

## *Can Investors Use MFN To Dodge Transparency?*

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February 7, 2011

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The jurisdictional award in *Maffezini v. Spain*<sup>1</sup> has loomed large in investment treaty arbitration decisions and in related scholarship since the decision was published 11 years ago. By my count, no fewer than 14 investment treaty arbitration decisions published after *Maffezini* address the interplay between MFN provisions and dispute resolution mechanisms. Several of these tribunals have relied explicitly on the *Maffezini* reasoning, using most-favored-nation (“MFN”) clauses to allow investors to take advantage of more favorable dispute resolution provisions in third treaties,<sup>2</sup> while a number of others have denied such attempts.<sup>3</sup> In any event, the sheer number of times this issue has arisen is a testament to the desire of claimants to use MFN to import preferable arbitration clauses from otherwise non-applicable treaties.

It therefore seems possible that as transparency requirements appear in more bilateral investment treaties (“BITs”), claimants may attempt to avoid those requirements by invoking the MFN clauses in those treaties, relying explicitly or implicitly on the groundwork laid by *Maffezini* and similar decisions. Indeed, it is my understanding that this issue was raised by several academics following the most recent round of UNCITRAL Working Group II talks. A detailed examination of MFN and transparency, however, suggests that such attempts would probably be futile.

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<sup>1</sup> *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000.

<sup>2</sup> See, e.g., *Siemens v. Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004; *Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005; *National Grid plc v. The Argentine Republic (UNCITRAL)*, Decision on Jurisdiction, 20 June 2006; *Suez, Sociedad General de Aguas de Barcelona S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, 16 May 2006; *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. Arbitration V 079/2005, Award on Jurisdiction, October 2007.

<sup>3</sup> See, e.g., *Tecnicas Medioambientales SA (“Tecmed”) v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003; *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 15 November 2004; *Plama Consortium Ltd. v. Bulgaria*, ICSID Case No. ARB/06/5, Decision on Jurisdiction, 8 February 2005; *Berschader v. The Russian Federation*, SCC Case No. Arbitration V 080/2004, Award, 21 April 2006; *Telenor Mobile Communications A.S. v. The Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006; *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008; *Renta 4 S.V.S.A. v. The Russian Federation*, SCC Case No. Arbitration V 024/2007, Award on Preliminary Objections, 20 March 2009; *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, 19 June 2009; *Austrian Airlines v. Slovak Republic (UNCITRAL)*, Final Award, 20 October 2009.

## I. BACKGROUND<sup>4</sup>

MFN provisions are among the oldest and most commonly-used provisions in treaties, finding their origin in the Middle Ages, becoming common in friendship, navigation and commerce treaties,<sup>5</sup> later appearing in trade treaties and more recently being incorporated into investment treaties.<sup>6</sup> In the context of investment treaties, MFN clauses generally require that a state-party treat a foreign investor and/or investment subject to the treaty no less favorably than the state-party treats investors and/or investments from other states.<sup>7</sup>

MFN has been found to extend to treatment not only under domestic law, but also under other investment treaties.<sup>8</sup> Thus, investors subject to one investment treaty—usually referred to as the “basic” treaty—may use the MFN provision in that treaty to seek the benefit of more favorable provisions in a treaty between the host state and a third country—usually referred to as the “third” treaty—as long as the third treaty covers the same subject matter as the basic treaty.<sup>9</sup> An example of the application of this doctrine appears in the first ICSID award arising from a bilateral investment treaty, *AAPL v. Sri Lanka*.<sup>10</sup> The claimant in that case, a U.K. national, argued that the MFN provision in the U.K.-Sri Lanka BIT entitled it to the benefit of more favorable substantive liability standards in the Switzerland-Sri Lanka BIT. The *AAPL* tribunal accepted the premise that a claimant can use the MFN clause in the basic treaty to take advantage

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<sup>4</sup> This background section is intended only to provide a short primer for those unfamiliar with MFN in investment treaty arbitration. Many other published books and articles—some of which are cited in the following footnotes—include greater detail and much deeper analysis for those interested in learning more about the subject. For background on transparency in investment treaty arbitration, see Mark Kantor, *The Transparency Agenda for UNCITRAL Investment Arbitrations: Looking in All the Wrong Places*, circulated concurrently with this paper.

