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An Inquiry into the Scope of MFN Provisions in Bilateral Investment Treaties

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AN INQUIRY INTO THE SCOPE OF MFN PROVISIONS IN BILATERAL INVESTMENT TREATIES

*Amit Kumar Sinha**

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INTRODUCTION: THE MEANING AND SCOPE OF MFN PROVISIONS

The constantly evolving jurisprudence and unique nature of international investment law have exposed this field to latitudinarian interpretations.¹ These interpretations are so varied in nature that it is difficult to find decisions or literature having general acceptability.² This article deals with one such issue: the scope of Most Favoured Nation (MFN) provisions in Bilateral Investment Treaties (BITs).

Continuing the debate about the scope of MFN provisions in BITs, which was initiated by Facundo Perez-Aznar,³ Simon

1. Tony Cole, *The Boundaries of Most Favored Nation Treatment in International Investment Law*, 33 MICH. J. INT'L L. 537, 538 (2012).

2. *Id.*

3. See generally Facundo Perez-Aznar, *The Use of Most-Favoured-Nation Clauses to Import Substantive Treaty Provisions in International Investment Agreements*, 20 J. INT'L ECON. L. 777 (2018).

Batifort, and J. Benton Heath,⁴ this article primarily deals with the scope of MFN provisions in the BIT regime. This article challenges the “conventional wisdom”⁵ of using MFN provisions to import or borrow provisions from a third-party BIT.⁶

Before moving to the issues directly, it is important to understand the meaning and importance of MFN provisions in BITs in general. The MFN provision, without a doubt, is an instrument of non-discrimination.⁷ It ensures that all foreign

4. See generally Simon Batifort & J. Benton Heath, *The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization*, 111 AM. J. INT'L L. 873 (2017).

5. “Conventional Wisdom” in reference to MFN provisions is used to describe the scope of MFN clauses to borrow provisions from third-party BITs. For more on this, see Batifort & Heath, *supra* note 4, at 873; see also Martins Paporinskis, *MFN Clauses and Substantive Treatment: A Law of Treaties Perspective of the “Conventional Wisdom,”* 112 AJIL UNBOUND 49 (2018).

6. For the purpose of convenience, the words “import” and “borrow” will be treated the same and will also be used interchangeably in this article. Also, to bring clarity to some terminology that will be used frequently in this article, “basic BIT” means a BIT signed by original parties (e.g., between A and B) and containing an MFN provision; “third-party BIT” means a BIT signed by one of the original parties with a third state (e.g., between A and C or B and C).

7. For more literature on MFN provisions in BITs, see generally Olivier Accominotti & Marc Flandreau, *Bilateral Treaties and the Most-Favored-Nation Clause: The Myth of Trade Liberalization in the Nineteenth Century*, 60 WORLD POL. 147 (2008); Tomoko Ishikawa, *Interpreting the Most-Favoured-Nation Clause in Investment Treaty Arbitration: Interpretation as a Process of Creating an Obligation?* in RETHINKING INTERNATIONAL LAW AND JUSTICE 127 (Charles Sampford et al. eds., 2014); J.R. WEERAMANTRY, TREATY INTERPRETATION IN INVESTMENT ARBITRATION 177 (2012); Scott Vesel, *Clearing a Path through a Tangled Jurisprudence: Most-Favored-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties*, 32 YALE J. INT'L L. 125, 126 (2007); Christopher Greenwood, *Reflections on ‘Most Favoured Nation’ Clauses in Bilateral Investment Treaties*, in PRACTISING VIRTUE 556 (David D. Caron et al. eds., 2015); Okezie Chukwumerije, *Interpreting Most-Favoured-Nation Clauses in Investment Treaty Arbitrations*, 8 J. WORLD INVEST. & TRADE, 597 (2007); Jurgen Kurtz, *The MFN Standard and Foreign Investment: An Uneasy Fit?*, 5 J. WORLD INVEST. & TRADE 861 (2004); D. H. Freyer & D. Herlihy, *Most-Favored-Nation Treatment and Dispute Settlement in Investment Arbitration: Just How “Favored” is “Most-Favored”?* 20 FOREIGN INVEST. L. J. 58 (2005); Elizabeth Whitsitt, *Application of Most-Favoured-Nation Clauses to the Dispute Settlement Provisions of Bilateral Investment Treaties: an Assessment of the Jurisprudence*, 27 J. ENERGY & NAT. RESOURCES L. 527 (2009); Henrik Horn & Petros C. Mavroidis, *Economic and Legal Aspects of the Most-Favored-Nation Clause*, 17 EUR. J. POLIT. ECON. 233 (2001); Edoardo Stoppioni, *Jurisdictional Impact of Most-Favoured-*

Nation Clauses, in MPI LUXEMBOURG WORKING PAPER SERIES 1–24 (2017); Yas Banifatemi, *The Emerging Jurisprudence on the Most-Favoured-Nation Treatment in Investment Arbitration*, in INVESTMENT TREATY LAW: CURRENT ISSUES III, 241 (A. Bjorklund et al. eds., 2009); Emmanuel Gaillard, *Establishing Jurisdiction Through a Most-Favored-Nation Clause*, 233 N.Y.L.J. 3 (2005); U.N. Conf. on Trade & Dev. [UNCTAD], *Most Favored Nation Treatment*, in SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II, at 14, U.N. Doc. UNCTAD/DIAE/IA/2010/1 (2010) [hereinafter MFN-UNCTAD]; Ylli Dautaj, Thesis, *ITA: The MFN Clause and its Procedural Extension – a Case Study of the RosInvestCo Case: The MFN clause in light of treaty interpretation*, Uppsala U. Publication 1, 35 (2015); Jarrod Wong, *The Application of Most-Favored-Nation Clauses to Dispute Resolution Provisions in Bilateral Investment Treaties*, 3 ASIAN J. WTO & INT'L HEALTH L. & POL. 171, 172 (2008); Stephan W. Schill, *Most-Favored-Nation Clauses as a Basis of Jurisdiction in Investment Treaty Arbitration: Arbitral Jurisprudence at a Crossroads*, 10 J. WORLD INVEST. & TRADE 189, 214 (2009); Stanley K. Hornbeck, *The Most-Favored-Nation Clause*, 3 AM. J. INT'L L. 395, 797–827 (1909); Quincy Wright, *The Most-Favored-Nation Clause*, 21 AM. J. INT'L L. 760 (1927); Aaron M. Chandler, *BITs, MFN Treatment and the PRC: The Impact of China's Ever-Evolving Bilateral Investment Treaty Practice*, 43 INT'L LAW. 1301, 1304 (2009); Stephanie L. Parker, *A BIT at a Time: The Proper Extension of the MFN Clause to Dispute Settlement Provisions in Bilateral Investment Treaties*, 2 ARB. BR. 30, 33 (2012); Yannick Radi, *The Application of the Most-Favoured-Nation Clause to the Dispute Settlement Provisions of Bilateral Investment Treaties: Domesticating the 'Trojan Horse,'* 18 EUR. J. INT'L L. 757, 758 (2007); Locknie Hsu, *MFN and Dispute Settlement: When the Twain Meet*, 7 J. WORLD INVEST. & TRADE 25, 27 (2006); Julie A. Maupin, *MFN-based Jurisdiction in Investor–State Arbitration: Is There Any Hope for a Consistent Approach?*, 14 J. INT'L ECON. L. 157 (2011); Alejandro Faya Rodriguez, *The Most-Favored-Nation Clause in International Investment Agreements: A Tool for Treaty Shopping?*, 25 J. INT'L ARB. 89, 92 (2008); Mara Valenti, *The Most Favoured Nation Clause in BITs as a Basis for Jurisdiction in Foreign Investor-Host State Arbitration*, 24 ARB. INT'L 447 (2008); Suzy H. Nikiema, *The Most-Favoured-Nation Clause In Investment Treaties*, IISD (Feb. 2017), <https://www.iisd.org/library/iisd-best-practices-series-most-favoured-nation-clause-investment-treaties>; Stephan W. Schill, *Multilateralizing Investment Treaties through Most-Favored-Nation Clauses*, 27 BERKELEY J. INT'L L. 496 (2009); Stephan W. Schill, *MFN Clauses as Bilateral Commitments to Multilateralism: A Reply to Simon Batifort and J. Benton Heath*, 111 AM. J. INT'L L. 914 (2017); OECD, *Most-Favoured-Nation Treatment in International Investment Law*, OECD Working Papers on International Investment 2004/02, OECD Publishing, <http://dx.doi.org/10.1787/518757021651>; Ruth Teitelbaum, *Who's Afraid of Maffezini? Recent Developments in the Interpretation of Most Favored Nation Clauses*, 22 J. INT'L ARB. 225 (2005); Catharine Titi, *Most-Favoured-Nation Treatment: Survival Clauses and Reform of International Investment Law*, 33 J. INT'L ARB. 425 (2016); Zachary Douglas, *The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails*, 2 J. INT'L DISP. SETTLEMENT 97 (2011).

investors in the territory of a host state will be treated equally.⁸ MFN provisions are often described as having dual characteristics—that is, providing protection against both internal and external measures.⁹ Internal measures suggest actions taken by the host state within its territory through its laws and regulations.¹⁰ External measures suggest borrowing of favorable provisions from third-party BITs.¹¹ Unlike national treatment provisions, where the comparators¹² are domestic investors, in MFN provisions, the comparators are foreign investors.¹³ This article argues that the scope of MFN provisions should be limited in their application to cases of internal measures only. Allowing an MFN provision to import or borrow provisions from other BITs is questionable and problematic in general international law, which includes, *inter alia*, interpretative methodologies provided under the Vienna Convention on the Law of Treaties (VCLT).¹⁴

Therefore, to substantiate the claims made in the previous paragraph, Part I of this article explains the use of MFN provisions for internal measures taken by the host state. Part II presents a critique of the practice of borrowing provisions from third-party BITs using MFN provisions. Part III then looks into possible interpretations suggesting the proper use of MFN provisions in BITs. Part IV highlights the problems created by the conventional use of MFN provisions, such as treaty shopping, jurisdictional problems, and free-ridership. Part V explores and delves into the reactions from states in response to the practice of borrowing using MFN provisions. Part VI argues that the drafting of MFN provisions is path dependent. Lastly, the conclusion argues that the practice of borrowing using MFN provisions in BITs is problematic and MFNs should be used in cases of internal measures only.

8. MFN-UNCTAD, *supra* note 7.

9. Perez-Aznar, *supra* note 3, at 778.

10. *Id.*

11. *Id.*

12. For the purpose of convenience, “comparator” here means investors who are working in the same area or industry with the aggrieved investor, such that a comparison can be made between them in order to determine discrimination. However, an attempt to establish a more acceptable meaning of comparators is made at the later part of this article. *See infra* Part II.A.

13. Perez-Aznar, *supra* note 3, at 778.

14. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

I. MFN APPLICATION: INTERNAL MEASURES

Internal measures here mean measures taken by the host state within its territory that have affected investments made by a foreign investor. In the context of MFN, such measures by a host state would discriminate between two foreign investors having different nationalities. The analysis below will provide the roadmap for identifying the investors who may be affected by measures taken by the host state.

A. Relevant Comparators for the Purpose of Establishing Discrimination

The importance of ascertaining the meaning of relevant comparators lies in the fact that discrimination between two investors cannot be said to have taken place unless it is established that those two investors are relevant comparators. Therefore, it is important to first determine the comparators and then look for claims of discrimination between them. The meaning of “relevant comparator,” however, is unsettled in the investment regime, and there are widely scattered opinions among different tribunals.¹⁵ Only a limited amount of academic literature is available on this issue.¹⁶ This largely untouched matter is of the utmost importance when delineating the scope of MFN provisions in BITs. Thus, it is relevant to delve into questions like those asked in *Apotex, Inc. v. United States*.¹⁷ The tribunal in *Apotex* posed the following questions:¹⁸ Who are comparators? Are they those who are in the same “economic [or] business sector?”¹⁹ Or are they those who “compete with the inves-

15. *Apotex Holdings Inc. & Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, ¶ 8.15 (Aug. 25, 2014); *Cargill Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/Z, Award, ¶ 196 (Sept. 18, 2009); *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, ¶ 165, Award (Jan. 12, 2011); *Merrill & Ring Forestry L.P. v. Canada*, ICSID Case No. UNCT/07/1, Award, ¶ 65 (Mar. 31, 2010); *Methanex Corporation v. United States of America*, UNCITRAL, Final Award, Part IV, Chapter B, pp. 8–11, ¶ 16 (Aug. 3, 2005); *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, ¶ 34 (Apr. 10, 2001).

16. See, e.g., *Perez-Aznar*, *supra* note 3; MFN-UNCTAD, *supra* note 7, at 26.

17. *Apotex v. US*.

18. *Id.* ¶ 8.15.

19. *Id.*

tor . . . in terms of goods and services?”²⁰ Or are they those who are subject to the same legal or regulatory regime?²¹

The tribunal in *Apotex* did not give satisfactory answers to these questions. However, it did state that those who are subject to the same legal and regulatory regime can be considered relevant comparators.²² According to the tribunal, Apotex (a foreign investor) was regulated by Health Canada (a regulatory agency in Canada), and United States (US) domestic manufacturers were regulated by the US Food and Drug Agency (FDA).²³ Therefore, US domestic manufacturers and Apotex were not regulated by the same regulatory regime. Thus, they were not relevant comparators.²⁴ However, the tribunal did find that other foreign investors working in the same area and regulated by the FDA were relevant comparators.²⁵ In other words, according to the tribunal, in order to be identified as relevant comparators, investors must be governed by the same regulatory regime.

As mentioned earlier, the *Apotex* tribunal fell short of giving a concrete answer to the question of who are relevant comparators? There are, therefore, many questions left unanswered. For example, what if the regulatory authority covers a wide range of activity in a sector? Can it be said that the investor who has invested in the production of fertilizer and the investor who has invested in the development of organic seeds are relevant comparators (assuming they are regulated by the same regulatory authority)? For example, the Reserve Bank of India (RBI) is the regulator and supervisor of the financial system in India.²⁶ RBI not only regulates the functioning of banks in India, but it also regulates non-banking financial companies (NBFCs).²⁷ It is true that the functioning of NBFCs is akin to banks in India; however, there are some major differences between the two.²⁸ For example, NBFCs cannot accept demand

20. *Id.*

21. *Id.*

22. *Id.* ¶¶ 8.54–8.55.

23. *Id.* ¶ 2.8, ¶ 8.44.

24. *Id.* ¶¶ 8.56–57.

25. *Id.* ¶ 8.61.

26. *About Us*, RESERVE BANK OF INDIA, <https://www.rbi.org.in/Scripts/AboutusDisplay.aspx> (last visited Jan. 2, 2019).

27. *Frequently Asked Questions*, RESERVE BANK OF INDIA, <https://www.rbi.org.in/Scripts/FAQView.aspx?Id=92> (last visited Jan. 2, 2019).

28. *Id.*

deposits, nor can they issue checks drawn on themselves.²⁹ Despite these major differences, accepting the “subject of the same regulatory regime” test would mean that an investor in an NBFC is a relevant comparator to an investor in a bank.

It would, however, be incorrect to accept such a proposition. As another example, the Indian government treats agriculture and animal husbandry as a single sector for the purposes of regulating foreign direct investment (FDI).³⁰ All FDI channeled through an automatic route³¹ is allowed in this sector.³² This sector includes, inter alia, development of seeds and animal husbandry.³³ Can one say that foreign investors in these areas are relevant comparators because they engage in activities incorporated within the same sector? It does not require sophisticated calculations to figure out that foreign investors working in two different industries in the same sector are not relevant comparators. Therefore, it is not satisfactory to identify relevant comparators exclusively on the basis of the “subject of the same regulatory regime/sector” test.

In contrast to World Trade Organization (WTO) law, basic questions in the investment law regime, such as who are relevant comparators, are still far from settled and depend upon the interpretations of investment tribunals.³⁴ Most of the interpretations by tribunals to determine relevant comparators are made in the context of the interpretation of national treatment provisions.³⁵ Thus, in order to determine relevant comparators for MFN provisions, findings of a violation of national treatment provisions made by the tribunals may prove to be

29. *Id.*

30. *FDI Entry Routes in India*, INVEST INDIA, <https://www.investindia.gov.in/foreign-direct-investment> (last visited Jan. 2, 2019).

