

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

The fact that most modern BITs and multilateral investment agreements contain dispute settlement clauses, providing for different forms of settling investment disputes between States and nationals of the other contracting parties, should not be mistakenly viewed as opening a guaranteed avenue to investment arbitration. While it is true that most dispute settlement clauses in investment treaties contain an offer to choose arbitration—often after obligatory and temporarily limited attempts to use more consensual methods of dispute settlement like direct negotiations and/or conciliation—it should not be overlooked that a number of BITs still contain a whole range of provisions that severely limit the availability of direct arbitration between investors and States.²

Some of these clauses narrow the scope of the definition of an investment dispute; others require that the parties first seek to settle the dispute amicably; they may require the exhaustion of local remedies or allow for the dispute to be submitted to international arbitration if the investor has submitted the dispute first to the national courts for a certain period of time and the dispute has not been resolved; again, others require a notice of intent or a waiting period before submitting the dispute to international arbitration; others provide that a choice to submit the dispute to one of the alternatives, provided in the treaty, will be a final choice (fork in the road); some BITs carve out certain areas, such as taxation, from their application including from dispute settlement;³ others restrict access of international arbitration to certain kinds of disputes, implying that other disputes under the treaty should be settled by the national courts of the host State.

2010) 433; P Peters, 'Dispute Settlement Arrangements in Investment Treaties' (1991) 22 *Netherlands Ybk of Intl L* 91 119, 129.

² R Dolzer and C Schreuer, *Principles of International Investment Law* (Oxford University Press, New York 2008) 215; JW Salacuse, *The Law of Investment Treaties* (Oxford University Press, New York 2010) 385; U Kriebaum, 'Local Remedies and Standards for Protection' in C Binder and others (eds), *International Investment Law for the 21st Century* (Oxford University Press, New York 2009) 417; C Schreuer, 'Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road' (2004) 5 *JWIT* 231; J van Haersolte-van Hof and AK Hoffmann, 'The Relationship between International Tribunals and Domestic Courts' in P Muchlinski, F Ortino and Ch Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, New York 2008) 998; Ch Schreuer, 'Consent to Arbitration' in P Muchlinski, F Ortino and Ch Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, New York 2008) 843; Ch Schreuer, 'Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration' (2005) 4 *L Prac Intl Courts Tribunals* 1, 3; Z Douglas, *The International Law of Investment Claims* (Cambridge University Press, Cambridge 2009) 152; T Weiler, *International Investment Law and Arbitration, Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May Ltd, London 2005) 301; M Weiniger, 'Jurisdiction Challenges in BIT Arbitration: Do you Read a BIT by Reading a BIT or by Reading into a BIT' in L Mistelis and J Lew (eds), *Pervasive Problems in International Arbitration* (Kluwer Law International, The Netherlands 2006) 235; A Parra and I Shihata, 'Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Treaties on Investment' (1997) 12 *ICSID Rev-FILJ* 287.

³ See the BIT applicable in *Occidental v Ecuador* where the Tribunal nevertheless found a limited jurisdiction over tax issues: Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment 1993, art X(2) ('Nevertheless, the provisions of this Treaty, and in particular Article VI and VII, shall apply to matters of taxation only with respect to the following: (a) expropriation, pursuant to Article III; [...]'); *Occidental Exploration and Production Company v Republic of Ecuador*, LCIA No UN 3467, Award, 1 July 2004, para 77.

A particular type of the last-mentioned kind of narrow dispute settlement clauses can be found in a number of BITs that provide for the settlement of disputes over the amount and method of compensation in case of expropriation only. Such narrow dispute settlement provisions are rare but not totally singular. In particular, many old Chinese BITs contain such clauses.⁴ But also a number of BITs of the former USSR and other ex-Communist countries include similar provisions.⁵ Since many of these BITs are still in force and continue to apply, it is likely that their proper interpretation will give rise to controversial views. In fact, a number of disputes have recently arisen that involved narrow dispute settlement clauses of that kind.

With the decreasing relevance of direct expropriation in recent State practice, their use has become even more problematic. Where States directly expropriate a foreign investor and the ensuing dispute revolves around the appropriate amount of compensation—as was often the case in the classic expropriation cases of the mid-20th century⁶—the limited scope of jurisdiction over the amount and method of compensation may have made sense; where expropriation hardly occurs in a direct way but rather results from a number of acts or omissions that *in toto* may constitute a taking of an investor's rights—as is the predominant practice in modern investment law⁷—the continuing usefulness of such narrow dispute settlement clauses becomes questionable. This article will investigate how investment tribunals have actually dealt with this problem and then engage in a discussion of the underlying interpretation and policy issues.

⁴ W Shan, N Gallagher and S Zhang, 'Bilateral Investment Treaty Overview – China' (2008) Investment Claims Online IC-OV 6 CN; N Gallagher and W Shan, *Chinese Investment Treaties. Policies and Practice* (Oxford University Press, New York 2009) 313ff; A Chen, *New Developments in International Investment Law and New Practice of Bilateral Investment Treaties in China* (Fudan University Press 2007); S Schill, 'Tearing Down the Great Wall: the New Generation Investment Treaties of the People's Republic of China' (2007) 15 *Cardozo J Intl Comp L* 73; Q Kong, 'Bilateral Investment Treaties: The Chinese Approach and Practice' (1998–99) 8 *AsYIL* 105; PJ Turner and M Mangan, 'China's Investment Treaties: Substantive and Procedural Rights' (2007) *Asian Counsel* at 22.

⁵ A Crevon, 'Bilateral Investment Treaty Overview – Russian Federation' (2008) Investment Claims Online IC-TOV 8; See eg Austria–USSR BIT (1990); Belgium and Luxembourg–Czechoslovakia BIT (1989); UK–USSR BIT (1989); Finland–USSR BIT (1989); Germany–USSR BIT (1989); USSR–Spain BIT (1990); N Rubins and A Nazarov, 'Investment Treaties and the Russian Federation: Baiting the Bear' (May 2008) 9 (2) *BLI* 100.

⁶ As eg in the so-called Libyan oil-concession arbitrations, *Libyan American Oil Company (Liamco) v Libya*, Award, 12 April 1977 (1981) 20 *ILM* 1; 62 *ILR* 140; *Texaco Overseas Petroleum Company (Topco)/California Asiatic (Calasiatic) Oil Company v Libya*, Award, 19 January 1977 (1978) 17 *ILM* 1; *British Petroleum v Libya*, Award, 10 October 1973 and 1 August 1974; 53 *ILR* 297; See also RCA White, 'Expropriation of the Libyan Oil Concessions: Two Conflicting International Arbitrations' (1981) 30 *ICLQ* 1; C Greenwood, 'State Contracts in International Law – The Libyan Oil Arbitrations' (1982) 53 *BYIL* 27; RB von Mehren and PN Kourides, 'International Arbitrations between States and Foreign Private Parties: The Libyan Nationalization Cases' (1981) 75 *AJIL* 476; A Varma, 'Petroleum Concessions in International Arbitration: *Texaco Overseas Petroleum Company v. Libyan Arab Republic*' (1979) 18 *Colum J Transnatl L* 259.

⁷ Today direct expropriation is rare; most investment cases raising expropriation issues focus on the question whether an indirect expropriation had occurred; see eg A Reinisch, 'Expropriation' in P Muchlinski, F Ortino and Ch Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, New York 2008) 408.

2. *Types of Restrictive Dispute Settlement Clauses relating to Compensation for Expropriation*

A good example of the kind of narrow dispute settlement clause in issue is provided by the 1990 Agreement between the Republic of Austria and the Union of Soviet Socialist Republics for the Encouragement and Reciprocal Protection of Investments ('Austria/USSR BIT').⁸ Its Article 7 provides in its relevant parts:

1. Disputes arising between one of the Contracting Parties and an investor of the other Contracting Party with regard to the amount and the procedure for payment of compensation under article 4 of this Agreement, and to the transfer of payments under article 5 of this Agreement, shall be settled by negotiation.

2. If such a dispute cannot be settled in that way within three months after the date of written notification by one of the parties to the dispute to the other party to the dispute, then it may, at the request of the investor, be submitted for consideration to the Arbitration Institute of the Stockholm Chamber of Commerce or to *ad hoc* arbitration under the Arbitration Rules of the United Nations Commission for International Trade Law (UNCITRAL).⁹

Pursuant to Article 4(3) Austria/USSR BIT, the investor shall be entitled to have the amount and the procedure for payment of compensation reviewed by a competent organ of the contracting party which instituted the measure for expropriation or by an international arbitral tribunal. To have the issue of expropriation as such reviewed by national or international tribunals is not mentioned in this BIT.

Some BITs include similar clauses containing language that refers to disputes 'concerning' or 'relating to' either 'the amount of' or just to 'compensation for expropriation'; whereas others refer to 'compensation due'. The precise wording of different BITs will be discussed in the following section, providing an overview of the interpretation given to such clauses by investment tribunals.

3. *The Interpretation of Restrictive Dispute Settlement Clauses in Arbitral Practice*

On its face, the wording of such narrow dispute settlement provisions is likely to constitute a hurdle for claimants to establish the jurisdiction of an investment arbitration tribunal over claims alleging various BIT violations, such as fair and equitable treatment or full protection and security, but even alleging that an indirect expropriation had occurred in the first place. The

⁸ Agreement between the Republic of Austria and the Union of Soviet Socialist Republics for the Encouragement and Reciprocal Protection of Investments 1990, 1976 UNTS 149 (Austria-USSR BIT). Also the Austria-Czech and Slovak Federal Republic BIT 1990, Austrian Federal Law Gazette No 513/1991 contains a similar dispute settlement provision, see n 23, below.

⁹ Art 7 Austria-USSR BIT (Emphasis added).

wording of narrow dispute settlement clauses like Article 7 Austria/USSR BIT may give rise to an argument that the jurisdiction of an arbitration tribunal is limited to disputes concerning the ‘amount and the procedure’ of compensation. This could be read to exclude disputes concerning the occurrence of an expropriation with the result that a defendant State may simply deny the existence of an expropriation and thereby, deprive the investor of its right to direct dispute settlement. Thus, the question whether narrow dispute settlement clauses provide a valuable jurisdictional basis for investment claims is at least doubtful. These doubts are also nourished by recent practice of investment tribunals that appear to be partly contradictory, and certainly, not yet settled.

A. Restrictive Approaches to Narrow Dispute Settlement Clauses

One of the first cases expressly dealing with the jurisdictional implications of restrictive dispute settlement clauses is *Berschader v Russia*.¹⁰ In this case, an investment tribunal set up according to the Arbitration Rules of the Stockholm Chamber of Commerce had to interpret the scope of a narrow dispute settlement clause. The Belgium–Luxembourg/USSR BIT provided:

1. Any dispute between one Contracting Party and an investor of the other Contracting Party concerning the amount or mode of compensation to be paid under Article 5 of the present Treaty shall be the subject of a written notice, accompanied by a detailed memorandum, to be submitted by the investor to the Contracting Party involved in the dispute. Whenever possible, the parties to this dispute shall endeavour to settle amicably and to their mutual satisfaction.
2. If such a dispute has not been settled in this way within a period of six months from the date of the written notification mentioned in paragraph 1 of this Article, it shall be submitted at the investor’s choice to: [Stockholm Chamber of Commerce or UNCITRAL arbitration].¹¹

The *Berschader* Tribunal found that this clause had to be interpreted according to its ‘ordinary meaning’, which excluded arbitration of ‘disputes concerning whether or not an act of expropriation actually occurred’.¹² As a result, the Tribunal held that it did not have jurisdiction over the Claimant’s claims alleging, among others, violations of the fair and equitable treatment and full protection and security standards as well as expropriation. According to the tribunal:

From the ordinary meaning of Article 10.1, it can only be assumed that the Contracting Parties intended that a dispute concerning whether or not an act of

¹⁰ *Vladimir and Moise Berschader v The Russian Federation*, SCC Case No 080/2004, Award 21 April 2006.

¹¹ Art 10 Accord entre les Gouvernements du Royaume de Belgique et du Grand-Duché de Luxembourg, et le Gouvernement de L’Union des Républiques Socialistes Soviétiques, Concernant L’Encouragement Et la Protection Reciproques des Investissements, 9 février 1989 (Belgium–Luxembourg/USSR BIT 1989). (Emphasis added; unofficial translation in *Berschader v Russia* (n 10) para 47).

¹² *Berschader v Russia* (n 10) para 153.