<sup>5</sup> See U.N.G.A., 59<sup>th</sup> Sess., International Law Commission, Report of the Working Group, A/CN.4/L.719 (20 July 2007) (“ILC Report”) at 3-4 (citing, as an example, the 1654 treaty between Great Britain and Sweden).

<sup>6</sup> See Mara Valenti, *The Most Favoured Nation Clause in BITs as a Basis for Jurisdiction in Foreign Investor-Host State Arbitration*, 24(3) *ARBITRATION INT’L* 447, 454, n.22 (2008).

<sup>7</sup> See Elizabeth Whitsitt, *Application of Most-Favoured-Nation Clauses to the Dispute Settlement Provisions of Bilateral Investment Treaties: An Assessment of the Jurisprudence*, 27 (4) *J. ENERGY & NAT. RESOURCES L.* 527, n.4 (2009).

<sup>8</sup> See, e.g., *Award of the Commission of Arbitration established for the Ambatielos claim between Greece and the United Kingdom (“Ambatielos”)*, 6 March 1956, United Nations: *Reports of International Arbitral Awards*, Vol. XII, 1963, p. 105; see also *Case concerning rights of nationals of the United States of America in Morocco* (U.S.A. v. France), Judgment of 27 August 1952, *I.C.J. Reports* 1952, p. 176; but see ILC Report, *supra* note 5, at 11 (“An MFN clause has the potential for becoming a “super-treaty” provision, which would allow beneficiary States simply to pick and choose from amongst the benefits that third States receive from the other contracting party - what has been referred to as “treaty-shopping”).

<sup>9</sup> See RUDOLPH DOLZER AND CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 186 (2008) (“The clause will operate, in principle, in relation to all matters that fall within the scope of the treaty containing the MFN rule. Put differently, *ratione materiae*, it operates according to the requirement of sameness, the *ejusdem generis* principle.”)

<sup>10</sup> *Asian Agricultural Products Ltd. (“AAPL”) v. Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990.

of more favorable substantive provisions in the third treaty, but ultimately rejected the claimant's argument because, while the substantive provisions of the U.K. and Swiss BITs with Sri Lanka were different, the claimant could not show that the Swiss BIT's provisions were more favorable than the U.K. BIT's provisions.

In 2000, the *Maffezini* tribunal applied this concept to investment treaty dispute resolution procedures for the first time. The Argentine claimant in *Maffezini* sought to avoid the requirement in the Argentina-Spain BIT that disputes first be submitted to a Spanish court and that the claimant wait 18 months after that lawsuit was filed to submit the dispute to arbitration. The claimant argued that the Chile-Spain BIT contained no such requirement and, therefore, Chilean investors in Spain received more favorable treatment to which the claimant was entitled under the MFN clause in the Argentina-Spain BIT. Spain argued that, in extending MFN privileges with respect to "all matters subject to this agreement," the treaty parties intended to refer only to substantive investment protections, not to dispute resolution procedures provided in the BIT. In siding with the claimant, the *Maffezini* tribunal relied heavily on a 1956 decision in an arbitration between Greece and the United Kingdom, referred to as the *Ambatielos* decision.<sup>11</sup> In *Ambatielos*, the arbitration commission found that the administration of justice fell into the category of substantive protections related to "navigation and commerce" such that, under the *ejusdem generis* principle, provisions regarding the administration of justice in one navigation and commerce treaty could be incorporated into a similar treaty through an MFN clause. Based on the broad MFN language in the Argentina-Spain BIT and relying on *Ambatielos*, the *Maffezini* tribunal concluded that "there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights of traders under treaties of commerce,"<sup>12</sup> and therefore that dispute resolution procedures from one BIT could be imported into another BIT through its MFN clause.

