Procedural Requirements in Dispute Settlement Provisions and Application of the MFN Clause in Recent Investment Disputes

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I. INTRODUCTION

In 2000, the Maffezini Tribunal adopted an approach extending the application of the Most-Favoured-Nation (MFN) clause in the relevant bilateral investment treaty (BIT) to procedural rules.¹ Since then, the interpretation of MFN clauses in the context of their application to dispute settlement provisions has become a complex issue, which has been dealt uniformly by neither investment treaty tribunals nor scholars. This split in opinion has caused discordance in investment arbitration case law that resulted in the emergence of three different standpoints, namely, in the words of Zachary Douglas, the ‘yes’ school, the ‘no’ school, and the ‘question cannot be formulated in general terms’ school.²

Rather than analysing the theoretical bases underlying these approaches, this article examines the impact of the International Court of Justice (ICJ) Judgment in the Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation) on the characterisation of procedural requirements envisaged in dispute settlement provisions, such as domestic litigation, settlement through negotiation, and waiting period requirements and the application of MFN clauses to these requirements. As a result of this examination, it explores whether the conclusion reached in Georgia v Russia has created a new trend in recent investment treaty awards. Ultimately, this article critically assesses the ICJ’s approach and recent developments in investment treaty arbitration.

II. INTERPRETATION OF CONDITION PRECEDENT IN GEORGIA v RUSSIA

In its application dated 12 August 2008, Georgia raised a claim against the Russian Federation for the breach of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) due to the Russian Federation’s alleged actions related to the ethnic cleansing of Georgians in South Ossetia and Abkhazia.³ Russia

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¹ Emilio Agustín Maffezini v Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, 25 January 2000, para. 56.


³ Case Concerning Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v Russian Federation), Judgment on Preliminary Objections, 1 April 2011, paras 16–17.
objected to the ICJ’s jurisdiction on the basis of the non-fulfilment of procedural preconditions by Georgia, one of which was conducting negotiations before filing an application.  

While addressing this objection, the Court first determined that the procedural requirements of Article 22 were ‘conditions precedent’ to the seisin of the Court. Then, it noted that one of the functions of prior resort to negotiations was to narrow the scope of the consent given by states. The Court supported its point by making a reference to the Armed Activities case in which it stated that:

The Court’s jurisdiction is based on the consent of the parties and is confined to the extent accepted by them. When that consent is expressed in a compromissory clause in an international agreement, any conditions to which such consent is subject must be regarded as constituting the limits thereon.

After the Court had examined its jurisprudence concerning compromissory clauses, it considered the negotiations requirement as a precondition that has to be complied with for the exercise of its jurisdiction.

Following that, the issue to be addressed was identified as the question of whether Georgia fulfilled the precondition of negotiations. The Court concluded that both parties had to engage in negotiations in the period between the date on which the legal dispute on matters falling under CERD arose (accepted as 9 August 2008) and the date of the filing of the Application (12 August 2008). Thus, the Court disregarded the possibility of complying with this precondition after the institution of the proceedings. Ultimately, the Court decided that it lacked jurisdiction under Article 22 of CERD.

III. INVESTMENT TREATY ARBITRATION CASES FOLLOWING THE ICJ JUDGMENT IN GEORGIA V RUSSIA

The controversial application of MFN clauses to dispute settlement provisions has raised an important scholarly and juridical debate within international investment law, which has been exacerbated by discrepant awards causing a lack of consistency. The purpose of this section is to explore whether any new trend of approach has developed in this context since the ICJ judgment in Georgia v Russia.

The particularly relevant features of the Georgia v Russia Judgment are, first, the Court’s characterisation of the preconditions envisaged in dispute settlement provisions

4 Georgia v Russia, Judgment, para. 116.
5 Georgia v Russia, Judgment, para. 130.
6 Georgia v Russia, Judgment, para. 131.
8 Georgia v Russia, Judgment, para. 168.
9 Georgia v Russia, Judgment, paras 181–184.
as jurisdictional requirements and especially as conditions of consent, and second, its laying down the fulfilment of such conditions before the seisin of the Court.

