

## HOW MOST FAVOURED NATION CLAUSES IN BILATERAL INVESTMENT TREATIES AFFECT ARBITRATION

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A Most Favoured Nation (MFN) clause requires the state party to one investment treaty to provide investors with treatment no less favourable than the treatment it provides to investors under other investment treaties. This note examines the evolving role of the most favoured nation clause, including commentary on leading investment treaty awards.

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### WHAT IS A MOST FAVOURED NATION CLAUSE?

Most favoured nation (MFN) clauses link investment agreements by ensuring that parties to one treaty provide treatment no less favourable than the treatment they provide investors under other treaties. The number of [bilateral investment treaties](#) (BITs) increased five-fold from 385 to 1,857 during the 1990s, and as of 2013, there were at least 2,857 BITs. As a result, MFN clauses have become a significant instrument of economic liberalisation. They help avoid economic distortions that would occur through country-by-country liberalisation because investors from any country are guaranteed to be treated as well as investors from countries that are most influential in their negotiations with the country where the investment took place.

A typical example of an MFN clause is provided by Article 3 of the 1998 German Model BIT:

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

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

### RESOURCE INFORMATION

#### RESOURCE ID

0-381-7466

#### RESOURCE TYPE

Practice note

#### STATUS

Maintained

#### JURISDICTION

International



## ISSUES OF INTERPRETATION

MFN clauses are usually general in their wording and leave considerable scope to argue competing interpretations. Some expressly include or exclude dispute settlement in their scope. Most BITs are silent on whether MFN treatment includes only substantive rules for the protection of investments (for example, fair and equitable treatment or protection from expropriation) or whether MFN treatment extends to procedural protections, like dispute resolution. (Despite numerous cases examining this topic, this issue is by no means settled. Most MFN clauses are unconditional, reciprocal, and indeterminate.)

Many MFN clauses also contain specific restrictions and exceptions, such as regional economic integration, matters of taxation, subsidies or government procurement and country exceptions. For example, Germany's BIT with China states:

"(4) The provisions of Paragraphs 1 to 3 of this Article shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege by virtue of

(a) any membership or association with any existing or future customs union, free trade zone, economic union, common market;

(b) any double taxation agreement or other agreement regarding matters of taxation."

Thus, a Chinese investor cannot invoke Germany's treatment of French investors if that treatment is governed by EU regulations. Nor can the Chinese investor require that it be exempt from German taxation on German assets by reason of already being taxed in China for those profits, if China and Germany have not signed an income tax treaty, merely because the US and Germany have.

## HOW HAVE MFN CLAUSES EVOLVED OVER TIME?

MFN treatment has been a pillar of trade law for centuries and can be traced back to the twelfth century. MFN treatment was a core obligation of commercial policy under the Havana Charter, where members were to "give due regard to the desirability of avoiding discrimination as between foreign investors". The importance of MFN treatment for international economic relations is underscored by the fact that the MFN treatment provisions of the WTO's predecessor, the General Agreement on Tariffs & Trade (Article I) and the General Agreement on Trade & Services (Article II), were to be provided "immediately and unconditionally". A similar, non-binding approach was taken in the 1992 World Bank Guidelines on the Treatment of Foreign Direct Investment and the 1994 APEC Non-Binding Investment Principles. Numerous arbitral tribunals and courts, including the International Court of Justice, have examined MFN

clauses, though these decisions have been inconclusive regarding the scope of MFN clauses.

In 1964, the International Law Commission (ILC) embarked on a project to prepare a set of draft articles on the MFN clause. While the draft articles, adopted in 1978, never became a treaty, the ILC clarified the principle that an MFN clause can only attract matters belonging to the same subject matter or category of subjects to which the clause relates (the *ejusdem generis* principle).

US and Canadian BITs cover both establishment and post-establishment phases, list various operations covered, and are explicit that MFN clauses only apply in "like circumstances", unlike other BITs that make no reference to comparative context against which treatment is to be assessed. For example, the US-Uruguay BIT states:

"[e]ach Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory."

## HOW DOES AN MFN OBLIGATION ARISE?

An MFN obligation only exists when a treaty clause creates it. Without a treaty obligation (or MFN obligation under national law), each country retains the option of discriminating economically among foreign investors.

## RANGE OF PURPOSES FOR WHICH MFN CLAUSES ARE INVOKED

Investors have argued that under an MFN clause, governments should be liable for actions taken under conditions that are exempt from liability under those investors' BITs but are not exempt under other BITs.