While *Maffezini*'s reasoning has been adopted by some tribunals, it has been sharply criticized by others. In particular, the tribunal in *Plama v. Bulgaria* argued that the *Maffezini* tribunal failed to take into account the specific consent to arbitrate required under international law for an arbitral tribunal to find jurisdiction. This reasoning was adopted by the tribunals in *Wintershall v. Argentina* and *Berschader v. Russia*. In fact, the *Wintershall* tribunal found that the an 18-month waiting period similar to the one at issue in *Maffezini* was an "essential preliminary step to the institution of ICSID Arbitration under the Argentina-Germany BIT; it constitutes an integral part of the 'standing offer' ('consent') of the Host State," and that such consent could not be circumvented through an MFN clause absent clear and express language in the BIT of the parties' intent to do so. A third line of cases has more recently developed (in particular, the *Renta 4* and *Austrian Airlines* decisions) in which the tribunals rejected the *Plama* assumption that MFN and dispute resolution provisions are to be read narrowly in light of concerns about the state's consent to arbitrate, but nonetheless found that the particular MFN clauses at issue in those cases were not sufficiently broad to cover dispute resolution.

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<sup>11</sup> *Ambatielos* at 81.

<sup>12</sup> *Maffezini* ¶ 54.

## II. CAVEAT

Before proceeding to an analysis of MFN and transparency, a caveat is in order. It is quite difficult to generalize about whether a claimant could use MFN provisions in the basic treaties in order to avoid transparency that may be required by those treaties, for two reasons. First, the analyses adopted by the various tribunals examining the interplay between MFN clauses and BIT dispute resolution provisions are highly specific to the particular treaties at issue.<sup>13</sup> To use just one of many examples, the *RosInvest* tribunal refused to enter “into the much more general question whether MFN-clauses can be used to transfer arbitration clauses from one treaty to another,” instead basing its conclusion solely on “the specific wording of Article 3(1) of the UK-Soviet BIT, for the specific purpose of arbitration with regard to expropriation.”<sup>14</sup> The analysis is treaty-specific because some MFN provisions are regarded by the tribunals as broader than others,<sup>15</sup> and whether dispute resolution in general or transparency in particular is subject to MFN protection depends on the intent of the treaty parties as expressed in the language of the MFN clause and the dispute resolution provision.<sup>16</sup> A few treaties, like those based on the U.K. Model BIT, explicitly state that MFN treatment is intended to include dispute resolution provisions in the BIT.<sup>17</sup> In contrast, in certain treaties negotiated by the United States, the application of MFN is limited to particular listed activities, and it is recognized that MFN does not apply to dispute resolution.<sup>18</sup>

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<sup>13</sup> See, e.g., Valenti, *supra* note 6, at 447 (“It is our opinion that the answer to the question of the extension of MFN treatment to procedural matters ultimately depends on the interpretation of the MFN clause at issue, according to the general rule on the interpretation of treaties. The language of the clause, thus, plays an important role in determining its content. . . . [T]he question cannot be decided once and for all according to general theories, but as to be addressed on a case-by-case basis through a proper interpretation of the relevant MFN clause.”).

<sup>14</sup> *RosInvest* ¶ 129.

<sup>15</sup> This was the basis of the *Salini* tribunal’s rejection of the claimant’s MFN argument in that case: instead of rejecting *Maffezini*’s legal reasoning, as the tribunals in *Plama* and its progeny did, the *Salini* tribunal distinguished *Maffezini* by pointing out that the Italy-Jordan BIT at issue in *Salini* had a narrower MFN provision than the Argentina-Spain BIT at issue in *Maffezini*. *Salini* ¶ 118. As one commentator has pointed out, however, this may not be a sound basis for distinguishing *Maffezini*, because “the *Maffezini* Tribunal did not base its decision on the breadth of the MFN clause in the Argentina-Spain BIT.” Gabriel Egli, *Don’t Get BIT: Addressing ICSID’s Inconsistent Application of Most-Favored-Nation Clauses to Dispute Resolution Provisions*, 34 PEPP. L. REV. 1045, 1075 (2007).

<sup>16</sup> See, e.g., *Berschader* ¶ 175 (“Firstly, the Tribunal must express its firm view that the fundamental issue in determining whether or not an MFN clause encompasses the dispute resolution provisions of other treaties must always be an assessment of the intention of the contracting parties upon the conclusion of each individual treaty. In each case, the question must be asked whether the contracting parties intended the MFN provision to incorporate by reference the dispute settlement provisions of other treaties. Ultimately, that question can only be answered by a detailed analysis of the text and, where available, the negotiating history of the relevant treaty, as well as other relevant facts.”).

<sup>17</sup> See *Wintershall* ¶ 167 (quoting U.K. Model BIT).

