Interpretation of treaties : how do arbitral tribunals interpret dispute settlement provisions embodied investment treaties?

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CHAPTER 13

INTERPRETATION OF TREATIES: HOW DO ARBITRAL TRIBUNALS INTERPRET DISPUTE SETTLEMENT PROVISIONS EMBODIED IN INVESTMENT TREATIES?

I. THE QUESTION: HOW TO APPROACH IT AND WHY IT IS RELEVANT

13-1 How do arbitral tribunals interpret dispute resolution provisions in investment treaties? This is the question this chapter seeks to review. The review will have coherence and consistency as the two guiding principles.

13-2 Do arbitral tribunals reach consistent interpretations on identical or similar treaty provisions? Or do they adopt inconsistent interpretations? If the interpretations are inconsistent, is it because the treaty provisions are different, or because the tribunals adopt divergent interpretations of identical provisions? Bearing this focus in mind, this contribution will examine interpretation in three steps:

- First, it will set out a reminder of the basics of treaty interpretation and attempt a comparison with contract interpretation (section II);
- Second, it will examine the application of the rules of treaty interpretation identified in section II to dispute settlement provisions in investment treaties (section III);
- Third and last, it will attempt to formulate an answer to the question posed at the outset and open some perspectives (section IV).

13-3 Before addressing the first of these three topics, it may be worthwhile to pause and ask why the question is relevant at all. The question of the interpreta-

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tion of investment treaties is relevant for a combination of two reasons. First because all investment treaties protect investments by granting investors certain rights which are materially identical or comparable, and second because there is no doctrine of precedent. Or, in the words of the arbitral tribunal in *SGS v. Philippines*:

> ... there is no doctrine of precedent in international law, if by precedent is meant a rule of the binding effect of a single decision. There is no hierarchy of international tribunals, and even if there were, there is no good reason for allowing the first tribunal to resolve issues for all later tribunals.[1]

13-4 In international commercial arbitration, there is no doctrine of precedent and no hierarchy of tribunals either. Yet the absence of a doctrine of precedent raises no difficulty because each decision involves a single or a series of contracts particularly negotiated between business partners. The position is different in treaty arbitration where a multiplicity of treaties often grants materially identical rights. Even where their wording differs, the purpose of protecting and promoting investment is common to all treaties.

13-5 With the present boom of investment arbitration,[2] there will be more and more awards dealing with the same protections, the same issues, and the same or similar provisions of bilateral or multilateral investment treaties.

II. A Reminder: Basics of Treaty Interpretation

1. The Vienna Convention

13-6 Although they are familiar, a brief reminder of the main rules of treaty interpretation may be useful to set the stage.[3] Article 31 of the Vienna Convention on the Law of Treaties, which codifies customary international law, provides for the primary means of interpretation in the following terms:

[1] *SGS Société Générale de Surveillance SA v. Republic of the Philippines* (referred to as *SGS v. Philippines*), Decision on jurisdiction, 29 January 2004, para 97, available on the ICSID website at www.worldbank.org/icsid/cases/SGSvPhil-final.pdf.

[2] For figures, see Stanimir Alexandrov, "The "Baby Boom" of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as "Investors" and Jurisdiction *ratione temporis*", *The Law and Practice of International Courts and Tribunals*, Leiden 2005, vol 4, 19-59.

[3] For a historic commentary of these rules see the International Law Commission (ILC), *Yearbook of the International Law Commission*, vol II, 218 et seq (1966).

> 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.

13-7 Accordingly, the general rule requires focusing

- first on the ordinary meaning of the terms;[4]
- second, on the context; and,
- third, on the object and purpose of the treaty.

13-8 The second paragraph of Article 31 specifies that the context comprises:

> [...] 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 the conclusion of the treaty;
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

13-9 If these primary means lead to an obscure or manifestly absurd result or to one that needs confirmation, the interpreter may rely on supplementary means under Article 32, *i.e.*, on the preparatory work and the circumstances of the conclusion of the treaty:

> 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 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.[5]

[4] In its commentary on treaty interpretation, the ILC adopted the textual approach noting 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 (ILC Commentary, *ibid*, 220).

[5] The rules for treaty interpretation were discussed in detail in the very first arbitral award based on a BIT, which was rendered in 1990 in *Asian Agricultural Products Limited v. Democratic Socialist Republic of Sri Lanka* (referred to as *AAPL v. Sri Lanka*), 30 ILM 577 (1991).

2. A Comparison with Contract Interpretation

13-10 Does treaty interpretation differ from contract interpretation? The question arises because counsel and arbitrators who have a commercial or private law background increasingly act in investment arbitrations. They are used to construing arbitration agreements by application of the rules of contract interpretation. Is contract and treaty interpretation the same exercise? If it is different, then how does it differ?

