

How Narrow are Narrow Dispute Settlement Clauses in Investment Treaties?

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The scope of jurisdiction of investment tribunals is a crucial question which often leads to protracted arguments in the course of regularly bifurcated arbitration proceedings. In recent years an increasing number of cases involved narrow dispute settlement clause in BITs which relate to the amount and mode of compensation only in cases of expropriation. Tribunals have differed on the appropriate reading of such clauses, in particular, on whether they should be regarded as excluding the issue whether an expropriation has occurred in the first place or not. In addition, some investment tribunals have relied on the post-*Maffezini* interpretation of MFN clauses in order to extend their jurisdiction beyond the narrow issue of the amount and mode of compensation. In its first part, this article intends to provide a comprehensive overview of the existing jurisprudence on this matter. Secondly, it analyses the different interpretation techniques resorted to by investment tribunals ultimately demonstrating that neither of them cogently leads to a certain outcome.

1. Introduction

The fact that dispute settlement has been increasingly made available through specific clauses in trade and investment treaties has had a crucial impact on the current state of international economic law. By giving interested parties, ranging from States and inter State entities like the EU to private investors, the option of enforcing their rights in specific forums has made such rights real and effective. In particular the surge of investment arbitration has liberated private parties from the uncertainties whether their case will be espoused by their home States and it has equally removed the nuisance for host States having to defend often highly technical claims against foreign States willing to exercise diplomatic protection.¹

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¹ On the development of dispute settlement clauses in investment agreements, see in general R Dolzer and C Schreuer, *Principles of International Investment Law* (Oxford University Press, New York 2008) 246, 247; K Vandevelde, *Bilateral Investment Treaties: History, Policy, Interpretation* (Oxford University Press, New York

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that such better treatment was accorded to any third party national or in any third party BIT. The controversial value of this ‘contextual’ interpretation was clearly exposed in Judge Brower’s Separate Opinion in the *Austrian Airlines* case. Among others, he pointed to the practical consequence of the majority’s reasoning:

If every time an MFN clause were invoked it were to be read together with the treaty provisions which the MFN clause is alleged to circumvent, such a clause might never be given any effect.¹⁹²

In his view, the better interpretation of the MFN clause in Article 3(1) of the Austria/Czech and Slovak Federal Republic BIT would be one that allows reliance on dispute settlement clauses in other BITs since Article 3(1) was broadly worded, not limited to substantive treatment, and since Article 3(2) only exempted preferential treatment accorded under REIO arrangements.

5. *The Proper Scope of Narrow Dispute Settlement Clauses as an Interpretation Issue*

To ascertain the proper scope of jurisdiction of arbitration panels on the basis of narrow dispute settlement clauses illustrates in an exemplary fashion a number of interpretation problems arising in the context of investment treaties. In principle, it is largely undisputed that dispute settlement clauses, like other BIT provisions, have to be interpreted according to the rules of interpretation laid down in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (‘Vienna Convention’)¹⁹³, which are, by now, broadly regarded as codifying customary international law.¹⁹⁴

The specific relevance of the interpretation rules of the Vienna Convention for dispute settlement as well as MFN clauses has been confirmed by a number

¹⁹² Ibid Separate Opinion Judge Brower, para 7.

¹⁹³ Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331, 8 ILM 679. See also I Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press, Manchester 1984); R Gardiner, *Treaty Interpretation* (Oxford University Press, New York 2008).

¹⁹⁴ See eg *Libya v Chad* [1994] ICJ Reps 4, 19, para 41 (‘[...] in accordance with customary international law, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.’); *Salini Costruttori S.p.A. and Italstrade S.p.A. v Jordan*, ICSID Case No ARB/02/13, Decision on Jurisdiction, 9 November 2004, para 75 (‘[...] the interpretation of [a BIT] Article in conformity with Articles 31 to 33 of the Vienna Convention on the Law of Treaties which reflect customary international law.’); *Tokios Tokelés v Ukraine*, ICSID Case No ARB/02/18, Decision on Jurisdiction, 29 April 2004 (2005) 20 ICSID Rev FILJ 205, para 27 (‘[...] we interpret the ICSID Convention and the Treaty between the Contracting Parties according to the rules set forth in the Vienna Convention on the Law of Treaties, much of which reflects customary international law.’); *Mondev Int’l Ltd v United States of America*, ICSID Case No ARB(AF)/99/2, Award, October 11, 2002 (2003) 42 ILM 85, para 43 (‘[...] the question is what the relevant provisions mean, interpreted in accordance with the applicable rules of interpretation of treaties. These are set out in Articles 31-33 of the Vienna Convention on the Law of Treaties, which for this purpose can be taken to reflect the position under customary international law.’); *Noble Ventures, Inc. v Romania*, ARB/01/11, Award, 12 October 2005, para 50 (‘[...] reference has to be made to Arts. 31 et seq. of the Vienna Convention on the Law of Treaties which reflect the customary international law concerning treaty interpretation.’).

of investment tribunals,¹⁹⁵ maybe most clearly by the Tribunal in *National Grid PLC v The Argentine Republic*,¹⁹⁶ which held:

As already stated above, the Tribunal will interpret the Treaty as required by the Vienna Convention. Article 31 of the [Vienna] Convention requires an international treaty to 'be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.' [...] The Convention does not establish a different rule of interpretation for different clauses. The same rule of interpretation applies to all provisions of a treaty, be they dispute resolution clauses or MFN clauses.¹⁹⁷

Article 31 of the Vienna Convention provides:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with to be conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connection with the conclusion of treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.¹⁹⁸

Article 32 of the Vienna Convention provides as follows:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to

¹⁹⁵ *National Grid plc v The Argentine Republic* (n 77) para 80; *Suez et al v Argentina* (n 95) para 54; OECD, *Most Favoured Nation Treatment in International Investment Law* (2004) 9, 11, 16, available at <<http://www.oecd.org/dataoecd/21/37/33773085.pdf>> accessed 17 December 2010; R Dolzer and C Schreuer, *Principles of International Investment Law* (OUP, New York 2008) 188; JW Salacuse, *The Law of Investment Treaties* (Oxford University Press, New York 2010) 140.

¹⁹⁶ *National Grid v Argentina* (n 77).

¹⁹⁷ *Ibid* para 80.

¹⁹⁸ Art 31 Vienna Convention.

confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.¹⁹⁹

International jurisprudence has generally confirmed that the starting point for any treaty interpretation is the plain wording of the individual provisions of an agreement,²⁰⁰ aided by a contextual understanding of the entire agreement²⁰¹ and supported by teleological considerations about the aims of an agreement.²⁰² Nevertheless, it is generally accepted that a textual interpretation does not enjoy primacy over the other elements contained in Article 31 Vienna Convention. Rather, all aspects enjoy equal relevance. Investment tribunals have captured this approach as a ‘process of progressive encirclement’.²⁰³

It has become a truism for many investment tribunals to state that the wording of BITs matters and that they will pay specific attention to the actual language of the provisions applicable in various cases.²⁰⁴ Equally, object and

¹⁹⁹ Art 32 Vienna Convention.

²⁰⁰ *Libya v Chad* [1994] ICJ Reps 4, 20 para 41 (‘Interpretation must be based above all upon the text of the treaty.’). Advisory Opinion on the *Competence of the General Assembly for the Admission of a State to the United Nations* (1949–50) ICJ Reps 4 (1950) 8 (‘The first duty of a tribunal which was called upon to interpret and apply the provisions of a treaty [is] to endeavour to give effect to them in their natural and ordinary meaning [...]’). See also the comment of the International Law Commission on art 31 in International Law Commission, Draft Articles on the Law of Treaties with commentaries, *Yearbook of the International Law Commission*, 1966 vol II, 220 (‘The article as already indicated is based on the view that the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties.’).