<sup>18</sup> See, e.g., United States – Peru Trade Promotion Agreement, 12 April 2006, Art. 10.4 and n.2 (“For greater certainty, treatment ‘with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments’ referred to in paragraphs 1 and 2 of Article 10.4 does not encompass

Most treaties, of course, do not address explicitly the relationship between MFN and dispute resolution, and thus the tribunal will likely look to the language of the MFN provision to determine its scope. For example, in *Maffezini*, the tribunal was asked to apply an MFN provision that broadly covered “all matters subject to this Agreement.”<sup>19</sup> The U.K.-Soviet BIT at issue in *RosInvest* stated generally that “Neither Contracting Party shall in its territory subject investments or returns of investors of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of investors of any third State,” without express reference to matters covered in the treaty.<sup>20</sup> Other treaties, like the one at issue in *Austrian Airlines*, are drafted broadly but include specific exceptions to the applicability of the MFN clause. If these exceptions do not include dispute resolution, an arbitral tribunal may have to decide whether to employ the principle *expression unius est exclusion alterius* in interpreting the MFN clause. As mentioned above, the investment chapters of NAFTA and other U.S. treaties specifically delineate the activities to which MFN protection applies. For example, the NAFTA specifies that “[e]ach Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”<sup>21</sup> Finally, the tribunal in *Renta 4* interpreted a MFN provision that was limited in its applicability only to that treaty’s fair and equitable treatment provision.<sup>22</sup> These MFN provisions are, on their face, very different. Without knowing the specific language and structure of the MFN provision in question, it is difficult to say in the abstract whether it would or would not apply to a BIT’s transparency provision.

Second, it is difficult to reach a general conclusion on this subject because tribunals have adopted very different approaches, making very different assumptions, in each of these cases.<sup>23</sup> Some tribunals, like the tribunal in *Telenor v. Hungary*, have assumed that MFN provisions apply only to substantive investment protections, and were not intended to apply to dispute

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dispute resolution mechanisms, such as those in Section B, that are provided for in international investment treaties or trade agreements.”)

<sup>19</sup> *Maffezini* ¶ 53.

<sup>20</sup> *RosInvest* ¶ 126.

<sup>21</sup> North American Free Trade Agreement (“NAFTA”), 17 December 1992, Can.-Mex.-U.S., 32 I.L.M. 289 (1993), Art. 1103(1).

<sup>22</sup> *Convenio de Fomento y Proteccion Reciproca de Inversiones Entre España y La Union de Republicas Socialistas Sovieticas*, 3 December 1991, Art. 5:

1. Each Party shall guarantee fair and equitable treatment within its territory for the investments made by investors of the other Party.
2. The treatment referred to in paragraph 1 above shall be no less favourable than that accorded by either Party in respect of investments made within its territory by investors of any third State.

<sup>23</sup> See ANDREW NEWCOMBE AND LLUÍS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES* 216 (2009) (“tribunals have adopted conflicting approaches to the application of MFN clauses to investor-state arbitration provisions”).

resolution provisions at all.<sup>24</sup> An underlying assumption in the *Maffezini* line of cases, on the other hand, is that where an MFN provision is broadly worded, the respondent state would have to show that dispute resolution was intended to be exempted from the MFN protection. This was made explicit in *Siemens v. Argentina*, in which the tribunal made clear that the general use of the term “treatment” would necessarily include treatment in the event of a dispute, except where “specifically agreed by the parties.”<sup>25</sup> In contrast, the underlying assumption in the *Plama* line of cases is that, since consent is the cornerstone of arbitration,<sup>26</sup> a tribunal should not infer that the parties intended for MFN protections to include arbitration provisions, and that to find that MFN applies to dispute resolution provisions, there must be a clear indication to that effect in the treaty.<sup>27</sup> As already mentioned, tribunals more recently have abandoned the use of any presumptions in favor of a more neutral treaty interpretation relying solely on VCLT principles.<sup>28</sup>

The jurisprudence has not reached anything close to consensus in this area.<sup>29</sup> To quote the majority of the *Renta 4* tribunal, the decisions analyzing MFN clauses and dispute resolution are “of uneven persuasiveness and relevance” and it is “jejune to declare that there is a dominant view; it is futile to make a headcount of populations of such diversity.”<sup>30</sup> In light of the various diverse BITs and analytical approaches, the success of a claimant attempting to avoid transparency obligations by invoking an MFN provision will depend on the specific language of the MFN provision and possibly on the backgrounds of the arbitrators sitting on the tribunal and the assumptions they are willing to adopt.<sup>31</sup>