31. “Automatic route” means that no government approval is required for investment; *see id.*

32. *Sector-Specific Conditions for FDI*, INVEST INDIA, <https://www.investindia.gov.in/foreign-direct-investment> (last visited Jan. 2, 2019).

33. *Id.*

34. Rudolf Dolzer, *National Treatment: New Developments*, Symposium, Making the Most of International Investment Agreements: A Common Agenda, OECD at 2 (Dec. 12, 2005).

35. MFN-UNCTAD, *supra* note 7, at 27; for analysis of comparators for MFN, see *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, ¶ 181 (Dec. 16, 2002).

helpful because both these provisions share a similar comparison requirement.³⁶

The tribunal in *Pope and Talbot v. Canada*³⁷ pointed out that the determination of relevant comparators should be based on activity in the same business or economic sector.³⁸ A study done by the Organization for Economic Cooperation and Development (OECD) provides that, in the context of national treatment interpretation, enterprises must be working in the same sector.³⁹ There are also a number of other cases where criteria for comparison have been cited to include the same business or economic sector,⁴⁰ the same economic sector and activity,⁴¹ the same legal and regulatory regime,⁴² and less similar⁴³ available comparators.⁴⁴ However, as argued earlier, the “same sector or economic activity” criteria is an important element but not alone sufficient to identify relevant comparators.⁴⁵ It is therefore necessary to look to other elements in order to identify relevant comparators.

There is some guidance from a few tribunals supporting the view that relevant comparators should be in competition with

36. MFN-UNCTAD, *supra* note 7, at 27; *Feldman v. Mexico*, ¶¶166–69.

37. *Pope & Talbot v. Canada*, ¶ 78.

38. It is important to point out that this analysis was based on the interpretation of Article 1102 of the North American Free Trade Agreement, which relates to national treatment.

39. OECD Negotiating Group on the Multilateral Agreement on Investment (MAI), *Discussion Of Draft Articles On National Treatment, Non-Discrimination/Mfn And Transparency*, OECD, Doc. No. DAF/MAI/DG2(95)1 at 4 (Nov. 17, 1995), <https://www.oecd.org/daf/mai/pdf/dg2/dg2951e.pdf>

40. *SD Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, ¶¶ 248-50 (Nov. 13, 2000), <https://www.italaw.com/sites/default/files/case-documents/ita0747.pdf>.

41. *Feldman v. Mexico*, ¶164–67; *see also* *Champion Trading Company Ameritrade International, Inc. v. Republic of Egypt*, ICSID Case No. ARB/02/09, Award, ¶ 130 (Oct. 27, 2006); *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, ¶ 83 (May 24, 2007).

42. *Apotex v. US*, ¶ 8.43.

43. *Methanex v. US*, ¶ 17 (Part IV - Chapter B). The tribunal here pointed out that it would be perverse to ignore less similar comparators when similar or like comparators are not available. So, the tribunal accepted the comparison of less similar comparators in the absence of similar/like comparators.

44. MFN-UNCTAD, *supra* note 7, at 27.

45. *See supra* notes 30–33 and accompanying text.

each other.⁴⁶ The tribunal in *ADM v. Mexico*⁴⁷ borrowed the WTO panel body analysis of directly competitive or substitutable products from *Mexico - Tax Measures on Soft Drinks*⁴⁸ in order to determine if products invested in by foreign investors are in competition with products targeted by domestic investors.⁴⁹ In other words, the tribunal made an attempt to see if foreign and domestic investors were competitors. It held that foreign and domestic industries share a competitive relationship with each other when a foreign product competes with and may be substituted for a domestic product in the market; therefore, they could be considered comparators.⁵⁰ Similarly, in *CPI v. Mexico*,⁵¹ the tribunal held that a foreign industry and a domestic industry were in competition with each other when the imposition of taxes on foreign products was done to change the terms of competition between the foreign product and the domestic product.⁵² In other words, the tribunal established the competitive relationship between the foreign and domestic products as a predicate to finding a violation of a national treatment provision. Thus, it can be said that, apart from being in the same sector or engaging in the same economic activity, it is required that investors share a competitive relationship with each other in order to be identified as relevant comparators.

This article points to an alternative determination for relevant comparators. Relevant comparators that are not part of treaty texts pose problems with respect to their determination. Therefore, in order to determine relevant comparators, it will be helpful to resort to WTO jurisprudence. Article 1 of the General Agreement on Tariffs and Trade (GATT) identifies relevant comparators, albeit indirectly.⁵³ Those who trade in “like

46. *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/04/1, Decision on Responsibility, ¶ 136 (Jan. 15, 2008); *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/04/5, Award, ¶ 202 (Nov. 21, 2007).

47. *ADM v. Mexico*.

48. Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WTO Doc. WT/S308/R (adopted Oct. 7, 2005).

49. *ADM v. Mexico*, ¶ 92 at 35.

50. *Id.* ¶ 201 at 66.

51. *CPI v. Mexico*.

52. *Id.* ¶ 120.

53. General Agreement on Tariffs and Trade, 30 Oct. 1947, 55 U.N.T.S. 194 [hereinafter GATT].

products” are relevant comparators as per the requirement of the MFN clause in the GATT.⁵⁴ However, the real issue concerns what constitutes like products. This is important because only those who sell like products are relevant comparators. Therefore, it is pertinent to look into WTO jurisprudence and analyze how WTO panels or the Appellate Body have developed standards to determine “likeness” in order to find relevant comparators.

Unlike in the investment law regime, WTO dispute settlement bodies have developed various approaches to determine the likeness of a product. Two such approaches, as put forward by authors Michael Trebilcock, Robert Howse, and Antonia Eliason,⁵⁵ are functional and formal approaches. The formal approach deals with the product’s physical characteristics and tariff classification,⁵⁶ whereas the functional approach deals with the degree of competitive substitutability of a product from the consumer’s perspective.⁵⁷ These elaborate and intricate approaches have been helpful in identifying like products. It is important to be mindful that the WTO analysis of like products cannot simply be adopted by the investment law regime without mending or molding these approaches in a manner that is suitable to the investment regime.⁵⁸ There is hardly any doubt that there exists competition between traders and investors within the same industry in a sector.⁵⁹ Thus, the

54. *Id.*

55. TREBILCOCK, HOWSE, & ELIASON, *THE REGULATION OF INTERNATIONAL TRADE* 70–71 (2013).

56. Panel Report, *Canada/Japan – Tariff on Imports of Spruce, Pine, Fir (SPF) Dimension Lumber*, WTO Doc. L/6470 – 36S/167 (adopted July 19, 1989).

57. Panel Report, *Spain - Tariff Treatment of Unroasted Coffee*, WTO Doc. L/5135 – 28S/102 (adopted June 11, 1981); Panel Report, *Indonesia - Certain Measures Affecting the Automobile Industry*, WTO Doc. WT/DS54/14–17/Add.1 Status Report by Indonesia (July 15, 1999).

58. See *Methanex v. US*, Brief for *Amicus Curiae*, ¶ 34 (stating that trade law approaches cannot simply be transferred to investment law); Jürgen Kurtz, *The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents*, 20 *EURO. J. INT’L L.* 749, 770 (2009); see also Robert Howse & Efraim Chalamish, *The Use and Abuse of WTO Law in Investor-State Arbitration: A Reply to Jürgen Kurtz*, 20 *EURO. J. INT’L L.* 1087, 1087–94 (2009).

59. RUWANTISSA ABEYRATNE, *COMPETITION AND INVESTMENT IN AIR TRANSPORT: LEGAL AND ECONOMIC ISSUES* 209 (2016); UNCTAD, *Transnation-*

functional approach, here, can be helpful because it provides for competitiveness.⁶⁰ Further, according to Trebilcock, Howse, and Eliason, likeness should be interpreted in terms of competitiveness as it justifies the economic rationale of the elimination of market distortions through internal measures.⁶¹ The partial applicability of the functional approach thus provides the answer that those investors who are competing with each other may be considered relevant comparators. Therefore, it is not adequate that investors are in the same business or sector—they should also be in competition with each other.

In light of this background, this article proposes that, in order to identify relevant comparators, the following two factors must be fulfilled cumulatively: (1) investors should be in the same industry within a sector or business or otherwise the subject of the same legal or regulatory regime, and (2) investors must be in competition with each other.

It is also pertinent to acknowledge a few issues with respect to the analysis taken thus far before moving to the next part of this article. First, while borrowing provisions from other BITs, why is the assessment of determining relevant comparators ignored completely? Second, is it reasonable to say that there is no need to assess relevant comparators while borrowing provisions from other BITs? Third, how does one find the existence of discrimination in the absence of relevant comparators?

B. Contextualizing the Discourse

When provisions are borrowed using the MFN clause in a BIT, the general practice is to assume the existence of relevant comparators. It is further assumed that these (imaginary) comparators are treated differently through their respective BITs; therefore, borrowing cures any discriminatory behavior that is created by the favorable language of other BITs. In other words, discrimination in such cases is alleged mainly because of the more favorable language of a third-party BIT. However, no inquiries are made to ascertain if any relevant

al Corporations, 11 U.N. Conf. on Trade & Dev. 3, at 31, U.N. Doc. UNCTAD/ITE/IIT/32 (2002).

60. TREBILCOCK, HOWSE, & ELIASON, *supra* note 55.

61. *Id.* at 72; see also Robert E. Hudec, "Like Product": *The Differences in Meaning in GATT Articles I and III*, in REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW 101 (Thomas Cottier & Petros Mavroidis, eds., 2000).

comparator of a different nationality actually exists. It is submitted that this sort of discrimination, for various reasons, is based on a legal fiction.⁶²

First, there are no efforts taken to identify the relevant comparators who may have been given more favorable treatment due to the favorable language in third-party BITs.⁶³ It is possible that a third-party BIT from which a provision is borrowed does not have any investor working in the same sector as the aggrieved investor from the basic BIT. In that situation, investors from third-party BITs are not relevant comparators. In the absence of a relevant comparator, there cannot be any discrimination. Under such circumstances, the question thus arises: what is the basis for borrowing? Therefore, the mechanism for borrowing works through presumption and without any evidence of the existence of a relevant comparator.

Second, there may exist certain circumstances where the determination of a relevant comparator is difficult. For example, it is difficult to find relevant comparators when commercial contracts are accepted by tribunals as being investments and thereby protected by a BIT,⁶⁴ or when an investor argues that an arbitral award should be considered as an investment in claims to money.⁶⁵ Identifying relevant comparators in such cases is certainly very challenging.

Third, with respect to actual treatment, there are no mechanisms to determine the treatment received by virtue of more favorable language. Consider, for example, if the language of a provision in a third-party BIT that is being borrowed says: “rights or claims to money or to any performance under contract having a financial or economic value.”⁶⁶ How does one de-

62. Black’s Law Dictionary defines “legal fiction” as: “an assumption that something is true even though it may be untrue, made esp. in judicial reasoning to alter how a legal rule operates; specif., a device by which a legal rule or institution is diverted from its original purpose to accomplish indirectly some other object.” *Legal Fiction*, BLACK’S LAW DICTIONARY (9th ed. 2009).

63. *White Industries Australia Ltd. v. Republic of India*, UNCITRAL, Final Award, Nov. 30, 2011.

64. It is generally accepted that rights arising from contracts may amount to investments for the purposes of BITs. See CHRISTOPH H. SCHREUER ET AL., *THE ICSID CONVENTION: A COMMENTARY* 126 (2009).

65. *White Industries v. India*, ¶¶ 4.1.26–27

66. *Agreement Between the State of Kuwait and the Republic of India for the Encouragement and Reciprocal Protection of Investment, (India-Kuwait BIT)*, Nov. 27, 2001.

termine what kind of treatment the investor is talking about? Does treatment relate to a breach of a contract having monetary value or simply the liquidated damages in an arbitration? It depends on the conveniences of the investor alleging discrimination what kind of discriminatory treatment they allege. Based on their alleged discriminatory treatment, it is presumed, without making proper inquiries, that discrimination has taken place. Thus, the justification for the practice of borrowing provisions from third-party BITs is based on a legal fiction. There is no doubt that this legal fiction is used by courts in common law systems as a tool for advancing justice;⁶⁷ however, its use to create a mechanism for borrowing provisions from third-party BITs is questionable.

II. MFN APPLICATION: EXTERNAL MEASURES

The fact that an investor can claim rights from a third-party BIT using an MFN provision appears completely normal because this process has already been accepted, recognized, and entrenched by various investment tribunals⁶⁸ and scholars.⁶⁹ In fact, most of the discussion surrounding MFN interpretation

67. *Staufen v. British Columbia (A.G.)*, 2001 B.C.S.C. 779, ¶¶ 9–11 (Can.).

68. *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, (Aug. 22, 2012); *Teinver SA v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction (Dec. 21, 2012); *Siemens AG v. Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, ¶ 109 (Aug. 3, 2004); *Gas Natural SDG SA v. Argentine Republic*, ICSID Case No. ARB/03/10, Decision on Jurisdiction, ¶ 31 (June 17, 2005); *Telefonica SA v. Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, ¶ 108 (May 25, 2006); *National Grid PLC v. Argentine Republic*, UNCITRAL, Decision on Jurisdiction, ¶ 93, (June 20, 2006); *Suez v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, ¶ 66 (May 16, 2006); *Impregilo SpA v. Argentine Republic*, ICSID Case No. ARB/07/17, Final Award, ¶ 108 (June 21, 2011); *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, ¶ 99 (Oct. 24, 2011); *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, ¶ 64 (Jan. 25, 2000); *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, ¶ 178 (Dec. 8, 2008).

69. Schill, *Multilateralizing Investment Treaties through Most-Favored-Nation Clauses*, *supra* note 7, at 501; Schill, *MFN Clauses as Bilateral Commitments to Multilateralism*, *supra* note 7; Patrick Dumberry, *The Importation of the FET Standard Through MFN Clauses: An Empirical Study of BITs*, 32 FOREIGN INV. L.J. 116, 131, 134 (2016); *see generally* Patrick Dumberry, *Shopping for a Better Deal: The Use of MFN Clauses to Get 'Better' Fair and Equitable Treatment Protection*, 33 ARB. INT'L 1 (2017).

today revolves around the borrowing of procedural and dispute settlement provisions.⁷⁰ The borrowing of substantive provisions has already been accepted by all except a few scholars and tribunals.⁷¹ Considering the lack of resistance to this practice, this article attempts to look into the rationale for the broad interpretation of MFN treatment below.

It is pertinent to consider the arguments and decisions of courts, tribunals, and scholars relating to the interpretation of MFN provisions. Therefore, this section is divided into three parts. The first part discusses the decisions of the International Court of Justice (ICJ), which dealt with interpretations of MFN provisions. The second part then addresses the decisions of various tribunals that have dealt with the issue of borrowing using MFN clauses. Finally, the third part delves into scholarly contributions on this topic.

A. The Tale of Two Cases

It is axiomatic that juxtaposed interpretations of certain cases by scholars and tribunals have created uncertainty regarding the usage of MFN provisions in BITs.⁷² In this subsection, this article shall deal with two of these cases: *Ambatielos Claim* (Greece v. United Kingdom)⁷³ and *Anglo-Iranian Oil Co. Case* (United Kingdom v. Iran).⁷⁴ The relevance of studying these cases lies in the fact that they provide clarity in terms of understanding the scope of MFN provisions in international law.

70. Ieva Kalnina, *White Industries v. The Republic of India: A Tale of Treaty Shopping and Second Chances*, 3 Y.B. ON INT'L ARB. 285 (2013).; Jose Antonio Rivas, *Application of Substantive Treaty Obligations via the Most-Favored-Nation Clause: ICSID Case Law Evolution*, in A REVOLUTION IN THE INTERNATIONAL RULE OF LAW: ESSAYS IN HONOR OF DON WALLACE, JR., 433–54 (Borzu Sabahi et al. eds., 2014).

71. Batifort & Heath, *supra* note 4; Perez-Aznar, *supra* note 3; Ickale Inssaat Limited Sirketi v. Turkmenistan, ICSID Case No. ARB/10/24, Award, ¶ 329 (Mar. 8, 2016); Ishikawa, *supra* note 7; Greenwood, *supra* note 7; Cole, *supra* note 1, at 538-39.

72. Cole, *supra* note 1; Perez-Aznar, *supra* note 3; *see, contra*, Schill, *Most-Favored-Nation Clauses as a Basis of Jurisdiction in Investment Treaty Arbitration*, *supra* note 7, at 199.

73. *Ambatielos Claim* (Greece v. U.K.), 12 R.I.A.A. 83 (Comm'n of Arb. 1956).

