

Maffezini v Spain Case

August Reinisch

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A. Introduction

- 1 The case of Emilio Agustín Maffezini v The Kingdom of Spain ('Maffezini') is interesting for a number of reasons, let alone the fact that it was one of the first → *International Centre for Settlement of Investment Disputes [ICSID]* cases where a national of a typical host country, Argentina, was partly successful in claiming a violation of a bilateral investment treaty ('BIT'; commonly entitled Agreement on the Reciprocal Promotion and Protection of Investments) by an → *Organization for Economic Co-operation and Development (OECD)* country, Spain (see also → *Investment Disputes*; → *Investments, Bilateral Treaties*; → *Investments, International Protection*). Maffezini is most widely referred to for the proposition that a → *most-favoured-nation clause* ('MFN clause') frequently included in BITs is not limited to substantive matters, but also covers issues of dispute settlement. On the merits, the *Maffezini* award contains an interesting discussion of the rules of attribution of conduct to States (see also → *State Responsibility*) and it provides an important example of conduct considered to be in breach of the fair and equitable treatment obligation according to the applicable BIT. Furthermore, the *Maffezini* case is remarkable from a procedural viewpoint because it involved not only the usual two steps, a decision on jurisdiction and a final award, but also gave rise to a decision on provisional measures (see also → *Interim [Provisional] Measures of Protection*) as well as to a rectification of the award (see also → *Judgments of International Courts and Tribunals, Revision of*).

B. Factual Background

- 2 The dispute concerned Mr Maffezini's 70% share investment in a Spanish company called Emilio A Maffezini SA ('EAMSA'), intended to produce and distribute chemicals in Spain. The other 30% were held by Sociedad para el Desarrollo Industrial de Galicia Sociedad Anónima SA ('SODIGA'), a company for the industrial development of the Spanish province of Galicia where EAMSA was to become operative. After the conclusion of an environmental impact assessment in early 1992, EAMSA encountered financial difficulties. 30 million Spanish pesetas were transferred from Mr Maffezini's personal bank account to EAMSA by a representative of SODIGA working at EAMSA. In March 1992, Mr Maffezini stopped the construction of the chemicals factory. In 1994, negotiations aimed at a settlement between EAMSA and SODIGA, which included a 1994 offer by Maffezini to return all assets of EAMSA to SODIGA in return for SODIGA's outstanding claims against EAMSA, failed. The investor claimed that the treatment received by his investment through Spanish entities was attributable to Spain and constituted a violation of the Argentina–Spain BIT.

C. Decision on Provisional Measures

- 3 Even before Spain raised its objections to jurisdiction it filed an application for provisional measures requiring the claimant to post a guaranty or bond for the expected costs of the arbitration. The tribunal, composed of Thomas Buergenthal, Maurice Wolf and Francisco Orrego Vicuña as president—who was appointed by the Chairman of ICSID's Administrative Council because the parties were unable to agree on a presiding arbitrator—dismissed this application in the Order on Provisional Measures dated 28 October 1999. While it found that under the ICSID Convention and Rules of Procedure for Arbitration Proceedings ('Rules') it had the power to recommend such measures, 'as an extraordinary measure which should not be granted lightly' (Maffezini [Order on Provisional Measures] para. 10), it did not consider the precondition fulfilled that existing rights needed to be preserved. According to the tribunal, '[e]xpectations of success or failure in an arbitration or judicial case are conjectures. Until this Arbitral Tribunal hands down an award, no one can state with any certainty what its outcome will be' (Maffezini [Order on Provisional Measures] para. 20). In the tribunal's

view, it would have been improper to prejudge the claimant's case by recommending provisional measures based on the assumption that the claimant's assertions were totally without merit, as the respondent had alleged.

- 4 The Order on Provisional Measures is also remarkable because it expressly stated that its 'authority to rule on provisional measures is no less binding than that of a final award' (Maffezini [Order on Provisional Measures] para. 9). Similar to the procedural rules of many other international courts or tribunals (see also → *International Courts and Tribunals, Procedure*; → *International Courts and Tribunals, Rules and Practice Directions [ECJ, CFI, ECtHR, IACtHR, ICSID, ITLOS, WTO Panels and Appellate Body]*), Art. 47 ICSID Convention merely provides for the recommendation of provisional measures, '[e]xcept as the parties otherwise agree, the Tribunal may, if it considers the circumstances so require, recommend any provisional measures which should be taken to preserve the respective interests of either party'. The Maffezini tribunal, however, deemed 'the word "recommend" to be of equivalent value as the word "order"' (Maffezini [Order on Provisional Measures] para. 9).