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. It is only a dispute which arises regarding the amount or mode of compensation to be paid subsequent to an act of expropriation already having been established, either by acknowledgement of the responsible Contracting Party or by a court or arbitral tribunal, which may be subject to arbitration under the Treaty.¹³

The Tribunal corroborated its finding by inquiring into the ‘intention’ of the parties when entering into such dispute settlement clauses. It found that the Soviet Union generally entered into BITs containing such narrow clauses and that only by the late 1990s the Russian Federation abandoned this practice by including arbitration clauses that ‘undoubtedly, encompass disputes concerning the occurrence of an act of expropriation’.¹⁴ According to the Tribunal, this 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’.¹⁵ As to the intention of Belgium, the Tribunal noted an explanatory memorandum by the Belgian Foreign Minister who had declared that the Soviet delegation ‘had accepted arbitration “in all areas covered by Article 5” (which would have included the question of whether or not [an expropriation] had occurred)’.¹⁶ However, the Tribunal found ‘the language of the Treaty to be quite clear and in the view of the Tribunal such language could not possibly lend itself to the interpretation suggested in the explanatory statement’.¹⁷ The finding of the *Berschader* Tribunal very clearly demonstrated that a narrow dispute settlement clause may effectively deprive an investor of its procedural protection through investment arbitration where respondent States deny that an expropriation has occurred in the first place.

A result similar to *Berschader* was reached in the *RosInvest* case.¹⁸ The applicable UK/USSR BIT contained the following dispute settlement clause in its Article 8:

This Article shall apply to any legal disputes between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former either concerning the amount or payment of compensation under Articles 4 or 5 of this Agreement, or concerning any other matter consequential upon an act of

¹³ Ibid.

¹⁴ Ibid para 155.

¹⁵ Ibid.

¹⁶ Ibid para 158.

¹⁷ Ibid.

¹⁸ *RosInvestCo UK Ltd. v The Russian Federation*, Award on Jurisdiction 2007, SCC Case No Arb V079/2005. See also K Hobér, ‘MFN Clauses and Dispute Resolution in Investment Treaties: Have we reached the end of the road?’ in C Binder and others (eds), *International Investment Law for the 21st Century* 31 (Oxford University Press, New York 2009); L Petersen, ‘Holdings in Spanish shareholders Yukos’ claim come to light; tribunal holds that narrow arbitration clause still permits examination of expropriation allegation’ [2009] 2 Inv Arb Reporter 7; L Peterson, ‘Tribunal affirms jurisdiction over claim by Spanish minority shareholders in Yukos oil company’ [2009] 2 Inv Arb Reporter 6.

expropriation in accordance with Article 5 of this Agreement, or concerning the consequences of the non-implementation, or of the incorrect implementation, of Article 6 of this Agreement.¹⁹

With regard to the limiting qualification ‘concerning the amount or payment of compensation’, the Tribunal came to the following conclusion:

In order to give an ordinary meaning to that qualification, it can only be understood as a limitation of the jurisdiction conferred by that clause. Though no documents from the negotiation of the BIT have been produced, the Parties including the Claimant agree that the rather complicated wording in Article 8 presented a compromise between the UK’s intention to have a wide arbitration clause and the Soviet intention to have a limited one. If that is so, it is hard to arrive at an interpretation all the same that the clause is so wide as to include all aspects of an expropriation.²⁰

Further, by comparing the dispute settlement clause of the UK/USSR BIT to dispute settlement clauses in other BITs the *RosInvest* Tribunal concluded that the former clause ‘does not include jurisdiction over the questions whether an expropriation occurred and was legal’.²¹

The UNCITRAL Tribunal in *Austrian Airlines v Slovakia*²² equally rejected the possibility of arbitrating the question whether an expropriation had occurred under a narrow dispute settlement clause similar to the ones applicable in *Berschader* and *RosInvest*. Article 8 of the Austria/Czech and Slovak Federal Republic BIT 1990 provided as follows:

1. Any dispute arising out of an investment, between a Contracting Party and an investor of the other Contracting Party, concerning the amount or the conditions of payment of a compensation pursuant to Article 4 of this Agreement, or the transfer obligations pursuant to Article 5 of this Agreement, shall, as far as possible, be settled amicably by the parties to the disputes.

2. If a dispute pursuant to para. 1 above cannot be amicably settled within six months as from the date of a written notice containing sufficiently specified claims, the dispute shall, unless otherwise agreed, be decided upon the request of the Contracting Party or the investor of the other Contracting Party by way of arbitral proceedings in accordance with the UNCITRAL Arbitration Rules, as effective at the date of the motion for the institution of the arbitration proceedings.²³

¹⁹ Art 8(1) 1989 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Promotion and Reciprocal Protection of Investments (UK–USSR BIT) (Emphasis added).

²⁰ *RosInvestCo UK Ltd. v The Russian Federation* (n 18) para 110.

²¹ *Ibid* para 114.

²² *Austrian Airlines AG v The Slovak Republic*, UNCITRAL Final Award, 9 October 2009. See L Petersen, ‘Slovak Republic prevails in UNCITRAL claim with Austrian investor; operative treaty contained narrowly-cast jurisdictional clause’ [2009] 2 *Inv Arb* 17.

²³ Art 8 Agreement between the Republic of Austria and the Czech and Slovak Federal Republic Concerning the Promotion and Protection of Investments, 15 October 1990 (Austria–Czech and Slovak Federal Republic BIT 1990) (Emphasis added).

The Tribunal in *Austrian Airlines v Slovakia* invoked the ordinary meaning of Article 8(1) of the Austria/Czech and Slovak Federal Republic BIT and held that

‘[...] only disputes “concerning the amount or the conditions of payment of a compensation” can be submitted to arbitration. The scope of Article 8 is therefore limited to disputes about the amount of the compensation and does not extend to the review of the principle of expropriation.’²⁴

The term ‘principle’ of expropriation apparently means whether or not an expropriation has occurred. The *Austrian Airlines* Tribunal heavily relied on the argument that the investor had the right to challenge an expropriation before national courts of the host country pursuant to Article 4(4) of the Austria/Czech and Slovak Federal Republic BIT, while it could choose between national courts and investment arbitration with regard to the amount and payment conditions of compensation pursuant to Article 4(5) of the Austria/Czech and Slovak Federal Republic BIT.²⁵

B. Expansive Interpretations of Narrow Dispute Settlement Clauses

The restrictive interpretation of narrow dispute settlement clauses is, however, not unanimously shared by other courts and tribunals. It is apparent that the wording of individual BITs differs and that tribunals increasingly pay attention to even slight textual variations of BITs, in general. It is thus likely that they would also pay specific attention to different formulations of narrow dispute settlement clauses. All three cases discussed above referred to disputes ‘concerning the amount or mode/payment/conditions of payment of compensation’ in case of expropriation. Other formulations may be interpreted differently. Thus, it may be asked whether language circumscribing the jurisdiction over disputes ‘with regard to the amount of compensation’ in case of expropriation or over disputes ‘concerning compensation due’ after expropriation may be considered to include disputes over the determination whether an expropriation had occurred.

In some cases, like *Sedelmayer, Telenor* and *Saipem*, the issue was not addressed extensively by the parties. Nevertheless, they indicate that investment tribunals may be willing to hear expropriation claims even though a narrow dispute settlement clause appears to limit their jurisdiction to questions of compensation.

One of the first cases where a narrow dispute settlement clause provided the jurisdictional basis for an investment tribunal was *Sedelmayer v Russian Federation*²⁶ in which an arbitral tribunal found that a Russian presidential

²⁴ *Austrian Airlines AG v The Slovak Republic* (n 22) para 96.

²⁵ *Ibid* paras 97–99.

²⁶ *Sedelmayer v Russian Federation*, Arbitral Award of 7 July 1998.

decree constituted an act of direct expropriation. The applicable dispute settlement clause of the Germany/USSR BIT provided as follows:

1. Disputes relating to investments between one Contracting Party and an investor of the other Contracting Party shall, as far as possible, be settled amicably between the parties to the dispute.
2. If a dispute relating to the amount of compensation or the method of its payment, in accordance with article 4 of this Agreement, or to freedom of transfer, in accordance with article 5 of this Agreement, is not settled within six months from the time when a claim is made by one of the parties to the dispute, either party to the dispute shall be entitled to refer the matter to an international arbitral tribunal.²⁷

It was probably because the respondent State did not really invoke this clause that the tribunal assumed jurisdiction not only over the amount of compensation, but also over the question whether an expropriation had taken place. In fact, the tribunal rejected Respondent's submission that Claimant's had not really been expropriated.²⁸ Instead, it found that 'measures of expropriation or similar measures have taken place'.²⁹

Also in *Telenor v Hungary*,³⁰ an ICSID case in which the Tribunal rejected the claimant's attempt to invoke the applicable BIT's MFN clause in order to widen a narrow dispute settlement clause,³¹ the specific scope of this clause was not addressed in detail. The applicable dispute settlement clause of the Hungary/Norway BIT provided as follows:

1. This Article shall apply to any legal disputes between an Investor of one Contracting Party and the other Contracting Party in relation to an investment of the former either concerning the amount or payment of compensation under Article V and VI of the present Agreement, or concerning any other matter consequential upon an act of expropriation in accordance with Article VI of the present Agreement or concerning the consequences of the non-implementation or of the incorrect implementation of Article VII of the present agreement.
2. Any such disputes which have not been amicably settled within a period of three months from written notification of a claim, shall if either Party to the dispute so wishes, be submitted for conciliation or arbitration under the Convention of 18 March 1965 on the settlement of investment disputes between States and nationals of other States (the Washington Convention).³²

²⁷ Art 10 Federal Republic of Germany and Union of Soviet Socialist Republics Agreement Concerning the Promotion and Reciprocal Protection of Investments, 13 June 1989 (Germany-USSR BIT) (emphasis added).

²⁸ *Sedlmayer v Russian Federation* (n 26) 67.

²⁹ *Ibid* 73.

³⁰ *Telenor Mobile Communications AS v Republic of Hungary*, ICSID Case No ARB/04/15, Award, 13 September 2006.

³¹ *Ibid*.

³² Art XI Agreement between the Government of the Kingdom of Norway and the Government of the Republic of Hungary on the Promotion and Reciprocal Protection of Investments, 8 April 1991 (Hungary-Norway BIT) (Emphasis added).

The issue whether such a clause restricted a tribunal's jurisdiction to assess the amount or payment of compensation or permitted it to ascertain whether an expropriation had occurred in the first place was not really addressed. The *Telenor* Tribunal held that it lacked jurisdiction over the claimant's expropriation claims because Telenor had failed to make out a *prima facie* case³³ of expropriation.³⁴ It seems, however, that this reasoning implicitly affirmed the possibility that the narrow dispute settlement clause of the Hungary/Norway BIT allowed an investment tribunal to assess whether an expropriation had taken place. Had the tribunal considered otherwise, its considerations on the existence of a *prima facie* case of expropriation as a jurisdictional hurdle would have been superfluous.

Also its conclusions on the MFN clause³⁵ suggest that the *Telenor* Tribunal considered that expropriation claims were indeed subject to its jurisdiction. In its 2006 award, the Tribunal held that 'the scope of the Tribunal's jurisdiction is limited by Article XI to claims involving expropriation [...]'.³⁶ Literally, this means that the narrow dispute settlement clause of Article XI Hungary/Norway BIT referring to disputes 'concerning the amount or payment of compensation [...] or concerning any other matter consequential upon an act of expropriation' comprises disputes 'involving' expropriation and it represented the first case where an investment tribunal gave a broad interpretation to a narrow dispute settlement clause.

Also in *Saipem v Bangladesh*³⁷ the basis for the Tribunal's jurisdiction was a narrow dispute settlement clause. The Bangladesh/Italy BIT provided:

1. Any disputes arising between a Contracting Party and the investors of the other, relating to compensation for expropriation, nationalization, requisition or similar measures including disputes relating to the amount of the relevant payments shall be settled amicably, as far as possible.

³³ Investment tribunals have generally endorsed a jurisdictional *prima facie* test, according to which a tribunal will determine 'whether the facts as alleged by the Claimant [...], if established, are capable of coming within those provisions of the BIT which have been invoked'. *Impregilo S.p.A. v Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction, 22 April 2005, para 254. See also *Plama Consortium Limited v Republic of Bulgaria* ICSID Case No ARB/03/24, Decision on Jurisdiction, 8 February 2005; *Salini Costruttori S.p.A. and Italstrade S.p.A. v The Hashemite Kingdom of Jordan* ICSID Case No ARB/02/13, Decision on Jurisdiction, 15 November 2004; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Pakistan* ICSID Case No ARB/03/29, Decision on Jurisdiction, 14 November 2005, paras 193–97; A Sheppard, 'The Jurisdiction Threshold of a Prima-facie Case' in P Muchlinski, F Ortino and Ch Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, New York 2008) 933; G Zeiler, 'Jurisdiction, Competence, and Admissibility' in C Binder and others (eds), *International Investment Law for the 21st Century* (Oxford University Press, New York 2009) 85; I Laird, 'A Distinction without a Difference? An Examination of the Concepts of Admissibility and Jurisdiction in *Salini v. Jordan* and *Methanex v. USA*' in T Weiler, *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May Ltd, London 2005) 205.

³⁴ *Telenor v Hungary* (n 30) paras 80, 102.

³⁵ *Ibid.*

³⁶ *Ibid* para 102.