²⁰¹ See eg *Fraport AG Frankfurt Airport Services Worldwide v Philippines*, ICSID Case No ARB/03/25, Award, 16 August 2007, para 339 (‘[...] Article 31 of the Vienna Convention on the Law of Treaties enjoins interpretation of particular provisions in their context, *i.e.* with reference to the rest of the treaty and in the light of its objects and purposes. The fact that there are three explicit references in the total of 16 provisions in the Treaty and Protocol plus an additional reference in the Instrument of Ratification, which selected only four items in the treaty deemed so important to the Philippines as to require additional recitation, indicates the significance of this condition. [...]’); *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. v Peru*, ICSID Case No ARB/03/4 (Previously *Empresas Lucchetti, S.A. and Lucchetti Perú, S.A. v Peru*) Decision on Annulment, 5 September 2007, para 80 (‘Having regard to the main rule in Article 31(1) of the Vienna Convention, the *Ad hoc* Committee finds that the second sentence of Article 2 of the BIT must be read in its context, *i.e.* together with the first sentence of the same Article which provides that the BIT shall apply to investments made both before and after the entry into force of the BIT.’).

²⁰² *SGS Société Générale de Surveillance SA v Philippines*, Decision on Objections to Jurisdiction and Separate Declaration, ICSID Case No ARB/02/6, 29 January 2004, para 116; *Occidental Exploration and Production Company v Ecuador*, Award, LCIA Case No UN 3467, 1 July 2004, para 183; *Siemens AG v Argentina* (n 89) para 81; *MTD Equity Sdn. Bhd. & MTD Chile S.A. v Chile*, Award, ICSID Case No ARB/01/7, 24 May 2004, para 113; *Enron Corporation and Ponderosa Assets, L.P. v Argentine Republic*, Award, ICSID Case No ARB/01/3, 22 May 2007, para 259.

²⁰³ *Aguas del Tunari v Bolivia*, ICSID Case No ARB/02/3, Decision on Respondent’s Objections to Jurisdiction, 21 October 2005, para 91 (‘Interpretation under Article 31 of the Vienna Convention is a process of progressive encirclement where the interpreter starts under the general rule with (1) the ordinary meaning of the terms of the treaty, (2) in their context and (3) in light of the treaty’s object and purpose, and by cycling through this three step inquiry iteratively closes in upon the proper interpretation. [I]t is critical to observe [that] the Vienna Convention does not privilege any one of these three aspects of the interpretation method.’).

²⁰⁴ See eg *M.C.I. Power Group L.C. and New Turbine, Inc. v Ecuador*, ICSID Case No ARB/03/6, Award, 31 July 2007, para 127 (‘From the wording of Article VII of the Argentina Ecuador BIT, the Tribunal concludes that, in accordance with the interpretation rules of Article 31 of the Vienna Convention, the references made in the text of that Article to “either Contracting Party,” “between the Contracting Parties,” “an investor of one Contracting Party and the other Contracting Party,” and “the other Contracting Party” unquestionably refer to

purpose of a treaty provision are of primary relevance for the interpretation of BITs.²⁰⁵ In spite of this general agreement on the use of the rules of treaty interpretation contained in the Vienna Convention, the actual results appear to differ sharply. In fact, the proper meaning of narrow dispute settlement clauses raises highly interesting interpretation questions;²⁰⁶ they demonstrate that tribunals may come to divergent results, although the actual difference in the specific wording of the clauses they have to apply may be slight.

A. *The Ordinary Meaning*

Faced with the question how to properly interpret a restrictive dispute settlement clause, the point of departure for investment tribunals usually is the literal interpretation required by Article 31(1) Vienna Convention.²⁰⁷

To many tribunals interpreting the scope of a provision referring to disputes ‘involving’ or ‘concerning’ the amount of compensation examination of the ‘ordinary meaning’ of such clauses suggests a narrow meaning. For instance, the *RosInvest* Tribunal referred to the ‘ordinary meaning’ of the limiting qualification ‘concerning the amount or payment of compensation’ to find that it excluded the possibility to arbitrate whether an expropriation had taken place.²⁰⁸ Similarly, it was clear to the *Berschader* Tribunal that the clause in issue had to be interpreted according to its ‘ordinary meaning’, which excluded arbitration of ‘disputes concerning whether or not an act of expropriation actually occurred’.²⁰⁹ Equally, for the *Austrian Airlines* Tribunal the ‘ordinary meaning’ of a clause referring to disputes ‘concerning the amount or the

the Contracting Parties of the Argentina Ecuador BIT.’); *Saluka Investments BV (The Netherlands) v The Czech Republic*, Partial Award, 17 March 2006, para 297 (‘The “ordinary meaning” of the “fair and equitable treatment” standard can only be defined by terms of almost equal vagueness. In *MTD*, the tribunal stated that: In their ordinary meaning, the terms “fair” and “equitable” [...] mean “just”, “evenhanded”, “unbiased”, “legitimate”. On the basis of such and similar definitions, one cannot say much more than the tribunal did in *S.D. Myers* by stating that an infringement of the standard requires treatment in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective. This is probably as far as one can get by looking at the “ordinary meaning” of the terms of Article 3.1 of the Treaty.’) (footnotes omitted).

²⁰⁵ See eg *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction, 14 November 2005, para 96 (‘Pursuant to the general principles of interpretation set forth in Article 31 of the Vienna Convention on the Law of Treaties [...] this Tribunal considers that the real meaning of Article VII of the BIT is to be determined in the light of the object and purpose of that provision.’); *Lauder v Czech Republic*, Award, 3 September 2001, 9 ICSID Reports 66, para 292; *MTD v Chile*, Award, 25 May 2004, (2005) 44 ILM 91, paras 104, 105; *Siemens v Argentina*, Decision on Jurisdiction, 3 August 2004 (2005) 44 ILM 138, para 81; *Noble Ventures v Romania*, Award, 12 October 2005, para 52; *Agua del Tunari S.A. v Republic of Bolivia*, Decision on Jurisdiction, ICSID Case No ARB/02/3, 21 October 2005, paras 153, 240 41; *Continental Casualty Company v Argentina*, Decision on Jurisdiction, 22 February 2006, para 80.

²⁰⁶ On the interpretation of investment treaties by arbitral tribunals, in general, see O Fauchald, ‘The Legal Reasoning of ICSID Tribunals: An Empirical Analysis’ (2008) 19 EJIL 301; T Wälde, ‘Interpreting Investment Treaties: Experiences and Examples’ in C Binder and others (eds), *International Investment Law for the 21st Century*, *Liber Amicorum Christoph Schreuer* (Oxford University Press, New York 2009) 724.

²⁰⁷ See n 198, above.

²⁰⁸ *RosInvest v Russia* (n 18) para 110, see text at n 20, above.

²⁰⁹ *Berschader v Russia* para 153, see text at n 12, above.

conditions of payment of a compensation' meant that only disputes about the amount of the compensation could be submitted to arbitration and not the question whether an expropriation had occurred in the first place.²¹⁰

A close look at the text will often show, however, that the presumed ordinary meaning may be less obvious than it appears at first sight. This is well illustrated by the decision in *Tza Yap Shum v Peru*.²¹¹ While clauses referring to disputes 'concerning the amount of compensation' have been mostly interpreted to exclude the question whether an expropriation had occurred at all,²¹² it is remarkable that a clause referring to disputes 'involving the amount of compensation for expropriation' was interpreted to include precisely this question. Starting with a literal interpretation of the dispute settlement clause, the *Tza Yap Shum* Tribunal stressed that the BIT:

'uses the word "involving" which, according to the Oxford Dictionary means "to enfold, envelope, entangle, include." A *bona fide* interpretation of these words indicate[s] that the only requirement established in the BIT is that the dispute must "include" the determination of the amount of a compensation, and not that the dispute must be restricted thereto. Obviously, other wording was available, such as "limited to" or "exclusively", but the wording used in this provision reads "involving"'.²¹³

Having 'broadened' the meaning of 'involving', the Tribunal held that the dispute must only 'include' the determination of the amount of a compensation, and not that it must be 'restricted thereto'.²¹⁴ This, of course, provided the possibility for determining also whether an expropriation had taken place.

