Class 4
Most-Favored Nation and National Treatment

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UNDERSTANDING NATIONAL TREATMENT

National treatment?

Stems from WTO law

- Definition?
- Article III of the GATT:
- GATT Article III Paragraph 1 articulates in a manner of general principle, a broad rule that encompasses both taxation ('internal charges and internal charges') and regulation ('regulations and requirements') which might lead to discrimination against foreign products and protection of domestic production
- **Article III Paragraph 1** states clearly that the **purpose** of Art. III is to avoid protectionism in favour of domestic products by the favourable treatment of tax law and other regulations. The ultimate goal, is in fact, to ensure that the conditions of competition within the State 's market are not modified by governmental action so as to advantage the domestic production over foreign products.

UNDERSTANDING NATIONAL TREATMENT

BITs and FTAs (e.g. NAFTA 1102) share a common language that usually stipulates: 'the foreign investor and its investments shall be accorded treatment **no less favourable** than that which the host states accords, in like circumstances, to its own investors.'

Examples?

As a general norm, the State is obliged not to provide less favourable treatment to foreigners (**negative differentiation**) that what it provides its nationals.

However, under special circumstances and specific international obligations, the State may actually be required to provide higher standards of protection to foreigners, when the national treatment is below what international law affords to international investors (**positive differentiation**).

UNDERSTANDING NATIONAL TREATMENT

COMPARISON WITH WTO SYSTEM

- Textual differences

"like products" in WTO / "like circumstances" in IIL

- Contextual differences

In context of GATT 'like' means in a comparative relationship

- Systemic differences

WTO is intended as state-to-state system / IIL is investor-state

- Differences in remedies

WTO provides for prospective remedies e.g. withdrawing the measures / IIL provides for compensation

TEST FOR NATIONAL TREATMENT

How to compare the circumstances and treatment to investors?

3-step test:

(a) Is the investor in **'like circumstances'** with the national investor?

(b) Is there a difference in treatment?

(c) Is the differentiated treatment justified?

LIKE CIRCUMSTANCES

How to determine 'likeness'?

- treaty interpretation under VCLT

Tribunals have held that the words of the NT clause need to be interpreted in the light of the overall legal context in which it is placed, such as *free trade protection* (non-distortion of trade), etc.

For example, in ***SD Myers***, the Tribunal acknowledged that: '*the interpretation of the phrase 'like circumstances' in NAFTA 1102 must take into account the general principles that emerge from the legal context of the NAFTA, including both its concern with the environment and the need to avoid* ***trade distortions*** *that are not justified by environmental concerns. The assessment of like circumstances must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest. The concept of like circumstances invites an examination of whether a non-national investor complaining of less-favourable treatment is in the same 'sector' as the national investor. The* Tribunal *takes the view that the word 'sector' has a wide connotation and includes the concepts of '****economic sector****' and '****business sector'****.*

LIKE CIRCUMSTANCES

Does the concept of likeness require a competitive relationship between the foreign and domestic investor in IIL?

What is the purpose of national treatment clause?

Should there be analogies with the WTO law?

LIKE CIRCUMSTANCES

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LIKE CIRCUMSTANCES

SD Myers v. Canada (NAFTA) was the first case on NT in IIL and concerned a US national investor that made an installation in Canada for PCB toxic waste cleansing of equipment (see above). The claimant asserted that the Interim Order discriminated against U.S. waste disposal operators who sought to operate in Canada by preventing them from exporting PCB contaminated waste for processing in the USA.

In considering the meaning of "like circumstances" under Article 1102 of the NAFTA, it is similarly necessary to keep in mind the overall legal context in which the phrase appears. The Tribunal considers that the interpretation of the phrase "like circumstances" in Article 1102 must take into account the general principles that emerge from the legal context of the NAFTA, including both its concern with the environment and the need to avoid trade distortions that are not justified by environmental concerns.

