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The Interpretation of International Investment Treaties: The Application of MFN Clauses to Matters of Dispute Settlement in BITs

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A Thesis Submitted to the
Department of Law

In partial fulfilment of the requirements for the
LL.M. Degree in International and Comparative Law

By

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September 2020

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DEDICATION

To my brother Dr. Asem M.Aabed, who I will never forget

You are in my heart, thoughts and prayers

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ABSTRACT

The decisions of the arbitral tribunals have been under heavy attack for the inconsistent and unintended interpretations that went beyond the intent of the parties as it is expressed in the treaty provisions. One of these misinterpreted provisions is the MFN clause. Many tribunals have used this clause to allocate the adjudicatory authority between international arbitration and domestic courts. The problem of this application is a matter of treaty interpretation that is governed by the international rules of interpretation in the VCLT. These rules provide a balance approach to treaty interpretation and recognize equally the legitimate rights and interests of the host states and foreign investors. The root cause of the interpretive problems in investor-state arbitration is the neglect and misapplication of the international rules on treaty interpretation. Although, interpretation is not an exact science, it is still a science requiring the application of particular rules to produce correct results. These rules are established to respect the states' intentions, not to deny any relevance of these intentions to interpretation. A full compliance with these rules will lead to correct interpretations and ensure that these interpretations are consistent with parties' intentions as it is expressed in the terms of the treaty. The duty of adjudicators is to discover the meaning of the treaty provisions; examining evidence according to the logical sequence of the rules of interpretation in the VCLT, and provide the parties with impartial interpretations. It is not their duty to harmonize dispute settlement arrangements in BITs or impose this harmonized system upon states against their intent. The actual application of these rules of interpretation works as a roadmap to reach the consistent meanings of the treaty provisions and will give us a negative answer to the question of whether the MFN clause should be applied to dispute settlement provisions in BITs or not.

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Introduction

Treaties are generally considered the most important source of international law sources. It seems that the existence of a formal written binding agreement signed by its parties is not a problematic issue within a consent- based theory of law. The provisions of this agreement accord rights to its parties and establish obligations upon them. However, the creative role of interpreters hampers this comforting picture of international mutual obligations. This creative role raises two concerns. First, to what extent do the texts of a treaty have determinate meaning? Second, do adjudicators have the right to interpret the text in the way they choose or are they constrained by certain rules that regulate the interpretation process?

The exponential proliferation of arbitral tribunals, ad hoc committees and international investment treaties has led to unintended and inconsistent interpretations in respect of the determination of treaty rights and obligations. Some adjudicators may adopt correct interpretations and other reaches wrong interpretations to the same text. Consequently, some interpretations deprived a party to a treaty from his rights and others may accord rights beyond the clear meaning of the text. The problem is the neglect and misapplication of the international rules on treaty interpretation.

The dilemma of interpretation has its overwhelming effects on international investment law. The investment relations between states are govern by bilateral investment treaties (BITs). The world has witnessed a great proliferation of BITs that contain many provisions. These provisions determine the rights and obligations of foreign investors and host states or define what might be called the standards of investment protection. In this paper, I focus on the Most Favored Nation (MFN) clause that has become, in one form or another, a usual provision in BITs. The interpretation of this clause affects the scope of its application to the extent that it may be applied to dispute settlement provisions in BITs regardless the wording of this clause. The application of this clause to dispute settlement provisions - in BITs - has recently attracted significant attention in international investment Law. The debate is about whether foreign investors should rely on the MFN clause from in BIT – the basic treaty - to incorporate dispute settlement provisions from a third-country BIT. Arbitral tribunals expand the scope of the application of this clause based on the interpretation process. Moreover, they alleged

that MFN clause connects the BITs of the host states with the basic treaty through this clause, which may resulted in the harmonization of dispute settlement arrangements in various BITs

Dispute settlement provisions are the most important provisions in BITs. These provisions address foreign investors, host states and arbitral tribunals. These clauses determine how any dispute may arise out of BIT between states and foreign investors shall be resolved. Nowadays, international arbitration is generally accepted as an effective avenue for resolving international investment disputes. From the perspective of the foreign investors, recourse to international arbitration guarantees the international protection for his rights and interests. They think that domestic courts lack to the sufficient impartial and independence to judge against their governments and cannot grant sufficient protection to the foreign investors. From the perspective of the host states, allowing foreign investors to access international arbitration is ample evidence that these states will met their treaty obligations. This may increase the foreign direct investments on their territories. However, states try to narrow the scope of access to international arbitration by limiting the jurisdiction of the international arbitral tribunals.

These limitations may prevent the foreign investors from access to international arbitration or impose procedural requirements before initiating international arbitration. The question here is should investors circumvent these obstacles, the binding dispute settlement provisions, to access international arbitration by the incorporation of most favorable procedural treatment from a third-country treaty, despite the clear host state's consent to a certain type of dispute settlement arrangements. Can we face a different answer in case that this consent is not clear and the text is ambiguous?

The scope of the application of any treaty provision, the MFN clause for instance, depends on the interpretation of this provision. The application of the MFN clause to dispute settlement provisions has proved to be one of the most controversial issues. Arbitral tribunals have given contradicting meanings to the same MFN clause. Some tribunals do not apply this clause to dispute settlement provisions in BITs and other do. The application of the MFN clause to dispute settlement arrangements covers many

situations. For instance, when the basic treaty does not contain dispute settlement arrangements, should an investor rely on the MFN clause to invoke dispute settlement arrangements contained in a third-party treaty to access international arbitration? When the basic treaty allow an investor to access international arbitration without no choice in respect of the type of arbitration, such as *ad hoc* arbitration, should investors rely on MFN clause to benefit form a certain type of international arbitration contained in dispute settlement arrangements in a third-party treaty? When the basic treaty allows access to international arbitration only for a specific type of disputes, such as the amount of compensation for expropriation, should the beneficiary of MFN clause benefit from the dispute settlement arrangements contained in a third-party treaty that allow access to international arbitration for any type of disputes? When the basic treaty requires the fulfillment of certain procedures before initiating international arbitration, such as the exhaustion of domestic remedies, should the investor rely on the MFN clause to benefit from dispute settlement provisions in a third-party treaty that do not required these procedures.

In this thesis, I argue that the broad wording of the MFN clause does not allow adjudicators to expand the scope of its application to dispute settlement provisions in BITs. In other words, the MFN clause should not serve as a title of jurisdiction, to allocate the adjudicatory authority between international arbitral tribunals and domestic courts. Moreover, the interpretation of this clause came one-side oriented - investor oriented - and gave the ultimate effect to facilitate access to international arbitration to guarantee excessive protection to investors' rights and interests. They simply adopt a broad interpretation to investors' treaty rights provisions. The treaty parties did not intend to expand the scope of the MFN clause, as a treaty provision, under the will of the investors.

The answer of this research question may guide the decision-making of arbitral tribunals, investment treaty makers and legal scholars to the real role of the MFN clause and the proper way of interpreting and applying this clause to matters of dispute settlement in a way that respect the mutual treaty obligations and rights.

It is a necessity to differentiate between two kinds of provisions that are contained in BITs and both of them can be subject to the application of the MFN clause. The first

kind is the substantive provisions that determine the substantive treaty obligations of the host states and the treaty rights of the investors. For instance, BITs provisions that deal with denial of justice; fair and equitable treatment standard; full protection and security; international minimum standard; legitimate expectations and national treatment. The second kind is the procedural provisions or dispute settlement provisions that determine how a host state and an investor will resolve any investment dispute arises out of BIT. This paper focuses on the second kind; the application of the MFN clause to dispute settlement provisions in BITs and whether foreign investors should rely on this clause to expand or establish the jurisdiction of international investment tribunals or not.

The main obstacle that may limit this paper is that the jurisdictional decisions of the international arbitral tribunals are confidential, especially the new decisions, and they are not published until the arbitral parties allow so. However, I use all publicly available arbitral awards and decisions that are relevant to the purpose of this thesis.

In this paper, I attempt to shed the light on the answer of the question of whether the MFN clause should be applied to dispute settlement provisions in BITs or not? In clear words, should MFN clauses serve as a title of jurisdiction, should these clauses allocate the adjudicatory authority between international arbitral tribunals and domestic courts? Therefore, it would be substantial to examine many MFN calluses that are contained in various BITs and the arbitral decisions that dealt with the interpretation and the application of these clauses to dispute settlement provisions. I analyses the legal reasoning of these tribunals to figure out their ways of thinking in interpreting these provisions.

In chapter I of this thesis, I explore generally the MFN clause in BITs. I discuss the origins of investment protection to prove that interpretation of MFN clause is not the first or the latest "episode" in a long history of a constant demand of foreigners to prevent domestic courts to hear their cases. Then I discuss the historical background of a MFN clause, its definition and the scope of its application. Then I explore the distinction between substantive and procedural provisions in BITs. In addition, the contemporary practice regarding MFN clauses in GATT and the WTO. Then I briefly discuss the arguments of proponents and dissenters to the application of the MFN

clause to dispute settlement provisions in BITs. In chapter II, I discuss the nature of treaty interpretation. This includes the answer to the question of whether treaty interpretation is an exact science or an art. Then I scrutinize the arbitral use of the international rules on treaty interpretation in the VCLT and the correct way of their application. In chapter III, I discuss the contemporary case law on the application of the MFN clause to dispute settlement provisions in BITs. I indicate the problems with the decisions that have applied this clause to dispute settlement provisions and the solutions of these problems by discussing decisions that have rejected this application. In chapter IV, I point out the two visions on the application of the MFN clause to matters of dispute settlements. I assess the vision that calls for the application of the MFN clause to dispute settlement provisions in BITs and suggestions to resolve the interpretive problem of this clause.

I. Most Favored Nation clauses in BITs

The awards of arbitral tribunals have been under heavy attack for the inconsistent and unintended interpretations of some provisions in BITs. Tribunals have criticized each other for interpretations that went beyond the intent of the parties as it is expressed in the treaty provisions. Some of these tribunals interpreted a treaty provision to increase states' treaty obligations in a way that incompatible with the actual meaning of the texts. One of these misinterpreted provisions is the MFN clause.

It is impossible to analyze the debate about the interpretation of the investment treaties without going into the characteristics of the MFN clause as a practical example of this thesis. The first section of this chapter explores the origins of investment protection. It proves that the interpretation of the MFN clause is not the first or the latest "episode" in a long history of a constant demand of foreigners to prevent domestic courts to hear their cases and instead seek the assurance of an international or internationalized forum. The second section provides the historical background of the MFN clause. The third section provides the definition of the MFN clause. The fourth section provides the scope of the application of the MFN clause. The fifth section discusses the distinction between substantive and procedural provisions in BITs. The sixth section discusses the contemporary practice regarding the MFN clause in GATT and the WTO. The seventh section explores briefly the arguments of proponents and dissenters to the application of the MFN clause to dispute settlement provisions in BITs.

A. The Origins of Investment Protection:

Interpretation of the MFN clause in relation to its application to dispute settlement arrangements in BITs is not a today issue. In fact, it is not the first nor will be the latest "episode" in a long history of a constant demand of foreigners to prevent domestic courts to hear their cases and instead seek the assurance of an international or internationalized forum. Indeed, investors, foreigners and colonial powers always wanted "exceptionality" in the forum that deals with legal disputes. By keeping the dispute outside the jurisdiction of the domestic courts, they will not be treated as "equals", but as "superior". Therefore, foreign investors do not accept the local

jurisdiction and demand special treatment in in a manner where they can control better the outcome of the adjudicative process. The development of foreign investors' treatment started from the complete outlawry in the early political communities to what is reflected in the current network of international investment agreements.

There is no a comprehensive history of the treatment of foreigners and their property under international law.[1] However, historical records tell us that the early political communities denied any legal capacity and rights to foreigners.[2] Those "outsider" or "aliens" were treated as enemies or outcasts.[3] The legal status and treatment of the aliens have been improved through history. Edwin Borchard in his book, *The Diplomatic Protection of Citizens Abroad*, wrote that the" legal position of the aliens has in the progress of time advanced from the complete outlawry, in the days of the early Rome and the German tribes, to that of the practical assimilation with nationals, at the present time".[4]

International law protected the right of aliens to travel, live and trade in foreign lands.[5] A host state's mistreatment of foreigners or his property was considered as an injury to foreigners' home state and gave the later state the right to claim reparation.[6] This underlying the exercise of the diplomatic protection that can be traced back to the Middle Ages.[7] According to the principle of diplomatic protection, "an injury to a state's national is an injury to state itself, for which it may claim reparation from any responsible state"[8]. The examination of the rules of the diplomatic protection is beyond the scope of this thesis, but it is important highlight that foreigner investors, in that time, have no control over the international claim-making process. A state has

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[1] *See* ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT, 3 (1st edition, Kluwer Law International Publisher, 2009).
[2] *See id.*
[3] *See id.*
[4] EDWIN BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD: OR THE LAW OF INTERNATIONAL CLAIMS. 33 (New York Banks Law Publishing Co. 1915).
[5] *See* Newcombe & Paradell, *supra* note 1, at 4.
[6] *See id.*
[7] *See id.* at 5.
[8] *Id. See* also Art .1 of the ILC's Draft articles on Diplomatic Protection provides that "diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility. Rep. of the Int'l Law Comm'n, 58th Sess., May 4 -June 5, July 6-Aug 7, 2006, U.N. Doc. A/61/10; GAOR, 61st Sess., Supp. No. 10 (2006).

discretion power to decide whether to exercise the diplomatic protection or not.[9] The exercise of diplomatic protection depended on many things like the merits of the claim or geopolitical interests that might be affected by the making of a claim.[10]

If we see the evolution of the diplomatic protection in its historical context, we will recognize the abuse of diplomatic protection. In the era of colonialism and imperialism, "states exercised all possible means – political, economic and military – to protect their nationals' interests abroad"[11]. During the nineteenth and early twentieth centuries, the exercise of this protection by powerful states was accompanied by "gun-boat diplomacy", since "the use of force to exercise the diplomatic protection was not inconsistence with international law"[12].

International trade and investment expanded within the colonial political and legal regimes.[13] With the existence of the colonial territories and extraterritorial jurisdiction, there was no need to powerful countries to recourse to international law process to protect their nationals.[14] Colonial political and military power protected their nationals - colonists - and their property from any domestic control in the colonies.[15] Extraterritorial jurisdiction allowed powerful states to apply their laws to their nationals in foreign states.[16] The extraterritorial jurisdiction was imposed by force through the treaties of capitulation.[17] This extraterritorial jurisdiction, in one form or another, was existed in Egypt, Morocco, china, japan, Thailand, Iran, Turkey and other parts of Ottoman Empire.[18]

I will speak about Egypt as a concrete example. On the nineteenth century, foreigners were immune from the jurisdiction of domestic courts and were exempt from the ordinary legislations. Before the Conference of Montreux in 1937, when the Convention of 8 May 1937 regarding the abolition of the Capitulations in Egypt was

[9] *See* Newcombe & Paradell, *supra* note 1, at 6.
[10] *See id.*
[11] *Id*. at 8.
[12] *See id*. at 9.
[13] *See id*. at 10.
[14] *See id.* at 11.
[15] *See id.*
[16] *See id.*
[17] *See id.*
[18] *See id.*

concluded, foreigners "were immune from the criminal jurisdiction of the Egyptian Courts and could be tried only by their own Consular Courts"[19] which were competent to decide anything that affect their legal status. Foreigners also were exempt from ordinary Egyptian legislations unless Assembly of the Mixed Court of Appeal accepted the application of these legislations upon them.[20] Moreover, the application of Egyptian financial legislations to foreigners required the formal consent of their governments.[21] These large exceptions from the Egyptian jurisdiction allowed foreigners to move freely and pursue their interests in Egypt without any restrictions by the Egyptian authorities. Foreigners subjected only to the domestic legislations of their own countries and the laws that their own Consular Courts chose to impose.[22]

Not everyone has agreed that achieving justice to foreigners was the aim of the establishment of the Consular Courts and Mixed Courts.[23] These courts were about a set of privileges granted to the nationals of certain countries who were exempted from the application of domestic laws and the jurisdiction of domestic courts. These privileges had been established by an agreement between the Egyptian government and the capitulatory powers.[24] These exceptions were closely associated with the capitulations of the Egyptian government. The consular courts and mixed courts might appear to some as tools of achieving stability in the judicial system to foreigners.[25] However, for others these courts were a product of the foreign influence on Egypt and a limitation on its sovereignty.[26] Even when a foreigner was found guilty by these courts, the Egyptian government could not expel him without the consent of his Consul.[27] Indeed, these privileges were misused and great abuses were existed,[28] to the extent that in 1936 the weekly *al Musawwar* described these courts as a "crime against humanity".[29]

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[19] A. McDougall, *The Position of Foreigners in Egypt on the Termination of the Mixed Courts*, 26 Brit. Y.B. Int'l L.358, 359 (1949).
[20] *See id*.
[21] *See id*.
[22] *Id.* at 360.
[23] *See* Nathan J. Brown, *The Precarious Life and Slow Death of the Mixed Courts of Egypt*, 25 INTERNATIONAL JOURNAL OF MIDDLE EAST STUDIES. 33, 33 (1993).
[24] *See id*.
[25] *See id*.
[26] *See id*.
[27] *See* McDougall, *supra* note 19, at 360.
[28] *See id*.
[29] *See Al-Musawwar*, 29 June 1936, included in Fish to secretary of state, 29 June 1936, State General Records, Record Group 59, 783.003/116 National Archives, Washington, D.C.

After the Conference of Montreux in 1937, the legal position for the foreigners was modified.[30] Their subjection to the domestic legislation would no longer required the consent of their governments.[31] Moreover, they subjected to the jurisdiction of the mixed-courts.[32] Although, Britain had recognized the independence of Egypt in 1922, she had reserved responsibility of the protection of minorities and foreign interests in Egypt. This reservation had been withdrawn by Article 12 of the 1936 Treaty that expressed "that the responsibility for the lives and property of foreigners in Egypt devolves exclusively upon the Egyptian Government, who will ensure the fulfilment of their obligations in this respect".[33] The Egyptian obligation of protecting the lives and property of the foreigners was imposed on Egypt by international law.[34] This was the usual situation with the third world states, the obligations towards foreigners and their interests were and still imposed by international norms after the termination of the Mixed Courts.

It seems that the history repeats itself and the old ideas have a capacity for a revival in new forms. Most international lawyers in Africa and Asia think that the international order "was formed by the statesmen and thinkers of the past, in order to facilitate the suppression of the people of the non-European world"[35]. M. Sornarajah, for instance, argues that the use of the standard of civilization in international law is a clear example for doctrines of exclusion in respect of the non -European world.[36] Sornarajah sees that the " in many other areas of international life, the instrumental use of international law in order to fashion rules that will ensure respect for the will of the powerful will be attempted and may succeed"[37].

The end of the 1980s and the beginning of the 1990s can be described as milestone in the development of the investment protection.[38] In many cases, Investors could

[30] *See* McDougall, *supra* note 19, at 360.
[31] *See id*.
[32] *See id*.
[33] *Id*.
[34] *See id*.
[35] M. Sornarajah, *Power and Justice: Third World Resistance in International Law*, 10 SINGAPORE YEAR BOOK OF INTERNATIONAL LAW.19, 26 (2006).
[36] *See id*.
[37] *Id*. at 29.
[38] *See* Jean d'Aspremont, *International Customary Investment Law: Story of a Paradox*, 8 Amsterdam Center for International Law.1, 13(2012).

recourse to international adjudication based on clauses that allow investor-state arbitration with unqualified state consent.[39] Foreign investment protection played a significant role in the formulation of international norms.[40] With the massive proliferation of arbitral tribunals and international courts, it has become easy to formulate binding and enforceable norms upon states. Sornarajah rejects that a series of arbitral awards followed by confirmatory writing of the so-called "highly qualified publicities" result in the creation of international law.[41] He said that "members of the so-called "arbitration fraternity" elevate each other in status, cite each other's views and create law on the basis that they are highly qualified publicists"[42]. This way of lawmaking found a resistance by the Third World states.

However, this resistance to the preferred norms of private power crumbled because of the dissolution of the unity of the Third World, theories of free market-led development, and the strategies of the International Monetary Fund and the World Bank.[43] Developing states have become parties to many BITs to protect reciprocal flows of foreign investment. In reality, this protection is for one-way flows of foreign investment that happened from developed and powerful countries to developing countries.[44] These BITs include many clauses that ensure the protection of foreign investors - special treatment - from the domestic courts and domestic legislations of the host states.[45] Moreover, the scope of this protection is enhanced by the expansive and wrong interpretations that produced by arbitral tribunals.[46]Arbitration clauses are the most important provisions of these BITs, since this kind of clauses gives foreign investors the right to invoke arbitration unilaterally.[47] This resulted in a profusion of the awards and decisions of arbitral tribunals that give affirm and articulate the principles of investment protection that work as an immunity against the jurisdiction of the domestic courts in the host states.[48]

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[39] *See id*.
[40] *See* Sornarajah, *supra* note 35, at 30.
[41] *See id*. at 31.
[42] *Id*.
[43] *See id*.
[44] *See id*.
[45] *See id*. at 32.
[46] *See id*. at 33.
[47] *See id*.
[48] *See id*.

The previous practices constitute the history of a constant demand of foreigners to prevent domestic courts from hearing their cases and instead seek the assurance of an international or internationalized forum. Because of the diverse and the constantly changing of the international environment, no one can predict the future of dispute settlement mechanisms in respect of international investment disputes. In this thesis, I focus on the problem of the application of the MFN clauses to dispute settlement arrangements as one of the recent practices of arbitral tribunals and foreign investors. This clause has been used to serve as a title of jurisdiction to allocate the adjudicatory authority between international arbitral tribunals and domestic courts. Moreover, this clause has been used as a multilateralization tool that works on the harmonization of dispute settlement arrangements and as a procedural protection for foreign investors, regardless the wording of the MFN clause.

B. The Historical Background of the Most Favored Nation clause:

The MFN clause is a treaty provision under which a state accords to other contracting state's investors "treatment that is no less favorable than that which it accords to other or third States"[49]. This clause was contained in the bilateral Treaties of Friendship, Commerce and Navigation (FCN treaties), which were concluded to facilitate and regulate a variety of matters, of commercial nature, between states parties and reciprocally protect investors and investments. For instance, a 1654 treaty between Great Britain and Sweden provided "the People, Subjects and Inhabitants of both Confederates, shall have and enjoy in each other's Kingdoms, Countries, Lands, and Dominions, as large and ample privileges, relaxations, liberties, and immunities, as any other Foreigner at present doth, or hereafter shall enjoy there"[50].

Such a clause was a form of non-discrimination clause that guaranteed that host state would provide foreign investor with treatment as good as, what other foreign investors were received. The MFN provisions aimed to facilitate economic activities and to guarantee that the subjects of a state will not be discriminated against with comparison

[49] *See* Andreas R. Ziegler, STANDARDS OF INVESTMENT PROTECTION, 60 (A. REINISCH. eds., 1st ed. Oxford University Press, 2009).
[50] Treaty of Peace and Commerce, Great Britain. Sweden., art. IV, Apr. 17, 1654, *British and State Foreign Papers 1812–1814*, vol. I, Part I.

to a third state. It was not a guarantee of national treatment that was received by citizens who may receive a better or worse treatment than foreign investors. Thus, we cannot consider that the MFN clause was a comprehensive non-discrimination clause.[51]

In the nineteenth and early twentieth centuries, Most Favorable Treatment was not granted automatically, it was granted conditionally. A country would grant this treatment in exchange for any benefit provided by other third country. Therefore, to benefit from Most Favorable Treatment a state had to pay for. This is known as "conditional most favored nation". With the greater realization of the great benefits that a state can achieve from granting "unconditional most favored treatment" to other state rather than "conditional most favored nation", the granting of "conditional most favored nation" lost its significance and the scope of its implementation has been decreased today.[52]

With the overwhelming proliferation of BITs that govern, facilitate and protect international investments, The MFN clause has been given a new lease on life. There has been a vast increase in the negotiation of BITs that usually include, in one form or another, most favored nation clause. Resorting to dispute settlement mechanisms such as the International Centre for the Settlement of Investment Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules has resulted in contradictory interpretations of the MFN clause. These contradictory interpretations have brought this clause to the front of the debate.

C. The Definition of the MFN Clause:

In 1978, The International Law Commission's draft article (ILC) defined the MFN clause as follows, "a most-favored-nation clause is a treaty provision whereby a state undertakes an obligation towards another state to accord most-favored-nation treatment in an agreed sphere of relations".[53] Due to the ambiguity of the previous definition, the working group of the ILC redefines the MFN clause as follows; "a most-favored-nation

[51] *See* Rep. of the Int'l Law Comm'n, 67th Sess., May 4 -June 5, July 6-Aug 7, 2015, U.N. Doc. A/70/10; GAOR, 7th Sess., Supp. No. 10 part II, para 7 (2015).
[52] *See id.*
[53] *See* Rep. of the Int'l Law Comm'n, 33rd Sess., May 8 – July 28, 1978, U.N. Doc. A/33/10; GAOR, 30th Sess., Supp. No. 10 Vol II, 18 (1978).

clause is a provision in a treaty under which a State agrees to grant to the other contracting partner treatment that is no less favorable than that which it accords to other or third States."[54]

The previous ILC's definitions determine three important elements of the MFN clause. First, this clause prohibits host states from discriminating against persons "investors" or things "investments" of a state and a third state. Second, the MFN clause is applied where the "investors or investments" of the beneficiary state is in the same relationship of the third state with the host state. Third, the investor receives less favorable treatment than the host state provides to, the comparators, the third state.[55]

Two main MFN clause's characteristics should be paid our attention. First, states' obligations under the MFN clause are strictly treaty obligation; this obligation does not based on customary international rules, but on the basic treaty. Therefore, the scope of the MFN clause as a treaty provision should be determined according to the wording of this clause.[56] Second, the MFN clause imposes relative obligations upon the states parties. Unlike other treaty provisions, it is impossible to determine an absolute content of the favorable treatment that is granted by the host state to various investors. Therefore, the treaty parties can restrict the scope of the application of the MFN clause to certain kinds of treatment.

D. The Scope of the Application of MFN Clauses:

The traditional view is that the MFN clause is applied only to the substantive treatment. To prohibit discrimination that may occurs by the host states against foreign investors or foreign investment of different nationalities. The decision of the arbitral tribunal in *Maffezini* was the point of change that gave the MFN clause unpredicted dynamic role as a title of jurisdiction.[57] Under an extensive interpretation, this clause can allocate the adjudicatory authority between international arbitral tribunals and domestic courts regardless the intentions of the treaty parties. In contrast, under a narrow interpretation,

[54] Rep. of the Int'l Law Comm'n, Annex II, *supra* note 33, para 3.
[55] *See* Newcombe & Paradell, *supra* note 1, at 196-198.
[56] *See* Rep. of the Int'l Law Comm'n, *supra* note 51, at 25.
[57] *See* Emilio Agustín Maffezini v. The Kingdom of Spain., ICSID Case No.ARB/97/7, Decision on objections to jurisdiction, (Jan. 5, 2000) 5 ICSID Rep 396, (2002).

many arbitral tribunals have refused the application of the MFN clause to dispute settlement provisions in BITs. These visions of arbitral tribunals have resulted in contradictory interpretations based on different interpretations to the MFN clauses that have the same wording.