13-11 These are questions which could give rise to a long debate. In the present context, it suffices to make two points. First, the interpretation tools are comparable and so are the approaches. Indeed, there are different approaches to interpretation in private law as well as in public international law. National contract laws adopt either a subjective theory, where investigation into the intentions of the parties prevails, or an objective theory, which relies primarily on the meaning of the text, or sometimes a mixed approach, where the meaning of the text is only taken into consideration if and to the extent that the intentions of the parties cannot be established.[6] Similarly, there are different schools of thought for interpretation in public international law: according to the subjective school, the goal of the interpretation is to ascertain the intent; pursuant to the objective school, the goal of interpretation must be to ascertain the meaning of the text, there being a presumption that the parties' intent is reflected in this text; and in the teleological school, the focus is primarily placed on the object and purpose of the treaty.[7]

13-12 Second, in spite of these resemblances, there is one basic difference which impacts the interpretation. An arbitration agreement in a contract is specific by its very nature. It is shaped to meet the needs of a given transaction. Moreover, both drafters are present in the arbitration and may thus explain their intentions. Whatever the contents of the applicable contract law, the arbitration will take ample account of these intentions.[8] When contracts are interpreted in international commercial arbitration, one may indeed venture to say that the search for the real intentions dominates. By contrast, dispute resolution provisions in treaties define jurisdiction in the abstract for an unlimited number of

[6] Marcel Fontaine / Filip De Ly, *Droit des contrats internationaux* (Bruylant 2003) 120.

[7] Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd ed., Manchester University Press 1984) 114-5; Ian Brownlie, *Principles of Public International Law*, (6th ed., Oxford University Press, 2003) 602 et seq.

[8] Gabrielle Kaufmann-Kohler, "Annulment of ICSID Awards in Contract and Treaty Arbitrations: Are there Differences?", in Emmanuel Gaillard and Yas Bonifatemi (eds.), *Annulment of ICSID Awards* (Juris and Staempfli, 2004) 206.

future investments. In arbitration proceedings, only one of the drafters is present, the respondent State[9]. For the claimant, the dispute resolution provision is *res inter alios acta*. As a result, in treaty arbitration more objective criteria will by essence prevail and the subjective element will play a lesser role.

13-13 It remains to be seen whether the increasing presence on international tribunals of arbitrators trained in commercial arbitration will influence interpretation methods[10]. It may be too early to make an assessment, but there are signs pointing in this direction. For instance, is a reference to the UNCITRAL Model Law on Commercial Arbitration in the context of the interpretation of the most favoured nation clause in an investment treaty in *Plama v. Bulgaria*, an award rendered by three "commercial" arbitrators, an indication of an emerging trend? Or is it another indication that, in applying the nationality requirement under Article 25 of the ICSID Convention, a tribunal also composed of arbitrators with a commercial background determined that, in the silence of the treaty, the parties to the investment agreement were free to define nationality as long as the definition was reasonable[11] and that a renowned specialist of public international law disagreed with this determination[12]? Even if it is premature to venture any statement, this is certainly an evolution to be watched carefully.

[9] Subject to the reservation that in NAFTA Chapter 11 arbitrations, the NAFTA states not party to the arbitration may make submissions to the Tribunal on questions of interpretation of the NAFTA (Art. 1128 NAFTA). As noted by Mark W. Friedman, "Non-Party States' Efforts to Influence Ongoing Proceedings, in Appeals and Challenges to Investment Treaty Awards: Is it Time for an International Appellate System?", 2(2) *Transnational Dispute Management* 45 (2005), in at least nine NAFTA cases, states have put in Article 1128 submissions.

[10] In *Loewen*, the Tribunal held that

> it is true that some aspects of the resolution of disputes arising in relation to private international commerce are imported into the NAFTA system via Article 1120.1(c), and that the handling of disputes within that system by professionals experienced in the handling of major international arbitrations has tended in practice to make a NAFTA arbitration look like the more familiar kind of process.

(*The Loewen Group, Inc and Raymond L Loewen v. United States of America*, Award, 26 June 2003, available on www.naftalaw.org).

[11] *Autopista Concesionada de Venezuela, CA v. Bolivarian Republic of Venezuela*, Decision on jurisdiction, 27 September 2001, 16(2) *ICSID Rev - FILJ* para 64 (2001).

[12] See Prosper Weil in his dissenting opinion in *Tokios Tokelés v. Ukraine*, dissenting opinion dated 29 April 2004, is available at www.worldbank.org/icsid/cases.

III. The Application of Treaty Interpretation Rules to Dispute Settlement Provisions in Investment Treaties

13-14 How are the rules of treaty interpretation referred and applied to dispute settlement provisions in investment treaties? In order to review this question, this chapter will elaborate on the following four topics:

- The distinction between treaty and contract claims and some of its effects, specifically the significance of contractual choice of court or arbitration clauses and of "fork in the road" provisions;
- The definition of "disputes with respect to investments";
- The meaning of umbrella clauses;
- The application of the most favoured nation clause (MFN) to dispute resolution.

1. Treaty v. Contract Claims

13-15 Most treaty arbitrations involve an investment that gave rise to a contract. The jurisdictional issues in treaty arbitration are particularly complex because of the difficult co-existence of treaty and contract dispute resolution mechanisms. In addition to reviewing notions such as investor, investment, and consent, the assessment of jurisdiction over a treaty claim will often involve drawing the line between treaty and contract claims and between treaty and contract dispute settlement methods. The distinction between treaty and contract claims in itself appears well accepted. The following quote from the *Vivendi* annulment decision could be replicated by many others:

> A state may breach a treaty without breaching a contract, and *vice versa,* and this is certainly true of these provisions of the BIT ... Whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law – in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract ...[13].