D. Decision on Jurisdiction

- 5 Subsequently, Spain filed a number of objections to jurisdiction which the tribunal disposed of in the Decision on Objections of Jurisdiction dated 25 January 2000. Spain's main argument was that the investor had failed to exhaust domestic remedies (→ *Local Remedies, Exhaustion of*) as required by Art. 10 Argentina–Spain BIT. Art. 10 (2) provided that a dispute which cannot be settled amicably 'shall be submitted to the competent tribunal of the Contracting Party in whose territory the investment was made'. Art. 10 (3) provided that the 'dispute may be submitted to international arbitration in any of the following circumstances: a) at the request of one of the parties to the dispute, if no decision has been rendered on the merits of the claim after the expiration of a period of eighteen months from the date on which the proceedings referred to in paragraph 2 of this Article have been initiated, or if such decision has been rendered, but the dispute between the parties continues; b) if both parties to the dispute agree thereto'.
- 6 Referring to Art. 26 ICSID Convention, which reverses the → *customary international law* rule of exhaustion of domestic remedies before bringing a claim before an international tribunal by making exhaustion superfluous unless expressly required, the Maffezini tribunal held that Art. 10 Argentina–Spain BIT did not require such exhaustion, but 'wanted to give their respective courts the opportunity, within the specified period of eighteen months, to resolve the dispute before it could be taken to international arbitration' (Maffezini [Decision on Objections of Jurisdiction] para. 35). Since the claimant had not complied with the requirement to go to Spanish courts in the first place, the tribunal had to address Maffezini's submission that he was not required to do so as a result of the more favourable dispute settlement provisions contained in the Chile–Spain BIT and applicable to him by operation of the MFN clause in Art. IV (2) Argentina–Spain BIT: 'In all matters subject to this Agreement, this treatment shall not be less favourable than that extended by each Party to the investments made in its territory by investors of a third country'. The tribunal rejected Spain's argument that matters can only be understood to refer to substantive matters or material aspects of the treatment granted to investors and not to procedural or jurisdictional questions. Relying on international precedents and considering the broad wording of the MFN clause which refers to 'all matters subject to this Agreement', the tribunal emphasized that dispute settlement provisions in BITs were 'essential, however, to the protection of the rights envisaged under the pertinent treaties; they are also closely linked to the material aspects of the treatment accorded' (Maffezini [Decision on Objections of Jurisdiction] para. 55). The tribunal did, however, narrow down its broad interpretation of the MFN clause by stating that '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' (Maffezini [Decision on Objections of Jurisdiction] para. 62; see also → *Ordre public [Public Policy]*). In the tribunal's view this would apply, for instance: where a State has conditioned its consent to arbitration on the exhaustion of local remedies; where a BIT contains a fork in the road clause according to which a choice between domestic or international courts or tribunals becomes irreversible once made; or where a particular forum such as ICSID or the → *North American Free Trade Agreement (1992)* has been chosen (→ *North American Free Trade Agreement, Dispute Settlement*). In this particular case, the requirement of Art. 10 Argentina–Spain BIT to first resort to domestic courts did not deprive the investor of the ultimate possibility to access international arbitration after a waiting period of 18 months. Thus, it did not reflect a fundamental question of public policy which would have limited the scope of the MFN clause.
- 7 The tribunal equally rejected the other Spanish objections to jurisdiction: because of the broad definition of investment in the Argentina–Spain BIT, including shares or other participation in companies and other capital investments, it held that an Argentine investor in a Spanish company had standing to invoke BIT provisions in his personal capacity (see also → *Individuals in International Law*).
- 8 As a result of structural and functional considerations, the tribunal also found that SODIGA was not merely a private company, but was created and owned by the Spanish State and performed public tasks as a regional development agency. SODIGA was thus a State entity for the purposes of ICSID jurisdiction. Finally, the tribunal rejected the argument

that the dispute had arisen before the Argentina–Spain BIT had entered into force and was thus excluded from the BIT's application *ratione temporis*. In the tribunal's view, though there may have been disagreements and differences of opinion before the entry into force, a dispute in the sense of a conflict of legal views and interests emerged only after that date.