[International Centre for Settlement of Investment Disputes](#) (ICSID) tribunals in [Asian Agricultural Products Ltd v Sri Lanka \(ICSID Case No ARB/87/3\)](#) and [CMS Gas Transmission Co v Argentina \(ICSID Case No ARB/01/8\)](#) rejected these arguments (see Substantive protections). However, claimants prevailed in importing "fair and equitable treatment" protections from other BITs through an MFN clause in [MTD v Chile \(ICSID Case No ARB/01/7\)](#) and [Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Kazakhstan \(ICSID Case No ARB/05/16, Award, 29 July 2008\)](#) (see [Fair and equitable treatment standard](#)).

Claimants seeking to broaden dispute resolution procedures often want to bring contract claims before ICSID, even though such an option is excluded from the treaty that covers the investment. They seek to invoke broader provisions in other treaties, through

an MFN clause (see [Umbrella clauses](#)). Attempts to impose arbitration through the application of an MFN clause were initially unsuccessful, based on the facts presented, for example in [Salini Construttori Sp v Jordan \(ICSID Case No ARB/02/13\)](#) (see [Jurisdiction ratione materiae](#)). Claimants also frequently attempt to use MFN clauses to bypass procedural pre-conditions to arbitration and are often successful (see [Preconditions to arbitration](#)).

## SUBSTANTIVE PROTECTIONS

### Asian Agricultural Products Ltd (AAPL) v Sri Lanka

[Asian Agricultural Products Ltd v Sri Lanka \(ICSID Case No ARB/87/3\)](#) was the first ICSID case to deal with the issue of importing liability standards from another BIT through an MFN clause. During a counter-insurgency operation, the Sri Lankan security forces destroyed the claimant's shrimp-farming facility, though the claimant's management had made clear to the Sri Lankan security forces that it would be prepared to remove suspected paramilitaries from the farm. The British claimant asserted that the MFN clause in the Sri Lanka-UK BIT made it possible to apply the liability standards incorporated in the Sri Lanka-Switzerland BIT, specifically to avoid the "war clause" or "civil disturbance exception" to liability found in the Sri Lanka-UK BIT.

The tribunal rejected the claim, stating that it was not proven that the Sri Lanka-Switzerland BIT actually contained more favourable provisions. However, the tribunal ultimately applied the liability standard of due diligence based in customary international law, holding that the security forces reasonably should have accepted the claimant's offer of removal, and therefore the claimant was entitled to compensation.

### CME Czech Republic BV v Czech Republic

In [CME Czech Republic BV v Czech Republic \(UNCITRAL Award, 14 March 2003\)](#), the tribunal allowed the claimant to use the MFN clause in the Czech Republic-Netherlands BIT to import a more favourable definition of "just compensation" from another Czech BIT. The tribunal interpreted the MFN clause to guarantee that "just compensation" could not mean anything less than fair market value, which was the standard used in the other Czech BIT.

### CMS Gas Transmission Co v Argentina

In [CMS Gas Transmission Co v Argentina \(ICSID Case No ARB/01/8\)](#), Argentina argued that it was in a "state of necessity", namely an economic and political crisis, which provided an excuse from liability under the Argentina-US BIT. The US claimant relied on the MFN clause in the Argentina-US BIT to argue that the liability standards included in other Argentine BITs should apply, which did not provide for similar

exceptions to liability. The tribunal held that the mere absence of a "state of necessity" exception to liability in other Argentine BITs did not support the claimant's argument, which in any event failed under the *ejusdem generis* rule (see [How have MFN clauses evolved over time?](#)).

### White Industries Australia Ltd v India

[White Industries Australia Ltd v India \(UNCITRAL Award, 30 November 2011\)](#) saw the Australian claimant successfully use the MFN clause in the Australia-India BIT to import substantive protections from another Indian BIT, guaranteeing the claimant "effective means of asserting claims and enforcing rights".

### Fair and equitable treatment standard

#### MTD Equity Sdn Bhd v Chile

In [MTD v Chile \(ICSID Case No ARB/01/7, Award, 25 May 2004\)](#), the claimant argued that Chile breached the obligation of fair and equitable treatment by encouraging strong expectations that an investment project could be built in a specific location and then subsequently disapproving of the location as a matter of public policy after the claimant had already committed substantial resources to the project. Chile denied the alleged violations and submitted that it had acted in accordance with its national laws and urban policy in refusing to grant the permit. Giving a broad scope to the MFN clause at issue, the tribunal upheld the claimant's request to use the Chile-Malaysia BIT's MFN clause to import fair and equitable treatment provisions from the Chile-Croatia BIT and the Chile-Denmark BIT.

