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THE APPLICATION OF THE MOST FAVORED NATION CLAUSE TO THE PROCEDURAL PROVISIONS OF BILATERAL INVESTMENT TREATIES: POSSIBILITIES FOR ESTABLISHING ICSID JURISDICTION FOR RESOLVING INVESTMENT DISPUTES

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Abstract. *This article explores problems related to establishing the ICSID jurisdiction to the BITs dispute settlement provisions by application of the MFN clause. Being that the application of the clause asks for very extensive interpretation of the BIT which contains this clause, the practice of ICSID tribunals in this field has been very much debated in professional and academic circles. Not only has it raised concerns about stability, predictability and legal certainty in international investment law but, more importantly, about its further development in respect of arbitrators' powers. The article analyzes three representative cases in which ICSID tribunals made decisions on jurisdiction based on the usage of the MFN clause: Maffezini, Plama and Salini. On the basis of this analysis, certain guidelines are proposed that might be applied in future disputes brought before ICSID tribunals. These guidelines are in compliance with modern tendencies in international scene, which should be considered as the indicators of the direction for further development of this particular area of law*.

Key words: *MFN clause, investment disputes, ICSID jurisdiction.*

1. INTRODUCTION

The most favored nation clause (MFN clause) is regularly entered into the text of bilateral investment treaties (BITs) and it is considered to be one of the basic standards of treatment for foreign investors. Although the frequent (or better to say default) use of this clause has led to identifying the legal definition and structure of this clause, its application is still a field of insufficiently clear and precise criteria. The application of the MFN clause on procedural provisions of BITs raises special concerns because this scope of

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application is yet to be discovered; on the other hand, it is related to the very essence of arbitration as the system for resolving investment disputes. Particularly, in the previous practice of ICSID tribunals, there were cases in which the claimant sought to establish ICSID jurisdiction by relying on the MFN clause. The decisions reached by ICSID tribunals in these cases were much debated because of the uncertainty they might add to in the sphere of international investment law, and because they are deemed to have the potential to alter the concept of contracting arbitration and balancing power of parties to the investment disputes with respect to their mutual consent to regulate their rights and obligations in a certain manner, stipulated in the BIT they concluded.

This article analyses the reasoning of ICSID tribunals in decisions on jurisdiction in three cases: *Maffezini*[1], *Plama*[2] *and Salini*[3]. These decisions had a great influence in professional public, especially the one reached in *Maffezini*, where the Tribunal allowed establishing the ICSID jurisdiction by expanding the application of the MFN clause to procedural provisions of the BIT. Given the lack of previous practice in this area, the Tribunal applied extensive interpretation in deciding on its competence. Even though there are no clear indicators of the scope of application of the MFN clause, its application might have an impact on general equilibrium of the treaty, which will necessarily be undermined by the substitution of provisions which are specifically negotiated and which constitute its pillars (Radi, 2007: 17).

This article argues that, in the process of reaching the decision in *Maffezini*, the Tribunal set certain standards on the review of language used in text of investment treaties as well as raised the State's practice standards which might be significant for interpreting MFN clauses. Also, in explaining its decision, the Tribunal set some limitations on the application of the MFN clause to procedural rights, which are important because they are based on public policy concerns and they are stipulated in a manner that should allow prevention of the abuse of rights by the disputing parties. In *Plama* and *Salini*, the other two tribunals have reached different conclusions. Yet, given the fact that the decisions are based on different circumstances and that tribunals have explained why their decisions differ from those in the previous case, all three of them provide for a good basis for abstracting certain rules for interpretation of BITs and application of the MFN clauses on procedural provisions of the BIT in future cases. This should reflect on raising the level of legal certainty and predictability in this sphere of international investment law, thus contributing to the social legitimacy of the investment disputes resolution system. The analysis in this article goes even further and explains the specific requirements of international environment that arbitrators must take into account when resolving investment disputes, and how they are reflected on the usage of MFN clause. This article is an attempt to provide a legal analysis of the elements that should be considered when interpreting possibilities of applying the MFN clause in establishing ICSID jurisdiction; thereupon, the article explores whether these elements comply with modern trends in the development of international investment law relations.

