

Most-Favored-Nation Treatment and Dispute Settlement in Investment Arbitration: Just How “Favored” is “Most-Favored”?

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I. INTRODUCTION

THE EXPONENTIAL GROWTH in investor-state arbitration through bilateral investment treaties (BITs) has triggered a new body of case law defining the jurisdiction of international tribunals in investment treaty disputes. As that case law matures, investors and states are starting to benefit from clearer rules on a wide range of jurisdictional issues, such as the distinction between treaty and contract claims and the standing of minority shareholder claimants, among others. But even as the number of arbitral decisions on jurisdiction under BITs continues to grow, a few thorny areas still evade consensus. The effect of a most-favored-nation (MFN) clause on a BIT’s dispute settlement procedures is a prime example.

Modern BITs commonly give investors a right to arbitrate investment-related claims against the state in which their investment is made (the “host state”). Today thousands of BITs provide investors with a neutral forum for

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arbitrating investment disputes, such as the International Centre for Settlement of Investment Disputes (ICSID).¹ Most investment treaties also contain an MFN clause, which entitles investors to treatment no less favorable than that accorded by the host state to investors of any third nation.² Thus, if States A and B enter into a treaty containing an MFN clause (the basic treaty), and State B enters into a treaty with State C (the third party treaty) which favors nationals of State C over those of State A, then the MFN clause in the basic treaty entitles investors from State A to claim the additional benefits contained in the third party treaty, thus placing them on an equal footing with investors from State C.

This paper analyzes how MFN clauses interact with dispute resolution provisions in BITs. We will see that international tribunals have been divided over how to reconcile a BIT's specific dispute resolution mechanism with an MFN clause that may, on its face, open the door to invoking any more favorable dispute settlement arrangement negotiated in another BIT entered into

¹ ICSID was established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, D.C., 1965 (the Washington Convention). For an estimate of BITs that include a reference to ICSID within their dispute resolution provisions, see Symposium, *Invoking State Responsibility in the Twenty-First Century*, 96 AJIL 798, 812-13 (2002) (estimating that over 1,500 BITs designate ICSID as an arbitral forum). *Ad hoc* arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) is another common option available to investors under BITs. Other forms of administered arbitration are also available for investment disputes, such as arbitration through the International Chamber of Commerce (the ICC).

² MFN treatment has been a cornerstone of trade policy for centuries. Scholars have traced its use to the thirteenth century, beginning with a 1226 treaty in which Frederick II conceded to the city of Marseilles the privileges previously afforded to Pisa and Genoa. Stanley Kuhl Hornbeck, *The Most-Favored-Nation Clause in Commercial Treaties: Its Function in Theory and Practice and Its Relation to Tariff Policies*, Bulletin of the University of Wisconsin, No. 343, Economics and Political Science Series, Vol. 6, No. 2 (1910). Although its initial use was confined to particular cities or regions, MFN treatment (as it is now known) eventually developed to a point where treaties extended treatment to other nations as a whole, as for example in a 1417 Treaty of Mercantile Intercourse between England and Flanders, which granted English ships the right to use Flemish harbors "in the same way as French, Dutch, Sealanders and Scots." *Most Favored-Nation-Treatment*, UNCTAD Series on Issues in International Investment Agreements, Section II A, UNCTAD/ITE/IIT/10 Vol. III (1999). Later, MFN clauses began to guarantee treatment equal to that given to any third state (as opposed to a closed list of favored nations). This became particularly apparent during the nineteenth and twentieth centuries, when Friendship, Commerce and Navigation treaties (the precursors to modern BITs) embraced the MFN model. See, e.g., Treaty of Friendship, Commerce and Navigation, Nov. 28, 1956, U.S.-Rep. of Korea, 8 U.S.T. 2217. The widespread acceptance of MFN treatment for investments was confirmed in 1948 by the Havana Charter, which included among its objectives "the desirability of avoiding discrimination as between foreign investors." United Nations Conference on Trade and Employment, Final Act and Related Documents, April 1948, Article 12 (International Investment for Economic Development and Reconstruction), para. 2(a)(ii). And although the Havana Charter never entered into effect, it influenced the ensuing wave of bilateral and multilateral investment treaties that filled the gap left by its failure. Marie-France Houde and Fabrizio Pagani, *Most-Favored-Nation Treatment in International Investment Law* (Organization for Economic Co-operation and Development (OECD), Working Paper No. 2004/2, 2004), at 3.

between the host state and a third nation, potentially rewriting the terms of the basic treaty.

The legal uncertainty is fueled, at least in part, by the wide variations in language among MFN clauses. Some clauses explicitly include (or exclude) dispute settlement within their scope, in which case their application is clear. For example, Article 3(3) of the U.K. Model BIT states that “for the avoidance of doubt it is confirmed that the [MFN] treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement,” thereby including the dispute settlement procedures in Article 8 of the U.K. Model BIT. In cases where the contracting parties have expressly stated that the MFN clause extends to dispute settlement, there is no need to inquire into their intent. The wording of the treaty is clear and must be given effect. The same is true in the opposite scenario, where the parties have expressly excluded dispute settlement from the scope of an MFN clause, either through the wording of the original treaty or, for example, through a common Note of Interpretation as is sometimes issued in connection with investment agreements such as Chapter 11 of the North American Free Trade Agreement (NAFTA).

A problem arises because, in most investment treaties, the MFN clause is more general in its wording and leaves considerable scope to argue competing interpretations. In particular, most BITs are silent on the question whether the MFN “treatment” they embrace includes only substantive rules for the protection of investments (such as guarantees of fair treatment and protection against uncompensated expropriation) or extends to other protections such as dispute settlement. A typical example is Article 3 of the 1998 German Model BIT, which states:

(1) Neither Contracting State shall subject investments in its territory owned or controlled by investors of the other Contracting State to treatment less favorable than it accords to investments of its own investors or to investments of investors of any third State.³

(2) Neither Contracting State shall subject investors of the other Contracting State, as regards their activity in connection with investments in its territory, to treatment less favorable

³ As in the case of the German Model BIT, MFN status is often combined with a guarantee of national treatment, *i.e.*, a commitment to treat foreign investors no less favorably than domestic investors.

than it accords to its own investors or to investors of any third State.

Faced with such open-ended wording in an investment treaty, may a claimant rely on the MFN clause to import more favorable dispute settlement procedures contained in another investment treaty signed by the host state? The answer to this question is by no means settled. In a recent article, one distinguished commentator summarized the existing case law as follows:

[T]he interpretation question of whether dispute settlement arrangements constitute a substantive right that can be extended to the beneficiary of an MFN clause arises when the clause is broadly phrased and the contracting parties to the treaty have neither expressly excluded dispute resolution mechanisms nor clarified their intention of including such mechanisms in the protection that is accorded to the beneficiaries of the clause. In those situations, the intention of the contracting parties can reasonably be interpreted to include the whole range of the rights accorded to the investors of a third country, including the right to the neutral and effective settlement of their investment disputes through arbitration rather than through the judicial organs of the host state itself.⁴

Several recent ICSID tribunals have reached results endorsing this view.⁵ However, it is fair to say that the recent decisions have not been unanimous, either in their results or their analytic methodology. Indeed, some arbitral awards rendered thus far seem to have been influenced not only by the wording of the relevant treaty (the “textual analysis”), but also by the purpose for which the claimant was seeking to invoke the MFN clause (the “effects

⁴ Emmanuel Gaillard, *International Arbitration Law: Establishing Jurisdiction Through a Most-Favored-Nation Clause*, NYLJ, June 2, 2005, at 3.