It must remain a matter of speculation how the *Saipem* Tribunal would have approached the textual variation found in the dispute settlement clause of the Bangladesh/Italy BIT. Its finding that 'the BIT provides for ICSID jurisdiction in case of expropriation'²¹⁵ was apparently motivated by the fact that the respondent did not challenge the Tribunal's jurisdiction in this respect. It is certainly remarkable that the applicable dispute settlement clause referred to 'disputes relating to compensation for expropriation, nationalization, requisition or similar measures including disputes relating to the amount of the relevant payments'.²¹⁶ Obviously, the expression 'relating to' compensation does not indicate that only compensation disputes were meant; similarly the additional wording clarifying that the covered disputes 'include' those relating to the amount of compensation may lend itself to an interpretation like in *Tza Yap Shum* according to which this does not limit them to disputes over such

²¹⁰ *Austrian Airlines AG v The Slovak Republic* para 96, see text at n 24, above.

²¹¹ *Tza Yap Shum v Republic of Peru* (n 52).

²¹² See *Berschader* (n 10), *RosInvest* (n 18) and *Austrian Airlines* (n 22); see, however, the apparent diverging view in *Telenor* (n 30).

²¹³ *Tza Yap Shum v Republic of Peru* (n 52), para 151.

²¹⁴ *Ibid* para 151.

²¹⁵ *Saipem v Bangladesh* (n 42).

²¹⁶ Art 9 Bangladesh Italy BIT 1990, see also text at n 38, above.

amount. Nevertheless, the clause's wording itself could give rise to the narrow interpretation that in addition to disputes over the amount of compensation only other disputes relating to compensation, such as the proper methods of compensation (type of currency; time frame; etc), are covered, not however, the preceding question whether an expropriation had occurred in the first place.²¹⁷ Many BITs, including the Bangladesh/Italy BIT, provide that compensation shall be 'prompt, adequate and effective'²¹⁸ and all these aspects may be considered to 'relate to' compensation. The formulation 'including disputes relating to the amount' of compensation may be seen as a clarification that the crucial issue of the amount is within the jurisdiction of an investment tribunal; it also indicates, however, that such jurisdiction is not limited to it. Thus, one could argue that the jurisdiction of an investment tribunal, limited to 'disputes relating to compensation' according to the Bangladesh/Italy BIT, encompasses these three aspects of compensation, not, however, the preceding issue whether an expropriation has occurred.

Particular emphasis was given to the literal interpretation of BIT provisions by the English court in the challenge proceedings concerning the jurisdictional award in *European Media Ventures SA v Czech Republic*.²¹⁹ Judge Simon insisted that he was unable to accept that the phrase 'concerning compensation due by virtue of' must be read as meaning 'relating to the amount of compensation' as a matter of 'its ordinary meaning'.²²⁰ Based on his interpretation of the word 'concerning' as a broad term, he concluded that the dispute settlement clause's 'ordinary meaning is to include every aspect of its subject: in this case 'compensation due by virtue of Paragraphs (1) and (3) of Article 3'. As a matter of ordinary meaning this covers issues of entitlement as well as quantification'.²²¹ This broad interpretation of the term 'concerning' shows that any possible distinction between a narrow 'concerning' as in *RosInvest, Berschader* and *Austrian Airlines*²²² and a broad 'involving' as in *Tza Yap Shum*²²³ has become questionable.

²¹⁷ Most investment tribunals concur that the requirement of an 'effective' compensation relates to the availability of compensation in a freely convertible currency, and that 'prompt' compensation requires compensation within a reasonable time frame and, if delayed, the payment of interest. See the overview by A Reinisch, 'Legality of Expropriations' in A Reinisch (ed), *Standards of Investment Protection* (Oxford University Press, New York 2008) 171, at 196. See also World Bank *Guidelines on the Treatment of Foreign Direct Investment*, IV (3) (8), in World Bank, *Legal Framework for the Treatment of Foreign Investment* (Washington DC: The World Bank 1992). The Guidelines are reprinted in (1992) 31 ILM 1379.

²¹⁸ Art 5(1)(2) of the Bangladesh Italy BIT uses as slight textual variation according to which the expropriating state shall make 'immediate full and effective' compensation.

²¹⁹ *European Media Ventures SA v Czech Republic*, UNCITRAL Award on Jurisdiction, 15 May 2007 (not public).

²²⁰ *European Media Ventures SA v Czech Republic*, Judgment of the High Court of England and Wales, 5 December 2007, (2007) EWHC 2851 (Comm) para 43.

²²¹ *Ibid* para 44.

²²² See text at n 208, above.

²²³ See text at n 211, above.

Interestingly, the other distinguishing element of the dispute settlement clause of the BIT applicable in the *European Media Ventures SA v Czech Republic* case, the reference to compensation ‘due’, was not expressly taken up as a matter of the court’s literal interpretation. This wording was, however, the decisive element leading the Tribunal in *Renta 4*²²⁴ to conclude that a narrow dispute settlement clause referring to disputes ‘relating to the amount or method of payment of the compensation due under [...]’²²⁵ was to be interpreted broadly. In the opinion of the *Renta 4* Tribunal the assessment whether an expropriation had taken place was a necessary element for the assessment whether the compensation was ‘due’ in such a situation.²²⁶

The ‘ordinary meaning’ is also regularly invoked in cases where tribunals are called upon to decide on the scope of MFN clauses. The *Maffezini* Tribunal emphasized the wording of the applicable MFN clause, which referred to treatment ‘in all matters subject to this Agreement’ in order to conclude that these covered dispute settlement as well.²²⁷ This interpretation was reaffirmed in the *Suez* case where the Tribunal held that dispute settlement was certainly a ‘matter’ governed by the Argentina/Spain BIT and that the ‘ordinary meaning’ of the term ‘treatment’ included the rights and privileges granted by a Contracting State to investors covered by the treaty.²²⁸

The limits of any perceived ‘objective’ literal meaning of the term ‘treatment’ can be seen when looking at the contrary opinion of the arbitrators in the *Wintershall* case. Equally invoking a literal interpretation approach, they found that:

[i]n the absence of language or context to suggest the contrary, the ordinary meaning of “investments shall be accorded treatment no less favourable than that accorded to investments made by investors of any third State” is that the investor’s *substantive* rights in respect to the investments are to be treated no less favourable than under a BIT between the host State and a third State.²²⁹

This outcome was buttressed by the Tribunal’s insistence that ‘[t]he ordinary meaning of expressions such as “investment related activities” or “associated activities” used in BITs refer generally to activities of the investor *for the conduct of his/its business in the territory of the host State* rather than to activities related to or associated with the settlement of disputes between the investors and the

²²⁴ *Renta 4 S.V.S.A et al. v Russian Federation* (n 49).

²²⁵ Art 10(1) Spain Russia BIT.

²²⁶ See text at n 51, above.

²²⁷ *Emilio Agustín Maffezini v Kingdom of Spain* (n 83).

²²⁸ *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v The Argentine Republic* (n 97).

²²⁹ *Wintershall v Argentina* (n 116) para 168; see also text at n 118, above.

