MFN in BITs: The Deconstruction of State Consent to Dispute Settlement?

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Abstract

In international law, all tribunals, whether arbitral or judicial, are of attributed jurisdiction. The attribution of this jurisdiction is based on state consent and is limited by the terms thereof. Yet the rigours of state consent to investment dispute settlement have been eroded through the broad interpretation of most favoured nation clauses (or MFN clauses) by investment tribunals. The question addressed by the present article is whether an investment treaty's MFN clause may be used to alter the terms of state consent to international arbitration by incorporating a more favourable dispute settlement clause contained in a third treaty. Its conclusion is that where an MFN clause merely refers to "treatment" and "all matters", an investor cannot rely thereon in order to avoid the conditions attached by a state to its standing offer to arbitrate. In any way, MFN clauses encompass treatment accorded within a contracting party's territory, and, by definition, international arbitration lies outside of a state's territory and control.

Keywords: most favoured nation clauses, bilateral investment treaties, international investment law, international dispute settlement, international economic law, public international law.

They just made it up.
(Counsel for the Claimant, Plama Consortium Limited v. Bulgaria)[1]

1 Introduction

When a foreign investor elects to enforce, against a host state, its investment treaty rights through international arbitration, it must be in a "dispute settlement relationship"[2] with that state. Whether such a relationship exists is generally determined by that state's consent and by the conditions it attached thereto, which form its "standing offer". The terms of such standing offer are laid down in the compromissory clauses that are part of the vast majority of

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1 *Plama v. Bulgaria*, ICSID, Decision on Jurisdiction, Case No. ARB/03/24, 8 February 2005, para. 221.

2 *Garanti Koza LLP v. Turkmenistan*, ICSID, Dissenting Opinion of Laurence Boisson de Chazournes, Case No. ARB/11/20, 3 July 2013, para. 40.

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investment treaties. In doing so, states establish varying and specific terms for their consent to international arbitration, tailoring their "standing offer" to their policy objectives. They can, for instance, opt for unbridled access by the investor to international dispute settlement, or they can provide for waiting periods and for domestic litigation as prerequisites for the foreign investor to bring a claim against a state.[3] Thus, state practice on investment treaty dispute settlement provisions is extremely heterogeneous. For instance, the bilateral investment treaty (BIT) concluded between the Netherlands and Kazakhstan stipulates that:

> 1. Any dispute between the Contracting Parties concerning the interpretation or application of the present Agreement, which cannot be settled within a reasonable lapse of time by means of diplomatic negotiations, shall, unless the Parties have otherwise agreed, be submitted, at the request of either Party, to an arbitral tribunal, composed of three members …[4]

Kazakhstan and the Netherlands have provided that, as soon as a dispute arises, the foreign investor may pursue international arbitration: this consent is founded on no further requirement. A different choice was made by the parties to the Kazakhstan-Italy BIT. According to that treaty's ninth article:

> 1. In the event that such dispute cannot be settled amicably within six months of the date of the written application for settlement, the investor in question may submit at his choice the dispute for settlement to: a) the Contracting Party's Court having territorial jurisdiction; b) an ad hoc Arbitration Tribunal, in compliance with the arbitration regulation of the UN Commission on the International Trade Law (UNCITRAL); and the host Contracting Party undertakes hereby to accept the reference to said arbitration. c) the International Centre for Settlement of Investment Disputes, for the implementation of the arbitration procedures under the Washington Convention of 18 March, 1965, on the settlement of investment disputes between States and nationals of other States, if or as soon as both the Contracting Parties have acceded to it.[5]

According to that clause's plain wording, the Italian investor's possibility to bring a claim against Kazakhstan before an international judicial body is premised on that investor having first waited for six months, which he would have presumably used to seek an amicable solution. At first sight, Kazakhstan's consent to international arbitration is premised on the investor having to negotiate with the host state for at least six months. There seems to be no possibility for the Italian investor to bypass such a requirement, even if it has no will to comply therewith.

3 Dolzer and Schreuer 2008, p. 232.

4 Agreement on Encouragement and Reciprocal Protection of Investments between the Republic of Kazakhstan and the Kingdom of the Netherlands, Art. 12.