⁵ See, e.g., *Emilio Augustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction of January 25, 2000 (hereinafter *Maffezini*), reprinted in 16 ICSID Rev.—FILJ 212 (2001), available at http://www.worldbank.org/icsid/cases/emilio_DecisiononJurisdictionotepdf; *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction of August 3, 2004 (hereinafter *Siemens*), available at http://www.asil.org/ilib/Siemens_Argentina.pdf; *Camuzzi Int’l S.A. v. Argentine Republic*, ICSID Case No. ARB/03/7, Decision on Jurisdiction of June 10, 2005 (in Spanish) (hereinafter *Camuzzi*), available at <http://www.asil.org/pdfs/lcvajd050614.pdf>; *Gas Natural SDG, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/10, Decision on Jurisdiction of June 17, 2005 (hereinafter *Gas Natural*), available at: <http://ita.law.uvic.ca/documents/GasNaturalSDG-DecisiononPreliminaryQuestionsonJurisdiction.pdf>.

analysis”). The effects analysis, it seems, can influence a tribunal’s attitude to treaty interpretation, even if not explicitly acknowledged in the final award.

II. COMPETING PRINCIPLES OF TREATY INTERPRETATION

The basic canons of treaty interpretation provide a framework for applying MFN clauses in investor-state arbitration. First, as with any treaty provision, an MFN clause should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.⁶ It is also commonly accepted that an MFN clause should be enforced, as a matter of public policy, in order to promote mutually-advantageous trade and investment relationships.⁷

But the widespread acceptance of these principles does not immunize them from tension when one conflicts with another. For example, it can be argued that a broadly-phrased MFN clause, which neither expressly excludes nor includes dispute settlement, means that the MFN clause applies without limitation to all “treatment” of investments, *i.e.* not just traditional protections against unfair treatment, uncompensated expropriation and the like, but also mechanisms for dispute settlement. This, it is argued, is the “ordinary meaning” of the MFN clause. On the other hand, Article 31 of the Vienna Convention on the Law of Treaties states that any treaty provision, including an MFN clause, has to be read “in its context” and “in the light of its object and purpose.” The context for an MFN clause is the remaining provisions of the basic treaty that contains it. So, for example, if the basic treaty contains its own dispute settlement procedures, it can be argued those procedures were specifically negotiated between the governments of the investor’s nation and the host state. Thus, the argument runs, since an MFN clause has to be read in the context of the dispute settlement procedures in the basic treaty, it cannot reasonably be inferred that the contracting parties intended those procedures to be overridden by a combination of an MFN clause in the basic treaty and some other dispute settlement procedure in an investment treaty entered into between the host state and a third nation. Added to these competing arguments is the principle that an MFN clause should be read in light of its object and purpose. It is commonly accepted that the purpose of an MFN clause is to prevent discrimination against nationals of different countries and thus to

⁶ See Vienna Convention on the Law of Treaties, May 22, 1969, art. 31, 1115 U.N.T.S. 331.

⁷ Rudolf Dolzer & Terry Myers, *After Tecmed: Most-Favored-Nation Clauses in Investment Protection Agreements*, 19 ICSID Rev.—FILJ 49, 49 (2004).

attain equality of treatment irrespective of nationality. BITs usually define their purpose in their title and/or preamble, typically stating they are being entered into in order to promote and protect investments made in the territories of one contracting party by nationals of the other contracting party. Applying this “object and purpose” principle, it can be argued that, in cases of ambiguity, MFN clauses and the treaties that contain them should be construed in a way that promotes investment protection by allowing more favorable dispute settlement procedures to be imported into the basic treaty through the MFN clause in a non-discriminatory way.

III. RECENT ICSID JURISPRUDENCE

Several recent ICSID decisions bring these competing principles into sharp focus. First, the Tribunal’s seminal holding in *Maffezini v. Spain* gave birth to the concept that a claimant could successfully invoke a BIT’s MFN clause to override a requirement that he first resort to local remedies before bringing his claim to ICSID. But the Tribunal’s decision triggered controversy in some quarters, the effects of which have begun to show. Since August 2004, at least five ICSID tribunals have rendered decisions interpreting *Maffezini*: three endorsing it (*Siemens A.G. v. Argentine Republic*, *Camuzzi International S.A. v. Argentine Republic* and *Gas Natural SDG, S.A. v. Argentine Republic*); one questioning it (*Salini Costruttori v. Jordan*⁸) and another rejecting it (*Plama Consortium v. Bulgaria*⁹). We consider each of these decisions below.

Before doing so, it is worth recalling that prior to the entry into force of the Washington Convention in 1966, the International Court of Justice (ICJ) had considered the effect of MFN clauses on dispute settlement without yielding any compelling guidance on the issue. Its decisions were largely inconclusive as to whether a typical MFN clause, such as that in the German

⁸ *Salini Costruttori S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction of November 15, 2004 (hereinafter *Salini Costruttori*), available at <http://www.worldbank.org/icsid/cases/salini-decision.pdf>.

⁹ *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction of February 8, 2005 (hereinafter *Plama Consortium*), available at <http://www.worldbank.org/icsid/cases/plama-decision.pdf>.

Model BIT, extended to dispute settlement procedures.¹⁰ These decisions are frequently raised by parties in ICSID proceedings, although as the ICSID jurisprudence on this issue becomes more developed, it is likely that the older ICJ cases will feature less and less in the debate. This is because the recent ICSID decisions focus specifically on investment arbitration under modern BITs, whereas the ICJ cases turned on the application of MFN clauses in other less relevant areas such as consular jurisdiction.

A. Emilio Agustín Maffezini v. Kingdom of Spain

The seminal case, *Maffezini*,¹¹ arose out of an investment by an Argentine citizen in a chemical production enterprise in the Spanish province of Galicia. In his request for arbitration, the claimant alleged that conduct by the Spanish authorities breached a 1991 investment treaty signed between Argentina and Spain (the Argentina-Spain BIT).¹² He also invoked, by way of an MFN clause in the Argentina-Spain BIT, the provisions of a 1991 investment treaty between Chile and Spain (the Chile-Spain BIT).

The MFN clause was relied upon to override Article X of the Argentina-Spain BIT, which requires a claimant first to submit its investment dispute to the Spanish courts, and then to defer commencing ICSID arbitration until either (i) a local court has ruled on the dispute; or (ii) eighteen months have passed with no decision. This provision was quite different from the dispute resolution process in the BIT signed between Spain and Chile, which imposes no requirement to resort to local courts before commencing arbitration. The Chile-Spain BIT entitles an investor to begin arbitration once a six month negotiation period has expired, with no requirement to go through local courts. In his request for arbitration, Maffezini acknowledged that he had not brought his dispute before the Spanish courts, as required by

¹⁰ The ICJ decisions of note are: (1) *Case Concerning Rights of Nationals of the United States of America in Morocco*, 1952 I.C.J. 176 (where the court held that a broadly worded MFN clause referring to “indulgence, in trade or otherwise” entitled a beneficiary to claim consular jurisdiction based on treaties signed with third parties); and (2) *Anglo Iranian Oil Company*, preliminary objection, judgment, July 22, 1952, 1952 I.C.J. 109 (where the ICJ expressly left undecided “the meaning and scope of the most-favored-nation clause” at issue). Another noteworthy decision came from the Commission of Arbitration in *Ambatielos*, United Nations: Reports of International Arbitral Awards, Vol. XII, p.106, where the tribunal concluded that “it cannot be said that the administration of justice, in so far as it is concerned with the protection of [the rights of traders], 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.’”

¹¹ See *supra* note 5.