The application of the MFN clause to dispute settlement provisions has become a significant interpretive problem in investor-state arbitration. Practitioners, civil societies and states have criticized the arbitral tribunals for their expansive, narrow or inconsistent interpretation to these clauses. Moreover, arbitral tribunals have criticized each other for the wrong interpretations that went beyond what the parties had intended to achieve from this clause.[58] In addition, some commentators see that arbitral tribunals have interpreted investment treaty provisions "in a manner not contemplated by the original drafting of the parties"[59]. The dilemma of interpretation has its overwhelming effects on the international investment law as a dynamic branch of the public international law, and the MFN clause as an investment treaties provision.

E. The Distinction between Substantive and Procedural Provisions in BITs:

It is a necessity in this thesis to differentiate between the substantive provisions in a treaty and another kind of provisions in the same treaty that addressing the jurisdiction of an arbitral tribunal and confer to it the legal power to resolve disputes arising out of this treaty.

Public international law and international investment law are familiar with the idea that the conferral of rights under law is inextricably linked to making available remedies for their breaches within the same legal system. Hans Kelsen asserted that:

> If "rights" are to be conferred on individuals by an international agreement, the latter must impose upon the states parties to the agreement the obligation to recognize the jurisdiction of a tribunal to which the

[58] *See* TRINH HAI YEN, THE INTERPRETATION OF INVESTMENT TREATIES, 9 (Loretta Malintoppi & Eduardo Valencia-Ospina. eds., BRILL, 2014).

[59] M. SORNARAJAH, APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES, 51-73 (Sauvant, Karl P and Michael Chiswick-Patterson. eds., 2008), *see* also JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 228– 262 (Cambridge University Press, 2005), see also M. SORNARAJAH, Resistance and Change in the International Law on Foreign Investment, 136-190 (Cambridge University Press, 2015).

> individuals have access in case of a violation of the rights on the part of the state, as well as the obligation to comply with the decision of the tribunal…. without subjecting the state to the jurisdiction of a tribunal, no "rights" of individuals in relation to the state are established.[60]

The classical approaches of public international law presume that the provisions that confer jurisdiction to arbitral tribunal are severable from those conferring rights.[61] Substantive provisions are the provisions that impose "a certain obligation of a certain behavior to a state, and determine the lawfulness of a state conduct"[62]. Procedural provisions are the provisions regulating dispute mechanisms in case of the breaching of the substantive rules, and provide or deny the injured party access to remedy.[63] In other words, procedural rules conferring adjudicative power to an arbitral tribunal to resolve disputes. A better way to distinguish between these two kinds of rules is to compare the consequences of non-compliance with them. Non-compliance with a substantive provision amounts to a wrongful act.[64] An investor can claim a violation of an MFN clause, if the host state granted an investor from a third state more favorable treatment than what accorded to him in the same circumstances.[65] On the other hand, such a behavior in respect of procedural provisions does not amount to a wrongful act involving state responsibility.[66]

In the context of public international law, we can see a clear distinction between substantive and procedural rules in the practice of the ICJ.[67] This practice involves different subject matter such as the application of the Genocide Convention, law of self-determination and state immunities. The diversity of these cases "suggests the universality of the separation line between substantive and procedural rules, and its status as a core principle of international law"[68].

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[60] *See* HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW, 143–144 (Robert W Tucker trans., 2d ed 1966).
[61] *See* Relja Radović, *Between Rights and Remedies: The Access to Investment Treaty Arbitration as a Substantive Right of Foreign Investors*, 10 JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT. 42, 45 (2019).
[62] *Id*.
[63] *See id*.
[64] *See id*. at 46.
[65] *See id*.
[66] *See id*.
[67] The ICJ at some point allowed the interdependence of substantive and procedural rules, See Radović, *supra* note 61, at 48.
[68] *See* id. at 47.

The first element that can be extracted from the practice of the ICJ is the severability of procedural provisions from substantive provisions in the same treaty.[69] This requires separate assessment to the validity of each set of these two kinds of provisions. For example, in *Fisheries Jurisdiction Case*, the court determined the validity of the procedural rules in the stage of proceedings and determined the validity of substantive obligations in the merits phase of the case.[70] The court affirmed that Iceland's argument that the treaty was terminated because of the changed circumstances does not affect its jurisdiction since such issues belong to the merits phase of the case where the court would examine the substantive obligations of the treaty parties.[71]

Secondly, substantive rules cannot affect the procedural rules and *vice-versa*.[72] The ICJ asserted that substantive obligations contained in the Genocide Convention have no impact on the jurisdiction of the court in resolving any dispute under the Convention. The Court ruled as follows:

> Rwanda's reservation to Article IX of the Genocide Convention bears on the jurisdiction of the Court, and does not affect substantive obligations relating to acts of genocide themselves under that Convention. In the circumstances of the present case, the Court cannot conclude that the reservation of Rwanda in question, which is meant to exclude a particular method of settling a dispute relating to the interpretation, application or fulfilment of the Convention, is to be regarded as being incompatible with the object and purpose of the Convention. [. . .]
> [T]he Court deems it necessary to recall that the mere fact that rights and obligations *erga omnes* or peremptory norms of general international law (*jus cogens*) are at issue in a dispute cannot in itself constitute an exception to the principle that its jurisdiction always depends on the consent of the parties.[73]

This means that the substantive obligation imposed by the Genocide Convention, which is to desist from acts of genocide, has no impact on the jurisdictional mandate of the

[69] *See* id.
[70] *See* Fisheries Jurisdiction (U.K. v. Ice) Jurisdiction of the Court, 1973 I.C.J. 3, Para 40 (Feb. 2).
[71] *See id*.
[72] *See* Radović, *supra* note 61, at 47.
[73] Armed Activities on the Territory of the Congo (Congo v. Rwanda) (Jurisdiction and Admissibility), 2006 I.C.J. 126, at 6, paras 67 and 125 (Feb. 2). See also, Case Concerning East Timor (Portugal v. Australia) 1995 I.C.J. 90, at 90, para 29 (June. 33).

Court in resolving disputes arising out of the Convention.[74] Each kind of provisions addresses different things. They are not *ejusdem generis.*[75]

Thirdly, the substantive and procedural rules "cannot conflict with each other, and no conclusion can be derived from one set of rules in respect of the other"[76]. In *Jurisdictional Immunities of the State*, the court recognized the procedural nature of the rules of immunity.[77] It asserted that there was no conflict between the rules of the law of armed conflict and the rules on state immunity.[78] In addition, the Court in *Arrest Warrant* asserted that:

> In the context of the personal immunities accorded by international law to foreign ministers), the law of immunity is essentially procedural in nature', and 'it regulates the exercise of jurisdiction in respect of particular conduct and is thus entirely distinct from the substantive law which determines whether that conduct is lawful or unlawful.[79]

The above practice of the ICJ helped us to realize the distinction between procedural provisions and substantive provisions as a fundamental principal in public international law. This will help us to understand the relation between MFN clauses and dispute settlement arrangements in BITs.

In the context of private international law, the distinction between procedural and substantive provisions is clear. [80] For example, the provisions that confer jurisdiction to arbitral tribunal are severable from the main contract.[81] This means that, the validity of an arbitration clause, for instance, does not affect the substantive obligations of the main contract. A claim that a contract is void for illegality does not affect the validity of an arbitration clause at the same contract. [82] Moreover, the arbitration clause subject to legal rules that are different from the rules regulating the substantive provisions in

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[74] Zachary Douglas, *The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails,* 2 Journal of International Dispute Settlement, 97, 103 (2011).
[75] *Id.*
[76] *See* Radović, *supra* note 61, at 47.
[77] *See* Jurisdictional Immunities of the State (Germany v. Italy) Judgment, 2012 I.C.J.434. para 58 (Feb. 3)
[78] *See id*.
[79] Arrest Warrant of 11 April 2000 (Congo v. Belgium) (Judgment), 2002 I.C.J. 75 para 60 (Feb. 14).
[80] *See* Douglas, *supra* note 74, at 103.
[81] *See id.*
[82] *See id.*

the main contract.[83] The procedural provisions have different purpose and different legal quality from what the substantive provisions have.

The distinction between the substantive provisions in an investment treaty and the provisions conferring adjudicative power to arbitral tribunal is straightforward. The substantive provisions address the contracting state parties. While the procedural provisions address an international arbitral tribunal and disputing parties. These disputing parties are not the state parties to BIT, but the investor and the host state. Both investor and host state "enter into a relationship of procedural equality before the international tribunal once a dispute has been submitted to it"[84]. This procedural relationship subjects to the equality of arms principle in international litigation. [85] This principle is not respected when one of the disputing parties has the ability to amend the rules that regulating the jurisdiction of the arbitral tribunal after the dispute has arisen.[86] The object of the substantive provisions is investments that made by the nationals of one contracting state on the territory of the other contracting state. The object of procedural provisions is creating a jurisdictional mandate for an international arbitral tribunal to settle disputes between the investor and the host state who are in an equal procedural relationship.[87]

However, there is another opinion in international investment law sees that there is no difference between procedural and substantive provisions.[88] This opinion asserts that access to international arbitration is a necessary substantive right that guarantees the enforcement of the treaty rights.[89] Others see that there is an inextricable relation between the procedural and substantive provisions for the purpose of the protection of foreign investors and investments.[90]

The distinction between procedural and substantive provisions in BITs is clear enough on the eyes of international courts and arbitral tribunals. As we will see in Chapter IV,

[83] *See id.*
[84] *See id.* at 104.
[85] *See id*.
[86] *See id.*
[87] *See id.*
[88] *See* Radović, *supra* note 61, at 52.
[89] *See id*.
[90] *See id.* at 53. See also Emilio Agustín Maffezini v. The Kingdom of Spain., ICSID Case No .ARB/97/7, Decision on objections to jurisdiction, (Jan. 5, 2000) 5 ICSID Rep 396, (2002).

the arbitral tribunals that applied MFN clauses to dispute settlement arrangements in BITs ignored the distinction between procedural and substantive rules to ensure the excessive protection of the foreign investment and investors. In other words, it seems that arbitral tribunals ignore this distinction when they want to apply MFN clauses to dispute settlement provisions in BITs. This vision relies on the purpose of investment protection. In contrast, arbitral tribunals that recognized the distinction between procedural and substantive rules are the tribunals that refused the application of the MFN clause to dispute settlement arrangements without a prior clear consent of the host state. Many arbitral tribunals have recognized the distinction between the substantive and procedural provisions as a general principle in public international law.[91] With respect to states, their practice before arbitral tribunals asserts the distinction between procedural and substantive rules. Moreover, if we accepted the right to access international arbitration as a substantive right, the failure to do so by the host state would amount to a wrongful act involving state responsibility.[92] In the same Vein, Consular jurisdiction in the past was considered essential for the protection of the foreigners' rights and their property. However, we cannot say that this form of extraterritorial jurisdiction is of the same nature of the substantive rights of the foreign investors and it is necessary to the investment protection. The necessity of any procedural rules should not change its nature as procedural rules.

I believe that dispute settlement arrangements are procedural rules that are different from substantive rules in BITs. The procedural provisions cannot be given a substantive character. This distinction appears clearly in the practice of the ICJ in the context of public international law. However, some arbitral tribunals try to take some steps towards connecting procedural and substantive rules in pursuance of the legitimization of the wrong interpretations. Neither the protection of foreign investments, nor the legitimization of the wrong interpretations should change the nature of the procedural rules in BITs. The final aim of considering dispute settlement provisions as part of the substantive and not the procedural provisions, is to give these clauses one-side oriented interpretation, investor oriented, and gave the ultimate effect to facilitate the access to international arbitration to guarantee excessive protection to interests and rights of

[91] For example, *see* Plama Consortium Limited v. Republic of Bulgaria., ICSID Case No. ARB/03/24, Decision on Jurisdiction, (Feb.8, 2005) 13 ICSID Rep 271, (2008).
[92] *See* Radović, *supra* note 61, at 62.

investors. With respect to MFN clause, treaty parties had not intended to expand its scope, as a treaty provision, under the will of the investors.

F. Contemporary Practice Regarding the MFN Clauses in GATT and the WTO:

It will be useful to address the question of the MFN clause more broadly to include its interpretation and application in fields other than international investment law. This clause has became the corner stone of the multilateral trading system. Under article I of the General Agreement on Tariffs and Trade (GATT), most favored nation is granted to the goods of other GATT contracting states "immediately and unconditionally" at the border. Under the requirement of article III of the GATT, "national treatment" shall be provided to these goods as soon as they enter the domestic market of any of contracting parties. [93] The immediate and unconditional applications of most favored nation together with national treatment constitute the core principle of non-discrimination under GATT.[94] Under article II of the General Agreement on Trade in Services (GATS), the MFN obligation is applicable to any measure that affects trade in services in any field covered by this agreement.[95] The importance of MFN treatment to GATT lays in the avoiding of discrimination in the application of tariffs and other treatment accorded to goods when they crossed borders.[96] The WTO has extend the scope of the application of the MFN clause from the application in trade in goods to trade in services and the protection of intellectual property rights.[97]

By reviewing the way in which MFN treatment had been applied in the GATT and WTO, we can determine the scope of its application within the WTO system through the recognition of five elements.

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[93] *See* Rep. of the Int'l Law Comm'n, *supra* note 51, para 8-9.
[94] *See Id*.
[95] *See Id*.
[96] *See* id.
[97] See Nicholas DiMascio & Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin*, 102 Am. J. Int'l L. 48, 48–89 (2008).

First, despite the fact that MFN provisions in the WTO are worded differently, the approach of the Appellate Body deals with them as they have the same meaning.[98] The textual interpretation to MFN provisions is less importance than the underlying concept of MFN treatment.

Second, the Appellate Body has interpreted MFN treatment under GATT article I in a manner that gave it the broadest possible application. The Appellate Body asserted that "any" advantages, favor, privilege or immunity means "any advantage". The Appellate Body's words are as follows:

> [W]e note next that Article I:1 requires that "any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Members." (emphasis added) The words of Article I:1 refer not to some advantages granted "with respect to" the subjects that fall within the defined scope of the Article, but to "any advantage"; not to some products, but to "any product "; and not to like products from some other Members, but to like products originating in or destined for "all other" Members.[99]

Although, the Appellate Body adopted the broadest possible application to MFN treatment, 'The specific issue of whether MFN treatment applies to both substantive and procedural rights has not been addressed by the Appellate Body"[100].

Third, although MFN treatment within the WTO system was meant to be unconditional, all of the WTO agreements contain exceptions to the application of MFN treatment to the extent that its application is more restricted than it appears. "Exceptions for customs unions and free trade areas, for safeguards and other trade remedies, as well as general

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[98] See Appellate Body Report, *European Communities —Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R para 231 (Sep. 9, 1998) (adopted 25 September 1997).
The Appellate Body asserted that:
[T]he Panel interpreted Article II of the GATS in the light of panel reports interpreting the national treatment obligation of Article III of the GATT. The Panel also referred to Article XVII of the GATS, which is also a national treatment obligation. But Article II of the GATS relates to MFN treatment, not to national treatment. Therefore, provisions elsewhere in the GATS relating to national treatment obligations, and previous GATT practice relating to the interpretation of the national treatment obligation of Article III of the GATT 1994 are not necessarily relevant to the interpretation of Article II of the GATS. The Panel would have been on safer ground had it compared the MFN obligation in Article II of the GATS with the MFN and MFN-type obligations in the GATT 1994."

[99] *See* Appellate Body Report, *Canada —Certain Measures Affecting The Automotive Industry*, WT/DS139/AB/R, Para 79, (Feb. 11, 2000) (adopted June.19, 2000).

[100] Rep. of the Int'l Law Comm'n, *supra* note 51, para 46.

exceptions and provisions for special and differential treatment"[101] all work as a limitation to the scope of MFN treatment under the WTO agreements.

Fourth, the particular nature of the WTO system, with its own agreement and dispute settlement process to interpret and apply these agreements means that there is a limited relation between the interpretation and application of the MFN clause within the WTO and its interpretation and application in other agreements.[102] Therefore, the interpretation and application of MFN treatment within the WTO has its own scope regardless how MFN clauses are treated in other agreements such as BITs.[103]

Fifth, with respect to the application of the MFN clause in GATS, trade in service under GATS includes providing by a supplier of one state member through natural persons on the territory of another state member. Article II of GATS shall regulate the MFN treatment that is accorded to this services supplier.

The question is whether a WTO member can rely on Article II of GATS to benefit from the provisions of BIT between another a WTO member and a third state that provides favorable measures to the service suppliers of this third State. The study group of the International Law Commission has found no answer to this question on practice or jurisprudence.[104]

I believe that interpretation in the Appellate Body's view is "to clarify the meaning of existing obligations, not to modify their content"[105]. In addition, the interpretation and application of the MFN treatment within the WTO system do not raise any problem. Moreover, there is no practice of the WTO Appellate Body on the application of the MFN clause to the procedural rights of the WTO members .The WTO has its own mechanism for resolving disputes. Although, the WTO agreements are interpreted based on Articles 31 and 32 of the VCLT, the existence of the appellate structure

[101] *See id.* para 47.
[102] *See id.* para 48.
[103] See id.
[104] *See id.* para 51.
[105] Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body*, 21 EUROPEAN JOURNAL OF INTERNATIONAL LAW. 605, 612 (2010).

ensures that the interpretations of the panel, in respect of the MFN clause, can be rethought or abolished.[106]

G. The Proponents and Dissenters to the Application of the MFN Clause to Dispute Settlement Provisions in BITs:

There are two-conflict interests that affect the scope of the application of the MFN clause with respect to dispute settlement provisions in BITs. The application of this clause to dispute settlement arrangements responds to the interest of the investors. This facilitates and broadens the scope of access to international arbitration that offers international protection to investors who benefit from procedural provisions that are contained in other BITs. This could be happened by overriding procedures requirements to access international arbitration or expand the jurisdiction of arbitral tribunals to matters beyond these specifically stated in the basic BIT. This protection cannot be granted by domestic courts that, in some opinions, lack to the sufficient independence to judge against their governments. On the other hand, the respondent state seeks to limit the jurisdiction of international tribunals and denies any effects to the MFN clause in respect of dispute settlement arrangements, fearing about being held responsible for breaching a treaty obligation or being sanctioned.

The answer of the question of whether the MFN clause should be applied to disputes settlement provisions in BITs or not, found many proponents and many dissenters. Each of them adopts arguments that present the case from his point of view and no one of them can claim a numerical supremacy of supporters. The proponents argue that the MFN clause should be applied to dispute settlement provisions in BITs. The dissenters argue that the MFN clause should not be applied to dispute settlement provisions in BITs.

The proponents argue that,[107] once the MFN clause existed in BIT, it should be applied to matters of dispute settlement provisions, since there are no differences between procedural and substantive provisions in BIT. They assert that there is an inextricable

[106] *See* Rep. of the Int'l Law Comm'n, *supra* note, para 52.
[107] *See* discussion *infra* Part IV. A.

link between procedural and substantive provisions, and procedural provisions are of the same nature of the substantive provisions. Therefore, the MFN clause should be applied to procedural provisions as it is applied to substantive provisions. Second, dispute settlement provisions are necessary for the enforcement of the investors' treaty rights. Third, all BIT's provisions are negotiated between the host state and the investor, so there is no need to differentiate between the MFN clause and other provisions. Fourth, the ability to choose between varieties of dispute settlement provisions in itself is a favored treatment, to let the investor to choose what he desire. Finally, the application of the MFN clause would lead to the harmonization of international investment law through linking large number of BITs in relation to dispute settlement provisions. Since, the MFN clause incorporate procedural provisions from other state's BITs to the procedural provisions in the basic BIT.

Dissenters argue that[108] the MFN clause should be applied only to substantive rights not procedural rights, so it cannot be applied to dispute settlement provisions since they are procedural rights. Second, to apply the MFN clause to dispute settlement provisions it has to extend, explicitly, its application to matters of dispute settlement and defines the references of the incorporation of these procedural provisions from other BITs. Third, there is no doubt that the dispute settlement provisions had been negotiated carefully between the parties. Therefore, dispute settlement provisions should not be incorporated from other BITs. Finally, in international investment arbitration precedents are not of binding nature whether to tribunals or states. Therefore, the application of the MFN clause to dispute settlement arrangements may lead to more conflicting investment rules and treaty shopping rather than the harmonization of dispute settlement mechanisms.

H. Conclusion:

In this chapter, I have explored the evolution of the investment protection from the early political communities to the recent practices of international courts and arbitral tribunals that clarify the framework of the MFN clause and the impact of this framework on the interests of both foreign investors and host states.

[108] *See* discussion *infra* Part IV. A.

In section one, I have demonstrated how interpretation of the MFN clause in relation to its application to dispute settlement arrangements in BITs is not a today issue. In fact, it is not the first nor will be the latest "episode" in a long history of a constant demand of foreigners to prevent domestic courts to hear their cases and instead seek the assurance of an international or internationalized forum. The legal position of the aliens has in the progress of time advanced from the complete outlawry, in the days of the early Rome and the German tribes, to the practical assimilation with nationals, at the present time. Diplomatic protection proved to be one of the notorious forms of protecting aliens abroad since the exercise of this protection by powerful states was accompanied by "gun-boat diplomacy". Moreover, the exercise of this protection depended on many things like the merits of the claim or geopolitical interests that might be affected by the making of a claim.

With the existence of the colonial political and legal regimes, there was no need to powerful countries to recourse to international law process to protect their nationals. Extraterritorial jurisdiction allowed powerful states to apply their laws to their nationals in foreign states. Egypt is a concrete example of this practice. This extraterritorial jurisdiction was embodied in the Mixed Courts and Consular Courts that were about a set of privileges granted to the nationals of certain countries who were exempted from the application of domestic laws and the jurisdiction of domestic courts. After the termination of the Consular Courts and Mixed Courts, the obligations upon host states towards foreigners and their interests were and still imposed by international norms. Developing states have become parties to many BITs to protect reciprocal flows of foreign investment. In reality, this protection is for one-way flows of foreign investment that happened from developed and powerful countries to developing countries. Moreover, the scope of this protection is enhanced by the expansive and wrong interpretations that produced by arbitral tribunals. This resulted in a profusion of the awards and decisions of arbitral tribunals that give affirm and articulate the principles of investment protection that work as an immunity against the jurisdiction of the domestic courts in the host states. With the diverse and the constantly changing of the international environment, no one can predict the future of dispute settlement mechanisms in respect of international investment disputes.

In section two, I have explained the historical background of the MFN clause from the Bilateral Treaties of Friendship, Commerce and Navigation (FCN treaties) to the recent practices that have led us to the current legal situation. In addition, how the overwhelming proliferation of BITs and resorting to dispute settlement mechanisms have given the MFN clause a new lease on life.

In section three, I have explored the definition of the MFN clause and the important elements that characterized this clause. First, this clause prohibits host states from discriminating against persons "investors" or things "investments" of a state and a third state. Second, the MFN clause is applied where the "investors or investments" of the beneficiary state is in the same relation of the third state with the host state. Third, the investor receives less favorable treatment than the host state provides to, the comparators, the third state. Fourth, states' obligations under the MFN clause are strictly treaty obligation, therefore it is a treaty provision as any treaty provision; it can be restricted to specific kinds of treatment, based on the intentions of the treaty parties.

In section four, I have explained the scope of the application of the MFN clause. The determination of this scope is matter of treaty interpretation. Arbitral tribunals used to apply these clauses only to substantive provisions in BITs. The tribunal's decision in *Maffezini* was the starting point in expanding the application of this clause to dispute settlement arrangements in BITs. Practitioners, civil societies and states have criticized the arbitral tribunals for the inconsistent and unintended interpretations of MFN clauses. Some arbitral tribunal interpreted the MFN clause in manner not contemplated by the original drafting to expand the scope of the application of this clause to matters of dispute settlement in BITs.

In section five, I have demonstrated that the distinction between substantive and procedural provisions is straightforward in public international law, private international law and international investment law. Generally, non-compliance with a substantive provision amounts to a wrongful act, in contrast, such a behavior in respect of procedural provisions does not amount to a wrongful act involving state responsibility. Therefore, if we accepted the right to access international arbitration as a substantive right, the failure to do so by the host state would amount to a wrongful act involving state responsibility. Although, the distinction between procedural and

substantive provisions in BITs is clear enough on the eyes of international courts and arbitral tribunals, some of them try to take some steps towards connecting procedural and substantive rules in pursuance of the legitimization of the wrong interpretations. These tribunals ignore this distinction when they want to apply MFN clauses to dispute settlement provisions in BITs to grant excessive protection to foreign investment. In fact, neither the protection of foreign investments, nor the legitimization of the wrong interpretations should change the nature of the procedural rules in BITs.

In section six, I have addressed the question of the MFN clause more broadly to include its interpretation and application in GATT and the WTO. Despite the fact that MFN provisions in the WTO are worded differently, the approach of the Appellate Body deals with them as they have the same meaning. Although, the Appellate Body has interpreted MFN treatment under GATT article I in a manner that gave it the broadest possible application, the Appellate Body has not addressed the issue of the application of the MFN clause to procedural provisions. The interpretation and application of the MFN treatment within the WTO system do not raise any problem. Moreover, the existence of the appellate structure ensures that the interpretations of the panel, in respect of the MFN clause, can be rethought or abolished.

In section seven, I have explored the conflict interests that affect - or affected by - the application of the MFN clause to dispute settlement arrangements in BITs. The application of this clause to dispute settlement provisions responds to the interests of foreign since it facilitates and broadens the scope of access to international arbitration that offers international protection to investors who benefit from procedural provisions that are contained in other BITs. This could be happened by overriding procedures requirements to access international arbitration or expand the jurisdiction of arbitral tribunals to matters beyond these specifically stated in the basic BIT. This could be happened by overriding procedures requirements to access international arbitration or expand the jurisdiction of arbitral tribunals to matters beyond these specifically stated in the basic BIT. On the other hand, the respondent state seeks to limit the jurisdiction of international tribunals and denies any effects to the MFN clause in respect of dispute settlement arrangements, fearing about being held responsible for breaching a treaty obligation or being sanctioned. Then I have explained briefly the arguments of the

proponents and dissenters of the application of the MFN clause to dispute settlement provisions in BITs.

In sum, I have explored the complete picture of the background and framework of the application of the MFN clause to matters of dispute settlement in BITs. The interpretation of this clause plays an important role in determining the scope of its application. In fact, the debate about the scope of the application of the MFN clause to dispute settlement provisions in BITs, is about how this clause should be interpreted.