### III. MFN AND TRANSPARENCY

With those caveats in mind, I am willing to argue that claimants attempting to dodge transparency using MFN clauses will, at the very least, have an uphill battle. For purposes of this discussion, I refer to “transparency” in four respects: (1) the public availability of the awards, (2) the public availability of orders, pleadings, transcripts, letters, and other documents submitted to or created by the tribunal, (3) the public viewing of the hearing, and (4) the

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<sup>24</sup> *Telenor* ¶ 92.

<sup>25</sup> *Siemens* ¶ 106.

<sup>26</sup> See CAMPBELL MCLACHLAN, LAURENCE SHORE, MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 257 (2007) (expressing a preference for the *Plama* reasoning over the *Maffezini* reasoning because “[j]urisdiction in international law depends solely upon consent. . . it is particularly important to construe the ambit of the State’s consent strictly.”).

<sup>27</sup> See, e.g., *Plama* ¶¶ 198-204; see also NEWCOMBE AND PARADELL, *supra* note 23, at 216.

<sup>28</sup> See, e.g., *Austrian Airlines* ¶ 121.

<sup>29</sup> See DOLZER AND SCHREUER, *supra* note 9, at 191 (“it is too early to conclude in broader terms in which direction the jurisprudence may evolve in regard to the effect of an MFN clause for the invocation of another treaty.”)

<sup>30</sup> *Renta 4* ¶ 94.

<sup>31</sup> See, e.g., ILC Report, *supra* note 5, at 12 (“Treaty interpretation does not take place in a vacuum. How an interpreter approaches an MFN clause will depend in part on how the interpreter views the nature of MFN clauses.”)

participation of amici in the arbitration. For the purposes of a hypothetical case, I have assumed that the claimant would prefer less rather than more transparency. I have also assumed that the hypothetical respondent state requires transparency in arbitration by including reference to transparency in the relevant treaty, either specifically delineating transparency requirements or by referring to rules or guidelines that will be promulgated by the UNCITRAL working group. Finally, I have assumed that the hypothetical respondent state is party to other BITs that, explicitly or by reference to particular rules, require confidential or otherwise less transparent arbitration. Under these circumstances, the claimant in our hypothetical case seeks to avoid transparency by invoking the MFN clause in the basic treaty to obtain the benefit of the dispute resolution clause in the third treaty.

There are at least three very significant hurdles our hypothetical claimant would face. The first obstacle is that it is not at all apparent that confidentiality is generally favorable to investors, particularly where there are procedures in place to protect sensitive information. It is plain, in invoking a most-favored-nation provision, that the claimant is invoking a relative standard<sup>32</sup> and must show that the treatment afforded to investors from another state is *more favorable* than that shown to investors from the investor's home state.<sup>33</sup> Indeed, in two of the foundational cases discussed above, *AAPL v. Sri Lanka* and the *Ambatielos* arbitral decision, the tribunals found in favor of the respondent on the MFN issue solely because the claimants could not demonstrate more favorable treatment under a different treaty.<sup>34</sup> On the other hand, those decisions importing dispute resolution provisions from a third treaty into the basic treaty through the basic treaty's MFN clause have relied on the finding that international arbitration—or, at least, the option of international arbitration—is preferable to suing the respondent state in court,

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<sup>32</sup> See, e.g., Pia Acconci, *Most-Favoured Nation Treatment*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 364 (Peter Muchlinski, Federico Ortino, and Christoph Schreuer, eds., 2008); accord DOLZER AND SCHREUER, *supra* note 9, at 186.