¹² Agreement for the Promotion and Reciprocal Protection of Investments, Argentina-Spain, Oct. 3, 1991, in 3 International Centre for Settlement of Investment Disputes, Investment Promotion and Protection Treaties (Release 97-2, Aug. 1997).

Article X of the Argentina-Spain BIT. He claimed, however, that Article X was trumped by the treaty's MFN clause, which allowed him to invoke the more favorable dispute settlement procedures in the Chile-Spain BIT.

The MFN clause in Article IV of the Argentina-Spain BIT reads as follows: "In all matters subject to this Agreement, this treatment shall be no less favorable than that extended by each Party to the investments made in its territory by investors of a third country."¹³ Spain advanced two arguments concerning the effect of this clause: (1) treaties between Spain and third countries such as Chile were *res inter alios acta*, *i.e.* confined to the signatory countries and their nationals, and therefore could not be invoked by an Argentine claimant; and (2) the reference to "matters" in the MFN clause should be read as referring only to matters of substantive investment protection, and not to procedural or jurisdictional questions.¹⁴

After considering the existing jurisprudence of the ICJ,¹⁵ the *Maffezini* Tribunal began its analysis by stating "it must first be established which is the basic treaty that governs the rights of the beneficiary of the most favored nation clause." The Tribunal then reached the widely-accepted conclusion that "the right approach is to consider that the subject matter to which the clause applies is indeed established by the basic treaty"—in that case the Argentina-Spain BIT.¹⁶ The Tribunal continued: "[I]t follows that if these matters are more favorably treated in a third-party treaty then, by operation of the clause, that treatment is extended to the beneficiary under the basic treaty. If the third-party treaty refers to a matter not dealt with in the basic treaty, that matter is *res inter alios acta* in respect of the beneficiary of the clause."¹⁷

The Tribunal continued: "The second major issue concerns the question whether the provisions on dispute settlement contained in a third party treaty can be considered to be reasonably related to the fair and equitable treatment to which the most favored nation clause applies under [the Argentina-Spain BIT]."¹⁸ Having found that "today dispute resolution arrangements are

¹³ The original Spanish text reads: "En todas las materias regidas por el presente Acuerdo, este tratamiento no será menos favorable que el otorgado por cada Parte a las inversiones realizadas en su territorio por inversores de un tercer país."

¹⁴ *Maffezini*, Decision on Jurisdiction, *supra* note 5, para. 41. Spain also argued, secondarily, that since the purpose of the MFN clause was to remove discrimination, a claimant would first have to show that submission of the dispute to Spanish courts would be less advantageous than submission to ICSID arbitration. *Id.* para. 42.

¹⁵ For a brief discussion of these cases, see *supra* note 10.

¹⁶ *Maffezini*, Decision on Jurisdiction, *supra* note 5, para. 45.

¹⁷ *Id.*

¹⁸ *Id.* para. 46.

inextricably related to the protection of foreign investors,”¹⁹ and that “[i]nternational arbitration and other dispute settlement arrangements ... are essential ... to the protection of the rights envisaged under the pertinent treaties [and] are also closely linked to the material aspects of the treatment accorded,”²⁰ the Tribunal held that “if a third-party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor’s rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause as they are fully compatible with the *ejusdem generis* principle.”²¹

The *Maffezini* Tribunal immediately tried to impose some boundaries on its now-famous ruling: limits that sparked debate in the years to follow, particularly since it was unclear how the tribunal had arrived at them. First, the Tribunal said, “the third-party treaty has to relate to the same subject matter as the basic treaty, be it the protection of foreign investments or the promotion of trade.”²² This was no more than a confirmation of existing international law. More controversially, the Tribunal also identified several “public policy considerations” that, in its view, placed “important limits” on the use of MFN clauses in a dispute settlement context.²³ The Tribunal gave examples of some provisions that would limit the operation of an MFN clause, such as an exhaustion of local remedies condition, or a “fork in the road” clause (under which an investor, once it has chosen to submit its dispute to the courts of the host state, cannot then submit the same dispute to international arbitration). The *Maffezini* Tribunal added two more exceptions, stating that “if the [basic] agreement provides for a particular arbitration forum, such as ICSID, for example, this option cannot be changed by invoking the clause, in order to refer the dispute to a different system of arbitration”; and that an MFN clause would not prevail “if the parties [to the basic treaty] have agreed to a highly institutionalized system of arbitration that incorporates precise rules of procedure” (referring as an example to the NAFTA).²⁴

Applying its new legal standard, the Tribunal then set out to identify whether Spain held a strong public policy that required recourse to its local courts for investor-state disputes. It began by reviewing approximately 25 BITs

¹⁹ *Id.* para. 54.

²⁰ *Id.* para. 55.

²¹ *Id.* para. 56. The *ejusdem generis* principle states that an MFN clause can apply only to matters belonging to the same subject category as the treaty containing the MFN clause itself. Thus, under that principle, an MFN clause in an investment treaty can only be used to invoke provisions in other investment treaties.

²² *Id.*

²³ *Id.* paras. 56, 62.

²⁴ *Id.* para. 63.

entered into between Spain and other nations. In the Tribunal's analysis, its review showed that "Spain's preferred practice is to allow for arbitration, following a six-month effort to reach a friendly settlement."²⁵ Thus, the Tribunal found, "the requirement for the prior resort to domestic courts spelled out in the Argentina-Spain BIT does not reflect a fundamental question of public policy considered in the context of the treaty, the negotiations relating to it, the other legal arrangements or the subsequent practice of the parties. Accordingly, the Tribunal affirms the jurisdiction of the Centre and its own competence in this case..."²⁶

The precise boundaries of the *Maffezini* decision were unclear: in particular, it was not apparent from the decision how the tribunal arrived at its list of exceptions; what other exceptions might exist;²⁷ or how the Tribunal's reasoning would apply to more narrowly-worded MFN clauses. One commentator recently observed, "[t]he justification of such limitations [in *Maffezini*] is ... lacking. In addition, it would be an ineffective exercise of treaty interpretation if one were to construct an MFN clause and subsequently narrow the scope of that clause on the basis of perceived limitations that had not been expressly stipulated by the parties."²⁸

Five recent decisions by ICSID tribunals have brought these issues into sharp focus. In three decisions similar to the *Maffezini* case—*Siemens*, *Camuzzi* and *Gas Natural*—the claimants successfully argued that an MFN clause entitled them to bypass requirements that disputes under the BITs should first be submitted to the Argentine courts for a period of 18 months prior to commencing ICSID arbitration. In another decision, *Salini Costruttori S.p.A. v. Jordan*,²⁹ the claimant failed to persuade a tribunal that the MFN clause in the Italy-Jordan BIT entitled it to override the treaty's requirement that contractual disputes should be resolved through local litigation, as provided for in the parties' investment agreement. More recently, in *Plama Consortium Ltd v. Republic of Bulgaria*,³⁰ an ICSID tribunal explicitly rejected

²⁵ *Id.* para. 58.

²⁶ *Id.* para. 64.

²⁷ A subsequent jurisdictional decision by another ICSID tribunal effectively added a fifth exception to the *Maffezini* rule, holding that there are certain matters that "due to their significance and importance, go to the core of matters that must be deemed to be specifically negotiated by the Contracting Parties" and "cannot therefore be impaired by the principle contained in the most favored nation clause." *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003, para. 69, available at <http://www.worldbank.org/icsid/cases/laudo-0519030%20-English.pdf>. In that case, the Tribunal held that "the time dimension of the application of [the BIT's] substantive provisions" was one such "core" item. *Id.* Thus, an MFN clause could not be invoked to give the basic treaty retroactive effect.