II. The International Rules of Interpretation in the VCLT

Understanding the role and significance of each rule of the interpretation rules is an indispensable criterion of the proper application of these rules and the proper interpretation of the BITs' provisions. Arbitral tribunals rarely justify their adopted interpretation, but they just refer to Articles 31 and 32 of the VCLT. Maybe they do not have to justify their adopted interpretation, since they have the power to provide binding interpretations. The methods of the application of the international rules on treaty interpretation have attract less attention rather than the concluded interpretations. For example, a study of the UNCTAD of the application of the MFN clause to matters of dispute settlement affirmed that this clause should be interpreted according to Articles 31 of the VCLT, however, it did not discuss how these articles should be applied.[109]

The world of any human or legal person consists of normative universes. These universes structured around the possibility of right or wrong, of lawful or unlawful or of valid or void. International law is one of these normative universes. It includes rules and restrictions that validate or invalidate certain practices or construct a certain reality. Therefore, interpretation is a process that in fact may lead to correct and incorrect conclusions.

In additions, each of the objective and subjective approaches has his own different approaches to treaty interpretation, so which approach should adjudicators followed. Moreover, the hierarchical order of the means of interpretation is a subject of debate that has not been solved. In addition, many BITs lack to the textual determinacy to the extent that tribunals struggle in interpreting the BIT's provision. How could tribunals interpret the silence of some texts is another unresolved problem. For all these reasons, the application of these interpretative rules is a dilemma. This chapter argues that the problem of interpretation is not crystalized in the availability of the means of interpretation, but in the misapplication of the available means of interpretation.

[109] *See* Rep. of U.N.C.T.A.D, on Most Favoured-Nation Treatment, UNCTAD/DIAE/IA/2010/1 paras 30– 33 (2010).

Section one of this chapter demonstrates the nature of treaty interpretation, and how it is not an exact science, but it is still a science. This science requires the application of certain rules to produce correct results. The second section explains treaty interpretation from the perspective of the objective and subjective approaches. The third section provides an analysis of Articles 31 and 32 of the VCLT and the arbitral use of these articles in interpreting investment treaties. This analysis includes the general rule of interpretation, the supplementary means of interpretation, the interpretation of the silence of a treaty text and the hierarchal order among the international means of interpretation in the VCLT.

A. The Nature of the Treaty Interpretation:

Treaty interpretation is a part of public international law, since treaties are concluded between states as the entities of international law. These treaties are not parchments or words carved on a stone. They are instruments that ought to provide the legal stability to their parties with respect to the purpose of each treaty. The provisions of these treaties predict the future, potential legal situations and new factual. In order to determine the treaty rights and obligations, its parties need to define the accurate meaning of these provisions. The determination of this correct legal meaning is the ultimate aim of the interpretation process. However, the determination of this meaning is a dilemma. Sometimes a treaty provision provides no accurate meaning, which raises the question of how to determine the correct legal meaning of this provision.

With respect to the concept of interpretation, it can be described as "the process of determining the meaning" or "the giving of meaning to a text"[110]. The mainstream of scholars defines interpretation as "meaning ascertainment, yet also see it as serving a wider purpose"[111]. "Interpretation in international law essentially refers to the process of assigning meaning to texts and other statements for the purposes of establishing rights, obligations.... Interpretation is both a cognitive and a creative process".[112]

[110] RICHARD GARDINER, TREATY INTERPRETATION, 27 (2nd edition, the Oxford International Law Library, 2008).
[111] Jörg Kammerhofer, *Taking the Rules of Interpretation Seriously, but Not Literally? A Theoretical Reconstruction of Orthodox Dogma.*, 86 NORDIC JOURNAL OF INTERNATIONAL LAW. 125, 129 (2017).
[112] MATTHIAS HERDEGEN, VI. Interpretation in International Law,*in* Max Planck Encyclopedia of Public International Law 260 (Rüdiger Wolfrum eds., Oxford University Press, 2012).

Other sees that "interpretation is a secondary process which only comes into play when it is impossible to make sense of the plain terms of the treaty, or when they are susceptible of different meanings".[113] "The way the word is used in the 1969 Vienna Convention" affirms that "only when we have already read a text, and the text has shown to be unclear, that we can say that we then interpret it".[114]

Other warns that interpretation is a multidimensional process and it can be broad or restrictive. This process can expand the universe of international law by legitimizing or qualifying norms that were not previously considered as rules of international law.[115] Interpretation also can broaden the scope of the application of existing rules or expand the content of these rules.[116] Conversely, interpretation can deprive a legal rule of any legal pedigree, or strip it of any meaningful content.[117] Consequently, this opinion sees that interpretation is a multidimensional process that includes; the determination of the content of the legal rule and the identification of legal rules that are available by public international law.[118] Therefore, our understanding of treaty interpretation should not be limited to content-determination.[119]

The mainstream of international legal scholarship has promoted a predominantly rule-based approach to interpretation in public international law, and the VCLT provides this overall model. It provides formal rules that govern treaty interpretation and operate as formal constraints on the interpretive freedom.[120]

The 2006 ILC Report employs another strain of argument. It asserters that interpretation is a process of giving a justifiable meaning to the text, but it is not an actual description of a psychological process. "The starting-point is the treaty itself,

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[113] ARNOLD DUNCAN MCNAIR MCNAIR BARON, THE LAW OF TREATIES, 365 (1st edition, Oxford: Clarendon Press, 1961).
[114] ULF LINDERFALK, ON THE INTERPRETATION OF TREATIES: THE MODERN INTERNATIONAL LAW AS EXPRESSED IN THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 10 (FRANCISCO J. LAPORTA et al. eds., Springer, 2007).
[115] *See* Jean d'Aspremont, *The Multidimensional Process of Interpretation: Content-Determination and Law-Ascertainment Distinguished*, 15 Amsterdam Center for International Law. 1, 4 (2014).
[116] *See id*.
[117] *See id.*
[118] *See id*. at 2.
[119] *See id.* at 10.
[120] *See id*. at 17.

with interpretation proceeding from the more concrete and obvious (dictionary, context), to the less tangible and less obvious (object and purpose, analogous treaties etc.) in order to give the text a justifiable meaning".[121]

Other asserts that interpretation is "the applicative construction of law's meaning. That is to say, interpretation is an effort to guide the concretization of abstract general norms in individual instances, foremost in the process of rendering tribunal judgments".[122]

From the previous definitions, we can distinguish between two fundamentally different conceptions of interpretation.[123] First, interpretation is the process of finding out what the treaty texts mean or what the parties to a treaty want its texts to express.[124] In other words, it not more than what jurists do when they understand the meaning of any treaty provision. Second, the conception of interpretation is unclear within international legal scholarship and practice.[125] However, we can say that the second conception of interpretation as used by international lawyers is more than meaning ascertainment. Interpretation, according to the second conception, is a creative act that provides the interpreter with choices and the rules of interpretation are the sources of these choices.[126]

The legal theory can help us to find out what exactly interpretation can be. Although, the doctrinal thinking on international law is theory-averse, avoiding theory makes the doctrine of interpretation impractical.[127] The theoretical "*ad hoc*" or a single theory for each single case or even a single theory for a single arbitral tribunal inevitably leads to inconsistency and failing arguments.[128] It will be useful in this thesis to use the pure theory of law to recognize what the legal interpretation is. Indeed, this theory is the best place to provide us with the theoretical foundation of interpretation.

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[121] Rep. of the Int'l Law Comm'n, 58th Sess., May 1 -June 9, July 3-Aug 11, 2006, U.N. Doc. A/CN.4/L.682. on the fragmentation of international law, finalized by Martti Koskenniemi, para 464 (2006).
[122] *See* Kammerhofer, *supra* note 111, at 132.
[123] *See id.*at 131.
[124] *See id*.
[125] *See id*.
[126] *See id*.
[127] *See id*. at 150.
[128] *See id.*

For Hans Kelsen, interpretation is "a mental process which accompanies law-making in its progress from the higher to the lower stages".[129] Interpretation is linked with the hierarchical structure of the legal order.[130] According to the structured order in the kelsenian prospective, the higher-order norm cannot fully determine all the contents of the lower norm, and the lower norm cannot be logically derived from the higher norm.[131] The lower norm as a positive law needs an act of will to be created, and must not contradict the higher norm.[132] Kelsen asserts, "If by interpretation we mean determining the sense of the norm which is to be put into effect, the result of that activity can only be to determine the frame which is presented by the norm".[133] According to Kelsen, we must acknowledge the possibility of a diversity of the results of interpretation within the frame of a norm. Therefore, the interpretation of a text need not inevitably to lead to a solely single decision as the only correct one, but it may lead to several results that each of them have - insofar as they confirm the higher norm- the same equal value.[134]

Interpretation in the Kelsenian thinking resulted in a lower-level norm that decided by an authorized organ who decides only the frame of possible meanings for us. If an interpreter imports external standers such as "morals, justice or political ideologies, one imports something that is not part of positive law and hence 'justifies' one's decision by a standard incommensurate with legal scholarship's exclusive focus on law."[135] The judicial decision would be well grounded on law only when the adopted interpretation is one of these possible results within the frame prescribed the higher norm.[136] Moreover, he calls for the development of the methods of interpretation to enable the correct content of the frame to be precisely determined.[137]

Kelsen rejects the idea that new norms can be made by means of elucidation from the higher norms or already existing norms.[138] In other words, we cannot use interpretation

[129] Hans Kelsen, *The Pure Theory of Law*, 51 L. Q. Rev. 517, 523 (Charles H. Wilson trans., 1935).
[130] *Id*. at 523.
[131] *See id.*
[132] *See* JÖRG KAMMERHOFER, UNCERTAINTY IN INTERNATIONAL LAW : A KELSENIAN PERSPECTIVE, 105 (Taylor & Francis Group publisher, 2010).
[133] *See* Kelsen, *supra* note 129, at 525.
[134] *See id*. at 525.
[135] See, KAMMERHOFER, *supra* note 132, at 106.
[136] *See id.* at 525 - 527.
[137] *See id.*
[138] *See id.*

to create new norms within the legal system. He sees that the function of interpretation is to discover the meaning from the existing norms.[139] In addition, he refuses to assign a special role to interpretation in the case of legal gaps, since these gaps must not be filled by interpretation.[140] Kelsen affirms that a legal dispute can be decided based on a valid norm and the non-existence of this norm has to lead to the disposing of this dispute.[141] The decision of confirming or disposing of a claim made by a party to a treaty against another party depends on whether law declares it a legal duty or not, since there is no a third possibility. When a person does not obliged by law to do a certain behavior, he is free to do or not to do what he is not obliged to do.[142] Moreover, interpretation has nothing to do with the non-existence of an obligation. Kelsen called this as a negative norm that "operates in a decision disposing of a claim directed to a behavior which is not a statutory duty"[143].

One aspect of Kelsen's frame theorem is worth discussing for the purpose of our analysis. The Kelsen's frame theorem recognizes the possibility of the existence of correct meanings. The theory did not decide how we could choose between those meanings in case they are different things. [144] The determination of the frame raises another question; how do we determine the frame, what it looks like and how many possible meanings can be within the frame. However, the theory helps us to determine the relation between the outcomes of the interpretation process and the treaty texts.

The world of any human or legal person consists of normative universes. These universes structured around the possibility of right or wrong, of lawful or unlawful, of valid or void, or permissible or impermissible.[145] International law is one of these normative universes and it has developed rules that regulate treaty interpretation. These rules of interpretation validate or invalidate certain practices or construct a certain reality.[146] Treaty interpretation operates within this normative universe and within the framework of pre-existing rules that have to be followed. The rules of interpretation

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[139] *See id.*
[140] *See id.*
[141] *See id.* at 528.
[142] *See id.* at 527- 531.
[143] *Id.*
[144] *See* KAMMERHOFER, *supra* note 132, at 115.
[145] *See* Robert M. Cover, *The Supreme Court, 1982 term- Foreword: Nomos and Narrative*, 97 HARVARD LAW REVIEW 4-5 (1983).
[146] *See* d'Aspremont, *supra* note 115, at 1.

determine the way we go about interpretation - or ought to go about it – and this is essential to what can be achieved by arbitral tribunals and *ad hoc* committees[147].

Recent contributions to treaty interpretation agree that the VCLT rules, including the rules of interpretation in Articles 31 to 33, are binding law that applicable as a treaty and as customary international law.[148] We can say that treaty interpretation subjects to certain rules that aim to conduct the behavior of interpreters in respect of the determination of the meaning of a treaty provisions. These rules are the product of the international community and must be respected by this community. Interpretation cannot neither change the law nor capable of creating new legal rules within the legal system. Interpretation is a reproduction of a legal norm and can never go beyond or contradict the original norm.[149]

One may ask whether applying the interpretation rules of the VCLT would result in correct interpretation. I believe that arbitral tribunals are bound to apply and give effect to the interpretation rules.[150] Moreover, interpretation is a process that in fact may lead to correct and incorrect conclusions. The interpretation rules serve as a common framework that guarantees a uniform arbitral interpretation practice of arbitral tribunals and *ad hoc* committees.[151] Article 31 of the VCLT provides a compulsory general rule and some flexibility and discretion lies in Article 32.[152] Article 31 of the VCLT provides four elements and this Article is expressed in mandatory terms.[153] This Article is designed to be applied within a single and integrated process of treaty interpretation. "Article 31 of the VCLT is entitled the "General rule of interpretation not the "General rules of interpretation" and the significance of this is often overlooked".[154]

The full compliance with the rules of interpretation will produce correct results and will resolve the problem of wrong interpretations that go beyond the clear meaning of the treaty texts.[155] Conversely, "the neglect and misapplication of these customary rules

[147] *See* Kammerhofer, *supra* note 111, at 1.
[148] *See* Kammerhofer, *supra* note 111, at 127.
[149] *See* Kammerhofer, *supra* note 111, at 138.
[150] *See* YEN, *supra* note 58, at 75.
[151] *See id.*
[152] *See id*.
[153] *See* Douglas, *supra* note 74, at 109.
[154] *Id*.
[155] *See* YEN, *supra* note 58, at 75.

would defeat their objectives, make adjudicators' interpretation illegitimate."[156] The problem of interpretation is not crystalized in the availability of interpretational means, but in the misapplication of the available interpretational means.

A crucial question in determining the nature of interpretation is whether treaty interpretation is a science or an art. This issue had appeared before the drafting of the VCLT when the ILC said, "the interpretation of documents is to some extent, an art not an exact science"[157]. When the Special Rapporteur Sir Humphrey Waldock was working on the first draft of the Law of Treaties, he informed the ILC members, at the 726th meeting, that "the subject was a vast and difficult one and he was anxious not to penetrate too deeply into the realm of logic and what might be described as the art of interpretation".[158]

If the statement of the ILC is correct and interpretation is an art and not a science, this would mean that achieving certainty in interpretation is a utopian dream. Moreover, academics, lawyers, adjudicators and judges would be artists and not legal scientists and judicial decisions would be works of art not products of a legal science.[159]

If we describe interpretation as an art, then it is a kind of antithesis to "exact science". This reveals the use of the epithet 'exact' to characterize science.[160] The ILC sees that interpretation as an art is unlike science, where there are rules that predetermined the exact outcomes of any interpretational process. Therefore, interpretation cannot be captured in certain rules or regulated be them and the prediction of the outcomes of any interpretation process is impossible. In this opinion, interpretation lacks any deterministic process.

The results of this opinion are dangerous to extent that the outcomes of any interpretation process will be correct. These results are works of art. Moreover, there

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[156] *See id.*
[157] Rep. of the Int'l Law Comm'n, 18th Sess., May 4 – July 19, 1978, U.N. Doc. A/6309/10/Rev.1; Draft Articles on the Law of Treaties with Commentaries, GAOR, 31st Sess., Supp. No. 9, Vol II, 218 (1966).
[158] *Summary Records of the 726th Meeting*, [1964] 1 Y.B. Int'L L.Comm'n, para 4 U.N. Doc. A/CN.4/SR.726/1964.
[159] *See* TREATY INTERPRETATION AND THE VIENNA CONVENTION ON THE LAW OF TREATIES : 30 YEARS ON, 10 (Malgosia Fitzmaurice et al. eds., BRILL 2010).
[160] *See id*.

will be no rules that determine whether the results of treaty interpretation are correct or wrong.

The idea of science as "exact" does not correspond to the legal reality at all.[161] Even in physics, which is an exact science according to the notion of the ILC, there is always a "margin of error".[162] Moreover, we cannot chastise interpretation for a shortcoming, as uncertainty, that may be existed in the exact sciences.

International courts and arbitral tribunals always refer to the rules of interpretation of the Vienna Convention on the law of treaties and this is a sufficient evidence that there is a tendency to highlight the science element in treaty interpretation. The fact that many international courts and arbitral tribunals may or may not correctly apply interpretation rules will not turns the nature of treaty interpretation from a science to an art.

Interpretation is regulated by Articles 31-33 of the VCLT, which are binding to adjudicators and treaty parties. Therefore, all international courts and tribunals either explicitly or implicitly follow the process of treaty interpretation enshrined in these articles. These rules are sufficient to achieve legal certainty.[163] The ultimate aim of treaty interpretation, according to the VCLT, is to determine the binding and correct legal meaning of the treaty provisions according to the communicative intention of the treaty parties, and what they want the treaty provisions to express.[164] According to Article 31/4 of the VCLT, an ordinary meaning shall be given to the treaty provisions unless it is established that the parties had intended to give a different meaning to these provisions.[165] The proliferation of international adjudication that has reached unprecedented heights should not affect the function and normative content of the rules of interpretation in the VCLT. This diverse and constantly changing international environment should not turn interpretation from a science that is regulated by certain rules to an art that governed by no rules.

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[161] *See id*.
[162] *See id*.
[163] *See id*.
[164] *See* Ulf Linderfalk, *Is Treaty Interpretation an Art or a Science? International Law and Rational Decision Making*, 26 EUROPEAN JOURNAL OF INTERNATIONAL LAW. 169, 171 (2015).
[165] *See* Vienna Convention on the Law of Treaties art 31, opened for signature May 23, 1969, 1155 U.N.T.S. 331.

Although, interpretation is not an exact science, it is still a science requiring the application of particular rules to produce correct results.[166] The VCLT puts limits for the creativeness and discretion of adjudicators to ensure that their findings do not counter the intent of the state parties that is expressed by the treaty texts.[167] Therefore, we have to assert the scientific nature of treaty interpretation as an activity, since at the end it subjects to certain rules.

In addition, science and art are not mutually exclusive.[168] I believe that interpretation is a science, that is, artful. Interpretation requires the application of a set of predetermined rules and the correct application of these rules will result in correct outcomes. Conversely, the neglect or the misapplication of these rules will result in wrong interpretations.

The application of legal rules needs many qualifications and experience. This what justifies that there are persons who are able to do some things better than the others are. This means that the application of a science to some extent needs an art. This truth should not refute the nature of treaty interpretation as a science that regulated by a certain binding rules. Moreover, it should not refute the artful nature of interpretation as a science that needs a scientific knowledge for the determination of the correct meaning of the treaty texts. However, the artful nature of interpretation as a science does not mean that interpretation processes are free of any constraints or rules to regulate. We need the art to apply correctly the rules of interpretation as a science. We can say that treaty interpretation is a science, that is, artful.

B. Treaty Interpretation According to the Subjective and Objective Approaches of International Law:

Each of the objective and subjective approaches has different answer to the question of why treaties are binding. According to the subjective approach, treaties are binding

[166] *See* Yen, *supra* note 58, at 103.
[167] *See id*.
[168] *See* TREATY INTERPRETATION AND THE VIENNA CONVENTION ON THE LAW OF TREATIES, *supra* note 159, at 13.

because they express the mutual consent of their parties. [169] According to the objective approach, treaties are binding because of the consideration of good faith, teleology, reciprocity or justice considerations. These conflicting answers affected the visions of these two approaches in relation to treaty interpretation. Indeed, the history of treaty interpretation is a reflection of the conflict between the objective and subjective approaches.

Case law and international tribunals emphasize the priority of the "natural", "ordinary", "usual" or "normal" meaning. Interpretation process of treaties has to produce this meaning.[170] This "ordinary" meaning of treaty provisions seems the relevant meaning since it is the most reliable evidence of what the treaty parties have consented to what bound them. Moreover, justice requires the enforcement of what the treaty parties had consented to.[171] However, the doctrine of "normal" meaning fails to produce a comprehensive solution when a treaty text can produce more than one "normal" meaning. Moreover, the "normal" meaning itself needs an interpretation. The existence of disputes about what the normal meaning is proves the failure of the normal meaning doctrine as a comprehensive solution to treaty interpretation.

The overriding force of the "normal meaning" varies from the subjective to the objective understanding. According to the subjective understanding, the original intent of the treaty parties is the primary element of interpretation and overrides the "normal meaning" if they conflict with each other.[172] The subjective understanding, "consensualism" and positivism believe that the original intents of the treaty parties are cornerstone of treaty interpretation. They see the treaty as the world of its parties, what are inside this treaty is relevant based on the intent of the treaty parties. They do not give any effects to any interpretations that apart from this original intent. In their approach, treaties bind because it is the reflection of the mutual consent of their parties.

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[169] *See* MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT, 333 (Cambridge University Press, 2006).

[170] *see also* Acquisition of Polish Nationality, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 7 at 20 (Sept.15, 1923); Interpretation of Convention of 1919 concerning Employment of Women during Night, Advisory Opinion, 1932 P.C.I.J. (ser. A/B) No. 50 at 373(Nov.15, 1932) and Competence of the General Assembly for the Admission of a State to the U.N., Advisory Opinion, 1950 I.C.J. 5 at 7-8 (Mar.3, 1950).

[171] *See* KOSKENNIEMI, *supra* note 169, at 333.

[172] *See id.* at 334.

According to the objective understanding, "normal meaning" is a secondary element of interpretation.[173] They assert that treaties bind because of the considerations of good faith, teleology, reciprocity or justice considerations.[174] Treaty interpretation in this approach should not be limited by the meaning of the words of the treaty texts. These texts can be interpreted in the light of many things outside the treaty provisions. They affirm that the treaties as a source of public international law are something higher than the intent of their parties. As a result, any interpretation based on consideration such as good faith, teleology, reciprocity or justice overrides "normal meaning".[175]

The "normal" meaning cannot be determined independently without a base of the parties' intent or good faith and justice, since there is no independent normative character to that normal meaning.[176] Normal meaning is the correct meaning as it is reasonable according to parties' intent or something higher than this intent such as good faith or legitimate expectations, etc.

The problem of "normal meaning' with the subjective understanding is that the goal of interpretation is to give effect to the intentions of parties. However, we cannot use the parties' intentions as a mean to attain interpretation. Under this understanding, we should exclude any objective points about the text such as teleology, good faith or subsequent conduct etc. The only mean of interpretation we have is what the treaty parties had consented on, how consent can be used as a mean to argue and support treaty interpretation, how can the goal used as a mean. If the subjective approach uses means such as good faith, teleology, subsequent practices, etc. then it will be indistinguishable from the objective understanding.

With respect to the objective approach, it provides no solution for determining the "normal meaning". This approach begins from an assumption that the parties' intentions are not known and we cannot justify an interpretation by referring to these intentions.[177] This approach denies the existence of "objective normality" as well as the existence of

[173] *See id*, at 335.
[174] *See id*.
[175] *See id*.
[176] *See id*, *see* also J. G. Merrills, *Two Approaches to Treaty Interpretation*, 4 The Australian Year Book of International Law Online. 55, 58 (1971).
[177] *See* KOSKENNIEMI, at 336.

non-subjective criterion that can evaluate the mutual treaty rights and obligations.[178] The objective approach affirms that the treaty interpretation must not be limited by the intentions of the parties, but there is something beyond this intention. Treaties can be interpreted in the light of legitimate expectations, justice considerations, teleology, etc.

Although, these two approaches, subjective and objective, are opposing each other, both of them are necessary to determine the proper meaning of the treaty provisions. A subject interpretation can be supported by objective elements; the intentions of the treaty parties can be determined by moving into the objective understanding and the objective argument can held under the subjective understanding. The doctrine of treaty interpretation cannot follows constantly the subjective and objective understandings. Interpretation shifts from a subjective approach to an objective approach *vice-versa* and adjudicators stop only in the point where they find that this interpretation is the reflection of what the parties had consented to. International courts and arbitral tribunals show that there is no conflict between these two understandings and they do not characterize their interpretation by anything, subjective or objective approach, except that this is what every states party to a treaty had consented to.

C. The Analysis of Articles 31 and 32 of the Vienna Convention on the Law of Treaties and the Arbitral Use of these Articles to Interpret BITs:

Principles, methods, rules, etc. are legal terms that describe the content of Articles 31 and 32 of the VCLT. These articles contain ways of weighing and choosing the evidence of interpretation. The evidence of the intentions of the parties can be found in the text of a treaty, preparatory work, preamble and annexes. The evidence of understanding can be found in subsequent agreements after the conclusion of a treaty and the subsequent practices of a treaty. Although, the borders between the two kinds of evidence are not always clear, they may result in competing interpretations. Moreover, there are elements that may affect the understanding of the texts such as the circumstances of a treaty conclusion, the applicable rules of international law and treaty object and purpose.

[178] *See id*.

Arbitral tribunals have to apply Articles 31 and 32 of the VCLT, because VCLT is a binding treaty upon the BIT's parties or it is a manifestation of the customary international rules of interpretation. These articles include the concepts such as original meaning of the text, context, object and purpose, subsequent agreements and practices. However, the method of the application of these rules is a dilemma. These rules provide a balance approach to treaty interpretation that recognizes equally the legitimate rights and interests of the host states and foreign investors. This balance can be reached only if each means of these interpretative means has been given its particular value, according to the VCLT. These means should be applied as defined under the VCLT, to avoid the problem of liberal interpretation of a treaty in the light of its object and purpose. The problem of interpretation is not crystalized in the availability of interpretational means, but in the misapplication of the available means of interpretation.

The first part of this section discusses the elements that consist the general rule of interpretation. The second part provides the supplementary means of interpretation. The third part explores the interpretation of the silence of a treaty provision. The fourth part provides the hierarchical order among the means of interpretation in the VCLT.

1. The General Rule of Interpretation According to Article 31 of the VCLT:

Article 31 of the VCLT expresses an integrated single rule of interpretation that contains specified elements. These elements are; good faith, the terms of a treaty, context, treaty object and purpose, subsequent agreements between the parties, subsequent practice of the application of the treaty and the relevant rules of international law.[179]

Adjudicators are bound to apply this rule since the previous Article uses the phrase "a treaty shall be interpreted ….." which affirm the mandatory nature of the application of these means. These means are of the same equal weight, since the paragraphs of Article 31 does not refer to a legal hierarchy of them. However, these separate

[179] Vienna Convention on the Law of Treaties art. 31, *supra* note 165.

paragraphs reflect the logic and natural progress of the process of interpretation.[180] Interpretation should starts with the text of the treaty, then the context, object and purpose and then the external elements that indicate the meaning of the text and reflect the intentions of the parties.[181]

According to Article 31 (1), the general rule of interpretation is based on the textual approach.[182] This is the starting point for the interpretation of a treaty, to clarify the meaning of the text. This based on the assumption that the text reflects and expresses the intentions of the treaty parties, rather than any external factors.