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[1] *Emilio Agustín Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7)
[2] *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24)
[3] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan* (ICSID Case No. ARB/02/13)

2. ANALYSIS OF ICSID TRIBUNALS PROCEDURAL DECISIONS

2.1. Introduction to cases: Maffezini, Plama and Salini

2.1.1. Maffezini

In *Maffezini*, investment dispute was submitted to arbitration by an Argentinean claimant, against Spain, under the Argentina-Spain BIT. This treaty stipulated that the dispute could only be submitted to international arbitration if the competent domestic tribunal rendered a decision on the merits that failed to resolve the dispute, or if no decision on the merits had been rendered within 18 months of the initiation of domestic proceeding, whichever was sooner. The claimant failed to meet this condition and submitted the dispute to the ICSID tribunal. For establishing the ICSID jurisdiction, the claimant relied upon the MFN clause contained in the Argentina-Spain BIT. In Article IV of this BIT it was stipulated: ''In all matters subject to this agreement, this treatment shall not be less favorable than that extended by each Party to the investments made in its territory by investors of a third country''. Then, the claimant referred to the Chile-Spain BIT in which there was no obligation to meet any previous conditions before submitting the investment dispute to international arbitration. The claimant argued that Chilean investors in Spain were treated more favorably than Argentine investors in Spain and that, based on the MFN clause, he was entitled to the same treatment as Chilean investors, which consequently entitled him to submit the investment dispute directly to the ICSID tribunal.

In this case, the Tribunal held that: "notwithstanding the fact that the basic treaty... does not refer expressly to dispute settlement as covered by the most favored nation clause, the Tribunal considers that there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors"[4]. As a result, it concluded that: "if a third-party treaty contains provisions for the settlement of disputes that are more favorable… than those in the basic treaty, such provisions may be extended to the beneficiary of the [MFN]clause as they are fully compatible with the *ejusdem generis* principle"[5].

The Tribunal allowed the claimant's argument that jurisdiction could be founded upon a combination of the MFN clause in the Argentina-Spain BIT and the dispute resolution provision of the Chile-Spain BIT. The Tribunal endorsed the use of MFN clauses intended to bypass prior resource to domestic courts, which means that it altered the procedure of the dispute resolution mechanism to which the investors had already had access. It is important to note that the Tribunal set exceptions from the extensive interpretation of MFN clause, based on public policy concerns which have been taken into account in cases dealt with by ICSID tribunals.

2.1.2. Plama

In *Plama*, a Cypriot claimant sought to establish the ICSID tribunal jurisdiction over a dispute with Bulgaria with reference to the Bulgaria-Cyprus BIT. The problem was that the Bulgaria-Cyprus BIT contains narrow dispute resolution provisions due to the fact

[4] See: *Emilio Agustín Maffezini v. Kingdom of Spain*, Decision on Objections to Jurisdiction of January 25, 2000, 16 *ICSID Rev.—FILJ* 212 (2001); 5 *ICSID Rep.* 396 (2002); 124 *I.L.R.* 9 (2003), paragraph 54
[5] Ibid., paragraph 56

that it was entered into during the communist era in Bulgaria. These provisions allow only for the resolution of disputes related to legality of expropriation and, more specifically, to the amount of compensation. The claimant relied on the MFN clause to incorporate dispute resolution provisions of the Bulgaria-Finland BIT, which does not contain these restrictions.

In this case, the Tribunal rejected the claimant's argument, holding that an agreement to arbitrate must be "clear and unambiguous"[6], and that the language used to stipulate the MFN clause in the Bulgaria-Cyprus BIT does not meet this criterion. The Tribunal also emphasized that: "dispute resolution provisions in a specific treaty have been negotiated with a view to resolving disputes under that treaty. Contracting states cannot be presumed to have agreed that those provisions can be enlarged by incorporating dispute resolution provisions from other treaties negotiated in an entirely different context".[7]

In analyzing the reasoning given by the Tribunal in *Plama* case, this article focuses on the distinction between different circumstances in *Maffezini* and *Plama*, which are ultimately used for drawing relevant conclusions on the differences. In *Plama*, there is a case of denial of resorting to the MFN clause to "shop" for an entirely different settlement mechanism. Understanding the denial to apply the MFN clause to establish ICSID jurisdiction in this case, thus brings the two cases and the legal reasoning used in them closer together, especially having in mind that in *Maffezini* the Tribunal set a simple rule which should shield tribunals from approving the claimants' abuse of powers, which will be discussed further on.

2.1.3. Salini

In *Salini*, an Italian investor brought a claim before an ICSID tribunal against Jordan, under the Italy-Jordan BIT. In this case, on the basis of the MFN clause, the investor attempted to introduce a provision from the Jordan-US BIT and the Jordan-UK BIT in order to establish ICSID jurisdiction. The Tribunal analyzed the decision reached in *Maffezini* case and concluded that in some BITs the MFN clauses contain broad language referring to "all matters" subject to the agreement. The wording of the MFN clause contained in the Italy-Jordan BIT was not so wide. Nor was there any evidence of a common intention of the parties to have that clause apply to dispute resolution issues[8].

The Tribunal held that it had no jurisdiction to resolve this case. Even so, it did not completely disagree with the tribunal's reasoning in *Maffezini* case but stated the differences in these two cases and expressed some concerns about the applicability of the approach adopted by the *Maffezini* Tribunal.