The first arbitrator who referred to this line of opinion is, in the knowledge of the author, Brigitte Stern. In her dissenting opinion in Impregilo, Stern asserted that the qualifying conditions attached to the consent of the state should be considered jurisdictional prerequisites regardless of their classification as a waiting period or compulsory litigation requirement. This being the case, she concluded that MFN clauses cannot be applied to displace this kind of prerequisites as they shape the consent and thus condition the access to right to international arbitration.

In this regard, Stern distinguishes ‘rights’ from ‘conditions for access to the rights’, to which MFN clauses do not apply. The majority in the Impregilo Tribunal, on the other hand, rejected this approach and acknowledged the MFN clause as a basis to bypass the jurisdictional precondition.

In a more recent dissenting opinion, Santiago Torres Bernárdez (agreeing with Stern) separated rights from the means of protecting rights and held that the application of the MFN clauses cannot be extended to the latter. By adopting the ICJ’s stance in Georgia v Russia, the dissenting arbitrator classified the requirements of amicable consultations and eighteen months litigation in local courts as jurisdictional and concluded that these treaty-based preconditions to the consent were not fulfilled.

Although it made reference neither to Georgia v Russia nor to Stern’s dissenting opinion in Impregilo, the Tribunal in Kılıç followed the same path. It regarded the requirement of compulsory litigation and ‘no-judgment-within-a-year’ condition in the dispute settlement provision as conditions linked to the consent to ICSID arbitration. The Tribunal also refused to suspend the proceedings since the condition was related

11 Georgia v Russia, Judgment, para. 131.
12 Georgia v Russia, Judgment, para. 141.
14 Impregilo, Dissenting Opinion, para. 88.
15 Ibid.
16 Impregilo, Dissenting Opinion, para. 47.
19 Ambiente Ufficio, Dissenting Opinion, para. 369.
20 Ambiente Ufficio, Dissenting Opinion, para. 409 and para. 430.
21 Ambiente Ufficio, Dissenting Opinion, para. 427.
22 Ambiente Ufficio, Dissenting Opinion, para. 434.
23 Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v Turkmenistan, ICSID Case No. ARB/10/1, Award, 2 July 2013, paras 6.3.12–6.3.15.
to jurisdiction rather than admissibility.\textsuperscript{24} With regard to the interpretation of the MFN clause, the Tribunal, in a similar vein as Stern, limited the extent of the MFN treatment to substantive rights and excluded remedial procedures in relation to those rights.\textsuperscript{25} One of the arbitrators, William W. Park, disagreed with the majority’s decision on the characterisation of the ‘no-judgment-within-a-year’ condition. He regarded it as a procedural requirement concerning the admissibility of the claim rather than as a jurisdictional requirement.\textsuperscript{26} In Park’s opinion, the non-compliance with this condition should result in holding proceedings in abeyance for a reasonable time.\textsuperscript{27}

The Tribunal in \textit{Dede and Elbüsüneyi}, where Park was the President and Stern was one of the co-arbitrators, held that the requirements of exhaustion of domestic remedies and expiry of one year from commencement of local litigation without any final award were jurisdictional preconditions.\textsuperscript{28} As these preconditions were deemed mandatory and attached to the consent of the state to arbitrate, non-compliance with them resulted in the lack of the Tribunal’s jurisdiction.\textsuperscript{29} Since the claimants did not invoke the MFN clause to provide a basis for jurisdiction, the Tribunal did not enter into the question of whether the MFN clause could be applied to the dispute settlement provision to bypass the unsatisfied jurisdictional preconditions.\textsuperscript{30}

For a recent example that argues against the \textit{Kılıç} and \textit{Dede and Elbüsüneyi} Tribunal’s characterisation of the waiting period as a jurisdictional precondition, one might look at the conclusion arrived at in \textit{Ascom and Stati}. The Tribunal in that case examined the legal characteristic of the three-month waiting period envisaged in Article 26(2) of the Energy Charter Treaty (ECT),\textsuperscript{31} which featured similar wording to the one in the dispute settlement provision applied in the \textit{Kılıç} case. The \textit{Ascom and Stati} Tribunal concluded that the provision in Article 26(2) of the ECT aimed to provide the three months as an opportunity for parties to settle their disputes, and thus the requirement was considered as procedural rather than jurisdictional.\textsuperscript{32}