According to Article 31 (1) of the VCLT, "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"[183]. This paragraph contains three principles of interpretation and combines these separate principles in one rule of interpretation.[184] The first principle is to interpret a treaty in good faith. This principle flows directly from the rule "*pacta sunt servanda"*[185]. The second principle, which is the very essence of the textual approach, is that an interpretation has to reflect the ordinary meaning of the text, which is the opposite of the special meaning.[186] The third principle is that this ordinary meaning has to be determined in the light of the text, context and the object and purpose of a treaty.[187]

The ICJ in its Advisory Opinion on the Competence of the General Assembly for the Admission of a State to the United Nations affirmed that:

> [T]he Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavor to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and

[180] *See* YEN, *supra* note 58, at 44.
[181] *See id*.
[182] *See* VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 541 (Oliver Dörr & Kirsten Schmalenbach eds., Springer, 2012).
[183] Vienna Convention on the Law of Treaties art 31, *Supra* note 165.
[184] *See* 1966 U.N.Y.B. of the Int'l Law Comm'n. Vol II, at 221, para 12, U.N.Doc. A/CN.4/SER.A/1966/Add.1.
[185] *See id*.
[186] *See id*.
[187] *See id*.

> ordinary meaning make sense in their context that is an end of the matter.[188]

The application of the general rule of interpretation is not something theoretical, but it has its practical effects. The way of how tribunals apply this rule, affect the outcomes of the interpretation process and the rights and obligations of the treaty parties.

a. In "a Good Faith":

Good faith as a requirement for treaty interpretation applies throughout the whole process of interpretation. Good faith works as a general guideline to choose between two or more competing meanings of the same treaty provision.[189] It is a fundamental rule in the application of a treaty. According to Article 26 of the VCLT, a treaty "must be performed in a good faith"[190]. The application of any treaty requires its interpretation as a necessity element for this application, so this interpretation must take place in a good faith.

The principle of effective interpretation "*Ut res magis valeat quam pereat*" that requires the preference of interpretation that gives a meaning to the term rather than none. This principle is a separate customary international law, while, good faith is a principle that combined with other interpretation means according to VCLT.[191] According to the ILC " when a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted"[192].

It is difficult determine a concrete content of the concept "good faith". However, this concept appears to be a reasonable requirement whether to interpretation or the application of a treaty.[193] This concept is the final stage of the general means of interpretation. Since the ordinary meaning has been established in accordance with

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[188] Competence of the General Assembly for the Admission of a State to the U.N., Advisory Opinion, 1950 I.C.J, *supra* note 170.
[189] *See* VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY, supra note 182, at 548, *see* also YEN, *supra* note 58, at 44.
[190] Vienna Convention on the Law of Treaties art 26, *Supra* note 165.
[191] *See* YEN, *supra* note 58, at 44.
[192] 1966 U.N.Y.B. of the Int'l Law Comm'n. Vol II, *supra* note 184, at 219, para 6,.
[193] *See* VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY, *supra* note 182, at 548.

context of the treaty and its object and purpose, this interpretation must result in a reasonable interpretation.[194] In case the ordinary meaning of the words led to unreasonable results, another reasonable interpretation must be adopted under the concept of "good faith". However, I argue that this reasonableness should be determined in the light of the intent of the parties and their mutual consent as it appears from the texts. This means that the meaning of treaty texts that reflects the intent of the treaty parties should be the corner stone of the determination of this reasonableness. Adjudicators ought to discover the meaning of the treaty terms not to create this meaning.

The decisions and awards of arbitral tribunals usually do not refer to the good faith principle. Adjudicators, by the other means of interpretation, may find an interpretation that complies with this principle and they adopt this interpretation without mentioning the good faith principle. On the contrary, adjudicators cannot depend only on the principle "good faith" without other interpretation means. This would be an incorrect application of article 31 of the VCLT. Then "this principle is misapplied and will be a blanket authorization for subjective findings of legal issues"[195]. It is not a standalone mean of interpretation. "Good faith" must be used with other interpretive elements.

Some commentators see that a principle like good faith has played an important role in unifying the interpretations of international tribunals with respect to cases concerning corruption, fraud and misrepresentation in international investment. They assert that this principle has led to consistent decisions from various tribunals on the similar facts in international investment arbitration.[196]

Arbitral tribunals usually relied on the principle of good faith to prefer an interpretation that give a meaning to the term rather than the interpretation the dose not. For example, the *APPL* tribunal asserted that a clause must be interpreted to give meaning to the term rather than none, it held that it is" a canon of interpretation in all systems of law"[197].

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[194] *See id*.
[195] See YEN, *supra* note 58, at 46.
[196] *See* ANDRÉS RIGO SUREDA, INVESTMENT TREATY ARBITRATION: JUDGING UNDER UNCERTAINTY, 102 (Cambridge University Press, 2012).
[197] Asian Agricultural Products Ltd v. Sri Lanka., ICSID Case No. ARB/87/3, Final Award, (June. 27, 1990) 4 ICSID Rep 246, (1990).

However, other tribunals have a methodological problem with the application of this element of interpretation. Based on the generality of the term, tribunals used "good faith" as a blanket authorization to provide side-oriented interpretation. For example, the *Maffezini* tribunal without an examination to the context to limit the interpretation of the word "treatment" it assumed that there are no applicable rules of interpretation except "good faith" to enable the investor to access international arbitration. The tribunal held that:

> "Like all other provisions of the BIT and in the absence of other specified applicable rules of interpretation, Article X must be interpreted in the manner prescribed by Article 31 of the Vienna Convention on the Law of Treaties. It provides that a treaty is to be "interpreted in good faith…… interpretation of Article X (2) would deprive this provision of any meaning, a result that would not be compatible with generally accepted principles of treaty interpretation, particularly those of the Vienna Convention on the Law of Treaties"[198].

The previous examples are evidence that the inconsistence interpretations caused by methodological problems. The proper use of the "good faith" as a tool is to discover the real meaning of a term, but using this element to justify an interpretation that goes beyond the ordinary meaning of a text, would lead to wrong interpretation.

b. The Ordinary Meaning of Treaty Terms:

The ultimate aim of treaty interpretation is to determine the correct meaning of its provisions. This correct meaning is a reflection of the intents of the parties and what these parties want the treaty to express.[199] That is why adjudicators shall give the ordinary meaning to the treaty provisions. Unless, it has been established that the parties had intended to provide a special meaning to a provision, adjudicators ought to adopt the ordinary meaning of this provision.[200]

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[198] Emilio Agustín Maffezini v. The Kingdom of Spain., ICSID Case No.ARB/97/7, Decision on objections to jurisdiction, (Jan. 5, 2000) 5 ICSID Rep 396, paras. 27-36 (2002).
[199] *See* Linderfalk, *supra* note 164, at 171.
[200] *Id*. at 172.

Article 31 (1) of the VCLT asserts that the textual approach is the base of the treaty interpretation process.[201] Therefore, the ordinary meaning is the starting point of the interpretation process. It is natural since the terms and words of a treaty provisions have been written by the parties and reflect the clear intents of these parties. This is the only means of interpretation that includes direct indications of the intents of the parties and their treaty commitments. Consequently, there is no need to go beyond the ordinary meaning inasmuch as it is clear and there is no evidence that the treaty parties had intended a special meaning.

The starting point to determine the "natural", "ordinary", "usual" or "normal" meaning of a treaty text is linguistic and grammatical. Dictionaries are a source of these meanings and these dictionaries may include more than one meaning to the same term. Adjudicators usually choose from these various definitions. Moreover, the tense of the treaty provisions is relevant to the ordinary meaning.[202]

Sometimes dictionaries are not sufficient to determine the ordinary meanings of the texts. When the treaty obligations are vague or a legal principle based, the interpretation of these provisions can be a challenge. For example, the interpretation of "investment" or "investor" in international investment arbitration cannot be determined based on a dictionary. The definition of these terms can be found in domestic laws or international treaties. Similarly, the interpretation of the fair and equitable treatment, and how a state can breach the investors' legitimate expectations. Adjudicators have to determine the content of these principles to decide whether any of them has been breached by the host state or not. The ordinary meaning here is not sufficient to interpret any of these principles. The interpretation in this case depends on both internal and external elements.[203]

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[201] *See* VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY, *supra* note 182, at 542.

[202] *See* Appellate Body Report, Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products, WT/DS207/AB/R, para 206 (Sep. 23, 2002) (adopted 23 October 2002).
The Appellate Body of the WTO held that:
We agree with Chile that Article 4.2 of the Agreement on Agriculture should be interpreted in a way that gives meaning to the use of the present perfect tense in that provision - particularly in the light of the fact the most of the other obligations in the Agreement on Agriculture and in the other covered agreements are expressed in the present, and not in the present perfect, tense. In general, requirements expressed in the present perfect tense impose obligations that came into being in the past, but may continue to apply at present.

[203] *See* ANDREA BJORKLUND, *International Investment Agreements, 2011-2012: A review of Trends and New Approaches, in* 2019 YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2012-2013,

Arbitral tribunals may rely on other means of interpretation to confirm the ordinary meaning that they adopted. For example, the *APPL* tribunal relied on the spirit of the treaty, the principle of effectiveness, precedents and the treaty object and purpose to affirm the suitability of the ordinary meaning.[204] Other tribunals may state the ordinary meaning based on the literal reading of the text without any reference to the interpretation process especially when the terms are not vague. [205]

The ordinary meaning requires the interpretation of the texts in the light of the context and the treaty object and purpose. Some commentators assert, "Object and purpose are modifiers of the ordinary meaning of a term which is being interpreted, the sense that the ordinary meaning is to be identified in their light"[206]. In addition, the context works as an aid selection to the ordinary meaning and modifier of any inconsistent interpretation.[207] Similarly, other sees that the context and the treaty object and purpose work as a big picture to check the suitability of the ordinary meaning.[208] According to this opinion, the ordinary meaning must fit in the context and the treaty object and purpose, otherwise, it should be tailored to fit in.[209] However, I argue that the employed terms in the treaty are the main sources of the intents of the parties. There is no a direct indication of the intents of the parties in the treaty "object and purpose". Treaty object and purpose must come as a second step to affirm an ordinary meaning, not to change or modify it.

Tribunals may rely on the prior tribunals' interpretations of a particular standard of protection when this standard is a term of art. The treaty parties use this term because it has its known meaning in a specific field. It is reasonable that the parties predict the usual meaning for this term.[210] Precedents may help in determining the ordinary meaning of a term of art. However, arbitral tribunals carefully analyze the decisions

289 (Oxford University Press, kindle edition, 2014).
[204] *See* Asian Agricultural Products Ltd v. Sri Lanka., ICSID Case No. ARB/87/3 Final Award, paras 47-53 (June. 27, 1990) 4 ICSID Rep 246, (1990).
[205] *See* YEN, *supra* note 58, at 48.
[206] *See* GARDINER, *supra* note 110, at 190.
[207] *See id*. at 177.
[208] *See* YEN, *supra* note 58, at 46.
[209] *See id.*
[210] *See id*.

and the awards of each other to ground their own decisions, not to find the ordinary meaning of a term.

Because of the generality of the investment treaty terms, some arbitral tribunals have used the ordinary meaning in conflicting ways. Consequently, they judge differently in same kind of disputes, which resulted in contradictory decisions. Some tribunals depend on the textual reading to adopt the broad meaning of the term. This adoption based on an assumption that the parties have not expressly provided any limitations to the generality of this term. For example, arbitral tribunals used to apply MFN clauses to the substantive provisions only, without the procedural provisions in BITs.[211] In *Maffezini,* based on the open worded MFN clause that allows its application to "all matters", the tribunal applied it to dispute settlement provisions. The tribunal adopted an implicit interpretation that excluded any restrictions on the meaning of the MFN clause because the limitations were not expressly provided for in this clause. This allowed the incorporation of procedural provisions from the host state's third-party treaty to the basic treaty to facilitate the access to international arbitration.[212]

On the contrary, the open worded MFN clauses that were examined in *Plama, Salini, Telenor, Berschader, and Wintershall,* are broad enough to be applied to dispute settlement provisions. However, the tribunals rejected this application according the ordinary meaning that should not be based on an assumption.[213]

The determination of the ordinary meaning is a dilemma. The practice of arbitral tribunals approve that the same treaty provision can provide two or more conflicting ordinary meanings. For instance, with respect to the application of the MFN clause to the procedural provisions in BITs, one of the ordinary meanings is based on an assumption and the implicit consent of the pretties to the BIT.[214] This assumption is that the open worded clause should be applied on its generality, since the parties implicitly have agreed upon the broad scope of the application. On the contrary, the

[211] *See* Zachary, *supra* note 74, at 101-105.
[212] *See* Emilio Agustín Maffezini v. The Kingdom of Spain., ICSID Case No.ARB/97/7, Decision on objections to jurisdiction, (Jan. 5, 2000) 5 ICSID Rep 396, paras. 27-28 (2002).
[213] *See* STEPHAN W. SCHILL, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW, 173-175 (Cambridge University Press, 2009).
[214] *See* Case Law *infra* Part III.A.1.

other ordinary meaning is based on the explicit consent of the parties not on an assumption.[215] Arbitral tribunals who adopted this ordinary meaning refused the application of this clause to the procedural matters in BITs because the two parties had not explicitly provided their consent to this broad scope of application.

Moreover, the MFN clause is a term of art in international investment law and has its ancient interpretation before the *Maffezini* case. The treaty parties have used this clause because of its well-known interpretation and content, not to redefine its scope of application according to the foreign investors' desires. The determination of treaty obligations should be based on explicit evidence not assumptions. Adjudicators cannot use the silence of a clause to interpret it in a manner that modifies or expands the scope of its application and broadens the jurisdiction of arbitral tribunals.

I believe that the natural and ordinary meaning of the texts is the basis of interpretation. However, the ordinary meaning of a treaty provision should not be determined in the abstract, but in the context of the terms and in the light of the object and purpose of the treaty.

c. The Context:

Article 31 (1) does not allow the determination of the ordinary meaning independently of the whole treaty. The treaty terms have to be interpreted in the context of the whole treaty, so adjudicators have to look at the treaty as a whole. All the elements of the context specified in this Article are connected directly or indirectly to the treaty. These elements are:[216]

- The treaty text, including its preamble and annexes
- Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

[215] *See* Case Law *infra* Part III.B.1.
[216] Vienna Convention on the Law of Treaties art 31, *supra* note 165.

- 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.

With respect to international investment arbitration, arbitral tribunals rely on the text, preamble and annex to identify and understand the context of the treaty provisions. These tribunals rarely rely on the other two means, related agreements and instruments, because of the unavailability of these means.[217]

The Permanent Court of International Justice asserted that treaty words obtain their meaning from the context of their use, and the context is of the same importance of the linguistic meaning in determining the correct meaning of the treaty terms.[218] The entire terms of the treaty have to be taken into account as a context this includes the preamble and annexes.[219] Even the title of a treaty has to be taken into account as a context.[220]

This requires also a comparison between the meaning of a term, a phrase or a provision and same use of it in elsewhere in the treaty. The understanding of the consequences of the same treaty terms illuminates the ordinary meaning of these terms.[221] The analogues wording of a relevant treaty assists in determining the textual interpretation of the terms of the treaty.[222]

The preamble of the international investment treaty may explicitly state the aim and purpose of this treaty, which illuminates the context of the whole treaty. The preamble of the BITs always reflects the mutual agreement of the treaty parties to promote trade and protect investments that are made by the nationals of one contracting party in the

[217] *See* YEN, *supra* note 58, at 51.
[218] *See* Competence of the Int'l Labour Org. in regard to Int'l Regulation of Conditions of Labour of Persons Employed in Agriculture, Advisory Opinion, 1922 P.C.I.J. paras 24-28 (ser. B) No. 2 (Aug.12, 1922).
[219] *See* VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY, *supra* note 182, at 543.
[220] In Oil Platforms (Islamic Republic of Iran v. United States of America). The ICJ held that: "For the meaning of the word 'commerce' in a bilateral treaty concluded by Iran and the US, the Court turned, inter alia, to the actual title of treaty which referred rather broadly to 'economic relations' and thereby suggested a wider reading of the term." See Oil Platforms (Iran v. U.S), Decision on Jurisdiction, 1996, I.C.J. 803, para 47 (Dec. 12).
[221] *See* VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY, *supra* note 182, at 543-545.
[222] *See*, Aegean Sea Continental Shelf Case (Greece v Turkey), Decision on Jurisdiction, 1978 I.C. 3, para 374 (Dec.19).

territory of the other contracting party.[223] The treaty provisions, preamble and annexes consist the context of the any BIT. The context reflects the textual approach of interpretation. It serves as a mean to confirm the intended meaning or to help in the selection of one of the competing ordinary meanings.

d. The Object and Purpose of the Treaty:

According to Article 31 (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 the light of its object and purpose"[224]. The VCLT did not define neither the content of the treaty object and purpose nor its elements. The treaty object and purpose require discussing not only the method of ascertaining them but also the priority that should be given to them in the process of treaty interpretation.

The provisions of some BITs explicitly indicate treaty object and purpose. However, many of these BITs lack a clear "object and purpose", which make it difficult to determine this interpretive element.[225] Other BITs have no single object and purpose, but many different or may be conflicting "objects and purposes".[226]

The treaty object and purpose are not an independent mean of interpretation, there is an inextricable relation between it and the ordinary meaning.[227] This mean reflects the

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[223] *See* Rights of Nationals of the United States of America in Morocco, Judgment, France v. U.S., 1952 I.C.J. 176. at 26 (Aug. 27).
In the analogues wording of the relevant treaty, the ICJ asserted that.
The same contrast of wording can be observed in Article 18 of the General Treaty of Peace, which, in paragraph 2, asks the Joint Frontier Commission to 'delimit the frontier line in the areas not described in Article 16 of this Treaty', while providing in paragraph 4, that 'it shall determine the legal situation of the islands and maritime spaces'. Honduras itself recognizes that the islands dispute is not a conflict of delimitation but of attribution of sovereignty over a detached territory. It is difficult to accept that the same wording 'to determine the legal situation', used for both the islands and the maritime spaces, would have a completely different meaning regarding the islands and regarding maritime spaces.

[224] Vienna Convention on the Law of Treaties art 31, *supra* note 165.

[225] *See* YEN, *supra* note 58, at 62.

[226] *See* Appellate Body Report, US Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R. para 17 (Oct. 12, 1998) (adopted 6 Nov 1998). The Appellate Body held that "the Panel failed to recognize that most treaties have no single, undiluted object and purpose but rather a variety of different, and possibly conflicting, objects and purposes. This is certainly true of the WTO Agreement."

[227] *See* 47 RUTH SULLIVAN, ON THE INTERPRETATION OF TREATIES: THE MODERN INTERNATIONAL LAW AS EXPRESSED IN THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES, 204 (Ulf Linderfalk. et al. eds., 2010), at 204.

teleological approach of interpretation that ascertain the general object and purpose of the treaty. The process of interpretation requires a link between the purpose of the treaty and its text. Therefore, if the texts of the treaty constitute a single object that aims to achieve a specific purpose, the interpretation of these texts has to be harmonized with the object and purpose of this treaty. This relationship between the ordinary meaning and the treaty object and purpose would prevent treaty interpretations that are incompatible with the correct meaning of the texts. Where the contractual and consensual elements are clear according to the text of the treaty, the treaty object and purpose are considered a crucial element in the treaty interpretation. However, this comforting picture of international treaties does not exist in international investment law. Usually contractual and consensual elements are not clear in BITs and both host states and foreign investors invoke contradictory objects and purposes.

The treaties' subject and purpose can be expressed in the text, such as Article 1 of the Charter of the Untied Nation.[228] In addition, the kinds of some treaties may be helpful in determining the object and purpose. For example, the object and purpose of the boundary treaties is "stable and final boundaries".[229]

The preamble of a treaty regularly includes the treaty purpose as stated by the parties. For example, the ICJ in the Rights of Nationals of the United States of America in Morocco case affirmed that:" the purposes and objects of this Convention were stated in its preamble"[230].

In international investment arbitration, some tribunals rely on the title or the preamble to determine the treaty object and purpose, which is always, promote and protect foreign investments.[231] This has become a usual assumption for the investment treaties. The problem here is that some of these preambles are very carefully negotiated, and others just copied and pasted.[232] Moreover, the title or the preamble is not the

[228] *See* VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY, *supra* note 182, at 546.
[229] *See id.*
[230] *See* Rights of Nationals of the United States of America in Morocco, Judgment, France v. U.S., 1952 I.C.J. 176. at 196 (Aug. 27).
[231] *See* YEN, *supra* note 58, at 63.
[232] *See* GARDINER, *supra* note 110, at 186.

appropriate place for stating treaty obligations, unlike the treaty provisions or annexes.[233]

The tribunal in *SGS v. Pakistan*, for example, asserted that a treaty interpreter must give effect to the subject and object that projected by the treaty as whole. The tribunal ascertained the object and purpose, in the first instance, from the text of the BIT.[234] In the same vein, the tribunal in *Philippe Gruslin v. Malaysia*, analyzed both the preamble and the substantive articles of the treaty to determine the object and purpose of the treaty.[235]

Some tribunals simply interpret the provisions of a treaty based on its purpose and subject, without any references or indications to how the tribunal reached this purpose and subject. For example, in the *Sedelmayer (Franz) v. Russian Federation*, the tribunal concluded that the aim of the treaty is to promote the investments, as so far as possible, in the two parties. Based on this conclusion, the tribunal justified the granting protection to investment that corresponds to the previous purpose.[236] Similarly, in *Saba Fakes v. Republic of Turkey*, the tribunal stated the phrase "the object and purpose of investment protection treaties" in general, without any further elaboration. Based on this ungrounded treaty purpose, the tribunal avoided the application of a BIT provision that requires the compliance of investments with the host state's domestic laws to be considered investments under the BIT. The illegality of investments, according to the

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[233] *See id*.

[234] *See*, *SGS* Société Générale de Surveillance SA v. Islamic Republic of Pakistan, ISCID Case No. ARB/01/13, Decision on Objections to Jurisdiction, para 165(6 Aug 2003) 8 ICSID Rep 406 (2005).

[235] *See* Phillipe Gruslin v. Malaysia , ICSID Case No. ARB/99/3, Award, paras. 13.8 - 13.9 (27 Nov 2000).

The tribunal held that:

13.8 The meaning of investment in Article 10 is informed by the stated objects of the IGA as expressed in its preamble (see para 9.1 above) by reference to the creation of favourable conditions for greater economic co-operation for investments by nationals of one party in the territory of the other.

13.9 Plainly this objective is carried through by the substantive articles. Article 2 reflects the preamble's promotion of investment in the territory of one party by nationals of the other contracting party. Article 3 deals with investments made within the territory by nationals of the other contracting party. Each of Articles 4, 5, 7, 8 and 12 also is predicated on the same subject matter of investments by nationals of one state party in the territory of the other party. In this context of the definitions of Article I, it is clear to the Tribunal that the concept of investment is to be read as confined to the same defined subject matter of investments by nationals of one contracting party in the territory of the other.

[236] *See* Sedelmayer v. Russian Federation, Award, SCC, Case No 106/1998, IIC 106, 59 (July.7, 1998).

tribunal, denies the substantive protection of the BIT and the run counter to the previous purpose.[237]

The subject and purpose in BITs is connected with the interests of the parties. In multilateral treaties the "subject and purpose" does not related to a specific interest of the parties. Therefore, this mean of interpretation may become less important in interpreting the multilateral treaties with the non-existence of a specific "object and purpose" of the parties.

With respect to the priority that should be given to the treaty object and purpose in treaty interpretation, they serve to affirm the ordinary meaning or the intentions of the treaty parties. Therefore, the treaty "object and purpose" is not a stand-alone mean of interpretation. It serves to confirm the ordinary meaning of the texts that reflects the intentions of the treaty parties. Moreover, the objects and purposes do not contain direct obligations. Investment treaties are characterized by the generality and ambiguity of their language, so treaty "object and purpose" should be elaborated comprehensively in the decisions of the arbitral tribunals. The merely mention of the object and purpose of a treaty to prefer a meaning to another would lead to wrong outcomes.

- **The Multiple Purposes of a Treaty:**

With the generality and ambiguity of the treaty provisions and the lack of consensual elements, adjudicators may find more than one purpose to the same treaty. Moreover, with the detailed treaty provisions some tribunals examine only the purpose of the provision that govern the dispute in question.

In *ADF Group, Inc. v. US*, the arbitral tribunal affirmed the NFTA's objectives in Article 201(1) and its preamble are on a high level of generality that not suitable with the dispute in question. The tribunal found that the particular detailed provision in its particular place of the treaty functions as *lex specialis,* such as national treatment, most-favored nation treatment and transparency. The tribunal held that "the object and

[237] *See* Saba Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20, Award, (July.14, 2010) ICC 439, para.119 (2010).

purpose of the parties to a treaty in agreeing upon any particular paragraph of that treaty are to be found, in the first instance, in the words in fact used by the parties in that paragraph".[238]

The previous opinion raises many concerns. Adjudicators will find uncountable purposes related to the same treaty. The whole purpose of the treaty is connected to specific interests of the parties, what if the new purposes affect some of these interests. The purposes of the same provision can vary from a treaty party to another. For example, the MFN clause aims to protect the treaty rights of the foreign investor. This investor may consider the purpose of this clause is to protect his right by facilitating access to the international arbitration. On the contrary, the host states believe that the MFN clause aims to prevent discrimination in relation to the substantive treatment and access to international arbitration is against their interest. Since they may be held responsible and being sanctioned. How could we balance between these contradictory purposes?

Another opinion calls for the balancing between the competing purposes of the same treaty.[239] In interpreting investment treaties, according to this opinion, tribunals have to figure out the consequences of the excessive protection of the foreign investors.[240] This excessive protection, affect badly the promotion of the investments in host states.

In *Eureko B.V. v. Republic of Poland*, a dissenting opinion shouts to balance between the competing purposes of the treaty. This opinion calls the tribunal to consider the effects of the investors' excessive protection and its impact on the promotion of investments. The opinion asserted that opining a wide door before investors to switch their disputes from the normal jurisdiction of the commercial arbitration or domestic courts to international investment arbitration would hamper the promotion of investments. This opinion added that the arbitral tribunals created dangerous precedents that provide privileges to the foreign investors. [241]

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[238] *See* ADF Group, Inc. v. US, ICSID Case No. ARB (AF)/00/1, Award (Jan.9, 2003) 6 ICSID Rep 470 para 147 (2004).
[239] *See* SUREDA, *supra* note 196, at 27.
[240] *See id.*
[241] See *Eureko B.V. v. Republic of Poland* , Partial Award and Dissenting Opinion, (Agu. 19th, 2005) IIC 98, para. 11(2005).

However, the general rule of interpretation refers to a single overarching purpose as a *telos* to the whole treaty.[242] In the case of the multi- purposes treaties, adjudicators have to take into account the various purposes to reach one single purpose of the treaty to best confirm the ordinary meaning, regardless the consequences of the adopted interpretation. In other words, the consequences of interpretation are not an element of the interpretation process. International arbitral tribunals must pay great attention to the consent of the contracting states and the explicit meaning of the terms of the treaty. This would demonstrate a proper administration of international justice with respect to interpretation of the treaties. Adjudicators have to be mindful of Sir Ian Sinclair's words of the "risk that the placing of undue emphasis on the 'object and purpose' of a treaty will encourage teleological methods of interpretation which, in some of its more extreme forms, will even deny the relevance of the intentions of the parties"[243].