#### Rumeli Telekom AS v Kazakhstan

In [Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Kazakhstan \(ICSID Case No ARB/05/16, Award, 29 July 2008\)](#), the claimants used the Turkey-Kazakhstan BIT's MFN clause to import a variety of substantive protections from other Kazakh BITs, including "the obligation to ensure the fair and equitable treatment of the investments of investors of the other Contracting Party; the duty not to deny justice; the obligation to accord full protection and security to such investments; and the obligation not to impair by unreasonable, arbitrary, or discriminatory measures the management, maintenance, use, enjoyment, or disposal of such investments."

### Other cases

Other cases in which the tribunal allowed claimants to rely on an MFN clause to import fair and equitable treatment standards include:

- [\*ADF Group Inc v United States of America \(ICSID Case No ARB\(AF\)/00/1, Award, 9 January 2003\*](#).
- [\*Bayindir Insaat Turizm Ticaret VE Sanayi AS v Pakistan \(ICSID Case No ARB/03/29, Decision on Jurisdiction, 14 November 2005\)\*](#).
- [\*ATA Construction, Industrial and Trading Co v Jordan \(ICSID Case No ARB/08/2, Award, 18 May 2010\)\*](#), discussed in [Legal update, Temporal arguments exclude majority of construction company's claims under Turkey-Jordan BIT but the extinguishing of a right to arbitrate gives rise to breach](#).
- [\*Sergei Paushok, CJSC Golden East Company, CJSC Vostokneftegaz Company v Mongolia \(UNCITRAL, Award, 28 April 2011\)\*](#), discussed in [Legal update, High threshold for counterclaims \(investment treaty\)](#).

### Umbrella clauses

#### EDF International SA v Argentina

In [\*EDF International SA, Saur International SA and Leon Participaciones Argentinas SA v Argentina \(ICSID Case No ARB/03/23, Award, 11 June 2012\)\*](#), the tribunal permitted claimants to use the France-Argentina BIT's MFN clause to rely on the umbrella clauses in two other Argentine BITs. The tribunal found that not giving effect to the MFN clause to allow incorporation of the umbrella clauses would amount to effectively "reading the MFN language out of the treaty" (see [Legal update, ICSID tribunal enforces MFN clause to allow reliance on umbrella clauses in other BITs](#)).

#### Arif v Moldova

In [\*Franck Charles Arif v Moldova \(ICSID Case No ARB/11/23, Award, 8 April 2013\)\*](#), the tribunal allowed the French claimant to use the Moldova-France BIT's MFN clause to import the umbrella clause from Moldova's BITs with the UK or the US. The tribunal noted that the parties agreed that MFN clauses could be used to import substantive protections and then reasoned "that 'umbrella' clauses are substantive in nature. A breach of specific undertakings covered by an 'umbrella' clause will give rise to a substantive breach of the BIT."

### Other cases

In at least two other instances, [\*Waguhi Elie George Siag and Clorinda Vecchi v Egypt \(ICSID Case No ARB/05/15, Award, 1 June 2009\)\*](#) and [\*Abaclat et al v Argentina \(case formerly known as Giovanna Beccara et al v Argentina\) \(ICSID Case No ARB/07/5, Decision on Jurisdiction, 4 August 2011\)\*](#), claimants sought to import umbrella clauses, but the tribunal declined to decide the issue of whether they could do so because the tribunal

concluded that invoking the umbrella clause would not have impacted the case.

## PROCEDURAL MATTERS

### Preconditions to arbitration

In another large grouping of cases, claimants have attempted, often successfully, to use an MFN clause to by-pass preconditions to arbitration (such as requirements to litigate a dispute in the local courts for a certain period of time before submitting it to international arbitration) by importing dispute settlement clauses from other BITs that did not mandate such preconditions.

#### Cases in which the tribunal allowed claimants to bypass preconditions to arbitration based on an MFN clause

##### Maffezini v Spain

The seminal and controversial holding in [\*Maffezini v Spain \(ICSID Case No ARB/97/7\)\*](#) (Maffezini) concerned a dispute arising from treatment of an Argentinean investor by Spanish entities in relation to his production and distribution of chemicals. The claimant sought to avoid submitting the dispute to the Spanish courts for 18 months as mandated by the Argentina-Spain BIT before resorting to international arbitration. It argued that the Argentina-Spain BIT's MFN clause should allow him to import a dispute settlement provision from the Chile-Spain BIT, which merely required that the investor observe a six-month negotiation period before filing for arbitration. Spain argued that the MFN clause was confined to the investors' substantive economic treatment, and did not extend to procedural matters.

The tribunal held that "dispute settlement procedures are inextricably related to the protection of foreign investors" envisaged under the BIT. Therefore, the MFN clause should be applied to give the Argentine claimant the benefit of the Chile-Spain BIT's easier access to international arbitration.

