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Contesting the injustice of a global regime: ideological bias in investment treaty arbitration

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CONTESTING THE INJUSTICE OF A GLOBAL REGIME: IDEOLOGICAL BIAS IN INVESTMENT TREATY ARBITRATION

A Thesis Submitted to the

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In partial fulfillment of the requirements for the

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By

Sarah Mohamed Abulkassem

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DEDICATION

To my Mom and Dad who taught me how to pursue my goals.
To my beloved husband for providing me with unfailing support
and continuous encouragement.

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ABSTRACT

This thesis explores the issue of perceived bias in the Investor-State Dispute Settlement (ISDS) system. It conceptualizes the political and procedural critique of the ISDS system. It focuses on the hybrid nature of the system perceived as being a form of public law adjudication while empowering the interests of private corporations over states' sovereignty. Moreover, it addresses the procedural critique of the system represented in the problem of party appointment and the moral hazard of arbitrators. It provides an empirical analysis of case law to show how the interpretation of the rule of law differs according to the ideologies of arbitrators. Following, it analyzes the reform proposals to establish a multilateral investment court in order to curb the illegitimacy problems of the ITA system and concludes that such a proposal does not provide an adequate solution to these issues.

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I. INTRODUCTION

The drastic increase in international investments by the end of the 1990s is associated with an increase in the number of bilateral investment treaties (BITs).[1] The international treaty community now is loaded with almost 3,000 BITs.[2] Most of these BITs require the application of international investment law. One component of these BITs is the Investor-State Dispute Settlement (ISDS) clause, whereby the substantive level of protection for investors becomes enforceable. Such clauses provide for the method of settlement of the dispute arising between an investor and its host state through arbitration.[3] For instance, the US Model BIT,[4] the Swiss BITs,[5] the Energy Charter Treaty "ECT",[6] and the North American Free Trade Agreement "NAFTA"[7] contain an arbitration clause for the mechanism of dispute settlement.

There is no definitive proof to show that the world of investment treaties had led to the economic development of developing countries.[8] Contrarily, it has brought economic prosperity to arbitrators, academic aspirants, and law firms.[9] Further, it has increased the anxiety of states because of the recurrent recourse to arbitration by foreign investors even during times of economic crises of developing states; it has hindered policies that could have been adopted to avoid problematic situations.[10] The legitimacy crisis that arises with the system is two fold. First, the system is criticized for allowing two unequal reciprocals,

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[1] Christoph H. Schreuer, *The Dynamic Evolution of the ICSID System*, *in* The International Convention on the Settlement of Investment Disputes (ICSID) 15, 20, in Rainer Hofmann & Christian J. Tams eds.(2007) [hereinafter, Shreuer The Dynamic]; *See also*, M. Sornarajah, THE INTERNATIONAL LAW ON FORIEGN INVESTMENT, (Cambridge 2), at 204-212(2004) [hereinafter, M.Sornarajah, THE INTERNATIONAL LAW].

[2] United Nations Conference on Trade and Development (UNCTAD), Investment Dispute Navigator, the statistics *available at* http://investmentpolicyhub.unctad.org/. [hereinafter UNCTAD].

[3] *See generally*, Gus Van Harten, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW, Oxford University Press (2007) [hereinafter Van Harten, INVESTMENT TREATY ARBITRATION].

[4] U.S. Model Bilateral Investment Treaty of 2012, available at http://www.state.gov/documents/organization/188371.pdf.

[5] *See*, *e.g.* Switzerland-China BIT, art. 11, ¶ 2, Jan. 27 (2009), *See also*, Switzerland-Malaysia BIT, art. 9, ¶. 2, (1978).

[6] The Energy Charter Treaty, art.26, ¶2 (c) and ¶4, (1994) [hereinafter ECT].

[7] North American Free Trade Agreement, U.S.A.-Canada-Mexico, art.1120, (1992) [hereinafter NAFTA].

[8] M.Sornarajah, THE INTERNATIONAL LAW, *supra* note 1.

[9] *Id.*

[10] *Id.*

the private investors and the sovereign states, to adjudicate before a group of private arbitrators who are perceived to decide disputes in accordance with their ideological preferences. Thus, the system is perceived as affecting the economic stability of states and exposes them to a multitude of claims that arise from their right to exercise their regulatory power in periods of economic and political crisis. Second, the criticism concerns the lack of democracy in the law that was created by ad hoc tribunals. Investment arbitrators should not have the mandate to make profound amendments they pursue on the grounds of the existing vague provisions in the bilateral and multilateral investment treaties. These adjudicators are not accountable to do so. The grounds for their decisions regarding vague provisions together with the lack of an appellate body raise many concerns about their independence and impartiality.

In that sense, the ISDS system creates a one-sided system of adjudication that empowers investors to bring claims against host states and bestows power to private adjudicators who decide disputes in an unfair manner affecting the economic stability of host states. Such a partial and dependent system calls for serious reform proposals in order to diminish such partiality.

Today, arbitration under the ICSID Convention[11] is the most frequently used mechanism for settling investment disputes.[12] The ICSID Convention was adopted in 1965 which allowed the World Bank to establish the International Center for Settlement of Investment Disputes.[13]

The ICSID Convention does not entail rules or impose any level of substantial protection to investors' rights, but rather it regulates the procedural mechanism for resolving

[11] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, (1965), entered into force Oct. 14 (1966), [hereinafter ICSID Convention].
[12] *Id*, ICSID Convention.
[13] UNCTAD, supra note 2,UNCTAD/WIR/2015, June 25 (2015); *See* also Meg Kinnear &Frauke Nitschke, *2 Disqualification of Arbitrators under the ICSID Convention and Rules*, in CHALLENGES AND RECUSALS OF JUDGES AND ARBITRATORS IN INTERNATIONAL COURTS AND TRIBUNALS 34, 34 (2015), available at http://booksandjournals.brillonline.com/content/books/b9789004302129_004.

investment disputes that arise between investors of member states and their host states.[14] Thus, ICSID allows investors to bring claims against their host states, provided that the investor's home state and the host state are both members of the Convention.[15] This means that the ICSID Convention assists investors in evading the potentially perceived bias of the domestic courts of the host states and in avoiding having to resort to the diplomatic protection provided by their home states. By substituting "gunboat diplomacy," which was formerly used to resolve investment disputes, and by assessing claims in a neutral manner, arbitration under the ICSID Convention has de-politicized investor-state disputes and enhanced the rule of law.[16]

The ICSID Convention focuses on empowering the procedural mechanism of dispute settlement, rather than providing any substantive protection. This means that it aims at providing substantive outcomes through fair and neutral procedural settings.[17] In this, it is purported to ensure that such neutral proceedings are better able to guarantee that decisions are not rendered in an unpredictable environment. In the complex environment of investment disputes, where in decisions rendered in investor-state disputes are most probably not satisfying to all parties concerned, the parties should have faith and trust in the fairness of the mechanism itself. Such acceptance and compliance of unfavorable awards is illustrated by the lack of any doubts about the impartiality and fairness of the procedures.[18] Therefore, the legitimacy of the system lies in the shared belief in the procedural integrity of the award despite the outcome of the award.[19]

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[14] *See generally*, Christoph Schreuer, Loretta Malintoppi, August Reinisch A, and Anthony Sinclair, THE ICSID CONVENTION: A COMMENTARY, 2nd edition, Cambridge University Press, (2009) [hereinafter Schreuer et al., COMMENTARY]; *See also*, Shreuer, The Dynamic, *supra* note 1, at 16.
[15] *Id.*
[16] David W. Rivkin, *The Impact of International Arbitration on the Rule of Law*, 29 Arb. Int'l.327, 341 (2013).
[17] *See* Marie-Claire Cordonier Segger, Markus W. Gehring, & Andrew Newcombe, *The Institutionalization of Investment Arbitration and Sustainable Development*, in Sustainable Development in World Investment Law 615, 618 (2011).
[18] Lars Markert, *Challenging Arbitrators in Investment Arbitration: The Challenging Search for Relevant Standards and Ethical Guidelines*, 3 Contemp. Asia Arb. J. 237-243 (2010).
[19] David D. Caron, *Investor State Arbitration: Strategic and Tactical Perspectives on Legitimacy*, 513 Suffolk Transnat'l. L.J., 514 (2008) [hereinafter Caron, *Investor State Arbitration*].

It is undoubted that such procedural integrity and fairness mainly depends on the decision makers. Therefore, the independence and impartiality of arbitrators is imperative and mutual within all the arbitration systems.[20] Its significance is further highlighted by both the lack of a rule of precedent and a mechanism for appeal in arbitration. The power endowed to arbitrators in deciding arbitration cases is only acceptable when it is objectively-wielded and follows the rules of law in a rational way.[21] This is so even with regard to investment arbitration, as it concerns significant public interests that are often at stake.[22] Van Harten highlights this idea in one of his writings;[23] he argues that should anyone affirm that investment arbitration guarantees neutral, fair, unbiased, and hence a superior scheme of decision-making, the system will be properly apprehended to reflect a high standard of independence and impartiality.[24] Whether investment arbitration under the ICSID Convention satisfies this expectation or not is controversial. There has been a tremendous increase in the number of disqualification requests submitted to the Centre against ICSID arbitrators;[25] accordingly, many scholars have started to shed light on this issue in the past few years.

The disqualification requests of arbitrators under the ICSID Convention have come under scrutiny in order to bring transparency to the standard of independence and impartiality set forth in the ICSID Arbitration Rules.[26] This standard and its threshold have been compared to equivalent standards applied in other mechanisms of adjudication, particularly commercial arbitration and public international law adjudication, aiming at

[20] Catherine A. Rogers, *The Ethics of International Arbitrators*, *in* The Leading Arbitrators' Guide to International Arbitration 621, 630, Lawrence W. Newman &Richard D. Hill eds., 2d ed. (2008) [hereinafter Rogers, *The Ethics of International Arbitrators*].

[21] Gus Van Harten, *Procedural Fairness, and the Rule of Law*, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 627, 627, 631, 637 (Stephan W. Schill ed., 2010) [hereinafter Van Harten, *Procedural Fairness*].
[22] *See* Rogers, *The Ethics of International Arbitrators*, *supra* note 17, at 648–649.
[23] Van Harten, *Procedural Fairness*, *supra* note 18.
[24] *Id*.
[25] ICSID Convention, *supra* note 8, art. 57; *See* also *infra* chapter two.
[26] James D. Fry & Juan Ignacio Stampalija, *Forged Independence and Impartiality: Conflicts of Interest of International Arbitrators in Investment Disputes*, 30 Arb. Int'l.189, 210–246 (2014).

reaching a decent standard for the independence and impartiality of ICSID arbitrators.[27] Many empirical analyses have been carried out for determining whether ICSID arbitrators are biased or not.[28] These analyses are executed through measuring the effect of the extra-legal factors on the awards rendered by ICSID Arbitrators.[29] Many scholars have varying conclusions and solutions for the problems identified. Some scholars propose that the problem should be resolved via new standards of independence and impartiality under the current institutional framework.[30] Another group of scholars detect a systematic bias in the whole system as the main issue that needs vital reform.[31]A further group of scholars has determined that the systematic bias existing in the core of the current system cannot be evaded by amending the applicable safeguards; it requires the abolishment of the whole system and the establishment of a permanent international investment court.[32]

This paper deals with the critiques directed towards the current ISDS specifically those concerning the political and procedural critiques of the Investment Treaty Arbitration system. In examining the political critiques, this paper scrutinizes the lack of independence in the system in its entirety because it empowers private investors to bring claims against host states and thus affecting the state regulatory powers concerning its public interests. The system creates a distinctive relationship between sovereign states and private individuals in which there is no balance between the two parties. Moreover, it jeopardizes a state's sovereignty by subjecting the investor-state disputes to private

[27] Audley Sheppard, *Arbitrator Independence in ICSID Arbitration*, *in* International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer 131, 133–136 (2009) [hereinafter, Sheppard, *Arbitrator Independence*].
[28] Gus Van Harten, *Arbitrator Behavior in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration*, 50 Osgoode Hall L.J. 211 (2012), available at SSRN: https://ssrn.com/abstract=2149256. [hereinafter Van Harten, *Asymmetrical Adjudication* (2012)].
[29] Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators*, 96 Cornell L. Rev. 47 (2010) [hereinafter, Kapeliuk, *The Repeat Appointment*]; *See also*, Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C.l. Rev. 1 (2007).
[30] G.J. Horvath & R. Berzero, *Arbitrator and Counsel: the Double-Hat Dilemma*, 10 Transnat'l. Disp. Mgmt. (2013) [hereinafter Horvath&Berzero]; *See also*, Jan Paulsson, *The Idea of Arbitration*, at 155-159 (2013) [hereinafter Jan Paulsson, *The Idea*].
[31] Stavros Brekoulakis, *Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision Making*, 4 J. Int'l.Disp. Settlement 553, 585 (2013) [hereinafterBrekoulakis, *Systemic Bias*].
[32] Van Harten, INVESTMENT TREATY ARBITRATION, *supra* note 3.

adjudicators who are perceived to be biased toward certain classes of investors. Afterwards, it deals with the problem of the arbitrators' bias in investment treaty arbitration when there is no obvious evidence of bias according to the applicable rules of arbitration. It argues that there is a perceived bias in the arbitrators' behavior in international investment arbitration. Such perceived bias is due to the influence of different ideologies and policy preferences of arbitrators on their decision-making.

Furthermore, the existence of party appointment mechanism increases the critiques toward the independence and impartiality of the system in its entirety. Since arbitrators lack secure tenure, the existence of a party appointment mechanism becomes a fertile ground for personal interests and unleashes the problem of the moral hazard of arbitrators. It finally analyzes the proposal for establishing a permanent multilateral investment court and argues that despite the possibility of resolving the critiques addressed to the party appointment mechanism, such a proposal does not guarantee an effective resolution of the political problems of the system and the moral hazard of arbitrators. Concluding that, such a proposal collects the worst features of the current ISDS system within one authoritative body and diminishes any hope for a fair and neutral adjudication.

Chapter two discusses the political criticism of the ISDS system represented in the empowerment of private investors to bring sovereign states before private adjudication bodies. Further, it analyzes the ideological bias of an arbitrator towards a certain party in investment arbitration. It focuses on the problems concerning the arbitrators' perceptions. Following, it discusses the procedural problems of the ITA system represented in the existence of the party appointment mechanism and analyzes the problem of the moral hazard of arbitrators.

Chapter three sets out the relevant case law in which we can detect the effect of ideology on the final decision can be detected. In this, it focuses on one controversial issue in investment arbitration; that is the scope of application of the Most Favored Nation clause (MFN) and whether it encompasses dispute resolution provisions or not, and scrutinizes how the existence of contested issues can reveal the different interpretations of arbitrators

in the same issue. It emphasizes two decisions rendered in two different cases that had similar claims and arguments but with different outcomes; these cases are *Siemens v. Argentina* and *Daimler v. Argentina*.

Chapter four scrutinizes the recent reform proposal dealing with the criticism of the illegitimacy of the ITA. In this, it examines the proposal of creating an Investment Court System (ICS) provided in the draft texts of the TTIP and the proposal for establishing a permanent Multilateral Investment Court (MIC) to replace the current ISDS system. Finally, it assesses these proposals in light of the current criticism of the present system and emphasizes the court's complete inefficiency in curbing the current problems of the ISDS system.

II. CRITIQUES OF INVESTMENT TREATY ARBITRATION

Many critiques address the structural and procedural flaws of the ITA system.[33] Since the system is of a public law nature, it must encompass the four main requirements for any public law adjudication system. These are accountability, coherence, transparency and openness, and independence.[34] Critiques demonstrate that the current ITA system has failed to meet any of these requirements. In brief, accountability, *stricto sensu*, refers to the accountability of the adjudicator in interpreting public law and the existence of higher appeal mechanism for matters of legal interpretations. Despite the fact that the ITA system allows the review of the arbitral awards, this review is minimal and limited in nature. To illustrate, the ICSID Convention provides for annulment procedures pursuant to Article 52.[35] These annulment procedures are held through constituting an annulment committee that is entitled to examine the challenges brought against the award from the losing party. However, this annulment mechanism is inefficient because the grounds for annulment are very limited and do not empower the annulment committee to review errors in interpretation of laws by arbitrators.[36] This demonstrates the power given to private adjudicators to interpret and review questions of public law without the existence of proper supervision over their

[33] Van Harten, INVESTMENT TREATY ARBITRATION, *supra* note 3; Catherine A. Rogers, *The Politics of International Investment Arbitrators*, 12 Santa Clara Int'l L. Rev, (2013), Penn State Law Research Paper No. 52-2013. Available at SSRN: https://ssrn.com/abstract=2347843 [hereinafter, Rogers, *The Politics].*

[34] *Id.*

[35] Article (52) provides that: ("stating that, Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based…").

[36] Van Harten, INVESTMENT TREATY ARBITRATION, *supra* note 3.

decisions. This absence of adequate supervision gives arbitrators free discretion in interpreting public law, which is perceived an lacking accountability.[37]

With regard to openness, there are two requirements that have to be fulfilled. These are the transparency of the decisions and its relevant documents to the public. This is important because it opens the door for public scrutiny and thus public issues not being decided in the dark. Public scrutiny is significant because the arbitrator would know that her/his decision is subject to review and possible criticism by the public and would attempt to avoid undermining the credibility of the entire system.[38] Thus, such a matter underpins the importance of independence and the accountability of adjudicators. Under the current ITA system, openness is decided on a case-by-case basis because it depends on the state party to the dispute.

Another critique of the ITA system is the lack of the standard of coherence.[39] This is due to the non-existence of a hierarchal system of appellate review that ensures a predictable manner in interpreting the rules of the law in a unified way in cases of inconsistent decisions concerning the same subject matter.[40] The absence of coherence is problematic because the governmental decision-making process relies, to a certain extent, on the ability of legislatures to recognize the boundaries of sovereign power and its consequences.[41] Consequently, it is difficult for governmental decision-makers to foresee the consequences and impacts of their policies. That is why governments find it difficult to endure the special burden of the lack of coherence in the ITA regime.[42]

[37] Van Harten, INVESTMENT TREATY ARBITRATION, *supra* note 3, at 107-158.
[38] *Id*, at 159-162.
[39] *Id*, at 164.
[40] *Id*.
[41] *Id*.
[42] *See supra* note 11.