I believe that the treaty object and purpose, as a guidance for interpretation does not mean to consider other affected interests. According to Art 31 (1) of the VCLT, any ambiguity in the language should be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms ... in the light of its object and purpose". We cannot divided the object and purpose of a treaty into many objects purposes according to the provisions of the treaty. We must read the treaty in a manner that gives effect to the object and purpose of the whole BIT. Article 31 of the VCLT speaks of one singular "object and purpose". It is unacceptable to say that the singular "object and purpose" is related to a single provision. This contradicts Article 31 of the VCLT that speaks of the entire treaty as relevant to interpretation not its individual provisions.

e. Subsequent Agreement and Subsequent Practice:

Subsequent agreement and subsequent practice, with other elements According to Articles 31(3) of the VCLT, constitute the context for the purpose of treaty interpretation. Subsequent agreements should be at the same rank of the interpreted treaty. Since, "the external means of interpretation must be of equal rank of the object

[242] *See* VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY, *supra* note 182, at 546.
[243] *See* Sir Ian Sinclair, The Vienna Convention on the Law of Treaties, 130 (2ed edition, Manchester University Press, 1984).

of interpretation"[244]. The subsequent practice of the parties related to the implementation of a treaty is an objective evidence of the mutual understanding of this treaty.[245] This subsequent practice should be an element of interpretation insofar it consists a sufficient, consistent and notable pattern of a state behavior related to the treaty in question.

Both agreements should be between the treaty parties and "regarding to the interpretation of the treaty or the application of its provisions"[246]. Some arbitral tribunals examine the practices of the parties that occurred during the ratification process of the BIT.[247] However, this is not considered a practice for the purpose of interpretation that requires the practice to be subsequent and related to the interpretation or the application of the treaty provisions.

Many arbitral tribunals depend on the practice of the treaty parties to interpret BITs without any elaboration to the status of this practice according to the VCLT. In *National Grid PLC v. Argentine Republic*, the tribunal examined the Argentine and Panamanian exchanged diplomatic notes with an "interpretative declaration" to determine whether the MFN clause should be applied to dispute settlement provisions or not.[248] The tribunal asserted, "The review of the treaty practice of the State parties to the Treaty with regard to their common intent is inconclusive"[249]. The practice lacks the qualifications of subsequent practice under the VCLT. It is not about the application of the BIT in the question. It did not establish any agreement between the parties regarding to the interpretation. In general, this practice does not reflect any understanding of the parties to the provisions of the BIT. Moreover, states negotiate and draft investment treaties as separated deals between two parties; they are governed by the principle *pacta sunt servanda*. When tribunals examine the practice of a state related to other BIT, they apply subsidiary means related other treaties.[250]

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[244] *See* VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY, *supra* note 182, at 554.
[245] *See id.*
[246] Vienna Convention on the Law of Treaties art 31, *supra* note 165.
[247] See, for example, CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/18, Award (May. 12, 2005) 7 ICSID Rep 492, para. 57-65 (2005).
[248] *See* National Grid PLC v. Argentina, IIC 178 (2006), Ad Hoc Tribunal (UNCITRAL), Decision on Jurisdiction, para 85(June.20, 2006).
[249] *Id.*
[250] *See* YEN, *supra* note 58, at 54.

Article 31 (2) and (3) requires qualifications for these agreements and practices to be relevant. First, an agreement that signed by all of the treaty parties and related to the BIT in question. Second, any instrument related to the treaty, concluded by one of the parties, and accepted by the others. Third, subsequent agreements or practices between the parties related to the treaty. Adjudicators who rely on the previous materials, they rely on clear interpretive materials according to the VCLT.

I believe that each BIT stands alone as a separated agreement between the two states without any contemporary or subsequent agreements. Therefore, any BIT between one of the parties and a third state is not relevant, since the BIT in question is the BIT that should be interpreted not the host state's third-party BIT. Similarly, the practices should be between the parties to BIT, otherwise it would fall under Article 32 of the VCLT that may be taken into account as a common intent of the parties. Subsequent agreements and practices as elements of interpretation are well established in the practice of international courts and they are important elements of interpretation especially in the early international jurisprudence.[251] However, in international investment treaties, states rarely have subsequent practices or subsequent agreements under the concept that is stated in Article 31 (3) of the VCLT.[252]

f. Any Relevant Rules of International Law Applicable in the Relation between the Parties:

The relevant rules of international law are another element that has to be taken into account with the context to interpret the treaty provisions. This mean refers to the international legal system as a whole as part of the context of every treaty subjects to international law.[253] By this mean, the VCLT created the foundation of a systematic approach to the interpretation of international treaties and whatever their subject matter, treaties are a creation of the international law and their operation is predicated upon that fact.[254]

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[251] *See* VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY, *supra* note 182, at 555.
[252] *See id*.
[253] *See id*. at 560.
[254] *See id.*

Under this mean, the relevant rules can be existed in all the primary sources of international law.[255] According to Article 38 (1) of the ICJ, these primary sources are conventions, international customary rules and the general principles of law recognized by civilized nations.[256]

This interpretational mean refers to the international legal system as a single system. Moreover, it mitigates the effects of what the ILC called the fragmentation of international law, and promotes its systemic integration.[257] Based on this mean, treaty interpretation transgresses all specialized sub-regions of international law, such as international investment law, environmental law, trade law, international criminal law, law of the sea and human rights law.[258]

The ILC's Study Group depended of the decision of the ICJ in *oil platform* case to shed the light on the role of Article 13 (3) (c) in treaty interpretation. The court invoked Article 13 (3) (c) to interpret the treaty provisions and asserted that the treaty in question cannot work independently from the rules of international law on the use of force, even to limit the context. The court continued, "The application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court".[259]

Only the rules of international law that are applicable in the relations between the parties, can be used for the purpose of interpretation. In *Maffezini v. Spain*, [260] the tribunal examined the provisions of the ICSID convention to determine whether the basic BIT requires the exhaustion of local remedies before access to international arbitration or not. The tribunal asserted that the relevant articles of the ICSID convention reverse the traditional international rules. The tribunal interpreted the BIT provisions to determine whether Spain has conditioned its acceptance to the tribunal's jurisdiction on the exhaustion of local remedies or not.

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[255] *See* YEN, *supra* note 58, at 55.
[256] *See* Statute of the International Court of Justice, Art 38, date in force Oct.24, 1945, 479 U.N.T.S. 35.
[257] *See* VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY, *supra* note 182, at 561.
[258] *See id.*
[259] Oil Platforms (Iran v. U.S), Decision on Jurisdiction, 2003, I.C.J. 161, (Nov.6, 2003),
[260] *See* Emilio Agustín Maffezini v. The Kingdom of Spain., ICSID Case No.ARB/97/7, Decision on objections to jurisdiction, (Jan. 5, 2000) 5 ICSID Rep 396, paras. 21-23. (2002).

Some tribunals relied on the general rules of international law to interpret the treaty provisions and determine the obligations of the parties. For example, in *Noble Ventures, Inc. v. Romania*, the tribunal relied on one of the general rules to interpret the Umbrella clause. The Tribunal asserted, "The well-established rule in general international law that in normal circumstances per se a breach of a contract by the State does not give rise to direct international responsibility on the part of the State."[261]

Some tribunals relied on customary international law as relevant rules to interpret treaty provisions. For example, in *Phoenix Action, Ltd. v. Czech Republic*, [262] the tribunal depended on the principle of good faith as a general principle of customary international law, not as a mean of interpretation, to interpret the term "investment". The tribunal found that the investments that are protected internationally under the BIT are only those are made in compliance with the principle of good faith and do not attempt to misuse the domestic legal system. Similarly, the NAFTA Free Trade Commission asserted that customary international rules are relevant in the interpretation of the NAFTA's standards.[263]

Some tribunals misapply the "relevant rules of international law" in the treaty interpretation. They skip the logical sequences of the steps of the treaty interpretation process, which requires a search for the ordinary meaning in the light of the context, object and purpose of the treaty.[264] For example, the tribunal in *Alex Genin and others v. Estonia*, skipped all the means of interpretation and immediately equated between the treaty terms and international customary rules, to interpret a provision that grant investors fair and equitable treatment.[265]

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[261]Noble Ventures Incorporated v Romania, ICSID Case No ARB/01/11, IIC 179 (2005), Award, (Oct.5,2005) para 53, (Oct.12,2005).
The tribunal emphasized that:
This derives from the clear distinction between municipal law on the one hand and international law on the other, two separate legal systems (or orders) the second of which treats the rules contained in the first as facts.". However, in para 55, it concluded, "An umbrella clause, when included in a bilateral investment treaty, introduces an exception to the general separation of States obligations under municipal and under international law.

[262] *See* Phoenix Action, Ltd. v. Czech Republic, ICSID Case No. ARB/06/5, IIC 367 (2009), Award, (Apr.9, 2009) (Apr.15, 2009).

[263] *See* Notes of Interpretation on Certain Chapter 11 Provisions, N.A.F.T.A Free Trade Comm'n, 267.B.2 (July.31, 2001).

[264] *See* YEN, *supra* note 58, at 60-61.

[265] *See* Alex Genin and others v. Estonia, ICSID Case No.ARB/99/2, Award (June.25, 2001)17 ICSID Rev-FILJ 395 para. 367 (2002).

The role of "the relevant rules of international law" is to affirm or clarify the ordinary meaning of the treaty terms. Where there are applicable rules between the parties such as conventions, international customary rules and the general principles of international law, adjudicators must examine these rules to determine the correct interpretation. Searching the various binding rules and commitments of the parties is helpful for the reasonableness of the interpretation of the BITs. The rules of public international law that have been developed over centuries will be an effective guidance to the interpretations of these BITs.

g. A Special Meaning Instead of Ordinary Meaning:

A special meaning may adopted to a particular treaty term when anything relevant to the treaty and its parties indicates that they had intended to provide this special meaning to this term. Both the ordinary and special meaning might be titled as methods that indicate to the adjudicators how to deal with the interactions between evidence.[266] Article 31 (4) of VCLT is an exception of the adoption of the ordinary meaning that governed by Article 31 para1. This exception deals with the cases when the parties replace the ordinary meaning, implicitly or explicitly, by a special one.[267]

Article 31 (4) includes two cases according to which adjudicators have to adopt the special meaning. The First, when the text and the context of a treaty have technical meaning because of a specific field that is covered by this treaty.[268] In this case, it seems that the interpreters try to give the treaty provisions their ordinary meaning in the light of the field that is covered by this treaty. The second, when the treaty parties intended to give the term a special meaning instead of its ordinary meaning.[269] This special meaning, as a method of interpretation, looks for the intentions of the parties, rather

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The tribunal held that "while the exact content of this standard is not clear, the Tribunal under stands it to require an "international minimum standard" that is separate from domestic law, but that is, indeed, a minimum standard. Acts that would violate this minimum standard would include acts showing a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith".

[266] *Summary Records of the 726th Meeting*, [1964] 1 Y.B. Int'L L.Comm'n, at 1179 U.N. Doc. A/CN.4/SR.726/1964.

[267] *See* VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY, *supra* note 182, at 568.

[268] *See id.*

[269] *See id*. at 569.

than what is the text expresses. It looks for a meaning that is different from the ordinary meaning of the term. The burden of proof that the parties had intended to provide a special meaning to a treaty term lies on the party who invokes the existence of this special meaning and the mutual intents towards this meaning. The permanent Court of International Justice affirmed this point in the Eastern Greenland case when it held that:

> [T]he geographical meaning of the word "Greenland", i.e. the name which is habitually used in the maps to denominate the whole island, must be regarded as the ordinary meaning of the word. If it is alleged by one of the Parties that some unusual or exceptional meaning is to be attributed to it, it lies on that Party to establish its contention.[270]

Article 31 (4) of the VCLT expressly asserts that the special meaning prevails over the ordinary meaning, if it is established that the parties so intended. This proves the fundamental role of the parties' intents in treaty interpretation. This article implicitly asserted that the ordinary meaning of the text has the priority in treaty interpretation, since the ordinary meaning is the reflection of the intents of the parties, and these parties can adopt another meaning instead of this ordinary meaning. Therefore, the interpretation of the treaty terms should be consistent with the intent of the parties as it appears from the treaty provision.

2. The Supplementary Means of Interpretation According to Article 32 of the VCLT:

Article 31 of the VCLT uses exhaustive means of interpretation as "a general rule" of interpretation. On the contrary, Article 32 of the VCLT uses what might be called non-exhaustive method of enumeration under the name of supplementary means of interpretation. This leaves a discretionary power to adjudicators to use "beside the preparatory work and the circumstance of the conclusion of a treaty, also other evidences and methods"[271]. The using of the word "including" in Article 32 indicates that the preparatory work and the circumstance are examples, and supplementary means, in this Article, is not an exclusive list.

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[270] Exchange of Greek and Turkish Populations (Greece. V. Turkey),1925 Advisory Opinion, P.C.I.J. (Ser.B) No.10, para 16 (Feb. 21).

[271] *Summary Records of the 726th Meeting*, [1964] 1 Y.B. Int'L L.Comm'n, at 1179 U.N. Doc. A/CN.4/SR.726/1964.

Consequently, the purpose of applying these means is: (1) to confirm the meaning that resulting from the application the general rule of interpretation under Article 31 of the VCLT, or (2) when the application of this general rule leaves the meaning ambiguous or obscure, or resulted in manifestly absurd or unreasonable meaning.[272] Under Article 32 of the VCLT, adjudicators can apply the supplementary means, but they are not obliged to apply these means when the application of general rule resulted in a clear meaning.[273]

a. The Preparatory Work of a Treaty:

There is no a recognized definition of the preparatory work (*travaux preparatoires*) in international law.[274] Moreover, there are no rules according to which the adjudicators can determine the kind of materials that are qualified as a preparatory work, neither how far back in the history of a treaty can the adjudicators go to look for a preparatory work.[275] Arbitral tribunals use preparatory work as a resource of clarification information that affirms a meaning that has been accepted, at least implicitly, by the treaty parties.[276] These tribunals depend on anything that helps to determine the meaning of a treaty provision, since the purpose of the preparatory work, as a mean of interpretation, is to discover what is the parties had intended to in their treaty.[277]

The materials that can be a preparatory work must be able to be objectively to assist adjudicators. These materials must be part of the outside world of the treaty. [278] This includes all documents relevant to the treaty from its preparation to its conclusion.[279] For example, memoranda, drafts, commentaries, other statements and observations transmitted by states to each other.[280]

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[272] *See* Vienna Convention on the Law of Treaties art 32, *supra* note 165, art 32.
[273] *See* Summary Records of the 726th Meeting, *supra* note 271.
[274] *See* VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY, *supra* note 182, at 574.
[275] *See id.*
[276] *See* Malgosia Fitzmaurice, *Treaty Interpretation*, *20* European Journal of International Law, 952, 955, (2009).
[277] *See* VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY, *supra* note 182, at 574.
[278] *See id.*
[279] *See id*. at 575.
[280] *See id*.

b. The Circumstances of the Conclusion of a Treaty:

According to Article 32, the circumstance of the conclusion of a treaty, along with preparatory work, is supplementary means of interpretation.[281] This Article allows adjudicators to take into account the circumstance of the conclusion of a treaty in interpreting its provisions. This includes the contemporary circumstances and the historical context of the conclusion of the treaty.[282] The factual circumstances present at the time of the treaty conclusion and the historical background of the treaty, reflect what was presented in the minds of the treaty parties at the time of the treaty conclusion.[283]

The WTO Appellate Body in several occasions referred to the circumstances of the conclusion of a treaty according the meaning in Article 32 of the VCLT. The Appellate Body asserted that:

> [I]n the light of our observations on "the circumstances of the conclusion" of a treaty as a supplementary means of interpretation under Article 32 of the Vienna Convention. We consider that the classification practice in the European Communities during the Uruguay Round is part of "the circumstances of the conclusion" of the WTO Agreement and may be used as a supplementary means of interpretation within the meaning of Article 32 of the Vienna Convention.[284]

The adjudicators have to be aware of the events, facts and circumstances of the conclusion or drafting history of the treaty. It is not acceptable to separate between the provisions of the treaty and these circumstances nor to neglect the relationship between these provisions and the external conditions of the treaty parties.

The value of the circumstances of the conclusion of a treaty, and its formation, as a supplementary mean of interpretation should be subjected to certain qualifications. The VCLT did not designate these qualifications. Consequently, adjudicators, in

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[281] *See* Vienna Convention on the Law of Treaties art 33, *supra* note 165.
[282] *See* VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY, *supra* note 182, at 578.
[283] *See id.*
[284] Appellate Body Report, *European Communities* – Customs Classification of Certain Computer Equipment, WT/DS62/AB/R, para 92 (June.5, 1998) (adopted 22 June 1998).

international investment arbitration, are the higher power that determines what should be considered as circumstances of a conclusion of the treaty and the value of these circumstances as a supplementary mean of interpretation. Adjudicators determine this on case-by-case bases.

3. The Interpretation of the Silence of a Treaty Term:

Adjudicators may find a treaty provision that is vague, ambiguous or silent to the extent that it does not give a determinate answer to the question of whether its application covers a particular issue or not. The interpretation of this provision can give conflict answers to the question of whether the parties to a treaty had included or excluded that issue from the scope of the provision's application. How should we interpret this provision? For example, if the parties to a treaty intended to apply a provision to a specific issue, should this provision explicitly defines this issue as a subject matter of its application. In this case, this treaty provision will not be applied to any issues except these that are defined by the provision, regardless the broad wording of this clause or its generality. Alternatively, if the parties to a treaty intended to exclude an issue from the scope of the application of a treaty provision, should this provision explicitly excludes this issue from the scope of its application. In this case, the treaty provision will be applied to all the issues that are subjected to the treaty except these issues that the provision has explicitly excluded from the scope of its application.

This problem raises the question of who should bear the risk of the silence of the treaty provision. Should this silence be interpreted in favor of the host state or in favor of the foreign investors? There are two conflicting answers to this question.

First, the doubt or ambiguity in treaty provisions should be interpreted in favor of the host state rather than foreign investors. This opinion assumes that governments are held with the standards of transparency and responsibility in their relations with the foreign investors.[285] In contrast, the other opinion considers that the broad wording of the treaty

[285] *See* T. W alde, Separate Opinion appended to Award in International Thunderbird Gaming Corporation v. United Mexican States, asserted:
[T]he main principles underlying the NAFTA (preamble Article 102) as developed in the most recent and authoritative jurisprudence by arbitral tribunals require that, in case of doubt, the risk of ambiguity of a governmental assurance is allocated rather to the government than to a foreign investor, and that the

provision is a presumption in favor of the protection of the foreign investors. According to this opinion, adjudicators should interpret the jurisdictional provisions or the standards of states liability in favor of the foreign investors. Since this would elevate the systematic protection of foreign investors. This opinion equals between the investors' interests and human rights within any state with respect to the priority governmental decision-making.[286] Others call for limitations to the protection of the foreign investors based on the principle of minimum limitation of the state sovereignty. According to this opinion, this minimum limitation should be the starting point of the interpretation of any ambiguous provision and this is the ordinary meaning that the generality of any treaty cannot override it.[287]

The application of MFN clauses to dispute settlement provisions raises the same debate. With the broad wording of the MFN clause that includes phrases like "all matters or MFN treatment", some arbitral tribunals applied this clause to dispute settlement provisions in BITs and others refused this application.[288]

I believe that the problem is not about who should bear the risk of the silence of the treaty provision; it is about the correct interpretation of the provision. Adjudicators must not interpret the treaty provisions by presumptions in their minds. They have to examine all the means of interpretation to find the real and correct meaning of the treaty provisions. The interpretation of a treaty is to determine the treaty rights and obligations of the parties, not the renegotiation of this treaty. Adjudicators should follow the logic sequence of the application of the rules of interpretation to find the correct meaning of the terms of the treaty.

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government is held to high standards of transparency and responsibility for the clarity and consistency in its interaction with foreign investors.
International Thunderbird Gaming Corporation v. Mexico, Award, IIC 136 (2006). UNCITRAL para 3324 (Jan.26, 2006).

[286] *See* GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW, 139 (Oxford Monographs in International Law, 1st edition, 2007).
Harten asserted,
[B]ecause investment treaties use such broad language to define core concepts, the presumption in favor of investment protection systematically favors an expansive approach to jurisdiction or, in the case of the standards of review, to state liability. This elevates the norm of investor protection in the same way that doctrines of human rights prioritize certain individual rights over those of the state, and the result is to exaggerate the importance of investor protection in relation to the other values and concerns that are at stake in governmental decision-making.

[287] *See* INTERPRETATION IN INTERNATIONAL LAW 32 (Andrea Bianchi et al, eds., Oxford University Press, 1st edition, 2015).

[288] *See* Case Law *infra* Part III. A, B.

4. The Hierarchical Order among the Means of Interpretation in the VCLT:

The hierarchical preference of the means of interpretation is another dilemma in the treaty interpretation. The issue of the determinate significance of the various means of interpretation has not been settled, at least, in a satisfactory way whether before or after the codification of the VCLT, which resulted in a significant amount of debate. Different approaches to interpretation of treaties have been embedded in Articles 31 and 32 of the VCLT. These articles contain ways of weighing and choosing the evidence of interpretation. The evidence of the intentions of the parties can be found in the text of a treaty, preparatory work, preamble and annexes. The evidence of understanding can be found in subsequent agreements after the conclusion of a treaty and the subsequent practices of a treaty. Moreover, there are elements that may affect the understanding of the texts such as the circumstances of a treaty conclusion, the applicable rules of international law and treaty object and purpose. The application of these rules may result in competing interpretations.

Adjudicators usually face contradictory evidence through the application of the interpretation rules. The concluded interpretation for the same text may vary from the application of one rule to another and the nature of the treaty itself would vary. Depending on the text of a treaty, as a source of the intents of the parties, would guarantee the stability to the treaty rights and obligations, whereas, depending on teleological tools of interpretation would develop these rights and obligations.

The application of each rule of the rules of interpretation separately would resulted in conflicting interpretations to the same text. This is what happened with the ICJ in deferent stages of proceedings; it gave different interpretations to the same provision.[289]

[289] *See* Application of the Int'l Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), 2008 I.C.J. (Order of Oct.15); Application of the Int'l Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.) preliminary objections judgment, 2011I.C.J. 140 (Apr.1).

Moreover, the ICSID tribunals interpreted the same provision differently in two cases that were included similar facts.[290]

The ILC, during the codification of the means of interpretation in 1964-1966, was very careful not to prejudice the hierarchy among the means of interpretation. In its 1966 commentary, the ILC explicitly asserted that the order of the Articles 31 and 32 does not mean a hierarchical order to the application of these means. The commission asserted, "The application of the means of interpretation in the article would be a single combined operation"[291] and "all the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation."[292] The ILC added that the division line between the primary means and the supplementary means is not a strict line, and the function of both kinds of means is to "establish a general link between the two articles and maintains the unity of the process of interpretation"[293].

Some argue that the sequence of these rules in Articles 31 and 32 of the VCLT consists a hierarchical order that has to be followed.[294] According to this opinion, tools like ordinary meaning, text, context and purposes are not applied together at the same time. For example, they see that the role of treaty object and purpose is less than searching for the meaning, the role of treaty object and purpose is to confirm this meaning. They see that the VCLT gave the priority to the textual approach.[295]

Others see that all the interpretational means should be considered as unity and complete each other. This opinion sees that the order of Article 31 and 32 as a list does not provides a hierarchical sequence. They affirm that the general rule of interpretation does not include a chronological or hierarchical order among the rules of interpretation. This allows the interpretive process to take place by using any or all of these

[290] *See* Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan, ICSID Case No. ARB/10/1, ICC 964 (2013), Decision on treaty authenticity and interpretation (July.2, 2013). *See* also Sehil Inşaat Endustri ve Ticaret Ltd. Sti.v. Turkmenistan. ICSID Case No. ARB/12/6, ICC 711 (2015), Decision on Jurisdiction, (Feb.13).
[291] Rep. of the Int'l Law Comm'n, 18th Sess, *supra* note 157.
[292] *Id.* at 219, para 8.
[293] *Id.* at 220, para 14.
[294] *See* SUREDA, *supra* note 196, at 21.
[295] *See id.*

interpretive rules simultaneously.[296] In the same vein, the tribunal in *Millicom International Operations BV and Sentel GSM SA v. Senegal*, sees that there is no hierarchical order between Article 31 and 32 of the VCLT and all the means of interpretation "combine with each other and complete each other"[297].

This unresolved question has led to inconsistent interpretations to many provisions in BITs. It leaves adjudicators with a great discretionary power to the extent that the parties to a treaty cannot predict the interpretation of their treaty provisions. Adjudicators determine the applicable rule of interpretation and this rule can vary from a tribunal to another. Then interpretation will not be about the meaning of the text, but about which rule of the rules of interpretation will be applied. This discretionary power is the main reason for a sharp criticism. H. Lauterpacht asserted that:

> … as a rule they (rules of interpretation) are not the determining cause of judicial decision, but the form in which the judge cloaks a result arrived at by other means… it is a fallacy to assume that the existence of these rules is a secure safeguard against arbitrariness or partiality."[298]

Lauterpacht adds that, we should not focus on the criticism of the rules of interpretation or their numbers, but we have to focus on the manner of the application of these rules, the accuracy of a certain rule and the hierarchal order among these rules when all of them should be applied.[299]

Similarly, another opinion compares the rules of interpretation to playing cards. This opinion asserts that the flexibility of the rules of interpretation in the VCLT allows to all the approaches of interpretation to be applied, and these rules can be twisted and bent and the priority can be given according to the preference of the interpreter. This opinion sees that the adopted interpretation relies on which card of the VCLT cards will be selected.[300]

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[296] *See* Rep. of the Int'l Law Comm'n, 18th Sess, *supra* note 157.
[297] *See* Millicom International Operations BV and Sentel GSM SA v Senegal, Decision on Jurisdiction, ICSID Case No ARB/08/20, IIC 450 (2010),para 62 (July.16, 2010).
[298] H. Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 Brit. Y.B. Int'l L. 48, 53 (1949).
[299] *See id.*
[300] *See* INTERPRETATION IN INTERNATIONAL LAW, *supra* note 287, at 44.

Thus, the interpretation rules in Articles 31 and 32 of the VCLT bind the treaty parties, international courts and tribunals. The structure framework of these rules allows for discretion and flexibility to these courts and tribunals in applying these rules.[301]

I argue that the application of the rules of interpretation in the VCLT is compulsory and the full compliance with them will resolve the problems of inconsistent and conflicting interpretations in investor-state arbitration. Neglecting the logical sequence of these rules will create inconsistent interpretations and conflicting decisions in disputes that are governed by the same treaty provisions that have the same wording. The neglect and misapplication of the international rules on treaty interpretation will lead to wrong interpretations.

