Restrictive Interpretation of Investment Treaties: A Critical Analysis of Arbitral Case Law

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This article critically discusses the recourse to the principle of restrictive interpretation (in dubio mitius) by treaty-based investor-state arbitral tribunals. Although its status as a rule of international law is at best controversial, in dubio mitius has been applied by a number of arbitral tribunals interpreting umbrella clauses and most-favoured-nation (MFN) provisions contained in investment treaties. This article shows that restrictive interpretation is inappropriate and undesirable. It highlights, first of all, that no rational justification for in dubio mitius exists and that the sovereignty-based rationale put forward is obsolete, illogical and largely dysfunctional. It also shows that restrictive interpretation frequently clashes with other, more fundamental, rules of treaty interpretation and that in dubio mitius interpretation of investment treaties has an inherently discriminatory effect on investors.

Keywords: Investment Treaties, Treaty Interpretation, Restrictive Interpretation, In Dubio Mitius, Umbrella Clause, Mfn Provision, State Sovereignty, Investment Law

1 INTRODUCTION

One of the most controversial maxims of treaty interpretation is the principle of restrictive interpretation, also known as *in dubio pars mitior est sequenda* or, more simply, *in dubio mitius*.[1] Under this principle, the interpreter should, in case of doubt or ambiguity, opt for a 'restrictive,' i.e. 'narrow' or 'strict' interpretation of the obligation(s) laid down in a treaty.[2]

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1 For commentary on the principle of *in dubio mitius, see* e.g. H. Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 BYIL 48 (1949); C. Morrisson, *Restrictive Interpretation of Sovereignty-Limiting Treaties*, 19 ICLQ 361 (1970); A. Orakhelashvili, *Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights*, 14 EJIL 529 (2003); C. Larouer, *In the Name of Sovereignty? The Battle over In Dubio Mitius Inside and Outside the Courts*, Cornell Law School Inter-University Graduate Student Conference Papers (2009), Paper 22, https://scholarship.law.cornell.edu/lps_clacp/22/; L. Crema, *Disappearance and New Sightings of Restrictive Interpretation(s)*, 21 EJIL 681 (2010); P. Merkouris, *In Dubio Mitius*, University of Groningen Faculty of Law Research Papers Series No. 14 (2017), https://ssrn.com/abstract=3003890 (accessed 11 July 2019).

2 The exact meaning of the *in dubio mitius* principle is discussed in more detail at 2.1 *infra*.

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Although recognized by a number of leading scholars in the early and mid-twentieth century,[3] the principle of restrictive interpretation has traditionally played a very limited role in the case law of international courts and tribunals. The Permanent Court of International Justice (PCIJ), for example, only referred to it on two occasions, without however basing any decision on it.[4] The PCIJ's successor, the International Court of Justice (ICJ), *appears* to have relied on this principle in one decision, though it failed expressly to acknowledge such reliance.[5]

In recent years, however, the *in dubio mitius* principle has experienced a noticeable renaissance. In fact, it has been applied or recognized, to varying extents, by a number of specialized courts and tribunals, including the Appellate Body of the World Trade Organization,[6] the European Court of Human Rights,[7] and arbitral tribunals established under investment treaties.[8]

As far as the specific context of investor-state dispute settlement is concerned, arbitral tribunals have primarily resorted to the principle of restrictive interpretation in connection with umbrella clauses and most-favoured-nation (MFN) provisions.[9] At least two arbitral tribunals interpreting umbrella clauses have expressly recognized the relevance of *in dubio mitius*,[10] with one tribunal entirely denying the effectiveness of the applicable clause.[11] A number of tribunals have implicitly recognized the appropriateness of restrictive interpretation of MFN provisions, thereby categorically excluding dispute resolution from their scope.[12]

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3 *See* L. Oppenheim, *International Law – A Treatise* vol 1: Peace (1912), para. 554(4); P. Guggenheim, *Lehrbuch des Völkerrechts* vol. 1, 128 (1948); Lauterpacht, *supra* n. 1, at 57.

4 *Case of the S.S. Wimbledon*, PCIJ, judgment of 17 Aug. 1923, www.worldcourts.com/pcij/eng/decisions/1923.08.17_wimbledon.htm, at 25; *Case of the Free Zones of Upper Savoy and the District of Gex (France v. Switzerland)*, PCIJ, judgment of 7 June 1932, www.worldcourts.com/pcij/eng/decisions/1932.06.07_savoy_gex.htm, para. 223.

5 *Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, ICJ, judgment of 20 July 1989, www.icj-cij.org/en/case/76, at 50.

6 *EC – Measures Concerning Meat and Meat Products*, WTO Appellate Body, Report of 16 Jan. 1998, https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20wt/ds26/ab/r*%20not%20rw*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#, para. 165, no. 154.

7 *See* Orakhelashvili, *supra* n. 1.

8 *See* 3 *infra*.

9 For commentary on these decisions, *see* e.g. Z. Douglas, *The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails*, 2 JIDS 97 (2011); J. Antony, *Umbrella Clauses Since* SGS v. Pakistan *and* SGS v. Philippines – *A Developing Consensus*, 29 Arb. Int'l 607 (2013); R. Gardiner, *Treaty Interpretation* 491–495 (2d ed., OUP 2015).

10 *See SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction of 6 Aug. 2003, www.italaw.com/cases/1009, para. 171; *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award of 12 Oct. 2005, www.italaw.com/cases/documents/748, para. 55.

11 *SGS v. Pakistan, supra* n. 10, para. 173.

12 *See* 3.3 *infra*.

Building on the growing scholarly rejection of the *in dubio mitius* rule,[13] this article argues that treaty-based investor-state arbitral tribunals should refrain from resorting to this principle. It offers a general critique of the principle of restrictive interpretation, highlighting its various flaws, and shows that there are no specific factors or reasons that would warrant its application in the context of investment arbitration.

This article is divided into three main sections. Section 2 introduces the principle of restrictive interpretation and analyses its meaning, origin, and rationale. Section 3 discusses arbitral decisions that have applied, or recognized, the *in dubio mitius* principle as a rule of treaty interpretation. Section 4 critically examines these decisions, showing that restrictive interpretation (1) lacks a legitimate foundation, (2) conflicts with other, better established, rules of interpretation, and (3) unduly favours host states over investors.

2 PRINCIPLE OF RESTRICTIVE INTERPRETATION

2.1 Meaning

There is no statutory or otherwise official definition of the principle of restrictive interpretation, at least not in the context of treaty interpretation. This is due to the fact that this principle cannot be found in the Vienna Convention on the Law of Treaties (VCLT)[14] or any other instrument (aimed at) codifying the customary international law of treaties.[15]

A definition that is frequently referred to by scholars and courts is the one contained in *Oppenheim's International Law*.[16] The authors define restrictive interpretation as a principle applying 'in deference to the sovereignty of states' according to which, '(i)f the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial or personal supremacy of a party, or involves less general restrictions upon the parties.'[17]

Under this definition, the principle of restrictive interpretation is thus characterized by three principal features. First and foremost, as the term suggests, it is characterized by a restrictive interpretive approach. Considering that interpretive rulings can only be regarded as 'restrictive' to the extent that they are stricter or narrower than other possible interpretive findings, restrictive interpretation is based

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13 *See*, in particular, Merkouris, *supra* n. 1.

14 Vienna Convention on the Law of Treaties concluded at Vienna on 23 May 1969, Arts 31–33, https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf, (no mention is made of restrictive interpretation or *in dubio mitius*).

15 *See* Merkouris, *supra* n. 1, para. 17.3.

16 R. Jennings & A. Watts, *Oppenheim's International Law* vol. 1 (9th ed., OUP 1992).

17 *Ibid.*, at 1278.

on the assumption that two or more interpretative options exist. Amongst those options, the interpreter must adopt the most (or more) restrictive one.