74. *Anglo-Iranian Oil Co. Case* (U.K v. Iran), 1952 I.C.J. Rep. 93 (July 22).

1. Ambatielos Claim

After the ICJ declined to accept jurisdiction, the United Kingdom (UK) and Greece concluded an agreement for settlement through arbitration by virtue of Anglo-Greek Commercial Treaty of 1886.⁷⁵ Article X of this treaty provided:

The Contracting Parties agree that, in all matters relating to commerce and navigation, any privilege, favour, or immunity whatever which either Contracting Party has actually granted or may hereafter grant to the subjects or citizens of any other State shall be extended immediately and unconditionally to the subjects or citizens of the other Contracting Party; it being their intention that the trade and navigation of each country shall be placed, in all respects, by the other on the footing of the most favoured nation.⁷⁶

Greece argued that the UK failed to provide rights, equity, and administration of justice to Mr. Ambatielos.⁷⁷ Thus, the UK had breached this MFN provision. The UK responded that its MFN provision protected treatment accorded as a privilege, favor, or immunity but not treatment accorded as a right.⁷⁸ The UK also contended that the provision concerned matters falling under the same subject matter since the treaty is primarily concerned with commerce and navigation and not with administration of justice; therefore, the UK argued that there was no violation of the MFN provision.⁷⁹

The tribunal, while accepting the proposition that the MFN provision attracted matters belonging to the same category of subject matter, ruled that the UK's interpretation could be accepted only when the term "administration of justice" was read in isolation.⁸⁰ According to the tribunal, however, the expression "administration of justice" in the context of commerce and navigation leads to the protection of the rights of traders.⁸¹ Thus, the administration of justice could not be excluded from

75. Ambatielos Claim, 12 R.I.A.A. at 97.

76. Treaty of Commerce and Navigation Between Great Britain and Greece, Greece-Gr. Brit., art. X, Nov. 10, 1886.

77. Ambatielos Claim, 12 R.I.A.A. at 106.

78. *Id.*

79. *Id.*

80. *Id.* at 107.

81. *Id.*

the field of operation of the MFN provision in that case.⁸² Ultimately, however, the tribunal held that there was no violation of Article X.⁸³

The tribunal in *Ambatielos* also acknowledged the principle of *ejusdem generis*, which, in the context of MFN provisions, provides that MFN clauses may apply to matters belonging to the same category of subject.⁸⁴ This principle is also reflected in Article 9 of the Draft Articles on MFN Clauses prepared by the International Law Commission (ILC-MFN).⁸⁵ This should technically mean that MFN clauses are applicable to only those situations where investors or investment are in the same category of subject matter.

Unfortunately, this principle is used in order to interpret MFN provisions with respect to the subject matter, in order to justify borrowing provisions from third-party BITs. Where the subject matter in this context should be understood to be the area relating to actual treatment of investment or investors in the territory of the host state, it has been interpreted to borrow rights or privileges granted in the provisions of third-party BITs.⁸⁶ For example, if the waiting period in a dispute settlement clause is found to be more favorable in a third-party BIT, it would be considered as falling under the same category; therefore, borrowing is justified in these cases. This approach is problematic because two corresponding provisions of two different treaties cannot be understood as belonging to the same subject matter.

The principle of *ejusdem generis* does not, by itself, provide an explanation as to the contours of subject matter. It would be an oversimplification of this principle to justify borrowing. The contours of subject matter depend upon the language of an MFN provision, and it must constitute a class under which alleged measures were applied.⁸⁷ The scope of the subject matter

82. *Id.*

83. *Id.* at 109.

84. MFN-UNCTAD, *supra* note 7, at 24.

85. *Report of the International Law Commission to the General Assembly on the work of its thirtieth session*, U.N. Doc. A/33/10, art. 9 (1978), reprinted in (1978) 2 Y.B. Int'l L. Comm'n 1 (Part II), U.N. Doc. A/CN.4/SER.A/1978/Add.1 [hereinafter ILC-MFN-1978].

86. *Maffezini v. Spain*, Decision of the Tribunal on Objections to Jurisdiction.

87. A.D. MCNAIR, *THE LAW OF TREATIES* 393 (1986).

must not be contrary to the objective of the parties.⁸⁸ However, there have been instances where this principle has been taken to justify borrowing without making proper inquiries as to the objective of the parties.⁸⁹ As it was aptly put by the English judge Lord Scarman, "the rule is a useful servant but a bad master."⁹⁰ It is submitted that the application and scope of subject matter must be understood to be related to internal measures only. Thus, the meaning of same subject matter has to be found in the nature of actual treatment of investment and investors within the territory of the host state.

2. Anglo-Iranian Oil Co. Case

The Anglo-Iranian Oil Company ("Anglo-Iranian"), incorporated in the UK, entered into an agreement with the Imperial Government of Persia (now Iran) in 1933.⁹¹ The agreement was ratified by the Iranian Majlis (parliament), and it received the imperial assent the following day.⁹² However, in 1951, the Majlis came up with a law nationalizing the oil industry in Iran.⁹³ This led to the dispute between the company and Iran. Exercising the right of diplomatic protection, the UK took up the matter for Anglo-Iranian and instituted proceedings against Iran in the ICJ.⁹⁴

As Iran did not give its consent to try the matter, the UK relied on the compulsory jurisdiction of the ICJ.⁹⁵ Under this jurisdiction, countries may lodge a declaration with the UN with respect to the cases they want to try before the ICJ.⁹⁶ Iran had accepted compulsory jurisdiction in 1930.⁹⁷ However, Iran made a declaration that it would try only those disputes arising out of a treaty directly or indirectly signed subsequent to the

88. Maharashtra University of Health Sciences & others v. Satchikitsa Prasarak Mandal & others (2010), 3 SCC 786, ¶ 28 (Ind.).

89. Maffezini v Spain, Decision of the Tribunal on Objections to Jurisdiction.

90. *Quazi v. Quazi* (1979), 3 All Eng. Rep. 897, 916.

91. Anglo-Iranian Oil Co. Case, 1952 I.C.J. at 102.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 103.

96. Statute of the International Court of Justice art. 36, ¶ 2, June 26, 1945, 33 U.N.T.S. 933.

97. Anglo-Iranian Oil Co. Case, 1952 I.C.J. at 103.

date of accepting compulsory jurisdiction.⁹⁸ Therefore, the UK's efforts to impute obligations onto Iran using the treaties signed in 1857 and 1903 were not accepted by the ICJ for lack of jurisdiction in this case because those treaties were signed before 1930.⁹⁹

Lastly, the UK argued for use of the MFN provision contained in Article IX of the Treaty of 1957 signed between the UK and Iran.¹⁰⁰ Referring to Article IV of the Treaty of 1934 between Iran and Denmark, the UK argued that treatment of Anglo-Iranian by the Iranian government was a breach of the principles and practice of international law.¹⁰¹ By the operation of the MFN provision in this matter, the UK argued, the Iranian government was bound to observe these obligations to protect the rights of a British national (in this case, Anglo-Iranian).¹⁰² The UK further argued that access to the ICJ under the Treaty of 1934 between Iran and Denmark, which came after the declaration of 1930, should have been considered as more favorable treatment of the nationals of a third party.¹⁰³ Therefore, the UK should have been allowed to bring the case to the ICJ by virtue of this MFN provision.¹⁰⁴

The ICJ, however, did not accept this contention by the UK. The court held that it did not have jurisdiction with respect to MFN provisions and made the following observation:

The treaty containing the most-favoured-nation clause is the basic treaty upon which the United Kingdom must rely. It is this treaty which establishes the juridical link between the United Kingdom and a third-party treaty and confers upon that State the rights enjoyed by the third party. A third-party treaty, independent of and isolated from the basic treaty, cannot produce any legal effect as between the United Kingdom and Iran: it is *res inter alios acta*.¹⁰⁵

While it is true that the ICJ in this case did not address the rationale or basis for borrowing, it did recognize the principle of

98. *Id.*

99. *Id.* at 105.

100. *Id.*

101. *Id.* at 108.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 109.

res inter alios acta explicitly. This means the sovereignty of states does not allow for the automatic application of treaties to third states.¹⁰⁶ Therefore, the use of MFN provisions to borrow clauses from a third-party BIT without the consent of the host state is problematic. It is unclear as to what binds a state, without its consent, to accept such borrowing under general international law.

What is even more problematic is the assumption that the inclusion of an MFN provision in a BIT itself is evidence of consent by states to accept such borrowing. There is literature finding MFN clauses to be a link between basic BITs and third-party BITs, arguing that there is automatic incorporation of third-party BITs into basic BITs through MFN clauses.¹⁰⁷ This assertion has been criticized for being inapposite and misleading because it ignores the validity of the third-party BIT.¹⁰⁸ If the third-party BIT ceases to exist, then the right incorporated through the MFN provision in the basic BIT also vanishes.¹⁰⁹ This has already been established by the ICJ decision in the *Case Concerning the Rights of Nationals of the United States in Morocco*.¹¹⁰ Also, unless the link is established between two treaties beyond any doubt, respective treaties remain *res inter alios acta*. Thus, until this link is established, it is unreasonable to believe that states want third-party BIT provisions to be included in their carefully negotiated bilateral agreements through MFN provisions. This negates the whole purpose of entering into negotiation before signing a new BIT.

B. Investment Tribunals

For the purpose of brevity, only the relevant parts of decisions are discussed here to analyze borrowing using MFN clauses.

106. GENNADY DANILENKO, LAW-MAKING IN THE INTERNATIONAL COMMUNITY 58 (1993).

107. Schill, *Multilateralizing Investment Treaties through Most-Favored-Nation Clauses*, *supra* note 7, at 507.

108. Douglas, *supra* note 7, at 106.

109. *Id.*

110. *Case Concerning the Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.)*, Judgment, 1952 I.C.J. Rep. 176 at 191–92 (Aug. 27).

1. Emilio Agustín Maffezini v. The Kingdom of Spain

One of the main objections to the jurisdiction of the tribunal in this case related to the use of an MFN provision, contained in Article 4, paragraph 2 of the Argentina-Spain BIT,¹¹¹ by the claimant to establish the jurisdiction of the tribunal.¹¹² Article 10 of Argentina-Spain BIT provides for the exhaustion of local remedies by the claimant for a period of eighteen months before it can move to arbitration to settle the dispute.¹¹³ However, Article 10 (2) of the Chile-Spain BIT does not provide any pre-conditions before moving to arbitration.¹¹⁴ The claimant argued that Chilean investors were being treated more favorably than the Argentinian investors because of the existence of more favorable dispute resolution provision in the Chile-Spain BIT.¹¹⁵

These contentions were rejected by Spain primarily on three grounds: (1) in accordance with the doctrine of *res inter alios acta*, agreements between Spain and a third party did not create any rights for the claimant; (2) by application of the principle *ejusdem generis*, MFN clauses should be used only in cases of substantive provisions and not in dispute settlement provisions; and (3) MFN provisions could be used to determine discrimination having a connection with material economic treatment but not with procedural matters.¹¹⁶

The tribunal in *Maffezini* made various observations with respect to the use of MFN clauses and Spain's objections. In doing so, the tribunal started with an assessment of the Anglo-Iranian Oil Company Case,¹¹⁷ the ICJ case concerning the rights of US nationals in Morocco,¹¹⁸ and the *Ambatielos Claim*.¹¹⁹

111. Agreement for the Reciprocal Promotion and Protection of Investments, Oct. 3, 1991, 1699 U.N.T.S. 187.

112. *Maffezini v. Spain*, Decision of the Tribunal on Objections to Jurisdiction, at 14.

113. *Id.* at 15.

114. Agreement between the Kingdom of Spain and the Republic of Chile on the Reciprocal Protection and Promotion of Investments, Oct. 2, 1991, 1774 U.N.T.S. 15.

115. *Maffezini v. Spain*, Decision of the Tribunal on Objections to Jurisdiction, ¶ 40 at 15.

116. *Id.* ¶¶ 41–42 at 15.

117. Anglo-Iranian Oil Co. Case, 1952 I.C.J. at 93

118. France v. USA, 1952 I.C.J. at 176.

119. *Ambatalios Claim*, 12 R.I.A.A. at 91.

In its assessment of Anglo-Iranian Oil Company case, the tribunal observed that, if the subject matter of a provision in a basic treaty is found to be less favorable than the corresponding provision in a third-party BIT, then the corresponding provision in the third-party BIT is extended to a beneficiary in the basic treaty as being more favorable.¹²⁰ This assessment is problematic. It is not a correct assessment of the Anglo-Iranian Oil Company case because the tribunal in that case categorically held that a third-party treaty is an independent and isolated treaty, and as such it did not create any rights or obligations for the basic treaty between the UK and Iran.¹²¹ Further, it is also not clear what the *Maffezini* tribunal meant by “same” subject matter.¹²² This approach is neither a sound reflection of the Anglo-Iranian Oil Company case, nor does it provide any suitable tools to determine what is the same subject matter. Therefore, this interpretation is vague and not based on sound interpretative tools as provided in Article 31 of the VCLT.

The reference to the *Case Concerning the Rights of Nationals of the United States in Morocco* by the tribunal in *Maffezini* seems to be a mere formality with respect to the assessment taken by the tribunal.¹²³ This is because the case was referred to only to show that the MFN clause was invoked by the US to claim consular jurisdiction, an argument that was ultimately rejected by the court because the treaties from which the US was trying to borrow provisions had ceased to exist.¹²⁴

The tribunal also discussed the *ejusdem generis* principle as incorporated by the *Ambateilos* and conceded that the scope of this principle provided under *Ambateilos* was very broad.¹²⁵ The tribunal also acknowledged that the *Ambateilos* did not allow third-party treaties to be applicable in the dispute.¹²⁶

All three cases left considerable gaps from an interpretative and theoretical standpoint regarding the question of whether MFN clauses can be used to borrow provisions from third-party

120. *Maffezini v. Spain*, Decision of the Tribunal on Objections to Jurisdiction, ¶ 45 at 16.

121. *Anglo-Iranian Oil Co. Case*, 1952 I.C.J. at 109.

122. *Maffezini v. Spain*, Decision of the Tribunal on Objections to Jurisdiction, ¶ 45 at 16.

123. *Id.* ¶ 47, at 17.

124. *Id.*

125. *Id.* ¶ 49, at 18.

126. *Id.* ¶ 50, at 18.

BITs. The only reason why these cases are used by various tribunals and scholars to support borrowing is because these cases fell short of making the direct and categorical prohibition on importation or borrowing.

This, in turn, is based on the redundant and anachronistic practice under international law, which is best expressed: “what is not prohibited expressly should be considered allowed in international law.”¹²⁷ This approach is an outdated dictum that was used by the Permanent Court of International Justice in the *SS Lotus* case¹²⁸ and was severely criticized by Judge Bruno Simma in the advisory opinion relating to the Kosovo independence case.¹²⁹ According to Simma, the court’s analysis that “there was no need to demonstrate permissive rules as long as there is no prohibition” was obsolete, and the court failed to answer the questions put before it satisfactorily.¹³⁰ He also criticized the court for upholding the dictum from the *Lotus* case and failing to move beyond the anachronistic and extremely consent-focused vision of international law.¹³¹ According to Simma, the court should have made an attempt to equate the absence of prohibitive rules with the presence of permissive rules; however, it did not.¹³²

Similarly, the tribunal in *Maffezini* failed to undertake any serious attempt to look into the permissive rules of international law to justify borrowing from third-party BITs using MFN provisions. In fact, there are established rules in international law, like Article 34 of VCLT,¹³³ that are prohibitive of such practices.

The reasoning of the tribunal in the later part of its award is even more problematic. In paragraph 52, it argued that, since the UK in most of its BITs included dispute settlement provi-

127. An Hertogen, *Letting Lotus Bloom*, 26 EUR. J. INT’L L. 901, 902 (2016).

128. Case of the S.S. Lotus (Fr. v. Turk.), Judgement, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7) (providing that the restrictions on the independence of states cannot be presumed because of the consensual nature of the international legal order).

129. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Declaration by Judge Bruno Simma, 2010 I.C.J. 403 (July 22).

130. *Id.* ¶ 3.

131. *Id.*

132. *Id.*

133. A treaty does not create either obligations or rights for a third state without its consent.

sions under its MFN provisions,¹³⁴ it was doubtful that parties had intended to exclude dispute settlement provisions from the purview of their MFN clause.¹³⁵ Even if one accepts that the UK intended to include dispute settlement provisions under its MFN provisions, by what analogy or principle can it be concluded that Spain or Argentina intended the same?

