

## OPINION OF PROFESSOR DOMINGO BELLO JANEIRO

### **Introductory considerations**

I wish to state at the outset that I fully subscribe to the decision proposed by the President of the Tribunal. I find the award to be well founded, since the question of most-favored nation (MFN) treatment is dealt with much more judiciously than in prior cases, in particular *Maffezini*<sup>1</sup> and *Siemens* (Decision on Jurisdiction). The latter decision was directly based on the former and involved excessive procedural complications.

I am of course aware of the arguments put forward both in the *Maffezini* case, with which I am familiar and which I have studied closely because it related particularly to Galicia, where I was born and where I live,<sup>2</sup> and in the *Siemens* case.<sup>3</sup> I participated in the latter decision, including of course the Decision on Jurisdiction, and endorsed the opinion of the other members of the tribunal specifically in order to ensure the smooth internal functioning of the tribunal. My disagreement related only to aspects with greater actual relevance, repercussion, and substantive content. I had disagreed with many other essential aspects but without success, for the obvious reason that I was in the minority in that arbitration which – I repeat – was marred by excessive procedural complications. If I could, I would of course reveal them in greater detail but I cannot now describe them in order not to distract attention from this arbitration and for reasons of confidentiality. Ultimately, these actually required a revision of the award. In addition, my failure to dissociate myself from the formal aspects of the jurisdiction decision can easily be explained by the fact that in practice there was no point in expressing any dissent because the other tribunal members were in full agreement. I explained my reasoning on that occasion but my explanation of January 30 was not duly taken into consideration at the time.<sup>4</sup>

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<sup>1</sup> *Maffezini v. Spain*, Decision of January 25, 2000, ICSID Case No. ARB/97/7, ICSID Rep. 212 (2001).

<sup>2</sup> I followed this case very closely because I found it interesting. In particular, it was the first instance in which the tribunal ruled against a member country of the then OECD (my country, Spain) in a claim brought not by a multinational, as is often the case, but by an individual of Argentine nationality who invested in the Autonomous Community of Galicia, where I live, work and reside. It was the first case in which the Treaty for the Promotion and Reciprocal Protection of Investments between Spain and Argentina was applied. In addition, the Kingdom of Spain was the first European Union country to be ruled against, in a case involving a claim by an Argentine citizen resulting from the creation of a joint venture with Sodiga, the development corporation of the Government of Galicia, for the purpose of constructing a chemical plant in Galicia. Sodiga had used money deposited by the businessman Maffezini to cover project losses and it was decided that Sodiga's actions constituted unfair and inequitable treatment and that, since it was a public entity, the Spanish Government was responsible for those actions – a responsibility which it indeed assumed.

<sup>3</sup> *Siemens A.G. v. Argentine Republic* (Decision on jurisdiction, August 3, 2004), ICSID Case No. ARB/02/8, 12 ICSID Rep. 174.

<sup>4</sup> At the time, I expressed to the other members of the tribunal my view that the ICSID Convention and Rules do not set any time limit for arbitrators to express an opinion, regardless of whether they dissent from the majority. In my case, I explained that I was not saying anything new, since “this opinion has been expressed repeatedly and, indeed, reflected my views at the outset. This opinion should therefore be attached to the award since rule 47, paragraph 3 states that any member may attach his individual opinion to the award. This clearly shows that the text is always attached after the complete award has been signed by the majority or the entire membership, whether or not the opinion dissents from the majority and

In any case, with regard to the practical possibility for an arbitrator on an ICSID tribunal to change, clarify or alter in any way his opinion or his position, he clearly has in principle complete freedom to do so, particularly after considering developments in the case and subsequent decisions rejecting the extension or maximum expansion of the ambit of the MFN clause to cover dispute resolution.<sup>5</sup>

This freedom of arbitrators to modify their position was, for instance, exercised by Mr. Albert Van den Berg, who in one case in which Argentina was involved accepted the argument of necessity (*LG&E v. Argentina*<sup>6</sup>) but in another (*Enron v. Argentina*<sup>7</sup>) did not, although in the second instance he did not express a dissenting opinion.

In this regard, another very interesting case specifically involved rejection of the expansion or extension of the MFN clause to dispute resolution. Professor Gabrielle Kaufmann-Kohler, an arbitrator in *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic*<sup>8</sup>, subsequently wrote an article<sup>9</sup> advocating application of the MFN clause to dispute resolution. However, in a more recent instance, in which she presided over a tribunal, she took the opposite view and did not accept the tribunal's jurisdiction based on reference to the clause. She did so specifically after considering the clear and demonstrated preference of the two parties for the bilateral treaty.