LIKE CIRCUMSTANCES

The concept of "like circumstances" invites an examination of whether a non-national investor complaining of less favourable treatment is in the same "sector" as the national investor. **The Tribunal thus takes the view that the word "sector" has a wide connotation that includes the concepts of "economic sector" and "business sector"**. From the business perspective, it is clear that SDMI and Myers were in "like circumstances" with Canadian operators: they all were engaged in providing PCB waste remediation services. SDMI was in a position to attract customers that might otherwise have gone to the Canadian operators because it could offer more favourable prices and because it had extensive experience and credibility.

The case of ***SD Myers*** takes an approach in favour of **competitive relationship:** by comparing the two operators functioning in the same sector and recalling the purpose of avoiding 'trade distortion' within the same 'business sector' by attracting customers through more favourable prices, it is clear that it upheld the competitive relationship criterion.

LIKE CIRCUMSTANCES

Occidental* v. *Ecuador: this case was about a US company, *Occidental,* which was engaged into producing and exporting oil in Ecuador. Until 2001, Occidental received refunds for VAT tax paid on purchases required to perform certain activities under the contract; under Ecuadorian tax law, exporters were entitled to VAT refunds on the purchase of goods as parts of their exporting activities. In 2001, the national tax authority refused to Occidental the VAT refunds, on the grounds that the new contract with Petroecuador (its local partner) provided a new formula of remuneration (Petroecuador was also denied the refunds).

Occidental brought a claim for a breach of the NT provision, claiming that it had been afforded less favourable treatment than enterprises that were not involved in petrol-related products' exports (such as flowers or sea food) and that constituted a violation of the NT obligation. As a matter of law, Occidental invited the Tribunal to disengage the interpretation of 'likeness' from the existence of a competitive relationship and to allow for protection under NT even when the benefit is not granted to a local operator in the exact identical position or even sector and thus when there is no competitive relation.

Ecuador, on the other hand, sought a delineation of the NT obligation in line with the jurisprudential sequence of *SD Myers* and so on, according to which likeness is related to *competitive relationship in the same economic sector.* Given that *Occidental's* economic competitor in the export oil sector had also suffered a denial of VTA refunds, there had been no breach of NT obligation.

LIKE CIRCUMSTANCES

"in like situations" cannot be interpreted in the narrow sense advanced by Ecuador as the purpose of national treatment ***is to protect investors as compared to local producers,*** *and* ***this cannot be done by addressing exclusively the sector in which that particular activity is undertaken.*** *The* Tribunal *is mindful of the discussion of the meaning of "like products" in respect of national treatment under the GATT/WTO. In that context it has been held that the concept* ***has to be interpreted narrowly and that like products are related to the concept of directly competitive or substitutable products.*** *However, those views are not specifically pertinent to the issue discussed in this case. In fact, the purpose of national treatment in this dispute is the opposite of that under the GATT/WTO, namely it is to avoid exporters being placed at a disadvantage in foreign markets because of the indirect taxes paid in the country of origin, while in GATT /WTO the purpose is to avoid imported products being affected by a distortion of competition with similar domestic products because of taxes and other regulations in the country of destination.' In the first situation, no exporter ought to be put in a disadvantageous position as compared to other exporters, while in the second situation the comparison needs to be made with the treatment of the "**like" product and not generally**.*

In any event, the reference to "in like situations" used in the Treaty seems to be different from that to "like products" in the GATT/WTO. ***The "situation" can relate to all exporters that share such condition, while the "product" necessarily relates to competitive and substitutable products.*** *In the present dispute the fact is that OEPC has received treatment less favourable than that accorded to national companies…The* Tribunal *accordingly holds that the* ***Respondent has breached its obligations under Article II (I) of the Treaty****".*

LIKE CIRCUMSTANCES

Understanding the award:

(1) The Tribunal starts in § 167 with text of the treaty: Article II (I) of the Treaty establishes the obligation to treat investments and associated activities "on a basis no less favourable than that accorded in like situations to investment or associated activities of its own nationals or companies"

(2) The Tribunal explains that 'like situations' are not solely confined to situations where there is a direct competition relationship with a domestic producer in the same economic sector, but also in cases where such competitive relationship is more loose and lenient. This, in the Tribunal's view, is consistent with the teleological interpretation of the BIT in view of its object and purpose, that is to protect investors from being treated in a less favourable way than domestic producers as such, whereas the GATT's object is to afford equal treatment to the products, vis-à-vis the products in direct competitive relationship.