5 Agreement between Italy and Kazakhstan for the Promotion and Protection of Investment (1996), Art. 9.

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Or, perhaps, such a possibility actually exists. Indeed, the same Italy-Kazakhstan BIT contains a most favoured nation clause (MFN clause) providing that:

> In case, from the legislation of one of the Contracting Parties, or from the international obligations in force or that may come into force for the future for one of the Contracting Parties, should come out a legal framework according to which the investors of the other Contracting Party would be granted a more favourable treatment than the one foreseen in this Agreement, the treatment granted to the investors of such other parties will apply to investors of the relevant Contracting party also for the outstanding relationships.[6]

Could the Italian investor rely on the foregoing MFN clause in order to avoid the waiting requirement in the same BIT and replace it with the "more favourable" dispute settlement regime contained in the Kazakhstan-Netherlands BIT? May our Italian investor rely on the MFN clause contained within the former treaty in order to overcome the terms of Kazakhstan's consent to international arbitration? The issue, then, is to what extent, if at all, MFN clauses may be used to bypass conditions in the states' "standing offer" when resorting to international arbitration. This question is not inconsequential within an international legal system where international adjudication is based on state consent and all tribunals are of limited jurisdiction.[7] An excessively flexible interpretation of these MFN clauses could lead international tribunals to disregard the common will of states on which every treaty is founded, significantly undermining legal certainty in international law. This would have far-reaching consequences, as international law is founded on the premise that legal commitments binding on states may emanate only from their own free will.[8],[9]

2 The Most Favoured Nation Clause

MFN treatment foresees, on the one hand, a granting state and, on the other, a beneficiary state: between them, it establishes a link that allows the integration of elements from a third treaty into the relationship between that granting state and that beneficiary state. Hence, the normal effect of MFN clauses in BITs is to expand the rights of investors.[10] This said, the MFN clause is a relative standard that depends, for its reach and scope, on the conduct of the particular state and may have no relevance if the state concerned fails to grant any relevant benefit to a third party. However, as soon as a state does confer a relevant benefit to a third

6 Ibid., Art. 3.
7 *Abaclat and Others v. the Argentine Republic*, ICSID, Dissenting Opinion of Georges Abi-Saab, Case No. ARB/07/5, para. 7.
8 *S.S. Lotus (France. v. Turkey.)*, PCIJ, Judgment of 7 September 1927, para. 44.
9 Pellet 1989, p. 22.
10 Dolzer and Schreuer 2008, p. 86.

party, that benefit is automatically extended to the beneficiary of the MFN clause. This said, the MFN clause operates according to the *ejusdem generis* principle, under which MFN treatment can be claimed only within the framework set by the clause and relates only to the subject matter for which the clause was stipulated in the first place.[11] Otherwise, that matter is, for what concerns the beneficiary of the MFN clause, *res inter alios acta*.[12]

Emilio Agustin Maffezini v. Spain was the first instance in which an investor relied on the MFN clause to avoid procedural requirements for dispute settlement. More specifically, the issue was whether an Argentinian investor could invoke the MFN clause in the 1991 Argentina-Spain BIT in order to ignore the provision giving to domestic courts the opportunity to deal with a dispute for a period of eighteen months before it may be submitted to arbitration.[13] In the end, the *Maffezini* tribunal reached a conclusion that was to prove controversial:

> if a third party treaty contains provisions for the settlement of disputes that are more favorable to the protection if investors' rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the MFN clause as they are fully compatible with the ejusdem generis principle. Of course, the third-party treaty has to relate to the same subject matter as the basic treaty…[14]

A certain number of tribunals have followed the line traced in *Maffezini v. Argentina*. Among these there are the tribunals in *Gas Natural v. Argentina*, *Siemens v. Argentina* and, more recently, *Impregilo v. Argentina* and *Hochtief v. Argentina*. Nonetheless, while the *Maffezini* judgment does not stand on its own, it has been met with considerable disquiet and vigorous dissent.[15] Other tribunals, such as *Plama v. Bulgaria* and *Telenor v. Hungary*, have taken a stance contrary to the conclusions of the *Maffezini* tribunal. Before 2008, it could at least have been argued that the two sets of cases were distinguishable on factual grounds. Most of the cases in which tribunals had accepted the applicability of the MFN clauses to dispute settlement provisions concerned procedural obstacles.[16] On the other hand, most of the cases in which the effect of MFN clauses had been denied concerned attempts to extend the scope of jurisdiction substantively to issues not covered by the arbitration clauses in the basic treaty.[17] However, more recent tribunals have broken this pattern and have ruled that the

11 *Plama v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 February 2005, para. 36.
12 *Anglo-Iranian Oil Co. case* (*United Kingdom v. Iran)* ICJ, Judgment of 22 July 1952, p. 20.
13 *Maffezini v. Spain*, ICSID, Decision on Jurisdiction, Case No. ARB/97/7, January 2000, para. 39.
14 Ibid., para. 56.
15 Douglas 2011, p. 98.
16 Dolzer and Schreuer, 2008, p. 86.
17 Ibid.