<sup>33</sup> See, e.g., *United Parcel Service of Am. Inc. ("UPS") v. Government Canada* (NAFTA/UNCITRAL), Award on the Merits, 24 May 2007, ¶ 83; see also Scott Vesel, *Clearing a Path Through a Tangled Jurisprudence: Most-Favored-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties*, 32 YALE J. INT'L L. 125, 189 (2007) ("the terms of the typical MFN clause and the overall aims of stability and predictability argue against allowing provisions to be imported that do not result in treatment that is objectively more favorable. Thus if one treaty provides for arbitration to take place in Geneva and another in London, this is not the sort of difference that would appear to disadvantage one party or the other.") Notably, in his dissent in *Renta 4*, Judge Brower took exception to this requirement, arguing that the claimant need only show different, not more favorable, treatment: "strictly speaking, it is not relevant, in my view, to attempt evaluation of whether one dispute settlement mechanism objectively is 'more favorable' than another. What is relevant is that Danish and Spanish investors in Russia are afforded 'different' dispute settlement options. The purpose and rationale of MFN clauses is, as the International Court of Justice has so clearly stated in *Rights of Nationals of the United States of America v. Morocco* to 'establish and to maintain at all times fundamental equality without discrimination among all of the countries concerned.' From this perspective, the mere existence of differences in the available dispute resolution mechanisms is sufficient to trigger an MFN clause and thereby to extend the treatment afforded by the Danish treaty to those benefitting from the MFN clause in the Spanish treaty." *Renta 4*, Separate Opinion of Charles N. Brower, ¶ 21.

<sup>34</sup> *AAPL* at ¶ 54; *Ambatielos* at 109. Although the *AAPL* tribunal based its decision on the claimant's failure to show that the third treaty contained more favorable terms than the basic treaty, according to one commentator "the point of the Tribunal's analysis was that the claimant failed to show that the Swiss treaty contained a different rule than the U.K. treaty"). Vesel, *supra* note 33, at 188-189.

and thus a treaty with a broad option to arbitrate investment disputes is more favorable than a treaty without such an option, or with strict limitations on the option.<sup>35</sup>

The decisions in *AAPL* and *Ambatielos* stand for the proposition that the determination of what constitutes favorable treatment must be based on general understandings of what is favorable, and cannot be based on the preferences of a particular claimant in a particular case. We should therefore examine each manifestation of transparency to see whether there is a general agreement that non-transparency is favorable to transparency:

- (1) **Awards:** A vast majority of investment treaty arbitration awards are already public, particularly those resulting from ICSID-administered arbitrations.<sup>36</sup> A claimant would have difficulty asserting that a confidential award is generally understood to be more favorable than a public award given the number of investors who consent to the publication of their awards.
- (2) **Proceedings:** These awards also undercut a claimant's argument that the pre-award submissions and orders should not be public. Investment treaty arbitration awards usually include an excruciatingly detailed account of the papers submitted and orders issued, usually with relevant dates and, at the very least, a summary of contents, if not extensive quotation. It is difficult in light of such extensive public disclosure to argue that the contemporaneous release of such information would disfavor a claimant. Indeed, many investors may favor transparency over the course of the proceedings. Noah Rubins has argued that investors would prefer transparency during the course of the proceedings in order to "politicize" the arbitration,<sup>37</sup> and force the respondent state into a settlement prior to the award.<sup>38</sup>
- (3) **Hearings:** For these same reasons, it is not apparent that investors are disfavored by opening hearings to public viewing.

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<sup>35</sup> Some commentators have criticized this assumption. See, e.g., J. Kurtz, *The MFN Standard and Foreign Investment: An Uneasy Fit?*, 5 J. World Inv. & Trade 861, 880 (2004) (criticizing *Maffezini*, writing "[t]his view in itself seems almost reflective of an epistemological belief in the superiority of investment arbitration. The lack of a rigorous comparison between the two forms of adjudication is a serious flaw in the Tribunal's reasoning...").

<sup>36</sup> ICSID cannot publish the award without the consent of the parties, but may publish the legal reasoning of the award without such consent. ICSID Rules of Procedure for Arbitration Proceedings, Rule 48(4). However, a 2004 discussion paper produced by the ICSID Secretariat suggests that party consent for publication of the award is obtained in almost every case. See ICSID Secretariat, *Possible Improvements of the Framework for ICSID Arbitration*, 15 October 2004, ¶ 11. The ICSID Secretariat also noted that in cases where consent from both parties for ICSID publication of the award is not obtained, one party often releases the award for publication by International Legal Materials or another legal periodical. *Id.*

<sup>37</sup> Noah Rubins, *Transparency in Investment Arbitration: A Call to Cost-Benefit Analysis*, in AUSTRIAN ARBITRATION YEARBOOK 297-298 (Christian Klausegger, Peter Klein, et al, eds., 2010).