³⁷ *Saipem S.p.A. v The People's Republic of Bangladesh*, ICSID Case No ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007.

2. In the event that a such [sic] dispute cannot be settled amicably within six months of the date of a written application, the investor in question may submit the dispute, at his discretion for settlement to:

- (a) the Contracting Party's Court, at all instances, having territorial jurisdiction;
- (b) an ad hoc Arbitration Tribunal, in accordance with [UNCITRAL] Arbitration Rules [...];
- (c) [ICSID arbitration].³⁸

Since the proper scope of this dispute settlement clause was not raised by the respondent, the ICSID Tribunal apparently did not feel the need to address this issue *in extenso*. In its 2007 decision on jurisdiction, the Tribunal briefly noted 'that the jurisdiction of the Tribunal under the BIT is limited to the scope of the dispute resolution clause contained in Article 9 of the BIT'³⁹ and in its citation of this provision it highlighted the passage 'relating to compensation for expropriation, nationalization, requisition or similar measures'. Instead of discussing whether such a clause permitted the Tribunal to assess whether an expropriation had occurred or not, it merely asserted that '[t]his provision [i.e. Article 9] implicitly refers to Article 5 of the BIT, which speaks of expropriation of "investment"'.⁴⁰ The Tribunal then proceeded to ascertain whether the investor had made an investment in the sense of the BIT's investment definition and whether the facts alleged were capable of constituting an expropriation in order to meet the jurisdictional *prima facie* test.⁴¹ In the end, the Tribunal found that the immaterial rights the investor had under a previous ICC arbitration award were capable of being expropriated and the acts attributable to the respondent, if proven, could constitute indirect expropriation.

In reaching its finding that it had jurisdiction over the expropriation claim, the Tribunal implicitly also gave a broad interpretation to the narrow dispute settlement clause of the Bangladesh/Italy BIT. This is most clearly evident in its remark that:

[...] Saipem brings a claim for expropriation and the BIT provides for ICSID jurisdiction in case of expropriation.⁴²

In its 2009 award,⁴³ the *Saipem* Tribunal held that the abusive revocation of the ICC Tribunal's authority—leading to its unenforceability—amounted to an indirect expropriation of Saipem's residual contractual rights.⁴⁴ It thereby

³⁸ Art 9 Agreement between the Government of the Republic of Italy and the Government of the People's Republic of Bangladesh on the Promotion and Protection of Investments, 20 March 1990 (Bangladesh–Italy BIT 1990).

³⁹ *Saipem v Bangladesh* (n 37) para 116.

⁴⁰ *Ibid* para 117.

⁴¹ See n 33, above.

⁴² *Saipem v Bangladesh* (n 37) para 130.

⁴³ *Saipem S.p.A. v The People's Republic of Bangladesh*, ICSID Case No ARB/05/7, Award, 30 June 2009.

⁴⁴ *Ibid* para 161.

clearly determined that the action in question was an indirect expropriation and implicitly reaffirmed that it had jurisdiction not only over the amount of compensation in case of expropriation but also over the question whether an expropriation had occurred in the first place.

The first broad discussion of the proper interpretation of a narrow dispute settlement clause ensued in *European Media Ventures SA v Czech Republic*.⁴⁵ In this case, an UNCITRAL Tribunal concluded that it had jurisdiction to decide not only on the amount of compensation in case of expropriation, but also whether an expropriation had taken place. The applicable BIT provided that ‘disputes – concerning compensation due by virtue of Articles 3(1) and 3(3)’ could be submitted to arbitration before an *ad hoc* tribunal in certain circumstances.⁴⁶

The Tribunal’s decision upholding its jurisdiction—which is not public—was confirmed in challenge proceedings before English courts. In *European Media Ventures SA v Czech Republic*,⁴⁷ Justice Simon confirmed the broad interpretation of the applicable dispute settlement clause. Justice Simon held that the phrase ‘concerning compensation’ gave rise to the most difficulty. He found:

[...] The starting point is, in my judgment, the width of the ordinary meaning of the phrase. I am unable to accept that the phrase must be read as meaning ‘relating to the amount of compensation’ as a matter of its ordinary meaning. On the other hand the phrase clearly provides some limit to the jurisdiction of the Arbitral Tribunal.

The use of the word ‘*compensation*’ limits the scope of the arbitration. It may be contrasted with broad phrases such as ‘*any disputes*’ which may be found in other BITs. Its impact is to restrict the jurisdiction of the tribunal to one aspect of expropriation. The word ‘*concerning*’, however, is broad. The word is not linked to any particular aspect of ‘*compensation*’. ‘*Concerning*’ is similar to other common expressions in arbitration clauses, for example ‘*relating to*’ and ‘*arising out of*’. Its 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.⁴⁸

Also in other cases, investment tribunals have been willing to broaden their own jurisdiction. For instance in the *Renta 4* case,⁴⁹ the Tribunal held that a clause providing for jurisdiction over ‘(a)ny dispute between one Party and an investor of the other Party relating to the amount or method of payment of the compensation due under Article 6 of this Agreement’⁵⁰ permitted arbitrators to

⁴⁵ *European Media Ventures SA v Czech Republic*, UNCITRAL Award on Jurisdiction, 15 May 2007 (not public).

⁴⁶ Art 8 Belgium–Luxembourg Economic Union–Czechoslovak Socialist Republic BIT 1989.

⁴⁷ *European Media Ventures SA v Czech Republic*, Judgment of the High Court of England and Wales, 5 December 2007, (2007) EWHC 2851 (Comm).

⁴⁸ *Ibid* paras 43, 44.

⁴⁹ *Renta 4 S.V.S.A et al. v Russian Federation*, Award on Preliminary Objections, 20 March 2009, SCC No 24/2007.

⁵⁰ Art 10(1) Spain–Russia BIT.

determine whether compensation was due (ie whether an expropriation has occurred), as well as the amount of compensation owed in case of expropriation. The *Renta 4* Tribunal stressed the importance of the question of ‘who’ was to determine whether compensation was indeed ‘due’ under Article 6 of the applicable Spain/Russia BIT. It found:

Consideration of this question leads the Tribunal to conclude that the word “due” in fact disfavors Russia. The reference to disputes relating to “compensation due under Article 6” is found in Article 10 itself. The logical progression seems straightforward. Article 6 establishes that there shall be no expropriation unless it is lawful by reference to criteria set out in that Article. Article 10 gives an investor the right to seek arbitration with respect to “[a]ny dispute . . . relating to the amount or method of payment of the compensation due under Article 6”. The Claimants allege expropriation. Russia denies any obligation under this head. There is therefore a dispute as to whether compensation is “due”. The force of this simple proposition is buttressed by the open texture of the introductory words: *any disputes . . . relating to*.⁵¹

Another recent case dealing with narrow dispute settlement clauses is *Tza Yap Shum v Republic of Peru*.⁵² It involved the interpretation of one of the narrow dispute settlement clauses of the old Chinese BITs. Article 8 of the applicable China/Peru BIT provided as follows:

Any dispute between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.

If the dispute cannot be settled through negotiations within six months, either party to the dispute shall be entitled to submit this dispute to the competent court of the Contracting Party accepting the investment.

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.

The Centre shall adjudicate in accordance with the law of the Contracting Party to the dispute accepting the investment including its rules on the conflict of laws, the

⁵¹ *Renta 4 S.V.S.A et al. v Russian Federation* (n 49) para 28.

⁵² *Tza Yap Shum v Republic of Peru*, ICSID Case No ARB/07/6, Decision on Jurisdiction and Competence, 19 June 2009. See also L Petersen, ‘ICSID panel interprets narrow-looking jurisdictional clause so as to permit arbitration of dispute over alleged expropriation of Chinese-owned assets in Peru’ [2009] 2 Inv Arb Reporter 11.

provisions of this Agreement as well as the generally recognised principles of international law accepted by both Contracting Parties.⁵³

The Tribunal considered

that the phrase “involving the amount of compensation for expropriation” may have a great variety of possible meanings. In case, according to Respondent, emphasis were given to the words “amount of compensation”, this would suggest a restrictive interpretation, one which would only include disputes related to the determination of the value of the investment. It may be assumed, in case this were the right interpretation, that such questions as whether expropriation has taken place or whether any compensation must be paid, among other potentially important matters, would be decided in a different manner. At the other end of the interpretative spectrum, this phrase may include, in addition to the amount of compensation, a determination of other important matters related to the alleged expropriation. This is the interpretation requested by Claimant. For a variety of reasons, the Tribunal has decided that the latter, i.e. the broadest interpretation, happens to be the most appropriate.⁵⁴

The *Tza Yap Shum* Tribunal then engaged in a lengthy review of existing case law and policy arguments *pro* and *contra* a wide reading of the narrow clause. Finally, the Tribunal concluded

[...] that to give meaning to all the elements of the article, it must be interpreted that the words “involving the amount of compensation for expropriation” includes not only the mere determination of the amount but also any other issues normally inherent to an expropriation, including whether the property was actually expropriated in accordance with the BIT provisions and requirements, as well as the determination of the amount of compensation due, if any.⁵⁵

In the opinion of the tribunal,

[...] a contrary conclusion would invalidate the provision related to ICSID arbitration since according to the final sentence of Article 8(3), turning to the courts of the State accepting the investment would preclude definitely the possibility choosing arbitration under the ICSID Convention. Consequently, since the Claimant has filed a *prima facie* claim of expropriation, the Tribunal, pursuant to Articles 25 and 41 of the ICSID Convention and Rule 41 of the Arbitration Rules, considers that it is competent to decide on the merits of the expropriation claim filed by Claimant.⁵⁶

Starting with a literal interpretation of the applicable dispute settlement clause, the Tribunal stressed that ‘the dispute must “include” the determination of the amount of a compensation, and not that the dispute must be restricted

⁵³ Art 8 Agreement between the Government of the People’s Republic of China and the Government of the Republic of Peru concerning the Encouragement and Reciprocal Protection of Investments 1994 (China–Peru BIT) (Emphasis added).

⁵⁴ *Tza Yap Shum v Republic of Peru* (n 52) para 150.

⁵⁵ *Ibid* para 188.

⁵⁶ *Ibid*.

thereto'.⁵⁷ In the Tribunal's view a claim 'involving the amount of compensation for expropriation':

'may, naturally, involve such aspects as whether (i) an instance of expropriation, nationalisation, or similar measure has taken place; (ii) the same has met the requirement of public interest; (iii) the same has followed an appropriate domestic legal procedure; (iv) there has been discrimination, (v) compensation will be paid, (vi) such compensation has been equivalent to the value of investments expropriated, paid in a convertible and freely transferable currency and without unreasonable delay.'⁵⁸

The Tribunal corroborated its broad interpretation by reference to the BIT's preamble, which referred to the promotion of investments. The Tribunal expressly assumed that 'the purpose of including the entitlement to submit certain disputes to ICSID arbitration is that of conferring certain benefits to promote investments'.⁵⁹ It took the stated purpose of the BIT as expressed in the BIT's preamble as an indication that the parties did not intend to exclude the issue of determining whether an expropriation had occurred in the first place.⁶⁰

The Tribunal next engaged in a 'contextual interpretation' of the dispute settlement clause. In its view, the combined effect of the last sentence in Article 8(2) and 8(3) of the China/Peru BIT would deprive an investor of access to ICSID arbitration at all, in case the narrow dispute settlement clause were interpreted to relate to the determination of the amount of compensation only. In the Tribunal's view, Article 8(3) last sentence China/Peru BIT was a fork-in-the-road clause, which implied that once an investor had chosen to submit a dispute to the competent courts of a contracting party, such an investor 'may not, under any circumstance, make use of ICSID arbitration to settle a "dispute involving the amount of compensation for expropriation"'.⁶¹ In the Tribunal's view, the only possibility to avoid such an 'incoherent conclusion'⁶² was to determine that Article 8(3) did not deprive an investor of the right to submit also other disputes involving expropriation⁶³ directly to ICSID arbitration.

The Tribunal then dealt at length with the 'preparatory works of the BIT and the circumstances surrounding its conclusion'⁶⁴ as supplementary means of interpretation pursuant to Article 32 Vienna Convention on the Law of Treaties.⁶⁵ Upon ratification of the ICSID Convention in 1993, China had

⁵⁷ Ibid para 151.

⁵⁸ Ibid para 152.

⁵⁹ Ibid para 153.

⁶⁰ Ibid.

⁶¹ Ibid para 159.

⁶² Ibid para 154.

⁶³ Ibid para 152.

⁶⁴ Ibid para 162.