Finally, the ITA system fails to maintain the independence requirement.[43] This is due to the existence of private law adjudicators that are entitled to decide on private law matters concerning private property between foreign investors and the sovereignty of host states.[44]

Under investment treaties, foreign investors enjoy a high level of protection against their host states' regulatory measures that might affect their investments.[45] This protection is demonstrated in the substantive guarantees provided in investment treaties; such guarantees include the prohibition of expropriation, Fair and Equitable Treatment (FET), and non-discrimination.[46] The obvious purpose is to protect foreign investments by shielding them from any political risks in their host states and thus, increasing the flow of foreign direct investments.[47] One important aspect of investment treaties is the settlement of disputes through arbitration, known as the dispute settlement clause. Investment arbitration operates beyond the domestic application of the host states' applicable laws and enables foreign investors to bring claims before international tribunals and obtain favorable financial adjudications against their host states.[48]

Furthermore, the ITA system faces many procedural criticisms. Critics identify investment arbitration tribunals as "secret courts"[49] that are constituted of biased

[43] Van Harten, INVESTMENT TREATY ARBITRATION, *supra* note 3, at 170.
[44] *See* Benedict Kingsbury, Stephan W. Schill, *Public Law concepts to Balance Investor's Rights with State Regulatory Actions in the public Interest –The Concept of Proportionality*, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW, Oxford Univ. Press, at 75-104 (2010) [hereinafter, Kingsbury&Schill *Public Law Concepts*]; *See also* Gus Van Harten, *Perceived Bias in Investment Treaty Arbitration*, in M. Waibel et al (eds.) THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY, Kluwer Law Intl' (2010).
[45] *See generally*, M. Sornarajah, THE INTERNATIONAL LAW, *supra* note 1.
[46] Rudolf Dolzer and Christopher Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW, 2nd ed., (2012) [hereinafter, Shreuer&Dolzer, PRINCIPLES].
[47] *Id*; *See also* Sornarajah, THE INTERNATIONAL LAW, *supra* note 1.
[48] Shreuer&Dolzer, PRINCIPLES, *supra* note 43.
[49] Anthony De Palma, "*Nafta's Powerful Little Secret, Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say*", NY Times, 11 March (2001).

arbitrators.[50] The arbitration regime is perceived to be rigged in favor of investors rather than being neutral and fair.[51] Unlike the court system, where judges are designated based on specific criteria, in investment arbitration the tribunal usually consists of three arbitrators; each disputing party appoints one arbitrator, who is deemed neutral and totally independent; the president of the tribunal is appointed either by the mutual agreement of both parties or by the arbitral institution.[52] Despite the fact that the appointed arbitrators must be independent and impartial toward both parties, the discretionary power of the parties in appointing them creates incentives for arbitrators to act favorably to their appointing parties aiming at future appointments. Having said that, one might think that the president of the tribunal, being appointed by the two arbitrators and not by the parties, is independent and not swayed toward any party; however, this is not the case here either. The presiding arbitrator might be biased toward a certain party due to the existence of mutual policy preferences or business benefits including future appointments. Since the investment arbitration regime is a small community, the president of the tribunal might have social connections with one party unbeknownst the other party and cannot be deemed as a solid ground for a challenge. In contrast, judges are appointed for fixed terms while arbitrators are appointed on case-by-case bases. This causes them to be keen on multiple appointments. For this reason, the discipline from reputation or job security may be insubstantial. This is in addition to the lack of an effective appeal mechanism

[50] Pia Eberhardt and Cecilia Olivet, *Profiting from Injustice: How Law Firms, Arbitrators and Financiers Are Fueling an Investment Arbitration Boom*, edit. By Helen Burley, Amsterdam: Transnational Institute, November (2012).

[51] Anton Strezhnev, *Detecting Bias in International Investment Arbitration*, 57th Annual Convention of the International Studies Association - Atlanta, Georgia, March at 16-19, (2016); *See also*, Van Harten, INVESTMENT TREATY ARBITRATION, *supra* note 3, at 26, 30; *See also* Nathalie Bernasconi-Osterwalder, *Who Wins and Who Loses in Investment Arbitration? Are Investors and Host States on a Level Playing Field? The Lauder/Czech Republic Legacy*6:1 J World Inv't& Trade 69(2005); *See generally* Olivia Chung, *The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration* 47:4 Va J Int'lL 953 (2007).

[52] ICSID Convention, *supra* note 8, Arbitration Rules, Art.(37) and (38).

in investment arbitration. All of these concerns contest the legitimacy of arbitrators in investment arbitration.[53]

This chapter explores the structural or political critiques addressed in the ITA system that are represented in the hybrid nature of the system and the way through which a balance between the states' sovereignty and private property must be achieved through adopting a public law approach in deciding investment arbitrations. Further, it examines the existence of ideological bias that influences the arbitrators' decisions. It scrutinizes the role of their policy preferences and the ideology of their decisions. It further sheds light on the procedural criticism of the ITA regime such as the problem of party appointment that impugns the independence and impartiality of the system. Further, it examines the way in which arbitrators' incentives correlate with their decisions. In doing so, this chapter addresses two issues. Section one analyzes the first issue concerning the structural and political problems that negatively influence the fairness of the ISDS system. Section two scrutinizes the procedural issues affecting the system's independence demonstrated in the existence of the party appointment mechanism and the moral hazard of arbitrators.

[53] Jan Paulsson, *Moral Hazard in International Dispute Resolution*, ICSID Review-Foreign Investment Law Journal no. 25 (2):339-355, (2010); *See also*, Van Harten, INVESTMENT TREATY ARBITRATION, *supra* note 3, at 152-175.

A. STRUCTURAL AND POLITICAL CRITIQUES OF THE ISDS SYSTEM

The ITA system must be comprehended as a method of adjudicative review in public law because it is established by the state's sovereign actions and is primarily used to resolve disputes that arise from the rights of the states to exercise their sovereign authorities.[54] To illustrate, investment treaty arbitration predominantly constitutes a class of claims emanating from the effect of states' regulatory measures that concerns public policies against the property of investors. This differs from arbitration between states concerning conventional international disputes and also differs from commercial disputes that arise between private parties whereby the disputing parties can equally enjoy legal rights and obligations. Therefore, this imbalance between the state's sovereignty and the investors' is a distinctive character of the ITA system that raises concerns about the independence of the whole system.

Investment treaty arbitration is a public law system; it concerns the regulatory relation between individuals and states instead of engaging in a reciprocal relation among juridical equals.[55] Therefore, investment treaties are different from other public international law treaties for permitting investors to bring claims against host states according to procedural rules that are developed widely in the international commercial arbitration's context. Therefore, the system implants dispute resolution mechanisms of a private international law nature into the realm of public international law treaties.[56]

The above portrait is clearly represented in the establishment of the ICSID. The purpose of establishing the ICSID in 1965 by the World Bank was to overcome the problems of investment dispute settlement before domestic courts and under the umbrella of diplomatic protection. The ICSID created a legal framework to

[54] Van Harten, INVESTMENT TREATY ARBITRATION, *supra* note 3, Ch. 3.
[55] *Id*, *See* also Kingsbury&Schill *Public Law Concepts*, Supra note 41; Stephan W. Schill, *W (h) ither Fragmentation? On the Literature and Sociology of International Investment Law*, 22 EJIL. No. 3, 875-908, (2011).
[56] Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, BRIT. Y.B. INT'L L, at 151–55 (2003).

settle investment disputes arising between foreign investors of contracting states and member host states.[57] It purportedly provides a neutral institutional and legal structure aiming at protecting transnational investments and promoting foreign direct investment and thus the economic development of member states.[58] Upon the consent of the parties to the ICSID jurisdiction, neither party has the right to invoke its claims before any other local remedies,[59] nor can the investor's home state exercise diplomatic protection[60] unless the parties have agreed otherwise.[61] This means that, the legal framework of the ICSID Convention converts the protection of foreign investments into a substantive right instead of perceiving it as a privilege, as it used to be under the diplomatic protection. The ICSID has departed from using the wording of protecting private property and shifted it towards the wording of protecting foreign investments for economic development. In this, it has recreated the international investments rules for the purported aim of promoting the international economic development of states.[62] Thus, despite shifting the wording of the aim of the Convention to be the protection of international foreign direct investment, the main purpose and aim of the Convention remains the same, that is, the protection of private property of the capital-exporting countries. Further, such protection becomes the purpose for achieving and promoting economic development among state members of the

[57] Andrew Newcombe & Lluís Paradell, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT, at 27-30 (1st edition, Kluwer Law International Publisher) (2009).
[58] *Id.*
[59] In this, The Report of the Executive Directors on the Convention provides that if the parties did not reserve their rights to bring claims before other remedies or did not require the exhaustion of local remedies before resorting to the ICSID, their resort to the ICSID is deemed an exclusion of any other remedies. *See also* ICSID Convention, *supra* note 8, Article (26) states that: "Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy."
[60] *See* ICSID Convention, *supra* note 8, Article 27(1) provides that: "No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute."
[61] *Id.*
[62] *See* the ICSID Convention, *supra* note 8, The Preamble asserts that: "Considering the need for international cooperation for economic development, and the role of private international investment therein."

ICSID Convention.[63] In addition, ratification of the ICSID Convention by states does not amount to consent to arbitration under the auspices of the ICSID; it has to be accompanied by the host state's consent to an investor-state dispute settlement provision that endorses the jurisdiction of the ICSID in the legal instrument such as the BIT between the latter and the foreign investor's home state.[64] Accordingly, Investment Treaty Arbitration serves as a distinctive adjudicative mechanism of public international law that regulates the relation between foreign investors and the host states through adjudicating the state's sovereign actions and regulatory measures within its territory before foreign investors and corporations. Therefore, the ICSID does not admit disputes without the prior waiver of the host state, as a respondent, to its sovereign immunity from the arbitration. For that reason, the ITA system is different from commercial arbitration.[65]

Another political criticism of the ITA system is that arbitrators decide disputes under the influence of their ideology and policy preferences. In international investment arbitration, on the one hand, there is a popular view that arbitrators are adjudicators who apply the law regardless of their policy preferences, educational backgrounds, and irrespective of any financial incentives they might receive.[66] On the other hand, anecdotes in addition to several academic studies criticize this popular view.[67] Since arbitrators are human beings, they cannot decide cases pursuant to the role of law only. They are still human beings who cannot be

[63] Mohamed A. Ismail, INTERNATIONAL INVESTMENT ARBITRATION: LESSONS FROM DEVELOPMENT IN THE MENA REGION, 1st ed. At 79-85 (2013).
[64] *Id.*
[65] Van Harten & Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EJIL, no. 1, (2006).
[66] Daniel S. Meyers, *In Defense of The International Treaty Arbitration System*, 31 Houston Journal of Intl' l' 47–82 (2008) [hereinafter, Meyers, *In Defense*]; Stephen E. Blythe, *The Advantages of Investor-State Arbitration as a Dispute Resolution Mechanism in Bilateral Investment Treaties*, 47 Int'l Law. 273, 290 (2013) [hereinafter Blythe, *The Advantage*] ; Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 Harv. Int'l L.J. 435, 490 (2009) [hereinafter, Frank, *Development Outcomes* (2009)]; Jan Paulsson, *Denial of Justice in International Law*, Cambridge Univ. Press, at 265 (2005).
[67] Gus Van Harten, *Fairness and independence in investment arbitration: A critique of development and outcomes of Investment Treaty Arbitration*, December (2010) [hereinafter, Van Harten, Fairness and Independence, 2010]; *See also* Rogers, *The Politics*, *supra* note 30.

righteous all the time because they have internal and external motivations that influence their impartiality and make them deviate from the law in their decisions. Such intrinsic influences exist because of the arbitrators' ideologies and policy preferences, and their specific mindsets and beliefs, which determine the sphere of their interpretations of the rules of law and of their analyses of the disputing parties' arguments. As such, they render their decisions in accordance with their inner beliefs and preferences subconsciously, and without leaving any doubt on their independence and impartiality.

In light of the above, it is significant to discuss extensively the two political criticisms of the present ISDS system in order to understand the impact of such problems on the fairness of the whole ITA regime. As such, the following section starts with examining the imbalance that the ITA system creates by enabling adjudication between two unequal reciprocals the private investors and the sovereign states and how this imbalance affects the host state's regulatory powers to amend its policies with the fear of facing a multitude of claims. Second, it criticizes the fact that the state's economic stability rests in the hands of private adjudicators who adjudicate disputes in accordance with their ideological preferences and in a way that is favorable to foreign investors.

1. The Imbalance between Sovereignty and Property

One way to understand the nature of the ITA system is through examining the regulatory relationship that is created under investment treaties between foreign investors and host states. Foreign investors usually challenge certain regulatory measures that have been taken by their host states such as economic or environmental legislative measures, health regulatory measures, and safety safeguards, which affect them negatively.[68] Instead of being private contractual disputes, these disputes concern public actions and comprise public interests.

[68] *See Philip Morris Asia Limited (Hong Kong) v. The Commonwealth of Australia*, UNCITRAL PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, December 17 (2015) [hereinafter, *Philip Morris v. Australia*].

Therefore, investment treaty arbitrations allow grievances to governmental actions in a way reminiscent of judicial review in accordance with domestic law.[69] Further, awards rendered in investment treaty arbitrations put a huge strain on the economy of the host states.[70] For example, in *CME v. Czech Republic*, the tribunal ordered the Czech Republic to pay damages amounting to US$ 353 million to the Dutch investor, an amount that is almost equivalent to the Czech Republic's entire health-care budget.[71] This is due to the issuance of regulatory advice that provoked the company to divest itself of a TV station.[72] Another vital example is the surge in investment arbitration cases against Argentina following Argentina's economic and financial crisis in early 2000.[73] Argentina implemented various reforms in order to restore its financial stability.[74] Such reform measures unfavorably affected many foreign investments that brought various cases before the investment arbitration regime claiming a breach by Argentina to the standard of protection envisaged in the treaty between it and their home states and relying on the investor-state dispute settlement provision in these treaties.[75]

State sovereignty is a conceptual frame to understand the representative relation with the people in its territory.[76] Sovereignty envisages the treatment of a state as an entity that represents and has authority over a group of people in connection with the group members and in connection with other states. Sovereignty infers

[69] *See Supra* note 62; *See also* Van Harten, INVESTMENT TREATY ARBITRATION, *supra* note 3.
[70] *See* Kingsbury&Schill *Public Law Concepts*, *supra* note 41.
[71] *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL (Partial award, September 13, 2001) (Final award, March 14, 2003) [hereinafter, *CME v. Czech Republic*].
[72] *Id*, *CME v. Czech Republic*; *See also Philip Morris v. Australia*, *supra* note 65; *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8 (Award May 12, 2005); *See also UNIÓN FENOSA GAS S.A v. The Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award August 31, 2018.
[73] Julia Hueckel, *Rebalancing Legitimacy and Sovereignty in International Investment Agreements*, 61 Emory L.J. 601, 640 (2012).
[74] *Id*.
[75] William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. J. INT'LL. 307, 309 10 (2008).
[76] I Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 6th ed. Oxford: OUP, at 289 (2003).

internal control and external independence on the state's part.[77] It is a tool for contemplating the organization of people as political entities.[78] Thus, it is a principal concept of public international law as well as domestic law.[79] A state, within the international sphere, is the representative of its population and territory; however, domestically, it is the source of the collective authority to make all governmental decisions. A certain group of disputes may rise between the state and private individuals that are subject to the state's exercise of its sovereign authority. This group of disputes is referred to as regulatory disputes that are different from other public disputes that rise between states or between different entities of the state. Further, the regulatory disputes must be differentiated from private disputes that rise among individuals acting in their private capacity.[80] Therefore, the party's consent in commercial arbitration is given within the party's private sphere because the disputing parties, in their private capacity, have decided to use a specific mechanism for resolving disputes arising between them.[81] They have consented, under the rules endorsed by the sovereign state, to isolate the resolution of their disputes through different mechanisms that is arbitration rather than through a state's local courts. Conversely, when a state decides to submit sovereign decisions to be reviewed before different adjudicative bodies, it is considered a policy choice to use that specific adjudicative method as a measure of its governing apparatus.[82] Public Law adjudication is different from reciprocal consensual adjudication under the private capacity of individuals because the act of the state in consenting to the mechanism of adjudication is exercised in its sovereign capacity and because of the fact that the subject matter of the dispute rises as a consequence of the state's exercise of its sovereign authority.

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[77] C Warbrick, *States and Recognition in International Law*, in MD Evans ed. INTERNATIONAL LAW 2nd ed. Oxford: OUP, at 222-224 (2006).
[78] *Id*.
[79] *Id*.
[80] A Redfern and M Hunter, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, 4th ed. London; Sweet&Maxwell, at 7-8 and 131 (2004).
[81] Id.
[82] Van Harten, INVESTMENT TREATY ARBITRATION, *supra* note 3, at 96.

Conventionally, regulatory disputes in international law were settled before local courts through applying the domestic laws of the state.[83] Domestic law deals with the state's internal authority. In this, it concerns the constitution of the sovereign authority, how it is delegated and exercised in the territory of the state. International law, however, concerns the authority of the external state; it governs the relation between states and the disputes arising between them.[84] In this line, it is rare to use international adjudication to resolve disputes between a state's treatment of an individual that is a national of a different state. In such cases, the regulatory relation between the foreign nationals and the state was engaged by the international adjudication. However, the occurrence of such cases was restricted by doctrines of immunity, sovereign consent, and the duty for exhaustion of local remedies.[85] Regulatory disputes in the territory of the state were assumed to fall under the exclusive domain of the legal system of the state while applying the minimum standards of international law. Further, settling regulatory disputes before international adjudication has never been accepted without the consent of the state. The international dispute concerning a foreign national had to be initiated by the home state and was perceived and dealt with as the home state's own claims.[86] All these rules were derived from the customary assumption on the nature of the authority of the state in its territory and the means whereby it could be organized by the engagements of other states in order to adjudicate regulatory disputes.

Where the regulatory relation among states falls directly under adjudication in customary international law, a dispute was conceptually transformed to be between juridical equals that are the states instead of being a mere regulatory dispute between foreign individuals and the host state. Therefore, the regulatory relation was made reciprocal under private law adjudication only. With the advent

[83] Van Harten, INVESTMENT TREATY ARBITRATION, *supra* note 3, at 110-113.
[84] MN Shaw, INTERNATIONAL LAW, 5th ed. Cambridge, at 121, (2003).
[85] Van Harten, INVESTMENT TREATY ARBITRATION, *supra* note 3, at 110-113.
[86] *Liechtenstein v. Guatemala*, ICJ Rep. 4, 24 (1995) [hereinafter, *Nottebohm* case]; *Barcelona Traction Light and Power Co.* case, *Belgium v. Spain*, ICJ Rep. 3, 9 ILM 227, ¶78-79, (1970) [hereinafter, *Barcelona Traction* case].

of disputes between private foreign investors and host states under investment treaty arbitration, which usually do not entail the requirement of exhaustion of local remedies, regulatory disputes have become adjudicated under international arbitration such that the sovereign state and the individual investor directly face each other as reciprocal disputing parties.

As a result, the regulatory relationship became the scope of a new private and individualized form of international adjudication that is not, from now onwards, reciprocally instituted. This reformation forms the genesis of the ITA system as a governing and regulatory arrangement. It affects the genuine principles of public international law including the legislative supremacy principle. Suffice it to note that by commanding the state to consent to subjectig future disputes arising from the exercise of its sovereign actions as a sovereign state, investment treaties accord a comprehensive jurisdiction to private arbitrators in order to adjudicate investor-state disputes that fall under the regulatory sphere in the first place.

Customary international law postulates that the adjudication of regulatory disputes concerning a foreign national is a matter of the host state's domestic law.[87] States must not be subjected to mandatory dispute adjudication in their territory neither by foreign courts nor by any international tribunal.[88] A dispute concerning the treatment of a state towards a foreign investor of a different state conventionally might trigger a diplomatic protection claim by the latter's home state,[89] however, the investors are not permitted to bring an independent claim against a sovereign host state.[90] Further, a claim concerning diplomatic protection initiated by the national home state of the foreign individual is possible on condition that the foreign individual has previously exhausted the local remedies in order to enable the host state the opportunity to resolve the claims of the

[87] W Peter, *Arbitration and Renegotiation of International Investment Agreements*, Kluwer Law International, The Hague, at 167-169 (1995).
[88] *Ambatielos* Claims, *Greece v. United Kingdom*, 12 RIAA, at 103 (1956) [hereinafter, *Ambatielos* Claims].
[89] *See generally*, *Nottebohm* case, *supra* note 83, at 23-24; *See also Barcelona Traction*, *supra* note 83, at 227 ¶ 35-36 &79.
[90] *Mavormmattis Palestine Concessions*, *Greece v. Great Britain*, PCIJ Ser. A, No.2, at 12 (1924).

investor prior to resorting to international law.[91] Even after the exhaustion of local remedies, resolving the dispute through the international adjudication is never possible without the consent of the host state. The reluctance of states to resort investment disputes to the International Court of Justice (ICJ) has shown that a low number of cases concerning the regulatory relation between foreign investors and states have been brought before the court.[92] Prior to the proliferation of states' general consent to the ITA, these regulatory disputes were ordinarily settled via inter-state diplomacy.[93]

This conventional mechanism of adjudicating regulatory disputes on the international level is grounded on the presumption that the entitlement of an investor to protection under international law within the territory of a foreign land is derived from the investor's home state's rights.[94] Therefore, the host state might aggravate or moderate disputes concerning foreign individuals in its negotiations with the foreign individual's home state.[95] International disputes were subject to the balancing of the home state between its own interests and considerations of good faith in international relations.[96] By bestowing investors with the power to initiate a claim and seek compensations because of an alleged violation of international law, ITA permits investors to choose the right time to threaten, initiate, or resolve a claim against host states. In view of that, the claimant becomes a private party possessing full custody of the dispute who has enormous power in deciding when and to what extent international adjudication may be used to settle its regulatory dispute.