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MFN clause in the BITs at issue could not be used to bypass procedural requirements.[18,19]

3 More Favourable Treatment?

The MFN clause is a relative standard: in order to successfully invoke the MFN clause in a third treaty, a foreign investor must establish that investors from a third state are actually being treated more favourably. Yet the wording of the relevant provisions never clarifies what is meant by "more favourable treatment". On this subject, it is also unclear whether the MFN treatment is a subjective or an objective standard. Here, it will suffice to say that the existing jurisprudence is divided on this point. Tribunals in *Impregilo v. Argentina* and *Garanti Koza LLP v. Turkmenistan* have posited that the claimant is more favoured when it has a choice between forums.[20,21] For these tribunals, a system that gives a choice is more favourable than a system that does not.[22] However, in her dissenting opinion to the majority ruling in *Impregilo v. Argentina*, Professor Stern warns that "it could as well be contended that a system which gives the possibility to use cumulatively two different forums (although one being delayed by 18 months) is more favorable than a system that obliges to elect only one possibility to the detriment of the other".[23] The tribunal in *ICS v. Argentina* came to a similar conclusion:

> [the BIT] effectively gives an investor two bites at the apple: once before the domestic courts of the host State, and again before an international arbitral tribunal. Although there are costs and delay involved in litigating before the Argentine courts if this fails to achieve a resolution, in many circumstances, this may be more favorable than direct access to international arbitration after only six months of amicable negotiations.[24]

Maffezini v. Spain and its successors have been keen to expand the MFN clause's reach but have done so without fully considering the appropriate benchmark under which to evaluate the "more favourable" nature of third-party treatment. Their assumption on that standard's subjective nature has been challenged by more recent arbitral decisions. In any case, there are other more profound

18 *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID, Award, Case No. ARB/04/14, 8 December 2008, para. 159.2.
19 *ICS Inspection and Control Services Limited v the Argentine Republic*, PCA, Award on Jurisdiction, Case No 2010-9, 10 February 2012, para. 32.
20 *Impregilo v. Argentina*, ICSID, Award, Case No. ARB/07/17, 21 June 2011.
21 *Garanti Koza LLP v. Turkmenistan*, ICSID, Decision on the Objections for Lack of Consent, Case No. ARB/11/20, 3 July 2013, para. 91.
22 *Impregilo v. Argentina*, ICSID, Award, Case No. ARB/07/17, 21 June 2011, para. 101.
23 *Impregilo S.p.A v. Argentine Republic*, ICSID, Concurring and Dissenting Opinion of Brigitte Stern, Case No ARB/0717, 21 June 2011, para. 11.
24 *ICS Inspection and Control Services Limited v. the Argentine Republic*, PCA, Award on Jurisdiction, Case No 2010-9, 10 February 2012, para. 323.

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reasons for which the state's standing offer may not fall within the ambit of the MFN clause.

4 State Consent: Dispute Settlement and the MFN Clause

In *Maffezini v. Spain*, the Tribunal dealt with the following MFN clause:

> 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[25]

Since the MFN clause could attract only matters belonging to the same category of subjects as that to which the clause itself relates, the tribunal in *Maffezini v. Spain* had to determine whether dispute settlement was part of the category of subjects to which the MFN clause applied. The tribunal decided that there were good reasons to conclude that dispute settlement arrangements are inextricably related to the protection of foreign investors. In reaching this conclusion, it relied largely on an older arbitral decision, the *Ambatielos* claim. This dispute concerned the non-execution of a contract concluded between a Greek businessman and the British government for the construction of nine ships. The ensuing dispute between Mr. Ambatielos and the British government had been settled by British courts at the expense of the Greek investor, with the Court of Appeal refusing to hear two key witnesses that were arguably "necessary to enlighten it and to safeguard the rights of [Mr Ambatielos] in the interests of impartial justice".[26] Consequently, as Mr. Ambatielos had recourse to his home state's diplomatic intervention, Greece and the United Kingdom differed on whether the term "commerce and navigation" appearing in the MFN provision the Anglo-Greek of Commerce and Navigation encompassed the "administration of justice".[27] Faced with this issue, the *ad hoc* Commission of Arbitration held that:

> 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-favored-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[28]

Therefore, according to the *Maffezini*award, there exists such a close relationship between substantive treatment and dispute settlement provisions contained in

25 Acuerdo para la Promocion y la Proteccion Reciproca de Inversiones entre el Reyno de Espana y la Republica Argentina, Art. IV. 2.

26 *Ambatielos Case (Greece v. United Kingdom)*, I.C.J., Application Instituting Proceedings, p. 10.

27 *Plama v. Bulgaria*, ICSID, Decision on Jurisdiction, Case No. ARB/03/24, 8 February 2005, para. 215.

28 *Maffezini v. Spain*, ICSID, Decision on Jurisdiction, Case No. ARB/97/7, January 2000, para. 49.