⁶⁵ Vienna Convention on the Law of Treaties, 1155 UNTS 331 (1969) 8 ILM 679. See also text below at n

made a notification pursuant to Article 25(4) of the ICSID Convention⁶⁶ in which it stated its intention to submit to ICSID only disputes ‘involving compensation for expropriation and nationalisation’.⁶⁷ The Tribunal, however, did not think that this statement would imply that it was China’s intention to limit the jurisdiction of an ICSID Tribunal in the China/Peru BIT. It considered

[...] that it would be questionable to interpret the consent of the parties to the BIT under Article 8 thereof based on the notification which addresses a completely different treaty such as the ICSID Convention, the wording whereof not even constitutes the consent of the People’s Republic of China in the Convention.⁶⁸

The Tribunal then inquired into the negotiating history of the China/Peru BIT, on the basis of testimony by Chinese and Peruvian treaty negotiators, which revealed that while China favoured a restrictive interpretation of the dispute settlement clause, Peru had apparently changed its position in the course of the negotiations from initially agreeing to have domestic courts determine the lawfulness of an expropriation to finally favouring a fork-in-the-road provision comprising any investment dispute. Since the latter proposal was unacceptable to the Chinese side, the BIT was concluded on the basis of the Chinese draft as initially proposed. The Tribunal found that:

[a]lthough this exchange shows that China was not willing to accept the Peruvian proposal on ICSID arbitration with regard to all the issues that could have arisen between a foreign investor and the government of China (and clearly China’s position was, in that regard, more restrictive than that of Peru), it is not a concluding proof of the scope of Article 8(3) of the BIT. In particular, it does not establish clearly if China’s consent was limited only to disputes involving the amount of compensation for expropriation or if as suggested by the actual wording of the BIT it would also include disputes involving other issues addressed in article 4 of the BIT.⁶⁹

Finally, the *Tza Yap Shum* Tribunal engaged in a detailed review of previous investment decisions dealing with narrow dispute settlement clauses.⁷⁰ These comprise all the cases discussed above. While stressing that they did not constitute binding precedent, the Tribunal was willing to look at them to analyse their rationales.⁷¹ In the end the *Tza Yap Shum* Tribunal sided with

⁶⁶ Art 25(4) Convention on the Settlement of Investment Disputes between States and Nationals of Other States (18 March 1965) 575 UNTS 159 (ICSID Convention) (‘Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).’).

⁶⁷ Notification by China, 7 January 1993, cited in *Tza Yap Shum v Republic of Peru* (n 52) para 163. (‘In accordance with Article 25(4) of the Convention, the Chinese government would consider to submit to the jurisdiction of the International Centre for Settlement of Investment Disputes only disputes involving compensation for expropriation and nationalisation’.)

⁶⁸ *Tza Yap Shum v Republic of Peru* (n 52) para 165.

⁶⁹ *Ibid* para 171.

⁷⁰ *Ibid* paras 173–86.

⁷¹ *Ibid* para 173.

those tribunals adopting a broad interpretation for the various reasons given in its decision and particularly because it doubted the appropriateness of the *e contrario* argument of some tribunals, which maintained that it would have been easy to include all kinds of disputes had the parties really wished to do so.⁷² By way of conclusion, the Tribunal held that it had jurisdiction to decide the merits of the expropriation claim.

4. *The Broadening of Narrow Dispute Settlement Options in BITs via MFN Clauses*

In addition to engaging in a broad interpretation of dispute settlement clauses as discussed above, investment tribunals have identified another possibility to overcome unfavourably limited dispute settlement provisions by allowing investors to rely on most-favoured-nation clauses ('MFN clauses') usually contained in BITs. This development has been facilitated by (i) the fact that the majority of investment treaties world-wide provides for MFN treatment and (ii) the emergence of a case law extending the application of MFN treatment to procedural and even jurisdictional issues in the aftermath of the seminal *Maffezini*-decision in 2000.⁷³

Pursuant to a typical MFN clause, Contracting States stipulate to accord to investments and investors of the other Contracting Party 'treatment no less favourable than that accorded in respect of an investment made by investors of a third State'.⁷⁴

⁷² *Ibid* paras 185–86.

⁷³ *Emilio Agustín Maffezini v Kingdom of Spain*, ICSID Case No ARB/97/7, Decision on Jurisdiction, 25 January 2000. See in detail, text at n 76 below.

⁷⁴ See eg art 3 Austria–USSR BIT ('1. Each of the Contracting Parties undertakes to accord, in respect of investments made in its territory by investors of the other Contracting Party, treatment no less favourable than that accorded in respect of an investment made by investors of a third State. 2. Each of the Contracting Parties undertakes to accord in its territory, in respect of the activities of investors of the other Contracting Party relating to investments, treatment no less favourable than that accorded to the activities of investors of a third State'.); See on MFN treatment in general P Acconci, 'Most-Favoured-Nation Treatment' in P Muchlinski, F Ortino and Ch Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, New York 2009) 363; OECD, Directorate for Financial and Enterprise Affairs, 'Most-Favoured-Nation Treatment in International Investment Law', *Working Papers on International Investment* (2004/2) 3, available at <<http://www.oecd.org/dataoecd/21/37/33773085.pdf>> accessed 17 December 2010; UNCTAD, *Most Favoured-Nation Treatment, United Nations Conference on Trade and Development* (UNCTAD Series on Issues in International Investment Agreements 1999), available at <<http://www.unctad.org/en/docs/psiteiid10v3.en.pdf>> accessed 17 December 2010 13; A Ziegler, 'Most-Favoured-Nation (MFN) Treatment' in A Reinisch (ed), *Standards of Investment Protection* (Oxford University Press, New York 2008) 59; R Dolzer and C Schreuer, *Principles of International Investment Law* (Oxford University Press, New York 2008) 253; F Orrega Vicuña, 'Bilateral Investment Treaties and the Most-Favoured-Nation-Clause: Implication for Arbitration in the Light of a recent ICSID Case' (25 January 2002) Paper delivered at ASA Swiss Arbitration Association Conference: Investment Treaties and Arbitration; R Dolzer and T Myers, 'After Tecmed: Most-Favored-Nation Clauses in Investment Protection Agreements' (2004) 19 ICSID Rev-FILJ 49; B Appleton, 'MFN and International Investment Treaty Arbitration: Have We Lost Sight of the Forest Through the Trees?' (2005) 1 Appleton's Intl Inv L Arb News 10; N Rubins, 'MFN Clause, Procedural Rights, and a Return to the Treaty Text' in T Weiler (ed), *Investment Treaty Arbitration and International Law* (JuristNet, LLC 2008) 213; AF Rodriguez, 'The Most-Favoured-Nation Clause in International Investment Agreements: A Tool for Treaty Shopping?' (2008) 25J Intl Arb 89; SW Schill, 'Multilateralizing Investment Treaties through Most-Favoured-Nation Clause' (2009) 27 Berk J Intl L 496.

A. MFN Clauses in Arbitration Practice

In past investment law practice, MFN clauses have rarely been used to invoke better substantive treatment than that accorded in the basic treaty. Rather, a number of investors have successfully claimed that an MFN clause allows them to rely on investment treaties of the host State with other countries, which provide for a more favourable treatment than the basic treaty as regards dispute settlement.⁷⁵

The first and leading case addressing this issue is *Maffezini v Spain*⁷⁶ in which a national of Argentina was permitted to invoke an MFN clause in order to avoid a burdensome 18 months waiting period by relying on the dispute settlement clause of another BIT, which did not contain such a requirement.

The *Maffezini* approach has since been cited favourably in a number of other cases⁷⁷ and specifically in the *Siemens* decision where an ICSID Tribunal found that '[a]ccess to [special dispute settlement mechanisms] is part of the protection offered under the Treaty. It is part of the treatment of foreign investors and investments and of the advantages accessible through an MFN clause'.⁷⁸ However, other tribunals like the one in *Plama v*

⁷⁵ See on this debate, in addition, S Fietta 'Most Favoured Nation Treatment and Dispute Resolution under Bilateral Investment Treaties: A Turning Point?' (2005) 4 Intl ALR 131; DH Freyer and D Herlihy, 'Most Favoured-Nation Treatment and Dispute Settlement in Investment Arbitration: Just how Favoured is "Most Favoured"?' (2005) 20(1) ICSID Rev-Foreign Invest L J 58; E Gaillard, 'Establishing Jurisdiction through a Most-Favored-Nation Clause' (2005) 6(2) NYLJ 3, col 1; K Hobér, 'MFN Clauses and Dispute Resolution in Investment Treaties: Have we reached the end of the road?' in C Binder and others (eds), *International Investment Law for the 21st Century* (Oxford University Press, New York 2009) 31; Y Radi, 'The Application of the Most-Favoured-Nation Clause to the Dispute Settlement Provisions of Bilateral Investment Treaties: Domesticating the Trojan Horse' (2007) 18 EJIL 757; N Rubins, 'MFN Clauses, Procedural Rights, and a Return to the Treaty Text' in TJ Grierson Weiler (ed), *Investment Treaty Arbitration and International Law* (JuristNet, LLC 2008); GS Tawil, 'Most Favoured Nation Clauses and Jurisdictional Clauses in Investment Treaty Arbitration' in C Binder and others (eds), *International Investment Law for the 21st Century* (Oxford University Press, New York 2009) 9; S Vesel, 'Clearing a Path through a Tangled Jurisprudence: Most-Favored-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties' (2007) 32 Yale J Intl L 125; S Ustor, 'Most-Favoured-Nation Clause' (1997) 3 EPIL 472.

⁷⁶ *Emilio Agustín Maffezini v Kingdom of Spain* (n 73). See also G Flores, 'Emilio Agustín Maffezini v Kingdom of Spain (ICSID Case No. ARB/97/7): Introductory Note' (2001) 16 ICSID Rev-FILJ 203; J Kurtz, 'The Delicate Extension of Most-Favoured-Nation Treatment to Foreign Investors: Maffezini v Kingdom of Spain' in T Weiler (ed), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May, London 2005) 523; L Liberti 'ICSID: Tribunale arbitrale: sentenza 25 gennaio 2000, con nota di L. Liberti: Arbitrato ICSID: clausola della nazione più favorita e problemi di attribuzione' *Rivista dell'arbitrato* (2004) 561-89; A Reinisch, 'Maffezini v Spain Case' (2009) EPIL; B Stern 'ICSID Arbitration and the State's Increasingly Remote Consent: Apropos the Maffezini Case' in S Charnovitz (ed), *Law in the Service of Human Dignity: Essays in Honour of Florentino Feliciano* (CUP, Cambridge 2005) 246; SD Sutton, 'Emilio Agustín Maffezini v Kingdom of Spain and the ICSID Secretary-General's Screening Power' (2005) 21 Arb Intl 113; R Teitelbaum, 'Who's Afraid of Maffezini? Recent Developments in the Interpretation of Most Favoured Nation Clauses' (2005) 22(3) J Intl Arb 225.

⁷⁷ *Gas Natural SDG, S.A. v Argentina*, ICSID Case No ARB/03/10, Decision on Preliminary Questions on Jurisdiction, 17 June 2005; *Camuzzi International S.A. v The Argentine Republic*, ICSID Case No ARB/03/2, Decision on Jurisdiction, 11 May 2005; *National Grid plc v The Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 20 June 2006; *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v The Argentine Republic*, ICSID Case No ARB/03/19 and *AWG Group Ltd. v The Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 3 August 2006.

⁷⁸ *Siemens A.G. v The Argentine Republic*, ICSID Case No ARB/02/8, Decision on Jurisdiction, 3 August 2004, para 120.

*Bulgaria*⁷⁹ have found that an MFN clause in a basic treaty does not incorporate by reference dispute settlement provisions in another treaty unless the MFN provision in the basic treaty leaves no doubt that such incorporation was intended. This restrictive line of reasoning can also be found in cases like *Salini* and *Telenor*.⁸⁰ For some time, it appeared possible to reconcile the different outcome in *Maffezini* and *Siemens*, on the one hand, and in *Salini* and *Plama*, on the other hand, by stressing that the former cases merely concerned situations where procedural obstacles (waiting periods) could be successfully avoided, while the latter cases involved attempts to create a jurisdiction that would not have existed otherwise.⁸¹ The following case overview will thus first look at decisions merely addressing procedural obstacles and then turn to cases where a broadening of a tribunal's jurisdiction was at issue.

(i) *MFN clauses as tools to avoid procedural obstacles where the basic treaty provides already for investment arbitration*

Based on the outcome of the *Maffezini* case, it appears to be well settled that MFN clauses may be relied upon by investors in order to avoid procedural obstacles, such as waiting periods often combined with procedural requirements to attempt to reach an amicable settlement with the host State, or to litigate in the latter's domestic courts prior to the institution of investment arbitration.

In *Maffezini v Spain*, an Argentine national was permitted to rely on the MFN clause of the Argentina/Spain BIT in order to avoid that treaty's requirement to resort to Spain's domestic courts for a period of 18 months before the institution of arbitration.⁸² The *Maffezini* Tribunal stressed that Article 10 of the BIT did not require the exhaustion of local remedies—a regular precondition for the exercise of diplomatic protection under customary international law. Rather, it 'wanted to give their respective courts the

⁷⁹ *Plama Consortium Ltd v Bulgaria* (n 33). See also H Essig, 'Balancing Investors' Interests and State Sovereignty: The ICSID-Decision on Jurisdiction *Plama Consortium Ltd. v. Republic of Bulgaria*' (2007) 4(5) *Transnational Dispute Management* 14; N Gallus, 'Plama v. Bulgaria and the Scope of Investment Treaty MFN Clauses' (2005) 2(3) *Transnational Dispute Management* 17; A Reinisch, 'ICSID: *Plama Consortium Limited v. Republic of Bulgaria*. Introductory Note' (2005) 44 *ILM* 717.