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whether or not it is a statement of dissent. In addition, rule 48, paragraph 2 specifies that the award shall be deemed to have been rendered on the date on which the copies certified by the Secretary-General were dispatched." This had not yet occurred at the time when my other tribunal colleagues received my individual opinion. The award may include individual opinions and dissenting statements and I had to insist that my individual opinion should be attached to the award and given to the Secretary-General (but not by me directly, so as not to further complicate the issue). I explained the formal problems that might prevent an accurate statement of my wishes, which alter the meaning of my signature of the text as a whole. However, as the other tribunal members are well aware (I have copies of communications between us), this reflects my wishes more accurately. I then stated that "my signature of the entire text is a general expression of consent but not to all the details. Now that I have just received the latest communications by e-mail, as have the other members of the tribunal, I find myself obliged to explain this because I am increasingly confused and wish to express my wishes on the subject in detail, which is why I see no problem including this text." Admittedly this was at a later stage but it was in any case before the completion of the administrative formalities and it explains my views in greater detail, which I requested at the time should be transmitted to the Secretary-General with the award, so that I would not have to do this myself.

<sup>5</sup> See, in particular, the decisions in *Salini Costruttori S.p.A. and Italstrade S.p.A v. Hashemite Kingdom of Jordan* (Decision on Jurisdiction, November 15, 2004), ICSID Case No. ARB/02/13, 14 ICSID Rep. 306; *Plama Consortium Limited v. Republic of Bulgaria* (Decision on Jurisdiction, February 8, 2005), ICSID Case No. ARB/03/24, 13 ICSID Rep. 272; *Telenor Mobile Communications A.A. v. Republic of Hungary* (Award of September 13, 2006), ICSID Case No. ARB/04/15; *Vladimir Berschader & Moise Berscharder v. Russian Federation* (Award of April 21, 2006), SCC Case No. 080/2004; *Wintershall Aktiengesellschaft v. Russian Federation* (Award of December 8, 2008), ICSID Case No. ARB/04/14; *Austrian Airlines v. Slovak Republic* (Award of October 9, 2009), UNCITRAL. See also *Renta 4 S.V.S.A et al. v. Russian Federation* (Award on preliminary objections, March 20, 2009) SCC Case No. 024/2007.

<sup>6</sup> ICSID Case No. ARB/02/1.

<sup>7</sup> ICSID Case No. ARB/01/3.

<sup>8</sup> ICSID Case No. ARB/03/19 (Decision on jurisdiction, August 3, 2006).

<sup>9</sup> *Arbitral Precedent: Dream, Necessity or Excuse?* The 2006 Freshfields Lecture. *Arbitration International*, vol. 23, No. 3, LCIA, 2002, pp. 357-378.

This is exactly what we do systematically in *Daimler* with regard to the bilateral treaty between Germany and Argentina. This was not done in the tribunal's decision in *Siemens*. After an in-depth re-examination and re-evaluation of the evidence of the true intention of the parties as regards dispute resolution, I am increasingly in favor of the position adopted by Gabrielle Kaufmann-Kohler in the Austrian Airlines case (*Austrian Airlines v. Slovakia*, UNCITRAL Ad Hoc Arbitration, final award, October 9, 2009).

These various factors finally led me to clarify my opinion, substantially nuancing it, since I had already been very favorably impressed and initially influenced by the arguments adduced by the *Wintershall* tribunal.

Consequently, my change of heart between the decision in the arbitral award concerning the claim by *Siemens* against Argentina and the current case can be explained by the important aspects summarized below, naturally without prejudice to any other more substantiated opinion, but can be fully justified by the obvious fact that each arbitration is different.

In any case, more generally speaking, I should like especially to emphasize the following observations, which reflect the fact that there are no precedents as regards either transnational arbitrations or international commercial arbitrations. Each arbitrator is free to change, clarify, explain, or nuance his legal analysis of the issues under discussion and the problems encountered. This is true, of course, even if the issue is interpretation of the same legal instrument, as it is in this dispute concerning the bilateral treaty between Germany and Argentina concluded in 1991.

In the time that has elapsed since the *Siemens* decision, international State practice and transnational arbitration case law reveal at least two things. In the first place, various countries, including the United States, Argentina, and Switzerland, have advanced the view that the clause cannot be expanded or extended to the dispute resolution system. They deliberately adopted this position precisely in order to react and protect themselves against the differing interpretations given in awards or decisions directly based on the award in *Maffezini* (2001). *Siemens* (Decision on Jurisdiction) is the first illustration or consequence of these awards or decisions.