Host State'.²³⁰ Also the *Telenor* Tribunal relied on a literal interpretation of the term treatment when it concluded that:

[i]n the absence of language or context to suggest the contrary, the ordinary meaning of “investments shall be accorded treatment no less favourable than that accorded to investments made by investors of any third State” is that the investor’s *substantive* rights in respect of the investments are to be treated no less favourably than under a BIT between the host State and a third State, and there is no warrant for construing the above phrase as importing procedural rights as well.²³¹

The limits of literal interpretation may have been transgressed in the *Berschader* case²³² where an MFN clause similar to the one in *Maffezini* was applicable. The Tribunal, however, asserted that “[w]ith respect to the construction of expressions such as “all matters” or “all rights” covered by the treaty, it should be noted that [...] not even seemingly clear language like this can be considered to have an unambiguous meaning in the context of an MFN clause’.²³³ The Tribunal concluded that the ‘expression “all matters covered by the present Treaty” certainly cannot be understood literally’.²³⁴ Rather, it should be read to relate only to the ‘classical elements of material investment protection, i.e. fair and equitable treatment, non expropriation and free transfer of funds’ as referred to in the clarification.²³⁵ The *Berschader* Tribunal bluntly concluded:

[...] that the expression “all matters covered by the present Treaty” does not really mean that the MFN provision extends to all matters covered by the Treaty. Therefore, the “ordinary meaning” of that expression is of no assistance in the instant case, and the expression as such does not warrant the conclusion that the parties intended the MFN provision to extend to the dispute resolution clause.²³⁶

In fact, it is hard to imagine a more direct renunciation of literal interpretation than that.

Also MFN clauses specifically listing certain areas in which such treatment is to be accorded have given rise to different interpretations. The *Suez* Tribunal relied on a textual interpretation when it interpreted the MFN clause of the Argentina/UK BIT, which referred to treatment accorded to investors ‘as regards their management, maintenance, use, enjoyment or disposal of their

²³⁰ *Wintershall v Argentina* (n 116) para 171; see also text at n 119, above. What exactly the *Wintershall* Tribunal intended to say was, of course, further complicated by its statement that it denied the bypassing of the waiting period ‘not because “treatment” in Article 3 may not include “protection” of an investment by the investor adopting ICSID arbitration [...]’ *Wintershall v Argentina* (n 116) para 162; see also text at (n 117), above.

²³¹ *Telenor v Hungary* (n 30) para 92.

²³² *Berschader v Russia* (n 10). See text at n 155, above.

²³³ *Berschader v Russia* (n 10) para 184.

²³⁴ *Ibid* para 192.

²³⁵ *Ibid* para 193.

²³⁶ *Ibid* para 194.

investments.²³⁷ The rationale for its holding that UK investors were entitled to invoke this MFN clause was that:

[t]he right to have recourse to international arbitration [...] is particularly related to the “maintenance” of an investment, a term which includes the protection of an investment.²³⁸

A similar approach was followed in the *RosInvest* decision where the Tribunal, in face of a nearly identical MFN clause,²³⁹ stressed the link of access to arbitration to an investment’s use and enjoyment. Taking the fact that expropriation interferes with an investor’s use and enjoyment of an investment as a point of departure, the Tribunal reasoned:

[...] that the submission to arbitration forms a highly relevant part of the corresponding protection for the investor by granting him, in case of interference with his “use” and “enjoyment”, procedural options of obvious and great significance compared to the sole option of challenging such interference before the domestic courts of the host state.²⁴⁰

While both in *Suez* and in *RosInvest* the link of procedural remedies to the substantive protection is highly plausible, one cannot help observing that this alone does not necessarily imply that the treatment ‘as regards management, maintenance, use, enjoyment or disposal of investments’ includes access to arbitration. The ordinary meaning of these terms appears to be sufficiently indeterminate to allow either choice.

Easier to grasp are decisions that are based on special formulations of MFN clauses diverging from those of other BITs, which compel a tribunal to give them a specific meaning. A good example is the MFN provision in the Spain/Russia BIT, which forms part of that treaty’s fair and equitable treatment provision and provides that fair and equitable treatment shall be no less favourable than that accorded to third party nationals.²⁴¹ Thus, the *Renta4* Tribunal came to the conclusion that while there was ‘no textual basis or legal rule to say that “treatment” does not encompass the host state’s acceptance of international arbitration’²⁴² ‘the terms of the Spanish BIT restrict MFN treatment to the realm of FET as understood in international law’.²⁴³ It requires a certain stretch of the notion of fair and equitable treatment to come to a contrary conclusion as the dissenting arbitrator in *Renta4* did. Since in his view, ‘international arbitration [was] an aspect of fair and equitable treatment’ even a narrow interpretation of the reference in the fair and

²³⁷ Art 3(2) Argentina UK BIT. See text at n 98, above.

²³⁸ *Suez v Argentina* (n 77) para 57; see also text at n 99, above.

²³⁹ Art 3(2) UK USSR BIT. See text at n 169, above.

²⁴⁰ *RosInvest v Russia* (n 18) para 130.

²⁴¹ Art 5(2) Spain Russia BIT. See text at n 176, above.

²⁴² *Renta 4 S.V.S.A et al. v Russian Federation* (n 49) para 101.

²⁴³ *Ibid* para 119.

equitable treatment article of the Spain/Russia BIT would have permitted the claimant access to more favourable dispute settlement clauses.²⁴⁴

The plain meaning also played an important role in the *Siemens* case in which an ICSID Tribunal rejected Argentina's argument that if the investor were allowed to rely on another, more favourable, third country BIT it should also be required to abide by the more burdensome provisions of such treaty. The Tribunal rejected this proposition not only out of teleological concerns about the proper object and purpose of an MFN clause in general,²⁴⁵ but also as a result of its own textual interpretation of the term 'most favorable treatment'. With regard to Argentina's interpretation of MFN, it merely stated that:

[...] this is not the meaning of an MFN clause. As its own name indicates, it relates only to more favorable treatment. [...] Even if the MFN clause is of a general nature, its application will be related only to the benefits that the treaty of reference may grant and to the extent that benefits are perceived to be such.²⁴⁶

Obviously, tribunals had to interpret dispute settlement clauses and MFN clauses with partially divergent wording. However, it may be questioned whether the degree of textual differentiation alone would have merited the divergent outcomes. Apparently, tribunals had to rely on other elements of interpretation as well.

B. Intent of the Parties—Negotiating History

Although the intention of treaty parties is not an express guideline for treaty interpretation pursuant to Articles 31 and 32 of the Vienna Convention, it is widely accepted that the intention of the treaty parties is a relevant aspect of interpretation. Thus, it is not surprising that international courts and tribunals often inquire into the intention of the parties in order to ascertain the content of specific treaty provisions. This is also true for investment tribunals, in general,²⁴⁷ and when it comes to interpreting arbitration clauses, in particular.²⁴⁸

²⁴⁴ Ibid (n 49), Separate Opinion Charles N Brower, para 22.

²⁴⁵ See text at n 298, below.

²⁴⁶ *Siemens A.G. v The Argentine Republic* (n 78); see also text at n 90, above.

²⁴⁷ See eg *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v Argentine Republic*, ICSID Case No ARB/97/3, Award, 20 August 2007, para 7.4.4 ('[...] the Tribunal notes the parties' wish, as stated in the preamble, for the Treaty to create favourable conditions for French investments in Argentina, and vice versa, and their conviction that the protection and promotion of such investments is expected to encourage technology and capital transfers between both countries and to promote their economic development.');

Parkerings Compagniet AS v Lithuania, ICSID Case No ARB/05/8, Award, 11 September 2007, para 277 ('The standard of "fair and equitable treatment" has been interpreted broadly by Tribunals and, as a result, a difference of interpretation between the terms "fair" and "reasonable" is insignificant. The Claimant did not show any evidence which could demonstrate that, when signing the BIT, the Republic of Lithuania and the Kingdom of Norway intended to give a different protection to their investors than the protection granted by the "fair and equitable" standard.')