[13] *Compañía de Aguas del Aconquija SA and Vivendi Universal v. Argentina* (referred to as *Vivendi v. Argentina*), Decision on annulment, 3 July 2002, 19(1) *ICSID Rev – FILJ* paras 95-96 (2004). A distinction between treaty claims and contract claims was also made by other ICSID tribunals, e.g., *SGS Société Générale de Surveillance SA v. Islamic Republic of Pakistan* (referred to as *SGS v. Pakistan*), Decision on jurisdiction, 6 August 2003, 18(1) *ICSID Rev – FILJ* paras 146 et seq (2003); *Azurix Corp v. Argentina* (referred to as *Azurix v. Argentina*), Decision on jurisdiction, 8 December 2003, paras 75 et seq. and 88 et seq, available on

13-16 The distinction between treaty and contract claims is especially useful when the investment contract contains an exclusive choice of court or an arbitration clause. In the presence of such a clause, can the investor nevertheless resort to investment arbitration? The distinction between treaty and contract claims yields the answer: yes, the investor can resort to investment arbitration for treaty claims, but not for contract claims. This answer is found in *CMS v. Argentina*, among other cases:

> As contractual claims are different from treaty claims, even if there had been or there currently was a recourse to the local courts for breach of contract, this would not have prevented submission of the treaty claims to arbitration.[14]

13-17 Or in the words of the Vivendi *ad hoc* Committee:

> In a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract. [15]

13-18 And further:

> Where "the fundamental basis of the claim" is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard.[16]

13-19 The question of the effect of a choice of court clause in a contract is sometimes linked to a so-called "fork in the road" provision contained in the investment treaty. The fork in the road provides that the investor has the right to start arbitration under specified rules, most often under the ICSID Convention or the UNCITRAL Rules, provided that it has not submitted the dispute to the local courts or to a previously agreed dispute settlement procedure.[17]

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www.asil.org; CMS *Gas Transmission Company v. Argentina* (referred to as *CMS v. Argentina*), Decision on jurisdiction, 17 July 2003, 42 ILM 788 (2003), para 80.

[14] *CMS v. Argentina* (supra note 13), para. 80; *Azurix v. Argentina* (supra note 13), para 89; see also Christoph Schreuer, "Investment Treaty Arbitration and Jurisdiction over Contract Claims – The *Vivendi I* Case Considered", in Todd Weiler (Ed.), *International Investment Law and Arbitration: Leading Cases from ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May 2005) 289 et seq.

[15] *Vivendi v. Argentina*, Decision on annulment (supra note 13), para 98.

[16] *Vivendi v. Argentina*, Decision on annulment (supra note 13), para 101.

[17] See, e.g., Art. VII(2) and (3) of the US-Argentina BIT:

13-20 Here again, the distinction between treaty claim and contract claim is useful. If no treaty claim was brought before the local courts or in a previously agreed procedure, the treaty arbitration option remains available. A difficulty arises, however, because treaty and contract claims often overlap in terms of the actual losses they seek to recover. Is the overlap an obstacle to the distinction? What requirements must a treaty claim meet to be distinct from a contract claim? It is doubtful that the consistency observed so far also prevails on this fact issue. Recent awards in Argentinean cases hold that the claims are distinct whenever they do not involve the same parties, "cause of action", and "instrument". This is the view expressed for instance in *CMS v. Argentina:*

> [...] even if TGN had done so [i.e., applied to local courts], – which is not the case –, this would not result in triggering the "fork in the road" provision against CMS. Both the parties and the causes of action under separate instruments are different.[18]

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(2) In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution:
(a) to the courts or administrative tribunals of the Party that is a party to the dispute; or
(b) in accordance with any applicable, previously agreed dispute-settlement procedures; or
(c) in accordance with the terms of paragraph 3.
(3) (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:
(i) to the International Centre for the Settlement of Investment Disputes ("Centre") established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 ("ICSID Convention"), provided that the Party is a party to such convention: or
(ii) to the Additional Facility of the Centre, if the Centre is not available; or
(iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNICTRAL); or
(iv) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.
(b) Once the national or company concerned has so consented, either party to the dispute may initiate arbitration in accordance with the choice so specified in the consent.

[18] *CMS v. Argentina* (supra note 13), para 80; see also *Azurix v. Argentina* (supra note 13), para 89; *Enron Corporation and Ponderosa Assets, L P v. Argentina* (referred to as *Enron v. Argentina*), Decision on jurisdiction, 14 January 2004, para 97, available on www.asil.org.

13-21 This approach appears to restate the traditional requirements set to the application of the principles of *res judicata* or *lis alibi pendens*, i.e. identity of parties, object or *petitum*, and ground or *causa petendi*.[19]

13-22 As opposed to this line of cases, an *obiter dictum* in the *Vivendi* annulment decision seems to imply that treaty and contract claims are not distinct as soon as they involve the same facts:

> In the Committee's view, a claim by CAA against the Province of Tucumán for breach of the Concession Contract, brought before the contentious administrative courts of Tucumán would *prima facie* ... constitute a "final" choice of forum and jurisdiction, if that claim was coextensive with a dispute relating to investments made under the BIT.[20]

13-23 This is a different test than the one applied in CMS. In other words, if the principle is well-established, its implementation varies.[21]

2. "Disputes with Respect to Investments"

13-24 Another related issue deals with the scope of the dispute settlement option offered in investment treaties or similar formulas. Certain treaties are quite specific and give the investor the right to initiate a treaty arbitration over "disputes under this Agreement"[22] or similar language. Other treaties use broader language such as "disputes with respect to investments". Does this language

[19] For a discussion of these principles with further references, see August Reinisch, "The Use and Limits of *Res Judicata* and *Lis Pendens* as Procedural Tools To Avoid Conflicting Dispute Settlement Outcomes", *The Law and Practice of International Courts and Tribunals*, Leiden 2004, vol 3, 37-77, 61 et seq.

