant was an Argentinean national who established and invested in a company named EAMSA, for the purpose of building a factory for

¹⁰ Thulasidhass PR “Most-Favoured-Nation Treatment in International Investment Law: Ascertainning the Limits through Interpretative Principles” *Amsterdam Law Forum* (2015), p. 8.

¹¹ Thulasidhass, *supra* note 10, p. 8.

¹² Thulasidhass, *supra* note 10, p. 8.

¹³ Thulasidhass, *supra* note 10, p. 8.

¹⁴ Thulasidhass, *supra* note 10, p. 8.

¹⁵ Emilio Augustin Maffezini v. The Kingdom of Spain (ICSID Case No. ARB/97/7).

¹⁶ *Siemens v. Argentina*, *supra* note 7.

¹⁷ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13.

¹⁸ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24.

¹⁹ *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14.

chemical products in Galicia, Spain. The project was a joint venture with the Sociedad para el Desarrollo Industrial de Galicia (SODIGA), a public-private entity with a mandate to promote industrial development in Galicia. The project eventually failed due to surging costs, and the investor filed for arbitration under the Argentina-Spain BIT.²⁰

Spain objected to the jurisdiction of the Tribunal on the ground that the Claimant did not fulfil the conditions provided under Article X of the Argentina-Spain BIT of 1991 before reaching the Tribunal for international arbitration. This article provides three different stages for settlement of disputes, as follows:

- (1) to be settled amicably by the parties to the dispute within a period of six months, and in the absence of a settlement,
- (2) to be submitted to the competent courts and tribunals of the host state for settlement over a period of eighteen months, and if the dispute continues,
- (3) to be submitted to the international arbitration.

Since, the Claimant did not exhaust the available remedies before domestic courts under Article X as provided above, Spain argued that the Tribunal had no jurisdiction over the case. On the other hand, the Claimant invoked MFN clause under Article IV (2) of the BIT to circumvent the domestic court requirement of Article X, by importing more favourable dispute settlement provisions from a third-party treaty (i.e. Spain-Chile BIT 1991) which did not impose any such condition before reaching an international arbitration. Article IV (2) of the Argentina-Spain BIT provides as follows: ‘In all matters subject to this Agreement, this treatment shall not be less favourable than that extended by each party to the investments made in its territory by investors of a third country’.

The issue before the ICSID Tribunal was whether the words ‘all matters’ in the MFN clause apply only to substantive matters or also to procedural issues like dispute settlement questions. Spain argued that reference to all matters in Article IV (2) of the BIT refers only to ‘substantial matters or material aspects of the treatment granted to investors and not to procedural or jurisdictional questions.’²¹ The Tribunal, however, declined to limit the application of MFN clause to substantial matters alone holding 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 Tribunal added that:

[I]f a third-party treaty contains provisions for the settlement of disputes that are more favourable 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 favoured nation clause as they are fully compatible with the *ejusdem generis*²³ principle.

²⁰ The investor claimed (1) that the project failed because SODIGA had given false advice underestimating the costs of the undertaking, and (2) that SODIGA was responsible for the additional costs resulting from the Environmental Impact Assessment (EIA) because it had pressured EAMSA to begin construction before the EIA process was completed. Spain contested the allegations, stating that SODIGA was a private company whose acts were not attributable to the State, and that the investor had assumed any risk relating to the feasibility and profitability of his investment.

²¹ *Maffezini v. Spain*, supra note 15, para. 41.

²² *Idem*, para. 55.

²³ Latin for "of the same kind", it is used to interpret statutes when a law lists classes of persons or things.

Siemens v Argentina

The claims in this case arose out of the Argentinean government's suspension and subsequent termination of a contract with *Siemens*, a German company to establish a system of migration control and personal identification. The ICSID Tribunal recognised the applicability of MFN clause to dispute settlement provisions, reinforcing the interpretative approach followed by the *Maffezini* Tribunal. The Tribunal reasoned as follows:

[T]he Tribunal finds that the Treaty itself, together with so many other treaties of investment protection, has as a distinctive feature special dispute settlement mechanism 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.²⁴

Cases rejecting the application of MFN clause to dispute settlement provisions***Salini v Jordan***

The understanding of the MFN clause in *Maffezini and Siemens* has been rejected by the ICSID Tribunal in *Salini v. Jordan*²⁵ where it held that treatment ‘relates to provisions concerning substantive protection in the sense of denial of justice in the domestic courts. It does not relate to the import of dispute resolution provisions of another treaty into the basic treaty’. The Tribunal stressed that the solution adopted in the *Maffezini* case ‘may in practice prove difficult to apply’ and that it would add more uncertainties to the risk of ‘treaty shopping’.²⁶ The Tribunal thus ruled that the MFN clause is limited in its scope to substantive matters and does not apply to dispute settlement arrangements. It is submitted that the arguments advanced by the Tribunal do not support its conclusion. The difficulty to apply a provision does not necessarily impact on the meaning of the provision in question, unless it is clear that the contested interpretation was in fact not the intention of the parties. The risk of treaty-shopping is also inherent in the MFN clause generally and is not limited to applying such a clause to dispute settlement provisions. This risk of ‘cherry-picking’, as it is often called in the legal literature, also applies to all substantive provisions of third-party BITs and should therefore not be an argument for not extending the MFN clause to dispute settlement issues.