The Maffezini approach has been re-affirmed in other cases, some of which involved the same Argentina-Spain BIT (see, for example, [\*Siemens v Argentine Republic \(ICSID Case No ARB/02/8, Decision on Jurisdiction, 3 August 2004\)\*](#), [\*Gas Natural SDG v Argentina \(ICSID Case No ARB/03/10, Decision on Preliminary Questions on Jurisdiction, 17 June 2005\)\*](#) and [\*Hochtief AG v Argentina \(ICSID Case No ARB/07/31, Decision on Jurisdiction, 24 October 2011\)\*](#)). This approach may be based in part on the broad scope of the MFN clause in the Argentina-Spain BIT, although tribunals have also given a broad interpretation to MFN clauses in other BITs.

In other cases, tribunals have refused to extend MFN provisions to pre-conditions to arbitration (see [Cases in which the tribunal did not allow claimants to bypass preconditions to arbitration based on an MFN clause](#)).

The issue remains unsettled and depends heavily on the precise wording of the BIT at issue.

## Siemens v Argentina and Hochtief AG v Argentina

The cases of [Siemens v Argentine Republic \(ICSID Case No ARB/02/8\)](#), [Wintershall Aktiengesellschaft v Argentina \(ICSID Case No ARB/04/14, Award, 8 December 2008\)](#), [Hochtief AG v Argentina \(ICSID Case No ARB/07/31, Decision on Jurisdiction, 24 October 2011\)](#), and [Daimler Financial Services AG v Argentina \(ICSID Case No ARB/05/1, Award, 22 August 2012\)](#) all considered the scope of the MFN clause in the Argentina-Germany BIT and the investors' attempts to use it to bypass a procedural requirement that all disputes be submitted to local courts for 18 months before going to international arbitration.

In *Siemens*, although the BIT was confined to treatment of investments, the tribunal held that the MFN clause was sufficiently wide to cover dispute resolution clauses, and the German investor was entitled to invoke the wider dispute resolution clause in the Argentina-Chile BIT.

In *Hochtief*, the majority of the tribunal took a similar approach, holding that the MFN clause in the Argentina-Germany BIT allowed the claimant to benefit from the broader dispute resolution provisions in the Argentina-Chile BIT. However, there was a strong dissenting opinion by J Christopher Thomas QC, who disagreed that the MFN clause extended to dispute resolution provisions (see [Legal update, MFN clauses extending to dispute resolution - putting the cart before the horse?](#)).

Conversely, in *Wintershall Aktiengesellschaft v Argentina* and *Daimler Financial Services AG v Argentina* (see below) the tribunal held that the MFN clause in the same Argentina-Germany BIT did not extend to dispute resolution provisions (see [Legal update, MFN clause does not extend to dispute resolution provision](#)).

## Gas Natural SDG v Argentina

Another case, [Gas Natural SDG v Argentina \(ICSID Case No ARB/03/10, Decision on Preliminary Questions on Jurisdiction, 17 June 2005\)](#) saw a Spanish investor argue that the MFN clause of the Argentina-Spain BIT, which had been at issue in *Maffezini*, entitled it to invoke the more favourable dispute resolution provision in the Argentina-US BIT, allowing the investor to avoid litigation in the local courts. The ICSID tribunal agreed that, similar to *Maffezini*, the claimant could submit the dispute to international arbitration despite the Argentina-Spain BIT's requirement of spending 18 months in local court. The tribunal ruled that access to "independent international arbitration is an important – perhaps the most important – element in investor protection". The decision made dispute resolution a default aspect of MFN clauses:

"[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 dispute resolution of disputes that may arise, most-favoured-nation provisions in BITs should be understood to be applicable to dispute settlement."

The tribunal noted the contrary *Salini v Jordan* decision but neglected to mention *Plama v Bulgaria* (see [Cases in which the tribunal did not allow claimants to expand jurisdiction rationally based on an MFN clause](#)).

## Other cases

There have been numerous cases in which claimants have sought to use MFN clauses to avoid litigating the dispute in local court before submitting it to international arbitration, as many of Argentina's BITs require. This tactic was generally successful in:

- [Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua SA v Argentina \(ICSID Case No ARB/03/17, Decision on Jurisdiction, 16 May 2006\)](#).
- [National Grid Transco PLC v Argentina \(UNCITRAL, Decision on Jurisdiction, 20 June 2006\)](#).
- [AWG Group Ltd v Argentina \(UNCITRAL, Decision on Jurisdiction, 3 August 2006\)](#).
- [Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal SA v Argentina \(ICSID Case No ARB/03/19, Decision on Jurisdiction, 3 August 2006\)](#).
- [Impregilo SpA v Argentina \(ICSID Case No ARB/07/17, Award, 21 June 2011\)](#) (see [Legal update, Stern dissent renews debate on whether MFN clauses extend to dispute resolution provisions](#)).
- [Teinver SA v Argentina \(ICSID Case No ARB/09/1, Decision on Jurisdiction, 21 December 2012\)](#) (see [Legal update, Claimants satisfied pre-conditions to arbitration in BIT \(ICSID\)](#)).