The application of the principle of *in dubio mitius* will frequently lead to a narrow construction of the *scope* of the obligation contained in a particular provision. Where, for example, a multilateral environmental treaty provides for an obligation to reduce certain emissions, a court or tribunal adopting a restrictive interpretive approach may hold that the obligation at stake only applies to a limited number of substances (and not to others) or that it only applies to certain specified persons (and not to others), thereby reducing the scope of the relevant obligation.

In other cases, restrictive interpretation may affect not so much the scope, but rather the *nature* of the obligation in question. Adopting an *in dubio mitius* interpretation of the environmental treaty referred to above, a court or tribunal may, for example, decide that a particular obligation does not constitute an obligation of result, but merely an obligation of best efforts. Or, more drastically, it may hold that a particular provision constitutes merely a recommendation not giving rise to any legally binding obligation.

The second characteristic feature of restrictive interpretation relates to the fact that it only applies '(i)f the meaning of a term is ambiguous.'[18] This particular feature implies that restrictive interpretation is a subsidiary interpretive rule that should only be applied where the general or primary rules of interpretation have not produced a satisfactory result or, to use the words of Hersch Lauterpacht, 'when all other means of interpretation have failed.'[19]

The subsidiary nature of the *in dubio mitius* principle is, however, not entirely uncontroversial. Indeed, the requirement that the provision concerned be ambiguous may be viewed as simply indicating an actual need for interpretation. As Lauterpacht has observed in this respect, 'all rules of interpretation apply only in case of doubt, where there is no doubt, there is no necessity for interpretation.'[20] For present purposes, there is no need to opt for one or the other view on the subsidiary character of the principle of restrictive interpretation. It is, however, interesting to note the relative uncertainty surrounding this fundamental aspect of *in dubio mitius*.

The third defining feature of restrictive interpretation relates to its underlying rationale, namely, the principle of state sovereignty. *In dubio mitius* interpretation thus derives from the fact that the party owing a particular obligation is a sovereign state, rather than an individual or corporation. This rationale will be explored in more detail in section 2.3 *infra*. It will be examined critically in section 4.1 *infra*.

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18 *Ibid*.
19 Lauterpacht, *supra* n. 1, at 60 (commenting on domestic law versions of *in dubio mitius*).
20 *Ibid*., at 49.

2.2 Origin

As its Latin name (*in dubio mitius*) suggests, the origins of the principle of restrictive interpretation can be traced back to Roman law. Under Roman law, *in dubio mitius*, which also indirectly found expression in a number of similar legal maxims, was essentially a principle of criminal law under which doubts regarding a person's guilt were to be resolved in the accused's favour (this principle was, and continues to be, also known as *in dubio pro reo*).[21] In the area of civil law and, more particularly, contract law, this principle seems to have been of far lesser relevance, if any.[22]

In the entirely different context of international law, *in dubio mitius* first appeared in the writings of a number of authors in the early and mid-twentieth century, all of whom seemed to view this principle as an established rule of international law. In his 1912 treatise on *International Law*, Oppenheim observed that '[t]he principle in *dubio mitius* must be applied in interpreting international treaties.'[23] Writing in 1948, Guggenheim also acknowledged the existence of *in dubio mitius*, referring to the 'supremacy, recognized in international practice, of restrictive as distinguished from extensive interpretation.'[24] Lauterpacht, though critical of the principle of restrictive interpretation, similarly recognized that it was a well-established canon of interpretation.[25]

While legal writers generally acknowledged the existence of the *in dubio mitius* principle, international courts and tribunals only very exceptionally applied or recognized this interpretive approach. One such decision is the PCIJ's judgment in the case of the *S.S. Wimbledon*, decided in 1923.[26] In this case, the German authorities had refused access to the Kiel Canal to an English steamship (the *Wimbledon*) carrying munitions and artillery stores consigned to the Polish Naval Base at Danzig, invoking Germany's neutrality in the context of the Russo-Polish war.[27] The applicants (Britain, France, Italy, and Japan) argued that such refusal violated Article 380 of the Treaty of Peace of Versailles which provided for a right of free passage of all vessels of nations at peace with Germany.[28] In its defense, the German government argued that Article 380 constituted a servitude and that it had

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[21] *See* Merkouris, *supra* n. 1, para. 17.2.B (reviewing the 'legal antecedents' of the *in dubio mitius* principle); Larouer, *supra* n. 1, at 4–5.
[22] Merkouris, *supra* n. 1, para. 17.2.C.
[23] Oppenheim, *supra* n. 3, para. 554(4).
[24] Guggenheim, *supra* n. 3, at 128 (translation from the German original taken from Lauterpacht, *supra* n. 1, at 49).
[25] Lauterpacht, *supra* n. 1, at 57 (noting that 'the rule of restrictive interpretation has acquired prominence in international law').
[26] *Case of the S.S. Wimbledon, supra* n. 4.
[27] *Ibid.*, at 19.
[28] *Ibid.*, at 20.

to be 'construed as restrictively as possible and confined within its narrowest limits.'[29] Germany further maintained that, in times of war, Germany's right to remain neutral should prevail over the right of free passage granted under the treaty.[30] In its analysis of Germany's defense, the Court acknowledged that the obligation enshrined in Article 380 amounted to a serious limitation of Germany's sovereign rights and that this constituted 'a sufficient reason for … restrictive interpretation.'[31] However, it also held that restrictive interpretation should not have the effect of being 'contrary to the plain terms'[32] of the provision concerned and that, in the present case, Article 380 clearly established a right of passage in both times of peace and times of war.[33] The Court thus concluded that Germany was in breach of its obligations under this provision.[34]

Further, the PCIJ approvingly referred to the *in dubio mitius* principle in its decision in the *Free Zones* case.[35] One of the issues in this case was whether France was entitled to impose certain taxes and duties on products manufactured in the free zones of Upper Savoy and Gex.[36] The Court held that this right had not been excluded under the applicable treaties entered into between France and Switzerland in 1815 and that, 'in case of doubt a limitation of sovereignty [such as an exclusion of, or limitation on, a State's power of taxation] must be construed restrictively.'[37]

As far as the ICJ is concerned, it arguably applied the principle of restrictive interpretation in its decision in the *ELSI* case.[38] In this case, the United States brought a claim against Italy under the Friendship, Commerce and Navigation (FCN) Treaty between the two countries, alleging that Italy's treatment of two US corporations in connection with their shareholding in the Italian company Elletronica Sicula amounted to a violation of various standards of protection contained in that treaty.[39]

Italy raised an objection to the admissibility of the claim, arguing that the two US corporations had failed to exhaust the legal remedies available to them in Italy.[40] The Court thus had to examine whether the customary international law rule requiring the exhaustion of local remedies, which is applicable in cases of

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29 *Ibid.*, at 24.
30 *Ibid.*
31 *Ibid.*
32 *Ibid.*, at 25.
33 *Ibid.*
34 *Ibid.*, at 30.
35 *Case of the Free Zones of Upper Savoy and the District of Gex, supra* n. 4.
36 *Ibid.*, para. 222.
37 *Ibid.*, para. 223.
38 *Case Concerning Elettronica Sicula S.p.A. (ELSI), supra* n. 5.
39 *Ibid.*, para. 12.
40 *Ibid.*, para. 49.

diplomatic protection, was applicable under the United States-Italy FCN Treaty, even though the relevant dispute resolution provision did not refer to such a requirement.[41] Observing that the parties to an FCN treaty were in principle free to exclude the requirement of the exhaustion of local remedies, the Court nevertheless held that such 'an important principle of customary international law should [not] be held to have been tacitly dispensed with.'[42] Rejecting also other objections raised by the United States, the Court concluded that the requirement of the exhaustion of domestic remedies was applicable.[43]