In the same vein, individualization of investment claims changes the operation of international adjudication by encountring numerous implications. The protection

[91] *Ambatielos* Claims, *supra* note 85, at 118-119.
[92] M. Sornarajah, *The Settlement of foreign investment disputes*, Boston, Kluwer, at 19-20 (2001) [hereinafter, Sornarajah, *The Settlement].*
[93] *Id*.
[94] *See Barcelona traction* case, *supra* note 83, ¶78.
[95] JG Merrills, *The Means of Dispute Settlement*, in MD Evans, INTERNATIONAL LAW, 2nd ed., Oxford:OUP, at 543-544 (2006).
[96] *See* Sornarajah, *The Settlement*, *supra* note 89.

of the investors' rights under bilateral investment treaties is no longer impacted by the consideration of the home state's own interests as a representative authority.[97] Accordingly, foreign investors are in a position to initiate their claims in a way that represents their own interests more vigorously because they do not have any interests to settle or conciliate for public interests' reasons.[98] For example, in *Siemens v. Argentina*, the tribunal accepted the claimant's argument that the presence of the MFN provision in the BIT gives the investor the right to mix-and-match different provisions which favor its position, and to construct them in one favorable form, consisting of various substantive and procedural rights, in order to get the utmost benefit for protecting its rights.[99]

In addition, in investment treaty arbitration, only investors can bring claims against their host states. [100] This is significant because it reveals the conversion of arbitration into a one-way method of adjudicating instead of being a reciprocal adjudication process between two equal parties. Another implication is that it extends the possibilities for the tribunals to adopt an expansive approach in determining their jurisdiction under an investment treaty. Accordingly, investors usually advocate a broad approach to the liability of the state other than what is embraced by state parties. What is significant is that by enabling investors to claim these arguments, the ITA system creates an environment where arbitrators are allowed to adopt an expansive interpretation of the treaty provisions even though such an approach contradicts with the unanimous state's submissions that negotiated and ratified it. Such an environment is not established under international custom whereby access to dispute resolution is limited to states. Furthermore, the ITA system bestows power on private arbitrators without providing for an appeal mechanism, resulting in the broadening of their discretionary powers in deciding cases in light of their ideologies and policy

[97] Van Harten, INVESTMENT TREATY ARBITRATION, *supra* note 3, at 97-99.
[98] *Siemens A.G. v.The Argentine Republic*, ICSID Case No.ARB/02/8, Decision on Jurisdiction, 3 August (2004) ¶ 116, 120& 135 [hereinafter, *Siemens* Decision].
[99] *Id*.
[100] Van Harten, INVESTMENT TREATY ARBITRATION, *supra* note 3, at 97-99.

preferences and thus resulting in an unfair decision that affects the economic stability and reputations of the host states.

2. Ideology and Policy Preferences of Arbitrators

The formalist view in international investment arbitration holds that adjudicators of the ISDS system apply the rules of the law regardless of their policy preferences, backgrounds, and views.[101] They argue that the ISDS system is a legitimate and depoliticized system for the settlement of investment disputes. Such a view ignores one of the main contentions of legal realism that is the outcome of the case is not decided in accordance with the mere application of the law alone.[102]

In the legal realist view, judges are as important as the law in deciding and determining the outcome of the case.[103] More specifically in the controversial areas of investment arbitration where ambiguity is left to the discretion of the arbitrators' interpretations, the outcomes may diverge due to the influence of different ideologies and policy preferences of the arbitrators when adjudicating. To illustrate, the balance that an arbitrator makes among competing considerations can be influenced by his/her ideology, professional experience, background, and certain incentives that s/he might receive when deciding the case. For example, the arbitrator may be acting as a counsel in other cases and his/her impartial view in a particular case as an arbitrator might affect his/her role as a counsel in the other case.

Studies on political voting and collegiate politics hold a significant place in the literature of political science in the US courts.[104] In this literature, it is perceived

[101] *See* Meyers, *In Defense*, *supra* note 63; *See also* Blythe, *The Advantage*, *supra* note 63; Frank, *Development Outcomes* (2009), *supra* note 63.
[102] *Id.*
[103] Oliver Wendell Holmes, *The Path of the Law*, Harv. L' Rev. no. 110, (1897).
[104] Glendon Schubert, *Quantitative analysis of judicial behavior* (1959); *See also*, Theodore Eisenberg and Stewart J.Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 j. Legal stud. 257, 281 (1995).

that the courts are political bodies, and thus, judges are deemed to be policy makers. This assumes that judicial decisions are driven by judicial politics and/or judicial ideology.[105] In international disputes where one party is a state, many scholars have selected the developing status of the adjudicators as a prominent cause of bias.[106] For instance, Eric A.Posner and Miguel Figueiredo found that members of the International Court of Justice (ICJ) tend to favor the interests of their appointing states, or the states at the same wealth level of their own states. They used statistical methods to test bias and found strong evidence that supported such a bias.[107] Furthermore, in 2007, Erik Voeten[108] demonstrated that judges of the European Court of Human Rights (ECHR) are inclined to not vote with their home states. In the same vein, in international arbitration, Susan Frank denies that the appointed arbitrators who come from developing countries are more likely to uphold jurisdiction and declare the host state's liability rather than their counterparts from developed countries.[109] One must say that the question of whether arbitrators from developing countries are biased against investors from developed countries remains open. However, I believe that arbitrators from developing countries will not, most probably, uphold the liability of the developing host states because they are aware of the economic and social circumstances in such states; and therefore, feel sympathetic towards rendering a decision that will cause a deficit in these developing countries.

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[105] Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court And The Attitudinal Model*, 65 (1993), it is stated that cases before the Supreme Court are adjudicated in accordance with the ideological and political preferences of the judges.

[106] Van Harten, *Fairness and Independence*, (2010), *supra* note 64; Gus Van Harten, *Fairness and Independence in Investment Arbitration: A Critique of Susan Franck's 'Development and Outcomes of Investment Treaty Arbitration*', December 1,(2011); *See also* Rogers, *The Politics*, *supra* note 30.

[107] Eric A. Posner and Miguel de Figueiredo, *Is the International Court of Justice Biased?*, The Journal of Legal Studies p.599-629, (2005) [hereinafter, Posner&Figueiredo].

[108] Erik Voeten, *The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights*, at 61 (2007) [hereinafter, Voeten, *The Politics*].

[109] Frank, *Development Outcomes* (2009), *supra* note 63.

Additionally, another factor that influences the policy preferences of arbitrators is their argumentative mindsets, which originate and develop in sociological analysis of commercial arbitration.[110] This means that the mindsets of arbitrators are shaped in accordance with their professional experience and thus it affects how they adjudicate arbitration cases.[111] On equal footing and in investment arbitration, arbitrators who have experience in working in the private sector tend to favor investors; however, those who have work experience with governments tend to favor host states.[112]

One manifestation of this partiality tendency is to give greater prominence to the protection of property rights, which is investment, over other social and economic goals of host states represented in their regulatory measures to protect their environmental and public policies. For instance, one might think that conservative arbitrators are biased toward investment protection; however, progressive arbitrators may have a greater tendency toward social standards such as environmental protection and other public policy standards. Erik Voeten shows that judges with communist backgrounds in Eastern Europe are ideologically committed to adjusting human rights abuses in their home countries, in contrast to judges from Western Europe.[113] In international investment arbitration, we assume that arbitrators with public international law backgrounds are more concerned with host states, and hence, tend to favor the latter in their decisions. Conversely, arbitrators with private law backgrounds, whether as private counsels or as arbitrators, deviate toward the investor and perhaps are likely to uphold jurisdiction and grant indemnifications to investors.

[110] *See generally* Yves Dezalay and Brant G. Garth, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER (1996) [hereinafter, Dezalay&Garth].
[111] *Id*.
[112] *Id*.
[113] Voeten, *The Politics*, *supra* note 105.

For the foregoing reasons, in international investment arbitration, arbitrators' decisions are swayed in accordance with their policy preferences toward one of the disputing parties. Put differently, arbitrators from developing countries favor the interests of host states, unlike arbitrators from developed countries who favor the private sector comprised of the foreign investors. Furthermore, arbitrators with public international law backgrounds or who have work experience in governments tend to favor host states; arbitrators who have work experience in corporations or have private law background tend to favor foreign investors.

In line with the above, the selection of arbitrators in investment arbitration is quite significant to the outcome of the case. Since the investment arbitration regime is a close-knit network, it is easy to find and collect all the necessary information about a potential arbitrator before selecting him/her. Selection here means the method by which the disputing parties to an ICSID arbitration case appoint their arbitrators. Practically, the disputing parties together with their counsels allocate sufficient time and exert huge effort to scrutinize arbitrators' backgrounds, for example, whether they have any correlation with the parties, their published work and especially if they have a clear opinion related to the substantive claims of the case; policy preferences; and previous appointments. This research is conducted to help the disputing parties in appointing the arbitrators who appear to have favorable tendencies towards their case but without reaching the level of bias that triggers challenges to the existence of conflict of interest. For example, arbitrators may be chosen because they share the same cultural or legal backgrounds with the parties who appointed them.[114] The disputing parties may agree to some specific characteristics of the appointed arbitrators, for example, a specific field of experience necessary for the arbitration, non-lawyers, or arbitrators with certain language skills. The time allocated for selecting the proper arbitrators reveals the important correlation that exists between the backgrounds and policy preferences

[114]*See generally*, Nigel Blackaby and Partasides Constantine, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION. 6th ed. Oxford: Oxford University Press, at 452 (2015).

of arbitrators and the outcome of the case. Otherwise, it would be unreasonable for the disputing parties and their attorneys to spend much time and hard work on choosing the right arbitrators for their dispute.

In domestic courts, the panel effect does exist in legal decisions.[115] This section tackles the significant role of collegial politics among panel members on judicial outcomes. In investment arbitration under ICSID, members of the tribunal are not unitary actors; usually it consists of three arbitrators who, most probably, do not share the same policy preferences. Decisions rendered in investment arbitration may be affected by collegiate politics.[116] For instance, members of the tribunal may have different or mutual preferences. Usually, elite arbitrators act together, and therefore, play repetitive games.[117] They are members of a profitable and exclusive club, whose members might be compared to a club of predominantly European, well-known, and grey-haired men.[118]

Since the ICSID community is a close-knit network, sometimes conformity pressures arbitrators in ICSID arbitration. In this, arbitrators might diminish or strengthen one another's policy preferences. Collegiality, deference, or persuasion play a significant role in amplifying the bias issue. For instance, one member of the tribunal may not disagree with the majority regardless of his/her preliminary different view, because s/he might have been persuaded by the majority's influence, or because of other tactical reasons. Furthermore, deliberation is an important part of decision making. To illustrate, instinctive decisions of arbitrators may involve fast decisions which bend toward their policy preferences; however, these decisions may perhaps be revised and reviewed in deliberations with the rest of the tribunal's members. Therefore, a panel impact occurs when the personal characteristics of its members strengthen the bias. Furthermore, when

[115] Dezalay&Garth, *supra* note 107.
[116] *Id.*
[117] Kapeliuk, *The Repeat Appointment*, *supra* note 26, at 61-63.
[118] Dezalay&Garth, *supra* note 107, at 10, 18-20, 34-42.

personal characteristics are widely shared among members of the same tribunal, such preferences also have a strong influence on the tribunal's decisions. All the foregoing ideological predisposition affect, more or less, the decision making process of arbitrators.

Since the legitimacy crisis of the current ISDS system is demonstrated in two main problems; the political or structural issues and the procedural problems of the system, it is significant to shed light on the procedural issues demonstrated in the lack of independence and impartiality of the system in its entirety. In this, the following section discusses the various procedural problems of the system represented in the existence of the party appointment mechanism and the moral hazard of arbitrators.

B. PROCEDURAL CRITIQUES

In the outset, there is an acknowledgment of the important role the institutions involved in the decision-making process in investment arbitration play. For institutional theorists, there are a number of significant institutional methods that shape the values and behavior of adjudicators, for example, the selection process, their tenure status, their financial reliance on the repetitive appointments of the institution, and their intrinsic sense of obligation for that institution.[119] If these methods are not perceived as independent and impartial, the system will eventually lose its integrity as a neutral means of adjudication. The importance of the system's integrity is demonstrated in the fact that it is based on trust. The parties must have faith that their dispute will be adjudicated in a fair and unbiased manner.

This section argues that, the systematic bias demonstrated in the selection process of arbitrators, besides the lack of tenure, results in the rendering of a biased adjudication. These aspects affect the independence and impartiality of

[119] *See*, Brekoulakis, *Systemic Bias*, *supra* note 28.

arbitrators, so that they become dependent on the prospective claimants contrary to judges who enjoy secure tenure and are perceived to be independent. In this section, the notion of independence and impartiality *stricto sensu* is discussed. Second, the criticism of the mechanism of party appointment is highlighted then followed by a demonstration of the moral hazard of arbitrators.

1. The Notion of Independence and Impartiality

The notion of independence and impartiality means that adjudicators decide cases without the interference of any external influences or manipulations. Albeit the two terms are sometimes used interchangeably, each one has a distinctive meaning. Independence concerns the lack of any relation between the parties to a dispute and the appointed arbitrators. One can distinguish between individual independence and institutional independence.[120]Individual independence concerns the independence of the adjudicator herself/himself directly. This type of independence is considered an obligation on the arbitrator because s/he is required to decide the case without any external influences. Further, it is a privilege of the arbitrator because neither the state nor any other institution should influence the decision making of the arbitrator.[121]

There are safeguards assigned to ensure the independence of arbitrators; these are the rules on qualifications, rules on conflict of interest, rules of disclosure, and the disqualifications rules.[122] On the other hand, institutional independence shall ensures that the institution's member arbitrators are secure in exercising their powers. It entitles the institution and not the arbitrators. Further, it is generally assured through the institution's autonomy with regard to its internal organization, its budget, and transparent rules of the recruitment process.[123] Institutional safeguards can be achieved through an objective method of case assignment, ensuring a secure tenure of arbitrators, and the appointment of arbitrators for fixed terms.[124]

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[120] Stefanie Schacherer, *Independence and Impartiality of Arbitrators: A Rule of Law Analysis*, January (2018) [hereinafter, Schacherer, *Independence and Impartiality*].
[121] *Id*.
[122] Georgios Dimitropoulos, *Constructing the Independence of International Investment Arbitrators: Past, Present and Future*, 36 Nw. J. Int'l L. & Bus. 371-376 (2016) [hereinafter, Dimitropoulos, *Constructing the Independence*].
[123] Schacherer, *Independence and Impartiality*, *supra* note 117.

[124] Van Harten, *Procedural Fairness*, *supra* note 18, at 627-657, 629.

Impartiality, however, relates to the lack of predisposition toward one of the parties or a certain legal issue in a given case.[125] In this way, arbitrators have to exercise their powers as adjudicators free from any favoritism and to adopt the behavior that reduces the risk of challenges. Thus, impartiality is, unlike independence, presented as a duty and not as a privilege.[126] Independence is a broader concept than impartiality and it is said that independence is a prerequisite to impartial decision-making.[127]

The two terms collectively constitute one standard and are used to describe bias.[128]Three possible grounds can be invoked to challenge the independence and impartiality of arbitrators. These are the existence of a personal, financial, or professional relationship between any of the arbitrators and one party, the existence of any of the arbitrators and one of the counsels representing any of the parties, and issue conflicts.[129]

The standard of independence and impartiality are differentiated from the provisions concerning the qualifications of arbitrators, which deal with the arbitrators' obligation to be independent and impartial;[130] the arbitrators' disclosure,[131] which is usually used to disclose any conflict of interest between the arbitrator and any of the parties and their counsels; and the disqualification challenges of arbitrators.[132] These provisions set the general framework for the

[125] Dimitropoulos, *Constructing the Independence*, *supra* note 119; *See also*, Brekoulakis, *Systemic Bias supra* note 28.
[126] Schacherer, *Independence and Impartiality*, *supra* note 117.
[127] *Id.*
[128] Dimitropoulos, *Constructing the Independence*, *supra* note 119.
[129] Federica Cristani, *Challenge and Disqualification of Arbitrators in International Investment Arbitration: An Overview*, 13 LAW & PRAC. INT'L CTS & TRIBUNALS 153, 154 (2014); *See generally*, Sheppard, *Arbitrator Independence*, *supra* note 24.

[130] The qualifications of arbitrators' provisions in investment treaty arbitration are found in ICSID Convention, Article 14(a); *also* in International Bar Association Guidelines (IBA), General Principle 1.
[131] Provisions concerning the disclosure of arbitrators in investment treaty arbitration are found in ICSID Arbitration Rules, art. 6(2); *See* also IBA Guidelines, General Standards 3 and 7.
[132] Provisions governing the disqualification challenges of arbitrators are found in the ICSID Convention, Articles 57 and 58.

arbitrators' independence. The common test of independence and impartiality that is applied among all fora is to decide the standard of the appearance of bias; the intensity of possibility of bias; and that the bias, from a reasonable person's point of view, gives rise to justifiable doubts as to the independence and impartiality of the arbitrator.[133] The normal basis for reviewing independence in investment arbitration is the appearance of the common test, which tackles the reasonable perception of bias by the decision makers.[134]

Having said that, the problem of independence and impartiality when it is related to a violation of the applicable rules is easy to tackle and deal with through the applicable challenging process of arbitrators. However, the origin and the reason behind the emergence of such a problem that is the existence of the party appointment mechanism requires examination. Put differently, the ISDS system consists of ad hoc tribunals whose members are appointed by the disputing parties. As such, each party chooses the co-arbitrator who best serves its claims. Thus, arbitrators render a favorable award toward their appointing party aiming at future appointments from perspective claimants, which is represented here as the moral hazard of arbitrators.

2. Problems of Party Appointment Mechanism

Parties choose their arbitrators not only based on their experience and skills, but also on the assumption that the arbitrator will enhance their probability of winning the case or not.[135] This argument is recognized in the challenged decision of Professor Phillippe Sands in the ICSID case of *OPIC Karimum Corporation v.*

[133] Dimitropoulos, *Constructing the Independence*, *supra* note 119.
[134] Gus Van Harten, *Contributions and Limitations of Empirical Research on Independence and Impartiality in International Investment Arbitration* (May 5, 2011). Oñati Socio-Legal Series, Vol. 1, No. 4(2011) [hereinafter, Van Harten, *Contributions and Limitations*].
[135] Jan Paulsson, *The Idea*, *Supra* note 27, at 155-159.

Bolivarian Republic of Venezuela.[136]The two unchallenged arbitrators pointed out that:

> In our view, multiple appointments of an arbitrator are an objective indication of the view of parties and their counsel that the outcome of the dispute is more likely to be successful with the multiple appointee as a member of the tribunal than would otherwise be the case.