The Tribunal in \textit{Philip Morris} noted the ICJ’s Judgment in \textit{Georgia v Russia} that considered procedural requirements as conditions precedent to the seisin of the court, when it examined the legal character of procedural conditions in international law.\textsuperscript{33} In

\textsuperscript{24} \textit{Kılıç}, Award, para. 6.4.2.

\textsuperscript{25} \textit{Kılıç}, Award, para. 7.3.9.

\textsuperscript{26} \textit{Kılıç}, Separate Opinion of Professor William W. Park, 20 May 2013, para. 8.

\textsuperscript{27} \textit{Ibid}.

\textsuperscript{28} \textit{Ömer Dede and Serdar Elbüsüneyi v Romania}, ICSID Case No. ARB/10/22, Award, 5 September 2013, para. 192.

\textsuperscript{29} \textit{Dede and Elbüsüneyi}, paras 262–263.

\textsuperscript{30} \textit{Dede and Elbüsüneyi}, para. 255.

\textsuperscript{31} \textit{Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Trading Ltd v. Kazakhstan}, SCC, Award, 19 December 2013, paras 814–830.

\textsuperscript{32} \textit{Ascom and Stati}, para. 829.

contrast to the ICJ’s strict restriction of time limit for fulfilment of preconditions, the Tribunal acknowledged the possibility of their satisfaction subsequent to the institution of arbitral proceedings even if they are considered as jurisdictional.\textsuperscript{34} Taking the main objective of the domestic litigation requirement into account, the Tribunal refrained from imposing a formalistic understanding of this condition and upheld its jurisdiction without addressing the arguments as to the application of the MFN clause.\textsuperscript{35}

Apart from the applicability of the MFN clause to preconditions envisaged in dispute settlement provisions, investment arbitration case law has also considered the applicability of the MFN clause to establish or expand the consent. In \textit{ST-AD GmbH v Republic of Bulgaria}, where Stern was this time the presiding arbitrator, the Tribunal decided that the MFN clause could not create jurisdiction.\textsuperscript{36} From this point forth, the Tribunal refused to expand its jurisdiction on the grounds of the MFN clause which was limited to disputes over the amount of compensation for expropriation.\textsuperscript{37}

In \textit{Garanti Koza}, however, the majority upheld the jurisdiction of the Tribunal by replacing through the MFN clause the applicable dispute settlement provision, which requires a mutual agreement of the parties on ICSID arbitration prior to the submission of the dispute to arbitration, with a dispute settlement provision that does not require such a case-specific consent.\textsuperscript{38} In her dissenting opinion Laurence Boisson de Chazournes concluded that the requirement of consent, which constitutes one of the basic elements for ICSID jurisdiction, cannot be bypassed by means of applying the MFN clause to the dispute settlement provision.\textsuperscript{39} Thus, in line with the \textit{National Grid} Tribunal,\textsuperscript{40} she refused the possibility of creating or importing consent by means of claiming an MFN clause.\textsuperscript{41}

\section*{IV. IS THERE ANY NEW TREND? CRITICAL REMARKS ON RECENT DEVELOPMENTS}

There is still no \textit{jurisprudence constante} following the \textit{Georgia v Russia} Judgment with regard to two issues: first, the characterisation of preconditions in dispute settlement provisions as either jurisdictional or admissibility and, second, the application of MFN clauses to such preconditions. Notwithstanding that, arbitrators such as Stern, Bernárdez, and Boisson de Chazournes pioneered a developing approach; they considered such