Plama v Bulgaria

In *Plama v. Bulgaria*, the ICSID Tribunal also held that an MFN clause in a basic BIT does not incorporate dispute settlement provisions in whole or in part set forth in a third-party treaty, ‘unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them’.²⁷ The *Plama* Tribunal held 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. In the instant case the Tribunal found that no such intention could be established in the circumstances of the case²⁸ and thus held that the MFN clause could not be interpreted ‘as providing consent to submit a dispute under the Bulgaria-Cyprus BIT to ICSID arbitration’.²⁹

The above view is also open to criticism. While it is always desirable that treaty provisions be as clear and specific as possible, the MFN clause can never be. Its purpose is to ensure that an investor is subject to the ‘most favourable treatment’ that the host State has previously granted or will ever grant in the future to an investor from a third-party State. Since the treatment in question is not known at the time of entering into the treaty, it is never possible to specify which treatment is referred to exactly at that time. It is up to the

²⁴ *Siemens v. Argentina*, supra note 7, para. 102.

²⁵ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13.

²⁶ *Idem*, para 115.

²⁷ *Plama Consortium Limited vs Republic of Bulgaria* (ICSID Case No. ARB/03/24), para 223.

²⁸ See paras 198, *et seq.*

²⁹ See para 227.

beneficiary to claim it whenever he deems most favourable to his situation. Viewed from this angle, there is no reason that the MFN clause in a basic treaty should not extend to dispute settlement provisions of a third-State's BIT.

The fear that 'the consent of the contracting parties will be replaced at the instance of the interests of private commercial investors'³⁰ should not be an argument against applying MFN clauses to dispute settlement provisions. That risk is always associated with the problem of treaty-shopping that is inherent in MFN clauses. The only acceptable solution to this problem is to expressly exclude such an extension in the provision of the MFN clause itself. In certain instances, countries do not recognise the jurisdiction of international courts and tribunals to settle disputes with certain countries, for different reasons.³¹ In such instances, the host State should expressly exclude the application of the MFN clause to the provisions granting such jurisdiction to nationals of third States. If it did not, such advantage should be granted to the investor beneficiary of an MFN clause in the basic treaty. Dispute settlement is part of the ways a State 'treats' foreign investors and, accordingly, part and parcel of the MFN provision. The argument by the *Plama v. Bulgaria* Tribunal that 'the Contracting States cannot be presumed to have agreed that those provisions can be enlarged by incorporating dispute resolution provisions from other treaties negotiated in an entirely different context'³² does not affect this conclusion since the purpose of the MFN clause is always to shop most favourable provisions from treaties that were negotiated in different contexts.

6. Conclusion

This paper was concerned with the meaning of the word 'treatment' in MFN clauses of bilateral investment treaties between capital-exporting States and the capital-importing ones. Three questions were considered. First, does 'treatment' require a comparison of the entire clause conferring treatment or merely part of the provision conferring favourable treatment? Secondly, is a favourable treatment in a third-party treaty a 'claim' in itself or simply a 'right to claim'? And, finally, does the word 'treatment' refer only to substantive treatment or also to dispute settlement regimes set forth in investment treaties?

With regard to the first question, it was found that, as the name suggests, the MFN clause attracts only favourable treatment, not corresponding disadvantages and the disadvantages contained in a provision as a whole. With respect to the second question it was argued that an MFN clause is only a right to claim, not a claim in itself and that, accordingly, the responsibility of the host State is limited to extending a most favourable treatment to the investor beneficiary of an MFN clause only when he makes such a claim. The claim does not have a retroactive effect.

With regard to the question to whether the MFN clause applies to substantive treatment, such as compensation in case of expropriation, as well as to procedural issues such as dispute settlement procedures, it was found that the issue is not yet settled. On the one hand, there is number of ICSID cases taking the view that the MFN clause applies to both issues while another bunch of cases hold the contrary view. The present writer has argued that given the fact that the dispute settlement provisions which, for example, specify a time for domestic remedies as antecedents to international arbitral jurisdiction 'unduly add to the costs of a remedy',³³ it appears that those that dispense with such procedures obviously offer more favourable treatment to investors and that, therefore, the view that such a clause also falls under the meaning of 'treatment' within the meaning of MFN clauses is the correct one.

³⁰ Thulasidhass, *supra* note 10, p. 11.

³¹ Thulasidhass, *supra* note 10, p. 12.

³² *Plama v. Bulgaria*, *supra* note 1, para 207.

³³ Sornarajah M *The International Law of Foreign Investment*, 3rd ed (Cambridge University Press, 2010), p. 322.