Furthermore, the pivotal role that independence and impartiality play in determining the legitimacy of the tribunals' decisions and the whole system should not be left to party autonomy.[137] Secure tenure is an additional means that could shield adjudicators from influential private interests and from rumors that might arise concerning their independence and impartiality. In this way, no one can simply say that a judge, in deciding a specific case, was influenced by his/her personal career interests. In this regard, the public law nature of the international investment arbitration system becomes critical. Recognizing the existence of the political basis for the system, only investors are allowed to bring claims against their host states and not *vice versa*.[138] Accordingly, arbitrators have a personal interest in interpreting the rules of law in a way that is favorable to investors in order to encourage claims.[139]

When an arbitrator belongs to a certain adjudicative industry, s/he might be interested in interpreting the law in a way that favors the interests of investors in any related potential claims in order to have future appointments as part of the growth of the industry. Arbitrators are different from judges; they work in a market in which suppliers from capital exporting states underlying individual standings are interested in advancing their own status and that of the whole

[136]*OPIC Karimum Corporation v. Bolivarian Republic of Venezuela*, (ICSID Case No. ARB/10/14) Decision on the Proposal to Disqualify Professor Philippe Sands, ¶41, 5 May (2011).
[137] Jan Paulsson, *The Idea*, *Supra* note 27, at 17.
[138] Despite what occurs in the limited and exceptional events of states' counterclaims.
[139] Alan S. Rau, *Integrity in Private Judging*, 38 South Texas L. Rev., at 455, 488, 496-497& 521 (1997).

industry.[140] Another distinction is that arbitrators are entitled to have another source of income from different activities besides their adjudicative role including acting as private counsels in investment law. Therefore, the investment industry encompasses a number of arbitrators, in addition to lawyers who work as counsel of either investors or states, who might serve as arbitrators as well, and who may participate in the negotiating and drafting of treaties and the different rules of arbitration.[141] It also encompasses a number of experts and scholars who might as well work as expert witnesses, arbitrators in a specific case, or as advisors.[142]Since arbitration is a close-knit industry, it is not difficult to say that it contains many cross-connected players who might be interested in expanding their networks by recommending each other for future appointments, sharing details about their awards, blacklisting whomever swims against the flow, or adopting an approach that favors their own industries relative to their competitors, for example, domestic adjudication and international diplomacy. It is crystal clear to whomever is well acquainted with this industry that international investment arbitration will not prosper unless businessmen and businesswomen who own assets in the extensive parts of the world know that it is not futile to bring claims against Third World states i.e. capital importing states.[143]

The purpose of secure tenure is demonstrated in the dismissal of any external influences on adjudicators when deciding a case. To illustrate, they only focus on interpreting the case at hand with neutral and impartial interpretations of the rule of law and in accordance with the given facts of the case. Put differently, the absence of the secure tenure results in the return of career interests; thus, it may be perceived by an outsider that the interpretation of the tribunal of a treaty or its decision is biased towards the interests of the investor, even though such

[140] Dezaley&Garth, *supra* note 69.
[141] Nudrat Majeed, *Investor-State Dispute and International Law: From the Far Side*, 98 ASIL Proceedings, at 30-31, (2004).
[142] Dezaley&Garth, *supra* note 69, at 49-50 (1996).
[143] Walter Matti, *Private Justice in a Global Economy: From Litigation to Arbitration*, 55 Int'l Org, at 919-921, (2001).

interpretation might have been done in a neutral way. This is because it is influenced by external factors rather than impartial treaty interpretation and application.

No one can assure the existence of these external influences on the independence and impartiality of arbitrators. For example, empirical results shows that tribunals declined their jurisdiction in about 20% of the published cases and held jurisdiction in about 50% of the remaining published cases.[144] Where the bias here is perceived, it does not reflect the impartiality and independence of the system. This is because it does not provide an answer to the question of whether claimants would probably win before court proceedings, rather than before arbitral tribunals. Further, it does not provide a logical explanation of whether fundamental legal issues, for example, forum shopping, the scope of Most Favored Nation treatment, or Fair and Equitable Treatment (FET), would be decided differently or not.

In the same vein, the mechanism of party appointment has created incentives for arbitrators to favor the party with whom they may gain future appointments from. Since the ITA system enables only investors to bring claims against host states, arbitrators tend to favor positions that best serve the prospective claimants in order to increase future appointments. This is what is referred to as the moral hazard of arbitrators.

3. The Moral Hazard

Assuming, *in arguendo*, that arbitrators' decisions are independent from their policy preferences, the commonly expressed public concerns regarding the independence and impartiality of investment arbitrators run deep. To illustrate, ICSID arbitrators are not appointed to full time jobs. This means that, they neither enjoy security of tenure, nor do they have fixed salaries. Consequently, they have

[144] Gus Van Harten, *Dataset Used in 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration*, April 19 (2012).

other work to do in addition to being arbitrators. For example, they might act as counsels in different arbitrations, give expert opinions to either host states or investors, work as academics, or, as mentioned earlier, they might have served in a full time public service position, such as in the executive or the legislative sectors of states, or even as judges before domestic courts. This spinning wheel of jobs in the close-knit network of investment arbitration may have led the arbitrators to being biased toward a certain party. Whether such bias is intentional, unintentional, or obvious to reach the level of challenges for disqualification of arbitrators, in that way it threatens the impartiality and independence of arbitrators. For instance, an arbitrator might be in a position to decide an issue against one party, while arguing against that position for the interest of his/her client in his/her capacity as a counsel in another case.

When the sole income for an arbitrator is the fee earned from arbitrations, such as academics, perhaps s/he tends to favor the party with the more financial incentives which is the foreign investor. In this regard, Gus Van Harten, when criticizing the international investment arbitration, contends that arbitrators have a financial interest in rendering arbitrations' to claimants, i.e. foreign investors, which results in an actual or potential partiality against host states.[145] Another critique is the bias resulting from concerns about reputation.[146] On the one hand, lawyers who often represent investors in investment arbitrations are more likely to be biased against host states in cases where they are appointed as arbitrators. They may question the states' actions and consider them arbitrary. On the other hand, counsels who usually represent host states in investment arbitrations are likely to reject investors' claims against the host states' actions and regulatory measures

[145] Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 U.C. Davis J. Int'l L. & Pol'y 157, 184 (2005); *See* also, Van Harten, INVESTMENT TREATY ARBITRATION, *supra* note 3, Chapters 3- 5.

[146] William W. Park, *Part III, Chapter 9: Arbitrator Integrity*, in Michael Waibel, Asha Kaushal, et al. (eds), THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY, at 189-251 (2010).

and show their tendency toward these host states in order to build a reputation in being pro-states in the arbitration market.

In sum, incentives influence arbitrators to be biased toward their interests. In this regard, an arbitrator whose income depends solely on the fee from arbitrations is not likely to reject jurisdiction. Furthermore, an arbitrator in a given investment arbitration who happens to be the counsel for another investor in a different case that invokes the same subject matter of the case he is adjudicating will deviate in his/her decision as arbitrator toward the interest of the investor that he is representing in the other case. Finally, arbitrators usually lean towards the interest of the party who frequently appoints them.[147] Despite the fact that both factors have an impact on arbitrators and thus sabotage the fairness and neutrality of their decisions, both factors can work in different directions. For instance, when the incentives factor is prominent, it prevails over the policy preference factor, and hence, arbitrators will favor the party that benefits them materially, rather than favoring the party of their policy preference. In contrast, policy preferences play a significant role in arbitrators' decisions in the absence of incentives.

The method of balancing the two factors depends on the method of appointment of arbitrators. In the party appointment mechanism, the disputing parties, as mentioned earlier, ideally balance between arbitrators' policy preferences and incentives when appointing the arbitrators. Therefore, it is important to examine such compromises with regard to the presiding arbitrator, who is selected either by party appointment or by the ICSID secretary.[148] When the president of the tribunal is appointed through ICSID, and since the presiding arbitrator will be more independent and impartial from the disputing parties, the impact of his/her policy preferences prevail over the influence of incentives on the award.

[147] Kapeliuk, *The Repeat Appointment*, *supra* note 26, at 61-63.
[148] ICSID Convention, *supra* note 8, article 38 of The Arbitration Rules.

Having discussed the critiques addressed to the legitimacy and the independence of the ITA system in this chapter, it is significant to shed light on the relevant case law whereby we can see the effect of ideology and policy preferences on the decision making of arbitrators under the ICSID Convention.

III. MOST FAVORED NATION CLAUSE AND DETECTION OF BIAS

The Most favored Nation is one of the core elements in BITs.[149]It is the standard of protection that aims at avoiding discrimination between the parties to a certain BIT, such as the standards of national treatment and Fair and Equitable Treatment (FET).[150] The dramatic increase in investment arbitrations has had a significant impact on the interpretation of the standards of BITs. Practically, some standards have grown in density and proven interaction with others, while other standards have appeared to have an independent nature.[151] In international investment arbitration and up until the past decade, the debate on the MFN clause focused on its substantial application.[152] The debate concerned the limitations of the regulatory measures of host states in investment policy and the notion of investment.[153] However, since 2000, the discussions have shifted since the award rendered in the ICSID case of *Maffezini v. Spain*.[154] In this award, the tribunal found that the standard of the MFN can be extended further than what had been comprehended before. One unique feature in this award is the unusual interpretation of the Tribunal concerning the scope of the MFN clause in its adoption of an expansive approach in interpretation; this is in contrast to the common norm of applying a restrictive interpretation to only include the importation of substantive provisions from a comparator treaty.[155] The *Maffezini*'s award is considered the turning point in the interpretation and application of the MFN clause. The finding of the *Maffezini* Tribunal has developed the scope of the standard from being applied strictly substantively to being extended to encompass

[149] Shreuer&Dolzer, PRINCIPLES, *supra* note 43, at 186.
[150] *Id.*
[151] Christoph Schreuer, *Standards of Investment Protection*, at 1-8 (2007), explaining the evolution of the BIT.
[152] Yas Banifatemi, *The Emerging Jurisprudence on the Most-Favoured-Nation Treatment in Investment Arbitration*, in INVESTMENT TREATY LAW: CURRENT ISSUES III, A. Bjorklund, I. Laird, S. Ripinsky eds., BIICL, at 242, Februray18 (2009).
[153]United Nations Conference on Trade and Development; *Most-Favoured-Nation Treatment*; UNCTAD Series on Issues in International Investment Agreements II; page XIV (2010).
[154]*Impregilo S.p.A. v. Argentine Republic* (ICSID Case No. ARB/07/17), Concurring and Dissenting Opinion of Brigitte Stern, at 2, (2011).
[155] UNCTAD *supra* note 150.

procedure of dispute settlement. Since this award, there have been a number of inconclusive awards concerning the scope of application of the MFN clause to procedural matters.[156] Such contradicting adjudications are influenced by many complex and controversial factors that differ from one case to another.

It is worth mentioning that the conflicting arguments on the right scope of application of the MFN standard need further interpretation by the jurisprudence. In this, the UNCTAD noted that: *"...*There are strong arguments both for and against applying the MFN clause to dispute settlement. In the end, this issue may need further clarification by international investment jurisprudence."[157]

The debate about the MFN application to procedural provisions is divided into two groups. One group agrees to the expansive interpretation and thus the encompassing of procedural provisions. However, the second group argues that it cannot be extended.[158] With such variable interpretations, it is possible to notice that the likelihood to foresee, with any level of certainty, the obligations that one party undertakes when integrating the MFN clause in international investment

[156] *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No.ARB/97/7, Decision on Jurisdiction (2000) [hereinafter *Maffezini* Award]*; Siemens* Decision, *supra* note 95; *Gas Natural SDG, S.A. v.The Argentine Republic*, ICSID Case No.ARB/03/10, Decision on Jurisdiction, 17 June 2005; *Suez, Sociedad General de Aguas de Barcelona S.A., Vivendi Universal S.A. and AWG Group Ltd. v.The Argentine Republic*, ICSID Case No. ARB/03/19, Award, 3 August (2006)[hereinafter *Suez* Decision]; *National Grid Pic v. The Argentine Republic*, UNCITRAL, Award, 20 June (2006) [hereinafter, *National Grid* Decision]; *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan* (ICSID Case No. ARB/02/13), Decision on Jurisdiction 29 November (2004)[hereinafter *Salini* Decision]; *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award 8 December (2008) [hereinafter, *Wintershall* Award]; *Impregilo* case, *supra* note 151, Decision 17 May (2011) [hereinafter, *Impregilo* Decision]; *Daimler Financial Services AG v. The Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Jurisdiction, 22 August (2012) [hereinafter, *Daimler* Decision]; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, 8 February (2005) [hereinafter *Plama* Decision]; *Telenor Mobile Communications AS v. Republic of Hungary*, ICSID Case No.ARB/04/15, Award, 13 September(2006); *RosInvest Co UK Ltd. v.The Russian Federation*, SCC Case No.V079/2005, Decision on Jurisdiction, October (2007); *Hochtief AG v.The Argentine Republic*, ICSID Case No.ARB/07/31, 24 October (2011).

[157] BILATERAL INVESTMENT TREATIES 1995-2006: TRENDS IN INVESTMENT RULEMAKING, UNCTAD/ITE/IIA/2006/5, UN Pub. New-York, Geneva, at 42, (2007).

[158] Zachary Douglas, *The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails*, at 98 (2011).

arbitration, has diminished substantially within the regime. To illustrate, there is no predictable outcome for the application of the MFN clause. Both parties to a dispute would have doubts about their arguments, in light of the application of the MFN provision, when they witness that their same arguments that have been rejected in one case succeeded in another.[159] With regard to investors, this legal uncertainty will not help them in assessing the commercial risk of their investments, whereas states might be incapable of exercising their legislative powers without being exposed to the risk of multiple litigations.[160] This means that when appointing the panel of arbitrators in a case invoking the scope of application of the MFN clause to procedural matters, the parties commonly pay attention to the previous tendency of their potential arbitrator. They do so through extensive research about her/his previous appointments in similar cases invoking the same issue; her/his position in those cases whether s/he was party appointed arbitrator or the president of the tribunal; and her/his previous dissenting opinions, if any.

Since there is no broad multilateral convention that is enriched with unified wording and provides for a standard of application of the MFN clause, there is a lack of consistency in the wording and the application of the MFN clause in investment arbitration.[161] To illustrate, the MFN principle is embodied in various clauses that dramatically differ in their texts and context; and thus, they differ in their interpretation. The hypotheses in this chapter examines arbitrators' interpretation in adopting the expansive or the restrictive approach to the controversial issue of the scope of application of the MFN clause under BITs

[159] United Nations Conference on Trade and Development; *Latest Developments in Investor-State Dispute Settlement*; IIA ISSUES NOT No. 1, UNCTAD/WEB/DIAE/IA/2010/3; at6, (2010).
[160] United Nations Conference on Trade and Development, *Research Note: Recent Developments in International Investment Agreements*, UNCTAD/WEB/ITE/IIT/2005/1 at 15, Aug. 30 (2005).
[161] Pia Acconci, Chapter 10, *Most-Favoured Nation Treatment* in P. Muchlinski, F. Ortino, Ch. Schreuer THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW, *Part II. Substantive Issues*, Oxford Univ. Press, at 363, (2008); *See also* Gabriel Egli, *Don't Get Bit: Addressing ICSID's Inconsistent Application of Most-Favored-Nation Clauses to Dispute Resolution Provisions*, 34 Pepp. L. Rev., at 1045, (2007); *also* Stephan Schill, *Allocating Adjudicatory Authority: Most-Favoured-Nation Clauses as a Basis of Jurisdiction—A Reply to Zachary Douglas*, 2 J Intl Dispute Settlement, at 353 (2011).

when there is an ambiguity or absence in the text of the treaty. It aims at analyzing the adopted approach by the tribunal in certain cases. Then it attempts to correlate such resolutions with the arbitrators' ideologies. The focus here is on the question of whether the scope of application of the MFN clause should be extended to procedural provisions of other BITs, such as the dispute settlement clause, or not. The expansive approach in interpretation is always in favor of investors; however, the restrictive interpretation is usually favorable to the host states.[162]

The first two sections analyze the legal reasoning of the tribunals in adopting the expansive[163] and restrictive[164] approaches in investment arbitration cases. In brief, the expansive approach in interpreting the scope of the MFN clause is indicated by the extension of its application to non-substantive or procedural provisions of other treaties to cover the dispute settlement provisions. On the other hand, the restrictive approach rejects the extension of dispute resolution provisions from other treaties into the basic treaty in question. Section three focuses on the legal analysis of two contradictory awards, in which the same article within BIT was interpreted differently by two different tribunals leading to different decisions the thing that reflects the effect of ideology and policy preferences of arbitrators on their decision making.

It is important to mention that this paper does not aim to resolve the controversial issue concerning the mixed interpretations of the MFN clause. However, it only analyzes the existing case law in light of the ideological preference of the members of the tribunal in order to be able to test the correlation between the interpretations of the clause with the ideological predisposition of arbitrators.

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[162] *See generally*, Gus Van Harten, *Arbitrator Behaviour in Asymmetrical Adjudication (Part Two): An Examination of Hypotheses of Bias in Investment Treaty Arbitration*, January 25, (2016)[hereinafter, Van Harten, *Arbitrator Behaviour in Asymmetrical* (2016)].
[163] *Maffezini* Decision, *supra* note 153; *Siemens* Decision, *supra* note 95.
[164] *Plama* Decision, *supra* note 153; *Salini* Decision, *supra* note 153.

The controversial debate concerning the interpretation of the MFN clause has begun with Argentina. The core of the debate is based on many of Argentina's BITs that require the dispute to be submitted before national courts for an 18-month period, giving the local courts the opportunity to decide on the dispute in that given period. Generally, foreign investors consider such provision to be ineffective at best and absurd at worst. Thus, they seek to escape this step through invoking the application of the MFN clause on the dispute settlement provision from a comparator BIT that does not contain such requirement. Ironically, the first case that dealt with this point was raised by an Argentinean investor against the Kingdom of Spain in the *Maffezini* case.[165]

Afterwards, multiple awards,[166] which all invoked the 18 months period requirement and in accordance with Argentinean BITs, followed the approach adopted in the *Maffezini* case. Albeit it shall always be left to the interpretation of the wording of every BIT separately, this tendency has resulted in the conclusion that the MFN clause might regularly be invoked to evade any procedural obstacles such as the cooling off period requirement.[167] After nearly eight years, the arbitral tribunal in the ICSID case of *Wintershall v. Argentina*,[168] having the International Jurist, Professor/ Fali Sam Nairman, reversed the debate in the opposite direction when considering a nearly similar provision in the Germany-Argentine BIT. This decision disrupted the earlier decision rendered in the case of *Siemens v. Argentina*, in which the tribunal adjudicated in favor of the German investor in the course of application of the same BIT between Germany and Argentine.[169] In the same vein, in *Plama* and *Salini* cases, the investors attempted to submit their allegations through other procedures or fora than those stipulated in the applicable

[165] *Maffezini* Decision, *supra* note 153.
[166] *Siemens* Decision, *supra* note 95; *Gas Natural* Decision, *supra* note 153; *Suez* Decision, *supra* note 153 ;*National Grid* Decision, *supra* note 153.
[167] Dozler&Shreuer, *supra* note 31, at 186-191, and 253-256.
[168] *Wintershall* Decision, *supra* note 153.
[169] *Siemens* Decision, *supra* note 95.