In other cases, the tribunal deemed the MFN argument moot, because the claimants had satisfied the local court requirement under the relevant BIT. These cases include:

- [TSA Spectrum de Argentina SA v Argentina \(ICSID Case No ARB/05/5, Award, 19 December 2008\)](#) (see [Legal update, ICSID tribunal denies jurisdiction on corporate nationality grounds.](#))
- [Urbaser SA v Argentina \(ICSID Case No ARB/07/26, Decision on Jurisdiction, 19 December 2012\).](#)
- [Ambiente Ufficio SPA v Argentina \(case formerly known as Giordano Alpi v Argentina\) \(ICSID Case No ARB/08/9, Decision on Jurisdiction, 8 Feb 2013\).](#) Interestingly, in *Ambiente Ufficio*, the dissenting arbitrator, Dr Santiago Torres Bernardez, found that the MFN clause was inapposite because the dispute resolution clause in the Argentina-US BIT included a “fork-in-the-road provision”, making it no more favourable than a BIT provision requiring the investor to litigate 18 months in local court.

## Cases in which the tribunal did not allow claimants to bypass preconditions to arbitration based on an MFN clause

### Wintershall Aktiengesellschaft v Argentina and Daimler Financial Services v Argentina

In [Wintershall Aktiengesellschaft v Argentina \(ICSID Case No ARB/04/14, Award, 8 December 2008\)](#), the German claimant submitted that it could rely on the MFN clause of the Argentina-Germany BIT to bypass the 18-month local court requirement under that BIT, and take advantage of the arbitration provisions in other Argentine BITs, such as the Argentina-Chile BIT, which allowed for a dispute to be submitted to international arbitration if it could not be resolved by negotiation within six months. Contrary to the tribunal’s decision in *Siemens v Argentina* and the majority decision in *Hochtief v Argentina* (discussed at [Cases in which the tribunal allowed claimants to bypass preconditions to arbitration based on an MFN clause](#), above), the Wintershall tribunal held that the MFN clause in the Argentina-Germany BIT did **not** extend to dispute resolution provisions. Therefore, the German investor was unable to take advantage of the less restrictive arbitration clause in the Argentina-Chile BITs (see [Legal update, MFN clause does not extend to dispute resolution provision.](#))

In [Daimler Financial Services AG v Argentine Republic \(ICSID Case No. ARB/05/1, Award on Jurisdiction, 22 August 2012\)](#), the majority of the tribunal reached the same conclusion under the same Argentina-Germany BIT. One of the *Wintershall* majority, Professor Domingo Bello Janeiro, had been on the *Siemens* tribunal, where he took a contrasting position. In *Daimler*, he provided a separate opinion to explain his “change of heart”. In addition, Judge Charles Brower issued a strongly worded dissenting opinion, criticising the majority’s position as “profoundly wrong” (see

[Legal update, Consistently inconsistent: another MFN case, another split decision, another contrasting decision \(ICSID\).](#))

### ICS Inspection and Control Services Limited v Argentina

In *ICS Inspection and Control Services Ltd (United Kingdom) v Argentine Republic (PCA Case No 2010-9, Award on Jurisdiction, 10 February 2012)*, the tribunal held that the MFN clause in the Argentina-UK BIT did not apply to dispute resolution provisions and, therefore, did not enable investors to import a less restrictive arbitration clauses from other Argentine BITs, which did not require that a dispute be litigated in the local courts for 18 months before it could be submitted to international arbitration. The tribunal’s approach was consistent with the dissenting opinions in *Impregilo SpA v Argentina and Hochtief AG v Argentina* (see [Legal update, Third time lucky for Argentina as tribunal rules MFN clause does not extend to dispute resolution.](#))

### Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v Turkmenistan

The tribunal in [Kiliç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v Turkmenistan \(ICSID Case No ARB/10/01, Award, 2 July 2013\)](#) reached a similar conclusion under the Turkey-Turkmenistan BIT, which required claimants to submit disputes to local courts first, and continue to international arbitration only if a conclusion had not been reached within a year (see [Legal update, MFN clause does not apply to Turkmenistan-Turkey BIT dispute resolution provisions.](#))

## Jurisdiction *ratione materiae*

In a number of cases, claimants have sought to use MFN clauses to broaden the tribunal’s jurisdiction to encompass certain types of disputes, which the BIT did not subject to international arbitration.