\begin{itemize}
\item \textsuperscript{34} Philip Morris, para. 144.
\item \textsuperscript{35} Philip Morris, para. 148.
\item \textsuperscript{36} ST-AD GmbH v Republic of Bulgaria, UNCITRAL, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013, para. 398.
\item \textsuperscript{37} ST-AD, para. 403.
\item \textsuperscript{38} Garanti Koza LLP v Turkmenistan, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent, 3 July 2013, para. 77.
\item \textsuperscript{39} Garanti Koza LLP, Dissenting Opinion of the Decision on the Objection to Jurisdiction for Lack of Consent, 3 July 2013, para. 62.
\item \textsuperscript{40} National Grid plc v The Argentine Republic, UNCITRAL, Decision on Jurisdiction, 20 June 2006, para. 92.
\item \textsuperscript{41} Garanti Koza, Dissenting Opinion, para. 61.
\end{itemize}
preconditions as elements of consent given in the dispute settlement provision and thus as jurisdictional conditions. Relating such preconditions to consent has led these arbitrators to reject the application of the MFN clause in order to overcome those conditions. This approach was also adopted by the Tribunals in STAD, Kılıç, and Dede and Elbişeyni. This might be observed as the first impact of the ICJ’s conclusions in its decision on jurisdiction in Georgia v Russia.

The second impact might be detected in the way investment tribunals interpreted the conditions for fulfilment of such preconditions. At this point, it can be noticed that the Tribunal in Philip Morris refused the formalistic approach of the ICJ and accepted that procedural requirements for jurisdiction could be met after the seisin of the Tribunal. On the other hand, the Kılıç Tribunal followed the ICJ’s approach in the sense that it required the condition of ‘no-judgment-within-a-year’ to be satisfied prior to the institution of proceedings as this condition limited the consent for its jurisdiction. However, Park refused to follow this interpretation and characterised the said condition as a procedural requirement for the admissibility of the claim, which could be fulfilled after the initiation of proceedings. The Tribunal in Ascom and Stati also characterised the condition in the relevant dispute resolution provision as an admissibility issue and adopted a similar approach with Park. Ultimately, one might conclude that there is no uniform approach adopted following Georgia v Russia in the context of determining the criteria for satisfaction of such procedural requirements.

Returning to the ICJ’s interpretation of procedural requirements envisaged in Article 22 of CERD as preconditions for the exercise of its jurisdiction, one might argue that the Court’s judgment was not correct. As argued by Douglas, the failure to comply with the period for negotiation prior to institution of arbitration proceedings would be a breach of a procedural requirement which concerns the seisin of the tribunal rather than its jurisdiction. Accordingly, such procedural requirements are not an impediment to the existence of the tribunal’s adjudicatory power; they concern the admissibility of the claim or the seisin of the tribunal. The Court also held the view that the negotiations requirement was a condition precedent to the seisin, although it explained that the purpose of such conditions was to limit consent. The Court misused the term ‘seisin’. The issue of seisin is not linked to consent; it rather indicates the procedures to follow prior to the initiation of arbitration proceedings. Therefore, the procedural requirements such as compulsory litigation, settlement through negotiation, and waiting period requirements envisaged in dispute settlement provisions are related to the admissibility of the claim, more expressly, the suitability of the claim for adjudication on the merits. Namely, these are not conditions to the consent of the parties, but to bringing a claim before a court or a tribunal.

The Court’s characterisation of the procedural requirement contained in Article 22 of CERD was criticized also in the Joint Dissenting Opinion of President Owada and

43 Ibid., 152.
44 Ibid., 152.
Judges Simma, Abraham, Donoghue and Judge ad hoc Gaja. The dissenting judges found the Court’s interpretation of Article 22 as if it established preconditions to the Court’s jurisdiction questionable.46

As mentioned above, some of the investment tribunals or dissenting arbitrators concurred with the approach adopted by the ICJ and subsequently refused to apply the MFN clause on the basis that the lack of consent cannot be fixed through importing consent from a third treaty. Although it has been argued that it is possible, in principle, to give consent by the operation of an MFN clause,47 this point is not the crux of the controversy.