2.3 Rationale

As the definition contained in *Oppenheim's International Law* suggests, the rationale underlying the *in dubio mitius* principle lies in the concept of state sovereignty. Although difficult to define with any precision, sovereignty is (as is well-known) an attribute or characteristic feature specific to states.[44] In international law, state sovereignty serves as a justification for a broad range of legal rules and principles including, for example, (1) equality of states[45]; (2) territorial sovereignty (including the obligation not to violate another's state's territorial sovereignty)[46]; (3) the lack of compulsory jurisdiction of international courts or tribunals[47]; and (4) immunities from jurisdiction and execution.[48]

While it does pinpoint the basic rationale for restrictive interpretation, Oppenheim's definition fails, however, clearly to define the specific nexus between *in dubio mitius* and state sovereignty. It refers to the idea that a restrictive interpretive approach should be adopted 'in deference to' state sovereignty, thus suggesting that the function of restrictive interpretation is to protect, preserve, or safeguard state sovereignty. It does not, however, explain why a non-restrictive

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41 *See* Treaty of Friendship, Commerce and Navigation signed at Rome on 2 Feb. 1948, 79 U.N.T.S. 172 (1951) Art. XXVI: 'Any dispute between the High Contracting Parties as to the interpretation or the application of this Treaty, which the High Contracting Parties shall not satisfactorily adjust by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties shall agree to settlement by some other pacific means.'

42 *Case Concerning Elettronica Sicula S.p.A. (ELSI), supra* n. 5, para. 50.

43 *Ibid.*, para. 55.

44 *See* M. Shaw, *International Law* 211 (6th ed., CUP 2008) (noting that '[p]erhaps the outstanding characteristic of a state is its independence, or sovereignty').

45 *Ibid.*, at 214. *See also* UN General Assembly Resolution A/RES/25/2625 of 24 Oct. 1970, www.un-documents.net/a25r2625.htm (referring to the principle of sovereign equality of states).

46 *See* Shaw, *supra* n. 44, at 489–492.

47 International courts and tribunals including the ICJ only have jurisdiction over states to the extent that the latter consent to this jurisdiction. *See*, in particular, Statute of the ICJ, Art. 36(1), www.icj-cij.org/en/statute.

48 *See* Shaw, *supra* n. 44, at 697–777.

interpretation of treaty obligations would lead to an excessive or undesirable limitation on state sovereignty.

One particular question that neither courts nor legal scholars have attempted to answer is whether the principle of *in dubio mitius* applies by reason of the sovereign nature of the *obligor* of a particular obligation (the state) or whether its application is mandated by the nature of the *obligation* in question. Under the first approach, every obligation owed by a state must be interpreted restrictively because the subject that owes the relevant duty is a sovereign state. Under the second approach, however, *in dubio mitius* will only have to be applied when the relevant obligation is one that affects, or may affect, the sovereignty of the state concerned – the underlying assumption being that not all treaty obligations undertaken by states necessarily have an impact on their sovereignty.

3 RESTRICTIVE INTERPRETATION OF INVESTMENT TREATIES IN ARBITRAL CASE LAW

3.1 General observations

3.1[a] *Areas of Application*

A restrictive interpretive approach can, in principle, be applied in connection with any provision contained in an investment treaty. In fact, there appears to be no logical reason why the use of this principle should be confined to certain categories of treaty clauses. Thus, it would in principle be possible to apply *in dubio mitius* in relation to the various substantive standards of protection contained in investment treaties such as, for example, fair and equitable treatment, protection from unlawful expropriation, full protection and security, and national treatment.

However, for reasons about which one can only speculate, arbitral tribunals have almost exclusively resorted to the principle of restrictive interpretation in relation to treaty provisions that are, directly or indirectly, connected with the scope of investor-state dispute resolution (ISDR). In fact, as has already been mentioned, a number of arbitral tribunals have restrictively interpreted the applicability of umbrella clauses, i.e. of clauses that transform various, notably contractual, obligations into treaty obligations, thereby frequently bringing claims alleging breaches of these obligations within the scope of the applicable ISDR provision. Similarly, as has also already been alluded to, several arbitral tribunals have restrictively interpreted MFN clauses, denying investors the possibility to rely on more favourable ISDR provisions contained in other treaties. These two sets of decisions will be examined in more detail in section 3.2 *infra*.

3.1[b] *Express and Implied Restrictive Interpretation*

When arbitral tribunals restrictively interpret particular treaty provision, they do not always expressly acknowledge recourse to this interpretive method. In other words, restrictive interpretation may sometimes be implied, rather than express. As will be shown below, indicators for such an implicit application of *in dubio mitius* notably include reliance on presumptions favouring a narrow interpretation and the use of demanding evidentiary thresholds.

The existence of decisions implicitly adopting the principle of restrictive interpretation makes it very difficult, if not altogether impossible, to state with accuracy how often arbitral tribunals adopt such an interpretive approach. While cases involving express references to *in dubio mitius* can easily be located, it is not always easy to spot decisions that tacitly adopt a restrictive interpretation of a particular treaty provision.

3.2 Restrictive interpretation of umbrella clauses

3.2[a] *Concept of Umbrella Clause*

An umbrella clause[49] is a clause under which the states parties to an investment treaty undertake to comply with (certain) obligations entered into vis-à-vis foreign investors. Under Article 2(2) of the U.K. Model Bilateral Investment Treaty (BIT),[50] for example, '[e]ach Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.' Umbrella clauses thus transform the obligations concerned – which are typically considered to include contractual obligations – into obligations arising under the treaty.[51] These obligations are considered to have been brought within the treaty's 'umbrella.'

Umbrella clauses play an important role in practice because they frequently have jurisdictional effects. This is due to the fact that, in many investment treaties, the ISDR clauses only cover claims alleging treaty violations (i.e. treaty claims) and

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[49] For commentary on umbrella clauses and their application by arbitral tribunals, *see* e.g. C. Schreuer, *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 JWIT 231 (2004); J. Wong, *Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes*, 14 Geo. Mason L. Rev. 135 (2006); J. Crawford, *Treaty and Contract in Investment Arbitration*, 24 Arb. Int'l 351, 366–370 (2008); Antony, *supra* n. 9, at 607; J. Lee, *Putting a Square Peg into a Round Hole – Assessment of the Umbrella Clause from the Perspective of Public International Law*, 14 CJIL 341 (2015).

[50] U.K. Model BIT of 2008, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2847.

[51] *See* e.g. Schreuer, *supra* n. 49, at 50 (observing that, under an umbrella clause, 'a violation of such a contract [a contract concluded between the investor and the host state] becomes a violation of the BIT').

not breach-of-contract claims. Under such treaties, an umbrella clause will bring contractual claims within the ambit of the ISDR provision, thus broadening the scope of the jurisdiction of treaty-based arbitral tribunals.

3.2[b] *Interpretive Question(s)*

In most cases, the basic interpretive question is whether a particular treaty provision has the effect of elevating contractual and other obligations to obligations owed under the treaty, i.e. whether the provision concerned does indeed constitute an umbrella clause. This may not always be a straightforward matter. For example, one may wonder whether a clause providing for an obligation to 'create and maintain … a legal framework apt to guarantee to investors the continuity of legal treatment, including the compliance, in good faith, of [*sic*] all undertakings assumed with regard to each specific investor'[52] can be considered as transforming those undertakings into treaty obligations.

In addition to this basic question, a string of other interpretive issues may arise in connection with the determination of the exact scope of umbrella clauses. Where, for example, an umbrella clause provides that '[e]ach Party shall observe any obligation it may have entered into with regard to investments,'[53] the question may arise as to whether this clause only covers obligations entered into vis-à-vis the investor or whether obligations entered into vis-à-vis other entities connected with the investor are also covered. The same clause may also give rise to the question of whether the expression 'obligation[s] … entered into' only applies to specific undertakings made vis-à-vis a particular investor or whether, on the contrary, it also extends to general, unilateral undertakings (such as those found in domestic legislation).