Within and outside ICSID, case law (see, for instance, the above-mentioned *Renta 4* case) shows that the tribunals do not have a common position on this issue. At present decisions are roughly evenly split between the *Maffezini* position and the *Plama* position.

I shall attempt below to provide further clarification regarding some of the substantive elements that I believe are decisive (I) and shall then deal more briefly with the procedural options that I believe should be highlighted because of their particular importance (II).

## I. Substantive elements

These all involve interpretation of the bilateral treaty on investment protection as it relates to the possible extension of the reach of the MFN clause(s) in that agreement.

1. The *Wintershall* Decision on Jurisdiction merits special consideration because it concerns the same treaty. It sheds light on a fundamental question: the correct interpretation of the will of the parties to the treaty. It is a fundamental principle of public international law that this will cannot be interpreted subjectively at the whim of the arbitrators but must be based on the text of the treaty itself, especially when this text is very clear. Judge Torres-Bernardes, who has direct experience at The Hague International Court, as we know, demonstrated this very clearly in *Wintershall*.

In our case, the will of the parties (Germany and Argentina) must also be interpreted on the basis of the international law in force at the time when the treaty was concluded, which was 1991 (“contemporaneity” principle). It was clear that at that time, ten years before the *Maffezini* award, two different issues were still completely separate: on the one hand, the “treatment” of foreign investments and, on the other, dispute resolution and the mechanisms selected for that purpose. Under the *ejusdem generis* principle, the MFN clause can apply only to matters of the same kind, which is not the case if the clause is extended to dispute resolution.

Since the time when the bilateral treaty was concluded between these two countries, widely differing opinions are found in international practice and international case law. There can thus be no change in the interpretation based on the law applicable in 1991, as most States still have a restrictive vision of the scope of the clause. And all sovereign countries (including, of course, Germany and Argentina) still want arbitrators to respect their will as expressed in treaties.

2. Paragraph 194 of the award states that all dispute resolution provisions based on bilateral treaties are, by their very nature, jurisdictional. This is one of the most important points on which Judge Charles Brower disagrees. In particular, it is the point covered by Article 10 of the bilateral treaty in question, whose terminology is analyzed in the award. Here again *Wintershall* is very important.

I wish once again to emphasize that this issue is directly linked to respect for the consent expressed by the States Parties to the bilateral treaty and reflects the requirements of public international law concerning choice of dispute resolution methods. As noted again in the most recent rulings of the International Court of Justice in *Djibouti v. France*<sup>10</sup> and *Georgia v. Russia*,<sup>11</sup> this choice can never be imposed on a sovereign State against its wishes.

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<sup>10</sup> *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Jurisdiction and Admissibility, Judgment of June 4, 2008, paragraph 62.

<sup>11</sup> *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objection, Judgment of April 1, 2011, paragraphs 133 to 135.

Considering, in particular, the unanimous position adopted by the *Wintershall* tribunal<sup>12</sup>, I wish to stress that I endorse the position adopted in the present decision to the effect that:

“All BIT-based dispute resolution provisions, on the other hand, are by their very nature jurisdictional. The mere fact of their inclusion in a bilateral treaty indicates that they are reflections of the sovereign agreement of two States – not the mere administrative creation of arbitrators. They set forth the conditions under which an investor-State tribunal may exercise jurisdiction with the contracting state parties’ consent, much in the same way in which legislative acts confer jurisdiction upon domestic courts. That this is so is particularly evident in the case of the German-Argentine BIT, which describes its dispute resolution process in mandatory and necessarily sequential language.”

3. My position in this regard has in no way been changed by the differing arguments set out in the recent Decision on Jurisdiction in *Hochtief v. Argentina*<sup>13</sup> concerning the same issue. On the other hand, I should like to draw attention to the very wise position stated by the arbitrator J. Christopher Thomas, Q.C., in his Separate and Dissenting Opinion, which is very similar to my position regarding our decision.

Adopting an approach based not only on public international law but also on the general principles of arbitration (commercial and between States and foreign investors), J. Christopher Thomas emphasizes that the conditions established in a bilateral treaty are part of the arbitration offer determined by the agreement of the States parties to the BIT. He also rightly emphasizes the need to respect the agreement of the host State as expressed in the BIT. He then recalls that “The 18-month period is plainly a product of compromise between the States Parties” (para. 7) and that “...the existence of the agreement to arbitrate is determined by examining the two consents” (para. 18).