Do you agree?

LIKE CIRCUMSTANCES

the real issue with *Occidental* is the failure of the Tribunal to draw the line between **National Treatment** on one hand and **fair and equitable treatment** on the other. In fact, in the NAFTA case ***Lowens***, the Tribunal held that the treatment of the investor animated by prejudice or bias against foreign nationality was to be disciplined as a violation of the Fair and Equitable Treatment Standard! In other words, **FET contains a non-discrimination obligation that may be broader or narrower than NT, but definitely protects investors against discriminatory treatment regardless of the existence of a competitive relationship**. The real quest is thus not to interpret WTO law and NT in IIL in clinical isolation, but rather to examine how the both relate to a broader concept: **discrimination against aliens.** Thus, the *root* of the problem in *Occidental* was not the misreading of WTO law but the **failure of division of labour between FET and NT obligations**.

LIKE CIRCUMSTANCES

Methanex v. the USA was the second case where the Tribunal examined the application of the competitive relationship with respect to the 'likeness' criterion in the NT clause. *Methanex* and *Occidental* are similar, to the extent that they reject competition as a criterion for likeness, however they are fundamentally different, inasmuch as *Occidental* ruled that competition-criterion is **unduly restricting** the NT protection, whereas *Methanex* ruled that competition-criterion is **unduly broadening** the NT protection.

LIKE CIRCUMSTANCES

Methanex was about a Californian ban on the use of MTBE (*methyl tertiary butyl ether*), an oxygenate enhancer used in gasoline. The use of oxygenates (ethanol, methanol) in refined petroleum was designed to reduce air pollution caused by gasoline. Methanex was a Canadian corporation and a major producer of Methanol (a key component of MTBE); when Canada imposed a wholesale ban on MTBE [on the grounds that it contaminated drinking water supplies due to leaking underground storage tanks and thus posed a threat to human health], Methanex claimed that there had been a breach of the NT obligation, because the ban of MTBE, even though it was imposed on *all* methanol producers (nationals and foreigners), was not applied to the national industry of *ethanol,* a different oxygenate (substitutable to methanol) used in gasoline refinement, thus affording protectionism in favour of national producers within the same market. In other words, while methanol would be banned, other oxygenates, such as **ethanol** could be continued to be used in the Californian market.

LIKE CIRCUMSTANCES

In order to substantiate its claim, *Methanex* asserted that the likeness between methanol and ethanol producers could be based on the fact that both ethanol and methanol were substitutable products and they were both competing for the same customers in the *oxygenates'* market [the oxygenates being the main economic sector]. Relying on the pre-*Occidental* jurisprudence, *Methanex* claimed that competition was a requisite for NT and thus, its scope had to be **widened**, in order to contain not only products that were physically identical (e.g. methanol) but also products different in their physical characteristics, but which were in a direct relation of competition. On this basis, it is irrelevant that Methanex is in identical circumstances with other US methanol producers and that it is not in identical circumstances with US ethanol producers. Methanol and ethanol are capable of serving the same or similar end uses, and consumers have perceived and treated methanol and ethanol as alternatives. Further, applying the highly similar GATT "like products" test also leads to the conclusion that ethanol and methanol are "like".

"If two or more investors or their investments compete for the same business, they are in 'like circumstances'" for the purposes of Article 1102, S. D. Myers v. Canada, Partial Award, (2001) 40 ILM 1193, para. 303.