Ultimately, the usage of the MFN clause to establish ICSID jurisdiction was not approved because the Tribunal rejected reliance on a third-party dispute resolution provision by means of the MFN clause to establish jurisdiction over contractual compensation claims not covered by the basic treaty.

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[6] See: *Plama Consortium Limited v. Republic of Bulgaria*, Decision on Jurisdiction of February 8, 2005, 20 *ICSID Rev.—FILJ* 262 (2005); 44 *ILM* 721 (2005), paragraph 198

[7] Ibid., paragraph 207

[8] See: *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, Decision of the Tribunal on Jurisdiction of November 29, 2004, 20 *ICSID Rev.—FILJ* 148 (2005); 44 *ILM* 569 (2005), paragraph 115

2.2. Analysis of ICSID tribunals' reasoning in rendered decisions

The analysis of previous ICSID decisions allows for abstracting guidelines that can be used to determine the possibility of establishing ICSID jurisdiction by application of the MFN clause contained in the basic investment treaty. Considerations of ICSID tribunals in these cases can be summarized through the following steps:

- determining the intentions of the parties to the dispute,
- determining whether conditions for the application of the MFN clause are fulfilled in accordance with the requirements set by the legal nature of this clause,
- determining the contents of investor treatment,
- determining if exceptions to the application of the MFN clause apply to particular case.

2.2.1. Determining the intentions of the parties to the dispute

The ICSID Convention[9] provides specific rules for determining whether ICSID jurisdiction can be established for resolving investment disputes. According to the preamble and Article 25 of the ISCID Convention, the Centre has the competence to resolve investment dispute if the parties to that dispute consent in writing to submit the dispute to the Centre. It is stipulated that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration. Reasoning of the *Plama* Tribunal is in accordance with these provisions: "the intention to incorporate dispute settlement provisions must be clearly and unambiguously expressed"[10].

However, determining jurisdiction of the ICSID centre cannot be viewed in isolation and without linking it to the role, purpose, object and operation of arbitration as a flexible system for the settlement of investment disputes designed to be easily adaptable to the needs of the business world and contribute to the process of making profit, with as little interruption as possible. Based on these needs, arbitration is shaped as a system embodying some specific features: efficiency, flexibility, adaptability to the changing circumstances and sensitivity to the development of legal framework it operates within.

Furthermore, arbitration is based on autonomy of the will of the parties to the dispute. When determining all the relevant issues in a dispute, tribunals must take into account this basic principle, from which they derive power to resolve investment dispute and incorporate it in their decision making processes. It is important not only when deciding on the scope of substantive rights but also on the procedural ones. For this reason, when determining whether the MFN clause can be extended to the establishment of ICSID jurisdiction, one of the elements that should be considered is the intention of the disputing parties, as the exercise of the parties' autonomy of will. If the Parties to an investment agreement intended the MFN clause to apply to the procedural aspects of their relations and clearly stated so in their agreement, then tribunals will have no dilemma. But, if not, as the tribunal concluded in *Maffezini*: "It must be established whether the omission was intended by the parties or can reasonably be inferred from the practice followed by the parties in their treatment of foreign investors and their own investors".[11]

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[9] Convention on the settlement of investment disputes between states and nationals of other states (1966), available at https://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp

[10] *Plama Consortium Limited v. Republic of Bulgaria*, supra note 6, paragraph 204

[11] *Emilio Agustín Maffezini v. Kingdom of Spain*, supra note 4, paragraph 53

In order to determine the intent of the parties, it is necessary to analyze the provisions of the basic agreement. The three tribunals did so in accordance with the provisions of the Vienna Convention on the Law of Treaties[12], that regulates the interpretation of contracts. In order to determine the scope of the MFN clause contained in the basic treaty, tribunals first analyzed its language. Article 31 Para 1 of the Vienna Convention stipulates that a contract must be interpreted in good faith by giving the ordinary meaning to the terms of the treaty in their context and in the light of its object and purpose. This approach in interpretation can be clearly seen in the decisions made by ISCID panels. In *Maffezini*, the panel analyzed the language used to stipulate the MFN clause and came to a conclusion that it was very wide: "In all matters subject to this Agreement, this treatment shall not be less favorable than that extended by each Party to the investments made in its territory by investors of a third Country."

In *Salini* and *Plama*, the tribunals analyzed the MFN clauses contained in the (respective) treaties they were deciding upon, then compared them with the language used in stipulating the MFN clause in *Maffezini*, and made a clear distinction between the analyzed clauses. In *Salini*, the panel stated that the language of the MFN clause was not as extensive as the one in *Maffezini*[13]. The same conclusion was reached in *Plama*.[14] By referring to the differences in the language used to stipulate MFN clauses incorporated in different investment treaties, the panels explained how different interpretations of intentions of the parties can be made, thus justifying different possibilities of its application for establishment of ICSID jurisdiction.