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investment treaties that the terms of the state's consent to international arbitration do not have a status separate from the treaty's other clauses. Hence, it decided that the protection of the rights of persons engaged in investment by means of dispute settlement provisions was covered by the terms of the MFN clause.[29] Arguably, the tribunal's use of precedent, which occupies a crucial place in its reasoning, was inaccurate. Indeed, the *Ambatielos* decision related to the denial of justice in domestic courts and not to access to international dispute settlement. In other words, it related to the substantive protection of foreign investors and not to "the import of dispute resolution provisions of another treaty into the basic treaty".[30]

However, the reasoning of the *Maffezini* tribunal has another important flaw determined by the fact that the jurisdiction of international courts is based on consent of the parties and confined to the extent accepted by them.[31] Within the framework of a BIT, the agreement to arbitrate is arrived at through the consent to arbitration given in advance by a state in respect of investment disputes falling under that BIT and the later acceptance thereof by an investor.[32] Certain tribunals have failed to distinguish between the jurisdictional provisions that contain this consent and substantive provisions such as the MFN clause. For instance, the Tribunal in *Hochtief v. Argentina* opined that

> ... the (procedural) right to enforce another (substantive) right is one component of the bundles of rights and duties that make up the legal concept of what property is.[33]

However, in international law, jurisdictional treatment is never inherent in substantive treatment: it requires a further condition in order to be granted to the investor. That condition is state consent. At the international level, most rights cannot be enforced through the jurisdictional process, and it is only when a state has given its consent that a jurisdictional treatment complements the substantive treatment granted by international rules.[34] This distinction between jurisdictional treatment and substantive treatment was also retained in the *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan* award. In this case, the arbitral tribunal held that:

29 Ibid., para. 54.

30 *Plama v. Bulgaria*, ICSID, Decision on Jurisdiction, Case No. ARB/03/24, 8 February 2005, para. 215.

31 *Armed Activities on the Territory of the Congo (New Application: 2002), (Democratic Republic of the Congo v. Rwanda)*, ICJ, Judgment of 3 February 2006, ICJ Reports 2006, para. 88.

32 *Plama v. Bulgaria*, ICSID, Decision on Jurisdiction, Case No. ARB/03/24, 8 February 2005, para. 198.

33 *Hochtief AG v. The Argentine Republic*, ICSID, Decision on Jurisdiction, Case No. ARB/07/31, 25 October 2011, para. 62.

34 *Impregilo S.p.A v. Argentine Republic*, ICSID Case No ARB/0717, B.Stern, Concurring and Dissenting Opinion, para. 45.

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> The text of the [Turkey-Turkmenistan BIT] indicates that its drafters recognised a distinction between substantive rights in relation to investments, and remedial procedures in relation to those rights. The substantive rights in relation to investments are found in Articles II-VI of the Treaty, and the procedures for the resolution of disputes in relation to those rights are set out in Article VII. This distinction suggests strongly that the "treatment" of "investments" for which MFN rights were granted was intended to refer only to the scope of the substantive rights identified and adopted in Articles II-VI.[35]

Consequently, the MFN clause must constitute more than a mere prohibition of discrimination between investors based on their provenance: it must be in itself a clear manifestation of consent to the arbitration of investment disputes according to the rules that the MFN provision might attract from other comparable treaties.[36] Should the MFN provision not be found to operate in this way, it cannot be relied on by an investor to bypass the procedural requirements contained in compromissory clauses.

The tribunals that have followed the reasoning in *Maffezini v. Spain* have not contested the necessity of state consent per se. Rather, they have argued that procedural requirements in dispute settlement provisions were not jurisdictional requirements and could be subjected to the operation of MFN clauses without calling into question state consent. For instance, the *Maffezini* tribunal distinguished between procedural requirements that could be modified by the MFN clause and "public policy considerations" that could not be overridden by the MFN clause.[37] Also the tribunal in *Hochtief v. Argentina* insisted that procedural requirements could be modified by the MFN clause because they did not impact on the scope of that tribunal's jurisdiction:

> the avoidance of the 18-month period in the Argentina-Germany BIT by reliance on the MFN clause would have no impact upon the scope of the jurisdiction of the Tribunal. It would not result in any case falling within its jurisdiction that could not eventually be brought before the Tribunal by the Claimant acting alone under Article 10 of the Argentina-Germany BIT[38]

Such a notion has been roundly criticised by other tribunals.[39] In *Wintershall v. Argentina* the claimant contended that since both Argentina and Wintershall had already consented to International Centre for Settlement of Investment Disputes

35 *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID, Award, Case No. ARB/10/1, 2 July 2013, para. 7.3.9.

36 *ICS Inspection and Control Services Limited v the Argentine Republic*, PCA, Award on Jurisdiction, Case No 2010-9, 10 February 2012, para. 278.

37 *Maffezini v. Spain*, ICSID, Decision on Jurisdiction, Case No. ARB/97/7, January 2000, para. 58.

38 *Hochtief AG v. The Argentine Republic*, ICSID, Decision on Jurisdiction, Case No. ARB/07/31, 25 October 2011, para. 86.

39 *ICS Inspection and Control Services Limited v. the Argentine Republic*, PCA, Award on Jurisdiction, Case No 2010-9, 10 February 2012, para. 262.