BIT by invoking the MFN clause. The tribunals in these cases declined such attempts.[170]

A. THE EXPANSIVE APPROACH[171]

The leading ICSID cases that adopted the expansive approach allowing the extension of the MFN clause to encompass the procedural matters are *Maffezini v. Spain*;[172] *Siemens v. Argentine*,[173] and *Gas Natural SDG v. Argentine*.[174] It is worth mentioning that Emilio Agustín Maffezini, the claimant in the *Maffezini* case, holds the Argentinian nationality. In the *Maffezini* case, the tribunal set specific standards on the language of the text used in the BIT.[175] It also raised the standards of state practice that might be vital in interpreting the MFN clause.[176] Moreover, the tribunal placed some limitations on the application of the MFN clause to procedural rights, which are significant because they are grounded on public policy concerns and are explained in a manner that prevents the disputing parties from the abuse of rights.[177] Following the *Maffezini* case, many subsequent decisions confirmed that foreign investors could rely on the MFN clause of the basic treaty to invoke the most favorable dispute settlement provision of a comparator treaty that does not entail the 18-month period rule.[178]

In the ICSID Case of *Siemens v. Argentina*, despite having a less broad MFN clause than in the *Maffezini* case, the tribunal applied the same reasoning that was

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[170] *Plama* Decision, *supra* note 153; *Salini* Decision, *supra* note 153.
[171] In examining the expansive and the restrictive approach of the MFN clause, I relied on my findings in a previous paper I wrote in fulfilling the requirement of another course (LAW 527102: International Investment Law Course) that is: *Most-Favored Nation Clause And Dispute Settlement Provision; A Controversial Issue Of Interpretation In Investment Treaty Arbitration*, December 21,(2017).
[172] *Maffezini* Decision, *supra* note 153.
[173] *Siemens* Decision, *supra* note 95.
[174] *Gas natural* Decision, *supra* note 153.
[175] In the *Maffezini* case, the claimant invoked, through the MFN clause in the Argentine-Spain BIT (1991), the provisions of Chile-Spain BIT (1991).
[176] *Maffezini* Decision, *supra* note 153, ¶ 58-61.
[177] *Maffezini* Decision, *supra* note 153, ¶ 62-63.
[178] *Siemens* Decision, *supra* note 95,¶ 94-110; *Gas Natural* Decision, *supra* note 153, ¶ 24-31; *Suez* Decision, *supra* note 153, ¶52-66; *National Grid* Decision, *supra* note 153,¶ 53-94; *Impreglio* Decision, *supra* note 153,¶51-109; *Hochtief* Decision, *supra* note 153, ¶ 86-87.

given in the *Maffezini* case through reinforcing the expansive approach. This case concerns a German investor that attempted to escape the 18-month period required in the Germany-Argentina BIT of 1991 and tried to invoke the MFN clause in order to enjoy the more favorable provisions of the Chile-Argentina BIT, which did not have such requirements.

One main difference between the two cases, besides the fact that Argentina was in this case the respondent, is that the wording of the MFN clause in the Germany-Argentina BIT was more explicitly limited in scope than the one in *Maffezini*.[179] Despite the fact that Argentina had urged this distinction upon the Tribunal, it was not successful. The tribunal concluded that the wording of the clause provides for a distinction and not a difference.[180]Albeit the tribunal's decision was similar to the one of the *Maffezini* case, in this case the tribunal, to a large extent, provided for more extensive explanation on the methodology and the rationale behind its decision. In doing so, it expressly confirmed its understanding that the purpose of a treaty is to promote and protect investments. While this is not untrue, we must be careful not to put much weight on such statements in BITs because in doing so the tribunal might end up resolving all doubtful questions in favor of investors, giving reason that providing protection is always the better way to maintain the purpose of the treaty.

Afterwards, in the ICSID case of *Gas Natural SDG v. Argentine*,[181] the tribunal concluded that the most crucial element of any BIT is "the provision of independent international arbitration of disputes between investors and host sates."[182] From the investors' perspective, the standard of treatment and

[179] Article IV (2) of Argentine-Spain BIT concerning the MFN clause provides that: "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."
[180] *Siemens* Decision, *supra* note 95, ¶103.
[181] In Gas Natural case, the claimant invoked, through relying on the MFN clause in article IV (2) of the Argentine-Spain BIT, the dispute settlement provision in U.S.A-Argentine BIT.
[182] *Gas Natural* Decision, *supra* note 153, ¶ 29- 49.

guarantees are of less significance until they are subject to a dispute settlement system and finally to enforcement.[183] Therefore, the value of the protection, provided for in a treaty to an investor is a function of the terms of the explicit provisions and also of the quality of the mechanism through which the investor would be able to enforce those rights against the host state. Meanwhile, from the perspective of the host state, the consent given to arbitration is a concession; it is a waiver of the sovereign prerogative of the state in order not to be dragged to international courts without its consent.[184] Therefore, the interests of the state include safeguarding the presence of an unbiased forum, which will never overstep the boundaries of state consent and intervene in domestic policy matters.[185]

B. THE RESTRICTIVE APPROACH

Another approach adopted by a group of adjudicators demonstrates an opposite tendency of the tribunals concerning the scope of application of the MFN clause on procedural matters, i.e. on the dispute settlement clause. These cases are *Salini v. Jordan*,[186] *Plama v. Bulgaria*,[187] *Wintershall v. The Argentine Republic*,[188] and *Daimler Financial Services AG v. The Argentine Republic*.[189] A brief about the Tribunals' findings in *Plama*, *Salini*, and *Wintershall* follows. The Tribunal's reasoning and findings in *Daimler* will be discussed in the following section.

In *Salini v. Jordan*, a dispute was raised concerning the final payment that was due to two Italian companies after finishing the construction of the Karameh Dam in Jordan. According to Article 9 of the Jordan-Italy BIT, disputes arising out of treaty violations are subject to ICSID arbitration; however, it also stated that the

[183] *Id.*
[184] *Id*, ¶ 28-30.
[185] *Id*, ¶ 49.
[186] *Salini* Decision, *supra* note 153.
[187] *Plama* Decision, *supra* note 153.
[188] *Wintershall* Decision, *supra* note 153.
[189] *Daimler* Decision, *supra* note 153.

contractual dispute settlement procedures would prevail if the investment was made pursuant to an investment agreement.[190]

Indeed, an investment contract was concluded regarding the Dam project whereby disputes must be settled in Jordanian national courts unless the disputing parties agreed to submit the conflict to arbitration. In spite of this stipulation, the Italian claimants attempt to submit their contractual claims before an ICSID tribunal claiming that Jordan's BITs with the United States and other states gave investors from these states the right to submit contractual claims to arbitration; and thus, the MFN clause should allow Italian investors to do the same. The Tribunal rejected this argument and declined its jurisdiction over contractual claims; however, it did state that it could have exercised its jurisdiction if the dispute had arisen out of violations of the treaty.[191]

The Tribunal reasoned such an outcome by distinguishing both the MFN provision included in Articles 3(1) and (2)[192] and Article 9(2)[193] from those at issue in *Ambatielos* and *Maffezini*. It provided:

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[190] Italy-Jordan BIT 1996, article 9 concerning the dispute resolution mechanism provides that: Any disputes which may arise between one of the Contracting Parties and the investors of the other Contracting Party on investments, including disputes relating to the amount of compensation, shall be settled amicably, as far as possible. 2.In case the investor and an entity of the Contracting Parties have stipulated an investment Agreement, the procedure foreseen in such investment Agreement shall apply. 3.In the event that such dispute cannot be settled amicably within six months from the date of the written application for settlement, the investor in question may submit at his choice the dispute for settlement to:(a) the Contracting Party's court having territorial jurisdiction; (b) to the International Center for the Settlement of Investment Disputes (the Center); 4.Both Contracting Parties shall refrain from negotiating through diplomatic channels any matter relating to an arbitration procedure or judicial procedure underway until these procedures have been concluded, and one of the Contracting Parties has failed to comply with the ruling of the Center or the Court of Law within the period envisaged by the ruling, or else within the period which can be determined on the basis of the international or domestic law provisions which can be applied to the case."

[191] *Salini* Decision, *supra* note 153, ¶ 76-79.

[192] Italy-Jordan BIT, Article 3 provides that: "(I) Both Contracting Parties, within the bounds of their own territory, shall grant investments effected by, and the income accruing to, investors of the other Contracting Party, no less favorable treatment than that accorded to investments effected by, and income accruing to, its own nationals or investors of Third States, (2)In case, from the legislation of one of the Contracting Parties, or from the international obligations in force or that may come into force in the future for one of the

> The Tribunal observes that the circumstances of this case are different [than in *Maffezini* and *Ambatielos*]. Indeed, Article 3 of the BIT between Italy and Jordan does not include any provision extending its scope of application to dispute settlement. It does not envisage 'all rights or all matters covered by the agreement'. Furthermore, the Claimants have submitted nothing from which it might be established that the common intention of the Parties was to have the most-favored nation clause apply to dispute settlement. Quite on the contrary, the intention as expressed in Article 9(2) of the BIT was to exclude from ICSID jurisdiction contractual disputes between an investor and an entity of a State Party in order that such disputes might be settled in accordance with the procedures set forth in the investment agreements. Lastly, the Claimants have not cited any practice in Jordan or Italy in support of their claims. From this, the Tribunal concludes that Article 3 of the BIT does not apply insofar as dispute settlement clauses are concerned.[194]

It is obvious that the tribunal in *Salini* had its mind set on its own conclusion that the MFN provision should only apply if it is expressly stipulated that the parties intended to extend its effect over the specific disputed issue.

The conclusion of *Salini*'s tribunal is justified by the fundamental rule of international law that the jurisdiction of an international tribunal is based on consent, not on the grounds of the tribunal's understanding of MFN clauses not extending to dispute settlement mechanisms. In other words, the specific provisions of the concerned treaty and the factual surroundings in which the MFN claim is raised are more valuable than any general principle that interprets MFN clauses in a "broad" or "narrow" scope.

In the *Plama* Case, the tribunal decided on whether the procedure of arbitration as a whole could be integrated from a third BIT by virtue of an MFN clause necessitates interpretation of an unambiguous agreement by the parties to that

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Contracting Parties, should come out a legal framework according to which the investors of the other Contracting Party would be granted a more favorable treatment than the one foreseen in this Agreement, the treatment granted to the investors of such other Parties will apply also for outstanding relationships."

[193] *See supra* note 191.

[194] *Salini* Decision, *supra* note 153, ¶118-19, at 592.

effect in the basic BIT that stipulates so. The dispute in this case concerned the Bulgarian government's treatment of an oil refinery in Bulgaria by a Cypriot company. The claimant submitted the dispute to ICSID arbitration rather than to the Bulgarian courts relying on the MFN clause in the Cyprus-Bulgaria BIT. The Cyprus-Bulgaria BIT, nevertheless, had no provision that allowed submitting disputes to the ICSID arbitration. The BIT provided for arbitration (a) only after the domestic legal system had concluded that an expropriation had occurred and (b) only to resolve a dispute as to the amount of compensation due for the claimant. Such disputes about the amount of compensation could be brought either before a domestic court or an international *Ad hoc* Arbitration Court.[195] The claimant nevertheless submitted the dispute to ICSID arbitration relying on the MFN clause.

The MFN clause envisaged in article 3 of Bulgaria-Cyprus BIT states that: "Each Contracting Party shall treat investments in its territory by investors of the other Contracting Party a treatment that is not less favorable than that accorded to investments by investors of third states."[196] The Tribunal declined jurisdiction over the treaty-based claims, holding that:

[195] Bulgaria-Cyprus BIT 1987, article 4 provides that: "4.1 The legality of the expropriation shall be checked at the request of the concerned investor through the regular administrative and legal procedure of the contracting party that had taken the expropriation steps. In cases of dispute with regard to the amount of the compensation, which disputes were not settled in an administrative order, the concerned investor and the legal representatives of the other Contracting Party shall hold consultations for fixing this value. If within 3 months after the beginning of the consultations no agreement is reached, the amount of the compensation at the request of the12 concerned investor shall be checked either in a legal regular procedure of the Contracting Party which had taken the measure on expropriation or by an international "Ad hoc" Arbitration Court.4.2 The International Court of Arbitration mentioned in paragraph 4.1 of the Article 4 shall be established on a case-by-case basis. Each Contracting Party shall designate one arbitrator, and the two arbitrators agree upon a national of the third state to be a Chairman… If the appointments are not made within the time period specified above, and if no other arrangement is agreed, either Contracting Party may request the Chairman of the Court of Arbitration to the Chamber of Commerce in Stockholm to make the necessary appointments… 4.3 The arbitration procedure is determined by the Arbitration Court itself, by applying the arbitration regulations of the U.N. Commission for International Trade Law (UNCITRAL) of 15th December 1976."

[196] *Plama* Decision, *supra* note 153, ¶ 26, at 726.

> The MFN provision of the Bulgaria-Cyprus BIT cannot be interpreted as providing consent to submit a dispute ... to ICSID arbitration and that the Claimant cannot rely on dispute settlement provisions in other BITs to which Bulgaria is a Contracting Party in the present case.[197]

The tribunal reasoned its finding stating that:

> [t]he 'context' may support the Claimant's interpretation since the MFN provision is set forth amongst the Treaty's provisions relating to substantive investment protection. However, the context alone, in light of the other elements of interpretation considered herein, does not persuade the Tribunal that the parties intended such an interpretation. And the Tribunal has no evidence before it of the negotiating history of the BIT to convince it otherwise.[198]

Based on that, the tribunal understood the Treaty's provisions to be insufficient with regard to the parties' intention; thus, it tried to find other evidence from the case circumstances that supported its conclusion that the parties had no intention of extending the MFN clause to dispute settlement provisions. First, the tribunal asserted that Bulgaria, at the time of concluding the BIT, tended to enter into "bilateral investment treaties with limited protections for foreign investors and with very limited dispute resolution provisions".[199] Second, the tribunal concluded that the parties' intention to apply the MFN clause on dispute settlement provision does not exist by asserting that:

> Bulgaria and Cyprus negotiated a revised version of their BIT in 1998. The negotiations failed but specifically contemplated a revision of the dispute settlement provisions ....It can be inferred from these negotiations that the Contracting Parties to the BIT themselves did not consider that the MFN provision extends to dispute settlement provisions in other BITs.[200]

[197] *Plama* Decision, *supra* note 153, ¶ 227, at 756.
[198] *Plama* Decision, *supra* note 153, ¶192, at 750-751.
[199] *Plama* Decision, *supra* note 153, ¶196, at 751.

[200] *Plama* Decision, *supra* note 153, ¶195, at 751.

The tribunal went further and emphasized its view regarding the importance of parties' intention to apply the MFN clause to dispute settlement provisions quoting that the *"Maffezini* interpretation went beyond what State Parties to BITs generally intended to achieve by an MFN provision in a bilateral or multilateral investment treaty."[201]

It is worth noting that the question raised in *Salini* differs from that in *Plama*. In *Salini*, the treaty provided for Jordan's consent to ICSID jurisdiction over BIT claims, but clearly opted out of contractual claims from its consent; in *Plama* however, no consent to ICSID jurisdiction was made by Bulgaria in the BIT.

In *Wintershall v. The Argentine Republic*, the claimant, a German company, alleged that the measures taken by the Argentinean government during the period of its financial crisis, which started in 2001, infringed on the interests of the claimant's local subsidiary company and with these measures, Argentina had breached its BIT with Germany. Article 10 of Germany-Argentine BIT provides that certain requirements have to be fulfilled before resorting to arbitration, i.e. the dispute must be raised before domestic courts for an 18-month period.[202] However, the Claimant did not comply with Article 10 and instead it brought the dispute before ICSID relying on Article 3 of the Germany-Argentine BIT concerning the MFN clause[203] in order to invoke the application of the dispute

[201] *Plama* Decision, *supra* note 153, ¶203, at 721-753.

[202] Germany-Argentine BIT, article 10 states that: "(2) If a dispute within the meaning of paragraph 1 cannot be settled within six months from the date on which one of the parties concerned gave notice of the dispute, it shall, at the request of either party, be submitted to the competent courts of the Contracting Party in whose territory the investment was made.(3) The dispute may be submitted to an international arbitral tribunal in any of the following circumstances: (a) At the request of one of the parties to the dispute where, after a period of 18months has elapsed from the moment when the judicial process provided for by paragraph 2 of this article was initiated, no final decision has been given or where a decision has been made but the Parties are still in dispute; (b) Where both parties to the dispute have so agreed."

[203] Germany-Argentine BIT, article 3 provides that: " (1) Neither Contracting Party shall subject investments in its territory by or with the participation of nationals or companies of the other Contracting Party to treatment less favourable than it accords to investments of its own nationals or companies or to investments of nationals or companies of any third State.(2) Neither Contracting Party shall subject nationals or companies of the other Contracting Party, as regards their activity in connection with

resolution provisions stipulated in Article VII of Argentine-US BIT, which does not necessitate the 18-month requirement.

The tribunal found that the requirements set forth in the basic BIT in the dispute settlement clause i.e. attempts for amicable settlement and proceedings before national courts, before resorting to arbitration, are preliminary and fundamental requirements that must be followed before resorting to arbitration. It also provided that the MFN clause cannot be invoked to encompass dispute settlement provisions, unless it clearly stipulates so. It asserted that:

> That the eighteen-month requirement of a proceeding in a local court constitutes a necessary preliminary step to an ICSID arbitration under the Argentina-Germany BIT is apparent from the text of Article 10 itself…. In the ICSID system, "consent" of the Host State to international arbitration is given – not generally, but inter alia under a particular investment treaty. The Host-State's "consent" is given when a bilateral investment treaty is concluded with another State. The Claimant's contention that since Argentina has already consented to ICSID arbitration in Article 10 of the Argentina-Germany BIT, the invocation by the Claimant of the MFN provisions of Article 3 of the said BIT (an invocation made to enable the Claimant to get direct access to international arbitration) would not involve any issue of jurisdiction, or of consent to arbitration of the Host State, is plainly erroneous; because as from the very moment that the MFN clause is so invoked by the Claimant on a jurisdictional ground (i.e. to enable the Claimant to invoke Article VII of the Argentina-US BIT in lieu of" Article 10 of the Argentina-Germany BIT) the question of the Host State's "consent" (or lack of it) to an alternate jurisdiction clause (in a different BIT) arises.[204]

The tribunal asserts that state consent to use a certain mechanism for dispute resolution must be explicit and leave no doubts. In addition, this requirment does

investments in its territory, to treatment less favourable than it accords to its own nationals or companies or to nationals or companies of any third State. (3) Such treatment shall not include privileges which may be extended by either Contracting Party to nationals or companies of third States on account of its membership in a customs or economic union, common market or free trade area. (4) The treatment under this article shall not extend to privileges accorded by a Contracting Party to nationals or companies of a third State by virtue of an agreement for the avoidance of double taxation or other tax agreements."

[204] *Wintershall* Decision, *supra* note153, ¶160.

not exist when the MFN provision does not "unequivocaly" stipulate procedural provisions.[205] It assured the distinction between the use of the MFN clause to accord the best treatment provided in a third treaty and to rely on it in order to avoid procedural requirments, unless this reliance is explicitly stipulated in the basic treaty.[206]

Furthermore, the tribunal referred to the exception mentioned in the *Maffezini* award mentioning that an investor is not allowed, based on the MFN clause, to bring a dispute before a different forum that is not provided for in the basic treaty.[207] It concluded that the dispute resolution method invoked by the investor in accordance with the provisions of the Argentine-USA BIT *in lieu* of the provisions of the basic treaty that is the Germany-Argentine BIT is inadmissible.

C. LEGAL ANALYSIS

Having explained some of the inconsistent awards concerning the scope of application of the MFN clause to procedural matters, it is important now to shed light on the cases sharing the same basic BIT, comparator BIT, and dealing with the same subject matter. These two cases are *Siemens v. Argentina* and *Daimler Financial Services AG v Argentine Republic*. Both cases share the same basic BIT that is Germany-Argentine BIT[208] and invoke the same comparator BIT that is Chile-Argentine BIT.[209] Both Claimants are indeed German investors and the Respondent state is The Argentine Republic.