3.2[c] *Express Recognition of the Principle of Restrictive Interpretation*

There are at least two decisions in which arbitral tribunals have expressly recognized the appropriateness of restrictively interpreting umbrella clauses. The first such ruling is the jurisdictional decision of the International Center for Settlement of Investment

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[52] This is the text of Art. 2(4) of the Italy–Jordan BIT. *See* Agreement between the Government of the Hashemite Kingdom of Jordan and the Government of the Italian Republic on the Promotion and Protection of Investments of 21 July 1996, available at http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/2082.

[53] Such a clause can notably be found in the United States–Argentina BIT. *See* Treaty between [the] United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment of 14 Nov. 1991, Art. II.2.c, http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/162.

Disputes (ICSID) arbitral tribunal in *SGS v. Pakistan*.[54] In this case, Société Générale de Surveillance S.A. (SGS) entered into a contract with the government of Pakistan for the provision of pre-shipment inspection services.[55] Less than two years following its conclusion, Pakistan terminated the agreement.[56] Taking the view that such termination was unlawful, SGS initiated proceedings in the Swiss courts, seeking the payment of unpaid invoices and damages for abusive termination.[57] The Swiss courts denied their jurisdiction over SGS's claim on the grounds that the parties' contract contained an arbitration clause providing for arbitration in Pakistan.[58] Eventually, Pakistan commenced arbitration proceedings in conformity with that clause.[59] While these proceedings were still pending, SGS initiated ICSID arbitration under the Switzerland–Pakistan BIT,[60] alleging various violations of that treaty by Pakistan.[61]

In the ICSID proceedings, Pakistan objected to the tribunal's jurisdiction, arguing that SGS's claims were essentially contractual in nature and that the tribunal did not have jurisdiction over such claims.[62] In an attempt to rebut Pakistan's objection, SGS primarily argued that it had characterized its claims as treaty claims and that it was not for the respondent to re-characterize those claims as contractual.[63] In addition, SGS also relied on the treaty's umbrella clause,[64] arguing that this clause had 'the effect of elevating a simple breach of contract claim to a treaty claim under international law.'[65]

Assessing the effect of the treaty's umbrella clause, the tribunal notably examined the literal meaning of this provision,[66] as well as the consequences that would follow from the interpretation advocated by the claimant.[67] Significantly, the tribunal also stated that '[t]he appropriate interpretive approach [was] the prudential one summed up in the literature as *in dubio pars mitior est sequenda*, or more tersely, *in dubio mitius*.'[68] In reliance on this interpretive approach, the

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54 *SGS v. Pakistan, supra* n. 10.
55 *Ibid.*, para. 11.
56 *Ibid.*, para. 16.
57 *Ibid.*, paras 20–21.
58 *Ibid.*, paras 22–25.
59 *Ibid.*, para. 26.
60 *Ibid.*, para. 33.
61 *Ibid.*, para. 34.
62 *Ibid.*, para. 43.
63 *Ibid.*, para. 83.
64 The umbrella clause is contained in Art. 11 of the Switzerland–Pakistan BIT. It reads: 'Either Contracting Party shall constantly guarantee the observance of commitments it has entered into with respect to the investments of the investors of the other Contracting Party.' *See* Agreement between the Swiss Confederation and the Islamic Republic of Pakistan on the Promotion and Reciprocal Protection of Investments of 11 July 1995, http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/2721.
65 *SGS v. Pakistan, supra* n. 10, para. 98.
66 *Ibid.*, para. 166.
67 *Ibid.*, para. 168.
68 *Ibid.*, para. 171.

tribunal held that in order for an umbrella clause to transform contractual obligations into treaty obligations, the corresponding intent of the contracting states had to be established by 'clear and persuasive evidence.'[69] Holding that no such evidence had been adduced by the claimant, the tribunal rejected the claimant's umbrella-clause argument.[70]

Another decision recognizing the appropriateness of *in dubio mitius* interpretation of umbrella clauses is the decision of the ICSID arbitral tribunal in *Noble Ventures v. Romania*.[71] In this case, the question of the effect of the umbrella clause contained in the applicable BIT (the United States–Romania BIT) arose in circumstances similar to those present in *SGS v. Pakistan*. In its analysis of this issue, the arbitral tribunal first reviewed relevant earlier decisions, highlighting similarities and differences between the umbrella clause contained in the applicable treaty and the umbrella clauses at stake in earlier decisions.[72] As regards the appropriate interpretive approach, the arbitral tribunal observed that 'the identification of a provision as an "umbrella clause" [i.e., as a clause transforming contractual obligations into treaty obligations] can … proceed only from a strict, if not indeed restrictive, interpretation of its terms.'[73] The arbitral tribunal derived this interpretive approach from the observation that umbrella clauses 'introduce … an exception to the general separation of States [*sic*] obligations under municipal and under international law.'[74] Based on the specific wording of the treaty's umbrella clause, the tribunal found that the applicable threshold was met, thus giving full effect to the umbrella provision.

3.2[d] *Implied Recognition of the Principle of Restrictive Interpretation*

3.2[d][i] Salini v. Jordan

In *Salini v. Jordan*,[75] two Italian contractors and the Jordanian Ministry of Water and Irrigation entered into a contract for the construction of a water dam.[76] After completion of the works, a dispute arose between the parties regarding Jordan's payment obligations.[77] The parties' attempt to settle their dispute amicably having

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69 *Ibid.*, para. 173.
70 *Ibid.*
71 *Noble Ventures v. Romania, supra* n. 10.
72 *Ibid.*, paras 50–54.
73 *Ibid.*, para. 55.
74 *Ibid.*
75 *Salini Costruttori S.p.A. & Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction of 15 Nov. 2004, www.italaw.com/cases/954.
76 *Ibid.*, para. 14.
77 *Ibid.*, paras 15–17.

failed, the contractors ultimately initiated ICSID arbitration proceedings under the Italy–Jordan BIT, alleging various treaty breaches.[78]

Jordan challenged the jurisdiction of the ICSID tribunal, arguing (similarly to Pakistan in *SGS v. Pakistan*) that the claimants' claims were contractual in nature and that the tribunal did not have jurisdiction over such claims.[79] One question that arose in connection with Jordan's jurisdictional objection was whether the treaty's umbrella clause had the effect of transforming breaches of the contract concluded between the parties into treaty breaches. Like the *SGS v. Pakistan* tribunal, the arbitral tribunal answered this question in the negative. Focusing on the specific language used in the treaty's umbrella provision, the arbitral tribunal concluded that this clause only gave rise to an obligation to 'create and maintain a legal framework apt to guarantee the compliance of all undertakings assumed with regard to each specific investor,'[80] i.e. an obligation falling short of a duty actually to 'observe' such undertakings or to 'guarantee' their observance.[81]

It is not entirely clear to what extent the tribunal's decision can be regarded as an application of the principle of restrictive interpretation. Unlike the tribunal in *SGS v. Pakistan*, the *Salini* tribunal did not actually refer to this interpretive approach, nor did it base its decision on any presumption or evidentiary threshold reflecting such an interpretive principle. In fact, the tribunal's decision appears to be based primarily on a literal reading of the relevant clause. However, in light of the conclusion reached by the tribunal (i.e. its denial of the transformative effect of the clause at stake), it is not unreasonable to argue that the tribunal's ruling implicitly endorses the *in dubio mitius* principle.