Most of the tribunal's decision on jurisdiction revolved around Spain's treaty practice and how various textual variations can be seen in treaties signed by Spain with other countries.¹³⁶ The tribunal also spent considerable time ascertaining the intention of the parties through the history of their BIT negotiations.¹³⁷ Unfortunately, none of these approaches has the gravitas to provide any rationale for borrowing provisions from third-party BITs. The problem with the tribunal's assessment is that it focused more on establishing that dispute settlement provisions can fall under MFN provisions, rather than on looking for a justification for borrowing under international law. The decision by the tribunal can hardly be considered a correct statement of the law with respect to its interpretation of MFN provisions.

2. *White Industries Australia Ltd. v. The Republic of India*¹³⁸

White Industries initiated a BIT claim against India for failure to enforce an arbitral award in favor of White Industries against Coal India, Ltd., a public sector unit in India, due to delay in the judicial process.¹³⁹ White Industries argued that a delay of over nine years in enforcing a foreign award should be considered a breach of India's obligation under the India-Australia BIT.¹⁴⁰ White Industries asserted that the provision concerning "effective means of asserting claims and enforcing rights" from the India-Kuwait BIT¹⁴¹ could simply be borrowed

134. *Maffezini v. Spain*, Decision of the Tribunal on Objections to Jurisdiction, ¶ 52 at 19.

135. *Id.*

136. *Id.* ¶¶ 58–60.

137. *Id.* ¶ 57.

138. *See White Industries v. India.*

139. *See generally* Sumeet Kachwaha, *The White Industries Australia Limited – India BIT Award: A Critical Assessment*, 29 *ARB. INT'L* 276 (2013).

140. *White Industries v. India*, ¶ 4.3.4, at 37.

141. *India-Kuwait BIT*, *supra* note 66, art. 4(5).

using the MFN provision from the India-Australia BIT.¹⁴² Thus, India's failure to enforce the award constituted a breach of India's obligation under the India-Australia BIT.¹⁴³

With respect to one of India's objections, that borrowing would subvert the carefully negotiated balance of its BIT with Australia,¹⁴⁴ the tribunal held that the authorities cited by India were applicable on the use of MFN clauses for borrowing dispute settlement provisions only, and the situation in the case was qualitatively different because a substantive provision was being borrowed.¹⁴⁵ Therefore, there was no subversion of the carefully negotiated balance of the BIT; in fact, by borrowing substantive provisions, the BIT achieved its objective that was intended by the contracting parties through incorporation of the MFN provision.¹⁴⁶

Fascinatingly, the tribunal evaded the question of subversion of the carefully negotiated balance of the BIT. This requires a serious assessment of the approach of the tribunal. According to the tribunal, the carefully negotiated balance of the BIT cannot be subverted when only substantive provisions of a third-party BIT are being borrowed.¹⁴⁷ This raises a question—what is the basis of this assessment? Further, the tribunal held that contracting parties intended to use the MFN to borrow substantive provisions.¹⁴⁸ It is difficult to understand the basis for reaching this conclusion and how the tribunal determined the actual intention of the contracting parties. It is possible that the tribunal may have assumed that incorporation of MFNs in BITs by sovereign states in itself is evidence that states wanted to allow borrowing from third-party BITs. This presumption, however, must be proved concretely. Even the conclusion that states wanted to allow borrowing using MFNs has to be satisfied beyond any doubt. In fact, recent state behavior provides evidence that states are not willing to accept the proposition allowed by the tribunal.¹⁴⁹ This approach, if it

142. *White Industries v. India*, ¶ 11.1.5, at 106.

143. *Id.*

144. *Id.* ¶ 11.2.1, at 106.

145. *Id.* ¶¶ 11.2.2–3, at 106.

146. *Id.* ¶ 11.2.4, at 107.

147. *Id.* ¶¶ 11.2.1-4, at 106.

148. *Id.*

149. See *Recent New Indian Model BIT (2016)*, https://dea.gov.in/sites/default/files/ModelTextIndia_BIT_0.pdf; see also *Draft Netherland Model BIT*

was indeed the rationale of the tribunal, is incorrect in the absence of any evidence from which intentions of the parties can be ascertained. The tribunal did not provide any justification or reasoning for allowing the importation of a provision from a third-party BIT. Further, it made an assessment as to the meaning of “*effective means and standards*” based on the decisions of different tribunals and writings of scholars without effectively satisfying the basis for borrowing.¹⁵⁰

It seems that the *White Industries* tribunal was already under the impression that borrowing substantive provisions using MFN provisions from third-party BITs was settled in practice and theory. According to the tribunal, as it may be inferred, it was only the borrowing of dispute settlement provisions from third-party BITs that was debatable. This approach is surprisingly problematic for two reasons: first, the tribunal did not cite any authority or source to reach its decision, and second, it did not make an effort to justify borrowing under international law. In other words, the decision of the tribunal with respect to the use of MFN clauses was not a reasoned decision.¹⁵¹ Indeed, it was based on the presumptive assessment of borrowing using MFNs and lacked sound legal principle to back its conclusion.

There is a long list of decisions by investment tribunals that have not undertaken the task of finding justification for the borrowing of provisions from third-party BITs.¹⁵² The problem

(2018), https://globalarbitrationreview.com/digital_assets/820bccdd9-08b5-4bb5-a81e-d69e6c6735ce/Draft-Model-BIT-NL-2018.pdf [hereinafter, Netherlands Draft Model BIT].

150. *White Industries v. India*, ¶ 11.3 at 108.

151. United Nations Commission on International Trade Law [UNCITRAL], Arbitration Rules, art. 34(3) (Feb. 2014), available at <https://www.un-citral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf> (providing for reasoned decisions). For more literature on reasoned decisions in international arbitrations, see Pierre Lalive, *On the Reasoning of International Arbitral Awards*, 1 J. INT'L DISP. SETTLEMENT 55, 55–65 (2010); Stephen Hunter, *A Duty to Give Reasons, But Only Just*, KLUWER ARBITRATION BLOG (Nov. 1, 2016), <http://arbitrationblog.kluwerarbitration.com/2016/11/01/a-duty-to-give-reasons-but-only-just/>.

152. For example: *EDF International S.A. et al. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award (June 11, 2012); *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, (Apr. 8, 2013); *Hesham T. M. Al Warraq v. Republic of Indonesia*, UNCITRAL, Award (Dec. 15, 2014); *Ansung Housing Co. Ltd. v. People's Republic of China*, ICSID Case No. ARB/14/25, Award (Mar. 9, 2017); *Garanti Koza LLP v. Turkmeni-*

with this approach is that these tribunals presumed that the importation of substantive provisions from third-party BITs using MFN clauses is not questionable at all. Therefore, it was not necessary, on their part, to seek justification for borrowing MFN provisions. Unfortunately, this practice has been so deeply entrenched in the investment regime that there are hardly any objections to its validity.

There have, however, been attempts to provide a fresh perspective with respect to the use of MFN provisions in BITs. *Kilic Insaat v. Turkmenistan*¹⁵³ and *Ickale Insaat v. Turkmenistan*¹⁵⁴ provide different perspectives on interpreting the use of MFN clauses. The *Ickale* tribunal, for example, categorically held that a common formulation of MFN clauses does not allow borrowing from third-party BITs.¹⁵⁵

3. *Ickale Insaat v. Turkmenistan*

In *Ickale*, the tribunal asked: “Can the Claimant invoke the FET, FPS, non-discrimination, and umbrella clause protections through the MFN clause in Article II of the BIT or the non-derogation clause in Article VI of the BIT?”¹⁵⁶ The tribunal observed that Article II of the basic BIT, which included MFN treatment, provided for the prohibition of discrimination between investors of two different nationalities.¹⁵⁷ According to the tribunal, this host state obligation to ensure equal treatment has to be observed only when investors are placed in *similar situations*.¹⁵⁸ Conversely, according to the tribunal, MFN obligations do not exist when foreign investors are not placed in similar situations.¹⁵⁹

stan, ICSID Case No. ARB/11/20, Award (Dec. 19, 2016); *Teinver v. Argentina*, ICSID Case No. ARB/09/1, Award (July 21, 2017); *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award (June 27, 1990); *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award (May 18, 2010).

153. *Kilic Insaat Ithalat Ihracat Sanayi Ve Ticaret Anonim Sirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award (July 2, 2013).

154. *Ickale v. Turkmenistan*.

155. *Batifort & Heath*, *supra* note 4, at 899.

156. *Ickale v. Turkmenistan*, ¶ 6.1 at 103.

157. *Id.* ¶ 326.

158. *Id.* ¶ 327.

159. *Id.*

The tribunal further held that the meaning of *treatment in similar situations* has to be determined according to the factual situations of a case, and this cannot be understood to include importing provisions from a third-party BIT.¹⁶⁰ Consequently, the tribunal rejected the claim of the investor to borrow a provision from a third-party BIT.¹⁶¹

This decision is a refreshing illustration of sound application of the rules of treaty interpretation without wandering into the realm of judicial adventurism. According to Batifort and Heath, this decision is significant for moving away from the top-down approach of MFN interpretation and reconsidering the bottom-up approach based on variation in texts.¹⁶²

C. Scholarly Contributions

This article will now present a critique of the major arguments made by scholars in support of importing favorable provisions from third-party BITs using MFN provisions in basic BITs. Most of the discussion today revolves around the importation of dispute settlement provisions from third-party BITs, and there is hardly any question as to the validity of this practice itself.¹⁶³ Schill puts it positively, that the practice of importing more favorable provisions is largely uncontested.¹⁶⁴ Except for a few recent works,¹⁶⁵ there are barely any objections to this practice whatsoever. The following section provides several major arguments that are presented as a justification for this practice.

1. Economic Rationale

One of the major arguments in favor of borrowing provisions from third-party BITs is that this practice allows investors of different nationalities to compete under equal competitive con-

160. *Id.* ¶ 329.

161. *Id.* ¶ 332.

162. Batifort & Heath, *supra* note 4, at 899.

163. Ishikawa, *supra* note 7, at 128; J.W. SALACUSE, *THE LAW OF INVESTMENT TREATIES* 253 (2010); WEERAMANTRY, *supra* note 7, at 177; Vesel, *supra* note 7.

164. Schill, *Multilateralizing Investment Treaties through Most-Favored-Nation Clauses*, *supra* note 7, at 519.

165. See generally Perez-Aznar, *supra* note 3; Batifort & Heath, *supra* note 4; Ickale v. Turkmenistan; Faya Rodriguez, *supra* note 7, at 93; Ishikawa, *supra* note 7; Cole, *supra* note 1, at 540–41.

ditions by creating uniform standards of investment protection.¹⁶⁶ Further, scholars argue that multilateral rules on investment protection, such as borrowing of provisions from third-party BITs, ensure fair treatment of investors independent of the source of the investor.¹⁶⁷ This enables capital flow to be allocated in areas where a state may have a comparative advantage over other economies.¹⁶⁸ These assessments are partially correct for several reasons.

First, the assessment that the practice of borrowing ensures equal competitive conditions is based on the presumption that there exist relevant comparators. These comparators, through their respective BITs, are treated differently; therefore, if there are no equal competitive conditions, borrowing will ensure equal competitive conditions. For this premise to hold true, there must be an inquiry, first, to determine if relevant comparators actually exist. In the absence of such an inquiry, it becomes highly subjective to debate whether or not equal competitive conditions exist. It is possible that there may not be any relevant comparator or investor from a third state or third-party BIT from which the provisions are being imported. Thus, there may be no competition at all due to the absence of a relevant comparator. This scenario creates more advantageous conditions for investors asking to import favorable provisions from third-party BITs compared to the other relevant comparators in the same sector. In such cases, borrowing goes against the very objective for which it was created—i.e., to ensure equal competitive conditions. Further, a sound assessment of perfect competitive conditions can be made only by looking into the domestic framework for regulating competition. Therefore, even if one believes that a state has failed to provide equal competitive conditions to an investor, and as a result an investor of a different nationality has gained some favorable conditions in the market, one has to look into the domestic or internal measures that have led to this scenario. It is insufficient to

166. Freyer & Herlihy, *supra* note 7, at 62–63; Chukwumerije, *supra* note 7, at 610; Schill, *Multilateralizing Investment Treaties through Most-Favored-Nation Clauses*, *supra* note 7, at 500.

167. Schill, *Multilateralizing Investment Treaties through Most-Favored-Nation Clauses*, *supra* note 7, at 498; Chukwumerije, *supra* note 7; Freyer & Herlihy, *supra* note 7, at 62–63.

168. Schill, *Multilateralizing Investment Treaties through Most-Favored-Nation Clauses*, *supra* note 7, at 499.

assume that borrowing a provision can ensure equal competitive conditions without looking into domestic measures. Therefore, in the absence of concrete research and studies, it is incorrect to assume that borrowing ensures equal competitive conditions.

Second, this assessment that borrowing favorable provisions creates uniform standards of investment protection is problematic because, in practice, borrowing takes place only in stand-alone instances. Provisions of third-party BITs do not remain attached to the basic BIT after the dispute is over; instead, they vanish once the investor uses them for their specific need or purposes in a dispute. In fact, it is also possible that the same investor may use or borrow a similar provision from a completely different BIT. An illustration will explain this narrative. Consider that A-B is a basic BIT; A-C is a third-party BIT; A-D is another BIT; and X is an investor. A is the host state. Assume X has borrowed a dispute settlement provision successfully from the A-C BIT, reducing the waiting period for initiating an investment arbitration. In another dispute between A and X, X borrows the dispute settlement provision from the A-D BIT to get away with a “fork in the road” clause.¹⁶⁹ To give another example, it is possible that two different foreign investors in two different host states may try to borrow fair and equitable treatment (FET) provisions for different reasons (one may seek it for denial of justice and another may seek it for legitimate expectations) from a third-party BIT. It is difficult to see any uniformity in such practices. Therefore, it is difficult to accept that borrowing creates a uniform standard of investment protection.

Third, discrimination based on the source or nationality of foreign investors is protected under the MFN provision in the basic BIT. Actual discrimination takes place only through internal or domestic measures. In fact, the claim that multinational rules on investment protection ensure no discrimination on the basis of the source of the investor¹⁷⁰ is contradictory because this assessment does not make any inquiry about more

169. “Fork in the road” clauses in BITs provide the investor a choice between pursuing its claims against the host state either through the arbitration mechanisms provided in the BIT or in local courts or other venues under relevant contract.

170. See generally Schill, *Multilateralizing Investment Treaties through Most-Favored-Nation Clauses*, *supra* note 7.

favorable treatment to foreign investors from third states. It simply assumes that borrowing ensures the same treatment between foreign investors. It is ironic that when a foreign investor enters into the territory of the host state, the more favorable provisions of a third-party BIT are not questioned until a dispute arises. These *so-called* multinational rules on investment protection play their role only when a dispute arises, which is based on the expediency to the investor; otherwise, they do not appear to play any role.

Fourth, the assessment that borrowing enables capital to flow where it is allocated efficiently is wrong. This is due to the fact that BITs do not leave it to the market to allocate foreign investment.¹⁷¹ It is the host state or home state that governs or regulates foreign investment because they do not trust the market to guide foreign investment and are deeply concerned about the macroeconomic effects of foreign investment.¹⁷² States regulate foreign investments to ensure desired macroeconomic effects.¹⁷³ Therefore, it is difficult to accept the proposition that the practice of borrowing plays any role in the efficient allocation of capital.

Fifth, the proposition that borrowing enables a state to garner specialization in areas where it can have a comparative advantage is also not entirely correct. It is possible that a state may, through low-tariff incentives, promote investment inflow in those areas in which it does not have a comparative advantage.¹⁷⁴ In other words, it completely depends on the state to decide how to steer the inflow of investment into its territory. A BIT does not oblige states to accept capital inflow; it merely creates an obligation to promote and protect investments.