I believe that the logical sequence of the concepts in Articles 31 of the VCLT reflects the logical and natural progression of the process of interpretation of the treaty. This progression should start with the ordinary meaning of the text, then the context, object and purpose and then any external elements that reflect the intents of the parties. The ordinary meaning that reflects the intents of the parties should prevails over other tools of interpretation. The treaty object and purpose is a second step that affirms the ordinary meaning. Adjudicators should not use the treaty object and purpose as a stand-alone mean of interpretation. The great emphasis on the object and purpose will deny any relevance of the intents of the parties to the interpretation of their treaty. In addition, the supplementary means of interpretation are used only in two cases and for one purpose. They are used to determine the meaning when the interpretation according to Article 31 resulted in either ambiguous or unreasonable meaning. This means that supplementary means are used to confirm the ordinary meaning resulting from Article 31 of the VCLT. Following the logical sequence of the rules of interpretation will led to correct conclusions.

Many arbitral tribunals used the unresolved question of the hierarchical order among the means of interpretation to grant excessive protection to the foreign investors. Tribunals depend on the assumption that the purpose of any BIT is to protect the foreign investors, and the international arbitration will guarantee this protection. These

[301] *See* SUREDA, *supra* note 196, at 75.

tribunals give the priority to many tools of interpretation except the text of the treaty, to expand the application of the MFN clause beyond the ordinary meaning of its wording. They give foreign investors the right to amend the treaty after its conclusion. The contemporary case law in the next chapter will indicate this fact.

D. Conclusion:

In this chapter, I have explored the nature of treaty interpretation, treaty Interpretation according to the subjective and objective approaches of international law, the analysis of Articles 31 and 32 of the Vienna Convention on the Law of Treaties and the arbitral use of these articles to interpret BITs.

In the first section, I have demonstrated how the world of any human or legal person consists of normative universes. These universes structured around the possibility of right or wrong, of lawful or unlawful, of valid or void, or permissible or impermissible. International law is one of these normative universes and it has developed rules that regulate treaty interpretation. These rules of interpretation validate or invalidate certain practices or construct a certain reality. Treaty interpretation operates within this normative universe and within the framework of pre-existing rules that have to be followed. The rules of interpretation determine the way we go about interpretation - or ought to go about it – and this is essential to what can be achieved by arbitral tribunals and *ad hoc* committees. I have distinguished between two different conceptions of interpretation. The first sees interpretation as a process of finding out what the treaty texts mean or what the parties to a treaty want its texts to express. The second sees that interpretation is more than meaning ascertainment. Interpretation, according to the second conception, is a creative act that provides the interpreter with choices and the rules of interpretation are the sources of these choices. I have analyzed the pure theory of law to find out what exactly interpretation can be. According to Kelsen, we cannot use interpretation to create new norms within the legal system or to provide meanings that contradict the interpreted text. The function of interpretation is to discover the meaning from the existing norms. Kelsen refuses to assign a special role to interpretation in the case of legal gaps, since these gaps must not be filled by interpretation. He considers these gabs as a negative norm and interpretation has nothing to do with the non-existence of an obligation.

I have answered the crucial question of whether treaty interpretation is a science or an art. I have indicated the problems with opinion who says that interpretation is an art. This means that achieving certainty in interpretation is a utopian dream. Moreover, the outcomes of any interpretation process will be correct since the results are works of art. In addition, there will be no any rules to determine whether the results of treaty interpretation are correct or wrong. International courts and arbitral tribunals always refer to the rules of interpretation of the Vienna Convention on the law of treaties and this is a sufficient evidence that there is a tendency to highlight the science element in treaty interpretation. The fact that many international courts and arbitral tribunals may or may not correctly apply interpretation rules will not turns the nature of treaty interpretation from a science to an art. However, interpretation is not an exact science, it is still a science requiring the application of certain rules to produce correct results. In addition, science and art are not mutually exclusive. Interpretation is a science, that is, artful. Interpretation requires the application of a set of predetermined rules and the correct application of these rules will result in correct outcomes. Conversely, the neglect or the misapplication of these rules will result in wrong interpretations. This means that the application of a science to some extent needs an art. This truth should not refute the nature of treaty interpretation as a science that regulated by a certain binding rules.

In section two, I have discussed the treaty interpretation from the perspectives of the objective and subjective approaches. I have illustrated that each of them has his different answer to the question of why treaties are binding. These conflicting answers affected the visions of these two approaches in respect of treaty interpretation. However, the subjective and objective approaches affirm the priority of the "ordinary" meaning of treaty provisions, they do not agree on what the ordinary meaning is especially when the treaty provision provides more than one ordinary meanings. This conflict crystalized in the disagreement on the overriding force of the "ordinary meaning". According to the subjective understanding, the original intent of the treaty parties is the primary element of interpretation and overrides the "ordinary meaning" if they conflict with each other. On the contrary, in the objective understanding, "ordinary meaning" is a secondary element of interpretation. The objective understanding gives the priority, in treaty interpretation, to the considerations of good faith, teleology,

reciprocity or justice considerations. Indeed, both approaches have failed to provide a comprehensive solution to treaty interpretation. To follow the subjective approach, we have to exclude any objective elements of interpretation, in the same vein, to follow the objective approach we have to exclude any subjective elements of interpretation. If one of these approaches uses the elements of the other, both of them will be indistinguishable. I concluded that both of them are necessary to determine the proper interpretation of the provisions of BITs. Adjudicators cannot not constantly follow one approach without the other. Adjudicators shift from a subjective approach to an objective approach *vice-versa* and stop only in the point where they find that this interpretation is the reflection of what the parties had consented to. Adjudicators do not characterize their interpretation by anything except that this is what every state had consented to.

In section three, I have explained the functional use of each mean of the means of interpretation in Articles 31 and 32 in the VCLT and the arbitral use of these means. In addition, I have discussed how should arbitral tribunals interpret the silence of treaty provisions, and how should these tribunals follow the logical hierarchical order among the means of interpretation.

I have argued that however, it is difficult to determine a concrete content to "good faith", it applies throughout the whole interpretation process and it works as a general guideline to choose between two or more competing meanings. This element can give effect to interpretation that gives a meaning to a term rather than none. This element also can give effect to interpretation that enables the treaty to have appropriate effects rather than none. Arbitral tribunals usually do not refer to "good faith" as a mean of interpretation. This element of interpretation helped in unifying interpretations in respect of disputes concerning corruption, fraud and misrepresentation in international investment arbitration. I have asserted that some tribunals used this element of interpretation as a blanket authorization to provide one side-oriented interpretation, investors oriented. This is not a stand-alone element of interpretation and the proper use of "good faith" as a tool is to discover the real meaning of term, but using this element to justify an interpretation that goes beyond the ordinary meaning of a text, would lead to wrong interpretation.

With respect to the ordinary meaning, I have argued that it is the starting point of the interpretation process. The practice of the arbitral tribunals asserts that the same treaty provision can provide two or more conflicting ordinary meanings. Usually these tribunals turn to dictionaries to search for the linguistic meanings, but dictionaries are not sufficient to determine the ordinary meanings of specific terms. Therefore, the interpretation of terms like "investment", "investor" or "MFN clauses" in international investment arbitration cannot be determined based on the dictionary definitions. The MFN clause is a term of art in international investment law and has its ancient interpretation before *Maffezini* case. The treaty parties have used this clause because of its well-known obligations, not to redefine its scope of application. Adjudicators cannot use the silence of a clause to interpret it in a manner that modifies or expands the scope of its application and broadens the jurisdiction of arbitral tribunals. I concluded that the ordinary meaning of a treaty provision should not be determined in the abstract, but in the context of the terms and in the light of the object and purpose of the treaty.

With respect to the context, the treaty words obtain their meaning from the context of their use, and the context is of the same importance of the linguistic meaning in determining the correct meaning of the treaty terms. The entire terms of the treaty have to be taken into account. In addition, a context includes the preamble and annexes. This element requires also the comparison between a term, a phrase or a provision's meanings and same use of it, in elsewhere in the treaty. The context reflects the textual approach of interpretation. It serves as a mean to confirm the intended meaning or to help in the selection of one of the competing ordinary meanings.

With respect to the treaty object and purpose, I have examined the framework of this element in treaty interpretation. This element is not a stand-alone mean of interpretation. There is an inextricable relation between it and the text. The objects and purposes do not contain direct obligations, and both serves to affirm the ordinary meaning or the intents of the treaty parties. I have argued that many arbitral tribunals have relied on the object and purpose to justify their pro-investor interpretations. Placing great emphasis on the "object and purpose" of a treaty will deny any relevance of the intents of the treaty parties to interpretation and would lead to wrong outcomes. This element serves to confirm the ordinary meaning of the texts that reflects the intentions of the treaty parties. Investment treaties are characterized by the generality

and ambiguity of their language, so treaty "object and purpose" should be elaborated comprehensively in the decisions of the arbitral tribunals. The merely mention of the object and purpose of a treaty to prefer a meaning to another would lead to wrong outcomes.

With respect to the multiple purposes of a treaty, some treaties include provisions that explicitly indicate the object and purpose, but most BITs have no single purpose. With the generality and ambiguity of the treaty provisions and the lack of consensual elements, adjudicators may find more than one purpose to the same treaty. Moreover, with the detailed treaty provisions some tribunals examine only the purpose of the provision that govern the dispute in question. I concluded that according to Art 31 (1) of the VCLT, any ambiguity in the language should be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms ... in the light of its object and purpose". We cannot divided the object and purpose of a treaty into many objects purposes according to the provisions of the treaty. We must read the treaty in a manner that gives effect to the object and purpose of the whole BIT. Article 31 of the VCLT speaks of one singular "object and purpose". It is unacceptable to say that the singular "object and purpose" is related to a single provision. This contradicts Article 31 of the VCLT that speaks of the entire treaty as relevant to interpretation not its individual provisions.

With respect to the subsequent agreement and subsequent practice, Article 31 (2) and (3) of the VCLT requires some qualifications for these agreements and practices to be relevant. First, an agreement that signed by all of the treaty parties and related to the BIT in question. Second, any instrument related to the treaty, concluded by one of the parties, and accepted by the others. Third, subsequent agreements or practices between the parties related to the treaty. Adjudicators who rely on the previous materials, they rely on clear interpretive materials according to the VCLT. I have explained that each BIT stands alone as a separated agreement between the two states without any contemporary or subsequent agreements. Therefore, any BIT between one of the parties and a third state is not relevant, for the purpose of interpretation under Article 31 of the VCLT, since the BIT in question is the BIT that should be interpreted not the host state’s third-party BIT. Similarly, the practices should be between the parties to BIT, otherwise it would fall under Article 32 of the VCLT that may be taken into account as

a common intent of the parties. Subsequent agreements and practices as elements of interpretation are well established in the practice of international courts and they are important elements of interpretation especially in the early international jurisprudence. I concluded that in international investment treaties, states rarely have subsequent practices or subsequent agreements under the concept that is stated in Article 31 (3) of the VCLT.

With respect to the relevant rules of international law, these rules have to be taken into account in interpreting treaty provisions. This mean refers to the international legal system as a whole as part of the context of every treaty subjects to international law. By this mean, the VCLT created the foundation of a systematic approach to the interpretation of international treaties and whatever their subject matter, treaties are a creation of the international law and their operation is predicated upon that fact. Under this mean, the relevant rules can be existed in all the primary sources of international law. According to Article 38 (1) of the ICJ, these primary sources are conventions, international customary rules and the general principles of law recognized by civilized nations. This interpretational mean refers to the international legal system as a single system. Based on this mean, treaty interpretation transgresses all specialized sub-regions of international law, such as international investment law, environmental law, trade law, international criminal law, law of the sea and human rights law. I concluded that the role of "the relevant rules of international law" is to affirm or clarify the ordinary meaning of the treaty terms. Where there are applicable rules between the parties such as conventions, international customary rules and the general principles of international law, adjudicators must examine these rules to determine the correct interpretation. Searching the various binding rules and commitments of the parties is helpful for the reasonableness of the interpretation of the BITs. The rules of public international law that have been developed over centuries will be an effective guidance to the interpretations of these BITs.

With respect to the special meaning, it may be adopted to a particular treaty term when anything relevant to the treaty and its parties indicates that they had intended to provide this special meaning to this term. Both the ordinary and special meaning might be titled as methods that indicate to the adjudicators how to deal with the interactions between evidence. Article 31 (4) of the VCLT includes two cases according to which

adjudicators have to adopt the special meaning. The First, when the text and the context of a treaty have technical meaning because of a specific field that is covered by this treaty. In this case, it seems that the interpreters try to give the treaty provisions their ordinary meaning in the light of the field that is covered by this treaty. The second, when the treaty parties intended to give the term a special meaning instead of its ordinary meaning. This special meaning, as a method of interpretation, looks for the intentions of the parties, rather than what is the text expresses. I concluded that Article 31 (4) of the VCLT expressly asserts that a special meaning prevails over the ordinary meaning, if it is established that the parties so intended. This proves the fundamental role of the parties' intents in treaty interpretation. This article implicitly asserted that the ordinary meaning of the text has the priority in treaty interpretation, since the ordinary meaning is the reflection of the intents of the parties, and these parties can adopt another meaning instead of this ordinary meaning. Therefore, the interpretation of the treaty terms should be consistent with the intent of the parties as it appears form the treaty provisions.

In addition, I have explored the supplementary means of interpretation; the preparatory work of a treaty and the circumstances of its conclusion according to the VCLT. the purpose of applying these supplementary means is: (1) to confirm the meaning that resulting from the application the general rule of interpretation under Article 31 of the VCLT, or (2) when the application of this general rule leaves the meaning ambiguous or obscure, or resulted in manifestly absurd or unreasonable meaning. Under Article 32 of the VCLT, adjudicators can apply the supplementary means, but they are not obliged to apply these means when the application of general rule resulted in a clear meaning.

With respect to the preparatory work a treaty, there are no rules according to which the adjudicators can determine the kind of materials that are qualified as a preparatory work, neither how far back in the history of a treaty can go the adjudicators look for a preparatory work. However, the materials that can be a preparatory work must be able to be objectively to assist adjudicators. These materials must be part of the outside world of the treaty. This includes all documents relevant to the treaty from its preparation to its conclusion. For example, memoranda, drafts, commentaries, other statements and observations transmitted by states to each other. With respect to the

circumstance of the conclusion of a treaty, it reflects what was presented in the minds of the treaty parties at the time of the treaty conclusion. Adjudicators, in international investment arbitration, are the higher power that determines what should be considered as circumstances of a conclusion of the treaty and the value of these circumstances as a supplementary mean of interpretation. Adjudicators determine this on case-by-case bases.

Then I have demonstrated how different tribunals interpret the silence of the treaty provisions. This problem raises the question of who should bear the risk of the silence of the treaty provision. The first opinion sees that this silence be interpreted in favor of the host state. The second opinion considers that the broad wording of the treaty provisions is a presumption in favor of the protection of the foreign investors. I have concluded that the problem is not about who should bear the risk of the silence of the treaty provision; it is about the correct interpretation of the provision. Adjudicators must not interpret the treaty provisions by presumptions in their minds. They have to examine all the means of interpretation to find the real and correct meaning of the treaty provisions. The interpretation of a treaty is to determine the treaty rights and obligations of the parties, not the renegotiation of this treaty. Adjudicators should follow the logic sequence of the application of the rules of interpretation to find the correct meaning of the terms of the treaty.

With respect to the hierarchical order among the means of interpretation in the VCLT, this issue has not been settled, at least, in a satisfactory way whether before or after the codification of the VCLT. I have argued that the application of the rules of interpretation is compulsory and the full compliance with them will resolve the problems of inconsistent and conflicting interpretations in investor-state arbitration. Neglecting the logical sequence of these rules will create inconsistent interpretations and conflicting decisions in disputes that are governed by the same treaty provisions that have the same wording. The neglect and misapplication of the international rules on treaty interpretation will lead to wrong interpretations.

I concluded that the logical sequence of the concepts in Articles 31 of the VCLT reflects the logical and natural progression of the process of interpretation of the treaty. This progression should start with the ordinary meaning of the text, then the context, object

and purpose and then any external elements that reflect the intents of the parties. The ordinary meaning that reflects the intents of the parties should prevails over other tools of interpretation. The treaty object and purpose is a second step that affirms the ordinary meaning. Adjudicators should not use the treaty object and purpose as a stand-alone mean of interpretation. The great emphasis on the object and purpose will deny any relevance of the intents of the parties to the interpretation of their treaty. In addition, the supplementary means of interpretation are used only in two cases and for one purpose. They are used to determine the meaning when the interpretation according to Article 31 resulted in either ambiguous or unreasonable meaning. This means that supplementary means are used to confirm the ordinary meaning resulting from Article 31 of the VCLT. Following the logical sequence of the rules of interpretation will led to correct conclusions.

In sum, I argued that interpretation is not an exact science, but it is still a science requiring the application of particular rules to produce correct results. In addition, the terms of the treaty are the sources of the intents of the parties who have employed these terms to express their ordinary meaning. The context of the treaty is not its historical or political context; it is the meaning of the terms within the whole treaty. The treaty object and purpose are not a stand-alone mean of interpretation and are not an independent source of the parties' intents. It is a second step to confirm the ordinary meaning and it cannot override the clear meaning of the text. Moreover, emphasizing the treaty object and purpose in interpretation may deny the relevance of intentions of the treaty parties. Adjudicators have to examine exhaustively all interpretation elements, according to its logical sequence, to find the real and correct meaning of the treaty.

III. Contemporary Case Law

The question of whether the MFN clause should be applied to matters of dispute settlement in BITs or not is a question about how arbitral tribunals should interpret this clause. There are two visions established in the jurisprudence and no one of them can claim a numerical supremacy of supporters. The first vision argues that the MFN clause should be applied to dispute settlement provisions in BITs. The second vision argues that this clause should not be applied to dispute settlement provisions in BITs.

The previous two points of views are driven by two conflicting decisions of the ICSID followed by two lines of subsequent tribunals' decisions that followed both sides. The first section of this chapter discusses the contemporary case law on the application of the MFN clause to dispute settlement provisions in BITs. I indicate the problems with the decisions that have applied MFN clauses to dispute settlement provisions in BITs. The second section provides the solutions for these problems by discussing the decisions that have rejected this application.

A. Case Law that has applied the MFN Clause to Dispute Settlement Provisions in BITs:

The excessive protection of the foreign investors and investments is the corner stone of this line of thinking of the arbitral tribunals. This vision of thinking can be classified under the objective understanding of the interpretation. They create international norms without the consent of the states. They override the ordinary meaning of the treaty provisions by many considerations that vary from a tribunal to another. These considerations are; protecting foreign investors internationally by facilitate the access to international arbitration; the harmonization of dispute settlement provisions by connecting provisions of same kind in other BITs, and adopt a broad interpretation to MFN clauses to benefit from state's broad consent retroactively after initiating international arbitration.

1. Maffezini v. Spain:

The confusion behind the incorporation of dispute settlement provisions form other BITs to the basic BIT by using the MFN clause arose out form the tribunal's decision in *Maffezini v. Spain*. This was the first ICSID decision that dealt with the interpretation and the application of the MFN clause to dispute settlement provisions in BITs.

In *Maffezini v. Spain* case, the question before the tribunal was whether the Argentine Claimant is able to initiate arbitration before pursuing local remedies for eighteen months as provided for under Spain-Argentina BIT, or whether he could benefit, under MFN clause, from Spain-Chile BIT that provides more favorable access conditions to international arbitration. The Spain-Chile BIT provided for six months waiting without prior domestic recourse before national courts.[302]

According to the dispute settlement provision in the Spain-Argentina BIT, disputes that arise out of this BIT and concerning an investment between an investor of one contracting party and the other contracting party, 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 Article 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.[303]

The MFN clause in Article IV (2) of the Spain-Argentina 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".[304]

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[302] *See* Emilio Agustín Maffezini v. The Kingdom of Spain., ICSID Case No.ARB/97/7, Decision on objections to jurisdiction, (Jan. 5, 2000) 5 ICSID Rep 396, (2002).
[303] *See id.* para 19.
[304] *See id*. para 38.

Spain argued that the Spain-Chile BIT in respect of Argentina is *res inter alios acta* and the claimant cannot invoke the application of the dispute settlement provisions in this BIT.[305] Moreover, the term "all matters" refers to substantive matters or the material aspects of the treatment and does not refer to the procedural or jurisdictional matters.[306] In addition, under the principle *ejusdem generis* the MFN clause should be applied only to the same matters, and cannot be extended to matters that are different from those in the basic BIT.[307] Above all, the purpose of the MFN clause is to avoid discrimination against foreign investors and this discrimination take place only to within the substantive treatment to investors.[308]

Although, the tribunal admitted the fact that the basic treaty - Spain-Argentina BIT- does not refer expressly to dispute settlement provisions as subject matter of the MFN clause, the tribunal rejected Spain's arguments. [309] The tribunal gathered many justifications for its new mistaken interpretation and application. This mistaken and pro-investor interpretation is a result of the neglect and misapplication of the international rules of interpretation in the VCLT.

The tribunal considered that nowadays there is an inextricable relation between settlements arrangements and the protection of foreign investors.[310] The tribunal added that international arbitration has replaced the old abuse practices of the past by a new international protection.[311] Moreover, the court admitted that the investors' rights and interests are better protected by international arbitration rather than recourse to domestic courts, which are preferred by the host states.[312]

The tribunal asserted that, if the third-party contain dispute settlement arrangements that provide more favorable protection to investors' rights and interests, this protection should be extended to the beneficiary of the MFN clause in the basic BIT.[313] The tribunal did not require any references of incorporation in the MFN clause, since the

[305] *See id.* para 41.
[306] *See id*.
[307] *See id.*
[308] *See id*. para 42.
[309] *See id*. para 54.
[310] *See id*.
[311] *See id.* para 55
[312] *See id*.
[313] *See id*. para 56.

subject matter of the basic BIT is the same subject matter of the another BIT, which is the protection of investors or the promotion of trade.[314]

In addition, the tribunal examined Spain's practices during the negotiation that had led to the recent BIT and its negotiation with other countries at the same time.[315] The court concluded that the Spain supported the investors' right to submit investment disputes directly to international arbitration.[316] Moreover, the tribunal examined in detail Spain's practices in respect of BITs with other countries and the tribunal concluded that Spain preferred practice that allows access to international arbitration.[317]

Another justification to this mistaken interpretation is that the application of the MFN clause to dispute settlement provisions will lead to the harmonization of dispute settlement provisions by linking the all BITs of the host state together through MFN clauses.[318] The tribunal concluded that the MFN clause in the Spain-Argentina BIT includes phrase "all matters", therefore, the application of the MFN clause should be expanded to cover dispute settlement provisions. According to the tribunal, the previous phrase asserted that the parties implicitly agreed to apply the MFN clause to matters of dispute settlement in BITs.[319] Since the BIT did not explicitly exclude dispute settlement arrangements from the subject matter of MFN clause.

For all these reasons, the tribunal found that the MFN clause linked the "the Spain-Argentina BIT" - the basic treaty- to other Spain's BITs and, under two conditions the investor can rely on more favorable conditions to access international arbitration. First, both the basic BIT and the host state’s third-country BIT have to deal with the same subject matter, which is protecting investors' rights and interests or the promotion of the trade. Second, a more favorable treatment that is granted by a third-party treaty to another investor.[320]

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[314] *See id.*
[315] *See id.* paras 57 -62.
[316] *See id.*
[317] *See id.*
[318] *See id.*
[319] *See, id.*
[320] *See Id.*

I believe that the tribunal has adopted a broad and mistaken interpretation to the MFN clause to extend the scope of its application to dispute settlement arrangements in BITs. The tribunal has committed many mistakes in the interpretation of this clause to provide excessive protection to the foreign investors regardless the treaty provisions or their ordinary meaning.

The interpretation of this clause came one-side oriented, investor oriented, and gave the ultimate effect to facilitate access to international arbitration to better protect investors' rights and interests. The tribunal gave the priority to the interests of the investor rather than the host state. How this could be justified against the host state without its clear acceptance and based on the interpretation of the MFN clause.

The arbitral tribunal depended on the broad wording of the MFN clause that included the phrase "all matters" to interpret the ambiguity of this text in favor of the investor based on the implicate acceptance of the treaty parties. The tribunal failed to follow the logical sequence of the rules in Articles 31 and 32 of the VCLT that reflects the logical and natural progression of the interpretation process of any treaty. This progression should starts with the ordinary meaning of the text, then the context, object and purpose and then any external elements that reflect the intent of the parties. This tribunal gave the priority to many tools of interpretation except the text of the treaty to expand the application of the MFN clause beyond what the parties had intended to. This tribunal's decision gave the investor the right to amend the treaty after its conclusion. The phrase "all matters" is silent on whether the MFN clause covers dispute settlement arrangements or not. The MFN clause is a "term of art" that has a history of application according to which it applies only to substantive treatment. The tribunal should not interpret the silence of this clause to establish a meaning against the ordinary meaning of this "term of art", regardless its well-known interpretation. Moreover, the starting point in interpreting this silence is the minimum limitation of state sovereignty, which works in favor of limiting the protection of investors. Even the ordinary meaning of the phrase "all matters" affirm this assumption - the minimum limitation of state sovereignty - and does not sufficient to override it.

In interpreting the MFN clause, the tribunal just skipped the other means of interpretation such as ordinary meaning of the treaty text and context. The tribunal

grounded its interpretation on the purpose of the BIT, which is the protection of investors. However, Spain asserted that the purpose of the whole treaty is to prevent discrimination in relation to the material economic treatment not the procedural treatment.[321] The tribunal put great emphasis on the purpose of the BIT to the extent that it denied any relevance to the intents of the parties. I argue that the tribunal failed to read the treaty in a manner that gives effect to the object and purpose of the whole BIT. Article 31 of the VCLT speaks of one singular "object and purpose". It is unacceptable to say that the singular "object and purpose" is related to a single provision. Since this contradict with Article 31 of the VCLT that speaks of the entire treaty as relevant to interpretation not its individual provisions. Moreover, the purpose of a treaty is not a stand-alone mean of interpretation. It is used to confirm the ordinary meaning that should be given to the terms of the BIT in their context.

The tribunal assumed that there is a direct relation between the procedural and substantive provisions in BITs, so it applied the MFN clause to the procedural provisions. However, the distinction between the substantive provisions in an investment treaty and the provisions conferring adjudicative power to arbitral tribunal is straightforward. The substantive provisions address the contracting state parties. While the procedural provisions address an international arbitral tribunal and disputing parties. These disputing parties are not the state parties to BIT, but the investor and the host state. Both investor and host state enter into a relationship of procedural equality before the arbitral tribunal once a dispute has been submitted to it. This procedural relationship subjects to the equality of arms principle in international litigation. This principle is not respected when one of the disputing parties has the ability to amend the rules that regulating the jurisdiction of the arbitral tribunal after the dispute has arisen. In addition, both of these kinds of provisions have its own purpose and each of them imposes different obligations and rights. The object of the substantive provisions is investments that made by the nationals of one contracting state on the territory of the other contracting state. The object of procedural provisions is creating a jurisdictional mandate for an international arbitral tribunal to settle disputes between the foreign investor and the host state who are in an equal procedural relationship. The invalidity

[321] *See id*. para 41-42.

of substantive provisions cannot affect the validity of the procedural provisions in the BIT and the contrary is right.