LIKE CIRCUMSTANCES

The US, on the other hand, claimed that NT protection had to be limited to **identical products** (or at least to products most closely situated to it) and NT clause is intended to address simple discrimination based on nationality of the investment and the likeness test should be effected in comparison to a domestic actor '*that is like in all respects but for nationality*' [Pt. IV, Ch. B, § 14]. The function of addressing nationality-based discrimination is served by **comparing the treatment of the foreign investor to the treatment accorded to a domestic investor that is most similarly situated to it.** In ideal circumstances, the foreign investor or foreign-owned investment should be compared to a domestic investor or domestically-owned investment that is like it in all relevant respects, but for nationality of ownership. When nationality is the only variable, such a comparison serves the Article's purpose of ascertaining whether the treatment accorded differed on the basis of nationality.

The USA, on the other hand, notes that methanol and ethanol differ chemically, and contends that the products have different end uses. Only ethanol is an oxygenate additive to gasoline while methanol is not a gasoline oxygenate and, moreover, is prohibited from being used as such under United States federal law; it is a feedstock for the production of MTBE which is then used as an oxygenate for gasoline. The USA also notes that the two products do not share the same tariff classification under the Harmonized System of Tariffs. In addition, the USA argues that the consumer taste test is not relevant, because the products are not in competition.

LIKE CIRCUMSTANCES

The Tribunal, thus, had to define the concept of the **comparator** for purposes of like circumstances. Methanex's methodology begins by assuming that its comparator is the ethanol industry, while the USA proposes a procedure in which the comparator that is to be selected is that domestic investor which is like or, if not like, then close to the foreign investor in all relevant respects, but for nationality of ownership (the methanol industry). In the Tribunal's view, simply to assume that the ethanol industry or a particular ethanol producer is the comparator here would beg the question.

By looking into Art. 1102 NAFTA, it underlined that "*it would be as perverse to ignore **identical comparators** if they were available and to use comparators that were less "like", as it would be perverse to refuse to find and to apply **less "like" comparators** when no identical comparators existed…. It would be a forced application of Article 1102 if a* Tribunal *were to ignore the identical comparator and to try to lever in an, at best, approximate (and arguably inappropriate) comparator*".

LIKE CIRCUMSTANCES

The Tribunal observed that NAFTA, as a treaty, is to be interpreted in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which codifies the customary international rules of treaty interpretation. Hence, the Tribunal begins with an inquiry into the plain and natural meaning of the text of Article 1102. Paragraphs 1, 2, and 3 of Article 1102 enjoin each Party to accord to investors or investments of another Party "treatment no less favourable than that it accords, in like circumstances, to its investors. **These provisions do not use the term of art in international trade law, "like products", which appears in and plays a critical role in the application of GATT Article III.** Indeed, the term "like products" appears nowhere in NAFTA.

LIKE CIRCUMSTANCES

It may also be assumed that **if the drafters of NAFTA had wanted to incorporate trade criteria in its investment chapter by engrafting a GATT-type formula, they could have produced a version of Article 1102 providing for NT treatment *in like circumstances with respect to any like, directly competitive or substitutable goods.*** And it would be unwarranted for a Tribunal interpreting the provision to act as if they had, unless there were clear indications elsewhere in the text that they had wished to do so. **In fact, the intent of the drafters to create distinct regimes for trade and investment is explicit in the very definition of investments under NAFTA**. Therefore, the text and the drafters' intentions, which it manifests, show that trade provisions were not to be transported to investment provisions. Accordingly, the Tribunal holds that 1102 is to be read on its own terms and not as if the words "any like, directly competitive or substitutable goods" appeared in it. Hence, the Tribunal held that there was no breach of NT.

Do you agree?

DIFFERENCE IN TREATMENT

The foreign and domestic investor must be treated in a different manner, for the NT clause to apply. The existence of differentiation poses two main questions:

(a) Does differentiation require a discriminatory intent?

(b) Does differentiation have to be *de jure* or may it also be *de facto*?

(c) Does differentiation has to be based on a nationality criterion?