Sixth, the aforementioned analysis by scholars is underpinned by the notion that BITs are related to FDI inflow. This proposition is inconclusive. In fact, there is secondary literature available that shows a weak linkage between BITs and FDI inflow into the territory of host states.¹⁷⁵ Countries like

171. Kenneth J. Valdevelde, *The Economics of Bilateral Investment Treaties*, 41 HARV. INT'L L. J. 469, 498 (2000).

172. *Id.*

173. *Id.*

174. *Id.*

175. JAN PETER SASSE, AN ECONOMIC ANALYSIS OF BILATERAL INVESTMENT TREATIES 69 (2011); see also Jason Webb Yackee, *Do Bilateral Investment*

Brazil and Mexico, which are the major hosts of FDI, were for a long period reluctant to sign BITs.¹⁷⁶ Similarly, the US is one of the largest investor countries in India, despite the fact that India and the US have not signed a BIT.¹⁷⁷ Therefore, the proposition that borrowing can increase FDI inflow in a country by providing suitable competitive conditions is not correct because a BIT, in itself, may not provide any basis for capital inflow.

2. Non-Economic Rationale

Scholars argue that borrowing provisions from third-party BITs, which ultimately leads to multilateralization of investment rules, discourages states from bloc-building¹⁷⁸ behavior and promotes international security and peace through economic interdependence.¹⁷⁹ They also argue that MFN clauses move away from general international law—which allows for the granting of special favors to certain states—and, instead, ensures equal treatment between states.¹⁸⁰ Ultimately, MFN provisions lock states into the framework of multilateralism, which is adverse to bilateral alliances.¹⁸¹

The abovementioned assessment is based on the assumption that bilateralism (or, in fact, regionalism) is not in the best interest of countries. Had this been the case, the GATT, which is itself a multilateral agreement, would not have contained provisions on regional trade agreements (RTAs).¹⁸² The theory of economic integration refers to the policy of reducing or eliminating trade barriers among nations jointly entering into

Treaties Promote Foreign Direct Investment?, 51 VA. J. INT'L L. 397 (2010–2011); Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract Foreign Investment?*, in *THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT* 349–78 (Karl Sauvant et al. eds., 2009).

176. SASSE, *supra* note 175.

177. *Five Countries that are Making it Big in India*, MAKE IN INDIA, <http://www.makeinindia.com/five-countries-that-are-making-big-in-india> (last visited Jan. 2, 2020).

178. Bloc-building refers to the regional collaboration among some states in trade and investment to pursue their interests.

179. Schill, *Multilateralizing Investment Treaties through Most-Favored-Nation Clauses*, *supra* note 7, at 501.

180. *Id.*

181. *Id.*; see also Efraim Chalamish, *The Future of Bilateral Investment Treaties: A De Facto Multilateral Agreement*, 34 BROOK. J. INT'L L. 304 (2009).

182. GATT, *supra* note 53, art. XXIV.

agreements.¹⁸³ RTAs do not increase the trade barriers for non-member countries, but they do lower the trade barriers among member countries, which, in turn, is seen as a move towards freer trade.¹⁸⁴ Presently, there are more than 450 RTAs, and this number is constantly growing.¹⁸⁵ Each WTO member is currently a member of more than ten RTAs.¹⁸⁶ Krugman explains that RTAs are so popular because (1) there are fewer participants at the regional level than at the global level, which changes the character of negotiations;¹⁸⁷ (2) the changing nature of trade restrictions makes monitoring trade relations very difficult; and (3) the decline of the relative importance of the US in world trade has shaken the hegemonic stability of the global trading system.¹⁸⁸

According to Krugman, regionalism offers to minimize these problems by providing countries with new bargaining opportunities.¹⁸⁹ The increasing prevalence of RTAs, however, creates a number of novel and complex tariff schedules that impose greater transaction costs on producers, raise business costs, and divert trade and associated investments.¹⁹⁰ BITs, unlike RTAs, are free from such inherent problems. In that sense, agreements like BITs provide greater transparency, better legal predictability, and increased security to stakeholders in order to attract FDI.¹⁹¹ Aside from these factors, there can be a

183. DOMINIC SALVATORE, *INTERNATIONAL ECONOMICS: TRADE AND FINANCE* 289 (2014).

184. *Id.*; see generally Rudiger Dornbusch, *Policy Options for Freer Trade: The Case for Bilateralism*, in *AMERICAN TRADE STRATEGY: OPTIONS FOR THE 1990s* (Robert Z. Lawrence et al. eds., 1990).

185. See *Regional Trade Agreements Database*, WORLD TRADE ORG., <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx> (last visited Jan. 1, 2020).

186. See TREBILCOCK et al., *supra* note 55, at 90.

187. Fewer participants mean countries have to negotiate with a small number of other countries, thus reducing their negotiation costs to a large extent. Apart from this, countries at the regional level feel more empowered to put forward their interests during negotiations.

188. Paul Krugman, *Regionalism versus Multilateralism: Analytical Notes*, in *NEW DIMENSIONS IN REGIONAL INTEGRATION* 74 (Jaime De Melo et al. eds., 1993).

189. *Id.* at 75.

190. JAGDISH BHAGWATI, *TERMITES IN THE TRADING SYSTEM: HOW PREFERENTIAL AGREEMENTS UNDERMINE FREE TRADE* 70 (2008).

191. W. J. Ethier, *The New Regionalism*, 108 *THE ECON. J.* 1149, 1149–61 (1998).

positive interaction between multi-level rulemaking within regional, bilateral, and multilateral agreements.¹⁹² It is incorrect to assume that these agreements conflict.¹⁹³ Therefore, the proposition that only multinational rules can achieve international peace and security is not well placed.

Further the assertion that MFN provisions create multilateral rules is, in itself, challenged by various scholars. McRae argues that multilateralization in trade happened because states chose to include MFN provisions in the multilateral agreements, not because MFN clauses were designed to affect multilateralization.¹⁹⁴ Perez-Aznar calls multilateralization through MFN clauses a legal fiction.¹⁹⁵ He argues that multilateralization should be based on the cooperation of states rather than one provision contained in a treaty or by the decision of an arbitral tribunal.¹⁹⁶ Perez-Aznar also argues that the use of legal fiction to replace the true legal effect of a rule may undermine the application and context of the rule.¹⁹⁷ He further posits that multilateralization through MFN provisions is not true multilateralism because it is the imposition of rules through the interpretation of MFN provisions by the arbitral tribunals.¹⁹⁸ The underlying idea behind these arguments is that states are the primary lawmakers in international law; therefore, any attempt to create a (multilateral) system without the consensus and cooperation of states is problematic. Thus, an attempt to create multilateral rules through MFN provisions in BITs is a flawed approach.

192. UNITED NATIONS, MULTILATERALISM, REGIONALISM AND BILATERALISM IN TRADE AND INVESTMENT 39 (Philippe De Lombaerde ed., 2006).

193. *Id.*; Douglas A. Irwin, *Multilateral and Bilateral Trade Policies in the World Trading System: An Historical Perspective*, in NEW DIMENSIONS IN REGIONAL INTEGRATION (Jaime de Melo et al. eds., 1993).

194. Donald McRae, *Introduction to the Symposium on Simon Batifort and J. Benton Heath*, in *The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization*, 112 AM. J. INT'L L. UNBOUND 38, 42 (2018).

195. Facundo Perez-Aznar, *The Fictions and Realities of MFN Clauses in International Investment Agreements*, 112 AM. J. INT'L L. UNBOUND 55, 58 (2018). Legal-fiction here, likely points towards the fact that it is tribunals and not states that have created this notion of the use of MFN provisions. In fact, there is little evidence to prove that states also support such use of MFN provisions in BITs.

196. *Id.*

197. *Id.*

198. *Id.*

III. INTERPRETATION OF MFN PROVISIONS

The VCLT provides various tools for the interpretation of treaty provisions.¹⁹⁹ Articles 31, 32 and 34 of the VCLT have been accepted as treaty law applicable to signatories of the VCLT and as rules of customary international law (CIL) between all states.²⁰⁰ Article 31 contains four paragraphs related to treaty interpretation,²⁰¹ which should be read for their overall logic and not in hierarchical order.²⁰² Even though the hierarchical character of these norms is not established, for the purpose of simplicity, each paragraph of Article 31 is explored here in the order that it appears in the treaty text. The following paragraph analyzes the interpretation of MFN provisions.

According to the study undertaken by the ILC on MFN provisions, there are as many as six types of obligations found in MFN provisions.²⁰³ These obligations are reflected in a large number of textually diverse MFN provisions. As each MFN clause is specific to its treaty, no uniform approach should be adopted for its interpretation.²⁰⁴ It would be sound, therefore, to interpret each and every type of MFN provision according to its language. The 2013 Tokyo Resolution²⁰⁵ and the ILC²⁰⁶ take similar approaches. Batifort and Heath also take a comparable

199. VCLT, *supra* note 14, arts. 31–32.

200. Int'l Law Comm'n, Rep. on the Work of Its Seventieth Session, at 17, UN Doc. A/73/10 (2018) *available at* https://legal.un.org/docs/?path=../ilc/texts/instruments/english/commentaries/1_11_2018.pdf&lang=EF (draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries) [hereinafter ILC-Subsequent Treaties and Practice].

201. VCLT, *supra* note 14, art. 31.

202. JEAN-MARC SOREL & VALERIE BORE EVANO, *THE VIENNA CONVENTIONS ON THE LAW OF TREATIES* 807 (Oliver Corten et al. eds., 2011).

203. Int'l Law Comm'n, Final Rep. of Study Group on the Most-Favoured-Nation Clause, ¶¶ 59–65, UN Doc. A/CN.4/L.852 (2015) [hereinafter ILC-MFN-2015]; Ibrahim Jamie Arabi, et al., *Evaluating (In) Consistency in Investor-State Arbitration: A Roadmap*, 13 (Apr. 18, 2018) (unpublished comment, University of Ottawa), *available at* <https://georgetown.app.box.com/s/obdg31rnxjkitrp6aydp46i855nw5g9y>.

204. Schill, *MFN Clauses as Bilateral Commitments to Multilateralism*, *supra* note 7, at 933.

205. Institut de Droit International, *Eighteenth Commission: Legal Aspects of Recourse to Arbitration by an Investor Against the Authorities of the Host State Under Inter-State Treaties*, art. 12 (Sept. 13, 2013), www.idi-il.org/app/uploads/2017/06/2013_tokyo_en.pdf.

206. ILC-MFN-2015, *supra* note 203, ¶¶ 213–14.

stance when they argue for the bottom-up approach to interpret MFN provisions.²⁰⁷ Despite its merit, their bottom-up approach has certain limitations. In most BITs, the ordinary meaning of MFN provisions do not give any reference or evidence with respect to their scope. This lack of clarity concerning the scope of MFN provisions has led many investment tribunals to interpret MFN provisions as a tool to borrow provisions from third-party BITs.²⁰⁸ The assessment proposed by Batifort and Heath, therefore, is helpful only when the MFN provision itself gives some reference point with respect to its scope. In the absence of such reference, MFN provisions will continue to remain a tool for latitudinarian interpretations. For the purpose of providing clarity irrespective of textual variations, this article proposes that there can be two types of MFN provisions; those that provide some reference point or evidence of their scope, and others that do not provide such reference. These MFN provisions shall be discussed in the subsections below.

207. See Batifort & Heath, *supra* note 4.

208. Rumeli Telekom A.S. & Telsim Mobil Telekomunikasyon Hizmetleri A.S.v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award (July 29, 2008), ¶ 575 at 152, <https://www.italaw.com/sites/default/files/case-documents/ita0728.pdf>; Teinver v. Argentina, Decision on Jurisdiction, ¶ 186 at 42; L.E.S.I. S.p.A. & ASTALDI S.p.A. v. République algérienne démocratique et populaire, ICSID Case No. ARB/05/3, ¶ 150 at 44, Award (Nov. 12, 2008), <https://www.italaw.com/sites/default/files/case-documents/ita0457.pdf>; Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, ¶¶ 148-167, Award (Aug. 27, 2009), <https://www.italaw.com/sites/default/files/case-documents/ita0075.pdf>; White Industries v. India, ¶ 16.1.1 (a); ATA Construction, Industrial & Trading Company v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/08/2, ¶ 125 at 64, Award (May 18, 2010), <https://www.italaw.com/sites/default/files/case-documents/ita0043.pdf>; Sergei Paushok, et al. v. The Government of Mongolia, UNCITRAL, ¶ 254 at 46, Award on Jurisdiction and Liability (Apr. 28, 2011), <https://www.italaw.com/sites/default/files/case-documents/ita0622.pdf>; EDF International S.A. et al. v. The Argentine Republic, ICSID Case No. ARB/03/23, ¶ 929 at 223, Award (June 11, 2012), <https://www.italaw.com/sites/default/files/case-documents/ita1069.pdf>; Arif v. Moldova, ¶¶ 395-396 at 96; OAO Tatneft v. Ukraine, UNCITRAL, ¶ 426, Award on the Merits (Perm. Ct. Arb. 2014), <https://www.italaw.com/sites/default/files/case-documents/italaw8622.pdf>; Al-Warraq v. Indonesia, ¶551, Final Award; MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, ¶¶ 100-104 at 27, Award (May 25, 2004), <https://www.italaw.com/sites/default/files/case-documents/ita0544.pdf>.

A. VCLT Article 31

Article 31(1) of the VCLT provides for treaty interpretation on the basis of plain and ordinary meaning.²⁰⁹ When interpreting treaty provisions, paramount importance has been given to the ordinary meaning in light of the treaty's object and purpose.²¹⁰ This approach incorporates both a textual and a teleological approach to interpretation.²¹¹ It is argued that the first attempt to interpret MFN provisions should be based on the ordinary meaning of the specific language of the provisions.²¹² MFN provisions, which include phraseology or terms such as "in like circumstances,"²¹³ "similar situations,"²¹⁴ or "in its territory,"²¹⁵ therefore, should be considered as having reference to their scope. The use of this phraseology means discrimination is expected to arise between relevant comparators only. As relevant comparators compete with each other in the same sector or business, MFN provisions should be used to determine discrimination based on actual treatment in the territory of the host state.²¹⁶ In this respect, an analysis of the aforementioned phrases by different tribunals is desirable to understand how

209. VCLT, *supra* note 14, art. 31(1). For more literature on treaty interpretation with respect to VCLT, see U. LINDERFALK, *ON THE INTERPRETATION OF TREATIES: THE MODERN INTERNATIONAL LAW AS EXPRESSED IN THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES* (2007); *see also* R.K. GARDINER, *TREATY INTERPRETATION* (Oxford U. Press, 2008); A. ORAKHELASHVILI, *THE INTERPRETATION OF ACTS AND RULES IN PUBLIC INTERNATIONAL LAW* (2008); QUEEN MARY U., *TREATY INTERPRETATION AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: 30 YEARS ON* (M. Fitzmaurice et al. eds., 2010); EUROPEAN U. INSTITUTE, *THE IMPACT OF HUMAN RIGHTS LAW ON GENERAL INTERNATIONAL LAW 235* (M.T. Kamminga & M. Scheinin eds., 2009); Liliana E. Popa, *The Holistic Interpretation of Treaties at the International Court of Justice*, 87 *NORDIC J. INT'L L.* 249, 269 (2018).

210. SOREL & EVANO, *supra* note 202, at 807.

211. Kenneth J. Vandeveld, *Treaty Interpretation from a Negotiator's Perspective*, 21 *VAND. J. TRANSNAT'L L.* 281, 291 (1988).

212. SOREL & EVANO, *supra* note 202, at 807.

213. North American Free Trade Agreement, Can.-Mex.-U.S., art. 1103, Dec. 17, 1992, 32 *I.L.M.* 289 (1993).

214. Agreement Between the Republic of Turkey and Turkmenistan Concerning the Reciprocal Promotion and Protection of Investments, Turk.-Turkm., art. II, May 2, 1992.

215. Agreement Between the Government of The Republic of India and the Government of The Republic of The Philippines for The Promotion and Protection of Investments, India-Phil., art IV, Jan. 28, 2000 [hereinafter India-Philippines BIT].

216. For more on relevant comparators, refer to Part II *supra*.

these phrases have been interpreted. Various tribunals²¹⁷ have interpreted “like circumstances” as factors with the same environment,²¹⁸ trade,²¹⁹ nature of service and functions,²²⁰ and public policy considerations.²²¹ The tribunal in *Cargill v. Mexico* held that “like circumstances” in NAFTA Section 1102 does not refer to “like products” in the GATT, thereby rejecting the claimant’s argument that “like goods” is an essential component of “like circumstances.”²²² The tribunal reasoned that if the NAFTA drafters intended to equate these two terms, they would have done so.²²³ The tribunal further emphasized that even if two investors work in the same sector, that does not necessarily mean they are in “like circumstances.”²²⁴ In *Apotex*, the tribunal held that, while Apotex (a US company) and other foreign pharmaceutical companies were relevant comparators, the companies were not in like circumstances because the US did not put import alerts on other foreign companies.²²⁵ The tribunal, however, made it clear that this assessment must be made only in relation to relevant investors (comparators).²²⁶

“Like circumstances,” according to various tribunals, should be interpreted based on the facts and circumstances of each case.²²⁷ It is accepted that two investors working in the same sector may not always be in “like circumstances,” and it is also noted that “like circumstances” should be decided on a case-by-case basis. It is contended, however, that “like circumstances” can only be applicable in cases of relevant comparators. It is

217. *Merrill & Ring v. Canada*, ¶ 88.