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(ICSID) arbitration, the application of the MFN provisions did not involve issues of jurisdiction.[40] The tribunal rejected this argument, stating that:

> The eighteen months requirement of a proceeding before local courts is an essential preliminary step to the institution of ICSID arbitration: it constitutes an integral part of the standing offer, or consent, by the host state… [it] is fundamentally a jurisdictional clause, not a mere procedural provision. The requirement of such recourse can only be dispensed with by some legitimate extension of rights and benefits by means of the MFN clause. That is to say when the MFN clause itself permits the treaty interpreter to conclude that this was the clear intention of the parties[41]

The rejection by the *Wintershall* tribunal of the distinction between "public policy considerations" and mere procedural requirements finds further support in the ICJ's jurisprudence on the interpretation of compromissory clauses in the context of interstate dispute settlement. Indeed, in the *Armed Activities (DRC v. Rwanda)* judgment the ICJ stated that "when consent is expressed in a compromissory clause in an international agreement, any conditions to which such consent is subject must be regarded as constituting the limits thereon".[42] This point is valid for what concerns the aforementioned BIT between Italy and Kazakhstan. In our case, the dispute settlement clause in the BIT at issue reads:

> 1. In the event that such dispute cannot be settled amicably within six months of the date of the written application for settlement, the investor in question may submit at his choice the dispute for settlement to: a) the Contracting Party's Court having territorial jurisdiction; b) an ad hoc Arbitration Tribunal, in compliance with the arbitration regulation of the UN Commission on the International Trade Law (UNCITRAL); and the host Contracting Party undertakes hereby to accept the reference to said arbitration. c) the International Centre for Settlement of Investment Disputes, for the implementation of the arbitration procedures under the Washington Convention of 18 March, 1965, on the settlement of investment disputes between States and nationals of other States, if or as soon as both the Contracting Parties have acceded to it.[43]

The point is that nothing in the terms of this provision suggests that the procedural requirements contained therein (that is, the six months' waiting period) should be given any less weight than the choice of forum for the settlement of disputes. On the contrary, giving a different weight to the terms

40 *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID, Award, Case No. ARB/04/14, 8 December 2008, para. 159.2.

41 Ibid., para. 160.2.

42 *Armed Activities on the Territory of the Congo (New Application: 2002), (Democratic Republic of the Congo v. Rwanda)*, ICJ, Judgment of 3 February 2006, ICJ Reports 2006, at para. 88.

43 Agreement between Italy and Kazakhstan for the Promotion and Protection of Investment (1996), Art. 9.

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contained in the same clause would run against the wording of that clause. Accordingly, such procedural requirements are an integral part of the consent given by contracting parties to international arbitration and confine the jurisdiction of an ICSID tribunal. This means that an MFN clause cannot remove the waiting periods unless it permits the treaty interpreter to conclude that such was the intention of the contracting parties.

It is a clear postulate of international law that state consent to international arbitration cannot be lightly assumed: tribunals cannot create a system of compulsory jurisdiction that in the present stage of positive international law remains the exception.[44] *A fortiori*, contracting states cannot be presumed to have agreed that the standing offer they negotiated be modified by incorporating dispute settlement provisions from other treaties negotiated in a different context.[45] For instance, a clause reading "[the more favourable] treatment granted to the investors of such other parties will apply to investors of the relevant Contracting party also for the outstanding relationships" cannot be said to establish *per se* such a clear consent. The mere presence of the term "treatment" is arguably legally insufficient to conclude that the contracting parties to the Italy-Kazakhstan BIT intended the MFN provision to cover agreements to arbitrate in other treaties to which Kazakhstan is a contracting party.[46]

Furthermore, the object and purpose alone of the BIT cannot justify an interpretation of the term "treatment" in MFN clauses that would change the dispute settlement mechanism negotiated by the parties of a BIT. Certainly, in *Siemens v Argentina*, the tribunal remarked that it was to be guided by the purpose of the Treaty as expressed in its title and preamble.[47] That purpose was to "protect" and "promote" investments, and the tribunal gave considerable weightage to this fact when making a decision favourable to the investor.[48] In this regard, the position expressed by the award in *SGS v. Philippines* is particularly telling. According to the majority:

> The object and purpose of the BIT supports an effective interpretation of Article X(2). The BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble it is intended "to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other". It is legitimate to resolve

44 *Garanti Koza LLP v. Turkmenistan*, ICSID, Dissenting Opinion of Laurence Boisson de Chazournes, Case No. ARB/11/20, 3 July 2013, para. 6, *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID, Decision on Annulment, Case No. ARB/97/3, 3 July 2002, para. 86.

45 Ibid.

46 *Plama v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 February 2005, para. 193.