In relevant literature, there is an opinion that both parties are required to consent to arbitration for a tribunal to have any jurisdiction. Unless an MFN clause can serve as an expression of the State's consent to arbitrate directly with investors, the MFN clause cannot be used to establish a tribunal's jurisdiction (Cole, 2010: 36). This is where determining the parties' intent can come into place because it can reveal whether the expression of such consent can be found in the language of the MFN clause. Also, while the language of each specific MFN clause must ultimately control the manner of its operation, every MFN clause is nonetheless a promise of a certain type of treatment. As such, given the extent to which conclusions may be drawn on the operation of MFN clauses from their generally accepted purpose, such conclusions will be applicable in every case in which an MFN clause is invoked (Cole, 2010: 39).

In determining the intentions of the parties, tribunals did not limit their interpretation to the literal one. Pursuant to Article 31 Para 2 of the Vienna Convention, tribunals took into account subsequent practice in the application of the investment treaty which serves to establish the parties' understanding on its interpretation. Specifically, tribunals examined the practice of host countries in concluding BITs with other countries, the public policy goals pursued by host countries in relevant period of time as well as the perceived purpose of the investment treaty. This analysis was used to determine whether the choice of a dispute resolution system has been altered in the later practice of the host countries. This was done in *Maffezini* when the Tribunal looked into the content of procedural provisions in BITs concluded with a number of other countries after the Argentina-Spain BIT was concluded.[15]

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[12] Vienna Convention on the Law of Treaties (1980), available at https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf

[13] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, supra note 8, paragraph 115

[14] *Plama Consortium Limited v. Republic of Bulgaria,* supra note 6, paragraphs 184-192

[15] *Emilio Agustín Maffezini v. Kingdom of Spain*, supra note 4, paragraphs 57-61

Also, based on the analysis of relations with other countries, which was done in *Plama*[16], an attempt was made to determine whether the different economic and political orientation may transfer to investment relations in question, and on that basis justify the jurisdiction of the ICSID center in matters in which, traditionally, its jurisdiction is not foreseen.

Moreover, Article 25 Para 4 of the ICSID Convention provides that any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. If a Contracting State did not exclude classes of disputes from submitting to the jurisdiction of the Centre, it can be argued that even if written consent to jurisdiction was not given, there is room to explore the intent of the Contracting State and whether it relied upon failure to explicitly exclude the dispute in question. This is a rather extensive approach towards establishing the ICSID jurisdiction but it is in compliance with respecting the autonomy of the will of disputing parties and honoring the fact that, in time of concluding investment treaties, parties cannot predict all the circumstances that will be put upon them in their future relations. This can also be viewed as one of the consequences of the very essence of foreign direct investments relations: long-term implementation. Analysis of parties' intentions must take into account the specificity and the legal nature of the relationship between them.

In all three cases, tribunals acted in accordance with the provisions of the Vienna Convention on the Law of Treaties governing the interpretation of contracts and, on the basis of different types of interpretation, they identified the elements relevant for determining the intent of the parties in pursuing the application of the MFN clause. The application of those elements to specific circumstances of each of these cases has served as a basis for deciding on the establishment of ICSID jurisdiction by the expansion of the MFN clause.

2.2.2. Determining whether the conditions for the application of the MFN clause are fulfilled in accordance with the requirements set by the legal nature of this clause

It is not enough to determine that the parties to the dispute had the intention to apply the MFN clause. To make it applicable, there are some further criteria that must be met. When deciding about the applicability of the MFN, tribunals must consider the fulfillment of conditions originating from the legal nature of this clause. They relate to the subject matter of the basic treaty. In *Maffezini*, the tribunal concluded that "the right approach is to consider that the subject matter to which the clause applies is indeed established by the basic treaty… 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] Furthermore, "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. (…) Of course, the third-party treaty has to relate to the same subject matter as the basic treaty."[18]

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[16] *Plama Consortium Limited v. Republic of Bulgaria*, supra note 6, paragraphs 195-197
[17] *Emilio Agustín Maffezini v. Kingdom of Spain*, supra note 4, paragraph 45
[18] Ibid., paragraph 56

The adoption of this principle as one of the standards for the application of the MFN clause could be of great importance for the further practice of ICSID panels. Of course, it would limit the possibility to apply the MFN clause in procedural matters. Yet, it could be argued that such limitation respects the interests of the disputing parties as well as the manner in which they originally regulated mutual rights and obligations under the investment agreement. This principle is also in line with respecting the intentions of parties to regulate specific matters in their mutual relations.