²⁸ Gaillard, *supra* note 4, at 3.

²⁹ *Salini Costruttori*, Decision on Jurisdiction, *supra* note 8.

³⁰ *Plama Consortium*, Decision on Jurisdiction, *supra* note 9.

the reasoning adopted in *Maffezini*, commenting that “the expansive interpretation [of the MFN clause] made in the *Maffezini* case ... went beyond what State Parties to BITs generally intended to achieve by an MFN provision in a bilateral or multilateral investment treaty.”³¹ The *Plama Consortium* Tribunal instead announced an alternative test, that “an MFN provision in a basic [investment] treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.”³² We now consider each of these decisions in more detail.

B. Siemens A.G. v. Argentine Republic

In *Siemens A.G. v. Argentine Republic*, decided on August 3, 2004,³³ the German claimant successfully overcame a clause in the Germany-Argentina BIT³⁴ requiring submission of investment disputes to the Argentine courts for a period of 18 months prior to commencing ICSID arbitration.³⁵ Like the claimant in *Maffezini*, Siemens accepted that it had not brought its investment dispute before the Argentine courts, but invoked the MFN clauses in Article 3 of the Argentina-Germany BIT, which states:

- (1) Neither Contracting Party shall subject investments in its territory by or with the participation of nationals or companies of the other Contracting Party to treatment less favorable than it accords to investments of its own nationals or companies or to investments of nationals or companies of any third State.
- (2) 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

³¹ *Id.* para. 203.

³² *Id.* para. 223.

³³ *Siemens*, Decision on Jurisdiction, *supra* note 5.

³⁴ Treaty on the Promotion and Reciprocal Protection of Investments, Argentina-Germany, Apr. 9, 1991, in 3 International Centre for Settlement of Investment Disputes, Investment Promotion and Protection Treaties (Release 92-4, Mar. 1993) (the Argentina-Germany BIT).

³⁵ *Siemens* arose out of a contract entered into between a Siemens subsidiary and the Argentine Government for the provision of a migration control and personal identification system. The six year contract was signed on October 6, 1998. On May 18, 2001, Argentina terminated the contract by Decree No. 669, issued under its Emergency Law 25.344. For a further discussion of the Tribunal's decision, see Chris Newmark & Edward Poulton, Most Favoured Nation Clause: Is The Siemens v. Argentina Decision The High-Water Mark?, *Mealey's Int'l Arb. Rep.*, Jan. 2005, at 39.

less favourable than it accords to its own nationals or companies or to nationals or companies of any third State.³⁶

According to the claimant, the MFN clauses in Article 3 entitled it to rely on the more-favorable dispute settlement procedures in other investment treaties signed by Argentina, such as the Argentina-Chile BIT, which did not require investors to submit their disputes to local courts.

Opposing the tribunal's jurisdiction, Argentina advanced several related arguments concerning the scope of the MFN clause. First, it contended that each MFN clause has to be considered in its own context, and that "it is not possible 'to determine *a priori* whether a certain clause of an international treaty is subject or not to the application of the [MFN clause] of another convention of equal nature. That shall depend on what the Parties had agreed upon in each case.'"³⁷ Second, seeking to distinguish *Maffezini*, Argentina submitted that the MFN clause in the Argentina-Spain BIT (which referred to "all matters subject to this agreement") was "substantially different" and broader than Article 3 of the Argentina-Germany BIT (quoted above). Invoking the principles of *res inter alios acta* and *eiusdem generis*, Argentina submitted also that the provisions of the Argentina-Chile BIT could not create rights for German investors.³⁸

Argentina also advanced a number of textual arguments based on the wording of the MFN clause and its place in the treaty as a whole. In particular, it argued that the concept of most favorable "treatment" embraced only substantive investor protections and did not extend to procedures for settling investment disputes. Argentina contrasted the Argentina-Germany BIT with other investment treaties it had entered into with Korea and the United Kingdom, which expressly include a specific reference to dispute settlement in the MFN clause, and argued that the failure explicitly to mention dispute settlement in Article 3 of the Argentina-Germany BIT compelled a conclusion that the MFN clause did not reach dispute settlement procedures. All the more so, Argentina urged, since the effect of Siemens' argument was to overwrite the express and specific dispute resolution procedures contained in Article X of the BIT that Argentina had negotiated with Germany. Thus, given the language of the basic treaty, Argentina submitted, the initial hearing of the investment dispute was "a role which the Contracting Parties can be presumed to have

³⁶ This translation is taken from the English text of the treaty reproduced at 1910 U.N.T.S. 198. It differs slightly from the Siemens Tribunal's own translation, which is set forth at para. 82 of its Decision on Jurisdiction.

³⁷ *Siemens*, Decision on Jurisdiction, *supra* note 5, para. 33.

³⁸ *Id.* para. 34

wished to retain for their courts, albeit within a prescribed time limit.”³⁹ In Argentina’s view, “Claimant’s interpretation of Article X(2) would deprive this provision of any meaning, a result that would not be compatible with generally accepted principles of treaty interpretation, particularly those of the Vienna Convention on the Law of Treaties.”⁴⁰

Moreover, Argentina submitted, the *Maffezini* Tribunal erred when it interpreted the ICJ decisions in *Ambatielos* and *Anglo-Iranian Oil* and failed sufficiently to analyze the *ejusdem generis* principle.⁴¹ Thus, *Maffezini* had “inverted the order in the analysis and, by transforming the exception into a rule and vice versa, it grants priority to the access to mechanisms for the settlement of disputes which are special over essential international law principles.”⁴²

Finally, even applying *Maffezini*, Argentina submitted that the Tribunal was required “to determine whether the [failure to explicitly include dispute settlement within the MFN clause] stems from the parties’ intention, or whether the extension of the clause can be reasonably inferred from the parties’ practice in their treatment of foreign investors and of their own investors.”⁴³ Argentina contended that no such intention could be inferred.

Siemens, on the other hand, argued that a good faith interpretation of the Argentina-Germany BIT compelled a finding that the MFN clause encompassed all matters covered by the treaty, except those expressly excluded. It argued that “[t]he mechanisms for the settlement of [investment] disputes are part of the guarantees for the promotion and protection of foreign investments granted to the investors, being [sic] international arbitration for the settlement of investment disputes before ICSID one of the most relevant of them.”⁴⁴ Regarding the principle of *ejusdem generis*, Siemens argued that this requires only that the MFN clause and the clause relied on in the third-party treaty both relate to jurisdiction, since the subject matters of the two BITs were identical.⁴⁵

Turning next to Argentina’s practice in other BITs, Siemens argued persuasively that MFN clauses conceived in broad terms were customary in BITs signed by Argentina, and that the Argentine BITs surveyed revealed no

³⁹ *Id.* para. 59.

⁴⁰ *Id.*

⁴¹ *See id.* paras. 53-54.

⁴² *Id.* para. 55. Although Argentina’s argument was rejected in *Siemens*, a similar argument was later endorsed by the Tribunal in *Plama Consortium*. See Part III D., *infra*.

⁴³ *Siemens*, Decision on Jurisdiction, *supra* note 5, para. 52 (quoting *Maffezini*, Decision on Jurisdiction, para. 53).

⁴⁴ *Siemens*, Decision on Jurisdiction, *supra* note 5, para. 60.