²⁴⁸ See already *Amco Asia Corporation and others v Republic of Indonesia*, Case No ARB/81/1, Decision on Jurisdiction, 25 September 1983, para 14 ('[A] convention to arbitrate is not to be construed restrictively, nor, as

Ideally, the wording of a treaty is seen as the best expression of what the parties really intended.²⁴⁹

Whether this is always true may be open to doubt, although the idea as such has been affirmed in investment arbitration practice. For instance, the *Salini v Jordan* Tribunal, after failing to find any evidence for a common intention of the Parties to have an MFN clause to apply to dispute settlement, stated:

Quite on the contrary, the intention as expressed in Article 9(2) of the BIT was to exclude from ICSID jurisdiction contractual disputes between an investor and an entity of a State Party in order that such disputes might be settled in accordance with the procedures set forth in the investment agreements.²⁵⁰

While this intention may certainly underlie the dispute settlement provision of the Italy/Jordan BIT, the question really was whether the parties intended the MFN clause of this BIT to encompass dispute settlement. It is questionable whether the dispute settlement clause could provide an answer to this question.

Instead of establishing the intention by reliance on the text, the ordinary meaning is often reconfirmed by what tribunals regard as the intention of the parties. Concerning the interpretation of narrow dispute settlement clauses the 'ordinary meaning' ascertained by tribunals is often corroborated with the argument that it was intended by the parties. For instance, in *Berschader* the Tribunal found that given the formulation of the applicable dispute settlement clause, it had to be assumed that:

[...] the Contracting Parties intended that a dispute concerning whether or not an act of expropriation actually occurred was to be submitted to dispute resolution procedures provided for under the applicable contract or alternatively to the domestic courts of the Contracting Party in which the investment is made.²⁵¹

Tribunals often attempt to uncover the intention of treaty parties by having recourse to the *travaux préparatoires* of a treaty. Though mentioned in Article 32 of the Vienna Convention only as supplementary means of interpretation,²⁵²

a matter of fact, *broadly* or *liberally*. It is to be construed in a way which leads to find out and to respect the common will of the parties.); *Berschader v Russian Federation* (n 10) para 175 ('Firstly, the tribunal must express its firm view that the fundamental issue in determining whether or not an MFN clause encompasses the dispute resolution provisions of other treaties must always be an assessment of the intention of the contracting parties upon the conclusion of each individual treaty. [...] Ultimately, that question can only be answered by a detailed analysis of the text and, where available, the negotiating history of the relevant treaty, as well as other relevant facts.').

²⁴⁹ *Berschader v Russia* (n 165) ('While my colleagues concentrate much of their analysis on identifying the intent of the drafters of the Treaty [...], I focus on the treaty terms themselves as the best evidence of ascertaining such intent.').

²⁵⁰ *Salini v Jordan* (n 33) para 118. See in more detail text at n 128, above.

²⁵¹ *Berschader v Russia* (n 12) para 153; see text at n 13, above.

²⁵² See text at n 199, above.

establishing the (re)constructed will of the parties is frequently the avowed task of arbitration tribunals.²⁵³ Since States often do not specifically negotiate individual treaty provisions, but rather rely on templates taken from national Model BITs, such emphasis on their presumed intention to be unearthed by studying the *travaux* may be overly optimistic.²⁵⁴

Nevertheless, the role of the parties' intention when agreeing on narrow dispute settlement clauses is often expressly addressed by investment tribunals. To what extent tribunals are able to identify the will of the parties and, correspondingly, to what extent the contracting parties were able to express their will in a comprehensible way may be questionable. Furthermore, often insolvable heuristic problems will arise where a tribunal concludes that the parties had obviously diverging intentions. Against this background one may wonder how, for instance, the *RosInvest* Tribunal came to the conclusion that, given that the dispute settlement of the UK/USSR BIT²⁵⁵ ('disputes concerning the amount or payment of compensation') represented a 'compromise between the UK's intention to have a wide arbitration clause and the Soviet intention to have a limited one', it could not be interpreted to include all aspects of an expropriation.²⁵⁶

In *Berschader*, the Tribunal concluded from the change in treaty practice on the part of the USSR that such change indicated 'that the restrictive wording of Article 10 arose from the deliberate intention of the Contracting Parties to limit the scope for arbitration under the Treaty'.²⁵⁷ In fact, this intention was not clearly expressed but rather was deduced from the fact that subsequent treaties no longer contained the restrictive wording, whatever its original meaning. Why the intention of the Belgian side that was presumably expressed in a statement by its Foreign Minister referring to the possibility to arbitrate all matters covered by the expropriation provision²⁵⁸ was less important, remained unanswered by the Tribunal.

Also the *Tza Yap Shum* Tribunal addressed the 'preparatory works of the BIT and the circumstances surrounding its conclusion',²⁵⁹ expressly mentioned as supplementary means of interpretation pursuant to Article 32 of the Vienna Convention. It particularly inquired into the negotiating history of the China/

²⁵³ *Plama Consortium Limited v Bulgaria* (n 33) paras 189-95; *Pope & Talbot Inc v Canada*, UNCITRAL Award on the Merits of Phase 2, 10 April 2001, paras 39-41; *Mondev v US*, ICSID Case No ARB (AF)/99/2, Award, 11 October 2002, para 111.

²⁵⁴ See T Wälde, 'Interpreting Investment Treaties: Experiences and Examples' in C Binder and others (eds), *International Investment Law for the 21st Century, Liber Amicorum Christoph Schreuer* (Oxford University Press, New York 2009) 724, 750 ('What these features do is to place a question mark over the use of *travaux* under Article 32 VCLT, but also over too much reliance on established interpretation maxims such as '*e contrario*' or the principle of effectiveness of each element of the text. These assume a degree of perfection and information with the drafters that did not exist.').

²⁵⁵ See text at n 19, above.

²⁵⁶ *RosInvestCo UK Ltd. v The Russian Federation* (n 18) para 110.

²⁵⁷ *Berschader v Russia* (n 10) para 155, see text at n 15, above.

²⁵⁸ *Ibid* para 158, see text at n 16, above.

²⁵⁹ *Tza Yap Shum v Republic of Peru* (n 52) para 162.

Peru BIT and found that China had favoured a restrictive interpretation of the dispute settlement clause, while Peru had changed its position in the course of the negotiations from initially agreeing to have domestic courts only determine the lawfulness of an expropriation to finally favouring a fork in the road provision comprising any investment dispute. Since the latter proposal was not accepted by the Chinese, the BIT was concluded on the basis of a Chinese draft as initially proposed. In the Tribunal's view, however, these divergent intentions were not 'concluding proof' of the scope of the dispute settlement clause.²⁶⁰ Finally, it decided mainly on the basis of the clause's wording that it did comprise the issue of whether an expropriation had occurred.

These three cases demonstrate the limited value of having recourse to the *travaux préparatoires* where they exhibit conflicting intentions. Where the parties disagreed in substance their intention cannot give rise to a single compelling interpretation. Thus, the tribunals either concluded that the parties' intentions were not 'concluding proof' for either view (*Tza Yap Shum*) or simply left it open how to assess such divergent intentions (*RosInvest*) or why the will of one contracting party was given greater weight than that of the other (*Berschader*).

Also tribunals interpreting the scope of MFN clauses repeatedly refer to the (perceived) intention of the parties. Often they merely had to state their inability to establish intent. For instance, the *Salini* Tribunal, holding that an MFN clause could not be used to import dispute settlement clauses of other BITs, did so among others because:

[...] the Claimants have submitted nothing from which it might be established that the common intention of the Parties was to have the most-favored-nation clause apply to dispute settlement.²⁶¹

Of course, the underlying presumption appears to have been one against such use, which had to be rebutted. Otherwise, the silence of the *travaux préparatoires* could have been used in the opposite way to demonstrate that there was no common intention of the Parties to exclude dispute settlement from the scope of MFN treatment. The Tribunal's subsequent retreat to the text of the treaty in order to ascertain the intention of the parties²⁶² is inconclusive to the extent that it was undisputed that the applicable BIT itself excluded certain disputes from the jurisdiction of ICSID Tribunals; the question was whether the MFN clause included dispute settlement in principle.