<sup>38</sup> *Id.* at 303.

(4) **Amicus Curiae:** Finally, investors would likely disagree about whether the participation of amici in the arbitration favors or disfavors the investor. While Mr. Rubins asserts that amici participation disfavors the investor because most amici support the state position,<sup>39</sup> this has not necessarily been the experience in NAFTA arbitrations. In some NAFTA cases, amici support only the state respondents,<sup>40</sup> but in *Glamis Gold* and *UPS*, for example, various amici submitted briefs to support both the claimant and the government, respectively.<sup>41</sup> In *Grand River Enterprises*, the only amicus to make a submission did so in support of the claimants.<sup>42</sup> Thus, depending on the facts of the case and the interest of the amici, amicus participation in the arbitration could favor the investor.

In summary, a fundamental problem with attempting to use MFN to avoid transparency is the likely inability of an investor to show that non-transparency constitutes favorable treatment.

The second hurdle our hypothetical claimant would face is the strictly procedural nature of transparency rules. The hypothetical transparency case can be differentiated from the *Maffezini* line of cases because each of those cases involved access to arbitration. In *Maffezini*, *Siemens*, and *Gas Natural*, for example, the issue was whether the tribunal could hear the case at all in light of the 18-month waiting period in the relevant BITs. The investors in those cases had not met the pre-arbitral conditions to arbitration established by the applicable BIT, and therefore could not arbitrate their dispute but for the MFN clause. In this context, the 18-month waiting period, and the lack thereof in other BITs, was regarded not as a procedural requirement but as an issue of substantive protection, because it effectively barred claimants from obtaining access to arbitration at all. Similarly, in *RosInvest*, the issue was whether the claimant could bring to arbitration the question of whether there was liability for expropriation, when the BIT under which the claimant was bringing its claim limited arbitration solely to questions of compensation.

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<sup>39</sup> *Id.*

<sup>40</sup> See, e.g., *Methanex Corp. v. United States of America* (NAFTA/UNCITRAL), Amicus Submission by Bluewater Network, Communities for a Better Environment and the Center for International Environmental Law (3 September 2004), Amicus Submission by the International Institute for Sustainable Development (3 September 2004), available at <http://www.state.gov/s/l/c5818.htm>; *Merrill & Ring Forestry L.P. v. Government of Canada* (NAFTA/UNCITRAL), Submissions of the United Steelworkers, Communications, Energy and Paperworkers Union of Canada, and the British Columbia Federation of Labour (26 September 2008), available at [http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/merrill\\_archive.aspx?lang=en](http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/merrill_archive.aspx?lang=en).

<sup>41</sup> *Glamis Gold Ltd. v. United States of America* (NAFTA/UNCITRAL), Submission of Non-Disputing Party Quechan Indian Nation (16 October 2006); Submission of Non-Disputing Parties Sierra Club and Earthworks (16 October 2006); Submission of Non-Disputing Party National Mining Association (13 October 2006), available at <http://www.state.gov/s/l/c10986.htm>; *UPS*, Canadian Union of Postal Workers and Council of Canadians Applications for Amicus Status and Amicus Submissions (20 October 2005); Chamber of Commerce of the United States Application for Amicus Status and Amicus Submission (20 October 2005), available at [http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/parcel\\_archive.aspx?lang=en](http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/parcel_archive.aspx?lang=en).

<sup>42</sup> *Grand River Enterprises v. United States of America* (NAFTA/UNCITRAL), Submission of the Office of the National Chief of the Assembly of Nations (19 January 2009), available at <http://www.state.gov/s/l/c11935.htm>.

In contrast, in the hypothetical transparency case, transparency rules would not eliminate the claimant's access to arbitration for whatever disputes are arbitrable under that BIT. The transparency provision would only affect the manner in which that arbitration proceeds after it is commenced. In this regard, transparency is much like the designation of particular rules or a particular arbitral institution in a BIT. In *Maffezini* itself, the tribunal recognized that "if the agreement provides for a particular arbitration forum, such as ICSID, for example, this option cannot be changed by invoking the [MFN] clause, in order to refer the dispute to a different system of arbitration."<sup>43</sup> Such designations are not subject to MFN provisions in part because they are non-substantive procedural choices that cannot easily be analogized to the "treatment" provided by substantive rights or protections. In addition, the designation of particular rules or procedures reflect the specific wills of the treaty parties and thus are subject to the principle that a specific provision supersedes a more general provision, particularly with respect to "core" negotiated issues.<sup>44</sup>