DIFFERENCE IN TREATMENT

The existence of discrimination does not depend upon discriminatory intent. In the context of NAFTA, the Tribunal held that '*the intention to discriminate is not a requirement for a breach of 1102 NAFTA*'. If such intention is shown, this is conclusive and sufficient for a violation of the 'less favourable treatment' requirement. If, however such intention is not shown, the fact that the adverse effects of the [tax] were felt exclusively by the [foreign] producers and suppliers, all of them foreign-owned, to the benefit of [domestic] producers, the majority of which were Mexican-owned, would be sufficient to establish that that requirement was satisfied (*Corn Products* v. *Mexico,* NAFTA Tribunal).

The existence of discrimination does not depend upon the absence of a public welfare policy objective. In ***Corn Products* v. *Mexico***, the impugned measures were taken by the Mexican government to address an emerging crisis in the sugar production industry. The Government contended that it did not treat differently the foreign investors, because the measure pursued a social policy aim, to prevent the crisis. The Tribunal dismissed the argument saying: '***discrimination does not cease to be discrimination, nor to attract the international liability stemming therefrom, because it is undertaken to achieve a laudable goal or because the achievement of that goal can be described as necessary***' (§142).

The existence of discrimination may be *de facto*, if the claimant has felt the effects of discrimination. The fact of less favourable treatment will be sufficient (*Thunderbird* v. *Mexico)*. The nationality criterion is not a

IS DIFFERENT TREATMENT JUSTIFIED

- **It is generally accepted that a differential treatment does not violate the NT obligation, if there are 'rational grounds'** [**Dolzen, Schreuer**].
- **These measures must be taken in the public interest** [*SD Myers,* § 250] and
- **pursue a legitimate policy goal** [*GAMI* v. *Mexico,* §§ 114-5].
- Nonetheless, it must be borne in mind that there is no '**equality in injustice**': if the measure is taken because the conduct of the investor is illegal, the investor cannot claim a violation of the NT clause because the law is not uniformly applied to national investors.
- In ***Thunderbird***, the measure at stake was a set of sanctions for illegal gambling. Even though the laws were not equally applied on nationals, the investor could not rely on this lack of consistency to substantiate a violation of NT clause to excuse itself from breaking the laws (no equality in injustice).

MOST-FAVOURED NATION TREATMENT

What is MFN?

'MFN standard is defined as treatment accorded by the granting State to the beneficiary State or to persons or things in a determined relationship with that state, not less favourable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third state.'

MOST-FAVOURED NATION TREATMENT

4 key components:

1. **The basic obligation:** the promisor State undertakes to grant, automatically and unconditionally a particular level of 'treatment' to the other party (the State or things or persons that are in a defined relationship with the State). In the specific context of IIL, that relationship is that the investor or the investment has to bear the nationality of the contracting party. What is 'treatment' in the ordinary meaning of the term has been the source of a lot of controversy in IIL.
2. **No less favourable:** the level of treatment to be granted is at least the same as that accorded to other states/things/persons. Hence, MFN is a standard of relative and not absolute protection: if no treatment is accorded to third states, the MFN claim-owner has absolutely no claim.
3. **The MFN obligation applies to treatment falling in the same category of treatment as the one granted to the third state/thing/person.** In other words, the beneficiary State acquires for itself or things/persons in a determined relationship with it, only those rights falling within the limits of the subject matter of that clause.
4. **The persons/things/states entitled to MFN are limited to those being in the same category as those entitled to the treatment being claimed, in the third state.**

MFN IN SUBSTANTIVE PROVISIONS

Very limited case law

- In ***AAPL v. Sri Lanka***, the claimant relied on the MFN clause in the UK-Sri Lanka BIT to claim for the better treatment contained in the 'war clause' provided for in the Switzerland-Sri Lanka BIT. The claimed failed to prove that the 'war clause' actually afforded a more favourable treatment.

- In ***ADF v. the USA***, the claimant relied on the MFN clause and sought for optimal protection under the 'minimum standard of treatment' of the NAFTA, in comparison with the US-Albania and US-Estonia BITs. The Tribunal rejected the claim, because the claimant failed to prove that even in the abstract, the two treaties provided for more favourable treatment.