218. *SD Myres v. Canada*, ¶ 250.

219. *Apotex v. US*, ¶ 8.15.

220. *SD Myres v. Canada*, ¶ 249.

221. *Id.* ¶ 246.

222. *Cargill v. Mexico*, ¶ 193.

223. *Id.*; see also *Methanex v. US*, ¶ 25.

224. *Cargill v. Mexico*, ¶ 191.

225. *Apotex v. US*, ¶ 8.15.

226. *Id.*

227. *Pope & Talbot v. Canada*, ¶ 75; *SD Myres v. Canada*; *Merrill & Ring v. Canada*; *Grand River v. US*, ¶ 61. It is important to clarify here that the abovementioned interpretations were made in the context of national treatment provisions, either under NAFTA § 1102 or a particular BIT. However, tribunals, while interpreting MFN provisions, have been influenced by interpretations of national treatment provisions made by previous investment tribunals. *Parkerings v. Lutanía*, ICSID Case No. ARB/05/8, Award, ¶¶ 369–70 (Sept. 11, 2007), <https://www.italaw.com/sites/default/files/case-documents/ita0619.pdf>.

thus a qualifier that exists only when relevant comparators exist. The ILC also adopts the notion that an analysis of “like circumstances” can only be made when the investors are relevant comparators.²²⁸ This argument is bolstered by the interpretation of “similar situation” by the tribunal in *Ickale*.²²⁹ In *Ickale*, the tribunal, held that the meaning of “treatment in similar situations” has to be determined according to the factual situations of a case, and this cannot be understood to include importing an MFN provision from a third-party BIT.²³⁰ Consequently, the tribunal rejected the investor’s request to borrow an MFN provision from a third-party BIT.²³¹ This clarified the meaning of “similar situations” as applicable to internal measures only.

The tribunal in *UPS v. Canada*²³² set forth a three-step analysis to determine whether a host state has acted in an inconsistent manner. The first step is to determine whether an investor received treatment.²³³ The second step is to delineate if investors were in like circumstances.²³⁴ The third step is to figure out whether the treatment was less favorable.²³⁵ The inquiry into whether investors are in like circumstances has to start with an analysis of treatment that investors receive. As noted above, the analysis of the treatment of investors can only be made among relevant comparators. Therefore, phrases such as “like circumstances” or “similar situations” give some reference with regard to the scope of MFN; thereby, it should be used only in cases regarding internal measures.

Further, the ordinary meaning of an MFN provision must be ascertained in light of the preamble of the treaty. The preamble of most BITs provides for “[i]ntending to create and maintain favourable conditions for the Investments and Investors of one Contracting Party in the territory of the other Contracting Party.”²³⁶ In this situation, where parties are trying to create favorable conditions for investments *in the territory* of each other,

228. ILC-MFN-2015, *supra* note 203, ¶ 163.

229. *Ickale v. Turkmenistan*.

230. *Id.* ¶ 329.

231. *Id.* ¶ 332.

232. *UPS v. Canada*, ¶ 83.

233. *Id.* ¶ 83 (a).

234. *Id.* ¶ 83 (b).

235. *Id.* ¶ 83 (c).

236. The India-Philippines BIT is one such example.

application of MFN provisions should be sought for internal measures only in the territory of contracting parties.²³⁷ The object and purpose of BITs,²³⁸ however, are often interpreted without consideration of the language in the preamble.²³⁹ Interpreters usually depend on the general idea behind the signing of BITs to interpret its object and purpose.²⁴⁰ They also often construe the object and purpose independent of the treaty provision.²⁴¹

Such an approach may not be a sound way to interpret MFN provisions. The expression “in its territory” means that unless differential treatment has taken place within the territory of the host state, there is no breach of the MFN provision. In fact, the tribunal in *Berschader v. Russia* interpreted the expression as the intention of contracting parties to accord material rights to investors within the territory of contracting states.²⁴² Perez-Aznar argues that the analysis of “in its territory” by the *Berschader* tribunal indicates that substantive provisions contained in other BITs should not be considered as “treatment in the territory” of host states.²⁴³ It is submitted, therefore, that these types of MFN provisions should be applicable only in cases of internal measures, and parties may not borrow any provisions from a third-party BIT.

The abovementioned analysis, however, cannot be made applicable to MFN provisions that do not give reference to their scope. This is due to the fact that the language in these MFN provisions is so plain, general, and vague that it leaves the scope open for all types of interpretation.²⁴⁴ When the interpretation of MFN provisions cannot be ascertained using the ordinary meaning of the texts, it is pertinent to resort to additional

237. Perez-Aznar, *supra* note 3, at 799; *see, e.g.* Hochtief v. Argentina, ¶¶ 105–109.

238. Namely, the promotion and protection of investors and their investments.

239. LINDERFALK, *supra* note 209, at 203; one such example would be Schill, *Multilateralizing Investment Treaties through Most-Favored-Nation Clauses*, *supra* note 7, at 554.

240. *Id.*

241. *Id.*

242. Vladimir Berschader & Moïse Berschader v. The Russian Federation, SCC Case No. 080/2004, Award, ¶ 185 (Apr. 21, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0079_0.pdf.

243. Perez-Aznar, *supra* note 3, at 799.

244. Borrowing provisions from a third-party BIT is one example of this.

tools of treaty interpretation. For this reason, it is necessary to explore Article 31 of the VCLT to find a more acceptable interpretation of MFN provisions.

Article 31(3) of the VCLT provides for an external context for interpretation, which includes subsequent agreement, subsequent practice, and any relevant rules of international law to ascertain the meaning of a treaty provision.²⁴⁵ According to the ILC, subsequent agreement presupposes the deliberate common act or undertaking by the parties.²⁴⁶ “The parties” referred to in this article intends to include all of the original parties to the treaty.²⁴⁷ A separate agreement between a few original members of an earlier treaty does not become a subsequent agreement within the meaning of Article 31(3)(a).²⁴⁸ A subsequent agreement should be an attempt to clarify the meaning of a treaty for the purpose of interpretation.²⁴⁹ In *Maritime Delimitation in the Area between Greenland and Jan Mayen*, the ICJ refused to accept the use of a subsequent agreement because that agreement failed to refer to the treaty.²⁵⁰ Thus, it is important that a subsequent agreement is made to clarify the meaning or interpretation of the provisions of a treaty, and the agreement must be between the original members of the treaty.²⁵¹ Subsequent agreements that clarify the meaning of BIT provisions are difficult to find. In fact, most of the annexes of BITs, which include either the exchange of letters, clarifications, or exceptions, are considered part of the BIT itself.²⁵² In the absence of subsequent agreements, it is difficult to interpret MFN provisions through this approach.

245. VCLT, *supra* note 14; *see generally* Luigi Crema, *Subsequent Agreements and Subsequent Practice within and outside the Vienna Convention*, in TREATIES AND SUBSEQUENT PRACTICE (Georg Nolte ed., 2013).

246. ILC-Subsequent Treaties and Practice, *supra* note 200, ¶10.

247. *Id.*; LINDERFALK, *supra* note 209, at 162.

248. ILC-Subsequent Treaties and Practice, *supra* note 200, ¶ 12.

249. *Id.* ¶ 14.

250. *Maritime Delimitation in the Area between Greenland and Jan Mayen* (Den. v. Nor.), Judgment, 1993 I.C.J. Rep. 1993 38, ¶ 28 (June 14).

251. *See* VCLT, *supra* note 14, art. 31(3)(a); *see also* LINDERFALK, *supra* note 209, at 162.

252. SALACUSE, *supra* note 163, at 127.

With regard to subsequent practice,²⁵³ the ILC connotes the conduct of the state in the form of actions, omissions, or relevant silence.²⁵⁴ The ILC provides that this conduct must be “in the application of the treaty.”²⁵⁵ This includes not only official acts at the international or domestic level, but also:

inter alia, official statements regarding its interpretation, such as statements at a diplomatic conference, statements in the course of a legal dispute, or judgments of domestic courts; official communications to which the treaty gives rise; or the enactment of domestic legislation or the conclusion of international agreements for the purpose of implementing a treaty even before any specific act of application takes place at the internal or at the international level.²⁵⁶

In other words, subsequent practice must be made to clarify the interpretation of *the treaty* through the aforementioned modes of conduct. In the BIT regime, there are various examples of states making assertions during the course of a legal dispute with respect to the interpretation of an MFN provision.²⁵⁷ However, these statements made by states as respondents in ISDS cases may amount to “self-serving attempts to avoid liability.”²⁵⁸ In such a scenario, it becomes difficult to reach a conclusion with respect to the scope of the MFN clause. It is difficult, therefore, to interpret MFN provisions in BITs through subsequent practices of states.

Before an analysis with respect to Article 31(3)(c)²⁵⁹ can be made, it is pertinent to shed some light onto the interpretative approaches taken by the tribunals with respect to Articles 31(3)(a) and (b). While interpreting an MFN provision, it is expected that the tribunals will look into the subsequent practice or agreement of states with respect to the MFN clause itself.

253. VCLT, *supra* note 14, art. 31(3)(b); *see generally* Anthea Roberts, *Subsequent Agreements and Practice: The Battle over Interpretive Power*, in *TREATIES AND SUBSEQUENT PRACTICE* (Georg Nolte ed., 2013).

254. ILC-Subsequent Treaties and Practice, *supra* note 200, ¶ 17.

255. *Id.* ¶ 18.

256. *Id.*

257. *See, e.g.* Spain in *Maffezini v. Spain*, Decision of the Tribunal on Objections to Jurisdiction; Turkmenistan in *Ickale v. Turkmenistan*.

258. Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT'L L. 179, 184 (2010).

259. VCLT, *supra* note 14.

Tribunals in general, however, commit two errors while interpreting MFN provisions in BITs. First, in order to ascertain the scope of MFN provisions, tribunals have *not* looked into the MFN provision in subsequent agreements, but have instead looked into the provision they wish to borrow from a third-party BIT.²⁶⁰ The tribunal in *Maffezini*, in order to interpret the scope of the MFN provision, looked into the subsequent agreements of states with respect to dispute-settlement clauses in other BITs.²⁶¹ The correct approach, however, would be an inquiry into subsequent practices or agreements of states in the context of MFN provisions only, and not with respect to any other treaty provisions. It is problematic to look into the subsequent agreements or practices of states for any other provisions.

Second, inquiries into subsequent agreements and practices must be made in the context of *the basic treaty* only.²⁶² Tribunals, however, usually find the intention of the parties by looking to other BITs signed by the host state.²⁶³ These third-party BITs, which do not have any relation to the basic BIT, cannot be said to be sound interpretative tools for determining the actual scope of MFN provisions in the basic BIT.

When the scope of the MFN provision cannot be ascertained through subsequent agreements and practices, it is desirable to resort to Article 31(3)(c) of the VCLT, which provides for the use of “any relevant rules of international law applicable in relations between the parties” to interpret the MFN provision.²⁶⁴ The “rules of international law” refer to its formal sources, such as treaties, customs, and general principles, while “applicable” refers to binding rules.²⁶⁵ Further, “relevant” means touching upon the same subject²⁶⁶ and relating to the context of the treaty.²⁶⁷ McLachlan describes Article 31(3)(c) as the “master key of

260. *Maffezini v. Spain*, Decision of the Tribunal on Objections to Jurisdiction, ¶ 57; *Berschader v. Russia*, ¶¶ 179, 181.

261. *Maffezini v. Spain*, Decision of the Tribunal on Objections to Jurisdiction, ¶ 58.

262. ILC-Subsequent Treaties and Practice, *supra* note 200.

263. *Maffezini v. Spain*, Decision of the Tribunal on Objections to Jurisdiction, ¶ 57.

264. VCLT, *supra* note 14, art. 31 (3)(c).

265. MARK E. VILLIGIER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON LAW OF TREATIES 433 (2009).

266. GARDINER, *supra* note 209, at 260.

267. ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 243 (2007) (ebook).

a large building” and draws an analogy that like a master key is used when a specific key fails to open the door, Article 31(3)(c) helps in a similar manner with the interpretation of a treaty text when the text is not capable of interpretation using its own terms.²⁶⁸ According to Linderfalk, treaties are usually assumed by the interpreters to have been drafted in a manner so as to not contradict relevant rules of international law.²⁶⁹ In other words, there is an assumption that parties did not intend to act inconsistently with respect to their other obligations under international law when entering into a treaty.²⁷⁰ Even if a treaty intends to deviate from a previous obligation, it has to provide reasons for such deviation expressly in the treaty itself.²⁷¹ In the absence of such express intent, a treaty should be interpreted in a manner that is consistent with the relevant rules of international law. For the purpose of interpretation of MFN provisions, therefore, it is proposed that a few relevant rules must be taken into consideration, as discussed below.

B. Article 34 of VCLT

Pacta tertiis nec nocent nec prosunt; res inter alios acta nec prodest nec nocet provides that an agreement neither creates rights nor obligations for third states.²⁷² This principle is often associated with the principle of state sovereignty and independence.²⁷³ It has received validation and recognition from various international decisions.²⁷⁴ The reflection of this princi-

268. Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention*, 54 INT'L COMP. L. Q. 279, 281 (2005).

269. LINDERFALK, *supra* note 209, at 178.

270. VILLIGIER, *supra* note 265, at 433.

271. McLachlan, *supra* note 268, at 313.

272. VILLIGIER, *supra* note 265, at 467; *see also Article 18-Treaties and Third States*, 29 AM. J. INT'L L. 918, 918–937 (1935); Eric David, *Article 34 (1969)*, in *THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY* 887 (Oliver Corten et al. eds., 2011).

273. VILLIGIER, *supra* note 265.

274. *Certain German Interests in Polish Upper Silesia Case* (Ger.v. Pol.), Judgment, 1926 P.C.I.J. (ser. A) No. 7, at 28–29 (May 25); *Territorial Jurisdiction of the International Commission of the River Oder Case* (U.K. v. Pol.), Judgment, 1929 P.C.I.J. (ser. A) No. 23, at 20 (Sept. 10); *Free Zones Case of Upper Savoy and the District of Gex Case* (Fr. V. Switz.), Judgment, 1932 P.C.I.J. (ser. A/B) No. 46, at 141 (June 7); *Status Eastern Carelia Case*, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 5, at 27 (July 23); *see generally* *Island of Palmas Case* (Neth. v. U.S.), 2 R.I.A.A. 831 (Perm. Ct. Arb. 1928); *North*

ple can be seen in Article 34 of the VCLT,²⁷⁵ which provides that “[a] treaty does not create either obligations or rights for a third State without its consent.”²⁷⁶

The “third state” here means a state that is not a party to the treaty.²⁷⁷ There is hardly any debate about whether Article 34 has been accepted and recognized as a norm of CIL.²⁷⁸ In *Anglo-Iranian Oil Company Case*, the ICJ explained the concept, stating that “[a] third party treaty, independent of and isolated from the basic treaty, cannot produce any legal effect as between the United Kingdom and Iran: it is *res inter alios acta*.”²⁷⁹

In order to create rights and obligations for a third state, two criteria must be satisfied. First, there must be a provision that clearly delineates the rights and obligations for third states as intended by the parties to the treaty. Second, there must be unambiguous consent of the third state to be bound by the obligations arising out of the treaty.²⁸⁰ Neither of these conditions exist in BITs. For the sake of argument, even if one accepts that an MFN provision creates rights for the third states, it is nearly impossible to find the consent of the third states, as well as the BIT makers, to create rights and obligations for third states through an MFN provision.

Article 16 of the ILC’s Draft Articles on MFN Clauses (1978) provides that rights acquired by the beneficiary state are not affected by the treatment of a third state by the granting state.²⁸¹ In other words, the application of MFN provisions is limited to the relationship between the beneficiary state and granting state, and it is not affected by the treatment of a third state by the granting state.²⁸² In this sense, Article 16 supports the general rule of Articles 34 and 35 of the VCLT.²⁸³ Similarly,

Sea Continental Shelf Cases (Den. v. Neth.), Judgment, 1969 I.C.J. Rep. 25 (Feb. 20).