⁴⁵ *Id.* para. 69.

consistency regarding waiting periods or requirements for prior recourse to local courts. Thus, using the *Maffezini* standard, there was no evidence of any strong public policy by Argentina which would prevent the MFN clause from applying to dispute settlement.⁴⁶

Rejecting Argentina's objection, the Tribunal held that the claimant was entitled to invoke the MFN clause to benefit from the more favorable dispute settlement procedures afforded to Chilean investors in the Argentina-Chile BIT. As a result, Siemens was not required to submit the dispute to the Argentine courts. Adopting a slightly different starting point than the *Maffezini* decision, the *Siemens* Tribunal began with a contextual analysis of the treaty, noting that it should

be guided by the purpose of the Treaty as expressed in its title and preamble. It is a treaty "to protect" and "to promote" investments. The preamble provides that the parties have agreed to the provisions of the Treaty for the purpose of creating favorable conditions for the investments of nationals or companies of one of the two States in the territory of the other State.... The intention of the parties is clear. It is to create favorable conditions for investment and to stimulate private initiative.⁴⁷

The Tribunal then analyzed the text of the MFN provisions in Article 3 of the treaty, which extended most-favored nation protection to the "treatment" of "investments" and "activities related to investments," subject to a list of explicit exceptions.⁴⁸ Finding that: (1) "[t]he term 'treatment' is neither qualified nor described except by the expression 'not less favorable'"; (2) "[t]he term 'activities' is equally general"; and (3) "[t]he need for exceptions confirms the generality of the meaning of treatment of activities,"⁴⁹ the *Siemens* Tribunal concluded that, based on the context of the treaty and its plain wording, the MFN clause could not be limited merely to the exploitation and management of investments, as opposed to the protection of those investments through international arbitration.⁵⁰

⁴⁶ *Id.* paras. 71, 75. Siemens also argued that recourse to the Argentine courts would be futile, since no decision would be forthcoming within the 18 month period, and that international tribunals "have generally refused to regard non-compliance with clauses providing for waiting periods as an obstacle to their jurisdiction" *Id.* para. 78.

⁴⁷ *Id.* para. 81.

⁴⁸ *Id.* para. 82.

⁴⁹ *Id.* para. 85.

⁵⁰ *Id.* para. 86.

The Tribunal's decision is noteworthy for its broad conclusion that "the [Argentina-Germany BIT], together with so many other treaties of investment protection, has as a distinctive feature special dispute settlement mechanisms not normally open to investors. Access to these mechanisms is part of the protection offered under the Treaty. It is part of the treatment of foreign investors and investments and of the advantages accessible through an MFN clause."⁵¹ The Tribunal thus endorsed the findings of the *Maffezini* Tribunal and noted, in dictum, that it saw no significant difference between the more limited MFN wording in the Argentina-Germany BIT⁵² and the expression "all matters subject to this Agreement"—the phrase used in the basic treaty relied on in *Maffezini*.⁵³ This was arguably a widening of the existing law, since the MFN clause invoked in *Siemens* was narrower in wording than that at issue in *Maffezini*.

On the other hand, *Siemens* also could be read as limiting *Maffezini* by creating a further exception for "sensitive" issues of economic or foreign policy.⁵⁴ In relevant part, the *Siemens* decision continues: "The Tribunal concurs with *Maffezini* that the beneficiary of the MFN clause may not override public policy considerations judged by the parties to a treaty essential to their agreement."⁵⁵ However, the *Siemens* Tribunal appeared to place the burden on the host state to avail itself of these exceptions, and on the facts before it required Argentina to identify "a certain requirement [that] has been consistently included in similar treaties executed by the [host state]" in order to establish a basis for invoking the public policy exception.⁵⁶ Since in this case there was no consistency in the other BITs negotiated by Argentina, the host state had not established that the institution of proceedings before its local courts was a "sensitive" issue of economic or foreign policy forming an essential part of its consent to arbitration in the Argentina-Germany BIT.

The decisions in *Maffezini* and *Siemens* did not receive unanimous support. Two subsequent decisions reached opposite conclusions to *Maffezini* and *Siemens*, holding that MFN clauses in two BITs did not extend to dispute settlement procedures: *Salini Costruttori v. Jordan* and *Plama Consortium v. Bulgaria*.

⁵¹ *Id.* para. 102.

⁵² See Argentina-Germany BIT, art. 3, *supra* note 34.

⁵³ See *Siemens*, Decision on Jurisdiction, *supra* note 5, para. 103.

⁵⁴ *Id.* para. 105.

⁵⁵ *Id.* para. 109.

⁵⁶ *Id.* para. 105.

C. Salini Costruttori S.p.A. v. The Hashemite Kingdom of Jordan

In *Salini Costruttori*, decided on November 29, 2004,⁵⁷ the Italian claimants asserted claims under the Italy-Jordan BIT⁵⁸ arising out of the construction of a dam in Karameh, Jordan. The claimants in *Salini Costruttori* attempted a more ambitious use of an MFN provision than *Siemens* or *Maffezini*: they sought to bring contractual claims before an ICSID tribunal, notwithstanding their prior agreement to submit contractual claims to local dispute settlement in Jordan. The parties' investment contract provided that contractual disputes would be settled by amicable negotiations, followed (if necessary) by local courts or local arbitration. Article 9(2) of the Italy-Jordan BIT, in turn, states: "In case the investor and an entity of the Contracting Parties have stipulated an investment Agreement, the procedure foreseen in such investment agreement shall apply." Thus, Jordan argued, since the parties' investment agreement was entered into with the Jordanian Valley Authority, an "entity" of Jordan, the claimants' contractual remedies were limited to the dispute settlement procedures contained in their investment agreement.

The claimants countered by asserting that an MFN clause in the Italy-Jordan BIT entitled them to invoke more favorable dispute settlement arrangements in other BITs signed by Jordan. The MFN clause in Article 3 of the Italy-Jordan BIT states:

Both Contracting Parties, within the bounds of their own territory, shall grant investments effected by, and the income accruing to, investors of the Contracting Party no less favorable treatment than that accorded to investments effected by, and income accruing to, its own nationals or investors of Third States.

In the claimants' view, other BITs signed by Jordan, including those entered into with United States and the United Kingdom, "entitled investors to refer to ICSID any dispute arising from their construction contracts," and therefore they were entitled to arbitrate their contractual claims before an ICSID tribunal notwithstanding Article 9(2) of the Italy-Jordan BIT and their contractual submission to local dispute settlement in Jordan.

⁵⁷ *Salini Costruttori*, Decision on Jurisdiction, *supra* note 8.

⁵⁸ Agreement on the Promotion and Protection of Investments, Italy-Jordan, July 21, 1996, in 7 International Centre for Settlement of Investment Disputes, Investment Promotion and Protection Treaties (Release 2004-2, June 2004).

Jordan advanced many of the same arguments raised by Argentina in *Siemens*: (1) the MFN clause could not be applied to procedural obligations; (2) *Maffezini* should not be followed; (3) even applying *Maffezini*, public policy considerations precluded application of the MFN clause; and (4) an MFN clause could not override the express choice of dispute resolution procedure embodied in Article 9(2) of the BIT.⁵⁹

Commenting on the *Maffezini* decision, the *Salini Costruttori* Tribunal observed: “The current Tribunal shares the concerns that have been expressed in numerous quarters with regard to the solution adopted in the *Maffezini* case. Its fear is that the precautions taken by the authors of the award may in practice prove difficult to apply, thereby adding more uncertainties to the risk of ‘treaty shopping.’”⁶⁰

In sharp contrast to the *Siemens* Tribunal, the *Salini Costruttori* panel remarked that “the circumstances of this case are different” from those in *Maffezini* and *Ambatielos*, because in those cases the MFN clauses referred to “all rights” contained in the treaty, or to “all matters” subject to the treaty.⁶¹ By contrast, the Tribunal reasoned, “Article 3 of the BIT between Italy and Jordan does not include any provision extending its scope of application to dispute settlement. It does not envisage ‘all rights or all matters covered by the agreement.’ Furthermore, the Claimants have submitted nothing from which it *might* be established that the common intention of the Parties was to have the most-favored-nation clause apply to dispute settlement.”⁶² The *Salini Costruttori* Tribunal did not address the fact that the tribunal in *Siemens* had permitted the claimant in that case to rely on the MFN clause even though it did not contain the “all rights” or “all matters” formula present in *Maffezini*, and had explicitly discounted the relevance of that distinction.