Furthermore, the very essence of the MFN clause is to provide equality among private entities that are doing business in the host country. It operates by adjusting the treatment accorded to those actors so that they can all have equal opportunities and be bound by the same conditions. However, the MFN clause cannot be understood as a means to alter the legal framework created by the investment treaty; so, it can expand to treatment not covered by the basic treaty at all.

The conditions for applying the MFN clause that are derived from its legal nature are of great importance, particularly considering the consequences this application might have. To better understand this importance, it is necessary to point out to the differences in the application of the MFN clause contained in trade agreements and in investment agreements. The application of the MFN clause in trade agreements relates to the treatment of goods at the point when they are crossing national borders. On the other hand, investments give rise to long-term relations in which the foreign investor is expected to comply with laws and regulations of the host state in their totality, throughout the realization of the investment.

The content of the treatment of investment is therefore much more complex and harder to determine because it is based on the overall regulatory measures, as well as on other factors that affect the host state market. If the MFN clause is applied without any restrictions, such application may lead to a change of the entire legal system that applies to investment. This could be perceived as a new system operating within the State's legal system which pertains solely to foreign investor that is party to the investment dispute. It would be hard to imagine that contracting states intended to create such a legal framework in the process of accepting the investment treaty they are parties to. This scenario may be prevented by linking the scope of applying the MFN clause to the subject matter of the basic treaty, which ultimately adds to predictability, stability and equality in international investment relations.

This was concluded in *Maffezini* (as cited above) as well as in *Salini*.[19] In its decision, the latter tribunal cited numerous other decisions and agreed with the findings that "the most favored nation clause can only attract matters belonging to the same category of subjects as that to which the clause itself relates."[20]

2.2.3. Determining the contents of investor treatment

If conditions for the application of the MFN clause are met, it is necessary to determine the content of the more favorable treatment that should be assigned to a foreign investor by means of this clause. In order to define a *tertium comparationis*, there are some issues that should be resolved first. Namely, there are two preliminary questions that need to be addressed as a prerequisite for the application of MFN clause:

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[19] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, supra note 8, paragraphs 106-112

[20] Ibid., paragraph 107

- can the procedural provision of an investment agreement regulating settlement of investment disputes be considered part of the treatment standard, and
- if so, what can be considered a more favorable treatment with respect to procedural aspects?

The ICSID panels considered these issues in the above cases. Traditionally, the standard of treatment includes substantive provisions. But, in *Maffezini*, "the Tribunal considers 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..."[21] In addition, regulating the substantive standard of treatment is of importance to investors only if there is a mechanism at their disposal that stands as a guarantor for the application of these standards.

This position was accepted in *Plama* and explained in more detail. The Tribunal first stated that "the object and purpose of the Bulgaria-Cyprus BIT are: "the creation of favorable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party." Then, the tribunal cited the Report of the Executive Directors on the ICSID Convention of 1965 (Exhibit C60, paragraph 9) in which it was outlined that "the creation of an institution designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital in those countries which wish to attract it".[22] This should demonstrate that both the Bulgaria-Cyprus BIT and the ICSID Convention are suppose to contribute to the same cause; so, it is in coexistence that they form a complete treatment of foreign investors that fully considers all aspects of investors' rights.

The second question is what can be considered a more favorable treatment. The analyzed practice of ICSID tribunals does not answer this question. The history of international arbitration indicates that there were conflicting opinions on this issue. In *Maffezini*, it was considered that "traders and investors, like their States of nationality, have traditionally felt that their rights and interests are better protected by recourse to international arbitration than by submission of disputes to domestic courts, while the host governments have traditionally felt that the protection of domestic courts is to be preferred".[23]

Yet, for the purpose of critical analysis of the tribunal's reasoning, it is important to note that in *Maffezini*, even though the tribunal considered that there are elements that are satisfactory to conclude that ICSID jurisdiction can be established on the basis of the MFN clause, the tribunal at no time estimated the work of Spanish courts to determine if they really were less effective in protecting the rights of investors than ISCID arbitration (Cole, 2010: 30).

In *Plama*, the tribunal took it a step further and considered some of the difficulties that may arise out of this question: "The Claimant argues that it is obviously more favorable for the investor to have a choice among different dispute resolution mechanisms... The Tribunal is inclined to agree with the Claimant that, in this particular case, a choice is better than no choice. But what if one BIT provides for UNCITRAL arbitration and another provides for ICSID? Which is more favorable?"[24]

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[21] *Emilio Agustín Maffezini v. Kingdom of Spain*, supra note 4, paragraph 54
[22] *Plama Consortium Limited v. Republic of Bulgaria*, supra note 6, paragraph 193
[23] *Emilio Agustín Maffezini v. Kingdom of Spain*, supra note 4, paragraph 55
[24] *Plama Consortium Limited v. Republic of Bulgaria*, supra note 6, paragraph 208

The formula that can be used to overcome these difficulties might be to establish whether the forum for settlement of investment disputes agreed upon in a third-party agreement would do a better job of enforcing the substantive rights granted in the BIT than the procedure incorporated into the basic treaty (Cole, 2010: 73).