MFN AND DISPUTE SETTLEMENT PROVISIONS

The operation of the MFN clause becomes complex when the claimant strategically uses the MFN clause in order to assert a claim on the most favourable nation obligation on the basis of more favourable procedural provisions agreed upon with another party in another BIT

For example, a State may use the MFN clause in order to obtain access to procedural rights contained in a third party treaty, such as: **(aa)** access to international arbitration through a jurisdictional clause embedded in another treaty, **(bb)** choice between various types of arbitration (*ad hoc* or institutional) when the basic treaty does not offer for options to the investor, **(cc)** a broad dispute settlement jurisdictional provision, when the basic treaty provides only for limited jurisdiction *ratione materiae,* such as a provision allowing only for the determination of damages in case of expropriation etc. Almost all of these questions have been addressed in the jurisprudence but the response has not been unanimous.

MFN AND DISPUTE SETTLEMENT PROVISIONS: MAFFEZINI

The ***Maffezini* v. *Spain*** award is the first award to address the application of MFN to procedural provisions. The case concerned a claim brought by an Argentinian investor against Spain. The Argentina-Spain BIT provided for a special dispute settlement mechanism: the investor had to negotiate for at least 6 months, following which he had to submit the dispute to the national courts of the respondent party; if the case were not settled before domestic courts within 18 months, then the treaty provided for recourse to arbitration before a Tribunal. Maffezini claimed, on the basis of the MFN principle, that it should be allowed access to arbitration without observing the 18-month period limitation, relying on the more favourable provisions of the Chile-Spain BIT. In its view, since the BIT provided that investors should be accorded no less favourable treatment than that accorded to investors of other states, then procedural prerogatives (such as arbitration proceedings) constituted a more favourable treatment and should thus be allowed to *Maffezini* as well.

MFN AND DISPUTE SETTLEMENT PROVISIONS: MAFFEZINI

As a matter of law, the Tribunal had to apply or not the ***ejusdem generis* principle**, according to which a statute that refers to a vague and broad category of matters regulated under its normative scope, applies to all matters that are similar to the matters referred to it. For example, the MFN clause referred explicitly to matters related to the **protection and promotion of investments.** So the question was whether, procedural mechanisms under a third-party BIT may be deemed as provisions taken for the protection and promotion of investments, thus calling for the application of the MFN clause. Of course, for the *ejusdem generis* principle to operate, the third-party treaty has to relate to the same subject matter as the basic treaty (namely, the protection/promotion of the investments), otherwise that would violate the *ejusdem generis* principle.

The Tribunal, quite surprisingly**, upheld Maffezini's approach**. The Tribunal held that:

'*notwithstanding the fact that the basic treaty containing the clause does not refer expressly to dispute settlement as covered by the MFN 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, as they are also related to the protection of rights of traders under treaties of commerce.'***

MFN AND DISPUTE SETTLEMENT PROVISIONS: MAFFEZINI

'*notwithstanding the fact that the application of the MFN clause to dispute settlement arrangements in the context of investment treaties might result in the harmonization and enlargement of the scope of such arrangements* ***there are important limits that ought to be kept in mind.***

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.*'

MFN AND DISPUTE SETTLEMENT PROVISIONS: MAFFEZINI

The Tribunal went on to enumerate some examples of public policy considerations, such as:

(1) **the exhaustion of domestic remedies**, it being a 'fundamental rule of international law'

(2) **the 'fork-in-the-road' clause**: when the treaty provides that the investor has the right to choose between domestic courts and arbitration, while the option being final and irreversible once made; this serves the public policy of finality and legal certainty in an investment dispute.

(3) **the choice of arbitration forum** such as ICSID cannot be surpassed by invoking the MFN clause with reference to another choice of forum, in another treaty.

(4) **the option of a highly institutionalized system of arbitration** through precise rules of procedures (e.g. NAFTA), as those rules reflect the specific will of the parties that may not be circumvented.