[20] *Vivendi v. Argentina*, Decision on annulment (supra note 13), para. 55; applying equally the sole requirement of identity of facts in connection with the waiver under Art. 1121 NAFTA, *Waste Management, Inc v. United Mexican States* (referred to as *Waste Management v. Mexico*), Award, 2 June 2000, 15(1) *ICSID Rev FILJ* (2000).

[21] For a discussion of various cases on fork in the road provisions, see in particular Christoph Schreuer, "Travelling the BIT Route – Of Waiting Periods, Umbrella Clauses and Forks in the Road", 5(2) *J World Inv & Trade*, 239 et seq (2004).

[22] See, e.g., the alternative version of Art. 8(1) of the United Kingdom Model BIT:

> Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period of three months from written notification of a claim, be submitted to international arbitration if the national or company concerned so wishes.

include contract disputes? At first sight at least, disputes on an investment contract certainly qualify as "disputes with respect to investment".

13-25 On this issue one may distinguish three lines of cases[23]. First, *Salini v. Morocco*[24] considers that the phrase includes contract disputes. More precisely, the *Salini* tribunal held that the terms of Article 8 of the applicable Morocco/Italy BIT[25] were "very general" and that the

> reference to expropriation and nationalisation measures, which are matters coming under the unilateral will of a State, cannot be interpreted to exclude a claim based in contract from the scope of application of this Article.[26]

To reach this conclusion, the *Salini* tribunal ruled out the effect of a contractual choice of the local administrative courts on the ground that the jurisdiction of such courts cannot be prorogated or chosen by the parties but exists by operation of law.[27] This appears to be an insufficient reason for denying effect to the contract clause providing for the jurisdiction of these disputes. Indeed, even if such jurisdiction cannot be prorogated, the very fact that the parties expressly stated their common intent to have contract disputes resolved in such courts should be sufficient to grant effect to this clause.

13-26 The second line is found in *SGS v. Philippines*. The *SGS v. Philippines* tribunal held that such language in the Swiss-Philippines treaty included contract claims, but that the treaty tribunal should not exercise its jurisdiction as long as the contract judge had not ruled on the scope of the contract obligation. In other words, jurisdiction of a contract dispute under the treaty was limited to performance of the contract obligations and did not extend to their scope or amount.[28]

[23] For a discussion of the relevant ICSID jurisprudence, see Emmanuel Gaillard, "Investment Treaty Arbitration and Jurisdiction over Contract Claims – the SGS Cases Considered", in Weiler (ed), *International Investment Law and Arbitration*, supra note 14, 331 et seq.

[24] *Salini Construttori SpA and Itaestrade SpA v. Kingdom of Morocco* (referred to as *Salini v. Morocco*), Decision on jurisdiction, 23 July 2001, *Journal du droit international* (2002), no 1, 196 et seq. (an English translation of the French original is published in 42 *ILM* 609 (2003)).

[25] Art. 8 of the applicable Italy-Morocco BIT used the terms "tutte le controversie o divergenze ... in relazione ad un investimento" in order to define ICSID jurisdiction.

[26] *Salini v. Morocco* (supra note 24), para 59.

[27] *Salini v. Morocco* (supra note 24), para 27.

[28] *SGS v. Philippines*, Decision on jurisdiction (supra note 1), paras 130 et seq and para 155.

13-27 The third line is represented by *SGS v. Pakistan*, where the tribunal held that similar language under the Swiss-Pakistani treaty covered only treaty claims.[29]

3. Umbrella Clause

13-28 The fifth and penultimate topic addressed here deals with umbrella clauses. A quotation from the Swiss-Pakistani BIT serves to illustrate the topic:

> Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party.[30]

13-29 Another example is excerpted from the Philippines BIT between the Philippines and Switzerland. It reads as follows:

> Each party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party.[31]

13-30 The question which arises is whether the words "any obligation" or "commitments" include contractual obligations and, if so, whether contract rights are transformed into or elevated to treaty rights by the operation of this provision. In other words, are contractual obligations "put under the treaty's protective umbrella"?[32]

13-31 Are the clauses just quoted different? They differ somewhat in the words used: "consistently guarantee the observance of" *versus* "observe"; "commitments" *versus* "any obligation"; "it has entered into with respect to the investment of the investors of the other Contracting Party" versus "it has assumed with respect to specific investments ... by investors of the other Contracting Party". Do these variations imply a different meaning of the clause? *SGS v. Pakistan* and *SGS v. Philippines* answered in the affirmative.