In support of this observation, J. Christopher Thomas cites the opinion of another eminent expert, Campbell McLachlan, Q.C., that “Given the absence of a meeting of minds between investor and host State, consent has to be constructed from the standing consent given by the State by treaty.”<sup>14</sup> In accordance with the fundamental principles of international law on the subject, the two experts (J. Christopher Thomas and Campbell McLachlan) thus explicitly refer to State consent as the cornerstone of the choice of a specific dispute resolution method, as the arbitrators in *Wintershall* did unanimously.

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<sup>12</sup> In *Wintershall*, the tribunal stated: “That an investor could choose at will to omit the second step [the 18-month domestic courts requirement is simply not provided for nor even envisaged by the Argentina-Germany BIT – because (Argentina’s) the Host State’s “consent” (standing offer) is premised on there first being submitted to the courts of competent jurisdiction in the Host State the entire dispute for resolution in local courts.”

<sup>13</sup> ICSID Case No. ARB/07/31, Decision on Jurisdiction, October 24, 2011, and Separate and Dissenting Opinion of J. Christopher Thomas.

<sup>14</sup> Campbell McLachlan, Q.C., Laurence Shore and Mathew Weiniger, *International Investment Arbitration: Substantive Principles*, Oxford University Press, 2007, p. 257.

In addition, also in his separate opinion on the *Hochtief A.G.* decision, the arbitrator J. Christopher Thomas notes that “In the pre-*Maffezini* days, it was clear that the offer and the acceptance must match,” as indicated by Professor Christoph Schreuer in his commentary on the Washington Convention.<sup>15</sup> Finally, the same arbitrator concludes with words that I can fully endorse: “In my view, the need for matching consents, once clear under the ICSID Convention, remains the case” (para. 21).

In view of all these substantive elements, I have rethought the position which I accepted in 2004 (*Siemens*) somewhat reluctantly but because there would in practice have been no point in objecting in view of the unanimity existing between the other two members of the tribunal. At that time, I did not have sufficient hindsight to fully evaluate the grounds for and the consequences of adopting a position in *Maffezini* that did not reflect public international law on the subject of dispute resolution consent.

4. I would add that also in the area of public international law, one should not seek to bolster the opposing view by making Articles 31 and 32 of the Vienna Convention on the Law of Treaties basically mean the opposite of what they say. Unfortunately, this is what the majority of the members of the tribunal did in the recent decision in *Hochtief A.G.* The detailed interpretation rule in that Convention does not give the interpreter complete freedom to freely construct the will of the States but requires us to follow the ordinary meaning to be given to the terms of the treaty. In the case of Article X of the bilateral treaty between Germany and Argentina, the terms used are clear and reflect unambiguously the consent of the Parties.

The tribunal chaired by Jan Paulsson rightly stated in *Renta 4*:

“Speculations relied upon as the basis of purposive readings of a text run the risk of encroachment upon fundamental policy determinations. The same is true when ‘confirmation’ of a hypothetical intention is said to be found in considerations external to the text. The duty of the Tribunal is to discover and not to create meaning.”<sup>16</sup>

In particular, it should be remembered that *in claris non fit interpretatio*, when terms are clear and meaning is obvious, those who interpret and apply the law do not need additional means of interpretation and should not prefer a meaning other than the literal meaning of the words. As we know, this Latin axiom originated in the second and third centuries before Christ, at which time the Roman schools of law (Sabinian and Proculian) were predominant. It was subsequently adapted and incorporated in the

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<sup>15</sup> Christoph Schreuer, *The ICSID Convention: A Commentary*, Cambridge University Press, 2001, para. 356, p. 238.

<sup>16</sup> *Renta 4 S.V.S.A. v. The Russian Federation*, Arbitration Institute of the Stockholm Chamber of Commerce, Award on Preliminary Objections to Jurisdiction (March 20, 2009) [hereinafter “*Renta 4*”], para. 93. The tribunal specifically explained that speculation or readings based on speculation regarding a text create a risk of encroachment on fundamental policy determinations. The same is true when “confirmation” of a hypothetical intention is said to be found in considerations external to the text. It is then concluded that the duty of the tribunal is to discover and not to create new meaning for the context of a text under consideration.

various legal orders on the basis of one of the adaptations in the Digest, with the same conclusion maintained in similar legal aphorisms such as “*Verba simpliciter prolata debent intelligi secundum suam propriam significationem*” and “*Cum in verbis nulla ambiguitas est, non debet admitti voluntatis quaestio.*”

The International Court of Justice already gave an excellent opinion along these lines in 1950, when an attempt was being made to understand exactly what were the rights and obligations of the Member States signing the new Charter of the United Nations. Considering the substantive conditions for the admission of a State to the Organization, the Court noted:

“If the relevant words [of a treaty] in their natural and ordinary meaning make sense in their context, that is the end of the matter”<sup>17</sup>.