MFN AND DISPUTE SETTLEMENT PROVISIONS: PLAMA

Plama* v. *Bulgaria, that is in stark contrast with *Maffezini*. In the *Plama* case, a Cypriot investor relied on the Cyprus-Bulgaria BIT, that provided for an MFN clause. The BIT also provided for *ad hoc* arbitration, only for disputes related to the calculation of compensation in case of expropriation. Relying on the MFN clause, the claimant sought for ICSID arbitration, to the effect that the Bulgaria-Finland BIT allowed for ICSID jurisdiction for all matters related to investment disputes.

The investor sought for an application of the MFN clause in accordance with the *Maffezini* award. However, the Tribunal ***rejected this argument*** and applied the procedural provisions of the basic treaty. Either directly (in some §§) or indirectly, the Tribunal criticized the *Maffezini* reasoning and rejected the extension of the MFN clause to procedural provisions, on the following grounds:

MFN AND DISPUTE SETTLEMENT PROVISIONS: PLAMA

1. The ordinary meaning of 'treatment': it is doubtful whether the procedural provisions on dispute resolution fall within the concept of 'treatment', for the MFN clause to apply in the first place (*Plama*). In accordance with the VCLT, the terms of the treaty need to be given their ordinary meaning and it is not clear whether such provisions satisfy the *ejusdem generis* principle.

2. The distinction between procedural and material rights: on a textual basis, in *Plama,* the BIT's clause on MFN provided for MFN on 'privileges'; this may be deemed as relating to substantive protection guarantees and **not** procedural guarantees, thus excluding the application of MFN to procedural provisions (*expressio unius est exclusio alterius - Plama*). The Tribunal seemed to imply a distinction between procedural and material rights, that became highly controversial point in subsequent case-load.

MFN AND DISPUTE SETTLEMENT PROVISIONS: PLAMA

3. The intention of the parties: the Tribunal reminded in *Plama,* §198 seq. that **consent to arbitration** is a prerequisite for any arbitration procedure. It is a well-established principle in international law, that consent to arbitration must be **clear and unambiguous.** If consent to arbitration is 'forced' through incorporation by reference to another BIT concluded in a difference context and between different parties, by means of an MFN clause, this 'consent' to arbitration remains unclear and ambiguous whether it was in accordance with the intention of the parties. Especially where a provision is specifically negotiated, it is not evident that it can be replaced by a different dispute settlement mechanism.

4. The teleological approach: in a line of severe criticism against *Maffezini,* the Tribunal held that it failed to understand how the operation of the MFN clause in dispute settlement provisions promotes uniformity and harmonization; on the contrary, if the claimant has the option to 'pick and choose' provisions from various BITS, this allows for selective treaty shopping, inducing a chaos in the normative framework of investment disputes' settlement and bypasses the State 's initial will (as expressed in the treaty), finding itself confronted with permutations of dispute settlement provisions from other instruments it has concluded with different parties, under different circumstances and where the balance of interests and the drafting history was fundamentally different. Furthermore, it could not understand the origin of the 'public policy considerations' advanced by *Maffezini.* According to ***Telenor***, a broad interpretation of the MFN clause may include the further danger of **uncertainty and instability.**

MFN AND DISPUTE SETTLEMENT PROVISIONS: PLAMA

5. The *lex specialis*: (implied in § 209), when the parties have agreed in a particular BIT on a specific dispute resolution mechanism, it would be against that **specifically negotiated rule**, to bypass its applicability and replace the norm through a more general MFN clause that refers to a different dispute resolution mechanism (e.g. ICSID instead of an *ad hoc* Tribunal). In a sense, the basic treaty's procedural provisions could prevail as *lex specialis* over the *lex generalis* of the MFN clause.

 Plama does not entirely reject the *Maffezini* approach, but it seriously limits its scope; in *Maffezini,* the extension of procedural provisions through the MFN clause is the principle, whereas public policy considerations appear as the exception.

Do you agree?

THANK YOU