The presumption against the extension of MFN clauses to dispute settlement provisions was expressly endorsed by the *Plama* Tribunal. In this context, the Tribunal attributed a specific role to the intention of the parties which must

²⁶⁰ *Ibid* para 171, see text at n 69, above.

²⁶¹ *Salini v Jordan* (n 33) para 118. See in more detail, text at n 128, above.

²⁶² *Salini v Jordan* (n 33) para 118 ('Quite on the contrary, the intention as expressed in Article 9(2) of the BIT was to exclude from ICSID jurisdiction contractual disputes between an investor and an entity of a State Party in order that such disputes might be settled in accordance with the procedures set forth in the investment agreements.').

become manifest – most likely in the wording of the treaty – to overcome such a presumption. According to the *Plama* Tribunal:

[...] 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.²⁶³

This presumption linked to a possible contrary intention of the parties is echoed in a number of MFN cases. For instance, in *Telenor* the Tribunal held that ‘[...] an MFN clause in a BIT providing for most favoured nation treatment of investment should not be construed as extending the jurisdiction of the arbitral tribunal to categories of dispute beyond those set out in the BIT itself in the absence of clear language that this is the intention of the parties’.²⁶⁴ Similarly, the *Berschader* Tribunal followed ‘[...] the principle that an MFN provision in a BIT will only incorporate by reference an arbitration clause from another BIT where the terms of the original BIT clearly and unambiguously so provide or where it can otherwise be clearly inferred that this was the intention of the contracting parties’.²⁶⁵ Since no such clear and unambiguous evidence was available, the majority declined to exercise jurisdiction on the basis of an ‘imported’ dispute settlement clause.

The *Telenor* Tribunal also relied on the intention of the BIT parties in order to rationalize its rejection of the possibility to import dispute settlement provisions from other BITs since it regarded dispute settlement clauses as specifically negotiated. In its view, it was ‘obvious’ that:

[...] a State, when reaching agreement on [a specific] form of dispute resolution clause, intends that the jurisdiction of the arbitral tribunal is to be limited to the specified categories and is not to be inferentially extended by an MFN clause. Where, as in the present case, *both* parties to a BIT which restricts the reference to arbitration to specified categories have entered into other BITs which refer all disputes to arbitration or where they have concluded other BITs some of which refer all disputes to arbitration while others limit such a reference to specified categories of dispute, then it can fairly be assumed that in the BIT in question the two parties share a common intention to limit the jurisdiction of the arbitral tribunal to the categories so specified. In these circumstances, to invoke the MFN clause to embrace the method of dispute resolution is to subvert the intention of the parties to the basic treaty, who have made it clear that this is not what they wish.²⁶⁶

None of these cases explain the legal basis of their underlying presumption, and in particular, why the presumption should work in one direction and not in the opposite. Possibly this is a result of the largely accepted interpretation

²⁶³ *Plama v Bulgaria* (n 33) para 223.

²⁶⁴ *Telenor v Hungary* (n 30) para 91.

²⁶⁵ *Berschader v Russia* (n 10) para 181.

²⁶⁶ *Telenor v Hungary* (n 30) para 95.

principle in *dubio mitius* according to which, in case of doubt, States must be presumed to incur fewer rather than more far reaching obligations.²⁶⁷

C. Contextual Interpretation

A contextual interpretation of treaty provisions is clearly mandated by Article 31 Vienna Convention calling for an interpretation of the ‘terms in their context’.²⁶⁸ Investment tribunals often determine the meaning of provisions by reference to their location within a specific BIT.²⁶⁹ Also, with regard to narrow dispute settlement clauses tribunals have repeatedly resorted to a contextual interpretation.

(i) Context within BITs

In the *Austrian Airlines* case,²⁷⁰ the Tribunal used the expropriation clause of the applicable BIT in order to support its narrow reading of the dispute settlement clause. There it found confirmation of its view that the choice between national courts and investment arbitration was limited to the amount and payment conditions of compensation,²⁷¹ while the right to challenge an expropriation was only foreseen before national courts of the host country.²⁷²

Also the *Tza Yap Shum* Tribunal engaged in a ‘contextual interpretation’ of the dispute settlement clause. In this case, the context was found in the dispute

²⁶⁷ See *Loewen v USA*, ICSID Case No ARB (AF)/98/3, Award, 26 June 2003; (2003) 42 ILM 811, 7 ICSID Rep 442; *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, ICSID Case No ARB/01/13, Decision on Jurisdiction, 6 August 2003, para 177 ([...]. The appropriate interpretive approach is the prudential one summed up in the literature as *in dubio pars mitior est sequenda*, or more tersely, *in dubio mitius*.). See also G van Harten, *Investment Treaty Arbitration and Public Law* (2007) 132; and the criticism in T Wälde, ‘Interpreting Investment Treaties’ in Ch Binder and others (eds), *International Investment Law for the 21st Century* (2009) 741. See also *Mondev v US*, ICSID Case No ARB(AF)/99/2 (NAFTA), Award, 11 October 2002, para 43 (‘There is no principle of either extensive or restrictive interpretation of jurisdictional provision in treaties. In the end the question is what the relevant provisions mean, interpreted in accordance with the applicable rules of interpretation of treaties.’).

²⁶⁸ See text at n 198, above.

²⁶⁹ See eg *Saluka Investments BV (The Netherlands) v The Czech Republic*, Partial Award, 17 March 2006, para 298 (‘The immediate “context” in which the “fair and equitable” language of Article 3.1 is used relates to the level of treatment to be accorded by each of the Contracting Parties to the investments of investors of the other Contracting Party. The broader “context” in which the terms of Article 3.1 must be seen includes the other provisions of the Treaty. In the preamble of the Treaty, the Contracting Parties recognize[d] that agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties and that fair and equitable treatment is desirable. The preamble thus links the “fair and equitable treatment” standard directly to the stimulation of foreign investments and to the economic development of both Contracting Parties.’).

²⁷⁰ *Austrian Airlines AG v The Slovak Republic*, UNCITRAL, Final Award and Dissenting Opinion, 20 October 2009.

²⁷¹ Art 4(5) Austria Czech and Slovak Federal Republic BIT 1991: ‘The investor shall have the right to have the amount of compensation and the conditions of payment reviewed either by the competent authorities of the Contracting Party which prompted the expropriation or by an arbitral tribunal according to Article 8 of this Agreement’.

²⁷² Art 4(4) Austria Czech and Slovak Federal Republic BIT 1991: ‘The investor shall have the right to have the legitimacy of the expropriation reviewed by the competent authorities of the Contracting Party which prompted the expropriation’; *Austrian Airlines AG v The Slovak Republic* (n 22) paras 97–99.

settlement clause itself.²⁷³ According to the Tribunal, the combined effect of Article 8(2) and 8(3) last sentence of the China/Peru BIT would have deprived an investor of any access to ICSID arbitration at all, in case the narrow clause were interpreted to relate to the determination of the amount of compensation only. Article 8(2) provided for the submission of investment disputes to domestic courts. In the Tribunal's opinion, Article 8(3) last sentence China/Peru BIT was a fork in the road clause²⁷⁴ which, in the tribunal's view, implied that once an investor had chosen to submit a dispute to the competent courts of a contracting party, such investor 'may not, under any circumstance, make use of ICSID arbitration to settle a "dispute involving the amount of compensation for expropriation"'.²⁷⁵ Because the context of the narrow dispute settlement provision of Article 8(3) first sentence would have led to an 'incoherent conclusion'²⁷⁶ the Tribunal determined that Article 8(3) did not deprive an investor of the right to submit other disputes involving expropriation²⁷⁷ directly to ICSID arbitration.