Here the problem mainly arises from maintaining an approach which suggests characterisation of procedural requirements as jurisdictional preconditions the non-compliance of which would cause the lack of consent. As has been explained, such requirements are not conditions attached to consent. Rather, they concern conditions to bring a claim to be adjudicated on the merits. Thus, procedural conditions are not an impediment to the establishment of jurisdiction over the claim, but to the exercise of jurisdiction of the competent judicial authority. Therefore, satisfaction of such conditions should be considered as an admissibility issue.

As a corollary to this characterisation, the criteria for compliance with procedural requirements should be assessed with a less formalistic and a more substantive approach. Hence, the Philip Morris Tribunal’s refusal of a formalistic interpretation adopted in the ICJ judgment even if such preconditions were considered as jurisdictional is a plausible approach in this sense. It is true that the purpose of procedural requirements laid down in dispute settlement provisions is to encourage parties to try other means of achieving a settlement or to give the host state an opportunity to rectify its wrongful act before the initiation of arbitration proceedings. Notwithstanding that, satisfaction of these conditions should still be regarded as possible after the seisin of the tribunal as long as their purpose is achieved.48 This, however, should not be understood as if it is suggested that procedural requirements are to be disregarded and approached with an absolute flexibility. The point to be made here is that compliance with such requirements should be evaluated on a case-by-case basis and this assessment should take into account the question of whether ‘the core objective of [the relevant procedural] requirement has been met’.49

The last remark is related to the application of MFN clauses to procedural requirements envisaged in dispute settlement provisions. Traditionally, MFN clauses are stipulated in most of the international investment treaties among substantive provisions

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46 Case Concerning Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v Russian Federation), Joint Dissenting Opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge ad hoc Gaja, 1 April 2011, para. 16.

47 Paparinskis, 39.

48 For example, although the Tribunal in Western NIS considered the requirement of proper notice as an element of the state’s consent, it suspended the arbitration proceedings to give the claimant an opportunity to comply with that procedural requirement within a certain period of time determined by the Tribunal.

of the treaty. In other words, MFN clauses provide substantive protection for investors on a similar footing to national treatment clauses or prohibition of discrimination clauses. There are other kinds of MFN clauses, which are drafted more broadly, expanding their protection beyond substantive treatment of the state. As explained above, traditionally worded MFN clauses concern substantive protection and, therefore, should not be interpreted as if they can be applied to the procedural requirements in the dispute settlement clause of the relevant international investment treaty. Such procedural norms laid down in these treaties should not be overcome by invoking the MFN clause, which is a substantive norm within the same treaties. On the other hand, the applicability of the MFN clauses that have a broader scope should be interpreted in accordance with their wording and place within the treaty. Hence, the question of whether an MFN clause can be applied in order to overcome procedural requirements in the dispute settlement clause should be answered in the context of the specific MFN clause.

V. CONCLUSION

The ICJ Judgment in *Georgia v Russia* has had some impacts on investment treaty arbitration. This can be observed in two different contexts. First, the ICJ endorsed the characterisation of the condition precedent foreseen under the dispute settlement provision as a jurisdictional requirement and an element of consent. Secondly, the Court laid down a formalistic approach for the assessment on compliance with such requirements.

Although the ICJ’s judgment has been influential in decisions of various investment treaty tribunals and separate opinions of dissenting arbitrators, there is still not a uniform approach adopted as to the characterisation of preconditions and the criteria for their fulfilment. This is reflected also in the interpretation of the MFN clause and its application to preconditions envisaged in dispute settlement provisions.

Contrary to the findings of the ICJ, preconditions requiring the referral to alternative means for settlement prior to the initiation of arbitration proceedings are procedural requirements that are not related to the jurisdiction of the tribunal, but to the admissibility of the claim. Such procedural requirements impose taking some procedural steps on parties and they concern the *seisin* of the tribunal. The satisfaction of these requirements should be dealt with a substantive approach rather than a formalistic one. In their assessment, investment treaty tribunals should take the object and purpose of the relevant procedural requirements into account. Finally, the MFN clause cannot be invoked to overcome such requirements unless the wording of the MFN clause and its place within the applicable international investment treaty can be interpreted in a manner that allows parties to do so.