This analysis necessitates the examination of the legal reasoning of the tribunals in order to be able to detect the points of divergence between the two reasonings that led to different decisions. Afterwards, we can test the hypothesis of the paper

[205] *Wintershall* Decision, *supra* note 153, ¶116.
[206] *Wintershall* Decision, *supra* note 153, ¶ 168.
[207] *Wintershall* Decision, *supra* note 153, ¶173.
[208] Germany-Argentine BIT.
[209] Chile-Argentine BIT.

in determining whether there is a correlation between the members of the tribunals in the two cases and their legal reasoning or not. This section aims at analyzing the legal reasoning of the tribunal in both cases and tackles the points of divergence that resulted in different outcomes. First, it starts with analyzing how the tribunal in *Siemens* case interpreted the provisions of the Germany-Argentine BIT and the reasons behind its conclusion that the wording of the MFN clause could be interpreted to circumvent the procedural requirements in the basic treaty; thus, upholding the jurisdiction of the tribunal. Second, it analyzes how the tribunal in the *Daimler* case used different interpretative arguments of the same BIT to reach its final decision in order to shed light on the discrepancy between the tribunals' decisions in the two cases.

1. *Siemens v. Argentine*

In *Siemens v. Argentine*, the Tribunal started its analysis by interpreting the provisions of the treaty concerning the MFN clause in Germany-Argentine BIT pursuant to Article 31 of the Vienna Convention on the Law of Treaties (VCLT),[210] and stated:

> Both parties have based their arguments on the interpretation of the Treaty inaccordance with Article 31(1) of the Vienna Convention. This Article provides that a treaty 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." The Tribunal will adhere to these rules of interpretation in considering the disputed provisions of the Treaty... .

Among the interpretations contained in Article 31 of the VCLT,[211] is the one that considers the object and purpose of the treaty. In doing so, the tribunal went beyond the contextual interpretation of the treaty; it looked at the objective and

[210] *Siemens* Decision, *supra* note 95, ¶80.
[211] The Vienna Convention on the Law of Treaties (VCLT), Article 31 (1969).

purpose of the treaty through interpreting the preamble and the title of the treaty.[212] It provides that:

> The Tribunal considers that the Treaty has to be interpreted neither liberally norrestrictively, as neither of these adverbs is part of Article 31(1) of the Vienna Convention. The Tribunal shall be guided by the purpose of the Treaty as expressed in its title and preamble. It isa treaty "to protect" and "to promote" investments. The preamble provides that the parties have agreed to the provisions of the Treaty for the purpose of creating favorable conditions for theinvestments of nationals or companies of one of the two States in the territory of the other State. Both parties recognize that the promotion and protection of these investments by a treaty maystimulate private economic initiative and increase the well-being of the peoples of bothcountries. The intention of the parties is clear. It is to create favorable conditions forinvestments and to stimulate private initiative.

It went further by indicating that such propose and object shall prevail over the text of the treaty. Therefore, we can say that the tribunal's approach in interpreting the scope of application of the MFN clause was based on the objective approach; the word "treatment" in the BIT shall be envisaged to contain all substantial and procedural rights of foreign investors. In light of this, the tribunal adopted the approach that the dispute resolution mechanism is inextricably linked to the treatment accorded to investors; hence, the provisions of dispute settlement shall be interpreted in a way that protects the rights of foreign investors. It assures that the word "treatment" does not refer, in any way, to substantive rights only; and thus, it shall envisage the procedural matters too.[213] It provided that:

> […]Treatment" in its ordinary meaning refers to behavior in respect of an entity or a person. The term "treatment" is neither qualified nor described except by the expression "not less favorable". The term "activities" is equally general. The need for exceptions confirms the generality of the meaning of treatment or activities rather than setting limits beyond what is

[212] *Siemens* Decision, *supra* note 95, ¶81.
[213] *Siemens* Decision, *supra* note 95, ¶85 and 86.

> said in the exceptions…. When the parties meant to provide an outright limitation by way of an exception they have done so in paragraphs (3) and (4) of Article 3 and in the Protocol in relation to security measures or taxation privileges of nationals or national companies. If it were the intention to limit the content of Article 3 beyond the limits of those exceptions, then the terms "treatment" or "activities" would have been qualified. The fact that this is not the case is an indication of their intended wide scope. Treatment in Article 3 refers to treatment under the Treaty in general and not only under that article.

It justified its position by stating that the dispute resolution mechanism is an integral part of the treatment accorded to foreign investors, their investments, and all other benefits accorded in light of the MFN clause.[214]

In the same vein, the tribunal did not favor the application of the principle of *expressio unius est exclusio alterius*, which means that mentioning one thing means the exclusion of another. The tribunal affirmed that it could not limit the scope of treatment received by the investor, according to the MFN clause, to the substantive treatments only unless otherwise expressly agreed by the parties.[215]It said:

> The Tribunal feels bound, in its interpretation of the Treaty, by the expressed intention of the parties to promote investments and create conditions favorable to them. The Tribunal finds that when the intention of the parties has been clearly expressed, it is not in its power to second-guess their intentions by attributing special meaning to phrases based on whether they were or were not part of a model draft. As already noted, the term "treatment" is so general that the Tribunal cannot limit its application except as specifically agreed by the parties. In fact, the purpose of the MFN clause is to eliminate the effect of specially negotiated provisions unless they have been excepted. It complements the undertaking of each State Party to the Treaty not to apply measures discriminatory to investments under Article 2.

[214] *Siemens* Decision, *supra* note 95, ¶102.
[215] *Siemens* Decision, *supra* note 95, ¶106.

We can conclude that the tribunal grounded its interpretations, and hence its final decision on jurisdiction, on the vagueness of the MFN provision so that it can extend its application to the procedural matters that are not expressly excluded in the treaty.

Furthermore, the tribunal's decision, in stating that the dispute resolution mechanism is inextricably intertwined with the protection of foreign investors and thus can be invoked under the scope of the MFN clause, is misleading. This is because the fundamental requirement, stated in Article 10 of the Germany-Argentine BIT, is a mandatory prerequisite to resorting to international arbitration. To illustrate, the tribunal allowed the German investor to select the most favorable treatment in the Chile BIT that he wished to incorporate and abandon others in the basic treaty without the consent of the other contracting party that is the Argentine Republic. The consent of contracting parties to international arbitration in the Germany-Argentine BIT is in fact a unilateral offer to arbitrate a group of specific potential claims of a group of putative investors pursuant to the provisions of the BIT. When an investor decides to initiate arbitration against the host state through invoking its prior consent to the investor-state arbitration clause in the BIT, the former must have accepted the terms of that unilateral offer in its entirety. The tribunal here did not recognize the 18-month waiting period before local courts as an exhaustion of local remedies clause that mandates the prior recourse to domestic courts before initiating international arbitration. However, it analyzes the waiting period as one of the steps that the Claimant is allowed to circumvent using the most favored nation clause in the Chile BIT.

In addition, the tribunal rejected Argentine's argument that if Siemens is to import the application of MFN clause from the Chile-Argentine BIT, it should do so regarding not only the advantageous clauses, but also the disadvantageous clauses including the fork in the road provision, which does not exist in the Germany-

Argentine BIT.[216] The tribunal highlighted that the MFN clause cannot be derogated as a whole package, or this would negate the benefit of its application.[217] It stipulates:

> The disadvantages may have been a trade-off for the claimed advantages. However, this is not the meaning of an MFN clause. As its own name indicates, it relates only to more favorable treatment. There is also no correlation between the generality of the application of a particular clause and the generality of benefits and disadvantages that the treaty concerned may include. Even if the MFN clause is of a general nature, its application will be related only to the benefits that the treaty of reference may grant and to the extent that benefits are perceived to be such……. the Tribunal concludes that the Claimant may limit the application of the Chile BIT to direct access to international arbitration. Therefore, there is no further need to consider the allegations of the parties on the fork-in-the-road provision of the Chile BIT or the nature of the jurisdictions referred to in the Treaty and the Chile BIT.

Therefore, apparently, the fact that whether the treatment, in its entirety, given to the Chilean investors pursuant to the dispute resolution clause in the Chile-Argentine BIT was more favorable to the treatment given to German investors in accordance with Germany-Argentine BIT was not the main concern of the tribunal. However, it successfully allowed the claimant to mix and match the benefits that could be integrated from the Chile-Argentine BIT to the Germany-Argentine BIT without worrying about any other disadvantages that the former treaty might envisage. The tribunal allegedly did so for the sake of harmonization of the dispute resolution mechanisms accorded to all investors in Argentina's BIT.[218] However, the tribunal's position in this regard opened the door for

[216] *Siemens* Decision, *supra* note 95, ¶118 and 119.
[217] *Siemens* Decision, *supra* note 95, ¶120-121.
[218] Stephen Fieta, *Most Favoured Nation Treatment and Dispute Resolution Under Bilateral Investment Treaties: A Turning Point?* (2005).

potential claimants to mix and match different dispute resolution provisions using various BITs, in order to meet their circumstances.[219]

The previous analysis emphasizes that the provisions of the arbitration agreement in a given BIT shall suffice for the objective ascertainment at the time of its finalization. This is only achievable when the jurisdiction of the tribunal is defined in accordance with only the basic treaty and without any references to a comparator treaty. When considering this consensual nature of an arbitration agreement, it is illogical to ascertain the significant nature of arbitration after the tribunal determines which most favorable jurisdictional clause from a comparator treaty could be incorporated based on the request of the investor.

2. *Daimler v. Argentine*[220]

On the other side, in *Daimler v. Argentine*, the tribunal took a different interpretative approach in deciding whether the MFN clause provided in the Germany-Argentine BIT could be invoked by the claimant in order to circumvent the application of the dispute resolution mechanism in Article 10(2)(3),[221] and apply the mechanism provided in the Chile-Argentine BIT. The tribunal started its analysis by demonstrating its interpretative approach according to public international law. In this, it started by emphasizing that no one can presume a state's consent to a dispute resolution mechanism, but it shall be established with "affirmative evidence." The tribunal stated that since BITs are mutual agreements between two contracting states that aim at protecting and promoting foreign investments, it can only do so according to the framework that is agreed upon

[219] *Id.*
[220] *Daimler* Decision, *supra* note 153.
[221] *See supra* note 203.

between the two state parties.[222] This mutual agreement balances both parties' interests; and hence, the importance of the dispute resolution provisions. It said:

> It is in this context that the exact wording of dispute resolution clauses plays a key role, as such clauses are one of the privileged places where the imbalances between the interests of both parties are often precisely defined as a result of the treaty's negotiation process.[223]

Furthermore, it stated that only states can decide their best interest and know how to protect and promote investments and express this intention in their treaties. The way to examine such intentions is through the text of the treaty. It stated: "The texts of the treaties they conclude are the definitive guide as to how they have chosen to do so."[224] Therefore, the tribunals are only responsible for discovering the meaning of the expressed intentions and not creating a new one. It provides that in doing so the tribunal must stick to the interpretation that is deemed more consistent with the object and purpose of the Germany-Argentine BIT.

It stated that consent is the "cornerstone of all international treaty commitments."[225] Therefore, it is applicable consistently to all states' commitments under a treaty whether procedural or substantive. In doing so, the tribunal contended that the interpretation of the MFN clause shall neither be construed restrictively, nor expansively. In the same vein, the interpretation of the dispute resolution provision in a given treaty shall not, in all circumstances, "exceed" the parties' consent as expressly stated in the treaty.[226] It stipulated:

> Thus, the fact that dispute resolution clauses should be construed neither liberally nor restrictively does not authorize international tribunals to interpret such clauses in a manner which exceeds the consent of the

[222] *Daimler* Decision, *supra* note 153, ¶160.
[223] *Id*.
[224] *Daimler* Decision, *supra* note 153, ¶164.
[225] *Daimler* Decision, *supra* note 153, ¶168.
[226] *Daimler* Decision, *supra* note 153,¶172.

> contracting parties as expressed in the text. To go beyond those bounds would be to act *ultra vires*.

Despite the lack of the word "consent" from Article 31 of the VCLT, the Article referrers to "good faith," which is construed as limitations to the interpretation to be restricted to the mutually agreed framework between the parties to a treaty.[227] It provided that:

> While the article does not explicitly mention consent, the reference to "good faith" nevertheless reinforces the duty of tribunals to limit themselves to interpretations falling within the bounds of the framework mutually agreed to by the contracting state parties. As stated by the International Law Commission in its commentary to the draft version of Article 31, the requirement of interpretation in good faith "flows directly from the rule *pacta sunt servanda*.

Consequently, it demonstrates that the existence of states' consent cannot be presumed but shall always be expressed in its declaration either via an express declaration of consent or on the grounds of "acts conclusively establishing" it.[228] No divergence shall be drawn between the given expression of the consent and its scope of application, as allegedly mentioned in the dissenting opinion of Judge Charles Brower.[229] It said:

> This distinction is a red herring. If the interpretive analysis reveals that the scope of Argentina's consent to submit to the jurisdiction of an international arbitral tribunal does not extend to the matter at hand, it is difficult to understand in what sense the State's consent to submit to that jurisdiction will have nevertheless been "established" on the basis of the State's mere signature and ratification of the Treaty. The relevant questions not whether the Treaty was ratified – which it was – but what precisely the States consented to in ratifying the Treaty.[230]

[227] *Daimler*Decision, *supra* note 153,¶ 173.
[228] *Daimler*Decision, *supra* note 153, ¶176.
[229] *Daimler* Decision, *supra* note 153, ¶ 175, at 70.
[230] *Daimler* Decision, *supra* note 153, at 70,Footnote no.325.

In light of the above, the tribunal scrutinized Article (10) concerning the dispute resolution mechanism and Article (3) that deals with the MFN clause in the Germany-Argentine BIT. First, the tribunal asserted that the wording of Article 10 and the continuous use of the word "shall" express an obligation upon the parties to follow the requirements stated in this article in sequence. Adding that, if the parties intend to entail optional steps, they would have substituted the word "shall' with more flexible terms like "may". Thus, the current text of the Article reflects their intention that such requirements are mandatory and to be followed in sequence for the tribunal to have jurisdiction over the dispute.[231]

As for whether the 18-month waiting period is a mere admissibility issue or is a substantive jurisdictional prerequisite, the tribunal held that such requirement is a jurisdictional matter, the lack of which results in a lack of tribunal's jurisdiction. It found that all dispute resolution provisions are jurisdictional in nature in all treaties.[232] Therefore, the jurisdictional issue of the 18-months period cannot be waived.[233] It said that "Since the 18-month domestic courts provision constitutes a treaty based pre-condition to the Host State's consent to arbitrate, it cannot be bypassed or otherwise waived by the Tribunal asa mere "procedural" or "admissibility-related" matter."

The second issue relates to the MFN clause. This issue entails two aspects: the timing of the standing of the MFN clause and the scope of its interpretation. As to the first aspect, the tribunal emphasized that the claimant, under the Germany-Argentine BIT, should have exhausted the prerequisite requirement of the local courts' waiting period prior to invoking the application of the MFN clause in

[231] *Daimler* Decision, *supra* note 153, ¶180-183.
[232] *Daimler* Decision, *supra* note 153, ¶193.
[233] *Daimler* Decision, *supra* note 153, ¶194.

order to maintain its legal standing before the current tribunal. By not doing this, the current tribunal has no jurisdiction over the current case.[234] It said:

> [...]these two conclusions suggest that a claimant wishing to raise an MFN claim under the German-Argentine BIT – whether on procedural or substantive grounds – lacks standing to do so until it has fulfilled the domestic courts provison. To 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.

Turning to the second aspect, which is the tribunal's interpretation of the scope of application of the MFN clause, it observed the existence of three MFN provisions stipulated in Article 3, Article 4 of the Germany-Argentine BIT, and Article 3 of the Protocol. It stated that Article 3 of the BIT has the most general MFN clause.[235] Article 4 deals with substantive protections only and is more limited than Article 3,[236] and Article 3 of the Protocol illustrates the suitable

[234] *Daimler* Decision, *supra* note 153, ¶200.

[235] Article 3 provides that: "(1) Neither Contracting Party shall subject investments in its territory by or with the participation of nationals or companies of the other Contracting Party to treatment less favorable than it accords to investments of its own nationals or companies or to investments of nationals or companies of any third State. (2) Neither Contracting Party shall subject nationals or companies of the other Contracting Party, as regards their activity in connection with investments in its territory, to treatment less favorable than it accords to its own nationals or companies or to nationals or companies of any third State. (3) Such treatment shall not include privileges which may be extended by either Contracting Party to nationals or companies of third States on account of its membership in a customs or economic union, common market or free trade area. (4) The treatment under this article shall not extend to privileges accorded by a Contracting Party to nationals or companies of a third State by virtue of san agreement for the avoidance of double taxation or other tax agreements."

[236] Article 4 states that: "(1) Investment by nationals or companies of either Contracting, Party shall enjoy full protection as well as juridical security in the territory of the other Contracting Party. (2) Investments by nationals or companies of either Contracting Party shall not be expropriated, nationalized or subject to any other measure, the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting Party, except for reasons of public interest and against compensation. Such compensation shall be equivalent to the value of the investment expropriated immediately before the effective or impending expropriation, nationalization or equivalent measure became public knowledge. The compensation shall be paid without delay and shall carry the usual bank interest until the date of payment; it shall be readily convertible and freely transferable. The legality of any such expropriation, nationalization or comparable measure and the amount of compensation shall be subject to review by due process of law."

interpretation of Article 3.[237] The tribunal pointed out that the three provisions use the word "treatment" without giving any explicit definition for it. Therefore, it is the duty of the tribunal to interpret in "good faith" the ordinary meaning of these texts in accordance with the object and purpose of the BIT in order to determine whether the MFN clause can embrace both substantive and procedural matters or is restricted to substantive protection only. It stated that, while the treaty did not specify what is meant by the word "treatment" anywhere, the word was used 13 times in the whole treaty. Thus, the tribunal must attempt to interpret the word in accordance with Article 31(4) of the VCLT.[238] It emphasizes that it is not concerned with the debate about how the term "treatment" shall be understood; whether it shall be previewed to comprise substantive treatment only, or it shall encompass procedural matters as well, but it is only concerned is about how the term is interpreted.[239] In this, it emphasizes that: "What matters is not how the general term treatment potentially could or "should" be interpreted but rather what meaning the Contracting State Parties to the specific Treaty in question have attached to the term."

In interpreting the term, the tribunal started by adopting the principle of contemporaneity. This principle requires that the term "treatment" shall be defined in accordance with the time of negotiations of the BIT between Germany and Argentine, which was 1991.[240] It observed that in 1991 the difference between contract claims and treaty claims remained incomprehensible and that the

[237] It provides that: "a) "Activity" within the meaning of Article 3(2) shall in particular, but not exclusively, include the management, use, enjoyment, and disposal of an investment. The following shall, in particular, but not exclusively, be deemed treatment "less favorable" within the meaning of Article 3: unequal treatment in the case of restrictions on the purchase of raw or auxiliary materials; of energy or fuel, or of means of production or operation of any kind and unequal treatment in the case of impeding the marketing of products inside or outside the country. Measures which have to be taken for reasons of public safety and public order, public
health, or morality shall not be deemed treatment "less favorable" within the meaning of Article 3. b) The provisions of Article 3 do not oblige a Contracting Party to extend to natural persons and companies residing in the territory of the other Contracting Party tax privileges, exemptions, and tax reductions which according to its tax law are granted only to natural persons and companies resident in its territory..."
[238] *Daimler* Decision, *supra* note 153, ¶217.
[239] *Daimler* Decision, *supra* note 153, ¶219.
[240] *Daimler* Decision, *supra* note 153, ¶220.

dispute resolution clauses were perceived, mainly, under the umbrella of the international contracts. This was accompanied by the perception that these provisions are independent from the contract and for protecting the investor's rights in initiating arbitration proceedings if the host state revokes the contract.[241] It also considered the World Bank Guidelines on the Treatment of Foreign Direct Investments of 1992. These Guidelines provide that the term treatment is meant to encompass distinct principles of conduct applicable to the host state in order to safeguard the "investment" from any discriminatory measures in the territory of the host state.[242] It declared that these Guidelines lack any references to the international dispute settlements in the section concerning the term "treatment"; however, it was mentioned in a separate section. This suggests that both the term "treatment" and the international dispute resolution were not interrelated at that time. Therefore, the tribunal concluded that the term "treatment" was, most probably, meant to encompass the direct treatment of the host states of the investment and not to international arbitration settlements.[243] Despite stressing that these guidelines cannot be determinative, they provide an indication of the predominant view among states at that time, which is the period contemporaneous with the conclusion of the BIT between Germany and Argentine.