⁸⁰ *Salini Costruttori SpA and Italstrade SpA v Jordan* (n 33); *Telenor Mobile Communications AS v Hungary* (n 30), 22 June 2006.

⁸¹ See eg Dolzer and Schreuer, *Principles of International Investment Law* (Oxford University Press, New York 2008) 253; A Reinisch, 'Maffezini v Spain Case' (2009) *EPIL*; GS Tawil, 'Most Favoured Nation Clauses and Jurisdictional Clauses in Investment Treaty Arbitration' in C Binder and others (eds), *International Investment Law for the 21st Century* (Oxford University Press, New York 2009) 9, at 13.

⁸² Art 10(2) Argentina/Spain BIT provided that a dispute that cannot be settled amicably 'shall be submitted to the competent tribunal of the Contracting Party in whose territory the investment was made'. Art 10(3) provided that the 'dispute may be submitted to international arbitration in any of the following circumstances: a) at the request of one of the parties to the dispute, if no decision has been rendered on the merits of the claim after the expiration of a period of eighteen months from the date on which the proceedings referred to in paragraph 2 of this Art. have been initiated, or if such decision has been rendered, but the dispute between the parties continues; b) if both parties to the dispute agree thereto'.

opportunity, within the specified period of eighteen months, to resolve the dispute before it could be taken to international arbitration.⁸³ The crucial issue for the *Maffezini* tribunal was whether the claimant's non-compliance with this procedural requirement could be dispensed with as a result of the MFN clause of the Argentina/Spain BIT. Article IV(2) of the BIT provided:

In all matters subject to this Agreement, this treatment shall not be less favorable than that extended by each Party to the investments made in its territory by investors of a third country.⁸⁴

The Tribunal rejected Spain's argument that 'matters' can only be understood to refer to substantive matters or material aspects of the treatment granted to investors and not to procedural or jurisdictional questions. Relying on the broad wording of the MFN clause, which referred to 'all matters subject to this Agreement', the Tribunal emphasized that dispute settlement provisions in BITs were

[...] essential to the protection of the rights envisaged under the pertinent treaties; they are also closely linked to the material aspects of the treatment accorded.⁸⁵

Nevertheless, the *Maffezini* Tribunal's endorsement of a broad interpretation of an MFN clause was not unlimited. In a rather cryptic sentence the Tribunal remarked that

[...] the beneficiary of the clause should not be able to override public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in question.⁸⁶

In the Tribunal's view this would apply, for instance, where a State has conditioned its consent to arbitration on the exhaustion of local remedies, where a BIT contains a 'fork-in-the-road' clause according to which a choice between domestic or international courts or tribunals becomes irreversible once made, or where a particular forum such as ICSID or NAFTA has been chosen. In the case at hand, the requirement of Article 10 of the Argentina/Spain BIT to resort to domestic courts first did not deprive the investor of the ultimate possibility to access international arbitration after a 'waiting period' of 18 months. Thus, it did not reflect a fundamental question of public policy, which would have limited the scope of the MFN clause.

An attempt to give meaning to the 'public policy considerations' warranting an exception to the reach of MFN clauses can be found in *Tecmed v Mexico*⁸⁷

⁸³ *Maffezini* (n 73) para 35.

⁸⁴ Art IV(2) Argentina–Spain BIT.

⁸⁵ *Maffezini* (n 73) para 55.

⁸⁶ *Ibid* para 62.

⁸⁷ *Technicas Medioambientales Tecmed S.A. v Mexico*, ICSID Case No ARB/AF/00/2, Award, 29 May 2003.

where an investment tribunal rejected a retroactive application of substantive standards

[...] because it deem[ed] that matters relating to the application over time of the Agreement [...] due to their significance and importance, go to the core of matters that must be deemed to be specifically negotiated by the Contracting Parties.⁸⁸

The possibility to overcome a mere waiting period in a BIT by relying on an MFN clause was clearly affirmed by a number of tribunals. Like in *Maffezini*, the ICSID Tribunal in *Siemens v Argentina*⁸⁹ allowed the claimant to bypass the obligation contained in Article 10(3) of the Argentina/Germany BIT to pursue local remedies for 18 months before commencing arbitration by ‘importing’ a more favourable dispute settlement provision contained in the Argentina/Chile BIT.

In addition, the *Siemens* Tribunal allowed the investor to ‘pick and choose’ single aspects of the ‘imported’ dispute settlement provisions. While the Argentina/Chile BIT did not provide for a waiting period before initiating arbitration, it contained a so-called ‘fork-in-the-road’ provision according to which the investor had to choose between local remedies or international arbitration with the implication that once an option has been pursued, the other becomes unavailable. By rejecting the Argentine argument that Siemens should be prevented from instituting ICSID arbitration as a result of administrative proceedings it had already initiated earlier before Argentine tribunals, the *Siemens* panel literally provided most-favourable-treatment to the investor. In the Tribunal’s view, reliance on a different BIT *via* an MFN clause did not include the application of clauses that may be considered less beneficial. In the tribunal’s view:

This understanding of the operation of the MFN clause would defeat the intended result of the clause which is to harmonize benefits agreed with a party with those considered more favorable granted to another party. It would oblige the party claiming a benefit under a treaty to consider the advantages and disadvantages of that treaty as a whole rather than just the benefits. The Tribunal recognizes that there may be merit in the proposition that, since a treaty has been negotiated as a package, for other parties to benefit from it, they also should be subject to its disadvantages. The disadvantages may have been a trade-off for the claimed advantages. However, this is not the meaning of an MFN clause. As its own name indicates, it relates only to more favorable treatment. There is also no correlation between the generality of the application of a particular clause and the generality of benefits and disadvantages that the treaty concerned may include. 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. [...].⁹⁰

⁸⁸ Ibid para 69.

⁸⁹ *Siemens A.G. v The Argentine Republic* ICSID Case No ARB/02/8, Decision on Jurisdiction, 3 August 2004.

⁹⁰ Ibid para 120.

This reasoning was largely followed in other cases. In *Gas Natural v Argentina*,⁹¹ an ICSID Tribunal permitted a Spanish investor to rely on the dispute settlement clause of the Argentina/US BIT, which did not contain the 18 months waiting period of the applicable Argentina/Spain BIT.⁹² According to the *Gas Natural* Tribunal, application of the MFN clause was clearly warranted since:

[...] access to such arbitration only after resort to national courts and an eighteen-month waiting period is a less favorable degree of protection than access to arbitration immediately upon expiration of the negotiation period.⁹³

In *Camuzzi v Argentina* the Respondent did not object to the invocation of the MFN clause. Thus, the ICSID Tribunal did not devote much space to considering its relevance. Rather, it remarked in passing that the MFN clause could be relied upon in order to avoid an 18 months waiting period.⁹⁴

The 18 months waiting period of the Argentina/Spain BIT was equally in issue in the joint ICSID/UNCITRAL decision on jurisdiction in *Suez v Argentina*.⁹⁵ The joined proceedings before tribunals constituted by identical arbitrators involved claimants incorporated in France, Spain and the UK. Thus, the jurisdictional and procedural requirements of three different BITs had to be fulfilled. Respondent Argentina had objected to the arbitration of both non-French claimants, arguing that both the Argentina/Spain BIT and the Argentina/UK BIT required legal proceedings before national courts for a period of 18 months before investment claims could be brought before an international arbitral tribunal.

The Spanish and UK investors invoked the applicable MFN clauses to overcome this procedural hurdle. The ICSID Tribunal rejected Argentina's argument, largely relying on a reasoning already adopted by the *Maffezini* Tribunal. It basically found that the applicable MFN clause of the Argentina/Spain BIT⁹⁶ was broad enough to comprise both substantive and procedural

⁹¹ *Gas Natural SDG, S.A. v The Argentine Republic*, ICSID Case No ARB/03/10, Decision on Jurisdiction, 17 June 2005.

⁹² See n 82, above.

⁹³ *Gas Natural SDG, S.A. v The Argentine Republic* (n 91) para 31.

⁹⁴ *Camuzzi International S.A. v The Argentine Republic*, ICSID Case No ARB/03/7, Decision on Jurisdiction, 10 June 2005, para 28 ('El Tribunal considera que el tratamiento de la nación más favorecida solicitado por Camuzzi es procedente en el presente caso, en cuanto a que el período de espera de 18 meses desde el sometimiento de la controversia a las autoridades judiciales o administrativas argentinas establecido en el Artículo 12(2) y (3) del Tratado no es aplicable al presente caso.').

⁹⁵ *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v The Argentine Republic*, (n 77) and *AWG Group Ltd. v The Argentine Republic* (n 77) para 52 ('[...] Article X of the Argentina-Spain BIT requires the investor, at the end of the same six month period, to bring a judicial proceeding in the local courts and allows it to have recourse to arbitration only after a further period of eighteen months in the local courts. [...]'); see also *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v The Argentine Republic*, ICSID Case No ARB/03/17, Decision on Jurisdiction, 16 May 2006, para 52.

⁹⁶ See n 84, above.

matters and that thus Spanish investors were permitted to rely on the more favourable treatment of the Argentina/France BIT. The Tribunal held:

The text [of Article IV(2) Argentina-Spain BIT] clearly states that “in all matters” (*en todas las materias*) a Contracting party is to give a treatment no less favorable than that which it grants to investments made in its territory by investors from any third country. Article X of the Argentina-Spain BIT specifies in detail the processes for the “Settlement of Disputes between a Party and Investors of the other Party.” Consequently, dispute settlement is certainly a “matter” governed by the Argentina-Spain BIT. The word “treatment” is not defined in the treaty text. However, the ordinary meaning of that term within the context of investment includes the rights and privileges granted and the obligations and burdens imposed by a Contracting State on investments made by investors covered by the treaty.

In the present situation, Argentina concluded a BIT with France which permits aggrieved investors, after six months’ of attempting to resolve their disputes to have recourse to international arbitration without the necessity of first bringing a case in the local courts of a Contracting State. Consequently, French investments in Argentina, as a result of the Argentina-France BIT, receive a more favorable treatment than do Spanish investments in Argentina under the Argentina-Spain BIT. That being the case, by virtue [of] paragraph (2) of Article IV, Spanish investments are entitled to a treatment with respect to dispute settlement no less favorable than the one accorded to French investments. In specific terms, granting a treatment to Spanish investments that is no less favorable than that granted to French investments would mean that the holders of Spanish investments would be able to invoke international arbitration against Argentina on the same terms as the holders of French investments. That is to say, Spanish investors, like French investors, may have recourse to international arbitration, provided they comply with the six months negotiation period but without the need to proceed before the local courts of Argentina for a period of eighteen months.⁹⁷

As to the UK investor, AWG, the Tribunal had to assess whether the differently worded MFN clause of the Argentina/UK BIT could equally be relied upon in order to avoid the procedural obstacle of a waiting period. As opposed to the Argentina/Spain BIT, which referred to all matters subject to the BIT, the MFN clause of the Argentina/UK BIT covered certain specifically enumerated aspects of an investment. The MFN clause provided as follows:

1. Neither Contracting Party shall in its territory subject investments or returns of investors or companies of the other Contracting Party to treatment less favorable than that which it accords to investments or returns of its own investors or companies or to investments or returns of nationals or companies of any third State.
2. Neither Contracting Party shall in its territory subject investors or companies of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favorable than that which it accords to its own investors or to investors of any third State.⁹⁸

⁹⁷ *Suez v Argentina* (n 77) para 55.

⁹⁸ Art 3 Argentina–UK BIT.

In spite of this difference in wording, the tribunal came to the conclusion that also such an MFN clause comprised procedural aspects. In the words of the *Suez* Tribunal:

The right to have recourse to international arbitration is very much related to investors' "management, maintenance, use, enjoyment, or disposal of their investments." It is particularly related to the "maintenance" of an investment, a term which includes the protection of an investment. Thus French investors by virtue of the Argentina-France BIT having the right to proceed directly in international arbitration without the necessity of first submitting their claims to local courts are treated more favorably with respect the management, maintenance, use, enjoyment and disposal of their investments than U.K. investors who may not. That being the case, U.K. investors may invoke the most-favored-nation clause in the Argentina-U.K. BIT to order to obtain the more favourable treatment accord to French investors.⁹⁹

More specifically, the *Suez* Tribunal rejected Argentina's assertion that the Contracting Parties of the BIT had not intended the MFN clause to cover dispute settlement. In the tribunal's view, the fact that Article 7 of the Argentina/UK BIT excluded certain matters, but not dispute settlement, from MFN treatment indicated a different intention of the parties. Equally, the fact that the UK had subsequently entered into BITs with MFN clauses confirming that they applied to provisions including dispute settlement¹⁰⁰ was regarded as a clarification of what had been UK's pre-existing intention in negotiating its BITs: that the most-favoured-nation clause is to cover all articles of the BITs.¹⁰¹ The *Suez* Tribunal also shared the view of a number of other tribunals, underlining the importance of dispute settlement for the central purpose of BITs to protect foreign investments. The Tribunal held:

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.¹⁰²

Finally, the Tribunal addressed the relevance of the *Plama* decision at length.¹⁰³ This did not change the outcome, however, since the *Suez* Tribunal considered *Plama* clearly distinguishable on a number of grounds. For one, the applicable MFN clauses of both the Argentina/Spain BIT and the Argentina/UK BIT were much broader in scope than the language of the Bulgaria/Cyprus BIT in *Plama*. Second, the Tribunal accepted that in *Plama* it

⁹⁹ *Suez v Argentina* (n 77) para 57.