47 *Siemens A.G. v. The Argentine Republic*, ICSID, Decision on Jurisdiction, Case No. ARB/02/8, 3 August 2004, para. 81.

48 Ibid.

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> uncertainties in its interpretation so as to favour the protection of covered investments.[49]

Nevertheless, these tribunals have arguably placed undue emphasis on the treaty's object and purpose in order to reach an outcome that ignored the treaty parties' common intent. First of all, the object and purpose of investment treaties is not limited to the protection of investments alone: these treaties' preamble contains references to environmental protection,[50] to economic cooperation between two countries,[51] or even to human rights.[52] Given that these treaties establish no particular hierarchy between these different objectives, an interpretation that privileges one of such objectives while ignoring all the others would run counter to the requirement of taking into account the text of the whole treaty.

This is confirmed by the various investment tribunals that have taken position against over-reliance on the treaty's object and purpose to enlarge the scope of the protection guaranteed by an international investment treaty. Thus, the tribunal in *Plama v. Bulgaria* held that the object and purpose of the BIT at issue were legally insufficient to conclude that the contracting parties intended to cover by the MFN provision agreements to arbitrate in other treaties to which Bulgaria is a contracting party.[53] More recently, the tribunal in *Postova Banka v Greece* took a similar stance concerning the definition of investment under the Greece-Slovakia BIT.[54]

5 The Territoriality of the MFN Clause

The majority of investment treaties articulate a territoriality requirement in their MFN clauses. For instance, the UK-Russia BIT reads in Article 3:

> 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.[55]

49 *SGS v. Philippines*, ICSID, Decision on Objections to Jurisdiction, Case No. ARB/02/6, para. 116.
50 Energy Charter Treaty, Preamble.
51 Agreement between the Government of the Italian Republic and the Government of the Republic of Kazakhstan on the Promotion and the Protection of Investment, Preamble.
52 Agreement between the Government of the Republic of Finland and the Government of the People's Democratic Republic of Algeria on the Reciprocal Promotion and Protection of Investments, Preamble.
53 *Plama v. Bulgaria*, ICSID, Decision on Jurisdiction, Case No. ARB/03/24, 8 February 2005, para. 193.
54 *Postova Banka and Istrokapital S.E. v. the Hellenic Republic*, ICSID, Award, Case No ARB/13/8, 9 April 2015, para. 310.
55 Agreement between the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Promotion and Reciprocal Protection of Investments, Art. 3.

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According to the tribunal in *Daimler v. Argentine Republic*, such a formulation in MFN clauses is quite standard.[56] That tribunal noted that, with the unique exception of *Vladimir Berschader and Moise Bershcader v. The Russian Federation*,[57] every MFN clause addressed in each of the publicly available investor-state awards that the Tribunal has been able to examine has contained a territorial reference.[58] There are, however, some notable exceptions: the Energy Charter Treaty and the Kazakhstan-Russia BIT contain MFN clauses that do not make any reference to "treatment" being accorded in a state's "territory".[59] It is unclear whether such territoriality requirement would also apply when such a language is lacking. Referring to the *Bershader* case, the *Daimler* tribunal implied that an MFN clause remains territorial even without such specific language. According to it,

> … given that the words "in its territory" have been consistently included in nearly all other BITs' MFN clauses, it seems at least likely that the BelgoLux-Soviet BIT's reference to "the MFN clause" also implicitly incorporates this phrase.[60]

However, this argument per se is insufficient. This is because state practice is actually not as uniform as the *Daimler v. Argentina* majority implies: as stated previously, there is an important minority of investment agreements, such as the Energy Charter Treaty or the Italy-Kazakhstan BIT, that do not contain any reference to territory.

Arguably, a stronger argument for the territorial nature of MFN clauses can be grounded on the clause's context as defined by Article 31(2) and (3) of the Vienna Convention on the Law of Treaties (VCLT). Indeed, the requirement of territoriality runs through these investment treaties: this may be illustrated by Kazakhstan's treaty practice. For instance, Article 1(2) of the Austria-Kazakhstan investment treaty defines an investment as "every kind of assets in the territory of one Party".[61] Article 2 of the same treaty, on the promotion and admission of investment, contains a requirement of observance of the law of the party "in whose territory the investments were made".[62] Similarly, in the investment treaty between Kazakhstan and France, each party accords fair and equitable treatment to investments made "sur son territoire et dans sa zone maritime".[63] Articles 1(2) and 2(3) of the Italy-Kazakhstan BIT, respectively, on the definition of investment and on fair and equitable treatment, are also premised on the notion

56 *Daimler v. Argentina*, ICSID, Award, Case, No. ARB/05/1, 22 August 2012, para. 226.
57 Ibid., in footnote 395.
58 Ibid., para. 225.
59 Energy Charter Treaty, Art. 10(1); Agreement between the Government of the Russian Federation and the Government of the Republic of Kazakhstan on the Promotion and Mutual Protection of Investment, Art. 3.
60 *Daimler v. Argentina*, ICSID, Award, Case, No. ARB/05/1, 22 August 2012, footnote 395.
61 Agreement for the Promotion and Reciprocal Protection of Investment between the Government of the Republic of Austria and the Government of the Republic of Kazakhstan, Art. 1(2).
62 Idem, Art. 2.
63 Accord entre le Gouvernement de la République Française et le Gouvernement de la République du Kazakhstan sur l'Encouragement et la Promotion Réciproque des Investissements, Art. 3.