275. See generally VCLT, *supra* note 14.

276. *Id.* art. 34.

277. *Id.* art. 2(1)(h).

278. David, *supra* note 273, at 888. While there are certain qualifications (Articles 35–37) provided in the VCLT with respect to Article 34, those provisions are not relevant in the context of the present study.

279. *Anglo-Iranian Oil Co. Case*, 1952 I.C.J. at 109 (emphasis added).

280. AUST, *supra* note 268, at 257.

281. See generally ILC-MFN-1978, *supra* note 85.

282. *Id.* at 42.

283. *Id.*

Article 17 of the ILC's Draft Articles on MFN Clauses provides that it is irrelevant that the more favorable treatment of the third state by the granting state is extended through a bilateral or multilateral agreement.²⁸⁴ It is evident that the aforementioned articles, which follow Article 34 of the VCLT, clarify the scope of MFN provisions that rights under the third-party BIT is not extended to an investor under the basic BIT. Therefore, the practice of borrowing rights and privileges from third-party BITs with an MFN provision is not only problematic, but also seems contradictory to the accepted norms of general international law.

C. MFN Provisions as Primary Rules Under State Responsibility

A breach of a BIT provision occurs when a state, acting in its sovereign capacity, fails to protect the interest of the investor and their investments.²⁸⁵ Therefore, a combination of two factors gives rise to state responsibility: (1) when states act in their sovereign capacity and (2) when states violate the obligations in a treaty (BIT). There are three basic characteristics of state responsibility: (1) the existence of an international legal obligation between two countries, (2) the violation of such an obligation by either action or omission, and (3) the consequences of such a violation.²⁸⁶ The first characteristic, which imposes particular obligations upon states, is known as primary rules.²⁸⁷ Violation of such rules trigger state responsibility.²⁸⁸

284. *Id.* at 44.

285. UNCTAD, *BILATERAL INVESTMENT TREATIES 1995–2006: TRENDS IN INVESTMENT RULEMAKING* 29 (2007), https://unctad.org/en/Docs/iteia20065_en.pdf.

286. E. Jimenez de Arechaga, *International Responsibility*, in *MANUAL OF PUBLIC INTERNATIONAL LAW* 533 (Sorensen ed., 1968); MALCOLM N. SHAW, *INTERNATIONAL LAW* 781 (6th ed. 2008).

287. Robert Ago, Special Rapporteur, *Second Report on State Responsibility: The Origin of State Responsibility*, at 179, U.N. Doc. A/CN.4/233 (Apr. 20, 1970); for more literature, see J. Combacau & D. Alland, *Primary and Secondary Rules in the Law of State Responsibility: Categorizing International Obligations*, 26 *NETH. Y.B. INT'L L.* 81, 81–109 (1985); JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLE ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARY* 81 (2002).

288. JAMES CRAWFORD, *BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 540 (8th ed. 2008); Int'l Law Comm'n, *Draft Articles on Responsibility of*

An MFN provision in a BIT imposes an obligation upon the host state to not discriminate against foreign investors as relevant comparators in its territory.²⁸⁹ MFN provisions, therefore, serve as primary rules that impose obligations between the two state parties of the BIT. This means that a violation of an MFN provision is an internationally wrongful act and, therefore, invokes state responsibility.

There are two conditions that must be satisfied before an act or omission of a state can be considered as an internationally wrongful act: first, whether the act or omission is attributable to the state (a subjective element), and, second, whether the act or omission has resulted in a breach of an international obligation (an objective element).²⁹⁰ Further, an act cannot be characterized as an internationally wrongful act unless it constitutes a violation of an international obligation.²⁹¹ A mere attribution of conduct to the state, therefore, must be distinguished from the characterization of conduct as a wrongful act.²⁹² As such, even when an act or measure that has affected the interests of an investor is attributed to the state, an independent inquiry into the legality of such measures has to be made to declare such measure an internationally wrongful act. Whether an act attributed to a state constitutes an internationally wrongful act depends primarily upon the precise terms of the primary rules.²⁹³ In other words, when a state, through actions already attributed to it, fails to fulfill the requirements imposed by the primary or secondary rules,²⁹⁴ it becomes an internationally wrongful act.²⁹⁵

To establish that a state has committed a wrongful act, an inquiry into the nature of an MFN provision is necessary. Since MFN provisions are the instruments of non-discrimination, a

States for Internationally Wrongful Acts, art. 1, U.N. Doc. A/56/10 (Oct. 24, 2001) [hereinafter Draft Articles].

289. Perez-Aznar, *supra* note 3, at 778.

290. Draft Articles, *supra* note 289, art. 2.

291. *Id.* art. 3.

292. *Id.* art. 4.

293. *Id.* art. 12.

294. Secondary rules under state responsibility deal with conditions for breach of primary rules and the legal consequences of such a breach. See Ulf Linderfalk, *State Responsibility and the Primary-Secondary Rules Terminology – The Role of Language for an Understanding of the International Legal System*, 78 NORDIC J. OF INT'L L. 53, 55 (2009).

295. *Id.*

determination of whether discrimination has taken place cannot be made without drawing comparisons between relevant comparators.²⁹⁶ As discussed above, however, no such inquiries are made when tribunals interpret MFN provisions to borrow clauses from third-party BITs. In the absence of such inquiries, it is difficult to establish how much injury is caused to the aggrieved investor to determine the quantum of reparation. In such a scenario, it is difficult to establish a causal link between a wrongful act and injury caused to the investor.²⁹⁷ Thus, a state cannot be held responsible for breaching an MFN provision unless an inquiry of discrimination between relevant comparators is made. It is not the function of MFN provisions to import clauses from other BITs; being a primary rule, it requires a comparison between relevant comparators.²⁹⁸

D. Principle of Acquiescence in International Law

It is likely that some BITs signed by the host state have more favorable provisions than other BITs. Negotiations regarding treaty provisions vary from country to country, and this has a huge influence on the final outcome of any BIT.²⁹⁹ This means that there is a possibility of more favorable provisions being implemented in third-party BITs before a dispute arises. Does the existence of more favorable provisions in third-party BITs, in and of themselves, constitute a violation of the MFN provision in the basic BIT? If so, why does the investor have to wait for any dispute to arise when there is already a violation of their rights because of more favorable provisions in third-party BITs? Is the right of an investor not violated the moment it enters into the territory of a host country because the basic treaty may have less favorable provisions as compared to a third-party BIT?

A counter argument to the questions posed above is that a violation only takes place if an investor claims that there has been a breach of an MFN provision. Technically, this means that an investor continues to maintain its relationship with the host state, despite the knowledge of the more favorable provi-

296. Perez-Aznar, *supra* note 195, at 56–57.

297. *Id.* at 57.

298. *Id.*

299. SALACUSE, *supra* note 253, at 127; M. I. Khalil, *Treatment of Foreign Investment in Bilateral Investment Treaties*, 7 ICSID REV.-FOREIGN INVEST. L. J. 339, 350–51 (1992).

sions in third-party BITs, until the host state violates the rights of the investor. The principle of acquiescence, which is recognized in most jurisdictions³⁰⁰ and in international law, states that inaction on behalf of a state may lead to a loss of claims by the state when the state should have shown some form of activity.³⁰¹ In other words, when any person/body/state participates in a process without objecting to any part of the process, that person/body/state loses the right to challenge the final outcome of that process.³⁰²

It is generally understood that a state, by not asserting its claim, has implicitly accepted the extinction of its claim.³⁰³ Tams argues that for the application of the doctrine of acquiescence to apply, three relevant elements must be satisfied.³⁰⁴ First, the state must have failed to assert its claim.³⁰⁵ Second, failure to assert a claim must be extended for a certain period of time.³⁰⁶ Third, a state must have failed to assert claims *in circumstances that would have required action*.³⁰⁷ These elements seem to be met when applied to the relationship between an investor and a host state. An investor should not be allowed to use MFN provisions to borrow a favorable provision from another BIT if they never objected to it, thereby failing to assert their claim. In fact, the investor maintained its amicable relationship for a long period of time with the host state until the dispute arose; therefore, borrowing an MFN provision from another BIT should be barred by the doctrine of acquiescence.

300. Christian J. Tams, *Waiver, Acquiescence and Extinctive Prescription*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* 1036 (J. Crawford et al. eds., 2010).

301. *Id.*

302. Draft Articles, *supra* note 289, art. 45(b); *see generally*, David J. Bederman, *Acquiescence, Objection and the Death of Customary International Law*, 21 *DUKE J. COMP. & INT'L L.* 31, 32 (2010); I. C. MacGibbon, *Customary International Law and Acquiescence*, 33 *BRIT. Y.B. INT'L L.* 115 (1957); I. C. MacGibbon, *The Scope of Acquiescence in International Law*, 31 *BRIT. Y.B. INT'L L.* 143 (1954); P. Cuasay, *Borders on the Fantastic: Mimesis, Violence, and Landscape at the Temple of Preah Vihear*, 32 *MOD. ASIAN STUDIES* 849 (1998); Phil C. W. Chan, *Acquiescence/Estoppel in International Boundaries: Temple of Preah Vihear Revisited*, 3 *CHINESE J. INT'L L.* 421, 422 (2004).

303. Tams, *supra* note 301, at 1043.

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

E. Non-prohibition does not Necessarily mean Permission

For the purpose of avoiding redundancy, a detailed analysis of the rules of international law with respect to the interpretation of MFN clauses is not reproduced here.³⁰⁸ None of the aforementioned rules provide any justification for borrowing clauses from third-party BITs that include MFN provisions. For this reason, it is submitted that a proper interpretation of an MFN provision does not allow it to import provisions from a third-party BIT.

Even if international investment law is considered a self-contained regime having *lex specialis* rules that prevail over the rules of general international law, for matters not governed by *lex specialis*, rules of general law are applicable.³⁰⁹ Thus, there are gaps within this regime that need support from rules of general international law to be resolved. One such area would be the practice of borrowing provisions from third-party BITs; therefore, it is pertinent to look to the rules and principles of general international law to determine if this practice is permitted.

Article 31(4) of the VCLT explores the subjective element of party intention for treaty interpretation, providing that “[a] special meaning shall be given to a term if it is established that the parties so intended.”³¹⁰ In other words, whether the parties to the treaty have given a special meaning to a term that differs from the common meaning has to be established by special evidence in the context of the treaty.³¹¹ The burden of proving that the parties actually intended to give special meaning to a treaty term, however, lies with the party asserting the special meaning.³¹² For the interpretation of the scope of MFN provisions, the burden is on the parties, as well as the interpreters, to provide special evidence to prove their claim that an MFN provision can be borrowed from a third-party BIT. Unfortunately, in none of the cases discussed above or otherwise have

308. See *supra* Part II.A.

309. Int'l Law Comm'n, Rep. on Fragmentation of International Law: Difficulties Arising From The Diversification And Expansion Of International Law, at 179, U.N. Doc. A/CN.4/L.682 (2006).

310. VCLT, *supra* note 14, art. 31(4).

311. GARDINER, *supra* note 209, at 293.

312. *Id.* at 295; AUST, *supra* note 268, at 244; OLIVER DORR & KIRSTEN SCHMALENBACH, VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 569 (Springer ed., 2012).

the parties provided evidence that the treaty makers intended to allow for MFN provisions to be borrowed from third-party BITs.³¹³ In fact, there are ample rules in international law, as discussed in the earlier sections,³¹⁴ that prohibit and contradict this practice. The scope of an MFN provision, therefore, has to be confined to internal measures.

IV. THE PROBLEMS BORROWING MFN PROVISIONS CREATE

The practice of borrowing provisions from third-party BITs creates several normative and practical problems. This part deals with some of these problems, such as jurisdictional issues, treaty shopping, and the problem of free-ridership.

A. The Jurisdiction of Investment Tribunals

There are a number of investor-state dispute settlement (ISDS) cases dealing with jurisdictional issues in investment arbitration.³¹⁵ However, of the cases that have extended the jurisdiction of the tribunal, none is as problematic as *Garanti Koza LLP v. Turkmenistan*.³¹⁶ The tribunal in this case imported the consent of Turkmenistan to an International Center for Settlement of Investment Disputes (ICSID) arbitration from a third-party BIT (Switzerland-Turkmenistan BIT)³¹⁷ into the

313. *See supra* Part II.

314. *See supra* Part III. .

315. *Teinver v. Argentina*, Decision on Jurisdiction; *Berschader v. Russia*; *Wintershall v. Argentina*; *RosInvestCo UK Ltd. V. The Russian Federation*, SCC Case No. V 079/2005, Award on Jurisdiction (Oct. 1, 2007), <https://www.italaw.com/sites/default/files/case-documents/ita0719.pdf>; *Garanti Koza v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent (July 3, 2013), <https://www.italaw.com/sites/default/files/case-documents/italaw1540.pdf>; *Renta 4 S.V.S.A et al. v. The Russian Federation*, SCC Case No. 24/2007, Award (July 20, 2012), <https://www.italaw.com/sites/default/files/case-documents/ita1075.pdf>; *Daimler v. Argentina*; *Plama Consortium Ltd. V. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (Feb. 8, 2005), <https://www.italaw.com/sites/default/files/case-documents/ita0669.pdf>; *Telenor Mobile Communications A.S. v. The Republic of Hungary*, ICSID Case No. ARB/04/15, Award (Sept. 13, 2006), <https://www.italaw.com/sites/default/files/case-documents/ita0858.pdf>.

316. *Garanti Koza v. Turkmenistan*, Decision on the Objection to Jurisdiction for Lack of Consent.

317. Agreement Between the Swiss Federal Council and the Government of Turkmenistan on the Promotion and Reciprocal Protection of Investments, Switz.-Turkm., May 15, 2008.

basic BIT (UK-Turkmenistan BIT),³¹⁸ despite the fact that Turkmenistan did not give its consent to settle the dispute through ICSID arbitration.³¹⁹ The tribunal, after establishing that Turkmenistan consented to international arbitration by virtue of Article 8(1) of the UK-Turkmenistan BIT,³²⁰ moved to the analysis of Article 8(2) of the UK-Turkmenistan BIT.³²¹ Article 8(2) of the UK-Turkmenistan BIT provides that the parties can submit their disputes to three forums in cases of international arbitration: the ICSID, the International Chamber of Commerce (ICC), and the United National Commission on International Trade Law (UNCITRAL).³²² Disputing parties must give their consent to one of the forums to resolve their claims.³²³

Despite the objection from Turkmenistan that it had not consented to ICSID arbitration, and that it only consented to submit disputes to UNCITRAL, the tribunal used the MFN provision in the UK-Turkmenistan BIT to import the consent of Turkmenistan to ICSID arbitration from a third-party BIT. In the dissenting opinion, Laurence Boisson de Chazournes, who was one of the arbitrators in the case, criticized the majority for ignoring the requirement of consent in Article 8(2) of the UK-Turkmenistan BIT, as well as failing to distinguish between consent to initiate arbitration and consent to arbitration.³²⁴

The majority in *Garanti Koza LLP* ignored one of the cardinal principles of international arbitration; that is, party autonomy. It is the parties who mutually decide which arbitration rules govern the arbitral proceedings.³²⁵ The absence of such consent

318. Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Turkmenistan for the Promotion and Protection of Investments, U.K.-Turkm, Feb. 9, 1995, [hereinafter, UK-Turkmenistan BIT].

319. *Garanti Koza v. Turkmenistan*, Decision on the Objection to Jurisdiction for Lack of Consent, ¶ 9.

320. *Id.* ¶ 29.

321. *Id.* ¶ 34.

322. UK-Turkmenistan BIT, *supra* note 319, art. 8.

323. *Id.*

324. Eric De Brabandere, *Importing Consent to ICSID Arbitration? A Critical Appraisal of Garanti Koza v. Turkmenistan*, INV. TREATY NEWS (May 14, 2014), <https://www.iisd.org/itn/2014/05/14/importing-consent-to-icsid-arbitration-a-critical-appraisal-of-garanti-koza-v-turkmenistan/>.