[29] *SGS v. Pakistan*, Decision on jurisdiction (supra note 13), paras 161 and 162.
[30] Art 11 Swiss-Pakistan BIT.
[31] Art X(2) Swiss-Philippines BIT.
[32] Schreuer, supra note 14, 299. On the history of the umbrella clause, see Anthony C. Sinclair, "The Origins of the Umbrella Clause in the International Law of Investment Protection", 20(4) *Arb Int* 411-434 (2004); see further Thomas W Wälde, "The "Umbrella" Clause in Investment Arbitration, A Comment on Original Intentions and Recent Cases", 6(2) *J World Inv & Trade* 183 et seq. (2005).

13-32 The *SGS v. Pakistan* tribunal held that the text fell considerably short of the alleged "elevator effect", that the legal consequences of the elevator effect were so far reaching that it could only be accepted on the basis of clear and convincing evidence of the shared intent of the contracting States, which evidence was not adduced. It also relied on the fact that the clause was placed at the end of the treaty, separate from the substantive protections. Specifically, it held the following:

> A treaty interpreter must of course seek to give effect to the object and purpose projected by that Article and by the BIT as a whole. That object and purpose must be ascertained, in the first instance, from the text itself of Article 11 and the rest of the BIT. Applying these familiar norms of customary international law on treaty interpretation, we do not find a convincing basis for accepting [...] that Article 11 of the BIT has had the effect of entitling [...] SGS, in the face of a valid forum selection contract clause, to "elevate" its claims grounded solely in a contract [...] to claims grounded on the BIT [...].[33]

13-33 The *SGS v. Philippines* tribunal reached the contrary view. In its opinion, the text was clear and the object and purpose of the BIT pleaded in favour of a broad interpretation:

> The object and purpose of the BIT supports an effective interpretation of Article X(2). The BIT is a treaty for the promotion and reciprocal protection of investments ... It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments.[34]

13-34 It is interesting to contrast this interpretation in favour of the investment and the investor with the one given by *SGS v. Pakistan*, which is reflected in the following passage:

> On the reading of Article 11 urged by the Claimant, the benefits of the dispute settlement provisions of a contract with a State also a party to a BIT, would flow only to the investor. ... Article 11 of the BIT should be read in such a way as to enhance mutuality and balance of benefits in the inter-relation of different agreements located in differing legal orders.[35]

[33] *SGS v. Pakistan*, Decision on jurisdiction (supra note 13), para 165.
[34] *SGS v. Philippines*, Decision on jurisdiction (supra note 1), para 116.
[35] *SGS v. Pakistan*, Decision on jurisdiction (supra note 13), para 168.

13-35 Accordingly, *SGS v. Pakistan* seeks to balance the interests of the State and the investor, while *SGS v. Philippines* privileges the interests of the investor over those of the State.[36]

13-36 On their face, these holdings would appear to reach radically opposed results; the reality is different. The *Philippines* tribunal accepted that contract claims fell within the umbrella clause and that it thus had jurisdiction over the contract claims. Its jurisdiction was, however, limited to the *performance* of contract obligations and did not extend to the scope of the obligation. The scope, here the amount of the debt due, remained within the jurisdiction of the local courts chosen in the contract. This reservation substantially mitigates the difference in outcome of the two cases. Depending on the circumstances, however, the mitigation may not always work. Moreover, the approach in the two cases to the umbrella clause remains fundamentally different.

4. Most Favoured Nation Clause

13-37 Many investment treaties provide that neither contracting State shall submit the investors of the other State to treatment less favourable than that which it accords to investors of any third country.[37] The obvious question in our

[36] For a discussion of theses cases, see in particular Gaillard, supra note 23, 251 et seq. See also Schreuer, supra note 21, 249 et seq; Stanimir Alexandrov, "Introductory Note to International Centre for the Settlement of Investment Disputes (ICSID): SGS Société Générale de Surveillance S.A. v. Pakistan", 42 *ILM* 1285 (2003); Judith Gill / Matthew Gearing / Gemma Birt, "Contractual Claims and Bilateral Investment Treaties – A Comparative Review of the SGS Cases", 21(5) *J Int'l Arb* 397-412. (2004).

[37] See, e.g., Art. 3 of the United Kingdom Model BIT:

> (1) Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State.
> (2) Neither Contracting Party shall in its territory subject nationals or companies 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 its own nationals or companies or to nationals or companies of any third State.
> (3) For the avoidance of doubt, it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement.

On most favoured nation treatment, see generally Georg Schwarzenberger, "The Most-Favoured-Nation Standard in British State Practice", 22 *BYbIL* 96 et seq. (1948). According to Schwarzenberger (at 99 seq.),

context is whether such "no less favourable treatment" also applies to the dispute settlement options. Can one incorporate into a treaty a dispute resolution provision of another treaty in whole or in part? Here again, one faces divergent solutions.

13-38 In *Maffezini v. Spain*, the tribunal had to decide whether a time limit in one treaty could be applied in another one on the basis of the MFN clause in the basic treaty, *i.e.*, the treaty containing the most favoured nation clause.[38] More precisely, if the provisions on dispute settlement contained in the basic treaty are more favourable than those in another treaty, can the former provisions be extended to the beneficiary of the latter treaty by operation of the MFN clause?