¹⁰⁰ The Tribunal relied on subsequent UK BITs, which contained clarifying language that the most-favored-nation clause is to cover all BIT articles, including dispute settlement. *Suez v Argentina* (n 77) para 58.

¹⁰¹ *Suez v Argentina* (n 77) para 58.

¹⁰² *Ibid* para 59.

¹⁰³ *Plama Consortium Ltd. v Bulgaria* (n 33). See in detail, text at n 130 below.

could be demonstrated that the actual intent of the contracting States did not encompass the extension of MFN to dispute settlement provisions. Third, the *Suez* Tribunal found that unlike in *Plama* where reliance on MFN should have replaced the applicable dispute settlement provisions by those from another treaty, the MFN clause only assisted in waiving a preliminary step in accessing international arbitration, which was available in the applicable BITs anyways.¹⁰⁴

The avoidance of the 18 months waiting period in the Argentina/Spain BIT was also permitted by the ICSID Tribunal in *Telefónica v Argentina*.¹⁰⁵ After broadly asserting that Investor-State arbitration may be considered to be one of the investment protections where the MFN clause is relevant, the Tribunal more specifically noted that it was not asked to extend ‘ICSID arbitration beyond what is provided for in the Argentina–Spain BIT by virtue of the reference to another BIT under the MFN clause’,¹⁰⁶ but merely to declare that the investor was ‘exempted from the precondition of submitting the claim to the domestic courts of the host State, thanks to the application of the MFN clause’.¹⁰⁷ As to the more preferential treatment by avoiding the 18 months waiting period, the Tribunal held:

It is undisputable that it is preferable for an investor not to be obliged to submit, and pursue for 18 months, its claim before the courts of the host State before being allowed to submit it to the specific investment arbitration at ICSID. Being exempted from such a requirement (also considering the unlikelihood that a decision on the merits be rendered within this time limit) represents a “better treatment” in respect of which, therefore, the MFN clause operates.¹⁰⁸

In *National Grid v Argentina*¹⁰⁹ an UNCITRAL Tribunal permitted an investor to avoid the 18 months waiting requirement under the Argentina/UK BIT on the basis of the MFN clause contained in the same BIT.¹¹⁰ The Tribunal observed 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*.¹¹¹

¹⁰⁴ *Suez v Argentina* (n 77) para 65.

¹⁰⁵ *Telefónica SA v Argentine Republic*, ICSID Case No ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, 25 May 2006.

¹⁰⁶ *Ibid* para 102.

¹⁰⁷ *Ibid*.

¹⁰⁸ *Ibid* para 103.

¹⁰⁹ *National Grid v Argentina* (n 77).

¹¹⁰ See n 98, above.

¹¹¹ *National Grid v Argentina* (n 77) para 82.

Since the applicable MFN clause differed from the one relied upon in the *Maffezini* case it was held that the

[...] issue for the Tribunal is whether reference only to most-favorable “treatment,” absent a reference to all matters covered by the Treaty, excludes a procedural prerequisite to dispute resolution from the scope of application of the MFN clause.¹¹²

While the Tribunal found the subsequent practice of the contracting parties inconclusive, it relied on previous decisions in order to narrow down the specific issue. The Tribunal found that it was not asked to affirm jurisdiction where the Argentina/UK BIT would not provide one. Rather, the issue was merely whether it was permissible to overcome the waiting period by invoking the MFN clause:

In the present case, the parties had agreed to arbitration under UNCITRAL Rules and the issue is the avoidance, by virtue of an MFN clause, of a procedural requirement that the Argentine Republic has dispensed with in its investment treaties concluded since 1994.¹¹³

In the Tribunal’s view, National Grid did not try ‘to extend an MFN clause beyond appropriate limits’. Rather, it considered that ‘[t]he MFN clause is an important element to ensure that foreign investors are treated on a basis of parity with other foreign investors and with national investors when they invest abroad’.¹¹⁴ It therefore concluded:

[...] that, in the context in which the Respondent has consented to arbitration for the resolution of the type of disputes raised by the Claimant, “treatment” under the MFN clause of the Treaty makes it possible for UK investors in Argentina to resort to arbitration without first resorting to Argentine courts, as is permitted under the US-Argentina Treaty. Therefore, the Tribunal rejects this objection to its jurisdiction.¹¹⁵

The 2008 ICSID award in *Wintershall v Argentina*¹¹⁶ however, has cast doubts on the established consensus that MFN clauses may be relied upon in order to avoid procedural obstacles like waiting periods. In a situation very similar to the one in *Maffezini* and *Siemens*, a German investor wanted to sidestep the 18 months waiting period contained in the Argentina/Germany BIT by relying on the dispute settlement clause of the Argentina/US BIT. The *Wintershall* Tribunal disallowed such invocation

[...] not because “treatment” in Article 3 may not include “protection” of an investment by the investor adopting ICSID arbitration, but primarily because of the

¹¹² Ibid para 84.

¹¹³ Ibid para 91.

¹¹⁴ Ibid, para 92.

¹¹⁵ Ibid para 93.

¹¹⁶ *Wintershall Aktiengesellschaft v Argentine Republic*, ICSID Case No ARB/04/14, Award, 8 December 2008.

significance that has been attached by the Contracting States to the eighteen-month requirement in Article 10(2): it is part and parcel of Argentina's integrated "offer" for ICSID arbitration; this "offer" must be accepted by the investor on the same terms.¹¹⁷

Furthermore, the *Wintershall* Tribunal openly questioned the proposition of the *Maffezini* Tribunal that treatment is not limited to substantive rights, but may also encompass the enforcement of such rights through dispute settlement. According to the *Wintershall* Tribunal:

[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 [favourably] than under a BIT between the host State and a third State. It is one thing to stipulate that the investor is to have the benefit of MFN treatment but quite another to use a MFN clause in a BIT to bypass a limitation in the settlement resolution clause of the very same BIT when the Parties have not chosen language in the MFN clause showing an intention to do this.¹¹⁸

The *Wintershall* Tribunal was of the view 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 Host State.¹¹⁹

This outcome is all the more irritating since the Tribunal had to apply the Argentina/Germany BIT, which was also applicable in *Siemens*.¹²⁰ Thus, the *Wintershall* Tribunal appears to have confirmed its own critical remark that '[i]n the sphere of MFN Clauses (in BITs) and their reach, adjudications by *ad hoc* tribunals have proved to be an obstacle to the development of a *jurisprudence constante*'.¹²¹

Except for the *Wintershall* award, however, there is a clear line of decisions in which investment tribunals have accepted that MFN clauses may be used in order to avoid waiting periods before instituting investment arbitration. Even tribunals highly critical of the use of MFN clauses, like the one in *Plama*,¹²²

¹¹⁷ Ibid para 162.

¹¹⁸ Ibid para 168.

¹¹⁹ Ibid para 171.

¹²⁰ See text at n 89, above.

¹²¹ *Wintershall v Argentina* (n 116) para 178 (Emphasis in original).

¹²² See in detail, text at n 130 below.

have demonstrated sympathy with this approach to avoid such ‘nonsensical’ dispute settlement provisions.¹²³

(ii) *MFN clauses as possible tools to establish jurisdiction in case of narrow dispute settlement clauses*

Whether MFN clauses may also be relied upon in order to establish a tribunal’s jurisdiction where such tribunal would otherwise not have jurisdiction pursuant to the basic treaty is a more contested issue. For quite some time, it seemed that MFN clauses could be relied upon in order to circumvent procedural obstacles like waiting periods, as suggested in *Maffezini* and a number of subsequent decisions. A number of cases suggest, however, that MFN clauses would not allow establishing jurisdiction that would not exist otherwise.¹²⁴

In the *Salini Case*,¹²⁵ the *Maffezini* and *Siemens* approach received a first setback by an ICSID Tribunal. The Tribunal held that the applicable MFN clause in the Italy/Jordan BIT¹²⁶—as opposed to the MFN clause in *Maffezini* referring to ‘all matters’ subject to the agreement—was not broad enough to form the basis for ICSID jurisdiction provided for in other BITs of the host State. Instead, it found that it lacked jurisdiction as a result of the applicable dispute settlement provisions in the Italy/Jordan BIT giving preference to the remedies directly provided for in the investment agreement between the investor and the host State.¹²⁷ The Tribunal more generally appears to have reversed the presumption that an MFN clause may encompass dispute settlement. It stated:

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”. Furthermore, 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. 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

¹²³ *Plama v Bulgaria* (n 33) para 224 (‘The decision in *Maffezini* is perhaps understandable. The case concerned a curious requirement that during the first 18 months the dispute be tried in the local courts. The present Tribunal sympathizes with a tribunal that attempts to neutralize such a provision that is nonsensical from a practical point of view. However, such exceptional circumstances should not be treated as a statement of general principle guiding future tribunals in other cases where exceptional circumstances are not present.’).

¹²⁴ See text at n 81, above.

¹²⁵ *Salini Costruttori S.p.A and Italstrade S.p.A v The Hashemite Kingdom of Jordan* (n 33).

¹²⁶ The combined national treatment and MFN clause in art 3(1) of the Italy/Jordan BIT provided as follows: ‘Both Contracting Parties, within the bounds of their own territory, shall grant investments effected by, and the income accruing to, investors of the Contracting Party no less favourable treatment than that accorded to investments effected by, and income accruing to, its own nationals or investors of Third States’.

¹²⁷ Art 9(2) of the Italy–Jordan BIT provided that ‘in case the investor and an entity of the Contracting Parties have stipulated an investment Agreement, the procedure foreseen in such investment agreement shall apply’.

the procedures set forth in the investment agreements. Lastly, the Claimants have not cited any practice in Jordan or Italy in support of their claims.¹²⁸

The *Salini* Tribunal's decision appears to have been motivated also by policy concerns over a potential forum shopping practice that may stem from too liberal an approach towards MFN clauses. The Tribunal stated:

The current Tribunal shares the concerns that have been expressed in numerous quarters with regard to the solution adopted in the *Maffezini* case. Its fear is that the precautions taken by authors of the award may in practice prove difficult to apply, thereby adding more uncertainties to the risk of 'treaty shopping'.¹²⁹

*Plama v Bulgaria*¹³⁰ is the leading case where an investment tribunal rejected the argument that its jurisdiction could be based on an MFN clause. In that case, the claimant had tried to bypass a specific form of a narrow dispute settlement clause in the Bulgaria/Cyprus BIT, providing only for *ad hoc* arbitration concerning disputes over the amount of compensation in the event of expropriation.¹³¹ *Plama* had invoked the BIT's MFN clause¹³² which, according to the claimant, applied to 'all aspects of treatment', and thus, also to the dispute settlement provisions in other Bulgarian BITs. The *Plama* Tribunal basically reversed the *Maffezini* presumption by stating that:

[...] an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.¹³³

Furthermore, the Tribunal in *Plama* distinguished between overcoming procedural obstacles and establishing jurisdiction. The Tribunal held that:

[i]t is one thing to add to the treatment provided in one treaty more favorable treatment provided elsewhere. It is quite another thing to replace a procedure specifically negotiated by parties with an entirely different mechanism.¹³⁴

¹²⁸ *Salini v Jordan* (n 33) para 118.

¹²⁹ *Ibid* para 115.

¹³⁰ *Plama Consortium Ltd. v Bulgaria* (n 33).

¹³¹ Art 4.1 Bulgaria–Cyprus BIT ('The legality of the expropriation shall be checked at the request of the concerned investor through the regular administrative and legal procedure of the contracting party that had taken the expropriation steps. In cases of dispute with regard to the amount of the compensation, which disputes were not settled in an administrative order, the concerned investor and the legal representatives of the other Contracting Party shall hold consultations for fixing this value. If within 3 months after the beginning of the consultations no agreement is reached, the amount of the compensation at the request of the concerned investor shall be checked either in a legal regular procedure of the Contracting Party which had taken the measure on expropriation or by an international "Ad hoc" Arbitration Court.')