2.2.4. Determining if exceptions to the application of the MFN clause apply to particular case

In *Maffezini*, even though the tribunal adopted extensive interpretation of the possibility to use the MFN clause in relation to procedural aspects of investment treatment, the Tribunal set some very important limitations: "As a matter of principle, the beneficiary of the 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, particularly if the beneficiary is a private investor, as will often be the case. The scope of the clause might thus be narrower than it appears at first sight."[25] The tribunal then enumerated examples on what these public policy considerations might be[26]:

- "if one contracting party has conditioned its consent to arbitration on the exhaustion of local remedies… this requirement could not be bypassed by invoking the most favored nation clause in relation to a third-party agreement that does not contain this element since the stipulated condition reflects a fundamental rule of international law fundamental rule of international law";
- "if the parties have agreed to a dispute settlement arrangement which includes the so-called fork in the road, that is, a choice between submission to domestic courts or to international arbitration, and where the choice once made becomes final and irreversible, this stipulation cannot be bypassed by invoking the clause";
- "if the 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";
- "if the parties have agreed to a highly institutionalized system of arbitration that incorporates precise rules of procedure… it is clear that neither of these mechanisms could be altered by the operation of the clause because these very specific provisions reflect the precise will of the contracting parties".

In *Plama*, the Tribunal also set some limitations: "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."[27]

In *Maffezini*, the Tribunal adopted a principle with multiple exceptions but, in *Plama*, the Tribunal concluded that "instead there should 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."[28]

Given that the tribunals are always required to interpret provisions of investment treaties and determine their scope in regulating mutual rights of parties to the dispute by applying

[25] *Emilio Agustín Maffezini v. Kingdom of Spain,* supra note 4, paragraph 62
[26] Ibid., paragraph 63
[27] *Plama Consortium Limited v. Republic of Bulgaria*, supra note 6, paragraph 209
[28] Ibid., at paragraph 223

these provisions to each specific case, the reasoning of the Tribunal in *Maffezini* might be taken as a governing principle in resolving future cases: "It is clear, in any event, that a distinction has to be made between the legitimate extension of rights and benefits by means of the operation of the clause, on the one hand, and disruptive treaty-shopping that would play havoc with the policy objectives of underlying specific treaty provisions, on the other hand."[29]

3. International Environment and the Changing Nature of Aribtrators' Role

Previous examples and analysis give solid basis for deciding on jurisdictional aspects of investment disputes. But it is not just deliberations on legal aspects of this matter that should be taken into account. International investment law is still is still developing; it should develop in compliance with the current tendencies in the contemporary world and reflect all the relevant problems and issues from the international arena. The attitude towards establishing ICSID jurisdiction by pursuing the application of the MFN clause to BIT procedural provisions might depend on the way these tendencies are implemented in shaping the system of investment disputes resolution. These considerations form an ideological framework, within which legal analysis should take place. How far-reaching future decisions of ICSID tribunals might be ultimately depends on how the role of the investment disputes settlement system and the role of arbitrators is positioned.

The decision reached in *Maffezini* has set in the center of attention the need to reconsider ways to find a balance between the legitimate expectations of both disputing parties and the observance of the legal regime agreed between them. In that course, it is worth taking into consideration that capital-exporting countries have become capital-importing countries, which implies that they no longer have the interest in only securing investors' rights. As a consequence, there is a shift towards private-public debate in which there is a clash of state sovereignty and corporate sovereignty (Shan, 2006: 31). In order to regulate the investment, this poses the question how to balance between the rights of the investors and the right of the host state. This tendency is also visible in investment disputes and the issues related to the protection of investors are well-illustrated by the conception which is designated as: "private rights, public problems" (Puig, 2013: 36). The nature of investment disputes has changed and investors are now able to challenge host countries' regulatory activities. These disputes concern complex domestic legal issues reaching beyond international investment law (Karl, 2013: 1). It is not only that the concerns of investment disputes have shifted from traditional questions of expropriation and nationalization to more demanding contents; moreover, arbitrations implicate the scope of regulatory powers of the respondent states. In addition, a broad variety of public goods disputes has come to be addressed trough investment arbitration (Burke-White, Von Staden, 2010: 2). When arbitrating, tribunals must be aware that these kinds of disputes always involve significant social interests. This means that the outcomes of investment disputes affect more than just relations in business sphere. In such conditions, the *inter partes* nature of investment agreements and disputes arising from them comes into question.