The *Salini Costruttori* Tribunal then found that the specific dispute resolution procedures in the BIT evidenced an opposite intention, continuing: “Quite on the contrary, the intention as expressed in Article 9(2) of the BIT was to exclude from ICSID jurisdiction contractual disputes between an investor and *an* entity of a State Party such that such disputes might be settled in accordance with the procedures set forth in the investment agreements.”⁶³

⁵⁹ Jordan also disputed that the third party treaties invoked by the claimants actually permitted U.S. or U.K. investors to bring contractual claims before ICSID tribunals. See *Salini Costruttori*, Decision on Jurisdiction, *supra* note 8, para. 103.

⁶⁰ *Id.* para. 115.

⁶¹ *Id.* paras. 117-18.

⁶² *Id.* para. 118.

⁶³ *Id.* (emphasis in original). Article 9(2) of the Italy-Jordan BIT states: “In case the investor and an entity of the Contracting Parties have stipulated an investment Agreement, the procedure foreseen in such investment Agreement shall apply.”

Unlike *Siemens*, the *Salini Costruttori* Tribunal appeared to place the burden of proof on a claimant to prove matters of treaty practice by the host state. This seems the natural inference from its findings that “the Claimants have not cited any practice in Jordan or Italy in support of their claims”⁶⁴ and that “[f]rom this, the Tribunal concludes that Article 3 of the BIT does not apply insofar as dispute settlement clauses are concerned.”⁶⁵ The *Salini Costruttori* Tribunal thus declined jurisdiction over contractual disputes between the claimants and the Jordanian Valley Authority.

D. Plama Consortium Ltd. v. Republic of Bulgaria

The *Plama Consortium* decision, rendered on February 8, 2005,⁶⁶ is consistent with the jurisdictional findings in *Salini Costruttori*.⁶⁷ But unlike *Salini Costruttori*, *Plama Consortium* is more sweeping in its critique of *Maffezini* and also explicitly declines to follow the approach of the *Siemens* Tribunal.

Plama Consortium arose out of a Cypriot investor’s purchase of a Bulgarian company, Nova Plama, which owned an oil refinery in Bulgaria. The claimant alleged that in the years following the investment, the Bulgarian Government and other public authorities in Bulgaria deliberately created difficulties for Nova Plama, and refused or unreasonably delayed the adoption of adequate corrective measures, thus causing material damage to the operations of the refinery.⁶⁸ The claimant in *Plama Consortium* asserted two bases for ICSID jurisdiction: (1) Part V of the Energy Charter Treaty,⁶⁹ and (2) the 1987 Bulgaria-Cyprus BIT.⁷⁰ A difficulty arose with the claimant’s second basis for jurisdiction, because Bulgaria’s consent to arbitration in Article 4 of the Bulgaria-Cyprus BIT is limited to *ad hoc* UNCITRAL arbitration of disputes “with regard to the amount of compensation” due to an investor only *after* the merits of the investor’s claims had first been adjudicated “through the regular administrative and legal procedure[s] of [Bulgaria].” Nonetheless, the claimant’s request for arbitration asked an ICSID tribunal to issue a primary

⁶⁴ *Salini Costruttori*, Decision on Jurisdiction, *supra* note 8, para. 118.

⁶⁵ *Id.* para. 119.

⁶⁶ *Plama Consortium*, Decision on Jurisdiction, *supra* note 9.

⁶⁷ While endorsing the approach in *Salini Costruttori*, the *Plama Consortium* Tribunal explicitly noted that it had not relied on that award, since the parties had been in a position to include it in their pleadings. See *Plama Consortium*, Decision on Jurisdiction, *supra* note 9, para. 225.

⁶⁸ *Id.* para. 21.

⁶⁹ European Energy Charter Treaty, Dec. 17, 1994, *reprinted in* 33 I.L.M. 360 (1995) (hereinafter ECT).

⁷⁰ The *Plama Consortium* Tribunal upheld its jurisdiction under the ECT. The discussion in this article is limited to the Tribunal’s findings on the MFN clause in the Bulgaria-Cyprus BIT.

ruling on the merits of its compensation claims, even though (1) the Bulgaria-Cyprus BIT contemplated only a limited form of *ad hoc* UNCITRAL arbitration, and (2) the claimant had not yet asked a Bulgarian court to rule on the merits of the underlying dispute. Seeking to overcome these jurisdictional barriers, the claimant invoked an MFN clause in Article 3 of the Bulgaria-Cyprus BIT which states:

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

Relying on *Maffezini*, the claimant argued that the scope of the MFN clause extended to all “treatment,” including dispute settlement, and that by operation of the MFN clause, the dispute resolution provisions of other BITs signed by Bulgaria, such as the Bulgaria-Finland BIT which provides for ICSID arbitration of a broader class of investment disputes, were imported into the Bulgaria-Cyprus BIT. As a result, the claimant urged, Bulgaria’s broad consent to ICSID jurisdiction in the Bulgaria-Finland BIT could be invoked by Cypriot investors through invocation of the MFN clause in the Bulgaria-Cyprus treaty.⁷¹

As in *Salini Costruttori*, this was a more ambitious invocation of an MFN clause than that endorsed by the *Maffezini* or *Siemens* tribunals, since rather than overriding a temporal hurdle to ICSID arbitration (an 18 month waiting period), the claimant sought to import into the basic treaty an arbitral mandate (ICSID jurisdiction over merits disputes) that was completely absent from the treaty’s text.

The difference did not go unnoticed. The *Plama Consortium* Tribunal remarked: “It is one thing to add to the treatment provided in one treaty more favorable treatment provided elsewhere. It is quite another thing to replace a procedure specifically negotiated by parties with an entirely different mechanism.”⁷² The *Plama Consortium* decision continues: “[I]n none of [the] cases [cited by claimant] was it held that the dispute settlement provisions in the basic treaty are replaced *in toto* by the dispute settlement provisions contained in the other treaty through operation of the MFN provision in the basic treaty.”⁷³

⁷¹ See *Plama Consortium*, Decision on Jurisdiction, *supra* note 9, paras. 79, 99.

⁷² *Id.* para. 209.

⁷³ *Id.* para. 210.

The *Plama Consortium* Tribunal concluded that “the MFN provision of the Bulgaria-Cyprus BIT cannot be interpreted as providing consent to submit a dispute under the Bulgaria-Cyprus BIT to ICSID arbitration.”⁷⁴ In reaching its decision, the Tribunal noted that the proliferation of BITs in recent years, coupled with an increasing use of MFN clauses, did “not take away the basic prerequisite for arbitration: an agreement of the parties to arbitrate.” Interpreting the requirement for consent to ICSID jurisdiction, the Tribunal stated: “It is a well-established principle, both in domestic and international law, that such an agreement should be clear and unambiguous.” In this case, based on the wording of the Bulgaria-Cyprus BIT and the negotiations between the contracting parties, the Tribunal found that the MFN clause at issue did not meet this standard.