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of "territory".[64] This context is bound to inform the interpretation of a clause located in the same treaty: provisions on issues such as the definition and access of investment, which underlie the protection afforded by the MFN clause, link the BIT's scope to territory. Equally, a fair and equitable treatment clause grounded on territory is relevant in interpreting an MFN clause in the same treaty because its object may overlap with the MFN treatment; issues such as access to courts and denial of justice are covered by both provisions.

Besides, Article 31(3)(c) of the VCLT states that, together with the context, treaty interpretation should take into account "any relevant rules of international law applicable in the relations between the parties".[65] This includes norms of customary international law.[66] Usually, the extent of a state's obligation is related to the notion of jurisdiction: that is, a state is bound to respect its international legal obligations where it exercises jurisdiction or control. This is implicitly admitted by the *Impregilo v. Argentina* tribunal, which held that access to international dispute settlement was a matter over which Argentina "had the power to decide".[67] Under customary international law, this control is essentially territorial.[68] For example, according to the European Court of Human Rights,[69] the bases of state jurisdiction are generally defined and limited by the sovereign territorial rights of the other relevant states.[70] The Strasbourg court argued that this is proved by the fact that a state's competence to exercise jurisdiction over its own nationals abroad is subordinate to the territorial competence of that state and other states (that is, it ends where another state's competence begins).[71] The primarily territorial nature of jurisdiction under customary international law has not been questioned by successive decisions,[72] which have at most expanded this notion so as to include "full and exclusive control" over a person.[73]

64 Agreement between Italy and Kazakhstan for the Promotion and Protection of Investment (1996), Arts. 1,2.

65 Vienna Convention on the Lew of Treaties, Art. 31(3)(c).

66 *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID, Award, Case No. ARB/10/7, 8 July 2016, para. 290.

67 *Impregilo v. Argentina*, ICSID, Award, Case No. ARB/07/17, 21 June 2011, para. 100.

68 Investment jurisprudence has frequently referred to the ECHR's case law. See, for example, *Tecmed, S.A. v. United Mexican States*, ICSID, Award, Case No. ARB(AF)/00/2, 29 May 2003, para. 122; *Azurix Corp. v. The Argentine Republic*, ICSID, Award, Case No. ARB/01/2, 14 July 2006, para. 311; *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID, Award, Case No. ARB/10/7, 8 July 2016, para. 295.

69 See, for example, *Al Skeini and Others v. UK*, Council of Europe, European Court of Human Rights, Application no. 55721/07, Judgment of 7 July 2011, *Issa and Others v. Turkey*, Council of Europe, European Court of Human Rights Application no. 31821/96, Judgment of 16 November 2994, *Bankovic and Others v. Belgium and Others*, Council of Europe, European Court of Human Rights, Application no. 52207/99, Judgment of the Grand Chamber, 12 December 2001.

70 *Bankovic and Others v. Belgium and Others*, Council of Europe, European Court of Human Rights, Application no. 52207/99, Judgment of the Grand Chamber, 12 December 2001, para. 59.

71 Ibid., para. 60.

72 See, for example, *Hirsi Jamaa and Others v. Italy*, Council of Europe, European Court of Human Rights, Application no. 27765/09, Judgment of the Grand Chamber, 23 February 2012, para. 70.

73 *Al Skeini v. UK*, Council of Europe, European Court of Human Rights, Application no. 55721/07, Judgment of 7 July 2011, para. 136.

Thus, the MFN clause is premised on treatment being accorded within a state's territory. Arguably, this is the case even when the clause's wording does not explicitly mention "territory". The question remains as to which effect should be given to the provision's territorial nature: would it exclude the applicability of the MFN clause to dispute settlement provisions? Where an MFN clause applies only to treatment in the territory of the host state, the logical corollary is that treatment outside the territory of the host state does not fall within the scope of the clause.[74] Investment awards have been discordant on the question of whether dispute settlement clauses constitute treatment within the respondent state's territory.