E. Award on the Merits

- 9 While dismissing most of Maffezini's claims, the tribunal held in its Award that the transfer of 30 million Spanish pesetas from Mr Maffezini's personal bank account to EAMSA was irregularly made, could be attributed to Spain and ordered its repayment plus interest (*Maffezini* [Award] para. 44). The tribunal rejected Spain's blanket assertion that SODIGA's acts and omissions were those of a commercial entity which could not be attributed to the State. Instead, the tribunal found that SODIGA was in the process of changing from a State oriented to a market oriented entity and that during this transitional phase each act or omission had to be scrutinized separately (*Maffezini* [Award] para. 57).
- 10 With regard to the allegedly mistaken business advice from SODIGA, the tribunal found that this did not occur in discharging any public functions, and concluded by using the strong metaphor that 'Bilateral Investment Treaties are not insurance policies against bad business judgments' (*Maffezini* [Award] para. 64). It equally dismissed the claim that Spain and SODIGA had exerted pressure on Maffezini in the context of the environmental impact assessment which was required by Spanish and European Community law (*Maffezini* [Award] para. 44; see also → *European Community and Union Law and Domestic [Municipal] Law*).
- 11 The tribunal did, however, find a violation of the Argentina–Spain BIT as a result of the 30 million Spanish pesetas transfer by an official of SODIGA. It found that while Mr Maffezini had previously authorized his bank to transfer such an amount on the order of the SODIGA official, no agreement or authorization had been obtained by the latter from Mr Maffezini in order to accomplish the actual transfer. The fact that he had instead sought and obtained authorization from the president of SODIGA, indicated that the transfer was attributable to SODIGA. In addition, the transfer was performed in the exercise of SODIGA's public functions and was thus attributable to the Spanish State which had thereby breached its obligation to protect the investment according to Art. 3 (1) Argentina–Spain BIT. At the same time the tribunal found a violation of Art. 4 (1) Argentina–Spain BIT, calling for fair and equitable treatment, in the lack of transparency with which the loan transaction was conducted (*Maffezini* [Award] para. 83).

F. Rectification of Award

- 12 In a decision of 31 January 2001, the tribunal granted Spain's request to rectify the award by substituting the word employee for the expression official in para. 45 of the Award summarizing the Spanish submission that the transfer of funds had been carried out by an employee of SODIGA 'acting in his personal capacity on instructions of Mr Maffezini' (*Maffezini* [Award] para. 45). Otherwise, the original award was left unchanged.

G. Most-Favoured-Nation Clause and Dispute Settlement in Subsequent ICSID Decisions

- 13 The broad interpretation of an MFN clause as extending to dispute settlement has been the most important aspect of the *Maffezini* case and it certainly has remained controversial both in scholarly writings as well as in a number of subsequent ICSID and other investment arbitration cases. The *Maffezini* approach was endorsed in cases like *ADF Group Inc v United States of America* (paras 193–98) and *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile* (para. 103) which mainly dealt with the import of substantive standards from other BITs. It was also used in *Técnicas Medioambientales Tecmed SA v United Mexican States* ('*Tecmed v Mexico*') and even expanded in *Siemens AG v The Argentine Republic* ('*Siemens v Argentina*'). Subsequent cases affirming the *Maffezini* approach are *Gas Natural SDG SA v The Argentine Republic* ('*Gas Natural v Argentina*'), *Camuzzi International SA v The Argentine Republic*, *National Grid PLC v The Argentine Republic*, as well as *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v The Argentine Republic* ('*Suez*') and *AWG Group Ltd v The Argentine Republic*. In *Salini Costruttori SpA and Italstrade SpA v Hashemite Kingdom of Jordan* ('*Salini*'), *Plama Consortium Limited v Republic of Bulgaria* ('*Plama*') and *Telenor Mobile Communications AS v Republic of Hungary*, however, ICSID tribunals came to the conclusion that the applicable MFN clauses did not extend to dispute settlement.
- 14 In *Tecmed v Mexico*, a Spanish claimant tried to overcome jurisdictional limitations *ratione temporis* by invoking an MFN clause. However, the ICSID tribunal rejected a retroactive application of substantive standards 'because it deem[ed] that matters relating to the application over time of the Agreement ... due to their significance and importance, go to the core of matters that must be deemed to be specifically negotiated by the Contracting Parties' (*Tecmed v Mexico* para. 69). Thus, it relied on the exceptions to the breach of MFN clauses with regard to core issues involving public policy considerations as formulated in the *Maffezini* decision.