The basic rationale underpinning the Tribunal’s decision is that: (1) arbitration is a matter of contract; (2) in the case of the Bulgaria-Cyprus BIT, the terms of Bulgaria’s limited consent to arbitration had been specifically negotiated between Cyprus and Bulgaria, and (3) “[w]hen concluding a multilateral or bilateral investment treaty with specific dispute resolution provisions, states cannot be expected to leave those provisions to future (partial) replacement by different dispute resolution provisions through the operation of an MFN provision, unless the States have explicitly agreed thereto.”⁷⁵

Interestingly, the *Plama Consortium* Tribunal could have reached the same result within the framework of *Maffezini*, which allows for an exception in cases where a claimant seeks to displace the basic treaty’s dispute resolution procedures in favor of an entirely different system. But the decision by the *Plama Consortium* Tribunal deliberately starts from another premise. *Maffezini* and *Siemens* had interpreted silence or ambiguity as an opportunity to include dispute settlement within the scope of an MFN clause. By contrast, the *Plama Consortium* Tribunal opined that where an MFN clause is silent on the issue of dispute settlement, “one cannot reason *a contrario* that the dispute settlement provisions must be deemed to be incorporated.”⁷⁶ Noting that it “was puzzled as to what the origin of [*Maffezini*’s] ‘public policy considerations’ [test] is,” the *Plama Consortium* Tribunal observed that the potential exceptions to the *Maffezini* rule “take away much of the breadth of the preceding observations made by the tribunal in [that case].”⁷⁷

The *Plama Consortium* Tribunal then sought to introduce a new rule for construing MFN clauses in the context of investor-state dispute settlement.

⁷⁴ *Id.* para. 184.

⁷⁵ *Id.* para. 212.

⁷⁶ *Id.* para. 203.

⁷⁷ *Id.* para. 221.

According to the tribunal, “the principle with multiple exceptions as stated by the tribunal in the *Maffezini* case should instead be a different principle with one, single exception: an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.”⁷⁸ The *Plama Consortium* Tribunal did not identify any guiding rule for deciding what degree of expression will rise to the level of “no doubt,” other than citing the uncontroversial example of the U.K. Model BIT which expressly states that the MFN guarantee extends to dispute settlement.⁷⁹ In particular, the *Plama Consortium* Tribunal did not comment on whether the “all matters governed by this Agreement” formula at issue in *Maffezini* would have met its “no doubt” standard.

E. Camuzzi International S.A. v. Argentine Republic

Two ICSID tribunals recently fell into line with *Maffezini* and *Siemens* when they allowed claimants to bypass an 18 month waiting period contained in BITs signed by Argentina. The first such case, *Camuzzi International S.A. v. Argentine Republic*,⁸⁰ involved claims under the Argentina-Luxembourg BIT. Invoking the treaty’s MFN clause and the *Maffezini* decision, the claimant in *Camuzzi* asserted that it was not bound by a clause in the Argentina-Luxembourg BIT that required investors to submit their disputes to the host state’s local courts for 18 months prior to commencing international arbitration (the same issue that had arisen in *Maffezini* and *Siemens*). The MFN clause in Article 4(1) of the Argentina-Luxembourg BIT is typical of that contained in other investment treaties. It states:

In all matters governed by the present Agreement, the investors of each Contracting Party will be entitled to most favored nation treatment in the territory of the other Party. In no case

⁷⁸ *Id.* para. 223. The *Plama Consortium* Tribunal later suggested that it objected less to the *result* in *Maffezini*, than to the *means* the Tribunal used to reach it. Describing the local courts requirement in the Argentina-Spain BIT as “curious” and “nonsensical from a practical point of view,” the *Plama Consortium* Tribunal nonetheless was clear that “such exceptional circumstances should not be treated as a statement of general principle guiding future tribunals in other cases where exceptional circumstances are not present.” *Id.* para. 224.

⁷⁹ *Id.* para. 204. Article 3(3) of the U.K. Model BIT explicitly states that “for the avoidance of doubt” the guarantee of MFN treatment shall apply to Articles 1 to 11 of the treaty, thereby including the dispute settlement provisions in Article 8.

⁸⁰ *Camuzzi*, Decision on Jurisdiction, *supra* note 5.

shall this treatment be less favorable than that recognized by international law.⁸¹

The claimant contended that since the United States-Argentina BIT contained no such pre-requisite for commencing ICSID arbitration, then it was entitled to avail itself of the more favorable treatment accorded to U.S. investors. Although the MFN clause did not explicitly refer to dispute settlement, the *Camuzzi* Tribunal nonetheless gave it the same effect accorded to the MFN clauses in *Maffezini* and *Siemens*. The Tribunal held that “[c]onsistent with the most-favored nation clause (Article 4 of the Treaty), invoked by Camuzzi and applicable in the present case ... the Claimant may resort directly to arbitration, without having to comply with the [18 month waiting period in the Luxembourg-Argentina BIT].”⁸² The Tribunal did not consider the “no doubt” test adopted by the *Plama Consortium* Tribunal.

F. Gas Natural SDG, S.A. v. Argentine Republic

Most recently, another ICSID tribunal issued a jurisdictional ruling that is important not only for its holding, but also for the tribunal’s more general comments about MFN clauses and how they should apply to dispute settlement in investment treaties. As in the *Maffezini* case, *Gas Natural* arose out of a claim under the Argentina-Spain BIT.⁸³ But this time the roles were reversed: the claimant was a national of Spain and Argentina was the respondent. The merits issues are similar to many other cases now pending against Argentina arising out of the economic and financial crisis which prompted Argentina during December 2001 and January 2002 to terminate parity between the U.S. dollar and the Argentine peso and to prohibit transfers of foreign exchanges abroad. The narrow jurisdictional issue in *Gas Natural* was whether the claimant could bypass the 18 month resort to local courts requirement contained in Article X of the Argentina-Spain BIT by using the MFN clause in Article IV of that treaty to avail itself of the provisions of other BITs entered into by Argentina, such as the United States-Argentina BIT, which did

⁸¹ Agreement on the Encouragement and Reciprocal Protection of Investments, Argentina-Belgium-Luxemburg, June 28, 1990, art. 4(1) (authors’ unofficial translation). The original Spanish text reads: “1. En todas las materias regidas por el presente Convenio, los inversores de cada Parte Contratante gozarán, en el territorio de la otra Parte, del tratamiento a la nación más favorecida. Este tratamiento no será en ningún caso menos favorable que el reconocido por el derecho internacional.”

⁸² *Camuzzi*, Decision on Jurisdiction, *supra* note 5, para. 34(iii) (authors’ unofficial translation).

⁸³ Agreement for the Promotion and Reciprocal Protection of Investments, Argentina-Spain, Oct. 3, 1991, *supra* note 12.

not require investors to resort to the local courts prior to commencing arbitration.