13-39 The *Maffezini* tribunal decided in the affirmative on the ground that procedural and substantive rights were intimately connected:

> The tribunal considers that there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors.[39]

> [the MFN standard's] main function consists in forming an agency of equality. It prevents discrimination and establishes equality of opportunity on the highest possible plane: the minimum discrimination and the maximum of favours conceded to any third State .... It is clear that m.f.n. clauses serve as an insurance against incompetent draftsmanship and lack of imagination on the part of those who are responsible for the conclusion of international treaties .... Unforeseen problems necessarily arise and changes occur which make desirable the adaptation of treaties to changed circumstances. As long as a country is content to enjoy treatment equal to that of the most-favoured third country, and the subject-matter of the treaty lends itself to such treatment, the use of the m.f.n. standard leads to the constant self-adaptation of such treaties and greatly contributes to the rationalization of international affairs.

[38] *Emilio Agustín Maffezini v. Kingdom of Spain* (referred to as *Maffezini v. Spain*), Decision on jurisdiction, 25 January 2000, 16(1) *ICSID Rev – FILJ* (2001), para 44. For a commentary of this decision see, e.g., Jürgen Kurtz, "The Delicate Extension of Most-Favoured-Nation Treatment to Foreign Investors: Maffezini v. Kingdom of Spain", in Weiler (ed), *International Investment Law and Arbitration*, supra note 14, 523 et seq; Francisco Orrego Vicuña, "Bilateral Investment Treaties and the Most-Favoured-Nation Clause: Implications for Arbitration in the Light of a Recent ICSID Case", in *Investment Treaties and Arbitration, ASA Special Series* No. 19 (2002) 133 et seq..

[39] *Maffezini v. Spain,* Decision on jurisdiction (supra note 38), para 54. In *Siemens AG v. Argentina* the Tribunal followed the *Maffezini* Tribunal, stating that

> access to [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 a MFN clause. ... This conclusion concurs with the findings of the arbitral tribunal in *Maffezini*

and

> If a third party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause as they are fully compatible with the *ejusdem generis* principle.[40]

13-40 By contrast, *Plama v. Bulgaria* did not extend the most favoured nation clause to arbitration. The claimant argued that it was entitled to select the ICSID dispute resolution mechanism provided in another treaty instead of the *ad hoc* arbitration offered in the "basic" treaty. The tribunal did not accept this substitution of dispute resolution systems because it was not clear from doubt that such an extension or incorporation of language from a third treaty reflected the intent of the contracting States:

> 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 provisions in the basic treaty leaves no doubt that the Contracting Party intended to incorporate them.[41]

13-41 Among more recent cases, *Salini v. Jordan* shares this view expressing fears over treaty shopping.[42]

IV. The Answer: Consistent and Other Solutions, and Possible Remedies

13-42 Where does this all lead? What is the answer to our question? The answer can be divided in three parts: the first deals with consistent solutions; the

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(*Siemens AG v. Argentina*, Decision on jurisdiction, 3 August 2004, paras. 102-103, available on www.asil.org).

[40] The *ejusdem generis* principle implies that the extension is only admissible to matters of the same category. See Endre Ustor "Most-Favoured-Nation Clause", in *Encyclopedia of Public International Law*, vol 8 (North-Holland 1985) 414-5) according to who

> the beneficiary State can only claim rights which belong to the subject-matter of the clause, which are within the time-limits and other conditions and restrictions set by the agreement, and which are in respect of persons or things specified in the clause or implied from its subject-matter.

See also *Maffezini v. Spain*, Decision on jurisdiction (supra note 38), para 56.

[41] *Plama Consortium Limited v. Republic of Bulgaria* (referred to as *Plama v. Bulgaria*), Decision on jurisdiction, 8 February 2005, para 223, available on www.worldbank.org/icsid.

[42] *Salini Construttori SpA and Italtrade SpA v. the Hashemite Kingdom of Jordan*, Decision on jurisdiction, 29 November 2004, para 115, available on www.worldbank.org/icsid.

second with divergent solutions due to different treaty provisions; and the third with remaining inconsistencies and possible remedies.

1. Consistent Solutions

13-43 First, there are indeed a number of consistent solutions which emerge from the review of treaty interpretations above. The main one consists in the distinction between contract and treaty claims and its implementation in terms of the effect of contractual choice of court clauses or arbitration agreements, or of the impact of fork in the road provisions. The consistent interpretation is not so much a result of the application of treaty interpretation methods, but rather arises from the recognition of the distinct nature of different instruments and of the rights flowing from such instruments.

13-44 Whether the distinction and its consequences, which involve a plurality of *fora*, with the inherent waste of resources, the risk of conflicting decisions and double recovery, is a good distinction or not is a different question. In the present state of the law, it appears to be an unavoidable feature of investment arbitration. Consistency and coherence of results as well as legal certainty will undoubtedly benefit if the distinction is rigorously applied.

2. Divergent Solutions due to Different Treaty Provisions

13-45 Second, certain divergent solutions are justified by the different meanings of treaty provisions or different underlying intentions. Modern investment treaties have many common features and their texts mostly derive from previous treaties. Nevertheless, there are sometimes substantial differences from one treaty to the other.[43]

13-46 Among the illustrations discussed above, the *Plama* award on MFN probably falls within this category. Indeed, the elements on record, especially evidence of later negotiations, showed that the parties' intent was not to incorporate the dispute resolution mechanisms from other treaties.[44]

[43] Thomas Wälde/Todd Weiler, "Investment Arbitration Under the Energy Charter Treaty in the Light of New NAFTA Precedents: Towards a Global Code of Conduct for Economic Regulations", in Weiler (ed,) *Investment Treaties and Arbitration*, supra note 38, 166, note 19; Jeswald W Salacuse / Nicholas P Sullivan, "Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain", 46(1) *Harvard Int'l L J* 85-6 (2005).