3.2[d][ii] Decisions Restricting the Scope of the Transformative Effect of Umbrella Clauses

Arbitral tribunals have restricted the scope of application of umbrella clauses in various ways. Some of these restrictions do not result from *in dubio mitius* interpretations of the relevant clauses. Instead, they derive from a literal reading of the provisions in question, analysed in their specific context and in light of their object and purpose. This is true, first of all, with respect to decisions that have applied limitations based on privity, holding that umbrella clauses only cover (1) obligations entered into by the host state itself (and not by other state

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78 *Ibid.*, para. 22.
79 *Ibid.*, para. 23.
80 *Ibid.*, para. 126.
81 *Ibid.*

entities)[82]; (2) obligations entered into vis-à-vis the investor itself (and not vis-à-vis affiliated or related entities)[83]; and (3) obligations meeting both of the above requirements.[84] Similarly, decisions that have excluded the application of umbrella clauses to general undertakings, such as those contained in legislative acts, are also firmly grounded in a textual interpretation of the applicable provisions.[85]

Two other types of restrictions adopted by arbitral tribunals are largely devoid of a textual basis and can thus be regarded as resulting from an implied application of the principle of *in dubio mitius*. There are, first all, several decisions in which arbitral tribunals have restricted the application of umbrella clauses to a certain category of contracts, namely, contracts entered into by the host state in its sovereign capacity. In *El Paso v. Argentina*,[86] for example, the arbitral tribunal held that the applicable umbrella clause did 'not extend the Treaty protection to breaches of an ordinary commercial contract entered into by the State or a State-owned entity.'[87] A virtually identical reasoning can be found in the decision of the arbitral tribunal in *Pan American v. Argentina*.[88]

The second type of *in dubio mitius* restriction established by arbitral tribunals is also based on the distinction between the state as a merchant and the state as a sovereign. However, rather than limiting the scope of application of umbrella clauses to certain types of *contracts*, the relevant decisions confine their application to certain types of contractual *breaches*. In other words, an umbrella clause will apply whenever the state measure alleged to be in breach of a contractual

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[82] *See* e.g. *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction of 22 Apr. 2005, para. 223 (noting that the relevant contracts were 'concluded by a separate and distinct entity [from the State of Pakistan].' In this case the umbrella clause relied upon by the investor was not contained in the BIT between Italy and Pakistan, which provided the legal basis for the investor's claim, but in the Switzerland–Pakistan BIT, which the investor sought to invoke by relying on the treaty's MFN clause. This umbrella clause referred to 'commitments it [each contracting Party] has entered into' with respect to investments. *See* Switzerland–Pakistan BIT, *supra* n. 64, Art. 11.

[83] *See* e.g. *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award of 14 July 2006, para. 384, www.italaw.com/cases/118, (observing that 'it was ABA [a third party affiliated with the investor] and not Azurix [the investor] which was the party to this Agreement'). In this case, the umbrella clause provided: 'Each Party shall observe any obligation it may have entered into with regard to investments.' *See* United States–Argentina BIT, *supra* n. 53, Art. II.2.c.

[84] *Azurix v. Argentina*, *supra* n. 83, para. 384 (noting that 'there is no undertaking to be honored by Argentina to Azurix other than the obligations under the BIT').

[85] *See* e.g. *Noble Ventures, Inc. v. Romania, supra* n. 10, para. 51 (stating that '[t]he employment of the notion "entered into" indicates that specific commitments are referred to and not general commitments, for example by way of legislative acts').

[86] *El Paso Energy Int'l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction of 27 Apr. 2006, www.italaw.com/cases/382.

[87] *Ibid.*, para. 81.

[88] *BP America Production Co., Pan American Sur SRL, Pan American Fuegina, SRL & Pan American Continental SRL v. Argentine Republic*, ICSID Case No. ARB/04/8, Decision on Preliminary Objections of 27 July 2006, para. 109, www.italaw.com/cases/808.

obligation was taken by the state in its sovereign capacity.[89] For example, the non-payment of amounts due under a concession agreement would not, as a general rule, be covered by an umbrella clause. However, the host state's undue interference with a concession through legislative enactments would in principle fall within the scope of such a provision:

3.2 Restrictive interpretation of MFN clauses

3.3[a] *Concept of MFN Clause*

An MFN (most favoured nation) clause is a provision that offers investors of a contracting state MFN treatment, i.e. treatment no less favourable than that which the other contracting state or states afford(s) to investors of third countries. The U.K. Model BIT, for example, provides that '[n]either Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns … of nationals or companies of any third State.'[90]

3.3[b] *Interpretive Question(s)*

The specific purpose(s) for which investors rely on a treaty's MFN provision and invoke a more favourable ISDR clause contained in another treaty may vary. Some claimants may seek to avoid the application of obligations to have recourse to the host states' courts prior to initiating investor-state arbitration proceedings.[91] Others may seek to broaden the scope of the claims they can submit to investor-state arbitration.[92]

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89 *See* e.g. *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award of 28 Sept. 2007, para. 310, www.italaw.com/cases/documents/1004, (noting that one has to distinguish according to whether 'the breach has arisen from the conduct of an ordinary contract party, or rather involves a kind of conduct that only a sovereign State function or power could effect' (footnote omitted).

90 U.K. Model BIT, *supra* n. 50, Art. 3(1).

91 *See* e.g. *Emilio Augustin Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction of 25 Jan. 2000, para. 40, www.italaw.com/cases/641; *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award of 8 Dec. 2008, para. 159.2, www.italaw.com/cases/1171; *Kilic Ĭnsaat Ĭthalat Ĭhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award of 2 July 2013, paras 4.2.7–4.2.9, www.italaw.com/cases/1220.

92 *See* e.g. *Salini v. Jordan, supra* n. 75, para. 102; *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 Feb. 2005, paras 183 and 186, www.italaw.com/cases/857; *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award of 13 Sept. 2006, paras 81–83, www.italaw.com/cases/documents/1094; *Vladimir Berschader & Moïse Berschader v. Russian Federation*, Stockholm Chamber of Commerce, Case No. 080/2004, Award of 21 Apr. 2006, para. 85, www.italaw.com/cases/140; *Renta 4S.V.S.A. and others v. Russian Federation*, Arbitration Institute of the Stockholm Chamber of Commerce, Case No. V (024/2007), Award on Preliminary Objections of 20 Mar. 2009, para. 69, www.italaw.com/cases/915; *Austrian*

Others again may aim to obtain the benefit of a particular form of arbitration not provided for in the basic treaty.[93] Regardless of the specific underlying motivation, the fundamental interpretive question will always be whether the scope of the MFN provision contained in the basic treaty extends to dispute settlement.

Unsurprisingly, a central interpretive issue in this respect is the question of whether the concept of treatment – which is evidently of fundamental importance for the interpretation of clauses providing for MFN 'treatment' – can be regarded as covering not only substantive rights, but also rights connected with the settlement of investment disputes. Depending on the particular wording of the applicable MFN clause, a host of other interpretive issues may arise. These may notably include (1) whether the express exclusion of certain matters from the scope of the MFN clause must be interpreted as meaning that all other matters are covered by it;[94] and (2) whether the reference to MFN treatment in the host state's 'territory' must be interpreted as excluding dispute resolution.[95] In addition, arbitral tribunals are likely to take into account the host state's past and current treaty practice in relation to ISDR provisions and MFN clauses.[96]

3.3[c] Plama v. Bulgaria*: Presumption of Non-applicability of MFN Clauses to Dispute Settlement*

In this case, Plama, an entity incorporated and doing business in Cyprus, initiated ICSID arbitration proceedings against Bulgaria under the Energy Charter Treaty and the Cyprus-Bulgaria BIT.[97] This BIT contained a narrow ISDR clause, only offering access to investor-state arbitration in connection with disputes regarding

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Airlines v. Slovak Republic, UNCITRAL Ad Hoc Arbitration, Final Award of 9 Oct. 2009, paras 114–116, www.italaw.com/cases/103.

93 *See* e.g. *Plama v. Bulgaria, supra* n. 92, para. 186.