## Cases in which the tribunal allowed claimants to expand jurisdiction *ratione materiae* based on an MFN clause

### RosInvestCo UK Ltd v Russia

In *RosInvestCo UK Ltd v Russia (SCC Case No V 079/2005, Award, 12 September 2010)*, an *Stockholm Chamber of Commerce (SCC)* tribunal held that the MFN clause in the UK-Russia BIT extended to dispute resolution provisions. The tribunal found that the UK claimant’s claims alleging breaches of the BIT’s expropriation provisions fell outside the scope of the BIT’s arbitration clause, which limited arbitration to a determination of the amount of compensation once expropriation had been established. Nevertheless, the tribunal concluded that it had jurisdiction over the expropriation claims because the Denmark-Russia BIT contained an arbitration clause broad enough to encompass the claims. Therefore, the UK-Russia BIT’s MFN clause allowed the claimant to expand jurisdiction *ratione materiae*.

**Cases in which the tribunal did not allow claimants to expand jurisdiction *ratione materiae* based on an MFN clause**

**Plama Consortium Limited v Bulgaria**

In [\*Plama Consortium Limited v Bulgaria \(ICSID Case No ARB/03/24, Decision on Jurisdiction, 8 February 2005\)\*](#), the tribunal expressly rejected the *Maffezini* tribunal's interpretation of MFN clauses and adopted a narrower construction of the MFN clause at issue. The Bulgaria-Cyprus BIT limited arbitration to a determination of the quantum of damages under the UNCITRAL arbitration rules only. The Cypriot claimant sought to invoke broader dispute resolution provisions in other Bulgarian BITs, which allowed for international arbitration in other fora (such as ICSID) and for international arbitration of the merits of a dispute (rather than limiting the arbitration to determine the amount of damages only).

The tribunal rejected the claimant's argument, holding that it:

"fail[ed] to see how harmonization of dispute settlement provisions can be achieved by reliance on the MFN provision. Rather, the 'basket of provisions', and 'self-adaptation' of the MFN provision . . . has as effect that an investor has the option to pick and choose provisions from various BITs. If that were true, a host state which has not specifically agreed thereto can be confronted with a large number of permutations of dispute settlement provisions from the various BITs that it has concluded. Such a chaotic situation – actually counterproductive to harmonization – cannot be presumed to be the intent of the Contracting Parties."

**Salini Construttori SpA v Jordan**

The dispute in [\*Salini Construttori SpA and Italstrade SpA v Jordan \(ICSID Case No ARB/02/13, Award, 31 January 2006\)\*](#) concerned the amount owed to the claimants for the construction of a dam in Jordan. The Italy-Jordan BIT allowed for ICSID arbitration of treaty claims, but not contract claims, and the claimants hoped to use the BIT's MFN clause to import a broader dispute resolution provision from the Jordan-US BIT or the Jordan-UK BIT, which allowed for arbitration of contract claims. The tribunal declined to treat the MFN clause as expanding the scope of the arbitration provision, and held that its jurisdiction was limited by the Italy-Jordan BIT's dispute resolution clause. In particular, the tribunal found that:

"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 favoured nation clause apply to dispute settlement . . . From this, the

Tribunal concludes that Article 3 of the BIT does not apply insofar as dispute settlement clauses are concerned."

**Berschader v Russia**

In [\*Vladimir Berschader and Moïse Berschader v Russia \(SCC Case No 080/2004, Award, 21 April 2006\)\*](#), the dispute arose under the Belgium-Russia BIT, which only allowed for international arbitration to determine "the amount or mode of compensation to be paid" after a breach of the treaty's expropriation provision had been established. The claimants argued that the BIT's MFN clause should allow them to import the broader dispute resolution provision from the Denmark-Russia BIT, which allowed for "any dispute in connection with an investment" to be submitted to international arbitration.

The tribunal rejected the claimants' argument, even though the MFN clause purported to apply to "all matters covered by the treaty." The tribunal noted that the MFN clause also provided that it applied "in particular to Articles 4, 5, and 6" of the BIT and concluded that applying the MFN clause to certain other articles of the treaty would be nonsensical (like Article 1, which included the definitions). Therefore, the tribunal held that the phrase "all matters covered by the treaty" cannot be read literally and does not encompass dispute resolution provisions. The tribunal relied on evidence from the time of the negotiations of the Belgium-Russia BIT, which demonstrated that Russia did not intend for the MFN clause to extend to dispute resolution provisions.