[44] *Plama v. Bulgaria*, Decision on jurisdiction (supra note 41), para 195.

3. Remaining Inconsistencies and Remedies

13-47 Third, certain inconsistencies in interpretation leading to irreconcilable outcomes remain. The interpretation of the umbrella clause, and of the words "disputes with respect to investment" are examples of such remaining inconsistencies. There are and there will be others. Are there possible remedies? One may think of the following:

- Improving the manner in which arbitral tribunals interpret treaties. However, the application of treaty interpretation rules by arbitral tribunals does not appear to be the problem. An extensive review of arbitral awards[45]

[45] *Metalclad Corp v. United Mexican States*, Award, 30 August 2000, 16(1) *ICSID Rev – FILJ* (2001); *Marvin Feldman v. United Mexican States*, Award, 16 December 2002, 18(2) *ICSID Rev – FILJ* (2003); *Tokios Tokelés v. Ukraine*, Decision on jurisdiction, 29 April 2004 (available on www.worldbank.org/icsid); *Salini v. Jordan*, Decision on jurisdiction (supra note 42); *Mihaly International Corp v. Democratic Socialist Republic of Sri Lanka*, Award, 15 March 2002, 17(1) *ICSID Rev – FILJ* (2002); *Consortium RFCC v. Kingdom of Morocco*, Decision on jurisdiction, 22 December 2003 (available on www.worldbank.org/icsid); *Ethyl Corp v. Canada*, Decision on jurisdiction, 24 June 1998 (available on www.naftalaw.org); *United Parcel Service of America Inc. v. Canada*, Decision on jurisdiction, 22 November 2002 (available on www.naftalaw.org); *Cross-Border Trucking Services*, Final Report of the Panel, 6 February 2001 (available on www.naftalaw.org); *Fireman's Fund Insurance Company v. United Mexican States*, Decision on jurisdiction, 17 July 2003 (available on www.naftalaw.org); *Pope & Talbot Inc v. Canada*, Award, 10 April 2001 (available on www.naftalaw.org); *SGS v. Philippines*, Decision on jurisdiction (supra note 1); *SGS v. Pakistan*, Decision on jurisdiction (supra note 13); *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, Decision on jurisdiction (9 January 2001) and Award (26 June 2003), supra note 10; *S.D. Myers, Inc. v. Canada*, Award, 13 November 2000 (available on www.naftalaw.org); *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, 29 May 2003, 19(1) *ICSID Rev - FILJ* (2004); *Maffezini v. Spain*, Decision on jurisdiction (supra note 38); *Champion Trading Co and Ameritrade International, Inc. v. Arab Republic of Egypt*, Decision on jurisdiction, 21 October 2003, 19(1) *ICSID Rev – FILJ* (2004); *Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema S.A.R.L. v. Democratic Republic of the Congo*, Award, 1 September 2000, 17(2) *ICSID Rev – FILJ* (2002); *Waste Management v. Mexico*, Award, 2 June 2000 (supra note 20); *Plama v. Bulgaria*, Decision on jurisdiction (supra note 41); *ADF Group Inc. v. United States of America*, Award, 9 January 2003, 18(1) *ICSID Rev – FILJ* (2003); *AAPL v. Sri Lanka*, Award (supra note 5); *Consorzio Groupement LESI – DIPENTA v. Algeria*, 10 January 2005 (available on www.worldbank.org/icsid); *Fedax NV v. Republic of Venezuela*, Award, 9 March 1998, 5 *ICSID Reports*, 200 et seq, *Lanco International, Inc v. Argentina,* Decision on jurisdiction, 8 December 1998, 5 *ICSID Reports*, 367 et seq.; *Siemens AG v. Argentina,* Decision on jurisdiction (supra note 39); *Victoir Pey Casado and Fondation Président Allende v. Republic of Chile*, Decision on provisional measures, 25 September 2001, 16(2) *ICSID Rev – FILJ* (2001); *Alex Genin, Eastern Credit Limited, Inc and AS Baltoil v. Republic of Estonia*, Award, 25 June 2001, 17(2) *ICSID Rev – FILJ* (2002); *Azurix v. Argentina*, Decision on jurisdiction (supra note 13); *CMS v. Argentina*, Decision on jurisdiction (supra note 13); *Enron v. Argentina*, Decision on jurisdiction (supra note 18); *Compañia de Aguas del Aconquija SA & Vivendi Universal v. Argentine*

shows that arbitrators do apply treaty interpretation rules rather conscientiously, with variations of course, some being more text-bound and others more intent-bound. The differences in solutions are not due to a misapplication of treaty interpretation rules, but rather to varying assessments of the meaning and respective weight of the different elements playing a part in the interpretation. The differences in the role assigned to the object and purpose of the treaty in the *SGS* cases are a good illustration.