Equally, for the purpose of interpreting MFN clauses, tribunals have frequently looked at the context of such clauses and the relationship to other clauses in a BIT that might shed light on their proper interpretation. One recurrent line of argument, particularly of those tribunals that were willing to allow the extension of MFN clauses to procedural or even jurisdictional provisions in third country BITs, relates to the implications of certain exceptions to MFN treatment as they are often expressly foreseen in BITs. At a minimum, many BITs provide that MFN treatment does not cover benefits granted as a result of preferential trade agreements like customs unions and free trade agreements. *E contrario* or on the basis of the principle of *expressio unius est exclusio alterius*, tribunals have argued that other exceptions should not be read into the text.²⁷⁸ Thus, where an MFN clause is wide enough to cover procedural or jurisdictional issues, the lack of any express exception in these fields should be interpreted as a clear indication that they

²⁷³ See for the text of this provision above text at n 53.

²⁷⁴ Art 8 (3) China Peru BIT provides: 'If a dispute involving the amount of compensation for expropriation cannot be settled within six months after resort to negotiations as specified in Paragraph 1 of this Article, it may be submitted at the request of either party to the international arbitration of the International Centre for Settlement of Investment Disputes (ICSID), established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, signed in Washington D.C. on March 18, 1965. Any disputes concerning other matters between an investor of either Contracting Party and the other Contracting Party may be submitted to the Centre if the parties to the disputes so agree. The provisions of this Paragraph shall not apply if the investor concerned has resorted to the procedure specified in Paragraph 2 of this Article.'

²⁷⁵ *Tza Yap Shum v Republic of Peru* (n 52) para 159.

²⁷⁶ *Ibid* para 154.

²⁷⁷ Like those mentioned in *Ibid* para 152. See n 58, above.

²⁷⁸ See, for instance, the Tribunal in *Tokios Tokelés v Ukraine*, on the issue of the correct interpretation of the definition of investor. *Tokios Tokelés v Ukraine*, ICSID Case No ARB/02/18, Decision on Jurisdiction, April 29, 2004, para 30 ('Under the well established presumption *expressio unius est exclusio alterius*, the state of incorporation, not the nationality of the controlling shareholders or *siège social*, thus defines "investors" of Lithuania under Article 1(2)(b) of the BIT.').

are included. This reasoning was adopted by the Tribunal in *National Grid*, stating that:

[...] the MFN clause does not expressly refer to dispute resolution or for that matter to any other standard of treatment provided for specifically in the Treaty. On the other hand, dispute resolution is not included among the exceptions to the application of the clause. As a matter of interpretation, specific mention of an item excludes others: *expressio unius est exclusio alterius*.²⁷⁹

The same reasoning was emphasized in the *RosInvest* case where the Tribunal specifically noted that the UK/USSR BIT exempted preferential trade and tax agreements from the application of its MFN clause²⁸⁰ and concluded that:

[...] it can certainly not be presumed that the Parties ‘forgot’ arbitration when drafting and agreeing on Article 7. Had the Parties intended that the MFN clauses should also not apply to arbitration, it would indeed have been easy to add a subsection (c) to that effect in Article 7. The fact that this was not done, in the view of the Tribunal, is further confirmation that the MFN-clauses in Article 3 are also applicable to submissions to arbitration in other Treaties.²⁸¹

It thus followed the argument proposed by claimant who had urged the tribunal to apply ‘the principle of *expressio unius est exclusio alterius* [...]’.²⁸²

However, even this seemingly compelling *e contrario* argument need not necessarily be heard by investment tribunals. For instance, in the *Austrian Airlines* case, the Tribunal faced with an MFN clause that merely exempted regional economic integration arrangements disregarded this exception and merely focused on what it termed the ‘manifest, specific intent’ of the parties expressed in the BIT’s dispute settlement clause to restrict arbitration to disputes over the amount of compensation for expropriation to the exclusion of disputes over the principle of expropriation. In its view, ‘it would be paradoxical to invalidate that specific intent by virtue of the general, unspecific intent expressed in the MFN clause’.²⁸³ Thereby, the MFN clause was deprived of any practical effect without even discussing the reach of its limitation. Indeed, it may be difficult to imagine in what circumstances an MFN clause may still have practical relevance if the provisions of the basic treaty are viewed as specific intended prevailing over the merely generally intended MFN treatment.²⁸⁴

²⁷⁹ *National Grid v Argentina* (n 77) para 82.

²⁸⁰ Art 7 UK USSR BIT. See for the text of this provision in n 172, above.

²⁸¹ *RosInvestCo UK Ltd. v The Russian Federation* (n 18) para 135.

²⁸² *Ibid* para 100. (‘Applying the principle of *expressio unius est exclusio alterius*, Claimant therefore interprets Article 7 to the effect that all matters within the scope of the IPPA not expressly excluded from Article 3 are included.’).

²⁸³ *Austrian Airlines AG v The Slovak Republic* (n 22) para 135.

²⁸⁴ Indeed, this was criticized by the dissenting arbitrator. *Austrian Airlines AG v The Slovak Republic* (n 192) (‘If every time an MFN clause were invoked it were to be read together with the treaty provisions which the MFN clause is alleged to circumvent, such a clause might never be given any effect.’).

Similarly, the Tribunal in *Plama v Bulgaria* first acknowledged that:

[t]he second paragraph of Article 3 of the Bulgaria/Cyprus BIT contains an exception to MFN treatment relating to economic communities and unions, a customs union or a free trade area. This may be considered as supporting the view that all other matters, including dispute settlement, fall under the MFN provision of the first paragraph of Article 3 (on the basis of the principle *expressio unius est exclusio alterius*).²⁸⁵

It then refuted this interpretation, however, by stressing that ‘the fact that the second paragraph refers to “privileges” may be viewed as indicating that MFN treatment should be understood as relating to substantive protection. Hence, it can be argued with equal force that the second paragraph demonstrates that the first paragraph is solely concerned with provisions relating to substantive protection to the exclusion of the procedural provisions relating to dispute settlement’.²⁸⁶

(ii) *The contextual relevance of other BITs*

When ascertaining the proper meaning of narrow dispute settlement clauses via contextual consideration, tribunals often take a comparative approach by looking at the wording of other BITs concluded by each of the parties with third States. The fact that some BITs clearly include the power of investment tribunals to determine whether an expropriation had occurred whereas others do not, is often taken as a crucial indication of the presumed true meaning of a narrow dispute settlement clause.

For instance, in *RosInvest* the Tribunal referred to the fact that other Soviet BITs included wider dispute settlement clauses to support its finding that the one in issue did not include ‘jurisdiction over the question whether an expropriation occurred and was legal’.²⁸⁷

Also in the field of interpreting the scope of MFN clauses a comparative approach is used. For instance in the *Salini* case, the Tribunal distinguished the MFN clause it had to apply from the one applicable in *Maffezini* to explain why it rejected the idea that it would encompass dispute settlement. It found that ‘Article 3 of the BIT between Italy and Jordan does not include any provision extending its scope of application to dispute settlement. It does not envisage “all rights or all matters covered by the agreement”’.²⁸⁸ Thus, it held that its jurisdiction could not be based on another BIT.

²⁸⁵ *Plama v Bulgaria* (n 33) para 191.

²⁸⁶ *Ibid.*

²⁸⁷ *RosInvest v Russia* (n 18) para 114, see text at n 21, above.

²⁸⁸ *Salini v Jordan* (n 33) para 118. See in more detail text at n 128, above.