5. Finally, the inclusion in Article 2 (d) of the words “in its territory” is very important and shows that the scope of the clause is limited. Assuming that the MFN clause in Articles 3 and 4 of the Germany/Argentina treaty could also extend to dispute resolution, it would be able to do so only in Argentine territory, which is the opposite of what would happen if an international arbitral tribunal were competent, as Judge Charles Brower now claims once again. This means that if the broad interpretation of the scope of the clause were correct (which, as amply demonstrated above, I do not believe), the consent given by the States to the bilateral treaty would still limit the scope of the treatment (including for dispute resolution) to the territory of the host country. This being so, only national tribunals located in Argentine national territory could then attempt to resolve the dispute.

Article 10 on dispute resolution provides for the possibility of recourse to an international arbitral tribunal. This shows that it is incompatible with the territorial limitation of the MFN clause ((limited to treatment in the territory of the host State) and strengthens the presumption that dispute resolution was not in 1991 and *a fortiori* is still not now part of the treatment referred to in Articles 3 and 4.

## **II. Procedural options**

Now that it has been proved that our tribunal does not have jurisdiction because the claimant did not meet the requirement of first submitting its case to the Argentine judicial courts within a period of 18 months, it seems appropriate to give the claimant the possibility of instituting judicial proceedings before the Argentine courts for a period not exceeding 18 months, in accordance with Article 10 (3) (b) of the bilateral investment treaty between Germany and Argentina.

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<sup>17</sup> International Court of Justice, Advisory Opinion in *Competence of the General Assembly for the admission of a State to the United Nations*, ICJ Reports 1950, pp. 4 and 5. If the relevant words [of a treaty] in their natural and ordinary meaning make sense in their context, that is the end of the matter or the purpose and ultimate conclusion of their content.

If the Argentine courts have not resolved the case after 18 months, the claimant is then free to request international arbitration and entitled to recuperate the costs of that request and the opportunity costs associated with the delay in the full resolution of its claims. It may then add to its other petitions an additional request concerning its treatment in the Argentine courts. In the event of a favorable ruling, it may be compensated, with interest, in the same way as it would be for any other violation of the treaty. In other words, any violation due to less favorable or discriminatory treatment would be compensated in accordance with the general international law principle of full redress.

As regards costs and expenses, I believe that because this would be more elegant and fair, it would be reasonable also to adopt the simple solution whereby each side bears its own costs. These would thus be evenly shared between the two parties since Argentina is also responsible for the length of the proceedings because of its surprising decision to add jurisdictional objections to the merits of the case.

### **General conclusion**

Clearly the most important part of the award is the one referring to the ambit of the MFN clause. Special attention is paid to the interpretation of the wishes of the parties to the bilateral treaty, Germany and Argentina, and to what those wishes were in 1991, when the bilateral treaty was concluded. The award is based on the law applicable at that time, as revealed particularly by the 1992 World Bank Guidelines on the Treatment of Foreign Direct Investment. These Guidelines confirm that at that time the “treatment” of investments (to which the MFN clause refers) and dispute resolution were two quite separate matters for which, as in the treaty, there were two different types of clauses.

In any case, for the reasons discussed above, I believe that both the *Wintershall* award and this *Daimler* award rightly base their decisions on lack of evidence of Argentina’s consent to submit to the jurisdiction of international arbitral tribunals on the basis of this type of use of the MFN clause. This specifically supports my current view for several reasons, of which the three most important are: 1) judicial practice has become more varied and more awards have been rendered that disagree with the position maintained in the *Siemens* arbitration; 2) several States, including Argentina, have since refined the focus of the *Maffezini/Siemens* awards, leading me to rethink my original conclusion and Argentina’s consent to this type of application of the MFN clause; and 3) the *Siemens* tribunal did not conduct an analysis of several of the points now covered extensively and very carefully by this award (for example, evidence of understanding of the common use of the word “treatment”, Argentine practice, limitation of the MFN clause, the logical fallacy of the *expressio unius* argument).

All these factors can reasonably more than justify my support for the opinion expressed in this award, which I naturally have great pleasure in submitting for further consideration.

Signed: PROFESSOR DOMINGO BELLO JANEIRO

August, 16, 2012