Furthermore, the tribunal provides that other indicators directed to the same interpretation of the Guidelines. First, the obligation of the most favored treatment was restricted to the treatment of the host state within its territory. Such territorial restriction is incompatible with the application of the MFN clause to international arbitration resolution.[244] It noted:

> Where an MFN clause applies only to treatment in the territory of the Host State, the logical corollary is that treatment outside the territory of the Host State does not fall within the scope of the clause..... The Host State's

[241] *Daimler* Decision, *supra* note 153, ¶221.
[242] *Daimler* Decision, *supra* note 153, ¶222.
[243] *Daimler* Decision, *supra* note 153, ¶ 224.
[244] *Daimler* Decision, *supra* note 153, ¶225-228.

> obligation extends no further than providing the covered investor with "treatment" in respect of domestic dispute resolution (aka dispute resolution "in its territory") that is no less favorable investors than the domestic dispute resolution treatment provided to third-State investors.

The tribunal pointes out the critical significance of the territorial limitation. It elaborates that the provision of the investor-state dispute settlement in the host state's national courts establishes an activity that shall take place in its territory.[245] Thus, the tribunal reasoned its position by saying that should a state give a foreign investor of a third state more-favorable-treatment under the auspices of its national courts, this is deemed a breach of the MFN clause. However, this shall not be invoked in the context of international arbitration, as it takes place outside the host state's territory. One important consequence is that if we assume, *in arguendo*, that the investor-state dispute settlement provision is envisaged under the term "treatment" in a given BIT, the MFN clause in the Germany-Argentine BIT shall only be applicable to the dispute resolution before national courts.[246] The tribunal noted that if we concluded otherwise, this would result in a disregarding of the territorial limitations specified in the BIT wording "in its territory" and hence would not be consistent with the interpretation provided for in the VCLT that involves, *inter alia*, the interpretation of the treaty's terms "shall be done in accordance with their context."[247] It held that:

> The present Tribunal therefore holds that the Treaty's clearly expressed territorial limitation upon the scope of its MFN clauses establishes that the Contracting State Parties to the Germany Argentine BIT did not intend for the Treaty's extra-territorial dispute resolution provisions to fall within the scope of those clauses.

Furthermore, the tribunal found that there is no supporting evidence as to whether the word treatment encompasses the investors only or includes investments as

[245] *Daimler* Decision, *supra* note 153, ¶227.
[246] *Daimler* Decision, *supra* note 153, ¶228.
[247] *Daimler* Decision, *supra* note 153, ¶231.

well. It notes that the several provisions of the MFN in the BIT apply differently to investments and investors. It, however, denies that any of the MFN provisions was meant to encompass international dispute settlements.[248]

In addition, the tribunal ascertained that the MFN clause encompasses the term treatment rather than "all matters", as alleged in *Maffezini v. Spain* case.[249] It refused to adopt the idea that the insertion of the term "all matters" instead of the term "treatment" would lead to the application of the MFN clause to the dispute settlement clause. It elaborates that "all matters cannot refer to all matters," because provisions concerning the territorial and temporal application of a BIT can never be extended under the scope of the MFN clause.[250] It concluded that the absence of the term "all matters" in the basic BIT indicates that both state parties to the BIT intended to distinguish between the treatment of the host state to investments in its territory and the international arbitration provision and such consequence is consistent with the aforementioned tribunal's findings.[251]

With respect to the principle of *expressio unius est exclusio alterius*, the tribunal rejected to rely on it in this case. It noted that the expression of the standard exceptions in Article 3 and 4 in the Germany-Argentine BIT does not indicate the intention of the state parties to include the international dispute resolution mechanism under the scope of the MFN clause. This is because the MFN exceptions provided in the BIT refer exclusively to treatment carried out under the host state's territory. In addition, it noted that all exceptions that were given in connection with the application of the MFN clause prior to Maffezini case, dealt

[248] *Daimler* Decision, *supra* note 153, ¶233.
[249] *Daimler* Decision, *supra* note 153, ¶234.
[250] *Daimler* Decision, *supra* note 153, ¶235.
[251] *Daimler* Decision, *supra* note 153, ¶236.

with the host state's treatment of investments and not the international settlement of disputes that arose from such treatment.[252] It said:

> Overlooking the obvious differences between rights and remedies would seem to push the principle *expressio unius est exclusio alterius* too far. One cannot use the principle to prove the non existence of apples based upon the existence of oranges. The exclusion of certain types of domestic substantive treatment from the German-Argentine BIT's Article 3 MFN clauses therefore does not imply the inclusion of particular types of extra-territorial dispute resolution procedures.

Afterwards, the tribunal rejected the arguments that the dispute resolution mechanism provided for in the Chile-Argentine BIT is, in fact, more favorable to the German investor.[253] The tribunal, in conclusion, decided that it lacks jurisdiction over the case; MFN provisions of the Germany-Argentine BIT cannot be used to circumvent the mandatory prerequisite conditions stipulated in Article 10 of the BIT and that the international dispute resolution provision does not necessarily indicate a more favorable treatment to the claimant.

3. Summary

In literature, there is an approach that both parties must express their consent to arbitration in order for the tribunal to have jurisdiction. Without having an explicit consent of the state to directly arbitrate with foreign investors through the application of the MFN clause, the MFN provision cannot be invoked to establish the jurisdiction of the tribunal.[254] In fact, this is where we can determine the intention of the parties because it exposes whether the manifestation of such consent is expressed within the language of the MFN provision or not. Moreover,

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[252] *Daimler* Decision, *supra* note 153, ¶238-239.
[253] *Daimler* Decision, *supra* note 153, ¶244.
[254] Tony Cole, *Notes on the Meaning of 'Treatment' Under a Most-Favoured Nation Clause, and What Makes Substantive Treatment 'More Favourable* (October 18, 2010). CONTEMPORARY TOPICS IN INVESTMENT ARBITRATION: MOST FAVORED NATION TREATMENT OF SUBSTANTIVE RIGHTS AND INVESTMENT ARBITRATION IN CHINA, Christian Leathley, Warwick School of Law Research Paper, ed. (2010).

since the wording of every MFN clause shall ultimately determines the scope of its application, every MFN clause is, in itself, a promise of specific treatment.

The foregoing analysis reveals that despite applying the same interpretative analysis in the two cases, there are many points of divergence between the two tribunals' reasoning that led to different findings. The first issue relates to the consent of the state to the dispute settlement provision. The second issue relates to whether considering the waiting period in the Germany-Argentine BIT is a mandatory step before resorting to international arbitration and thus, can be deemed an exhaustion of local remedies, or considering it as one of the many steps provided in Article 10 that can be waived through invoking a more favorable dispute settlement provision from the Chile-Argentine BIT. The third issue relates to the interpretation of the word "treatment" mentioned in the Germany-Argentine BIT.

As illustrated above, the tribunal in *Siemens* was not persuaded with the importance of state's consent to deviate from the dispute resolution provision in the BIT and perceived its consent from the BIT in its entirety including the MFN clause. This led to the conclusion that such a requirement is subject to the state's consent provided when concluding the BIT. From my point of view, this finding is incorrect. It is well established that the consent of two parties must match in order to invoke a dispute resolution mechanism. To illustrate, the prior consent of the state that was given at the time of the signing of the BIT must meet the subsequent consent of the investor that is given by initiating the arbitration.[255] However, in *Siemens* the consent did not match. To put it simply, the claimant had not fulfilled the requirements stipulated in Article 10, which is the offer of the state to arbitrate. However, the claimant here made a counter-offer to the state's

[255] Campbell McLachlan QC, Laurence Shore and Mathew Weiniger, *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES*, Oxford University Press, at. 257 (2007).

offer to arbitrate. Such a counteroffer lacks the subsequent consent of the state; therefore, the tribunal has no jurisdiction here.

Furthermore, the tribunal refused to consider the requirement of the 18-month waiting period as an exhaustion of local remedies that is a mandatory prerequisite in holding the jurisdiction of the tribunal and declared that it is a mere step that can be circumvented upon the application of the MFN clause.

Finally, the tribunal emphasized that the word "treatment" in the BIT shall be interpreted to envisage all substantial and procedural rights of foreign investors. It assured that the word "treatment" does not refer to substantive rights only; and thus, it shall envisage the procedural matters too. Thus, the tribunal found that albeit there might be an absence of any reference to 'all matters' under the BIT, the MFN provision could extend to encompassing the international dispute settlement provisions.[256] Accordingly, the tribunal adopted the approach that the dispute resolution mechanism is inextricably linked to the treatment accorded to investors; hence, the provisions of dispute settlement shall be interpreted in a way that protects the rights of foreign investors.

The tribunal's reasoning and interpretation is misleading. When a treaty mandates the investor to resort to domestic courts for a specific period of time before bringing its claims before international arbitration, whereas another treaty concluded by the respondent does not specify such a requirement, it is not hard to conclude that all putative claimants would favor the latter treaty. Moreover, the tirubnal here overrode the intention of the parties established in the dispute resolution provision of Article 10 of the basic BIT with the wider application of the MFN clause as adopted in *Maffezini*, notwithstanding the limited wording of the MFN clause in the Germany-Argentine BIT. This decision was unfairly favorable to the foreign investor, as it disregarded the actual intention of the

[256] *Siemens* Decision, *supra* note 95, ¶ 103, at 71.

Argentine Republic regarding the dispute settlement clause. In sum, the tribunal disregarded the state's consent to the sequential dispute resolution mechanism and overrode its sovereignty by importing the dispute resolution clause from the Chile-Argentine BIT pursuant to the MFN provision in the basic treaty.

Conversely, the majority of the tribunal in *Daimler* had a different interpretation. With reference to the consent, the majority of the tribunal strongly agreed that the existence of states' consent can never be presumed, it is established either via an express declaration of consent or on the grounds of "acts conclusively establishing" it. It is logical to apply the principle of contemporaneity when tempting to analyze the state parties' intention at the time of negotiating the BIT. The consent of Argentina is clearly expressed in Article 10 of the BIT and it reflects the requirements of public international law with regard to the dispute resolution mechanism adopted in this Article. In sum, the tribunal found that it is the choice of states to choose the dispute resolution mechanism that they prefer in their BITs and this choice must not be enforced against their wishes.

In addition, the tribunal was concerned with the correct interpretation of the term "treatment" rather than considering whether it encompasses substantial and procedural matters, makes sense in this regard. Furthermore, the territorial limitation specified in the Germany-Argentine BIT cannot be bypassed as it is connected to state sovereignty. This means that, assuming, *in arguendo*, that the MFN scope is broad enough to encompass the dispute resolution mechanism, it shall be applied within the territory of Argentina pursuant to the territorial limitation stipulated in Article 2.[257]

[257] Article 2 states that: **"**(1) Each Contracting Party shall encourage investments by nationals or companies of the other Contracting Party in its territory and shall admit such investments in accordance with its laws and regulations. In any case each Party shall accord fair and equitable treatment to investments. (2) Investments made by nationals or companies of either Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter Party shall enjoy full protection

Finally, the tribunal emphasized that the 18-month period stipulated in Article 10 of the BIT represents a mandatory jurisdictional condition that has to be fulfilled prior to initiating international arbitration. It is well established that dispute resolution provisions constitute jurisdictional matters, the lack of which result in the lack of the tribunal's jurisdiction. Therefore, the 18-month period condition cannot be bypassed.

In conclusion, it can never be possible for a tribunal that expansively interprets the treatment accorded to an investor, pursuant to a BIT, to encompass the procedural provisions of another treaty by invoking the MFN clause, without knowing that such a tribunal is favoring investors' rights over what might be the actual intentions of the parties when drafting the treaty.

Having said that, it is significant now to reveal the members of each tribunal in light of their foregoing decisions. The two party-appointed arbitrators were the same in both cases *Siemens* and *Daimler*. In *Siemens*, the president of the tribunal was Andres Rigo Sureda who was appointed as president of the tribunal in *National Grid Pic v. The Argentine Republic*.[258] In this case, the tribunal also adopted an expansive approach in interpreting the scope of the MFN clause. The other members of the tribunal in *Siemens* is Judge Charles Brower as co-arbitrator for the claimant and Professor Bello Janiero as co-arbitrator for Argentina. In *Daimler*, the two party-appointed arbitrators were the same as *Siemens*, but with Professor Pierre-Marrie Dupuy acting as president of the tribunal. Judge Brower was also the claimant appointed arbitrator in the ICSID Case of *Hochtief v. Argentine*, which rendered, by the majority, the same conclusion as the one reached in *Siemens*, with Professor Christopher Thomas dissenting the majority's

under this Treaty. (3) Neither Contracting Party shall subject the management, utilization, use or enjoyment of investments of nationals or companies of the other Contracting Party in its territory to arbitrary or discriminatory measures."

[258] *National Grid* Decision, *supra* note 153.

decision.[259] However, in *Daimler*, and as mentioned above, the majority of the tribunal decided that it lacked jurisdiction because the MFN did not permit the claimant to access the international dispute resolution provision in the comparator BIT. Judge Brower, however, dissent to this decision expressing his disagreement with the majority analysis of the MFN clause. Moreover, Professor Bello Janeiro expressed in his separate opinion how he changed his opinion from the decision unanimously rendered in *Siemens*. It is worth mentioning that the decision of the tribunal in *Daimler* was decided consistently with the decision rendered in *ICS Inspection and Control Services Ltd v. Argentine* of which Professor Pierre-Marie Dupuy acted also as president of the tribunal.[260]

The foregoing examination of the members of the tribunals shows, to some extent, that the tribunals' interpretations of the same subject matter may be altered in connection with their policy preferences and their ideologies. Despite no concrete evidence to support this hypothesis, the aforementioned analysis of the two cases detects the inconsistency of the tribunals' interpretation that correlate with their intrinsic ideologies. This tendency does not reach the threshold of disqualification of the arbitrators and thus cannot be a ground for a challenge. However, the question of how we can solve this problem of ideological bias remains open.

D. CONCLUSION

With all the foregoing diversity of approaches, it is acceptable to say that there is a number of inconclusive evidence of the existence of potential bias in international investment arbitration. Empirical analysis and detection cannot deal with this type of bias in a particular case. Even though, on a systematic level, any empirical analysis is deemed as an attempt to test the bias, but not how to deal with it.[261] We can say that tribunals usually adopt an expansive approach when

[259] *Hochtief* Decision, *supra* note 153.
[260] *ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina*, UNCITRAL, PCA Case No. 2010-9, Decision on Jurisdiction 10 February (2012).
[261] Van Harten, *Contributions and Limitations*, *supra* note 131.

they tend to favor the foreign investors. By doing so, they boost the compensatory promise of the investment arbitration regime in the interest of foreign investors, while endangering the sovereignty of states through risking their liabilities.[262] The foregoing results tested the hypothesis that arbitrators tend to interpret the law in the direction that will fit their ideologies and policy preferences. This implies that arbitrators' decisions, when deciding upon a controversial issue, might be, to a great extent, influenced by their ideologies or policy preferences.

Having said that, we can summarize this chapter by saying that, in the analysis of arbitrator's decisions, which concerns contested issues, there is tentative support of bias derived from his/her ideologies and policy preferences because of the asymmetrical structure of the claims in the system and the lack of conventional indicators of his/her independence. Therefore, we have to adopt a precautionary approach through which we can limit the risk of actual bias in investment arbitration. This might be achieved through establishing an adjudicative system that adopts institutional safeguards in order to limit any perceived bias emanating from the structure of the system itself. For this reason, it is important to assess the reform proposals addressed to the problem of independence and impartiality to the ITA system and its adjudicators. Such proposals are discussed in the subsequent chapter.

[262] *Id.*

IV. REFORM PROPOSALS

In ITA and during the past few years, there is a clash between arbitrators' ideologies and the interests of the parties. The clash has arisen between the private interests to protect foreign investments that has been the main concern of investment treaties and the interests of the sovereign states to exercise their regulatory powers in order to ensure the protection of public welfare. The surge in investment treaty arbitration is both structural and procedural. As discussed in chapter two, some scholars argue that ICSID arbitration suffers from a critical and predominant systemic lack of neutrality.[263] Other scholars' views are motivated by the irreconcilable inconsistency between the independence and impartiality of the appointment of arbitrators and the systematic nature of the ITA, thus, magnifying such discrepancy.[264] In their analysis, many scholars have concluded that specific characteristics of the investment treaty arbitration system are dramatically opposed to independence and impartiality. Accordingly, these irreconcilable inconsistencies call for systematic reform of the entire ICSID arbitration system rather than a fractional approach. For instance, Jan Paulsson argues that the party appointment mechanism contradicts the obligation of neutrality and thus proposes the abolishment of this mechanism.[265] R. Berzero and G.J. Horvath argue that the double-hatting function of the ICSID arbitrators to act as arbitrators and counsels at the same time, contradicts the obligation to be independent and impartial. Hence, they propose the prevention of the dual function by eliminating potential conflicts.[266] This has led to the emergence of several trials that aim at reconciling these issues. This chapter examines the EU proposal in the TTIP in establishing an Investment Court System (ICS) as it is almost fully integrated in the new proposal for establishing the Multilateral Investment Court (MIC). Following, it assesses such a proposal in light of its efficiency on the issues of independence and impartiality of the system and

[263] Van Harten, INVESTMENT TREATY ARBITRATION, *supra* note 3, at 167-174.
[264] Jan Paulsson, *The Idea*, *Supra* note 27, at 155-159.
[265] *Id*.
[266] Horvath&Berzero, *supra* note 27.

predicts the failure of this permanent multilateral investment court to curb the political and procedural issues of the current ITA system.

A. THE ICS PROPOSAL IN TTIP

The EU Commission has attempted to find solutions to the issues facing the ISDS system as a whole. It proposed the establishment of an investment court system during the TTIP negotiations.[267] The EU Commission held that in order to solve the ongoing surge in the ITA system there has to be a diametrical reform to the system and not in one of the applicable rules or procedures. In November 2015, the EU Commission introduced its proposal for establishing an Investment Court System (ICS) *in lieu* of the current ISDS in TTIP and in all future trade and investment agreement of the EU.[268] The EU Commission describes the new two-tier ICS as being more "modern, efficient, transparent, and impartial system for international investment dispute settlement resolution."[269]

The proposed amendments concerning the issue of independence and impartiality includes that, first, it will be constituted of 15 judges; five nationals of EU member states, five nationals of the United States, and five nationals of third countries.[270] Second, the appointed judges shall be qualified to hold a judicial office in their home country and to have expertise in international public law, international investment law, and international trade law.[271] Third, judges are not arbitrators and shall not be selected by the parties to a dispute, rather they shall be appointed for a fixed term of six years, which can be renewed once.[272] Fourth, each case shall be constituted of three judges: an EU judge, a U.S. judge, and a

[267] European Commission, Draft text on Investment Protection and Investment Court System in the Transatlantic Trade and Investment Partnership (TTIP), (2015).
[268] European Commission, press release, EU Finalizes Proposal for Investment Protection and Court System for TTIP, 12/11/15 available at: http://europa.eu/rapid/press-release_IP-15 6059_en.htm.
[269] *Id.*
[270] The EU Commission's draft text TTIP, *Trade in Services, Investment and E-commerce*, Chapter 2, Sub-Section 4- Investment Court System, article 9, (draft text), available at http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf .[hereinafter, TTIP Draft Text].
[271] *Id*, Art 9 (4).
[272] *Id.*

judge from a third country.[273] Fifth, the members of the tribunal and the appellate tribunal are to be selected from those whose independence is beyond reasonable doubt and "not affiliated to any government".[274] Sixth, it prohibites the double-hatting role of arbitrators; meaning that a judge before the investment court cannot act as counsel, expert, or witness in any pending or future investment disputes including disputes under domestic laws.[275] When a party has concerns about conflict of interest with any of the judges, it shall notify the president of the tribunal or the president of the appeal tribunal with its challenge notice.[276] Finally, challenges to the president of the tribunal shall be submitted to the president of the appellate body and vice versa.[277]

In order to ensure a fair dispute, there has to be solid and effective institutional safeguards. The EU proposal is attempting to amplify the institutional safeguards for independence and impartiality of the new ICS in order to ensure a fair arbitration process. The safeguards proposed by the EU are of a public law nature, such as security of tenure, selection of arbitrators from a roster, fixed salaries, and a binding code of conduct. On the one hand, the selection of judges from a roster or a pre-established list might, to some extent, guarantee an objective way of assigning disputes without influences from any party on the case's outcome. In addition, it also abolishes the party appointment mechanism. This issue is significant for quality control, accountability, and independence of the system.[278] Furthermore, the existence of the security of tenure and the random selection of judges in cases will undermine the link between parties and judges.