D. Object and Purpose

Article 31 of the Vienna Convention explicitly makes ‘object and purpose’ of a treaty one of the relevant interpretation criteria. It is thus not surprising that investment tribunals regularly refer to the ‘object and purpose’ of BITs which they often find expressed in their preambles.²⁸⁹

In a number of cases, arbitral tribunals have stressed that effective Investor State dispute settlement is a crucial aspect of investment protection.²⁹⁰ This has led to calls for an extensive interpretation of MFN clauses to include dispute settlement as well.²⁹¹

For instance, in *Telefónica v Argentina*²⁹² an ICSID Tribunal first held that:

[a]n MFN clause is aimed at ensuring equality of treatment to the beneficiaries in respect of its subject matter at the most advantageous level. In respect of trade in goods, establishment, services and investments, the purpose of an MFN clause has been described as that of guaranteeing equal competitive conditions to businessmen of the countries concerned in the contracting States’ territories. Specifically as to foreign investors, it appears correct to state that ‘the basic purpose of MFN is to guarantee equality of competitive opportunities for foreign investors in the host state’.²⁹³

²⁸⁹ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v Argentine Republic*, ICSID Case No ARB/97/3, Award, 20 August 2007, para 7.4.4 (‘As to the object and purpose of the BIT, the Tribunal notes the parties’ wish, as stated in the preamble, for the Treaty to create favourable conditions for French investments in Argentina, and vice versa, and their conviction that the protection and promotion of such investments is expected to encourage technology and capital transfers between both countries and to promote their economic development. In interpreting the BIT, we are thus mindful of these objectives. [...]’); *MTD Equity Sdn. Bhd. & MTD Chile S.A. v Chile*, Award, ICSID Case No ARB/01/7, 24 May 2004, para 113 (‘[...] As regards the object and purpose of the BIT, the Tribunal refers to its Preamble where the parties state their desire “to create favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party”, and the recognition of “the need to protect investments by investors of both Contracting Parties and to stimulate the flow of investments and individual business initiative with a view to the economic prosperity of both Contracting Parties”. [...]’); *LG&E Energy Corp v Argentine Republic*, ICSID Case No ARB/02/1, Decision on Liability, 26 September 2006, para 124 (‘In considering the context within which Argentina and the United States included the fair and equitable treatment standard, and its object and purpose, the Tribunal observes in the Preamble of the Treaty that the two countries agreed that “fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective use of economic resources.”’); *Saluka Investments BV (The Netherlands) v The Czech Republic*, Partial Award, 17 March 2006, paras 299 (‘The “object and purpose” of the Treaty may be discerned from its title and preamble.’).

²⁹⁰ See eg *National Grid plc v The Argentine Republic* (n 77) para 49 (‘[...] assurance of independent international arbitration is an important perhaps the most important element in investor protection.’); *Eastern Sugar BV v Czech Republic*, Partial award and partial dissenting opinion, SCC Case No 088/200427 March 2007, para 165 (‘From the point of view of the promotion and protection of investments, the arbitration clause is in practice the most essential provision of Bilateral Investment Treaties.’); *Suez v Argentina* (n 95) para 59 (‘From the point of view of the promotion and protection of investments, the stated purposes of both the Argentina Spain BIT and the Argentina U.K. BIT, dispute settlement is as important as other matters governed by the BITs and is an integral part of the investment protection regime that the respective sovereign states have agreed upon.’).

²⁹¹ See eg SW Schill, *The Multilateralization of International Investment Law* (Cambridge University Press, New York 2009) 180.

²⁹² *Telefónica SA v Argentine Republic* (n 105).

²⁹³ *Ibid* para 98.

On this basis, it held that being exempted from complying with a waiting period was a 'better treatment' than having to comply and that thus the MFN clause was applicable.²⁹⁴

More expressly, the Tribunal in *Suez* insisted that dispute settlement was crucial for the promotion and protection of investments, the stated purposes of the applicable BITs.²⁹⁵ This finding corroborated its conclusion that the right to arbitration was covered by the MFN clause's wording expressly referring to the 'maintenance' of investments.²⁹⁶

Also in the *Siemens* case, the object and purpose of an MFN clause as understood by the Tribunal was a crucial matter for justifying the pick and choose approach of the claimant endorsed by the ICSID Tribunal. The Tribunal rejected Argentina's argument that if the investor were allowed to rely on another, more favourable, third country BIT it should also be required to abide by the more burdensome provisions of such treaty. The *Siemens* Tribunal rejected this proposition in which it saw some merit because it 'would defeat the intended result of the clause, which it to harmonize benefits agreed with a party with those considered more favorable granted to another party'.²⁹⁷

'Object and purpose' is equally invoked in cases supporting a broad interpretation of narrow dispute settlement clauses in order to give them practical meaning. The underlying, though rarely expressed, idea appears to be that dispute settlement only concerning the amount of compensation in case of expropriation is widely useless in an age of indirect expropriation. Indeed, as long as States directly expropriated foreign investors and the disputes between them centred on the amount of compensation that was due as a result of such expropriation, it made sense to agree on international arbitration with regard to this very specific point. Where, however, as is prevalent today, States hardly expropriate investors directly any more but rather engage in practices that, in their effects, may amount to expropriation, the preliminary question whether an expropriation had occurred at all becomes central and providing merely for arbitration concerning the amount of compensation will often deprive investors of any remedy because host States merely need to deny that they had engaged in expropriatory acts.

Tribunals interpreting narrow dispute settlement clauses have expressly referred to the object and purpose of BITs. For instance, the Tribunal in *Tza Yap Shum v Republic of Peru* corroborated its broad interpretation of such a clause by referring to the preamble of the applicable BIT's, which mentioned the 'promotion of investments'. The Tribunal assumed that 'the purpose of including the entitlement to submit certain disputes to ICSID arbitration is

²⁹⁴ Ibid para 103.

²⁹⁵ *Suez v Argentina* (n 95) para 59, see text at n 102, above.

²⁹⁶ Ibid para 57, see text at n 99, above.

²⁹⁷ *Siemens A.G. v The Argentine Republic* (n 78).

that of conferring certain benefits to promote investments'.²⁹⁸ For the Tribunal, the purpose of the BIT as expressed in its preamble was an indication that the parties did not intend to exclude the issue of determining whether an expropriation had occurred in the first place.²⁹⁹

This rationale of enabling private investors to protect their investments by bringing direct claims is even evident in, though not acknowledged by, decisions that advocate a narrow reading of restrictive dispute settlement clauses. For instance in *Berschader*, the Tribunal concluded that only the amount of compensation was subject to international arbitration, thus, it found that the occurrence of (indirect) expropriation had to be established either by acknowledgement of the expropriating State or by the determination of domestic courts.³⁰⁰ The Tribunal refrained from commenting on these options. However, it appears evident that the first is unlikely to occur in practice, while the latter is exactly what investment arbitration intends to overcome.

6. *The Proper Scope of Narrow Dispute Settlement Clauses as a Policy Issue*

In modern investment law, access to international investment dispute settlement decided by a neutral authority and not by the courts of the host State is more and more regarded as an essential element of the protection that a foreign investor should enjoy. This notion is specifically expressed in the MFN cases that qualify access to Investor State arbitration as a matter of treatment, but it is even more broadly encapsulated on the idea that only judicially or quasi judicially enforceable rights are 'real' rights. In the field of investment protection this realization has led to the gradual introduction and widening of access to dispute settlement for private investors against host States in bilateral as well as multilateral investment agreements.

Nevertheless, States negotiating investment treaties sometimes choose to limit the scope of issues that may be subject to international dispute settlement procedures. Some of these limitations may be motivated by an underlying distrust *vis à vis* international arbitration, in particular, favouring domestic courts. Often these competing interests lead to compromise formulas, such as fork in the road provisions or waiting periods during which domestic remedies must be pursued. Since the latter usually do not prevent access to international dispute settlement but merely delay it, some forms of them, in particular, where they only require domestic proceedings for a certain period of time without awaiting any outcomes, have even been critically termed as 'nonsensical'.³⁰¹

²⁹⁸ *Tza Yap Shum v Republic of Peru* (n 52) para 153, see also text at n 59, above.

²⁹⁹ *Ibid.*

³⁰⁰ *Berschader v Russia* (n 10) para 153. See n 13, above.

³⁰¹ See *Plama v Bulgaria* (n 33) para 224. See n 123, above.