94 This is an issue that notably arises under the United Kingdom–Argentina BIT. While Art. 3 provides for national and MFN treatment, Art. 7 lays down a number of exceptions to the application of these standards of protection. *See* Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments dated 11 Dec. 1990, http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/161.

95 This issue also arises under the United Kingdom–Argentina BIT, *supra* n. 94. The BIT's MFN and national treatment clauses expressly refer to these treatments being afforded in the territory of the contracting states. Art. 3(1), for instance, provides that: 'Neither Contracting Party shall in its territory subject investments or returns of investors of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own investors or to investments or returns of investors of any third State.'

96 *See* e.g. *Berschader v. Russia, supra* n. 92, paras 198–204; *ICS Inspection & Control Services Ltd. v. Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction of 10 Feb. 2012, para. 296, www.italaw.com/cases/documents/553.

97 *Plama v. Bulgaria, supra* n. 92, para. 21.

the amount of compensation for expropriation.[98] Plama therefore relied on the treaty's MFN provision[99] in order to benefit from the broader dispute resolution clause contained in the Bulgaria–Finland BIT.[100]

Examining the possibility for the claimant to invoke the treaty's MFN clause for such purpose, the arbitral tribunal first analysed the meaning of the MFN provision under the rules of interpretation laid down in the VCLT. It thus examined the ordinary meaning of the MFN provision,[101] taking into account the context[102] as well as the treaty's object and purpose.[103] It concluded that none of these interpretive approaches allowed it to answer the question of whether the MFN provision could be relied upon to import a dispute resolution clause contained in another BIT.

The tribunal went on to observe that, under both domestic and international law, arbitration agreements 'should be clear and unambiguous.'[104] Following a brief discussion of earlier decisions dealing with this matter (including the decision of the ICSID tribunal in *Maffezini v. Spain*[105]), the arbitral tribunal held, in very general terms, that there was a presumption that 'an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty,'[106] noting that this presumption can only be rebutted if 'the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.'[107]

Although the *Plama* tribunal did not expressly refer to the *in dubio mitius* principle, its reliance on an interpretive presumption favouring a narrow construction of the contracting states' obligations under the treaty's MFN provision indicates that its ruling is in fact based on a restrictive interpretive approach.

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98 *See* Agreement between the Government of the People's Republic of Bulgaria and the Government of the Republic of Cyprus on Mutual Encouragement and Protection of Investments of 12 Nov. 1987, Art. 4(1), http://investmentpolicyhub.unctad.org/IIA/treaty/666.

99 *Ibid.*, Art. 3(1) which provides that 'Each Contracting Party shall apply to the investments in its territory by investors of the other Contracting Party a treatment which is not less favourable than that accorded to investments by investors of third States.'

100 *Plama v. Bulgaria, supra* n. 92, para. 183. *See also* Agreement between the Government of the Republic of Finland and the Government of the Republic of Bulgaria on the Promotion and Protection of Investments of 3 Oct. 1997, http://investmentpolicyhub.unctad.org/IIA/treaty/671. Art. 8(2) of this BIT provides for investor-state arbitration of investment disputes which Art. 8(1) broadly defines as disputes 'which may arise between an investor of one Contracting Party and the other Contracting Party relating to an investment.'

101 *Plama v. Bulgaria, supra* n. 92, paras 189–191.

102 *Ibid.*, para. 192.

103 *Ibid.*, paras 193–197.

104 *Ibid.*, para. 198.

105 *Maffezini v. Spain, supra* n. 91.

106 *Plama v. Bulgaria, supra* n. 92, para. 223.

107 *Ibid.*

However, it should be noted that a contrary view has been expressed by the tribunal in *ICS v. Argentina*.[108]

3.3[d] *Post-Plama Decisions Applying a Restrictive Interpretive Approach*

When a tribunal holds that an MFN provision does not apply to dispute settlement, this does not necessarily – perhaps not even frequently – result from the application of a restrictive interpretive approach. Instead, such a ruling may simply be based on the specific wording of the relevant MFN clause. Arbitral tribunals may, for example, attach importance to (1) whether a particular clause expressly applies to 'all matters covered' in the treaty concerned or not[109]; (2) whether MFN treatment is confined to a particular territory[110]; and (3) whether MFN treatment merely qualifies a particular substantive standard set forth in the treaty.[111] In addition, the historical context in which the relevant treaty was negotiated and drafted, as well as the perceived need to ensure the effectiveness (or *effet utile*)[112] of the dispute resolution provision contained in the basic treaty also frequently play a role in such decisions.

There are, however, several arbitral decisions that have, in whole or in part, followed the restrictive interpretive approach adopted in *Plama*. In *Telenor v. Hungary*, for example, the arbitral tribunal held that the MFN provision contained in the BIT between Norway and Hungary did not apply to dispute resolution,[113] relying notably on an examination of the ordinary meaning of that clause,[114] as well as on various policy arguments.[115] However, at the very outset of its analysis, the arbitral tribunal referred to the decision in *Plama*, observing that it 'whole-heartedly endorses the analysis and statement of principle furnished' in this decision.[116] This must be understood as an express approval of the presumption established by the *Plama* tribunal.

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[108] *ICS v. Argentina Republic, supra* n. 96, para. 282 ('The Tribunal believes that the *Plama* award is interpreted incorrectly when it is taken to stand for the restrictive interpretation of MFN clauses as compared to other treaty provisions.').

[109] *See* e.g. *Salini v. Jordan, supra* n. 75, para. 118; *Berschader v. Russia, supra* n. 92, para. 183.

[110] *See* e.g. *ICS v. Argentina, supra* n. 96, paras 305–309.

[111] This was notably the case in *Renta 4 v. Russia, supra* n. 92. In this case, the MFN provision contained in the applicable treaty (the Spain-USSR BIT) merely qualified the treaty's fair-and-equitable-treatment standard. Art. 5 of that BIT provides that: '1. Each Party shall guarantee fair and equitable treatment within its territory for the investments made by investors of the other Party. 2. The treatment referred to in paragraph 1 above shall be no less favourable than that accorded by either Party in respect of investments made within its territory by investors of any third State.' (translation taken from the tribunal's Award, para. 68).

[112] *See* e.g. *ICS v. Argentina, supra* n. 96, paras 314–317.

[113] *Telenor v. Hungary, supra* n. 92, para. 100.

[114] *Ibid.*, para. 92.

[115] *Ibid.*, paras 93–94.

[116] *Ibid.*, para. 90.

In *Berschader v. Russia*, the arbitral tribunal emphasized the importance of determining the parties' intent in each individual case.[117] In its decision rejecting the applicability of the MFN clause contained in the Belgium–Luxemburg–Soviet Union BIT to dispute settlement, it focused on an interpretation of the historical context[118] and of Russia's treaty practice.[119] However, it also expressly endorsed the *Plama* requirement of 'clarity and lack of ambiguity'[120] of arbitration clauses, though on different grounds. Moreover, the arbitral tribunal also seems to have expressed support for the presumption established by the *Plama* tribunal when holding that 'the failure by the Contracting Parties to clarify whether or not Article 2 [the MFN provision] was to extend to arbitration provisions tends to support the view that none of the Contracting Parties had any such intention.'[121]

In *Wintershall v. Argentina*, the arbitral tribunal had to decide whether the claimant could rely on the MFN provision contained in the applicable treaty (the BIT between Germany and Argentina) in order to avoid the obligation to have prior recourse to the Argentine courts. In its very detailed analysis of this issue, the arbitral tribunal notably relied on scholarly commentary of the relevant question expressing strong support for the *Plama* approach, arguing that 'the Most Favoured Nation clause will not apply to investment treaties' dispute settlement provisions, save where the States *expressly* so provide.'[122] Endorsing this approach, the arbitral tribunal noted that it had 'the merit of clarity and consistency.'[123]

4 CRITICAL ASSESSMENT OF RESTRICTIVE INTERPRETATION OF INVESTMENT TREATIES

4.1 Absence of a rational foundation

4.1[a] *Deficiencies of Sovereignty as a Rationale for Restrictive Interpretation*

The sovereignty rationale underlying the principle of restrictive interpretation presents several flaws. To begin with, it suffers from an inherent lack of clarity. In fact, as has already been mentioned, it is not clear whether *in dubio mitius* applies in light of the sovereign character of the *parties* assuming treaty obligations, i.e. of states, or whether it applies in light of the fact that the relevant *obligations* (potentially) violate or limit sovereign rights.