After skipping the other means of interpretation, the tribunal mentioned three kinds of practices; public practice, practice of the negotiation that led to the conclusion of the BIT and subsequent practices with other BITs. All these practices lack the qualifications of subsequent practice under Article 31 (3) the VCLT. Subsequent practice should be an element of interpretation insofar it consists a sufficient, consistent and notable pattern of a state behavior related to the treaty in question. This practice should be between the parties of the BIT in question and should be related to the implementation or interpretation of this BIT or any instrument related to the treaty, concluded by one of the parties, and accepted by the others. Adjudicators who rely on the previous materials, they rely on clear interpretive materials according to the VCLT.

The practices that were mentioned by the tribunal are not relevant to the interpretation of the BIT in the question before this tribunal. The old abuse practice of the past and Spain's practice regard the other BITs were not between the parties of the dispute before the tribunal. In addition, the practices during the negotiation that led to the BIT do not consider a subsequent practice according to article 31 of the VCLT. States negotiate and draft BITs as separated deals between two parties these BITs are governed by the principle *pacta sunt servanda*. Indeed, these practices do not reflect any understanding of the parties to the MFN clause in this case and are not relevant to treaty interpretation.

Finally, the application of MFN clause to disputes settlement arrangements will not lead to the harmonization of these arrangements. On the contrary, the incorporation of these arrangements would increase the treaty shopping in BITs that would affect the binding nature of BITs. Moreover, this will lead to the counterproductive to the harmonization of dispute settlement provisions. Above all, there is no any national or international rule that requires from an arbitral tribunal to harmonize the dispute settlement mechanisms in BITs.

2. National Grid Plc. v. Argentine Republic:

After *Maffezini* award, many tribunals followed the same line of thinking with the same conclusion, but with different analysis. One of these cases is *National Grid Plc. v. Argentine Republic*.

In this case, Argentina asserted that the wording of the MFN clause in question is different from the MFN clause in *Maffezini* case, since the text of the treaty indicates that the parties had not intended to apply the MFN clause to dispute settlement provisions.[322]

Article 3 of the UK-Argentina BIT included the National treatment and Most-favored Nation Provisions. Article 3 (2) of this Article reads as follow, "Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments, to treatment less favorable than that which it accords to its own investors or to investors of any third State".[323]

The tribunal affirmed that the previous MFN clause does not expressly refer to the dispute settlement mechanisms, however, this clause affirms that these mechanisms are not included among the exceptions of the application of this clause.[324] The tribunal asserted, "As a matter of interpretation, specific mention of an item excludes others: *expressio unius est exclusio alterius*".[325] The tribunal used the same justifications of the *Maffezini* tribunal. It concluded that the interpretation of "most-favored nation treatment" with respect to the disposal of investment includes the protection of the investment through international arbitration.

While the tribunal in *Maffezini v. Spain* grounded its jurisdiction on the broad wording of MFN clause the included the phrase "all matters", the tribunal in *National Grid Plc. v. Argentine Republic* found that the MFN treatment with respect to "the use and enjoy

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[322] *See* National Grid PLC v. Argentina, IIC 178 (2006), Ad Hoc Tribunal (UNCITRAL), Decision on Jurisdiction, paras 56-57 (June.20, 2006).
[323] *See id*. para 82.
[324] *See id*. para 82.
[325] *Id.*

of investments" expands the scope of the application of this clause to cover dispute settlement mechanisms.[326] This allows the incorporation of dispute settlement provisions in other argentine BITs that accord favorable procedural conditions with the UK-Argentina BIT. The tribunal affirmed that submitting disputes only to domestic courts is a procedural matter that leads to the inequity among investors, which will defeat the object and purpose of the BIT.

The same mistaken way of *Maffezini,* the interpretation of the MFN clause came one-side oriented, investor oriented, and gave the ultimate effect to facilitate access to international arbitration to guarantee the better protection of foreign investors' rights and interests. Although, the wording of the MFN clause did not include any mention to dispute settlement arrangements, the tribunal interpreted its silence in favor of the interests of the investors. The tribunal put great emphasis on the purpose of the BIT, protecting investors, to the extent that it denied any relevance to the intent of the parties to the interpretation process.

3. RosInvest Co UK Ltd. v. The Russian Federation:

The arbitral tribunals that followed the *Maffezini* way of thinking relied on the broad interpretation of MFN clauses to expand their jurisdiction under more favorable conditions that allow foreign investors to access international arbitration. The *RosInvest* tribunal relied on the MFN clause to expand the subject matter of the international arbitration's jurisdiction. This case is a glaring example of how can the arbitral tribunals ignore the clear ordinary meaning of the treaty terms and adopt interpretations that are against the intent of the parties.

The basic BIT of the UK - Soviet Union allowed the submission of compensation disputes only to international arbitration, but not for the adjudication of expropriation itself that was under the jurisdiction of the domestic courts of the parties.[327] The MFN

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[326] *See id*. para 94.

[327] *See* RosInvest Co UK Ltd v. Russian Federation, SCC, Case No. V079/2005, IIC 315 (2007), Jurisdiction award, para. 23 (Oct.1, 2007).
Article (8) of the UK–Soviet BIT/IPPA reads as follow
"Disputes between an Investor and the Host Contracting Party
(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

clause provided protection regarding the "management, maintenance, use, enjoyment or disposal of investment".[328] The tribunal used this clause in the basic BIT to expand its scope of jurisdiction to cover the disputes about expropriation by incorporating better procedural arrangements in other BITs. This better protection is existed in the Denmark-Russia BIT provisions that allow the access to international arbitration for both compensation and expropriation disputes. The tribunal found that the Denmark-Russia BIT provided for more favored procedural treatment than what the UK - Soviet Union BIT provided for.[329]

States may have many significant reasons to limit the jurisdiction of international arbitral tribunals. Both adjudicators and investors have to put these restrictions in mind before initiating an investment. The states parties to the BIT have agreed upon these dispute settlement arrangements. These arrangements are in favor of the interests of the both contracting states. With respect to expropriation, both United Kingdom and Soviet Union have decided - in the BIT - that the affected investor has the right to prompt review by a judicial authority of the Contracting Party making the expropriation.[330] However, the tribunal completely ignored the explicit intent of states parties and the clear meaning of the treaty texts and expanded its jurisdiction to subject matter beyond the intent of the parties to the BIT. This interpretation forms a clear violation to *ratione consensus*.

4. Hochtief Aktiengesellschaft. v. Argentine Republic:

The arbitral tribunal in *Hochtief* case continued to interpret MFN clause in the similar way of *Maffezini* case. The Argentina-Germany BIT, the basic BIT, provided for arbitration after pursuing local remedies for eighteen months.[331] Under the MFN clause in the basic BIT, the tribunal found that the investor could circumvent this period and

payment of compensation under Articles 4 or 5 [Article 5 was on expropriation] of this Agreement, or concerning any other matter consequential upon an act of 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.

[328] *Id.*

[329] *See id.* paras 124-128.

[330] *See id*. para 23, art 5 (1) of the UK-Soviet BIT.

[331] *See* Hochtief Aktiengesellschaft v. Argentine Republic, SCC Case No. ARB/07/31, IIC 513 (2011), Decision on Jurisdiction (Oct. 24, 2011).

submit the dispute to international arbitration before the elapsing of this period, as provided for in the Argentina-Chile BIT.[332]

I believe that the tribunal by this decision helped the investor to circumvent the treaty procedural obligations that stand in his way to international arbitration. This proves that the arbitral tribunals assume that the single object and purpose of the BIT is to protect the foreign investors. The great emphasis that they put on the object and purpose will deny any relevance of the intents of the parties to the interpretation of the BIT. The object and purpose do not contain direct obligations; they serve to affirm the ordinary meaning. Therefore, the treaty "object and purpose" is not a stand-alone mean of interpretation. It serves to confirm the ordinary meaning of the texts that reflects the intentions of the treaty parties.

5. Impregilo S.p.A. v. Argentine Republic:

In similar way, the Argentina-Italy BIT did not allow disputes to be submitted to the ICSID before pursuing local remedies for eighteen months before the domestic administrative or judicial bodies. Under the MFN clause in article 3 (1) of the Argentina-Italy BIT the investor sought to apply the more generous provisions in the Argentina-US BIT. Article VII of the Argentina-US BIT provided: "the investor may choose to submit the dispute for resolution to the domestic courts or administrative tribunals, or to deal with it in accordance with previously agreed dispute settlement procedures, or, after six months from the date on which the dispute arose, to submit it to international arbitration".[333]

Argentina's two main new arguments were; first, the MFN clause in the Argentina-Italy BIT refers to the granted treatment to investments "in the territory", while arbitration takes place outside Argentina and beyond its sovereign powers. Second, resorting to domestic courts cannot be less favorable choice to investors.[334]

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[332] *See id*.
[333] *See* Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17, IIC 498 (2011), Final Award (June. 21, 2011).
[334] *See id.* para 55.

The arbitral tribunal affirmed that the term "treatment" in the MFN clause is wide enough to expand the application of this clause to dispute settlement provisions. Moreover, the phrase "all other matters regulated by this argument" also is wide enough to expand the scope of the application of the MFN clause to cover dispute settlement arrangements.[335] The tribunal asserted that the words "within its own territory" limit the scope of MFN clause with respect to treatment of the host state. The tribunal affirmed that the legal protection that Argentina shall give to the investor is a question before the tribunal and Argentina has no power to decide the way of this protection. Moreover, this legal protection is not tied to a particular territory. Therefore, the tribunal found that the phrase "within its own territory" does not exclude dispute settlement provisions from the scope of the application of MFN clauses.[336] In addition, the tribunal believed that "a system that gives a choice is more favorable to the investor than a system that gives no choice"[337].

Based on the wide interpretation of the MFN clause, the tribunal found that under the more favored conditions in the Argentina-US BIT, the investor could choose between domestic courts and international arbitration without any legal need to pursue compulsory local remedies before access to international arbitration.

B. Case Law that has rejected the Application of the MFN Clause to Dispute Settlement Provisions in BITs:

The previous line of thinking in *Maffezini* and the subsequent decisions of the various arbitral tribunals adopted a mistaken interpretation to the MFN clause. Indeed, the proponents of applying MFN clauses to dispute settlement have found strong opposition. Many arbitral tribunals rejected the application of the MFN clause to dispute settlement provisions in BITs without an explicit consent form the BITs' parties to apply this clause to matters of dispute settlement. They require that this clause expressly indicate that the two parties intended the application of this clause to such arrangements. The followers of this vision respect the international rules of interpretation in the VCLT. This vision recognizes that the agreement between the

[335] *See id*. para 99.
[336] *See id*. para 100.
[337] *Id*. para 101.

parties to arbitrate is a prerequisite for national or international arbitration. This opinion affirms that this agreement should be clear and unambiguous.

1. Plama v. Bulgaria:

Plama v. Bulgaria is a unique case, the investor in this case sought to rely on the MFN clause to replace the entire dispute resolution mechanism that provided for in the basic BIT with another mechanism.[338] In this case, the claimant, a Cypriot investor, under Bulgaria-Cyprus BIT (the basic) was limited to access international arbitration for disputes concerning the amount of compensation for expropriation under the UNCITRAL Arbitration Rules only. The question before the tribunal was whether this investor could benefit from the host state's broader consent to ICSID arbitration under other BITs that allows access to ICSID for any breach to these applicable BITs.

The MFN clause in Article 3 (1) of the Bulgaria-Cyprus BIT provided "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"[339].

The most obvious thing in the arbitral tribunal's decision is the tribunal's reasoning to make a choice between the competing ordinary meanings based on the logical sequence of the rules of interpretation in the VCLT.

The tribunal asserted that it is not clear whether the term "treatment" in the MFN clause includes or excludes the application of disputes settlement provisions contained in other BITs to which Bulgaria is a party. The tribunal examined the context of the MFN clause and found that it may support the Claimant demands; however, the context alone in the light of the other elements of interpretation was not persuadable to the tribunal.[340]

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[338] *See* Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction, (Feb.8, 2005) 13 ICSID Rep 271, (2008).
[339] *See id*. at 187.
[340] *See id*. para 189.

The tribunal examined the object and purpose of the Bulgaria-Cyprus BIT in the preamble and the title, this "object and purpose" was "the creation of favorable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party"[341]. The tribunal asserted that the object and purpose of the treaty are not sufficient to conclude that the contracting parties had intended to use MFN clause to incorporate settlement disputes mechanisms from other BITs to the basic BIT. The tribunal was mindful of the Sir Ian Sinclair's warning to not to put great emphasis on the "object and purpose" to an extreme form to the extent that denies the relevance of the intentions of the treaty parties.[342]

The tribunal also examined the practices of Bulgaria with other states for clarifying the meaning of the BIT text. These practices showed that Bulgaria has concluded more liberal dispute settlement provisions. The tribunal held that the practices of Bulgaria with other states are note relevant for the interpretation of the Bulgaria-Cyprus BIT, since the negotiations between Bulgaria and Cyprus did not indicate that the parties had intended to provide for the MFN clause a meaning based on the Bulgarian practices with other states. Moreover, the tribunal found that these negotiations indicate that the contracting parties had not intended to extend the application of MFN clause to dispute settlement provisions.[343]

With respect to the circumstances surrounding the conclusion of the BIT, the tribunal affirmed that in the time of the conclusion of the BIT in question Bulgaria was under the communist regime that favored BITs with limited protection for foreign investors and limited dispute settlement provisions. These circumstances of the Bulgaria-Cyprus BIT indicate that the contracting parties did not intend to extend the application of MFN clause to dispute settlement provisions in BIT.[344]

The tribunal affirmed the fact that the traditional diplomatic protection by home states for their citizens has been replaced by investor's direct access to international arbitration against the host states. This makes investors-states arbitration largely

[341] *See id*. para 193.
[342] *See* Sinclair, *supra* note 243.
[343] *See* Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction, para. 195.
[344] *See id*. para 196.

accepted avenue for resolving investment disputes. However, the tribunal emphasized that this phenomena does not override the fundamental prerequisite for arbitration: an agreement of state – investor to arbitrate, which is an established principle in the domestic and international law and this agreement must be clear and unambiguous.[345] Moreover, the tribunal asserted that this agreement to arbitrate consists of state's consent to arbitrate in advance in respect of disputes that are covered by the BIT, and then the acceptance thereof by the investor if he so desires.[346]

With respect to the interpretation of the silence of MFN clause, the tribunal asserted that it could not be presumed that the contracting states had agreed to replace by incorporating disputes settlement mechanisms from other BITs that have been negotiated in entirely different circumstances and context. [347] Moreover, such intents must be clearly expressed.

With respect to the alleged harmonization of dispute settlement provisions, the tribunal affirmed that this could not be achieved by the reliance of the arbitral tribunals on the MFN clauses.[348] This would provide investor with "basket of treatment" with respect of dispute settlement provisions, and then he will has the ability to pick up and choose provisions from various procedural provisions in the various BITs to which the host state party. The host states would find themselves in confront of various number of dispute mechanisms to which they had not given their consent. Indeed, this would lead to the counterproductive to the harmonization of dispute settlement arrangements in the BITs of the host state.

As a result, the tribunal concluded that the MFN clause in question should not be interpreted to as providing the consent of Bulgaria to arbitrate the recent dispute. Moreover, the investor cannot rely on the MFN clause to incorporate more favorable dispute settlement provision from the other BITs to which Bulgaria is a contracting party.[349]

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345 *See id*. para 198.
346 *See id*.
347 *See id*. paras 204-207.
348 *See id.* paras 221-224.
349 *See id*. para 227.

I believe that the tribunal in *Plama v. Bulgaria* applied the international means of interpretation in the VCLT to determine the real meaning of the treaty text without any oriented interpretation. The tribunal balanced between the evidence to clarify the real meaning of the MFN clause. With the generality of the text, it weighted between the object and purpose, practices, circumstance surrounding the BIT and its conclusion to clarify the ordinary meaning of the text. The tribunal gave each mean of interpretation its value to interpret the MFN clause, and elaborated how it managed to conclude the final adopted interpretation.

2. Vladimir Berschader and Moïse Berschader v. The Russian Federation:

This case is an obvious example that even if the MFN clause has the same wording of the MFN clause in *Maffezini* case that include the phrase "all matters", it should not be applied to dispute settlement provisions. Similarly, in the *Rosinvest* case, Russia argued that only disputes concerning the amount or mode of compensation for expropriation could be submitted to international arbitration.[350] Under article (10) of (the basic BIT) the Belgium-Russian Federation BIT, only Russian arbitration court has the jurisdiction to determine whether an expropriation took place or not.[351] The investor attempted to rely on the MFN clause in article 2 in the basic treaty to benefit from more favored conditions in the Denmark - Russia BIT that provided international arbitration for any investment disputes falling under the BIT.[352]

The arbitral tribunal asserted that the ordinary meaning of the phrase "all matters covered by the present treaty" is clear, however, it must be seen in its context in the BIT with relation to the definition of the treatment that shall be applied to these matters.[353] The tribunal found that the BIT did not include a definition for "the most favored nation clause". The tribunal relied on the Protocol of the Treaty that provides the most favorable treatment to the investors in the territory of one party from the nationals of the other contracting party.[354] The tribunal found that linking between "all

[350] *See*, Vladimir Berschader and Moïse Berschader v. Russian Federation, SCC Case No. 080/2004, ICC 314 (2006), Award (Apr.21, 2006).
[351] *See id.*
[352] *See id*. at 86.
[353] *See id*. para 185.
[354] *See id.*

matters"," treatment" and "in its territory" indicates that the MFN clause is applied only to the material rights in the territory of one of the contracting party to the BIT, so the MFN clause should be applied only to substantive matters. Then the tribunal rejected the application of MFN clause to dispute settlement provisions, since the phrase "all matters" cannot expand this application beyond the intents of the parties to the BIT.

In my opinion, the tribunal found that the starting point to determine whether the MFN clause should be applied to dispute settlement provisions or not must be assessed according to the intent of the contracting parties and based on the interpretation of the basic BIT. The ordinary meaning of the MFN clause cannot be determined, and its broad wording was not persuadable, to the tribunal, to expand its scope of application to dispute settlement provisions. The object and purpose of the treaty is, the ordinary aim of any BIT, to promote and protect investments, however, this broad statement was not able to construct an ordinary meaning to the MFN clause. Moreover, there was no any preparatory work, subsequent agreements or practices related to the BIT to provide any guidance to interpret this clause.

The reasonable way to interpret the text and indicate the intents of the parties is to connect the text of the treaty with other relevant available facts. The tribunal weighed between the facts and found that the balance between these facts does not affirm the broad application of the MFN clause to cover dispute settlement provisions. The text of the treaty does not clearly refer to the ability to incorporate more favorable dispute settlement arrangements from other BITs to the Belgium-Russian Federation BIT.

The adopted interpretation of the MFN clause in this case followed the same correct way of interpretation in *Plama v. Bulgaria*. The tribunal has not been affected by the interests of the foreign investors to provide pro-investor interpretation. The tribunal tried to interpret the terms to figure out the real meaning or ordinary meaning in the light of other elements of interpretation. The tribunal discovered the meaning and did not create it.

3. Daimler Financial Services AG v. Argentine Republic:

In the same vein, the arbitral tribunal in *Daimler* case rejected to apply the MFN clause to dispute settlement provisions in BIT. The question arose before the tribunal is whether the German investor was to pursue domestic remedies before the Argentinian courts for eighteen months prior to initiate international arbitration according to the Argentina-Germany BIT or could he benefit from the Argentinian-Chile BIT that did not require this procedure.[355]

In this case, the German-Argentine BIT contained two MFN clauses. The first is general one that addresses the MFN treatment and national treatment.[356] The second MFN clause deals with a particular substantive protection.[357]

In interpreting MFN clauses in the German-Argentine BIT, the tribunal examined the ordinary meaning of the term "treatment" in both MFN clauses in the context of the whole BIT. Then it differentiated between the treatment of foreign investors and the treatment of investments. Then it examined this ordinary meaning in the light of the object and purpose of the BIT. Finally, the tribunal searched whether the state practices would confirm the conclude interpretation or not.

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[355] *See* Daimler Financial Services AG v Argentine Republic, ICSID, Case No. ARB/05/1, ICC 560 (2012) Award (Aug. 22, 2012).

[356] *See id*. para. 205. Article 3 of the German-Argentine BIT reads as follow:
(1) Neither Contracting Party shall accord investments in its territory by nationals or companies of the other Contracting Party, or investments in which nationals or companies of the other Contracting Party are participating, treatment less favorable than the treatment accorded investments of its own nationals or companies or investments of nationals or companies of any third country.
(2) With respect to their activities in connection with investments in its territory, nationals and companies of the other Contracting Party shall not be accorded treatment less favorable by a Contracting Party than its own nationals and companies or nationals and companies of third countries.
(3) Such treatment shall not refer to privileges granted by a Contracting Party to nationals or companies of third countries by virtue of their membership in a customs or trade union, a common market, or a free trade area.
(4) The treatment granted in this Article shall not refer to advantages accorded by a Contracting Party to nationals or companies of third countries under an agreement for the avoidance of double taxation or other agreements regarding tax matters.

[357] *See id*. para. 206. Article 4 of the German-Argentine BIT provided:
Nationals or companies of a Contracting Party shall enjoy most-favored-nation treatment in the territory of the other Contracting Party in respect of the matters provided for in this Article. And mentioned three substantive protection; (1) Full legal protection and security, (2) Expropriation, nationalization, and equivalent measures, (3) Losses owing to war or internal strife.

The tribunal examined the wording of these MFN clauses in light of the treaty text and context. However, the word treatment employed 13 times in the treaty and its protocol, none of the treaty provisions gives this word a specific definition. [358] The tribunal found that the MFN clauses were generally worded and provide clues in different directions. The tribunal found that the context of the treaty provides a clear limitation to the generality of the MFN clauses. The tribunal affirmed that the most favored treatment that provided for by the whole BIT is territorially limited, including MFN clauses that stated "treatment in its territory".[359] In addition, none of the BIT's obligations acts in a manner outside the host states. The territorial limitation is a general limitation that governs the universe of the German-Argentine BIT. Therefore, the tribunal concluded that the BIT clearly expressed a territorial limitation on the scope of the application of its provisions, including MFN clauses, and did not intended to provide MFN clauses an extra-territorial scope to cover dispute settlement provisions outside the host state.[360]

With respect to the treaty object and purpose, it was to promote and protect the investments in the host state. The tribunal found that the text of the treaty did not revealed any indications that the parties had intended to protect foreign investments in the particular manner that was invoked by the investor, by the incorporation of dispute settlement provisions form other BITs. The tribunal affirmed that it would be incorrect to characterize the investor's position, as it is more compatible with BIT object and purpose than the host state's position.[361]

The tribunal concluded that the treaty materials suggested that the contracting parties to the German-Argentine BIT had intended to provide the most favorable treatment to the investments within the host state's territory.[362] The tribunal affirmed that none of the treaty materials authorized the tribunal to interpret MFN clauses in an evolutive way to achieve a broad meaning that desired by the investors.[363] Moreover, the relevant

[358] *See id.* para 217.
[359] *See id.* para 225, Article 1(1) of the German-Argentine BIT defines qualifying investments territorially; Article 2 territorially limits the States' obligations in respect of fair and equitable treatment and arbitrary or discriminatory measures; Article 4 does likewise for the States' obligations concerning full legal protection and security, expropriation, and losses in cases of war or other conflict.
[360] *See id*. para. 231.
[361] *See id.* paras. 254-260.
[362] *See id*. para. 278.
[363] *See id*.

subsequent practices of the parties confirm the adopted interpretation by the tribunal.[364] In addition, the silence of the states should not be interpreted as consent to access international arbitration. This states' consent to submit disputes to international arbitration must be established and interpreted based on clear indicators.

For all the previous reasons, the tribunal rejected to apply MFN clauses, in the basic BIT, to dispute settlement provisions. The tribunal asserted that the procedural requirements act as a strict limit to arbitrate disputes between Argentina and the German investor, and this must be strictly complied with before access to international arbitration. The tribunal held that

> [T]o put it more concretely, since the Claimant has not yet satisfied the necessary condition precedent to Argentina's consent to international arbitration, its MFN arguments are not yet properly before the Tribunal. The Tribunal is therefore presently without jurisdiction to rule on any MFN-based claims unless the MFN clauses themselves supply the Tribunal with the necessary jurisdiction.[365]

The tribunal in this case followed the same fair way of interpretation according to the VCLT to determine the rights and obligations of the parties to the BIT. The tribunal interpreted the text in the light of the treaty context, object and purpose and supplementary means. The tribunal depended on the explicit meaning of the text not an implicit one. It did not put great emphasize on the purpose of the treaty, from the investor's point of view, to not to deny the relevance of the states' intent to interpretation. It balanced between the competing purposes of the BIT, the protection of investors and the promotion of investments to put one single purpose to the BIT.

4. ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina:

In the same vein of thinking, the arbitral tribunal in *ICS* case refused to apply MFN clause to dispute settlement provisions in BIT. The question arose before the tribunal is whether the British investor was to pursue domestic remedies before the Argentinian domestic courts for eighteen months before initiating international arbitration as the

[364] *See id*. paras 261-278.
[365] *Id*. para 200.

Argentina-UK BIT provided for, or could he benefit from the Argentinian-Lithuania BIT that has a fork in the road provision. This provision granted the Lithuanian investors the right to choose between local remedies or submitting their disputes directly to international arbitration.[366]

The tribunal in this case followed the same way of interpretation in the previous cases. In interpreting MFN clauses in the Argentina-UK BIT, the tribunal examined the ordinary meaning of the term "treatment" in the context of the whole BIT. Then it differentiated between the treatment of investors and the treatment of investments. Then it examined this ordinary meaning in the light of the object and purpose of the BIT. Finally, the tribunal searched whether the state practices would confirm the concluded interpretation or not.[367]

The tribunal concluded that the Argentina-UK BIT requires a mandatory eighteen months litigation prior to pursue international arbitration and the failure of the foreign investors to comply with this prerequisite deprives the tribunal of its jurisdiction.[368] The tribunal refused to apply the MFN clause to dispute settlement provisions.

C. Conclusion:

In this chapter, I have discussed the contemporary case law on the application of MFN clauses to dispute settlement provisions in BITs. I have indicated the problems with the decisions that have applied the MFN clause to dispute settlement provisions in BITs. I have explored the solutions for these problems by discussing the decisions that have rejected to apply the MFN clause to dispute settlement provisions in BITs.

There are two visions established in the jurisprudence and no one of them can claim a numerical supremacy of supporters. The first vision argues that the MFN clause should be applied to dispute settlement provisions in BITs. The second vision argues that this clause should not be applied to dispute settlement provisions in BITs. These two points

[366] *See* ICS Inspection and Control Services Limited v. Argentine, PCA Case No. 2010-9, ICC 528 (2012) Award on jurisdiction (Feb.10, 2012).
[367] *See id*. paras 238-317.
[368] *See id*. para 326.

of views are driven by two conflicting decisions of the ICSID followed by two lines of subsequent tribunals' decisions that followed both sides.