[29] *Emilio Agustín Maffezini v. Kingdom of Spain,* supra note 4, paragraph 63

Bearing in mind the changed nature of investment disputes, the significant effects they might have on the community which they originated from as well as the impact on further development of investment law, it is legitimate to wonder to what extent the arbitrators are Agents of contracting parties, and to what extent they are Agents of global community (Stone Sweet, 2010: 4). The answer to this question would reflect the level of credibility arbitration enjoys in the public eye, and how much power the parties to BITs are willing to vest in the arbitrators. In terms of the arbitrators' role and tasks, there are two features which are important for answering this question: the ground for legitimacy of the arbitrators' power and the classification of legal issues, i.e. which area of law the disputed issues fall into. It is safe to say that the legitimacy of arbitral power is not initially problematic as it is based on an act of delegation of powers to which the parties have freely consented (Stone Sweet, 2010: 11). But once the arbitrators start to arbitrate, there is a shift in their position in relation to the disputing parties. At this point, the simple notion that arbitrators are agents of the parties must be reconsidered. This can be explained as a functional change in the arbitral power legitimacy, which is derived from the tasks they must fulfill. Tribunals cannot be viewed solely as agents of the contracting parties because they are tasked to impartially resolving disputes between investors and states and enhance the credibility of the contracting parties' commitments, which requires a meaningful degree of independence (Roberts, 2013: 18-19). Furthermore, their power is derived from the notion that any transnational contract that contains an arbitration clause and any transnational commercial arbitration are embedded in a larger system of law (Stone Sweet, 2010: 12). The issues raised before international arbitration tribunals can be best understood as public law issues. The arbitrations which may be classified as falling within the scope of public law are those in which the arbitral tribunal has to consider the State's power and to establish the legal authority of the State to regulate the issue in the public interest. The ICSID arbitrators should come to understand their role as public law actors and recognize that their awards have impacts well beyond the direct case at hand (Burke-White, Von Staden, 2010: 3, 6, 64).

Previous considerations show that issues that arbitrators deal with involve public law obligations and raise significant issues of public concern (Roberts, 2013: 18-19). They also demonstrate greater latitude given to the arbitrators' role, which is prominent in the arbitrators' powers and the independence necessary to perform these tasks. With that in mind, this analysis of the previous cases adjudicated by the ICSID, placed in the context of the altered nature of investment disputes, shows that arbitrators need to observe and combine the following tasks:

1. to respect the mandate and limits of the authority given to them by the arbitration agreement, for two very important reasons:
   1.1. it is in line with the autonomy of will of the disputing parties, which is essential for arbitration proceedings, and
   1.2. pursuant to article 52 of the ICISD Convention, an arbitral award may be annulled if the Tribunal has manifestly exceeded its powers;
2. to accept and embed in arbitral decisions a broader concept of public interest, and relevant social circumstances in which the investment dispute has occurred, not limiting themselves solely to the effects that the disputes may have to the parties in question, but to the community.

This is in line with considerations that could be found in literature that, given the fact that global economy is in deep crisis, many of the states are going to be compelled to introduce a wide range of measures to preserve national economies, frequently unpopular with foreign investors (Stone Sweet, 2010: 24). This might expose them to claims before international arbitrations, in which the arbitrators will have to deal with state's regulatory authority but also with assessing public interests that were meant to be preserved with measures in question. Subjecting themselves to such proceeding cannot be appealing to the states, especially if they consider the possible outcomes. So if the ICSID does not develop a coherent framework for dealing with these cases, the system could well collapse (Stone Sweet, 2010: 24). Accepting the change in understanding the role of arbitrators might be a step forward in this direction because it would add to greater sensitivity to all the issues that need to be addressed when resolving investment disputes. This is in accordance with the reasoning that failure to pay under the award will not only be a violation of a State's obligation to the investor but also a breach of the State's international obligations towards other contracting states to the convention (Lin, 2012: 4). Since there are greater interests at stake, responsibility of the relevant actors needs to be brought to a higher level.