**Telenor Mobile Communications AS v Hungary**

[\*Telenor Mobile Communications AS v Hungary \(ICSID Case No ARB/04/15, Award, 13 September 2006\)\*](#)

concerned the Hungarian subsidiary of Norwegian telecommunications company, Telenor. Between 2001 and 2003, Hungary adopted numerous regulatory measures allegedly aimed at bringing its telecommunications regime in line with EU norms. The claimant asserted that the BIT's MFN clause allowed it not only to invoke broader substantive rights conferred to investors in other Hungarian BITs, but also to rely on wider dispute resolution clauses found in other Hungarian BITs. While the Hungary-Norway BIT's arbitration clause was limited to the adjudication of expropriation claims, other Hungarian BITs provided for arbitration of any disputes relating to an investment.

Relying on the BIT's MFN clause, the claimant argued that the tribunal's jurisdiction encompassed claims for breach of the BIT's fair and equitable treatment obligation. However, the tribunal rejected the claimant's argument. It found that, under the Vienna Convention on the Law of Treaties, the BIT's MFN clause should be interpreted according to its ordinary meaning, and the case law on MFN clauses implied application to substantive provisions only. The tribunal also noted that a broader interpretation of MFN clauses would expose a

state to treaty shopping and would create unacceptable uncertainty, given the constant potential for a new BIT to create jurisdiction, where none had existed before.

#### Renta 4 SVSA v Russia

In *Renta 4 SVSA et al v Russia (SCC Case No V 024/2007, Award, 20 March 2009)*, an SCC tribunal held that the Spain-Russia BIT's MFN clause did not allow the claimant to invoke the broader dispute resolution provisions in other Russian BITs. The claimant was attempting to arbitrate claims unrelated to expropriation, even though the Spain-Russia BIT's arbitration clause was limited to adjudicating expropriation claims under the BIT (see [Legal update, Interplay between MFN and FET clauses](#)).

#### Tza Yap Shum v Peru

In *Tza Yap Shum v Peru (ICSID Case No ARB/07/6, Award, 19 June 2009)*, the tribunal rejected the claimant's attempt to use the China-Peru BIT's MFN clause to bypass the BIT's narrow dispute resolution provision (which only provided for arbitration of expropriation disputes) and to invoke the broader dispute resolution clause of the Columbia-Peru BIT (see [Legal update, MFN argument rejected, but scope of arbitration provision interpreted broadly](#)).

#### Austrian Airlines v Slovak Republic

In *Austrian Airlines v The Slovak Republic (UNCITRAL, 20 October 2009)*, the majority of the tribunal held that the claimant could not rely on the Austria-Slovak Republic BIT's MFN clause to bypass the BIT's narrow dispute resolution provision (which allowed arbitration of disputes as to the amount or conditions of payment of compensation for expropriation only) and to invoke the broader arbitration clause contained in other Slovak BITs. The majority considered that the specific wording of the Austria-Slovak Republic BIT's dispute resolution clause should prevail over the general wording of the BIT's MFN clause. The majority relied on evidence related to the BIT's negotiating history, which showed that the state parties had agreed specifically to narrow their consent to arbitration.

The dissenting arbitrator, Judge Charles Brower, stated that the MFN clause could be used to import broader dispute resolution provisions from other BITs because it expressly excluded certain types of agreement; therefore, there was no justification for implying any further restrictions to the MFN clause by reference to the BIT's narrow dispute resolution provisions (see [Legal update, UNCITRAL tribunal had no jurisdiction over principle of expropriation and MFN clause did not assist](#)).

In *European American Investment Bank AG (EURAM) v Slovak Republic (UNCITRAL, Award, 12 Oct 2012, award not public)*, the tribunal reached a similar conclusion under the same Austria-Slovak Republic BIT.

#### Accession Mezzanine Capital LP v Hungary

In *Accession Mezzanine Capital LP and Danubius Kereskedohaz Vagyonkelo Zrt v Hungary (ICSID Case No ARB/12/3, Decision on Respondent's Objection Under ICSID Arbitration Rule 41(5), 16 January 2013)*, the BIT's arbitration clause expressly covered expropriation-related claims. The claimants argued that, through the application of the Hungary-UK BIT's MFN clause, the tribunal's jurisdiction extended to claims based on customary international law. While the tribunal noted, in obiter dicta, that an MFN clause could not be used to create causes of action, which the parties had not specifically consented to submit to arbitration, the tribunal ultimately concluded that the claims at issue related to expropriation, and, therefore, fell within the scope of the Hungary-UK BIT (see [Legal update, Objection that claim manifestly without legal merit partly successful \(ICSID\)](#)).