The *Gas Natural* Tribunal reached the same result as *Maffezini*, and held that the “Claimant is entitled to avail itself of the dispute settlement provision in the United States-Argentina BIT in reliance on Article IV(2) of the Bilateral Investment Treaty between Spain and Argentina.”⁸⁴ But the Tribunal did not stop there. It offered more general observations about MFN clauses and dispute settlement procedures in BITs that are certain to be invoked in future cases. The *Gas Natural* Tribunal explicitly considered each of the decisions in *Maffezini*, *Siemens* and *Salini Costruttori* and offered the following analysis:

Summarizing th[e] debate [between the parties over the scope of the MFN clause in the Argentina-Spain BIT], the Tribunal considers that the critical issue is whether or not the dispute settlement provisions of bilateral investment treaties constitute part of the bundle of protections granted to foreign investors by host states. As the Tribunal sees the history, first of the ICSID Convention, which created the institution of investor-state arbitration, and subsequently of the wave of bilateral investment treaties between developed and developing countries (and in some instances between developing countries *inter se*), a crucial element—indeed perhaps the most crucial element—has been the provision for independent international arbitration of disputes between investors and host states. The creation of ICSID and the adoption of bilateral treaties offered to investors assurances that disputes that might flow from their investments would not be subject to the perceived hazards of delays and political pressures of adjudication in national courts. Correspondingly, the prospect of international arbitration was designed to offer to host states freedom from political pressures by governments of the state of which the investor is a national. The vast majority of bilateral investment treaties, and nearly all the recent ones, provide for independent international arbitration of investor-state disputes, whether pursuant to the ICSID Convention, the ICSID Additional Facility, the UNCITRAL Arbitration Rules, or comparable arrangements, and such provisions are universally regarded—

⁸⁴ *Gas Natural*, Decision on Jurisdiction, *supra* note 5, para. 31.

by opponents as well as by proponents—as essential to a regime of protection of foreign direct investment.⁸⁵

The *Gas Natural* Tribunal continued:

The Tribunal holds that provision for international investor-state arbitration in bilateral investment treaties is a *significant substantive incentive and protection for foreign investors*; further, that access to such arbitration only after resort to national courts and an eighteen-month waiting period is a less favorable degree of protection than access to arbitration immediately upon expiration of the negotiation period. Accordingly, Claimant is entitled to avail itself of the dispute settlement provision in the United States-Argentina BIT in reliance on Article IV(2) of the Bilateral Investment Treaty between Spain and Argentina.⁸⁶

Finally, the *Gas Natural* Tribunal remarked:

This Tribunal understands that the issue of applying a general most-favored-nation clause to the dispute resolution provisions of bilateral investment treaties is not free from doubt, and that different tribunals faced with different facts and negotiating background may reach different results. The Tribunal is satisfied, however, that the terms of the BIT between Spain and Argentina show that dispute resolution was included within the scope of most-favored-nation treatment, and that our analysis ... is consistent with the current thinking as expressed in other recent arbitral awards. We remain persuaded that assurance of independent international arbitration is an important—perhaps the most important—element in investor protection. *Unless it appears clearly that the state parties to a BIT or the parties to a particular investment agreement settled on a different method for resolution of disputes that may arise, most-favored-nation provisions in BITs should be understood to be applicable to dispute settlement.*⁸⁷

⁸⁵ *Id.* para. 29.

⁸⁶ *Id.* para. 31 (emphasis added).

⁸⁷ *Id.* para. 49 (emphasis added).

IV. ANALYSIS

As a matter of treaty interpretation, the foregoing cases can be rationalized around the unifying principle that the issue whether an MFN clause applies to dispute settlement procedures depends, in the first instance, on the wording of the MFN clause in the basic treaty. The effect of the MFN clause should be interpreted having regard to the parties' intentions as expressed in the text of the MFN clause itself and the wording of other provisions in the treaty that give context to the MFN agreement. Thus, for example, the four exceptions identified in *Maffezini* might seem less controversial when analyzed not simply as a tribunal's *ad hoc* list of "public policy" reservations, but instead as exceptions that flow logically from the intentions expressed by the contracting parties in the basic treaty. A common thread runs through each of the four situations identified by the *Maffezini* Tribunal: *i.e.* that an MFN clause cannot (1) override a requirement for exhaustion of local remedies, (2) negate a "fork in the road" clause, (3) replace a specific choice of arbitral forum, such as ICSID, or (4) supplant the contracting parties' choice of a highly institutionalized system of arbitration such as that contained in the NAFTA. All four principles derive from the expressed intentions of the contracting parties which, according to the *Maffezini* Tribunal, prevail over any unexpressed intention imported through an MFN clause.⁸⁸ Thus, it is possible to find common ground among the existing ICSID decisions if one reads *Maffezini* as an application of the maxim that a specific and express provision in a BIT takes precedence over a more general one.

But there are limits to these textual explanations, since they do not explain why it is acceptable to allow a claimant to bypass an 18 month waiting period in a BIT, while not overriding a fork in the road clause or an exhaustion of remedies clause. Isn't one just as much an "expressed intention" as the others? This leads us to an "effects analysis," which suggests that the fault line in these cases may lie in the purpose for which each MFN clause was invoked. In *Maffezini*, *Siemens*, *Camuzzi* and *Gas Natural*, the tribunals gave effect to MFN clauses to overcome admissibility requirements (a requirement to submit disputes initially to local courts for an 18 month period). Applying the MFN clause in those cases did not actually change the BIT's agreed scope of the tribunal's jurisdiction or create a consent to arbitration that was otherwise lacking. It affected merely the timing of the host state's consent to ICSID arbitration and allowed tribunals promptly to hear claims over which they would later have jurisdiction in any event. By contrast, the claimants in *Salini*

⁸⁸ See Dolzer and Myers, *supra* note 7, at 54.

Costruttori and *Plama Consortium* sought to invoke MFN treatment to vest the ICSID tribunals with jurisdiction over a class of claims for which ICSID jurisdiction had been specifically excluded under the basic treaty.

Yet while this distinction may explain the differing results, it may not be entirely satisfactory as a matter of treaty interpretation. Nor does it overcome the tension between the opposite starting points in the existing case law. Although it is commonly agreed that the wording of an MFN clause determines its scope, that principle is of limited use where (as in most BITs) the MFN wording is open to multiple interpretations.⁸⁹ The *Maffezini*, *Siemens* and *Camuzzi* tribunals have interpreted the absence of an explicit reference to dispute settlement in the MFN clause as a legitimate basis for concluding that dispute settlement procedures do fall within the concept of MFN “treatment,” subject to certain limits. Similarly, the *Gas Natural* Tribunal concluded that “[u]nless it appears clearly that the state parties to a BIT or the parties to a particular investment agreement settled on a different method for resolution of disputes that may arise, most-favored-nation provisions in BITs should be understood to be applicable to dispute settlement.”⁹⁰ By contrast, the *Plama Consortium* Tribunal (and arguably the *Salini Costruttori* Tribunal) would interpret ambiguous wording in MFN clauses restrictively, excluding dispute settlement procedures from an MFN clause “unless the MFN clause in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.”⁹¹ Since decisions of ICSID tribunals are not binding in other ICSID cases, and absent any ICSID appellate system, we are likely to hear more on MFN treatment and dispute settlement in investor-state arbitration before a consensus emerges.⁹²

⁸⁹ One lesson from these cases is that investors should take a close interest in the wording of BITs concluded by their own states. Already, it is clear that some states are being more explicit when drafting and negotiating new investment treaties, particularly on the issue of whether they intend MFN clauses to extend to dispute settlement arrangements. *See, e.g.*, draft text of the Central American Free Trade Agreement (CAFTA) of January 28, 2004, which explicitly states in its negotiating history that the MFN clause is not intended to encompass dispute resolution mechanisms.

⁹⁰ *Gas Natural*, Decision on Jurisdiction, *supra* note 5, para. 49.

⁹¹ *Plama Consortium*, Decision on Jurisdiction, *supra* note 9, para. 223.

⁹² Although ICSID awards can be subject to annulment proceedings under Article 52 of the Washington Convention, ICSID has also been considering comments on a proposal to establish an appellate body system. At present no consensus to proceed with such a system exists. *See* Possible Improvements of the Framework for ICSID Arbitration, 21 News from ICSID, No. 2, at 1, 13 (2004).