- 15 The tribunal in *Siemens v Argentina* came to investor friendly conclusions in interpreting the applicable MFN clause in the Argentina–Germany BIT. As in *Maffezini*, the ICSID tribunal allowed the claimant to bypass the BIT obligation to pursue local remedies for 18 months before commencing arbitration by importing a more favourable dispute settlement provision contained in the Argentina–Chile BIT. In addition, the tribunal allowed the investor to pick and choose single aspects of the imported dispute settlement provisions. While the Argentina–Chile BIT did not provide for a waiting period before initiating arbitration, it contained a so-called fork-in-the-road provision according to which the investor had to choose between local remedies or international arbitration with the implication that once an option has been pursued, the other becomes unavailable. By rejecting the Argentine argument that Siemens should be prevented from instituting ICSID arbitration as a result of administrative proceedings started earlier before Argentine tribunals, the panel literally provided most-favourable-treatment to the investor (*Siemens v Argentina* para. 102). The *Siemens v Argentina* tribunal summed up the rationale of the Maffezini interpretation of a MFN clause by stating that BITs included ‘as a distinctive feature special dispute settlement mechanisms not normally open to investors. Access to these mechanisms is part of the protection offered under the Treaty. It is part of the treatment of foreign investors and investments and of the advantages accessible through a MFN clause’ (*Siemens v Argentina* para. 120). The *Siemens v Argentina* decision is also remarkable because it broadly analyzed the interpretation given to MFN clauses in classical international case law. Thus, the tribunal referred to the → *Anglo-Iranian Oil Company Case*, the → *United States Nationals in Morocco Case* and the → *Ambatielos Case*.
- 16 The *Gas Natural v Argentina* tribunal followed the *Maffezini* approach in stating that there was ‘no “public policy” reason not to give effect to the most-favoured-nation provision with respect to the right to proceed directly to international arbitration’ (*Gas Natural v Argentina* para. 28) because the applicable MFN clause related to all matters and thus covered dispute settlement. In the tribunal’s view ‘assurance of independent international arbitration is an important—perhaps the most important—element in investor protection’ (*Gas Natural v Argentina* para. 49). This view was also endorsed in *National Grid plc v Argentina* and in the joined ICSID and UNCITRAL arbitrations of *Suez and AWG Group Ltd v The Argentine Republic*.
- 17 In *Salini*, however, an ICSID tribunal rejected the *Maffezini* and *Siemens v Argentina* approach. The applicable MFN clause in Art. 3 Italy–Jordan BIT provided as follows: ‘Both Contracting Parties, within the bounds of their own territory, shall grant investments effected by, and the income accruing to, investors of the Contracting Party no less favourable treatment than that accorded to investments effected by, and income accruing to, its own nationals or investors of Third States’ (*Salini* para 66). According to the *Salini* tribunal, this clause—as opposed to the MFN clause in *Maffezini* which referred to all matters subject to the agreement—was not broad enough to form the basis for ICSID jurisdiction provided for in other BITs of the host State. Instead, it found that it lacked jurisdiction as a result of the applicable dispute settlement provisions in the Italy–Jordan BIT giving preference to the remedies directly provided for in the investment agreement between the investor and the host State (*Salini* para. 119). The *Salini* tribunal openly criticized the *Maffezini* and *Siemens v Argentina* approach for effectively permitting investors to engage in treaty shopping.
- 18 In *Plama*, another ICSID Tribunal equally rejected the argument that its jurisdiction could be based on the MFN clause contained in the BIT between Bulgaria and Cyprus which applied to all aspects of treatment and thus, according to the claimant, also to the dispute settlement provisions in other Bulgarian BITs. The *Plama* tribunal basically reversed the *Maffezini* presumption by stating that ‘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’ (*Plama* para. 223).
- 19 The different outcomes in *Maffezini* and *Siemens v Argentina*, on the one hand, and in *Salini* and *Plama*, on the other, need not necessarily be regarded as inconsistent case law. The tribunal in *Plama* hinted at an important distinction that can be made between the two sets of cases, by arguing that ‘[i]t is one thing to add to the treatment provided in one treaty more favourable treatment provided elsewhere. It is quite another thing to replace a procedure specifically negotiated by parties with an entirely different mechanism’ (*Plama* para. 209). Both in *Maffezini* and *Siemens v Argentina*, obligations for dispute settlement between the investors and the respondent States existed already so that the MFN clauses were successfully invoked in order to avoid procedural obstacles. In *Plama*, however, like in the earlier *Salini* decision, claimants tried to create a jurisdiction that would not have existed otherwise.
- 20 This distinction was also relied upon in *Telenor Mobile Communications AS v Republic of Hungary* where an ICSID tribunal found that MFN clauses might help to overcome procedural obstacles, but could not be permissibly relied upon in order to expand the scope of ICSID jurisdiction to substantive claims that the BIT parties had deliberately excluded from submission. The claimant had tried to expand the scope of jurisdiction which, according to the Hungary–Norway BIT, was limited to expropriation claims to other claims concerning fair and equitable treatment as well as other treatment standards.

- 21 A number of States have reacted to the *Maffezini* interpretation of MFN clauses by circumscribing the scope of such clauses as excluding dispute settlement. An example is Art. 10.3 Chile–US Free Trade Agreement which provides: ‘Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory’. While this tendency may reflect the opinion of some contracting parties to BITs that they had not intended to include dispute settlement in a MFN clause, it gives rise to a reaffirmation of the *Maffezini* interpretation of standard MFN clauses which extend to all matters covered by an investment treaty.
- 22 While one has to expect that the discussion about the effects of MFN clauses in BITs will continue, it is clear that *Maffezini* has set the framework for this debate. It is a leading case in the true sense of the word.

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