4. CONCLUSION

Arbitral proceedings rely on the autonomy of will of the disputing parties. It is up to them to decide upon the path for the resolution of their dispute and the authority before which the dispute will be resolved. Even so, Article 41 of the ICSID Convention stipulates that the tribunal shall be the judge of its own competence. Clearly the Convention does not empower the tribunals solely to be executors of the parties' will but also gives them more independence and authority to reach decisions in respect of their own competences on the basis of their own knowledge and conviction, which may not always be in accordance with the interests of the disputing parties. Being able to establish jurisdiction even if it was not specifically contracted can be viewed as one aspect of this authority. Establishing ICSID jurisdiction by pursuing the application of the MFN clause can be interpreted as a form of converting arbitration into a judicial institution. Solid arguments could be made that such application of clauses contained in investment treaties goes beyond the purpose and spirit of the ICSID Convention; thus, this manner of interpretation cannot be allowed as it is not in line with the basic rules set out in this Convention. However, when trying to set the rules for future behaviour of actors relevant for shaping international investment law, it must not be forgotten that investment law is constantly developing. This development must not be detached from the reality but reflect the latest developments in the immediate environment. As demonstrated, relations between states and investors have changed. This change is embedded in investment disputes and it is time to face the fact that the change must encompass the powers of arbitrators in charge of resolving such disputes. They are currently dealing with public law concerns; as their decisions may have a greater impact on the international community, it can be argued that they are acting as agents of that particular larger community. The arbitrators do not only focus their attention on the disputing parties, nor do they intend to narrow and privatize the subject matter of dispute. If we understand that the role of arbitrators has changed in this direction, then we are on a good path to allow extensive interpretations when the arbitral tribunals decide on their own competence. The

analysis of relevant case law shows that establishing the jurisdiction of ICSID tribunals by relying on the application of the MFN clause can lead to difficulties in practice. However, these difficulties are not sufficient reason to dismiss the possibility of allowing for the application of the MFN clause in respect of procedural rights.

As this article shows, changes in the international environment provide sufficient arguments to modify the role of arbitrators that would allow them more freedom, independence and more maneuver space, until they reach the point where they may be deemed to have exceeded their powers. Furthermore, relevant cases show that there are certain rules that can be used when determining whether ICSID jurisdiction can be established. It is true that these rules are not set in stone, and perhaps it would be more precise to describe them as guidelines rather than rules. It should also be noted that tribunals have reached different decisions in different cases when it comes to establishing ICSID jurisdiction on the basis of the MFN clause. Yet, it is not a novelty in law that, whenever there is a need to subsume a particular case under the legal standard, it is the question of interpretation how this will be done. It is therefore important to create an ideological framework that would steer these interpretations.

Using the MFN clause for establishing ICSID jurisdiction raises the degree of the arbitrators' discretionary authority, which is in line with the conception that their role has grown out of *inter partes* nature of investment disputes. This concept reflects the changed nature of investment disputes but its sustainability depends on the political will of actors involved. Ideally, it could be viewed as a progressive development in international investment arbitrations, as long as the law, legal stability and balance of competing interests are preserved, and as long as the arbitrators make the effort to suppress the possibility of abuse of rights. This notion is well-illustrated in the decision reached in *Maffezini*, and it should be embedded in future decisions dealing with these issues: "It is clear, in any event, that a distinction has to be made between the legitimate extension of rights and benefits by means of the operation of the clause, on the one hand, and disruptive treaty-shopping that would play havoc with the policy objectives of underlying specific treaty provisions, on the other hand."[30]

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PRIMENA MFN KLAUZULE NA PROCEDURALNE ODREDBE BIT-A – MOGUĆNOSTI ZA ZASNIVANJE NADLEŽNOSTI ICSID CENTRA ZA REŠEVANJE INVESTICIONIH SPOROVA

Ovaj članak istražuje probleme vezane za zasnivanje nadležnosti ICSID centra primenom MFN klauzule na odredbe BIT-a kojima je uređeno rešavanje investicionih sporova. Imajući u vidu da takva primena ove klauzule zahteva ekstenzivnu interpretaciju BIT-a u kome je sadržana, praksa ICSID tribunala u ovoj oblasti je izazvala brojne polemike u stručnoj i akademskoj javnosti. U pitanje je dovedena stabilnost, predvidivost i pravna sigurnost u oblasti međunarodnog investicionog prava i, još značajnije, dalji razvoj ove oblasti prava – posmatrano u kontekstu ovlašćenja arbitara. Članak analizira tri reprezentativna slučaja u kojima su ICSID tribunali doneli odluke o svojoj nadležnosti primenjujući MFN klauzulu: Maffezini, Plama i Salini. Na osnovu ove analize ovih slučajeva, predlažu se smernice koje bi mogle da se primenjuju u budućim sporovima koji se budu našli pred tribunalima ICSID centra. Ove smernice su vezane za savremene tendencije na međunarodnoj sceni, koje bi trebalo da se uzmu u obzir kao pokazatelji daljeg pravca u razvoju međunarodnog investiciong prava.

Ključne reči: *MFN klauzula, investicioni sporovi, nadležnost ICSID centra*.