The arbitral tribunals that have applied the MFN clause to dispute settlement provisions in BITs adopted a mistaken interpretation to this clause. The neglect and misapplication of the international rules of interpretation in the VCLT is what characterizes the decisions of these tribunals. The confusion behind the incorporation of dispute settlement provisions form other BITs to the basic BIT by using the MFN clause arose out form the tribunal's decision in *Maffezini v. Spain*. This was the first ICSID decision that dealt with the interpretation and the application of the MFN clause to dispute settlement provisions in BITs. After *Maffezini* award, many tribunals followed the same line of thinking with the same conclusion, but with different analysis of the MFN clause.

On the other hand, many arbitral tribunals, in ***Plama v. Bulgaria*** and the subsequent decisions, adopted correct interpretation that rejected the application of the MFN clause to dispute settlement provisions in BITs without an explicit consent form the BITs' parties to apply this clause to matters of dispute settlement. The followers of this vision respect the international rules of interpretation in the VCLT. This vision recognizes that the agreement between the parties to arbitrate is a prerequisite for national or international arbitration. This opinion affirms that this agreement should be clear and unambiguous.

Although, the previous cases involving same facts, same legal provisions, similar treaty rights and obligations, the arbitral tribunals reached different conclusions. They answered the same question of whether foreign investors should rely on the MFN clause to incorporate most favorable procedural treatment form the host state’s third-party BITs to access international arbitration or not. The first line of decisions adopted one-side oriented interpretation, investor-oriented, to provide excessive protection to investors on the international level. The second line of decisions focused on discovering the interpretation that compatible with the intent of the parties. In sum, I argued that the duty of adjudicators is to discover the meaning of the treaty provisions, examining all evidences according to the logical sequence of the interpretational rules in the VCLT

and provide the states parties to BITs with impartial interpretations. It is not duty of adjudicators to create meanings or assume the intent of the parties.

IV. The Jurisprudence of the Application of the MFN Clause to Matters of Dispute Settlement in BITs

The main question before the previous tribunals was whether the foreign investors should rely on the MFN clause to incorporate most favorable procedural treatment form other BITs to access international arbitration or not. However, the question lurks in the jurisprudence is whether the MFN clause should serve as a title of jurisdiction to allocate the adjudicatory authority between domestic courts and international arbitral tribunals or not. The decisions of *Maffezini v. Spain, Plama v. Bulgaria* and subsequent cases created two visions in the jurisprudence of international investment law. Each of these visions adopts many arguments that support his point of view.

The first section of this chapter discusses these two visions in international investment law. The second section provides an assessment of the vision that calls for the application of the MFN clause to dispute settlement provisions and suggestions to resolve the interpretive problems of the MFN clause.

A. Two visions in international investment law:

The application of the MFN clause to dispute settlement provisions in BITs is a question of how arbitral tribunals should interpret these clauses. Should these tribunals follow the understanding of *Plama v. Bulgaria* that adopted the ordinary meaning as an evidence to the parties' intent? Or, they should follow the understanding of *Maffezini v. Spain* by giving effect primarily to considerations such as good faith, justice or reciprocity and a consideration like justice can override this ordinary meaning.

There are two visions established in the jurisprudence and no one of them can claim a numerical supremacy of supporters. The first vision argues that the MFN clause should be applied to dispute settlement provisions in BITs. The second vision argues that this clause should not be applied to dispute settlement provisions in BITs.

With respect to the first vision, it began with the arbitral tribunal's jurisdictional decision in *Maffezini v. Spain*.[369] The proponents of this vision argue that the tribunal in *Maffezini v. Spain* grounded its interpretation on the public international law.[370] This is clear with the usage of international law concepts, such as *res inter alios actos* and the *ejusdem generis* rules, in application and interpreting the MFN clause in international treaties.[371] The tribunal framed the role of the MFN clause as a positive systematic contribution to the governance of international investment rules. In this view, the MFN clause is a multilateralization device that works on the harmonization of international investment law and the procedural protection of the foreign investments and investors and will strengthen the power of arbitral tribunals that will urge the host states to respect their treaty obligations.[372] It asserts that foreign investors should rely on the MFN clause to benefit from dispute settlement provisions in other BITs that grant other investors more favorable treatment to overcome the problems of the admissibility of investor - state claims before international arbitral tribunals.[373]

They affirm that the exhaustion of local remedies or pursuing these remedies for a period before accessing to international arbitration might impede the enforcement of the treaty rights of the foreign investors.[374] They emphasize that the national legal system and domestic courts are insufficient to guarantee the protection and enforcement of the investment treaty rights, since, BITs does not applied directly within the domestic legal system of the host state, moreover, the domestic courts lack to the sufficient independence to judge against their governments to enforce these treaty rights.[375] In addition, arbitral tribunals have accepted that foreign investors should circumvent the admissibility requirements by relying on the MFN clause to benefit from the dispute settlement arrangements that are contained in other BITs that grant other investors most favorable access conditions to international arbitration.[376]

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[369] See, Emilio Agustín Maffezini v. The Kingdom of Spain., ICSID Case No.ARB/97/7, Decision on objections to jurisdiction, (Jan. 5, 2000) 5 ICSID Rep 396, (2002).
[370] *See* STEPHAN W. SCHILL, *Maffezini v. Plama: Reflections on the Jurisprudential Schism in the Application of Most Favored-Nation Clauses to Matters of Dispute Settlement, in* BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS OF ICSID, 251, 253(Meg Kinnear, et al. eds., Kluwer Law International, kindle edition 2015).
[371] *See id*. at 256-258.
[372] *See id*. at 258.
[373] *See* SCHILL, *supra* note 213, at 151.
[374] *See id.*
[375] *See id.* at 153.
[376] *See id.*

They also argue that the debate on the application of the MFN clause is not merely about selecting the proper interpretation of this clause. The debate has become higher than this. The MFN clause has become an effective tool by which the foreign investors can import procedural and substantive provisions from the host state's third-party BIT.[377] They believe that the broad interpretation of the MFN clause and the ability of importing dispute settlement provisions form other BITs, is consistent with the teleological view that BITs are not designed only to protect the rights of foreign investors, but also to maximize this protection.[378]

They do not concern about the wording of the MFN clause that varies from BIT to another, they affirm that this clause should be applied to dispute settlement provisions in BITs as a general principle in international investment law and this application should be independent from the exact wording or meaning of the MFN clause in any dispute.[379]

With respect to the second vision, the followers of this vision reject the application of the MFN clause to dispute settlement arrangements in BITs, unless this clause expressly indicates that the contracting states intended the application of this clause to these arrangements. This vision recognizes that the agreement of the parties to arbitrate is a prerequisite for national or international arbitration and such agreement should be clear and unambiguous.

This vision began with the arbitral tribunal's jurisdictional decision in *Plama v. Bulgaria*.[380] It argues that the tribunal in this case, by contrast to *Maffezini v. Spain*, denied any application of the public international law rules such as *ejusdem generis* and the private law thinking characterizes this tribunal.[381] The proponents of this vision affirm that the tribunal equalized between BITs and private contracts and applied the

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[377] See Simon Batifort & J. Benton Heath, *The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization*, 111 AMERICAN JOURNAL OF INTERNATIONAL LAW 873- 913 (2017).
[378] *See id*, at 912.
[379] *See* SCHILL, *supra* note 213, at 153.
[380] *See* Plama Consortium Limited v. Republic of Bulgaria., ICSID Case No. ARB/03/24, Decision on Jurisdiction, (Feb.8, 2005) 13 ICSID Rep 271, (2008).
[381] *See* SCHILL, *supra* note 370, at 256-258.

pacta sunt servanda rule and it dealt with international arbitration, as it is a commercial arbitration.[382] The tribunal also differentiated between the application of the MFN clause to dispute settlement provisions and the clear and unambiguous state's consent as a prerequisite to initiate disputes before international investment arbitration. Therefore, provisions state's consent is required to apply this clause to dispute settlement arrangements in BITs. In their opinion, adjudicators should not have a governance vision in relation to dispute settlement provisions, since their own universe is the bilateral investment treaty. In addition, the application of the MFN clause to dispute settlement provisions will lead to the permutations of treaty provisions that lead to the counterproductive to the harmonization of dispute settlement arrangements.[383]

According to this opinion, the broad wording of the MFN clause allows its application only to substantive matters not to the dispute settlement provisions in BITs. There is a fundamental distinction in public international law between the substantive and procedural provisions. Whereas, the first kind addresses the parties and imposes substantive obligations upon the host states, the second kind creates a jurisdictional mandate for an arbitral tribunal, and addresses arbitral tribunals and dispute's parties who are in a procedural relation, and this distinction should be taken into consideration regarding the application of the MFN clause. Therefore, both substantive and procedural provisions have a different purpose. The object of the substantive provisions is the investments made by an investor in a host state and the object of the procedural provisions is the adjudicative power of an arbitral tribunal and the arbitral parties.[384] Therefore, the proponents of this vision accept that investors can rely on the MFN clause, under the basic BIT, to benefit from more favorable substantive treatment in other BITs, but those investors cannot establish the jurisdiction of the arbitral tribunals based on this clause.

[382] *See id*.
[383] *See id*. at 259.
[384] See Douglas, *supra* note 74, at 97.

B. The assessment of the vision that calls for the application of the MFN clause to dispute settlement provisions in BITs and suggestions to resolve the interpretive problems of the MFN clause:

The MFN clause is of the same nature of any treaty provisions. Interpreting the MFN clause based on assumptions that it has its special nature, has specifically negotiated or in the light of the friendly preamble, this will not give us a complete picture.

I believe that the broad wording of the MFN clause does not allows adjudicators to expand the scope of the application of this clause to matters of dispute settlement in BITs. This proper interpretation will be reached by resolving the interpretive problems of the BITs in investor-state arbitration.

The words and terms of this clause have been employed by the treaty parties to express a specific meaning. The proper application of the means of interpretation will lead to the correct and consistent meaning of this clause. The starting point of interpretation is to find the ordinary meaning of the clause. The MFN clause is a term of art that has its historical background of application and interpretation. This historical background refers to the application of this clause to substantive matters in BITs. The treaty parties have employed this clause to express this specific ancient meaning, not the meaning that may invoked by the foreign investors. This clause may express a new or different meaning if it is established that the parties to the BIT so intended.

The major problem is that many provisions in BITs, such as the MFN clause, lack textual determinacy. It may be argued that this indeterminacy is the main reason for the conflicting decisions and arbitral tribunals struggle because of the generality and vagueness of the provisions of the BITs. The problem of the interpretation of the MFN clause is not crystalized in its indeterminacy, but in the misapplication of the available means of interpretation in the VCLT. Although, interpretation is not an exact science, it is still a science requiring the application of certain rules to produce correct results. The following of the logical sequence of the rules of interpretation will reduce the area of uncertainty as guidance for the choice between the different meanings. It will also rationalize the interpretation process and adjudicators behavior.

Adjudicators must first look for the ordinary meaning of the text. This is the starting point of the interpretation process, in the light of the context and treaty object and purpose. These terms and words of the provisions have been written by the parties and reflect the clear intent of these parties. This means that the tribunals must examine the text of the treaty to find whether the treaty parties intended to expand the scope of the application of the MFN clause to dispute settlement provisions or not. Searching for potential limitations is acceptable insofar the text itself allows so. Arbitral tribunals must not assume the scope of application of any treaty provision. Since this assumption without an evidence from the text will be misinterpretation. In addition, interpretation should be impartial not in favor of one of the parties and against the other without clear evidence from the text.

The silence of the treaty term should be interpreted in the light of clear evidence to override its ambiguity. The tribunals in *Maffezeini*, *National Grid*, *Hochtief* and *Impregilo* ignored the functional history of the MFN clause and interpreted it based on its generality. This was one-side oriented, investor oriented, interpretation. They interpreted the silence of the MFN clause in favor of the excessive protection of the foreign investors. Moreover, the tribunal in *RosInvest Co UK Ltd The Russian Federation* totally ignored the clear meaning of the BIT's provisions and allowed the investor to submit a dispute to international arbitration against the ordinary meaning of the text.

Each BIT has limited its application to particular persons "*ratione personae"* to particular matters "*ratione materiae"* or to a certain time "*ratione temporii"*. The treaty parties may restrict access to international arbitration by specific restrictions such as; negotiation between investors and host state, pursuing domestic courts for a time or allow to arbitration for particular disputes. Any interpretation do not respect these limitations would violate the treaty rights and obligations.

With respect to the treaty object and purpose, all BITs include the phrase "protect and promote the investments" whether in the preamble, title or the treaty texts. This impartial object and purpose works in favor of both foreign investors and host states. It protects the investors, investments and host states. We cannot divided the object and purpose of a treaty into many objects and purposes according to the provisions of the

treaty. The MFN clause does not has a specific purpose that is different from the purpose of the whole BIT. We must read the treaty in a manner that gives effect to the object and purpose of the whole BIT. Article 31 of the VCLT speaks of one singular "object and purpose". It is unacceptable to say that a singular "object and purpose" is related to a single provision. This contradicts Article 31 of the VCLT that speaks of the entire treaty as relevant to interpretation not its individual provisions.

In addition, the ambiguity of a text does not allow treaty object and purpose to override the ordinary meaning of this text or other potential context that may indicate this ordinary meaning. Since, treaty object and purpose is not a stand-alone mean of interpretation, nor does it contains direct obligations. They serve to affirm the ordinary meaning of the texts. So, the merely mention of the object and purpose to mysteriously interpret the MFN clause, is clear evidence of the manipulation of the means of interpretation. Emphasizing on the treaty "object and purpose" to an extreme extent, not only will it deny the relevance of the intentions of the treaty parties, but also it will provide the priority to the interests of the investors with respect to interpretation. Then interpretation will become a continuation of the treaty negotiation for the sake of the investors' excessive protection. Connecting the text, context, object and purpose of the whole treaty will give us a negative answer to the question of whether the MFN clause should be applied to dispute settlement provision in BITs or not.

The tribunals assumed a direct relation between the procedural and substantive provisions that covered by the MFN clause, so it applied the MFN clause to the procedural provisions. However, the distinction between the procedural and substantive provisions in an investment treaty is straightforward. The substantive provisions address the contracting state parties. While the procedural provisions address an international arbitral tribunal and disputing parties. These disputing parties are not the state parties to BIT, but the investor and the host state. Both investor and host state enter into a relationship of procedural equality before the arbitral tribunal once a dispute has been submitted to it. This procedural relationship subjects to the equality of arms principle in international litigation. This principle is not respected when one of the disputing parties has the ability to amend the rules that regulating the jurisdiction of the arbitral tribunal after the dispute has arisen. In addition, both of these kinds of provisions have its own purpose and each of them imposes different

obligations and rights. The object of the substantive provisions is investments that made by the nationals of one contracting state on the territory of the other contracting state. The object of procedural provisions is creating a jurisdictional mandate for an international arbitral tribunal to settle disputes between the foreign investor and the host state who are in an equal procedural relationship. How can one of the parties able to change the jurisdiction of the tribunal after the risen of this dispute. Finally, the invalidity of substantive provisions cannot affect the validity of the procedural provisions in the BIT and the contrary is right.

With respect to the contemporary or subsequent treaty practices of the parties, all the tribunals that followed *Maffezini* case have misapplied these means of interpretation. Article 31 (2) and (3) requires some qualifications for these practices to be relevant. First, an agreement that signed by all of the treaty parties and relegated to the BIT in question. Second, any instrument related to the treaty, concluded by one of the parties, and accepted by the others. Third, subsequent agreements or practices between the parties related to the treaty. Adjudicators who rely on the previous materials, they rely on clear interpretive materials according to the VCLT.

However, the BIT stands alone as a separated agreement between the two contracting states without any contemporary or subsequent practices and agreements. Therefore, any BIT between one of the parties and a third state is not relevant, since the BIT in the question should be interpreted not the host state's third-country BIT. Similarly, the practices should be between the BIT parties otherwise it would fall under Article 32 of the VCLT that may be taken into account as a common intent of the parties. However, according to Article 32 of the VCLT, supplementary means of interpretation are used only when the application of Article 31 leaves the meaning ambiguous or unreasonable.[385] The contemporary or subsequent treaty practices, in this case, do not reflect the understanding of the parties.

Some arbitral tribunals and foreign investors have overestimated the functional role of the MFN clause. Some adjudicators framed the role of this clause as a positive systematic contribution to the governance of international investment rules. They use

[385] *See* Vienna Convention on the Law of Treaties art 31-32, *supra* note 165.

this clause as a multilateralization device that works on the harmonization of dispute settlement mechanisms in BITs. This is a mistaken justification for the wrong interpretation of the MFN clause. First, there is no a general principle in international law that requires from adjudicators to harmonize dispute settlement provisions in the various BITs of the host states.[386] States themselves who can harmonize these mechanisms based on their intentions, since these provisions included in treaties that are concluded by states. Arbitral tribunals should only interpret treaty provisions to apply them not to guarantee the unity of the wording of these provisions.

On the other hand, the precedents of international arbitral tribunals cannot do nothing neither with the harmonization of dispute settlement provisions, nor with the interpretation of any treaty provisions. In international investment arbitration precedents is of non-binding nature. Arbitral tribunals do not blindly follow the previous decisions whether the decisions of the same tribunal or other tribunals. However, these tribunals critically analyze the decisions of each other to build their decisions on better arguments, not to follow precedents. In addition, the application of the MFN clause to matters of dispute settlement would lead to the counterproductive to the harmonization.

The VCLT provides an appropriate framework of interpretation that recognizes equally the legitimate rights and interests of both host states and foreign investors. Arbitral tribunals have to acknowledge completely the binding nature of these rules as a starting point in treaty interpretation. Merely referring to Articles 31 and 32 of the VCLT without their proper application would be useless. The application of these interpretational rules is a part of the acknowledgment of their binding nature. The application of these interpretational rules will guarantee an effective way to reach correct interpretations. Arbitral tribunals should analyze the application of these rules in interpreting a treaty provision. They have to provide the reasonable reasons that led them to these interpretations. It is not acceptable that adjudicators avoid the application of the rules of interpretation and just state the concluded interpretations without any further elaboration of how they reached these results. This reasoning will enrich the

[386] See ANDREA BJORKLUND, *International Investment Law and Arbitration: 2012 in Review, in* 109 YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2012-2013, 196 (Oxford University Press, kindle edition, 2014).

jurisprudence of treaty interpretation, and respect the ordinary meaning of the treaty terms that reflects the intentions of the parties. An incomplete application of these rules will lead to wrong interpretations.

Adjudicators should grant each rule of the rules of interpretation its value according to the VCLT. Depending on means without the others will lead to wrong interpretations that contradict the ordinary meaning that reflects the intent of the parties. The starting point in interpretation should be the ordinary meaning of the text. The context and treaty object and purpose should be an affirmative tool to the ordinary meaning. The circumventing these rules to interpret a treaty according to its object and purpose, would deny any relevance of the intent of the parties to the interpretation of their treaty.

The supplementary means of interpretation are used only in two cases and for one purpose. They are used to determine the meaning when the application of the general rule in Article 31 of the VCLT resulted in either ambiguous or unreasonable meaning. This means that the supplementary means are used to confirm the ordinary meaning resulting from Article 31 of the VCLT. Adjudicators are obliged to apply the general rule of interpretation, while they do not have to apply the supplementary means when the application of the general rule resulted in a clear meaning. The text of the treaty reflects the agreement between the parties, but these supplementary means do not bind the treaty parties together.

In sum, in determining whether the MFN clause should be applied to dispute settlement provisions or not there must not be interpretive assumptions in favor of the foreign investors or the host states. This application is a matter of treaty interpretation. The interpretation of the MFN clause is not different form the interpretation of any other treaty provisions. This clause is not negotiated separately or in a way that differs from the other treaty provisions. This MFN clause subjects to certain limitations that limit the whole treaty. The scope of the MFN clause should not extend the limitations of the application of the BIT, which is "*ratione personae", "ratione materiae"* and "*ratione temporii"*. The scope application of the BIT should work as a limitation to the application of the MFN clause.

The MFN clause should not be applied to dispute settlement provisions in BITs. This application would increase the uncertainty in international investment arbitration and no state would be able to predict the outcomes of the interpretation process to any provision in the BIT. The question would not be what the correct interpretation of the treaty provisions is, but which rule of the rules of interpretation will be applied. Treaty interpretation is not an exact science, but it is still a science requiring the application of particular rules to produce correct results. The problem of interpretation is not crystalized in the availability of the means of interpretation, but in the misapplication of the available means of interpretation.

Conclusion

This thesis has analyzed the interpretation of the international investment treaties and the application of the MFN clause to matters of dispute settlement provisions in BITs. The purpose of this thesis is not to discuss whether the using of BITs to harmonize dispute settlement mechanisms is necessary and feasible or not. This harmonization is not a legal matter it is a policy choice. States have their sovereign rights to determine whether to harmonize their mutual treaty rights and obligations or not. The aim of this thesis is to respect the ordinary meaning of the text of the treaty and other means of interpretation and to respect the intentions of the parties as it is expressed in the terms of the treaty. Treaty interpretation must proceed from the ordinary meaning of the words of the treaty even if we do not like them. It is a necessity to respect the intent of the treaty parties as it is expressed in treaty provisions, otherwise, state sovereignty will be useless in international investment law.

In this thesis, I have argued that the interpretation of the MFN clause in relation to its application to dispute settlement arrangements in BITs is not a today issue. In fact, it is not the first nor will be the latest "episode" in a long history of a constant demand of foreigners to prevent domestic courts to hear their cases and instead seek the assurance of an international or internationalized forum. Indeed, investors, foreigners and colonial powers always wanted "exceptionality" in the forum that deals with legal disputes. Foreign investors do not accept the local jurisdiction and demand special treatment in in a manner where they can control better the outcome of the adjudicative process. The development of foreign investors' treatment started from the complete outlawry in the early political communities to what is reflected in the current network of international investment agreements. I have also explored the evolution of the investment protection from the early political communities to the recent practices of international courts and arbitral tribunals that clarify the framework of the MFN clause and the impact of this framework on the interests of both foreign investors and host states. The interpretation of this clause plays an important role in determining the scope of its application. In fact, the debate about the scope of the application of the MFN clause to dispute settlement provisions in BITs, is about how this clause should be interpreted.

I have explored the nature of treaty interpretation, the analysis of Articles 31 and 32 of the VCLT and the arbitral use of these articles to interpret BITs. I have argued that the world of any human or legal person consists of normative universes. These universes structured around the possibility of right or wrong, of lawful or unlawful or of valid or void. International law is one of these normative universes. It includes rules and restrictions that validate or invalidate certain practices or construct a certain reality. Therefore, interpretation is a process that in fact may lead to correct and incorrect conclusions.

Each arbitral tribunal applies the rules of interpretation form its point view. As a result, the values of these rules vary from one tribunal to another and from a dispute to another. This entails unpredictability and inconsistency of the tribunals' decisions with a clear tendency to provide excessive protection to investors. The VCLT provides an appropriate framework of treaty interpretation that recognizes equally legitimate rights and interests of both the host states and the foreign investors. Arbitral tribunals have to acknowledge the completely binding nature of these rules. This will not happen until they adopt the exhaustive application of the means of interpretation in the VCLT. The actual application of these means works as a roadmap to reach the correct meanings. Interpretation is not an exact science, but it is still a science requiring the application of particular rules to produce correct results. Therefore, the problem of interpretation is not crystalized in the availability of interpretational means, but in the misapplication of the available means of interpretation.

The terms of the treaty are the sources of the intents of the parties who have employed these terms to express their ordinary meaning. The context of the treaty is not its historical or political context; it is the meaning of the terms within the whole treaty. The treaty object and purpose are not a stand-alone mean of interpretation and are not an independent source of the parties' intents. It is a second step to confirm the ordinary meaning and it cannot override the clear meaning of the text. Moreover, emphasizing the treaty object and purpose in interpretation may deny the relevance of the intentions of the treaty parties to the interpretation of their treaty. Adjudicators have to examine exhaustively all interpretation elements, according to its logical sequence, to find the real and correct meaning of the treaty provisions.

In addition, I have discussed the contemporary case law on the application of MFN clauses to dispute settlement provisions in BITs. I have indicated the problems with the decisions that have applied the MFN clause to dispute settlement provisions in BITs. I have explored the solutions for these problems by discussing the decisions that have rejected to apply the MFN clause to dispute settlement provisions in BITs. Although, these cases involving same facts, same legal provisions, similar treaty rights and obligations, the arbitral tribunals reached different conclusions. They answered the same question of whether foreign investors should rely on the MFN clause to incorporate most favorable procedural treatment form a third-party treaty to access international arbitration or not. The first line of decisions adopted one-side oriented interpretation, investor-oriented, to provide excessive protection to investors on the international level. The second line of decisions focused on discovering the interpretation that compatible with the intent of the parties. I have argued that the duty of adjudicators is to discover the meaning of the treaty provisions, examining evidence according to the logical sequence of the interpretational rules in the VCLT and provide the states parties to BITs with impartial interpretations. Indeed, adjudicators are not supposed to create the meaning, but to discover it.

I have also discussed the jurisprudence of the application of the MFN clause to matters of dispute settlement in BITs. The question lurks in the jurisprudence is whether the MFN clause should serve as a title of jurisdiction to allocate the adjudicatory authority between domestic courts and international arbitral tribunals or not. There are two visions established in the jurisprudence and no one of them can claim a numerical supremacy of supporters. I have analyzed the two visions in international investment law. I have provided an assessment of the vision that calls for the application of the MFN clause to dispute settlement provisions and suggestions to resolve the interpretive problems of the MFN clause. I have concluded that in determining whether the MFN clause should be applied to dispute settlement provisions or not there must not be interpretive assumptions in favor of the foreign investors or the host states. This application is a matter of treaty interpretation. The interpretation of the MFN clause is not different form the interpretation of any other treaty provisions. This clause is not negotiated separately or in a way that differs from the other treaty provisions. This MFN clause subjects to certain limitations that limit the whole treaty. The scope of the MFN clause should not extend the limitations of the application of the BIT, which is

"*ratione personae"*, "*ratione materiae"* and "*ratione temporii"*. The scope application of the BIT should work as a limitation to the application of the MFN clause.

The duty of adjudicators is to discover the meaning of the treaty provisions, examining evidence according to the logical subsequence of the interpretational rules in the VCLT and provide the parties with impartial interpretations. The establishment of a unified international system of investors' rights protection or universal investors' rights system should depend on how many states ratify multilateral investment treaties to make legally binding commitments to establish such a system. It is not the duty of adjudicators to impose such a system on states. The application of the means of interpretation will be misused to create and establish excessive protection to foreign investors against the intent of states parties who created the BIT. The conflicting interpretations will outlive and repeat themselves in many decisions. This thesis is an alert message to the coming generations to apply the rules of interpretation honestly, to determine the treaty rights and obligations based on facts not assumptions. A full compliance with the international rules of interpretation in the VCLT will lead to correct interpretations and ensure that these interpretations are consistent with parties' intention as it is expressed in the terms of the treaty.