- Introducing a doctrine of precedent or *stare decisis*. In addition to being unrealistic, this solution would not serve much of a purpose.[46] It is striking how ICSID tribunals pay deference to precedents, in particular to ICSID awards and ICJ cases. Subject to exceptions such as the *SGS v. Philippines* case, past cases have considerable influence on future arbitral tribunals. Is it because "arbitrators tend to go with the flow" and because "placing oneself within the collegial continuity is a condition for continuing practice of guild membership"?[47] These factors may play a role, but one would doubt that they are decisive. In any event, for our purposes what matters is that arbitrators are indeed rather deferential.

- What else then may be done? Would the introduction of an appeal facility promote consistency[48]? The existence of an appeal would bring certain advantages, including increased consistency if the appellate procedure is well designed. It would, however, also bring along substantial drawbacks. Justice would take longer and be more expensive. No party dissatisfied with an award could afford *not* to file an appeal, be it only for internal

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Republic, Award, 21 November 2000, 16(2) *ICSID Rev – FILJ; Autopista Concesionada de Venezuela, CA v. Bolivarian Republic of Venezuela*, Decision on jurisdiction (supra note 11).

[46] On this point, see, *e.g.*, Barton Legum, "Visualizing an Appellate System", *in Appeals and Challenges to Investment Treaty Awards: Is it Time for an International Appellate System?*, supra note 9, 68-9), who points out that

> it is doubtful that a formal system of *stare decisis*, such as that applicable in common-law courts, is either necessary or desirable. It is of doubtful necessity because international tribunals seem to accord considerable weight to earlier decisions whether or not a formal *stare decisis* system is in place ... A rigid system of binding precedents may not be suited for an environment in which many different treaties, with many different histories, contexts and provisions, are in play.

On this aspect and other reform proposals see also Susan D Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions", 73 *Fordham L Rev* 1611 et seq (2003).

[47] Wälde/ Weiler, supra note 43, 166.

[48] On this issue, see, e.g., the contributions of Doak Bishop, Judith Gill and Nigel Blackaby in *Appeals and Challenges to Investment Treaty Awards: Is it Time for an International Appellate System*?, supra note 9, 8 et seq.

reasons. Whether the additional cost and time involved would produce a superior quality of justice is questionable at best.[49]

- Rather than an appellate mechanism, would it be preferable to introduce a permanent investment court, an ICJ of investment disputes? Investment arbitration is shaped on the model of commercial arbitration which may not always be adapted to investment disputes.[50] Hence, investment arbitration may be in a state of transition and evolve towards a permanent court. Ruling as a sole instance, a permanent body would not have the drawbacks of an appellate mechanism, but it would certainly have other disadvantages, such as feasibility and the risk of politicisation.

- Further, for jurisdictional purposes (the same would not be true for the merits), the annulment mechanism under Article 52 of the ICSID Convention could very well offer some remedy against inconsistency. Article 52 provides for annulment in the event of "manifest excess of power", which applies to the merits as well as to decisions on jurisdiction. It is submitted that any exercise of jurisdiction when jurisdiction is not given and any failure to exercise jurisdiction when jurisdiction is given, is a manifest excess of power in and of itself.[51] There are no degrees in terms of jurisdiction: either a tribunal has jurisdiction or it does not. Hence, there can be no degrees in the review of a decision on jurisdiction at the annulment stage. This understanding of the ground for annulment would allow for an unrestricted review of decisions on jurisdiction and would thereby greatly foster coherence and consistency in treaty interpretation. This being said, it is not entirely satisfactory. Indeed, like the arbitral tribunals, the annulment committees change from one proceedings to the other. Thus, even with a full review of jurisdictional objections, complete uniformity cannot be taken for granted.

[49] On the pros and cons of an international appellate system, see in particular the contributions of Bette Shifman, Barton Legum, Guido Tawil and Thomas Wälde in *Appeals and Challenges to Investment Treaty Awards: Is it Time for an International Appellate System*?, supra note 9, pp. 60 et seq.

[50] Brigitte Stern, "International Economic Relations and the MAI Dispute Settlement System", 16(2) *J Int'l Arb* 127-8 (1999).

[51] Although not expressed in so many words, this appears to be the meaning of an *obiter* in *Vivendi v. Argentina*, Decision on annulment (supra note 13), para 86. On "manifest excess of power" and jurisdictional review of ICSID awards, Philippe Pinsolle's contribution "Appeals and Challenges to Investment Treaty Awards: Is it Time for an International Appellate System?", supra note 9, 28 et seq; Kaufmann-Kohler, supra note 8, 197-198.

- Finally, another possible solution may be to introduce a consultation mechanism at the level of the arbitration proceedings. Any ICSID tribunal could request guidance about legal issues from a permanent consultative body.[52] A possible model may be provided by the procedure of Article 234 (formerly 177) of the EC Treaty, pursuant to which national courts of Member States request interpretative rulings from the European law. If properly designed, such a mechanism would ensure consistency, without the drawbacks of a full-fledged appellate procedure. Which of these possible remedies will develop in practice remains to be seen in the years to come.

[52] Such a function of an independent body with interpretative jurisdiction is very different from the one provided in Art. 1131(2) of the NAFTA, pursuant to which the States party to the Treaty, may issue joint interpretations of the treaty. It is submitted that the proposed consultation mechanism would meet the definition of a "similar mechanism" in Section 2102(b)(3)(G)(iv) of the US Federal Trade Act.