¹³² Art 3.1 Bulgaria–Cyprus BIT ('Each Contracting Party shall apply to the investments in its territory by investors of the other Contracting Party a treatment which is not less favorable than that accorded to investments by investors of third states.')

¹³³ *Plama v Bulgaria* (n 33) para 223.

¹³⁴ *Ibid* para 209.

It was this remark of the *Plama* Tribunal that led many commentators to rationalize and explain the different outcome in *Maffezini* and *Plama* by establishing the distinction between overcoming procedural difficulties and establishing an otherwise non-available jurisdiction.¹³⁵ However, the cautious, if not negative, attitude of tribunals *vis-à-vis* MFN clauses is not entirely new. Rather, the *Plama* Tribunal followed the restrictive approach adopted by another ICSID Tribunal in *Salini v Jordan*.¹³⁶

The *Plama* approach was confirmed in *Telenor v Hungary*,¹³⁷ another ICSID case in which an investor tried to overcome a narrow dispute settlement clause in the applicable Hungary/Norway BIT. This clause provided for dispute settlement ‘concerning the amount or payment of compensation [...] or concerning any other matter consequential upon an act of expropriation’.¹³⁸ The Tribunal declined to exercise jurisdiction over Telenor’s expropriation claim because the claimant had failed to make out a *prima facie* case of expropriation.¹³⁹ As explained above, the Tribunal did not conclude, however, that the narrow dispute settlement clause itself prevented the parties from litigating the issue of whether an expropriation had occurred in the first place.¹⁴⁰

With regard to the MFN clause, however, it rejected the other BIT claim concerning fair and equitable treatment, which was apparently not covered by the dispute settlement clause of the Hungary/Norway BIT. Relying on *Maffezini* and *Siemens*, claimant had invoked the treaty’s MFN clause, which guaranteed ‘treatment no less favourable than that accorded to investments made by Investors of any third State’.¹⁴¹ The *Telenor* Tribunal, however, relied on *Plama* and *Salini* in holding 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.¹⁴²

In its view, a literal interpretation of the MFN clause implied 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. It

¹³⁵ See text at n 81, above.

¹³⁶ *Salini Costruttori S.p.A and Italstrade S.p.A v The Hashemite Kingdom of Jordan* (n 33). See text at n 128, above.

¹³⁷ *Telenor Mobile Communications AS v Republic of Hungary* (n 30).

¹³⁸ Art XI Hungary–Norway BIT, see text at n 32, above.

¹³⁹ *Telenor v Hungary* (n 30) para 80.

¹⁴⁰ See text at n 36, above.

¹⁴¹ Art IV Hungary–Norway BIT (‘Investments made by Investors of one Contracting Party in the territory of the other Contracting Party, as also the returns therefrom, shall be accorded treatment no less favourable than that accorded to investments made by Investors of any third State.’).

¹⁴² *Telenor v Hungary* (n 30) para 91.

is one thing to stipulate that the investor is to have the benefit of MFN investment treatment but quite another to use an MFN clause in a BIT to bypass a limitation in the very same BIT when the parties have not chosen language in the MFN clause showing an intention to do this, as has been done in some BITs.¹⁴³

It added a policy-driven argument, already raised by the *Plama* Tribunal. It cautioned that ‘the effect of the wide interpretation of the MFN clause is to expose the host State to treaty-shopping by the investor among an indeterminate number of treaties to find a dispute resolution clause wide enough to cover a dispute that would fall outside the dispute resolution clause in the base treaty [...]’.¹⁴⁴ A further argument relied upon by the *Telenor* Tribunal against a wide interpretation of the MFN clause was its concern that such interpretation would also ‘generate[s] both uncertainty and instability in that at one moment the limitation in the basic BIT is operative and at the next moment it is overridden by a wider dispute resolution clause in a new BIT entered into by the host State’.¹⁴⁵ Finally, the Tribunal emphasized its view that dispute resolution provisions in BITs are practically always to be understood as specifically negotiated between the contracting parties and thus not amenable to ‘importation’ from other BITs *via* MFN clauses. The Tribunal explained:

The importance to investors of independent international arbitration cannot be denied, but in the view of this Tribunal its task is to interpret the BIT and for that purpose to apply ordinary canons of interpretation, not to displace, by reference to general policy considerations concerning investor protection, the dispute resolution mechanism specifically negotiated by the parties. There are BITs entered into by a State which provide for reference to arbitration of *all* disputes, and others entered into *by the same State* that limit consent to arbitration to specified categories of dispute, such as expropriation. It must be obvious that such a State, when reaching agreement on the latter 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.¹⁴⁶

¹⁴³ Ibid para 92.

¹⁴⁴ Ibid para 93.

¹⁴⁵ Ibid para 94.

¹⁴⁶ Ibid para 95.

The *Telenor* Tribunal found that in the specific case, the BIT practice of both Norway and Hungary, mostly providing for dispute settlement of all or any disputes, demonstrated a deliberate choice to limit arbitration to the categories mentioned in Article XI of the Hungary/Norway BIT.¹⁴⁷ It thus concluded that the treaty's MFN clause could not be invoked to extend the Tribunal's jurisdiction to claims under its fair and equitable treatment clause.¹⁴⁸

As opposed to the clear stance of the tribunals in *Plama*, *Salini* and *Telenor*, other tribunals have left the issue open as to whether an MFN clause may be relied upon, in order to establish a jurisdiction which would otherwise not be available.

For instance, in *Suez v Argentina*¹⁴⁹ an investment tribunal noted the fact that in *Plama*, the Claimant had attempted to replace the dispute settlement provisions in the applicable Bulgaria/Cyprus BIT *in toto* by a dispute resolution mechanism incorporated from another treaty. It expressly added, however, that it would not express an opinion on whether a most-favored-nation clause may achieve such a result.¹⁵⁰

This issue was addressed in more detail by tribunals in *Berschader*,¹⁵¹ *Renta4*,¹⁵² *RosInvest*¹⁵³ and *Austrian Airlines*¹⁵⁴ with regard to the specific question whether MFN clauses may be relied upon in order to avoid a narrow dispute settlement clause. Since the tribunals came to different conclusions, sometimes against strong dissenting views by some of their arbitrators, this issue must be considered to be still an unsettled, controversial point.

(iii) *MFN Clauses as instruments to overcome narrow dispute settlement clauses*

One of the first cases addressing this problem explicitly was *Berschader v Russia*.¹⁵⁵ In that case an investment tribunal rejected the possibility to invoke an MFN clause in order to avoid a narrow dispute settlement clause, which referred only to disputes 'concerning the amount or mode of the compensation for expropriation'.¹⁵⁶ The applicable MFN clause provided that:

'[e]ach Contracting Party guarantees that the most favoured nation clause shall be applied to investors of the other Contracting Party in all matters covered by the present Treaty, and in particular in articles 4, 5 and 6, with the exception of benefits provided by one Contracting Party to investors of a third country on the basis – of its

¹⁴⁷ Ibid paras 96, 97.

¹⁴⁸ Ibid paras 100, 102.

¹⁴⁹ *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v The Argentine Republic* (n 95). (See text at n 95, above).

¹⁵⁰ Ibid para 65.

¹⁵¹ *Berschader v Russia* (n 10).

¹⁵² *Renta 4 S.V.S.A et al. v Russian Federation* (n 49).

¹⁵³ *RosInvestCo UK Ltd. v The Russian Federation* (n 18).

¹⁵⁴ *Austrian Airlines AG v The Slovak Republic* (n 22) para 135.

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

¹⁵⁶ Art 10 Belgium-Luxembourg-USSR BIT 1989. See also n 11, above.

participation in a customs union or other international economic organisations, or – of an agreement to avoid double taxation and other taxation issues.¹⁵⁷

After a lengthy review of pertinent cases, like *Maffezini*, *Siemens* and *Plama*, the *Berschader* Tribunal sided with the restrictive approach of the *Plama* decision by stressing that ‘[...] particular care should nevertheless be exercised in ascertaining the intentions of the parties with regard to an arbitration agreement which is to be reached by incorporation by reference in an MFN clause’.¹⁵⁸ While the Tribunal was of the opinion that it was ‘universally agreed that the very essence of an MFN provision in a BIT is to afford to investors all material protection provided by subsequent treaties’, it considered it to be ‘much more uncertain whether such provisions should be understood to extend to dispute resolution clauses’.¹⁵⁹ The *Berschader* Tribunal followed the *Plama* approach by stating that it would apply:

[...] 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.¹⁶⁰

Although the applicable MFN clause referred to ‘all matters covered by the present Treaty’, the Tribunal cautioned that this ‘seemingly clear language’ should be read in context. On this basis, it concluded that the ‘expression “all matters covered by the present Treaty” certainly cannot be understood literally’.¹⁶¹ 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.¹⁶² Since the Tribunal could not find any evidence of the parties’ intention that the MFN provision should embrace arbitration issues, it held that ‘the Treaty does not clearly and unambiguously provide for incorporation by reference of arbitration clauses in other BITs’.¹⁶³

This result was vigorously criticized in the separate opinion by one of the arbitrators. Though concurring with the majority that the MFN clause should be interpreted according to the rules of the Vienna Convention,¹⁶⁴ Todd Weiler

¹⁵⁷ Art 2 Belgium–Luxembourg–USSR BIT 1989 (Unofficial translation in *Berschader v Russia* (n 11) para 47). (‘Chaque Partie contractante garantit que la clause de la nation la plus favorisée sera appliquée aux investisseurs de l’autre Partie contractante dans toutes les matières visées au présente Accord, et plus particulièrement aux articles 4, 5, et 6 [...]’)

¹⁵⁸ *Berschader v Russia* (n 10) para 178.

¹⁵⁹ *Ibid* para 179.

¹⁶⁰ *Ibid* para 181.

¹⁶¹ *Ibid* para 192.

¹⁶² *Ibid* para 193.

¹⁶³ *Ibid* para 208.

¹⁶⁴ See n 65, above.

insisted that when ascertaining the intent of the treaty drafters ‘the treaty terms themselves [were] the best evidence of ascertaining such intent’.¹⁶⁵ In his view,

There is simply no reason to suppose that—absent some specific treaty language—any given MFN provision should be more or less narrowly defined. In other words, MFN clauses apply to all aspects of the regulatory environment governed by an investment protection treaty, including availability of all means of dispute settlement.¹⁶⁶

Though couched in language referring to procedural aspects, the dissenting arbitrator would clearly have allowed use of the MFN clause in order to establish jurisdiction which would otherwise not be available.¹⁶⁷

In *RosInvest v Russia*,¹⁶⁸ an *ad hoc* Tribunal for the first time found that it could rely on an MFN clause in order to establish its jurisdiction to decide whether an expropriation had occurred where—because of a narrow dispute settlement clause—it would otherwise not have had such jurisdiction. The *RosInvest* Tribunal found that it could rely on the applicable MFN clause of the UK/USSR BIT, which provided with regard to the treatment of investors as follows:

Neither Contracting Party shall in its territory subject investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to investors of any third State.¹⁶⁹

According to the Tribunal, this formulation permitted the claimant to rely on a wider dispute settlement clause than the one contained in the basic UK/USSR BIT. The *RosInvest* Tribunal reasoned that it would be:

[...] difficult to doubt that an expropriation interferes with the investor’s use and enjoyment of the investment, and 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.¹⁷⁰

With regard to the controversial issue whether an MFN clause encompasses procedural rights or is limited to substantive treatment, the *RosInvest* Tribunal clearly sided with the former interpretation. It stated:

If this effect is generally accepted in the context of substantive protection, the Tribunal sees no reasons not to accept it in the context of procedural clauses. Quite the contrary, it could be argued that, if it applies to substantive protection, then it

¹⁶⁵ *Berschader v Russia* (n 10) para 4.

¹⁶⁶ *Ibid* para 20.

¹⁶⁷ *Ibid* para 17 (‘A broad-based MFN provision [...] extends to procedural aspects of the dispute, including entitlement to pursue arbitration.’).

¹⁶⁸ *RosInvestCo UK Ltd. v The Russian Federation* (n 18).

¹⁶⁹ Art 3(2) UK–USSR BIT.

¹⁷⁰ *RosInvestCo UK Ltd. v The Russian Federation* (n 18) para 130.

should apply even more to ‘only’ procedural protection. However, the Tribunal feels that this latter argument cannot be considered as decisive, but rather, as argued further above, an arbitration clause, at least in the context of expropriation, is of the same protective value as any substantive protection afforded by applicable provisions such as Article 5 of the BIT.¹⁷¹

The Tribunal confirmed its finding that the claimant could rely on the MFN clause of the UK/USSR BIT in order to institute investment arbitration by relying on the BIT’s exceptions to MFN treatment relating to preferential trade agreements as well as tax matters.¹⁷² In view of the detailed and careful formulation of this exceptions clause the tribunal 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.¹⁷³

As a result the Tribunal held that it had jurisdiction beyond the narrow dispute settlement clause of the UK/USSR BIT in order to assess whether an expropriation had taken place and was lawful.¹⁷⁴

This option is also not ruled out by the recent *Renta4* case.¹⁷⁵ The Tribunal rejected the Claimant’s attempt to rely on the MFN clause of the Spain/Russia BIT¹⁷⁶ in order to avoid its narrow dispute settlement clause.¹⁷⁷ It stressed, however, that this finding resulted from the particular wording and structure of

¹⁷¹ Ibid para 132.