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117 *Berschader v. Russia, supra* n. 92, para. 175.
118 *Ibid.*, paras 198–202.
119 *Ibid.*, paras 203–204.
120 *Ibid.*, para. 182.
121 *Ibid.*, para. 205.
122 *Wintershall v. Argentina, supra* n. 91, para. 188 (emphasis added by the tribunal).
123 *Ibid.*, para. 189.

This distinction between the sovereign nature of the *parties* and the impact that the *obligation*s undertaken have, or might have, on state sovereignty has significant implications. In fact, under the first approach, all obligations undertaken by states would have to be construed restrictively, simply because they are undertaken by sovereign states. Under the second approach, however, only those obligations entered into by states which limit or threaten their sovereign rights would be subjected to *in dubio mitius* interpretation.

This line of reasoning raises the question of whether it is at all possible to distinguish between obligations that limit or undermine state sovereignty (sovereignty-limiting obligations) and those that do not (non-sovereignty-limiting obligations). In support of the validity of such a distinction, one could argue that some obligations entail restrictions on various sovereign rights (such as territorial sovereignty, legislative and judicial jurisdiction, or immunity from jurisdiction), while others leave those rights unaffected. Some of the early cases examined in section 2 *supra* provide useful examples for the first category of obligations. These notably include Germany's obligation to allow free passage through the Kiel Canal under Article 380 of the Treaty of Versailles (a limitation of its territorial sovereignty) and France's alleged obligation not to levy any taxes on products manufactured in the Free Zones of Upper Savoy and Gex (a restriction on its sovereign power of taxation). The second category of obligations would notably include commitments of pecuniary nature such as, for example, the obligation to contribute towards the budget of an international organization.

Whether this distinction is conceptually clear and useful in practice is uncertain. In reality, the vast majority of obligations undertaken by states could be characterized as involving (some) limitations on their sovereign rights. The obligation incurred under a double-taxation treaty not to tax certain income, for example, could be viewed as a limitation of the state's sovereign right of taxation. Similarly, the obligation undertaken under an environmental treaty to reduce certain emissions could be regarded as a limitation on a state's territorial sovereignty. Even obligations arising under international investment agreements (such as obligations to ensure that foreign investors enjoy certain standards of treatment) may be considered as potentially undermining the contracting states' sovereign legislative and judicial functions.

For present purposes, it is not necessary to decide whether the distinction between sovereignty-limiting and non-sovereignty-limiting obligations is appropriate or useful. What matters is that the principle of restrictive interpretation as it has been defined both by courts and by scholars is silent as to whether it applies only to the first category of obligations, or to both, giving rise to significant uncertainty in the operation of *in dubio mitius*.

Secondly, as has notably been highlighted by Merkouris, the *in dubio mitius* principle seems to be based on an outdated notion of state sovereignty[124] which views the assumption of obligations by states as incompatible with such sovereignty. Indeed, by advocating a restrictive interpretive approach, *in dubio mitius* seek to minimize the damaging impact that treaty obligations are considered to have on state sovereignty. In a contemporary context, such an approach makes little sense. In fact, it is now well established that the undertaking of obligations by states (whether vis-à-vis other states or private parties) is not incompatible with the idea of state sovereignty. To the contrary, state sovereignty is viewed as a factor explaining the validity of such undertakings.[125]

Lastly, it is doubtful whether the principle of restrictive interpretation is at all capable of achieving the objective it claims to pursue, especially if that objective consists of the general protection of states, rather than the preservation of states' sovereign rights. Indeed, as is well-known, most treaties establish bi- or multilateral obligations between contracting states, i.e. for every obligation that a state incurs under a treaty, it is also granted a corresponding right vis-à-vis the other contracting state(s). The restrictive interpretation of treaty obligations thus not only restricts the scope of the obligations owed *by* states, but also the scope of the obligations owed *to* states, under a particular treaty. Generally speaking, the *in dubio mitius* principle thus cannot be viewed as being protective of state interests.

4.1[b] *Absence of Specific Factors Requiring the Restrictive Interpretation of Investment Treaties*

Investment treaties are characterized by a specific feature, distinguishing them from many other types of treaties. In fact, although they are entered into between states, the main (arguably, the only) beneficiaries of investment treaties are third parties, namely, potential investors. Indeed, the various substantive guarantees contained in investment treaties (such as fair and equitable treatment, protection and security, national treatment, etc.) exclusively protect investors, and not states. The question thus arises whether this particular characteristic of investment treaties provides a valid justification for the application of the *in dubio mitius* principle.

If one considers the sovereignty justification as generally adequate – which, as has been explained, is a problematic assumption – then it could be argued that *in dubio mitius* interpretation is appropriate in connection with investment treaties. In fact, given that the obligations contained in such treaties consist of duties that the

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[124] Merkouris, *supra* n. 1, para. 17.4.D (observing that the *in dubio mitius* principle 'clings to a concept of State sovereignty of a bygone era').

[125] *Ibid.*, para. 17.4.B.

contracting states owe to investors, their restrictive interpretation necessarily benefits those contracting states, without adversely affecting the scope of their rights.

On the other hand, however, the inequality between states and investors may also, and perhaps more convincingly, be viewed as a factor justifying the exclusion of any restrictive interpretive methods. As has notably been argued in relation to human rights treaties, restrictive interpretation has, or would have, the effect of defeating the basic object and purpose of these treaties.[126] Due to the similarity between these treaties and investment treaties (both involve the conferral of rights upon non-sovereign third parties), the same argument may be made in connection with the latter.

4.2 Incompatibility with fundamental rules of treaty interpretation

4.2[a] *Incompatibility with Interpretation According to the Ordinary Meaning (Literal Interpretation)*

The principle according to which the terms of a treaty have to be interpreted in accordance with their ordinary meaning (sometimes referred to as the principle of literal or textual interpretation) is a fundamental rule of treaty interpretation, enshrined in the general rule set forth in Article 31(1) of the VCLT.[127] The ordinary meaning of a term refers to its 'regular,' 'normal,' 'customary,' or 'plain' meaning.[128] In order to determine that meaning, courts and arbitral tribunals frequently consult dictionaries and other sources of definitions.[129]

The principle of restrictive interpretation is, almost by definition, incompatible with an interpretation in accordance with the ordinary meaning of the terms to be interpreted. In fact, the very idea that a particular interpretive approach is 'restrictive' means that it advocates an interpretation that is stricter or narrower than another, more 'balanced' interpretation and, more particularly, than an interpretation based on the literal meaning of the relevant terms.

The risk of contradiction between restrictive and literal interpretation has notably been highlighted by the PCIJ in its decision in the *S.S. Wimbledon* case, examined above.[130] As has already been explained, the main issue in this case was whether Germany was entitled to refuse access to the Kiel Canal to an English

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126 *See* e.g. R. Bernhardt, *Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights*, 42 GYIL 11, 14 (1999).

127 VCLT, Art. 31(1) provides that: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

128 Gardiner, *supra* n. 9, at 183–184.

129 *Ibid.*, at 186–189.