This exception noted in *Maffezini* is drawn from its general "public policy exceptions" discussion, in which the tribunal wrote that "[a]s a matter of principle, the beneficiary of the [MFN] clause should not be able to override public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in question...."<sup>45</sup> The state-parties' inclusion of transparency requirements in an investment treaty is a quintessential public policy decision, and this is the third reason claimants would be hard-pressed to use MFN to dodge transparency required by investment agreements.<sup>46</sup> As noted in an article by Nigel Blackaby and Caroline Richard in favor of amicus participation in investment-related arbitrations, the public policy considerations underlying the push for transparency in investment treaty arbitration include the fact that arbitration consists of "supranational review of state acts," which "often raises issues of public interest," including "the right to explore and exploit natural resources," "the construction and management of large infrastructure projects," and "rights granted to operate public service concessions."<sup>47</sup> I would add to their list—relying on the Parties' experience under the NAFTA—by noting that investment treaty arbitration often

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<sup>43</sup> *Maffezini* ¶ 63; see also *Wintershall* ¶¶ 173-174.

<sup>44</sup> See, e.g. *Tecmed* ¶ 69; *Telenor* ¶ 95; but see Andrew Newcombe, *Another misapplication of MFN? Tza Yap Shum v. The Republic of Peru*, Kluwer Arbitration Blog, 21 October 2009, available at <http://kluwerarbitrationblog.com/blog/2009/10/21/another-misapplication-of-mfn-tza-yap-shum-v-the-republic-of-peru> ("In my view, the reasoning that a specific provision, or a specifically negotiated provision, should trump an MFN clause is flawed. This "effet utile" approach is unsound because it differentiates between the application of the MFN clause based on an *a priori* categorization of general and specific provisions. This approach is not grounded in principles of treaty interpretation.").

<sup>45</sup> *Maffezini* ¶ 62. The *Plama* tribunal noted that the *Maffezini* tribunal's determination, particularly in light of its recognition of a public policy exception, amounted to a finding that the 18-month waiting period was "nonsensical from a practical point of view." *Plama* ¶ 224.

<sup>46</sup> See also Rubins, *supra* note 37, in which the author lays out the public policy argument against transparency in investment treaty arbitration.

<sup>47</sup> Nigel Blackaby and Caroline Richard, *Amicus Curiae: A Panacea for Legitimacy in International Arbitration?*, in *THE BACKLASH AGAINST INVESTMENT ARBITRATION* 255 (Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung & Claire Balchin, eds., 2010).

raises environmental and health issues of national, or at least local, public concern. The public concern may even be specific to the case at hand: in permitting amicus curiae participation in *UPS*, the tribunal noted the “public character of the submissions in this arbitration,” namely the provision of a public postal service and the deleterious effect claimant’s position might have on public pension funds.<sup>48</sup> Finally, as Blackaby and Richard note, “damages claimed by investors... are often counted in the hundreds of millions of dollars,”<sup>49</sup>—indeed, some claims can be even higher—and if the state were found liable, damages payments would have to be drawn from the public treasury. For all of these reasons, certain state-parties have agreed, as a matter of public policy, to make transparency a condition upon which they will arbitrate disputes with investors under the applicable treaty. As the *Maffezini* tribunal recognized, that agreement cannot be undone by an MFN clause.

Before closing, let me add a few words about the reverse hypothetical. Let us imagine that an investor subject to a BIT that does not include a transparency provision wishes for the arbitration to be transparent, and invokes an MFN clause to import a transparency requirement from another BIT. It seems likely that the same hurdles would exist for this claimant, who would have to show, at least, that transparency is more favorable than lack of transparency for an investor, that transparency is more akin to a substantive protection than a mere procedural choice, and that the state’s choice of non-transparency would not be sustained on public policy grounds. I leave it to further discussion to determine how this hypothetical claimant would fare.

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<sup>48</sup>*UPS*, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*, 17 October 2001, ¶¶ 46, 70.

<sup>49</sup> Blackaby and Richard, *supra* note 47, at 255.