¹⁷² Art 7 UK–USSR BIT (‘The provisions of Articles 3 and 4 of this Agreement shall not be construed so as to oblige one Contracting Party to extend to the investors of the other the benefit of any treatment, preference or privilege resulting from (a) any existing or future customs union, organisation for mutual economic assistance or similar international agreement, whether multilateral or bilateral, to which either of the Contracting Parties is or may become a party, or (b) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly taxation.’).

¹⁷³ *RosInvestCo UK Ltd. v The Russian Federation* (n 18) para 135.

¹⁷⁴ Ibid para 139.

¹⁷⁵ *Renta 4 S.V.S.A et al. v Russian Federation* (n 49).

¹⁷⁶ Art 5 Spain–Russia BIT (1. Each Party shall guarantee fair and equitable treatment within its territory for the investments made by investors of the other Party. 2. The treatment referred to in paragraph 1 above shall be no less favourable than that accorded by either Party in respect of investments made within its territory by investors of any third State. 3. Such treatment shall not, however, include privileges which may be granted by either Party to investors of a third State, by virtue of its participation in: – A free trade area; – A customs union; – A common market; – An organization of mutual economic assistance or other agreement concluded prior to the signing of this Agreement and containing conditions comparable to those accorded by the party to the participants in said organization. The treatment granted under this article shall not include tax exemptions or other comparable privileges granted by either Party to the investors of a third State by virtue of a double taxation agreement or any other agreement concerning matters of taxation.’).

¹⁷⁷ Art 10 Spain–Russia BIT (‘1. Any dispute between one Party and an investor of the other Party relating to the amount or method of payment of the compensation due under Article 6 of this Agreement, shall be communicated in writing, together with a detailed report by the investor to the Party in whose territory the investment was made. The two shall, as far as possible, endeavour to settle the dispute amicably. 2. If the dispute cannot be settled thus within six months of the date of the written notification referred to by [sic] either of the following, the choice being left to the investor: [Stockholm Chamber of Commerce arbitration or UNCITRAL arbitration].’).

the MFN clause, which only applied to fair and equitable treatment.¹⁷⁸ Significantly, the *Renta4* Tribunal stated that in its view there was no authority for the proposition that MFN treatment was generally limited to ‘primary’ or substantive obligations and that it cannot be doubted that ‘access to international arbitration has been a fundamental and constant desideratum for investment protection and therefore a weighty factor in considering the object and purpose of [the] BIT’.¹⁷⁹ It further held that there was ‘no textual basis or legal rule to say that “treatment” does not encompass the host state’s acceptance of international arbitration’.¹⁸⁰ Thus, the outcome of the majority decision was very much determined by the fact that ‘the terms of the Spanish BIT restrict MFN treatment to the realm of FET as understood in international law’.¹⁸¹ More generally, the Tribunal added:

This in the majority view relates to normative standards and does not extend to either (i) the availability of international as opposed to national fora or (ii) “more” or “less” arbitration (as the separate opinion puts it).¹⁸²

As indicated in the majority decision, the dissenting arbitrator Charles N Brower disagreed with that view and was of the opinion that even the specific MFN clause of the Spain/Russia BIT would have permitted claimant to incorporate respondent’s ‘broader consent’ to arbitration under third BITs.¹⁸³ He saw ‘no reason why an issue of the incorporation of broader consent to arbitration under the host State’s third-country investment treaties should be treated differently from the consistently accepted application of MFN clauses to substantive standards of treatment, or the (rather) consistent application of MFN clauses to the shortening of waiting periods’.¹⁸⁴ Mostly on the basis of the original Spanish and Russian version of Article 5 of the Spain/Russia BIT, Judge Brower concluded that the MFN clause referred to any treatment and not just to fair and equitable treatment and would thus enable an investor to ‘incorporate’ the better treatment of investment arbitration beyond the narrow confines of the dispute settlement clause of the Spain/Russia BIT.¹⁸⁵ In addition, the dissenting arbitrator was of the opinion that ‘international arbitration is an aspect of fair and equitable treatment’ and that thus even a narrow interpretation of the reference in Article 5(2) of the Spain/Russia BIT would permit the claimant access to more favourable dispute settlement clauses.¹⁸⁶ While the debate among the *Renta 4* arbitrators centred very much on the specific and rather unusual formulation of the applicable MFN clause, it

¹⁷⁸ *Renta 4 v Russia* (n 49) paras 105–18.

¹⁷⁹ *Ibid* para 100.

¹⁸⁰ *Ibid* para 101.

¹⁸¹ *Ibid* para 119.

¹⁸² *Ibid* para 119.

¹⁸³ *Ibid* Separate Opinion Charles N Brower, para 5.

¹⁸⁴ *Ibid* para 10.

¹⁸⁵ *Ibid* paras 15, 16.

¹⁸⁶ *Ibid* para 22.

is important to realize that both the majority and the dissenter appear to agree that, in principle, treatment afforded under MFN clauses may include investment arbitration.

This view, clearly espoused by the *RosInvest* Tribunal,¹⁸⁷ was rejected by the majority in *Austrian Airlines v Slovakia*.¹⁸⁸ The UNCITRAL Tribunal in this case denied the possibility to rely on an MFN clause in order to arbitrate investment disputes beyond the narrow confines of Article 8 of the Austria/Czech and Slovak Federal Republic BIT.¹⁸⁹ The Austria/Czech and Slovak Federal Republic BIT contained an MFN clause, which read as follows:

Each Contracting Party shall accord to investors of the other Contracting Party and to their investments treatment that is no less favourable than that which it accords to its own investors or to investors of any third State and their investments.¹⁹⁰

The *Austrian Airlines* Tribunal shortly considered claimant's argument that the exceptions to the MFN clause in Article 3(2) of the Austria/Czech and Slovak Federal Republic BIT (relating to regional economic integration treaties) indicated that other exceptions should not be read into the broad wording of Article 3(1) of the BIT—on the basis of the principle *expressio unius est exclusio alterius*. However, the Tribunal rejected this argument relying on a somewhat vague contextual interpretation of the MFN clause. In fact, the *Austrian Airlines* Tribunal relegated the *expressio unius* principle to secondary rank *vis-à-vis* a contextual meaning derived from the BIT's specific dispute settlement provisions. In the words of the Tribunal:

Faced with a manifest, specific intent to restrict arbitration to disputes over the amount of compensation for expropriation to the exclusion of disputes over the principle of expropriation, it would be paradoxical to invalidate that specific intent by virtue of the general, unspecific intent expressed in the MFN clause. As a result of these contextual considerations, the specific intent expressed in Articles 8, 4(4) and 4(5) informs the scope of the general intent expressed in Article 3(1), with the result that the former prevails over the latter. In other words, the restrictive dispute settlement mechanism for expropriation claims set out in Articles 8, 4(4) and 4(5) constitutes an exception to the scope of Article 3(1). Hence, the MFN clause does not apply to the settlement of disputes over the legality of expropriations.¹⁹¹

This argument effectively neutralized any MFN treatment. It basically held that any better treatment by reliance upon an MFN clause would 'paradoxically invalidate' the specific treatment agreed upon on the basic treaty. One may think, however, that this is exactly the purpose of an MFN clause to accord better treatment than the one provided for in the basic treaty depending upon the fact

¹⁸⁷ See text at n 168, above.

¹⁸⁸ *Austrian Airlines AG v The Slovak Republic* (n 22).

¹⁸⁹ Art 8 Austria–Czech and Slovak Federal Republic BIT, see n 23, above.

¹⁹⁰ Art 3(1) Austria–Czech and Slovak Federal Republic BIT.

¹⁹¹ *Austrian Airlines AG v The Slovak Republic* (n 22).

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 Repts 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 Perú*, ICSID Case No ARB/03/4 (Previously *Empresas Lucchetti, S.A. and Lucchetti Perú, S.A. v Perú*) 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.’); *Sahuka 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; *Aguas 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 Tokeles v Ukraine*, on the issue of the correct interpretation of the definition of investor. *Tokios Tokeles 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.

From a policy perspective, developments in the law protecting against unlawful expropriation may equally cast doubt on the sense of jurisdictional limitations in the form of narrow dispute settlement clauses. Rules on the expropriation of foreign investors belong to the typical core standards contained in international investment agreements. They regularly do not prohibit expropriation as such but make it permissible on the condition that certain legality requirements are fulfilled. One crucial element next to public interest, non-discrimination and due process is the provision of compensation. In the logic of expropriation clauses in investment treaties the obligation to pay compensation is dependent upon the existence of expropriation. Where governmental acts or omissions do not amount to expropriation, no compensation is due. This has become particularly important in the debate concerning the delimitation between compensatory regulatory expropriation and non-compensatory regulation. While this distinction was in principle always accepted, the precise delimitation and the appropriate criteria for such delimitation remain highly contested.³⁰²

However, what has given additional momentum to this problem is the empirical fact that States rarely engage in overt expropriation. Instead, they increasingly regulate in a general manner and such regulation may sometimes amount to indirect expropriation. Because of the general lack of direct expropriation, disputes are no longer limited to disputes about the amount and modalities of compensation; rather they almost always require the preliminary determination that a governmental measure amounted to expropriation. Thus, the determination of the amount of compensation has become regularly linked to the determination whether there was an expropriation or a similar measure in the first place. Depriving investment tribunals of their power to determine whether an expropriation has occurred would effectively deprive investors of their right to have the amount of compensation determined by an international tribunal. By denying the existence of any regulatory expropriation host States could easily avoid the narrow jurisdiction of tribunals to decide over the amount and modalities of compensation.

Apparently this problem has been recognized by States and they are gradually abandoning those narrow dispute settlement clauses that purport to limit a tribunal's jurisdiction to the determination of the amount and method of compensation in case of expropriation. It is undoubtedly within the discretion of BIT Contracting States to modify, and in this case, to enlarge the

³⁰² See among others D Clough, 'Regulatory Expropriation and Compensation under NAFTA' (2005) 6 JWIT 553; U Kriebaum, 'Regulatory Takings: Balancing the Interests of the Investor and the State' (2007) 8 JWIT 717; C McLachlan QC, L Shore and M Weiniger, *International Investment Arbitration, Substantive Principles* (Oxford University Press, New York 2007) 306; A Newcombe, 'The Boundaries of Regulatory Expropriation in International Law' (2005) 20 ICSID Review-FILJ 1; A Newcombe and L Paradell, *Law and Practice of Investment Treaties* (Kluwer Law International, The Netherlands 2009) 322; A Reinisch, 'Expropriation' in P Muchlinski, F Ortino and Ch Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, New York 2008) 432; V Lowe, 'Regulation or Expropriation?' (2002) 55 CLP 447.

scope of jurisdiction of the institutions charged with settling investment disputes. The cases discussed in this article raise the further issue whether it is the proper role of investment tribunals to correct the meaning of dispute clauses they qualify as use- or senseless or whether such remedial action should remain reserved to the States Parties entering into BITs: Is it the treaty-interpreters or the treaty-makers who determine the proper scope of arbitration? Since the arbitrators are the interpreters, it is obvious that the former have an important word in this question, but whether it is the appropriate one is open to question. The problem is further complicated by the fact that the dispute settlement provisions are not only treaty-provisions; they are also the jurisdictional foundation of the powers of investment tribunals. Generally, adjudicatory bodies possess the power to determine their own jurisdiction (*Kompetenz-Kompetenz*).³⁰³ This is also true for investment tribunals under ICSID, UNCITRAL or other arbitration rules chosen in BITs and other investment treaties. Thus, blurring the (mostly fictitious) line between making and applying the law becomes ever more relevant in this area. While it is apparent that investment tribunals have tried to stay true to the text of the treaties they have to apply, it is equally obvious that they often base their decisions on sometimes unexpressed notions of what they consider to be appropriate solutions for jurisdictional questions.

³⁰³ Cf *RosInvestCo UK Ltd. v The Russian Federation* (n 18) para 35 ([...] the generally accepted principle in international arbitration, as well as national arbitration laws [...] that the arbitrators have what is most often called “Kompetenz-Kompetenz”, namely that they have the inherent authority to decide on their own jurisdiction.); *Inceysa Vallisoletana S.L. v Republic of El Salvador*, ICSID Case No ARB/03/26, Award, 2 August 2006, para 148 (‘Article 41 of the ICSID Convention is clear when it indicates that “The Tribunal shall be the judge of its own competence.” Consequently, the ICSID Convention recognizes the “Kompetenz-Kompetenz” principle and imperatively obligates the Arbitral Tribunal to decide the issues formulated on this subject.’)