130 *Case of the S.S. Wimbledon, supra* n. 4.

vessel carrying military equipment, despite such right being (apparently) conferred under Article 380 of the Treaty of Versailles. Germany claimed that this provision had to be construed restrictively and, more particularly, as not being applicable in times of war. Dealing with Germany's argument, the PCIJ held that such a restrictive interpretation would be contrary to the 'plain meaning' of Article 380, which did not provide any textual basis for the distinction between times of peace and times of war.[131] The Court thus rejected Germany's argument.

The arbitral case law on umbrella clauses confirms the inherent conflict between restrictive and textual interpretation. In *SGS v. Pakistan*, discussed above, the arbitral tribunal adopted a restrictive interpretation of the umbrella clause contained in the Switzerland–Pakistan BIT. On the basis of this approach, it entirely denied the transformative effect of this clause, i.e. its ability to transform contractual obligations into obligations arising under the BIT. However, an interpretation of the umbrella clause in accordance with the ordinary meaning of its terms quite clearly required the opposite conclusion. In fact, under the heading 'Observance of Commitments,' the treaty's umbrella clause required each contracting state to 'constantly guarantee the observance of the commitments it has entered into'[132] vis-à-vis investors of the other contracting state.

While the tribunal in *SGS v. Pakistan* entirely denied the transformative effect of the applicable umbrella clause, other tribunals, as has been explained above,[133] have merely restricted the scope of this effect, notably by reference to the nature of the investment contract and the nature of the alleged contractual breach. Although less drastic in its effect, the interpretive approach adopted in these decisions also conflicts with the principal of literal interpretation. In fact, the relevant umbrella clauses do not offer any textual bases for the factors relied upon by these tribunals. Those were, in reality, 'read into' the various clauses.

4.2[b] *Incompatibility with the Principle of Effectiveness*

Under the principle of effectiveness (or *effet utile*), treaty provisions must be interpreted in such way as to ensure that they produce some effect.[134] The principle of effectiveness thus proscribes the adoption of interpretations that would deprive treaty provisions of any usefulness. This principle is based on the

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131 *Ibid.*, at 25.
132 Pakistan–Switzerland BIT, *supra* n. 64, Art. 11.
133 *See* 3.2[d][i] *supra*.
134 *See* e.g. T. Gazzini, *Interpretation of International Investment Treaties* 170 (OUP 2016) (explaining that effectiveness means that 'any provision is supposed to have intended to have some significance and to achieve some end').

(sensible) assumption that treaty drafters intend every treaty provision to be meaningful, i.e. to produce some legal effect(s).

In many cases, *in dubio mitius* interpretation will not actually lead to results that are incompatible with the principle of effectiveness. In fact, in most cases, restrictive interpretation will merely have the effect of limiting the scope or reach of a particular rule, without entirely depriving it of all legal effects. Decisions restricting the scope of application of umbrella clauses, for example, do not render such clauses fully ineffective; they merely limit their scope of application. Similarly, decisions holding that MFN clauses do not apply to dispute resolution do not call into question their applicability to substantive rights and do not, therefore, fully deprive such clauses of their effectiveness.

In some cases, however, restrictive interpretive approaches may clash with the principle of effectiveness. This will be the case whenever the restrictive interpretation of a specific provision entirely deprives that provision of any effectiveness. In *SGS v. Pakistan*, for example, the tribunal held that the umbrella clause contained in the Switzerland–Pakistan BIT did not elevate contractual obligations to the level of obligations owed under the BIT, thus denying it any effect. Such an interpretation is incompatible with the principle of effectiveness.

Interestingly, some arbitral tribunals have relied on the principle of effectiveness in order to justify, rather than exclude, the adoption of restrictive interpretive approaches. The tribunal in *ICS v. Argentina*,[135] for example, restrictively interpreted the applicable MFN clause in order not to deprive the ISDR provision contained in the basic treaty of its effectiveness. It held that the eighteen-month waiting period set forth in the basic treaty's ISDR clause would be deprived of its *effet utile* if it were rendered inapplicable as a result of the application of a more favourable ISDR clause contained in another treaty.[136]

4.3 Discrimination against investors

Where a treaty establishes bi- or multilateral obligations as between states, the restrictive interpretation of those obligations does not in principle create any imbalance between the contracting states, i.e. it does not systematically favour one state (or certain states) over another one (or others). In fact, since these obligations are owed by all states parties to the relevant treaty, their restrictive interpretation benefits and disadvantages all contracting states equally. As obligors, they all benefit from a narrow interpretation of their obligations. As beneficiaries,

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[135] *ICS v. Argentina, supra* n. 96.
[136] *Ibid.*, paras 314–317.

on the other hand, they are all equally disadvantaged by the restrictive interpretation of the obligations concerned.

The same observation cannot be made in connection with investment treaties. In fact, as has already been shown, the vast majority of obligations established under such treaties are obligations that are owed by the contracting states to third parties, i.e. investors. The restrictive interpretation of these obligations (of the various standards of protection afforded to foreign investors, including the right of access to investor-state arbitration) thus necessarily favours host states over investors.

Arbitral decisions adopting a restrictive approach to the interpretation of umbrella and MFN clauses illustrate the discriminatory effect of *in dubio mitius*. As far as umbrella clauses are concerned, the denial or restriction of the transformative effect of these clauses, inherent in their restrictive interpretation, systematically disadvantages investors. In fact, these decisions either exclude or limit the ability of investors to bring breach-of-contract claims (and possibly claims alleging the violation of other types of commitments) before an investor-state arbitral tribunal established under the applicable treaty. The unavailability, or limited availability, of investor-state arbitration advantages host states to the detriment of investors.

Similarly, the restrictive interpretation of MFN provisions also adversely affects investors. Inasmuch as it leads to the non-application of a treaty's MFN clause to dispute settlement, the restrictive interpretation of these provisions prevents investors from invoking more favourable dispute resolution provisions contained in other treaties. In practice, this means that investors may be unable (1) to avoid the application of certain cooling off or waiting periods and related obligations to seek redress in the host state's courts; (2) to submit certain categories of claims to investor-state arbitration; or (3) to submit their claims to a particular arbitral institution.

The discriminatory effect produced by *in dubio mitius* when applied to investment treaties largely discredits the restrictive interpretive approach.[137] In fact, although the VCLT does not establish any interpretive principle based on the need to ensure the equality of the parties to a treaty, an interpretive rule must not have the effect of systematically favouring one side (states) over the other (investors). Such a rule would be incompatible with basic principles of justice and fairness, including the principle of equal treatment.

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[137] For a general critique of the equilibrium-disrupting effect of restrictive interpretation, *see* Merkouris, *supra* n. 1, para. 17.4.C (stating that *in dubio mitius* 'favors one party over the other' and that 'such an imbalance goes against the grain of the equilibrium that the parties themselves have managed to achieve after careful deliberation and negotiations').

5 CONCLUSION

Though recognized as a rule of treaty interpretation by scholars and courts in the early twentieth century, the principle of restrictive interpretation has not gained entry into the VCLT, suggesting that its contemporary status as a rule of international law is at best controversial. Yet, it has been applied by several arbitral tribunals interpreting umbrella clauses and MFN provisions contained in investment treaties. Given that these restrictive approaches have, to some extent, given rise to an established case law, it is likely that arbitral tribunals will continue relying on *in dubio mitius*, whether expressly or implicitly.

However, this does not change the fact that restrictive interpretation of investment treaties is inappropriate and undesirable. Indeed, there is no rational justification for this interpretive rule, whether generally or in the specific context of investment treaties. The sovereignty-based rationale, in particular, is obsolete, illogical, and largely dysfunctional. Also, *in dubio mitius* frequently proves to be incompatible with other, more fundamental, rules of treaty interpretation. What is more, restrictive interpretation of investment treaties has an inherently discriminatory effect on investors.