#### Consent to specific arbitral forum

##### Garanti Koza LLP v Turkmenistan

*Garanti Koza v Turkmenistan (ICSID Case No ARB/11/20, Decision on Jurisdiction, 3 July 2013)*, a dispute between a UK construction company and Turkmenistan over whether the latter failed to pay for construction work, marks the first time a tribunal allowed a claimant to use an MFN clause to invoke a state's consent to a particular arbitral forum found in another BIT.

The UK-Turkmenistan BIT's dispute resolution clause contained the state's consent to international arbitration in general, but parties to an arbitration had to agree on the specific arbitral forum, with UNCITRAL arbitration being the default mechanism if no agreement could be reached. When Turkmenistan refused to agree to ICSID arbitration, the UK claimant argued that the BIT's MFN clause should allow it to submit the dispute to ICSID arbitration, as that was the dispute settlement mechanism Turkmenistan had consented to in other BITs and the Energy Charter Treaty. Notably, the UK-Turkmenistan BIT's MFN clause expressly applied to dispute resolution provisions. The tribunal disagreed with the holding in *Plama Consortium Limited v Bulgaria* (discussed above). It held that Turkmenistan had consented to international arbitration in general in the UK-Turkmenistan BIT, and that its consent to ICSID jurisdiction in particular could be imported from another Turkmen BIT through the MFN clause (see [Legal update, Effect of MFN clause on BIT dispute resolution clause](#)).



### Expanding the BIT's scope of application

In a few cases, claimants have failed in their efforts to use MFN clauses to expand the BIT's scope of application.

#### **Técnicas Medioambientales Tecmed SA v Mexico**

In [\*Técnicas Medioambientales Tecmed SA v Mexico \(ICSID Case No ARB\(AF\)/00/2, Award, 29 May 2003\*](#), the claimant attempted to use the Mexico-Spain BIT's MFN clause to retroactively apply the protections of the BIT to an investment predating the treaty, which was not covered by the BIT's protections. The tribunal rejected this argument because factors such as the temporal scope of application of the BIT itself "go to the core of matters that must be deemed to be specifically negotiated by the parties [because] they are determining factors for their acceptance of the treaty."

#### **MCI Power Group LC and New Turbine Inc v Ecuador**

[\*MCI Power Group and New Turbine Inc v Ecuador \(ICSID Case No ARB/03/6, Award, 31 July 2007\)\*](#) involved a creative attempt to use an MFN clause to expand the temporal scope of a BIT. The investments at issue were not covered by the protections of the Ecuador-US BIT because they were made before the BIT entered into effect. The claimants argued that the BIT's MFN clause allowed them to import a clause from the Argentina-Ecuador BIT that would bring the investments at issue within the temporal scope and thus under the protections of the Ecuador-US BIT. Because the tribunal disagreed with claimants' reading of the clause that claimants sought to import, the tribunal did not find it necessary to rule on the MFN question.

#### **Vannessa Ventures Ltd v Venezuela**

In [\*Vannessa Ventures Ltd v Venezuela \(ICSID Case No ARB\(AF\)/04/6, Award, 16 January 2013\*](#), the claimant attempted to expand the definition of "investment" under the Canada-Venezuela BIT through application of the BIT's MFN clause. As the definition of "investment" delineates the BIT's material scope of application, the tribunal rejected the claimant's argument, holding that the BIT's MFN clause could only come into play once the BIT itself applied.

The same conclusion was reached in [\*Société Générale v Dominican Republic \(LCIA Case No UN 7927, Decision on Jurisdiction, 19 September 2008\)\*](#).

### Concluding thoughts

MFN treatment is widely accepted, together with national treatment, as one of the most important standards of treatment for investors and their investments. In light of attempts to increase liberalisation, interdependence and globalisation, these clauses are likely to become more, rather than less, important. At the same time, states are becoming increasingly aware that MFN clauses can be a source of undesirable international obligations and are, therefore, acting to limit their scope of application.

Despite their widespread use in investment treaties, MFN clauses do not have a universal meaning. Their drafting and application varies widely; sometimes they apply to the entire content of a treaty and other times, they apply only to specific matters. Interpreting an MFN clause requires careful reading of a particular provision in light of the treaty interpretation rules of the Vienna Convention on the Law of Treaties. The *ejusdem generis* principle has been applied in jurisprudence of international tribunals, national courts and by diplomatic practice. As discussed above, an MFN clause can only attract more favourable treatment if it is in regard to the same "subject matter", the same "category of matter", or the same "class of matter". While this principle provides some useful guidance, it is not always simple to apply and interpret. Even though prior decisions of arbitral tribunals do not have binding precedential value, their reasoning can be persuasive and may serve to inform states, investors and other tribunals of the current thinking on a difficult issue, especially when they concern the same BIT or a similar provision.