[273] *Id.*
[274] TTIP Draft Text, *supra* note 259, article 11.
[275] *Id.*
[276] *Id.*
[277] *Id.*
[278] Gus Van Harten, *A Report On the Flawed Proposals of Investor State Dispute Settlement On TTIP and CETA*, Osgoode Hall L' School Legal Studies Research Paper Series, Res. Paper no16, Volume 11, Issue 4 (2015).

On the other hand, the EU proposal does not deal with all concerns of independence and impartiality. First, Article 11 of the draft text of the proposal does not prohibit judges from acting as arbitrators; it only prohibits judges from working as counsels, party appointed experts, or witnesses. This means that judges before the investment court are permitted to act as arbitrators in other ISDS disputes. Put differently, conflicts of interest could still be invoked as long as an adjudicator can play the dual role of a judge and an arbitrator at the same time. Such a double hatting role is irreconcilable with the idea of an independent court. Therefore, an effective independence and impartiality can only be achieved when judges are prohibited from doing any external work as arbitrators. Hence this proposal failed to resolve the problem of double-hatting.

Second, another pitfall in the ICS proposal is that judges' monthly retainer is still linked to the duration of the case. To illustrate, judges of the first instance will earn € 2,000 as a monthly retainer fee and appeal's judges will earn € 7,000 to guarantee their permanent availability and availability on short notice in addition to a fee earned for every day of their work on the case.[279] This underpins the financial incentive of the judges in the cases. Hence the link between judges and financial interest has not been undermined.[280] Therefore, the EU proposal fails again here to resolve the moral hazard represented in the adjudicators' financial interests with investors to bring more claims.

Third, although the code of conduct, which is applicable to first instance judges and judges of appeal tribunal[281] refers to independence, impartiality, confidentiality obligations, and maintaining the significance of the independence

[279] Deutcher Richterbund, *Opinion on the establishment of an investment tribunal in TTIP - the proposal from the European Commission on 16.09.2015 and 11.12.2015*, No. 04/16, at 3, February (2016).
[280] Van Harten, *Key Flaws in the European Commission's Proposal for Foreign Investor Protection in TTIP*, Osgoode Hall L' School Legal Studies Res. Paper Series, Res. Paper no 16, Volume 12, Issue 4, (2016).
[281] TTIP Draft Text, *supra* note 259, Annex II (Code of Conduct for Members of the Tribunal, the Appeal Tribunal and Mediators).

and impartiality of the judges for the integrity of the system,[282] its determination of the forbidden behavior and relationships is still vague and is not as comprehensive as the IBA Guidelines. Therefore, it leaves a vast space for different interpretations. It is worth mentioning that this proposal of the TTIP is still under negotiations and has not been finalized or entered into force yet.

B. THE ESTABLISHMENT OF A MULTILATERAL INVESTMENT COURT (MIC)

Another counter proposal by the EU is the establishment of a Multilateral Investment Court (MIC) for the settlement of investment disputes. There have been negotiations concerning its establishment since 2015.[283] The aim of the Commission is to address the criticism of the current ISDS system concerning the EU trade and investment agreements. The Commission proposes to establish a permanent and independent MIC that is consistent with its case law and includes an appeal mechanism. The Commission's initiative deals with procedural issues only, as the substantive matter is to be decided in accordance with the underlying investment agreements that will be applied to the MIC. On March 20, 2018, the Council of the European Union adopted and issued the negotiating directives for a Convention establishing the MIC.[284] The Council's directives entails instructions for the Commission concerning the composition of the court, procedural safeguards, independence and impartiality, coherence, transparency, effectiveness demonstrated in the costs and length of procedures, contribution of developing countries, and the admission of small and medium-sized enterprises and natural persons.[285]

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[282] *Id*, articles 2,3, and 5 (1) (2) (3) (5).
[283] This information available at: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608.
[284] Council of the European Union, *Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes*, March 20, (2018), available at: http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf.[hereinafter, EUC Negotiating Directives].
[285] *Id.*

The proposal to establish the MIC is not much different from the ICS proposal in the draft TTIP discussed earlier. Although there is no final draft articles for the MIC until now, the ongoing deliberations refer to some of its features. The Commission aims at conveying the key features of the national courts system into the international investment world through establishing one international multilateral court for international investment adjudications. The MIC is to be a permanent court that has first instance and appeal tribunals;[286] secure tenure for a number of highly qualified judges who are obliged to abide by the strictest ethical standards; and have transparency and coherence of work. The MIC is a permanent body for settlement of investment disputes that arise concerning the current and future investment treaties and only when such treaties explicitly permit an investor to bring its claims against a state; abolish the party appointed mechanism of arbitrators; provide enforceability of decisions; and provide for an opt-in mechanism.[287]

Further initial talks about the establishment of the MIC started in late 2017 under the United Nation Commission on International Trade Law (UNCITRAL), which mandated its Working Group III to work on the global reform of the current ISDS. The mandate of the UNCITRAL Working Group III (WGIII) distributes the present negotiations on MIC among three phases.[288] The first phase focused on addressing the criticism of the current ISDS.[289] Phase two addresses the interest in reforms.[290] Phase three deals with the negotiations of such reform.

[286] *Id*, Art.10.
[287] The European Commission on, The Multilateral Investment Court Proposal, updated on 10 October 2018, available at, http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608.
[288] United Nation Commission on International Trade Law (UNCITRAL), available at: http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html?fbclid=IwAR3s3ys6A34NMSKWxoNh_x_pSURXQg2en-31EL_bm6sOY3nY0FjIp2nFhTg.
[289] United Nations General Assembly, United Nation Commission on International Trade Law Working Group III, *Investor-State Dispute Settlement Reform*, thirty-fourth session, 18 September (2017), available at: http://undocs.org/A/CN.9/WG.III/WP.142.
[290] United Nations General Assembly, United Nation Commission on International Trade Law Working Group III, *Investor-State Dispute Settlement Reform*, thirty-fifth session, 19 December (2017), available at, https://documents-dds-ny.un.org/doc/UNDOC/GEN/V18/029/83/PDF/V1802983.pdf?OpenElement.

They are currently in Phase two including an ongoing deliberations that took place in Vienna from 29 October to 2 November 2018.[291]

Concerning the issue of independence and impartiality, it is dealt with in Article 11 of the Directives of the EU Council. It provides that the court shall be independent. There is a challenge mechanism included in the convention. Members shall receive permanent remuneration, are appointed for fixed non-renewable long terms and have secure tenure. They are to be appointed in an objective and transparent way similar to the method of appointment adopted by the International Court of Justice and the International Criminal Court. It states that:

> The independence of the Court should be guaranteed. Members of the Court (both of the tribunal of first instance and of the appeal tribunal) should be subject to stringent requirements regarding their qualifications and impartiality. Strong rules on ethics and conflict of interests, including a code of conduct for the Members of the Court and challenge mechanisms shall be included in the Convention. The Members of the Court should receive a permanent remuneration. They should be appointed for a fixed, long and non-renewable period of time and enjoy security of tenure, as well as all necessary guarantees of impartiality and independence. Members should be appointed through an objective and transparent process. Different methods of appointment of the Members of the Court should be explored including, for example, the possibility that all Parties to the Convention are entitled to appoint a Member of the Court, or the possibility that Members of the Court are appointed through other methods inspired by existing international courts such as the International Court of Justice or the International Criminal Court, taking into account, *inter alia*, the expected size of the Court and the need to ensure effectiveness and cost-efficiency. Any such method shall ensure that the Members of the Court who are appointed are of a high quality with the necessary professional and ethical standing to fulfil their duties. Any method of appointment of the Members of the Court shall provide also for regional balance and gender representationin addition to ensuring the efficient and effective management of the Court. Moreover, Members

[291] United Nations General Assembly, United Nation Commission on International Trade Law Working Group III, *Investor-State Dispute Settlement Reform, thirty-sixth session*, 30 July (2018), available at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/V18/051/60/PDF/V1805160.pdf?OpenElement.

should be appointed to hear a particular case by a transparent and objective method.[292]

The foregoing texts represent the current negotiations concerning the independence and impartiality of the new MIC and reveals the drafters intention to show that they are concerned about the surge in the criticism directed at the ITA system. However, one must think about whether these drafters are really resolving the current problems of the ITA or not. Is it a good idea to centralize such power in one entity? Is it going to properly balance the interests of the protection of investors with the interests of sovereign states to regulate? In order to be able to predict the efficiency of the MIC proposal we need to assess the adequacy of such proposal in resolving the foregoing critiques of the current ITA system.

C. ASSESSMENT OF THE CURRENT REFORM PROPOSAL

The foregoing proposal to establish an MIC is a red herring. The principal concern is whether such a proposal will effectively curb the illegitimacy problems of the current system or not. The second concern is whether such centralization is better than that characterizing the current ISDS.

First, the dissatisfaction with the current ISDS system flows from the imbalance between the interests of protecting investments and the interests of host states to regulate public policies, the perceived bias of arbitrators and their ideological predisposition in decision making that result in expansive interpretations than what the states to an agreement have previously agreed upon in their treaty, thus, curtailing the regulatory functions of those states. The establishment of a multilateral investment court would not curb such illegitimacy. The court would become a tool with a greater authority to wield neoliberal rules that protect investments and disregard states interests. Many judges of the ICJ act as

[292] EUC Negotiating Directives, *supra* note 273, article11.

arbitrators in investment arbitrations. An examination of the record of their decisions does not reveal that they avoid the predispositions of other arbitrators who have never acted as judges before.[293] On the rare occasions when ICJ judges who come from developing countries have acted as arbitrators in investment arbitrations, they dissented from the majority's opinion coming from developed countries.[294] They represent the minority, even assuming *in arguendo* that those appointed judges are not acquainted with the neoliberal vision.[295] They might still be well-equipped to comply with the majority opinions.

Moreover, since the EU has made reference to domestic courts judges as models to follow, one must highlight that Judges of domestic courts are chosen from elite classes that share the same unified views and in sights.[296] For example, it has been observed that most English judges are male, white, enrolled in the same universities, and specialized in commercial law.[297] Therefore, most of those judges in a certain court are likely to share the same ideological preferences and predispositions.[298] Judges who are appointed from other EU countries and the USA. are most probably alike too. Therefore, the likely outcome of establishing the MIC would be the affirmation of biased tendencies in a more authoritative manner. Since the ITA is controlled by a small group of persons, such a group will be promoted to the permanent body of the MIC. Put differently, the oligarchy in the ITA system will be relocated to an international authoritative body. In this line, not only will they transmit their ideological preferences to the bench, more importantly their shared ideologies will be legitimized in the process. Although the judges of the MIC are to be elected by states, other tribunals that were constituted in the same manner such as the ICJ suffer from the inherent

[293] M. Sornarajah, *An International Investment Court: panacea or purgatory?*, Columbia FDI Perspectives, No. 180, August 15 (2016).
[294] *Abaclat and others v. Argentina*, ICSID Case No. ARB/07/5, Judge Abi-Saab's Dissenting Opinion to Decision on Jurisdiction and Admissibility August 4 (2011).
[295] *Supra* note 282.
[296] *Id.*
[297] *Id*, at footnote 2.
[298] *Id.*

dominance of these courts by judges who have greater legal skills. Needless to mention, the selection process of the developing countries before international tribunals has been based on extraneous aspects instead of being based on skills.[299] Additionally, there are no indications of the geographical zones those arbitrators may come from or even the mechanism for their selection criteria.

Second, the existence of a permanent investment court would detach it from the democratic control of the host states. Like other permanent international courts, the MIC would arrogate extra powers and establish a new regime of precedents in investment arbitrations. Some scholars support this idea to constitutionalize the current international investment law.[300] The peril here is that it will amplify the neoliberal principles to a position that is above and beyond democratic processes. At present, investment treaty arbitration does not envisage a doctrine of precedent and thus by establishing a permanent body, the doctrine of precedents will emerge. The doctrine of precedents in investment arbitration has a dark side affecting the economic stability of host states. Put differently, the proposal of establishing a permanent international investment court will constrict further the sovereignty of states relative to the current ISDS system.[301] Usually, states favor international arbitration because it at least enables them to have some control over the selection of arbitrators who might consider the states' regulatory powers to control public policies, the thing that will be missing from the permanent court.[302] Moreover, pursuing consistency through *stare decisis* might decrease the accountability of the court to the states and thus harbor a considerable risk to a state's economy.[303] It may lead to a decline in accuracy because judges would follow precedents instead of focusing on rendering the right decision in light of

[299] M. Sornarajah, RESISTANCE AND CHANGE IN THE INTERNATIONAL LAW ON FOREIGN INVESTMENT, Cambridge Univ. Press, at 283 (2015) [hereinafter, Sornarajah, RESISTANCE].
[300] *Id.*
[301] *Id*, at 263; *See also* Jason Webb Yackee, *Controlling the International Investment Law Agency*, 53 HARV. INT'L L.J. at 391- 434 (2012).
[302] Sornarajah, RESISTANCE, *Supra* note 288, at 264.
[303] *Id*, at 265.

the given merits of the case and thus affecting the quality of decisions.[304] Furthermore, the establishment of the MIC will not eliminate the disenchantment of many developing states with the law in the present ISDS system. It will perhaps establish procedures aiming at creating consistent interpretation notions that are significantly unfavorable to maintaining states' regulatory measures.

Furthermore, since each applicable law is drawn from a different treaty, the applicable laws are decentralized. Despite alleging that such laws share similar provisions, different treaties generate different laws due to the textual divergence. In addition, there is a divergence in the legal reasoning of the decisions. As we have seen in chapter three of this paper, the different reasoning of the *Siemens* and *Daimler* tribunals led to completely different decisions, despite invoking the same BIT between Germany and Argentina. This is because tribunals, when using analogical reasoning to amplify certain issue, employ reasoning derived from a diversity of inconsistent sources in order to be able to assess claims and objections in the manner that they see suitable.[305] Therefore, if it is perceived that philosophical attitudes demonstrated in neoliberalism dictate the outcomes in ITA, such predispositions will become deep-rooted in the permanent international court and thus these philosophical attitudes will outlast accordingly.[306] Therefore, the establishment of a permanent international investment court would boost the worst features of the present ITA system.

In conclusion, the EU bilateral attempt with the USA in the TTIP proposing the establishment of the ICS and its attempt with the UNCITRAL Working Groups to establish a Multilateral Investment Court is perceived to address ISDS concerns, *inter alia*, the independence and impartiality of arbitrators. However, this

[304] *Id*, at 266-267; *See also* Irene M. Ten Cate, *The Costs of Consistency: Precedent in Investment Treaty Arbitration*, 51 COLUM. J. TRANSNAT'L L. at 418-420 (2013).
[305] *See* Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 Am. J. Int'l L. at 52 (2013).
[306] Sornarajah, RESISTANCE, *Supra* note 288, at 386.

proposal does not solve the problem of the imbalance between the interests of protection of investments and the interests of the sovereign states to regulate their public policies and the issue concerning the ideological predisposition of arbitrators. It also fails to deal with the moral hazard in adjudicating investment disputes under the current ISDS system, despite examining the issue in the Working Group sessions. One might say that the new MIC proposal is nothing more than a replica of the current ISDS system with a new face. This means that the perceived bias in investment arbitration will still be an open question that needs to be reformed.

V. CONCLUSION

There is a large debate about the legitimacy of the investment treaty arbitration system as a whole. The system is perceived as being favorable to investors over host states. This perception is not nonsense because of the general features of the system, specifically the use of arbitration as a method of adjudication between sovereign states and private investors and the use of private adjudicators to decide on public law matters. These two principal features represent the pillars for the political and procedural problems of the ITA system.

The political criticism addressed to the legitimacy of the system is demonstrated in the imbalance between state sovereignty and private investors' property. The ITA system is criticized because it resolves disputes between states and individuals as opposed to the regulatory disputes between two reciprocal parties, i.e. either between individuals or between states. The ITA has changed the dynamics of sovereign authority of the states through empowering the foreign investors to bring claims against the state's regulatory measures before an *ad hoc* tribunal of private arbitrators instead of bringing such claims under the state's domestic court system. In addition, it endangers the sovereign authority of the state and submits its budget to the control of private adjudicators. These private adjudicators are perceived to be biased because of their ideologies and policy preferences that affect their decision making.

The procedural criticism is elaborated in the mechanism of appointing arbitrators in investment arbitration. The party appointment mechanism of arbitrators and the lack of secure tenure creates the moral hazard of arbitrators. Since the parties to investment arbitration are entitled to select their party appointed arbitrators, and since investment arbitration is a close-knit network, arbitrators became interested in future appointments and in increasing their social networking sphere in the field. Since only investors are entitled to bring claims against host states, arbitrators adopt approaches that are favorable to foreign investors and best serve

their claims over host states. Therefore, the party appointment mechanism and the problem of the lack of a secure tenure threaten the independence and impartiality of the arbitrators and thus the legitimacy of the ISDS system as a whole. The issue of legitimacy is important because once the parties to a dispute contest the legitimacy of the adjudicators, they lose faith in the fairness of the entire system.

In this paper, it is argued that the problem of the investment treaty arbitration cannot be resolved by selecting different people, whether through ICSD or any other institution to have more integrity, as arbitrators. The problem is beyond the existence of the rogue tribunals or the questionable arbitrator. Despite how a tribunal cautiously performs in an individual case, the system in its entirety lacks independence, impartiality, and openness in many vital ways, and most importantly, it is open to a perception of bias as long as its adjudicators earn their income from individual appointments.

I examine the reform proposal to establish a permanent multilateral investment court to deal with the political and procedural criticisms addressed to current investment arbitration system. I conclude that such proposal does not unravel the correlation between arbitrators' ideologies and their decision-making. Despite it is possibly solving some of the concerns related to the systematic bias of the whole arbitration system, such as abolishing the party appointment mechanism and ensuring that the arbitrators are selected from a roster, it is far from addressing the ideological bias of arbitrators. Further, it fails to address the problem of imbalance between the sovereign state's public interests and the private investors' property rights. Conversely, such a proposal would legitimize the ideological preferences of arbitrators and centralize the illegitimacy issues in one body. Having said that, the new proposal of establishing a multilateral investment court will carries the flaws of the current ISDS system and constitutes a centralized powerful and predisposed body that will continue to be negatively affecting the regulatory sphere of host states.