Certain tribunals have simply ignored this issue: the question of territoriality was not addressed either in *Maffezini v. Spain* or in *RosInvest v. Russia*, in spite of the inclusion of the term "territory" in the relevant MFN clauses.[75,76] Also, the tribunal in *Impregilo v. Argentina* did not give any weight to the presence of the term "in its territory" in the BIT at issue, stating that "the question as to what legal protection Argentina shall give to foreign investors is in no way an issue over which Argentina has no power to decide, nor is it tied to any particular territory".[77] However, such reasoning overlooks the plain wording of the treaty. In this regard, the tribunal in *ICS v. Argentina* stated:

> ... 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. It is difficult to see how an MFN clause containing this phrase could be applied to international arbitration proceedings without discounting the explicit territorial limitation upon the scope of the clause[78]

In addition, the tribunal in *Daimler v. Argentina* considered decisive the fact that international arbitration usually takes place outside the territory of the host state and proceeds independently of any state control and determined that the host state's obligation extended no further than providing MFN treatment in respect of domestic proceedings.[79]

The nature of international investment arbitration provides an additional argument in favour of such an interpretation. The elaboration of BITs was a defensive reaction to a trend of expropriations carried out by various developing states without the payment of fair market value compensation.[80] The *raison d'être* of investment treaty arbitration is to provide foreign investors with an assurance

74 *Daimler Financial Services AG v. Argentine Republic*, ICSID, Award, Case No. ARB/05/1, 22 August 2012, para. 226.
75 *Maffezini v. Spain*, ICSID, Decision on Jurisdiction, Case No. ARB/97/7, January 2000.
76 *RosInvest v. Russian Federation*, SCC, Award on Jurisdiction, Case no V 079/2005, October 2007.
77 *Impregilo v. Argentina*, ICSID, Award, Case No. ARB/07/17, 21 June 2011, para. 100.
78 *ICS Inspection and Control Services Limited v. the Argentine Republic*, PCA, Award on Jurisdiction, Case No 2010-9, 10 February 2012, para. 309.
79 Ibid.
80 Sornarajah 2010, p. 22.

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that investment contracts and arrangements made with host country governments would not be subject to unilateral change at some later time,[81] thus protecting them from the risk that host states would abuse their sovereign powers. It does so by placing foreign investment firmly within the field of international law, outside of the host state's exclusive control and subject to third-party dispute settlement. It is precisely for that purpose that the investor is generally not required any more to exhaust domestic remedies before invoking international legal protection.[82] This hypothesis is supported by the wording of the Preamble to the ICSID Convention, which presents international methods of dispute settlement as an alternative to national legal processes.[83] Also, the Report of the Executive Directors, which accompanies the ICSID Convention and has been used several times by arbitral tribunals to interpret that treaty, describes investment arbitration as a substitute for national judicial procedures. According to its tenth paragraph:

> The Executive Directors recognize that investment disputes areas a rule settled through administrative, judicial or arbitral procedures available under the laws of the country in which the investment concerned is made. However, experience shows that disputes may arise which the parties wish to settle by other methods; and investment agreements entered into in recent years show that both States and investors frequently consider that it is in their mutual interest to agree to resort to international methods of settlement.[84]

These elements indicate that the investment treaty dispute settlement regime was conceived as a substitute for national courts in order to shield the foreign investor from abuse by a host state of its regulatory powers. The extension of the MFN clause to investment treaty arbitration would be inconsistent with this essential characteristic.

6 Conclusion

By taking an unprecedented decision, the *Maffezini* award paved the way for increasingly audacious interpretations of MFN clauses. Consequently, dispute settlement in investment treaties runs the risk of becoming *à la carte*, with investors being granted a *sui generis* dispute settlement mechanism contemplated by neither the basic treaty nor the third-party treaty.[85] While not explicitly contesting the necessity for state consent in international dispute settlement, the

81 Vandevelde 2005, p. 170.

82 Brauch 2012, p. 7.

83 ICSID Convention, Preamble: "Recognizing that while such disputes would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases."

84 *Société Ouest Africaine des Bétons Industriels v. Senegal*, ICSID, Dissenting Opinion of Kéba Mbaye, Case No. ARB/82/1, 25 February 1988, para. 4.

85 *Impregilo S.p.A v. Argentine Republic*, ICSID, Concurring and Dissenting Opinion of Brigitte Stern, Case No ARB/0717, 21 June 2011, para. 12.

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Maffezini tribunal and its successors have broken it down into a variety of components, some of which could be overcome by invoking the MFN clause and others which could not. In this way, they have established a *de facto* hierarchy between different provisions within dispute settlement clauses.

Yet the wording of compromissory clauses in investment treaties does not establish any particular hierarchy between the various conditions attached to state consent. Thus, no intent to change the terms of state consent can be derived from a mere reference to "treatment" and "all matters" by an MFN clause. Accordingly, an investor cannot rely on the MFN clause contained in the relevant BIT in order to avoid the conditions attached by a state to its standing offer of international arbitration. In addition, as MFN clauses encompass treatment accorded within a contracting party's territory, international arbitration lies outside of the "treatment" covered by those provisions.

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