325. SIMON GREENBERG ET AL, INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA PACIFIC PERSPECTIVE 101 (2012).

not only violates the general law relating to arbitration, but may also render the award unenforceable.³²⁶ Therefore, party autonomy with respect to the governing law of the arbitration has to be respected. Unfortunately, the majority in *Garanti Koza LLP* did not give any relevance to this fundamental, basic principle of arbitration. Dispute settlement provisions in any BIT are a form of the arbitration agreement. Until and unless both the parties agree to be governed by the same arbitral rules, it is not wise or sound to allow any arbitration. As much as an investment tribunal has a right to determine its own jurisdiction (based on the principle of competence-competence),³²⁷ parties to the dispute also have the right to decide the rules that govern their dispute (principle of party autonomy).³²⁸ Tribunals have been criticized for converting a fiction into reality when they assume that a clause in a third-party BIT is automatically incorporated into the basic BIT through the MFN provision and thereby exercise jurisdiction to resolve the dispute.³²⁹ This behavior sparks criticism because these tribunals have acted contrary to the general principles of international law.³³⁰

Further, such interpretation of an MFN provision may lead to forum shopping,³³¹ which is already a problematic factor³³² in

326. GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS* 560 (Kluwer Law International 2d ed., 2001).

327. The principle of competence-competence refers to the power of the arbitral tribunals to decide matters relating to its own jurisdiction.

328. The principle of party autonomy refers to freedom of the parties to arbitration to make a varied range of decisions with respect to arbitration. The appointment of an arbitrator and choosing of law governing arbitral proceedings are a few examples.

329. Douglas, *supra* note 7, at 108.

330. *Id.*

331. Katia Yannaca, Small, *Improving the System of Investor- State Dispute Settlement: An Overview* ¶¶ 79–80 (OECD Working Paper on International Investment, No 2006/ 1, 2006), available at http://www.oecd.org/china/WP-2006_1.pdf (explaining that forum shopping is “the process throughout which one of the parties to a dispute attempts to bring a claim before the forum most advantageous to him or her.”).

332. Richard Leung, *Arbitration and Forum Shopping in the Seat*, 2016/SOM1/EC/WKSP1/006 (Feb. 26, 2016), http://mddb.apec.org/Documents/2016/EC/WKSP1/16_ec_wksp1_006.pdf. Leung explains forum shopping as, “obtain[ing] a home advantage, or at least the perception of such an advantage, insofar as a particular seat (and its national law on *arbitration*) will

international arbitration.³³³ In commercial arbitration cases where forum shopping takes place due to the jurisdictional overlap of different tribunals,³³⁴ it is possible that in investment arbitration cases, a tribunal that ordinarily would not have jurisdiction over the dispute may import it using an MFN clause in the basic BIT. For example, an investor may use the MFN clause in the basic BIT to borrow a completely different dispute settlement forum to resolve the dispute contained in the third-party BIT. In this situation, not only is the principle of party autonomy greatly undermined, but it also encourages the worst form of forum shopping cases to ISDS claims.

B. Treaty Shopping

Treaty shopping, as explained by Jorun Baumgartner, is a practice by investors to access more favorable procedural or substantive provisions aimed at invoking, creating, or changing nationality through structuring or restructuring.³³⁵ There are various policy concerns related to treaty shopping, including, inter alia, reciprocity,³³⁶ legitimacy concerns,³³⁷ sustainable development,³³⁸ the threat of regulatory chill,³³⁹ and lack of a level playing field.³⁴⁰ These policy concerns related to treaty shop-

give rise to the selection or appointment of *arbitrators* with a corresponding nationality or background.” *Id.* (emphasis added).

333. See generally Joost Pauwelyn & Luiz Eduardo Salles, *Forum Shopping before International Tribunals: (Real) Concerns, (Im)Possible Solutions*, 42 CORNELL INT'L L. J. 77 (2009).

334. *Id.* at 79.

335. JORUN BAUMGARTNER, *TREATY SHOPPING IN INTERNATIONAL INVESTMENT LAW* 33 (2016).

336. *Id.* at 39.

337. *Id.* at 49.

338. *Id.* at 59; for more literature on sustainable development, see GRO HARLEM BRUNDTLAND, *OUR COMMON FUTURE: THE REPORT OF THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT* (1987), <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf>; Markus Gehring & Andrew Newcombe, *Introduction to Sustainable Development in World Investment Law*, in *SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW* 4–5 (Marie-Claire Cordonier Segger et al. eds., 2011).

339. BAUMGARTNER, *supra* note 336, at 62.

340. *Id.* at 63; see generally, Christoph Schreuer, *Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration*, in *THE LAW & PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS* 1–17 (2005); Wenhua Shan, *From “North-South Divide” to “Private-Public Debate”: Revival of the*

ping disrupt the balance of BITs and the relationship between states. Concerns about disruptive treaty shopping have also been expressed by the tribunals in *Maffezini* and *Salini*.³⁴¹

It is contended that the broad application of MFN provisions to import clauses from third-party BITs leads to treaty shopping. This assessment can be demonstrated by establishing the relationship between actual measures taken by the host state and the provision that is requested to be borrowed from the third-party BIT. The table below explains this relationship illustrated by some cases.

Calvo Doctrine and the Changing Landscape of International Investment Law, 27 NORTHWEST. J. INT'L L. & BUS. 631 (2007).

341. *Maffezini v. Spain*, Decision of the Tribunal on Objections to Jurisdiction, ¶ 63; *Salini Costruttori S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, ¶¶ 114–15 (Nov. 15, 2004), <https://www.italaw.com/sites/default/files/case-documents/ita0735.pdf>.

Table 1: Relationship between Actual Measures and Provisions Sought for Borrowing

Case	Actual Measure	Basic BIT	Provision requested to be borrowed	Nature of imported provision	Third-party BIT
Garanti Koza v. Turkmenistan ³⁴²	Contractual breach	UK-Turkmenistan BIT	Consent to ICSID arbitration (Dispute Settlement Clause)	Extending jurisdiction	Switzerland-Turkmenistan BIT
Maffezini v. Spain ³⁴³	Flawed advice from public-private entity (SODIGA) to investor's company (EAMSA)	Argentina-Spain BIT	Shorter waiting period for arbitration	Relaxing admissibility	Chile-Spain BIT
MTD v. Chile ³⁴⁴	Failure of the government to rezone agricultural land into residential and commercial land	Malaysia-Chile BIT	FET	Absence of FET in Basic BIT	Chile-Denmark BIT and Chile-Croatia BIT
Ansung Housing v. China ³⁴⁵	Failure of the government to fulfill its assurances to the investor	China-Korea BIT	No temporal limitation for an investor to initiate an arbitration	Relaxation of time-barred claims	Reference to "most Chinese BITs"

Source: Author

As the table shows, there is in fact no relationship between actual measures and the provisions requested to be borrowed

342. Garanti Koza v. Turkmenistan, Decision on the Objection to Jurisdiction for Lack of Consent.

343. Maffezini v. Spain, Decision of the Tribunal on Objections to Jurisdiction.

344. MTD v. Chile.

345. Ansung Housing v. China.

by the investor. As succinctly put by Perez-Aznar, tribunals do not inquire whether there is a prima facie breach of an MFN provision, rather they inquire whether imported provisions have been violated.³⁴⁶ This means the investor is free to choose any provision in any of the third-party BITs signed by the host state that is most advantageous to it, independent of the actual measures taken by the host state. Without a doubt, this is treaty-shopping.

Further, in the absence of a relationship between the actual measures and the imported provisions, what is the deciding factor that allows for a third-party BIT provision to protect the interest of an aggrieved investor in a particular dispute? Are there any guidelines for this analysis? Or does the assessment depend entirely on the will of the investor? For example, if an investor is using an MFN provision in an ISDS case against India, what factors are relevant to decide which of the BITs signed by India the investor will use in its dispute?

To determine whether discrimination has occurred, the first step is to identify the relevant comparator, and the second step is to identify the favorable measure provided to the relevant comparator.³⁴⁷ In the unique practice of borrowing, however, the first step is to decide which measure an aggrieved investor wants to borrow from any of the BITs signed by the host state. Then, the second step is to assert that there is a chance that an imaginary relevant comparator (even if they may not exist in reality) takes advantage of the favorable provision that is being borrowed. If both elements are satisfied, there is discrimination by the host state. In sum, it simply depends on the investor to choose the BIT provision that is most advantageous to them.

C. Free-riders in the BIT Regime?

When two countries agree to a bilateral treaty, a third state that benefits from the treaty without being involved in the negotiation is a free-rider.³⁴⁸ In other words, an investor (or their home country) who is not involved in the process of third-party BIT negotiations but reaps the benefits or rights from the

346. Perez-Aznar, *supra* note 3, at 781.

347. *UPS v. Canada*.

348. Wisarut Suwanprasert, *The Role of the Most Favored Nation Principle of the GATT/WTO in the New Trade Model*, 1, 22 (2016) (unpublished, Vanderbilt U.), available at <https://ssrn.com/abstract=2713416>.

third-party BIT, becomes a free-rider. Even in a multilateral framework like the GATT, the problem of free-riders subsisted until the Uruguay Round.³⁴⁹ The Uruguay Round took special steps to deal with this problem, like the implementation of a single package deal, and the requirement that all parties must accept all parts of the Uruguay Round.³⁵⁰

The problem of free-riders entails two incentive problems;³⁵¹ first, it is possible that countries simply stop entering into treaties and instead enjoy benefits as a free-rider,³⁵² and, second, countries that enter into negotiations may reach an inefficient agreement because they may not internalize benefits of their liberalization.³⁵³ The consequences of allowing free-riders to participate in the investment regime through an arbitral decision³⁵⁴ are evident by the fact that India has removed the MFN provision from its new model BIT.³⁵⁵ Multilateral frameworks like the GATT and the WTO have undertaken steps to tackle the problem of free-riders. In the investment law regime, however, free-riders are promoted for creating a (pseudo) multilateral framework using MFN provisions. Arguably, the use of MFN provisions to borrow clauses from third-party BITs promotes free-ridership. This is certainly not in the interest of the BIT regime, as it disincentivizes states to negotiate efficient BITs.

V. EXAMPLES OF RECENT STATE BEHAVIOR: *LEX LEGE FERENDA?*

It is important to understand how states have reacted to the use of MFN provisions for borrowing clauses from third-party BITs. It is obvious that a state's reaction to this practice de-

349. JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 160 (1997).

350. *Id.*, except annex IV-plurilateral agreements.

351. Rodney D. Ludema & Anna Maria Mayda, *Do countries free ride on MFN?*, 77 *J. INT'L ECON.* 137, 137 (2009).

352. *Id.*; see Jacob Viner, *The Most Favored Nation Clause in American Commercial Treaties*, 32 *J. POL. ECON.* 101, 105 (1924); see generally Harry G. Johnson, *An Economic Theory of Protectionism, Tariff Bargaining and the Formation of Customs Unions*, 73 *J. POL. ECON.* 256, 256–83 (1965); Robert Pahre, *Most-Favoured Nations Clauses and Clustered Negotiations*, 55 *INT'L. ORG.* 859, 859–90 (2001).

353. See Ludema & Mayda, *supra* note 351.

354. *White Industries v. India*.

355. *New Indian Model BIT*, *supra* note 149.

depends on the role it played. The behavior of the state as the respondent in an ISDS case will be different than when the state has a vested interest in a broad interpretation of an MFN provision. In this context, a restrictive interpretation generally favors capital-importing countries, and an expansive interpretation generally favors capital-exporting countries.³⁵⁶ Thus, statements supporting the conventional use of MFN provisions made by capital-exporting countries—like Austria,³⁵⁷ Australia,³⁵⁸ Italy,³⁵⁹ as well as a few developing countries in the General Assembly—should not be taken as an endorsement of borrowing MFN provisions by all countries.³⁶⁰

Scholarly literature shows that capital-exporting countries do not hesitate to adopt the restrictive approach for MFN interpretation when they become the respondents in ISDS cases.³⁶¹ It is difficult, therefore, to ascertain the intended use of MFN provisions by capital-exporting countries because they change their stance on MFN provisions in BITs based on convenience. Developing countries have suffered due to such expansive interpretations of MFN provisions; for example, India (*White Industries*³⁶²), Pakistan (*Bayindir*³⁶³), Argentina (*Siemens*,³⁶⁴ *Gas Natural*,³⁶⁵ *Camuzzi*,³⁶⁶ *Suez*,³⁶⁷ and *National Grid*³⁶⁸), Turkmenistan (*Garanti Koza*³⁶⁹), Chile (*MTD*³⁷⁰), and more. In this

356. Vesel, *supra* note 7, at 132.

357. U.N. GAOR, 67th Sess., 20th mtg. ¶ 117, UN Doc. A/C.6/67/SR.20 (Nov. 2, 2012).

358. U.N. GAOR, 68th Sess., 24th mtg. ¶ 54, UN Doc. A/C.6/68/SR.24 (Nov. 4, 2013).

359. U.N. GAOR, 70th Sess., 17th mtg. ¶ 56, UN Doc. A/C.6/70/SR.17, (Nov. 2, 2015).

360. *See, contra*, Paparinskis, *supra* note 5.

361. Vesel, *supra* note 7, at 132.

362. *White Industries v. India*.

363. *Bayindir v. Pakistan*.

364. *Siemens v. Argentina*.

365. *Gas Natural v. Argentina*.

366. *Camuzzi International S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Objection to Jurisdiction (May 11, 2005), <https://www.italaw.com/sites/default/files/case-documents/ita0108.pdf>.

367. *Suez v. Argentina*.

368. *National Grid v. Argentina*.

369. *Garanti Koza v. Turkmenistan*, Decision on the Objection to Jurisdiction for Lack of Consent.

370. *MTD v. Chile*.

respect, Venezuela,³⁷¹ Cuba,³⁷² and India³⁷³ have already expressed their concerns about borrowing MFN provisions.³⁷⁴ It is also surprising that despite contesting the borrowing of MFN provisions from third-party BITs in ISDS cases,³⁷⁵ many states have not challenged this practice in any other international forum. At the same time, there are also examples of states that have reacted very strongly to this practice.³⁷⁶ The following section undertakes an assessment of a few ways that states have reacted in recent years.

A. *The Indian Model BIT*

The year 2015 brought an important change to India's BIT approach, as it came up with its new, very detailed model BIT.³⁷⁷ Certainly, since it was drafted in the aftermath of *White Industries*,³⁷⁸ it had to be unique in form and substance.³⁷⁹ The MFN provision was not included in the new Indian model BIT. As such, it drew the attention of scholars from all over the world.³⁸⁰ With regard to the MFN provision, India had expressed its concern at the World Investment Forum of 2014

371. U.N. GAOR, 70th Sess., 19th mtg. ¶ 49, UN Doc. A/C.6/70/SR.19 (Nov. 4, 2015).

372. U.N. GAOR, 68th Sess., 25th mtg. ¶ 74, UN Doc. A/C.6/68/SR.25 (Nov. 5, 2013).

373. Sixth Committee, Summary Record of the 18th Meeting, UN Doc. A/C.6/70/SR.18, ¶ 27 (Nov. 3, 2015); U.N. GAOR, 70th Sess., 18th mtg. ¶ 27, UN Doc. A/C.6/70/SR.18 (Nov. 3, 2015).

374. Paparinskis, *supra* note 5, at 50–1.

375. For example, Spain in *Maffezini v. Spain*, Decision of the Tribunal on Objections to Jurisdiction.

376. For example, India through its New Indian Model BIT, *supra* note 149.

377. *Id.*

378. *White Industries v. India*.

379. Some examples of its unique features include the absence of provisions related to MFN and indirect expropriation.

380. Prabhash Ranjan & Pushkar Anand, *The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction*, 38 NW. J. INT'L L. & BUS. 1, 1–54 (2017); Grant Hanessian & Kabir Duggal, *The Final 2015 Indian Model BIT: Is This the Change the World Wishes to See*, 32 ICSID REV. FOREIGN INV. L. J. 216, 216–26 (2017); Aniruddha Rajput, *India's Shifting Treaty Practice: A Comparative Analysis of the 2003 and 2015 Model BITs*, 7 JINDAL GLOB. L. REV. 201, 201–26 (2016); Amokura Kawharu & Luke R Nottage, *Models for Investment Treaties in the Asian Region: An Underview*, 34 ARIZ. J. INT'L & COMP. L. 461 (2017); Ajay K. Sharma, *A Good Offence Is Not Always the Best Defence: Critiquing the Standards of Protection under the 2015 Indian Model BIT*, 36 BUS. L. REV. 203 (2015).

that MFN provisions have been interpreted in a manner to include rights beyond what is granted by the treaty.³⁸¹ India's abovementioned approach to MFN provisions can be attributed to the interpretation of the MFN clause in *White Industries*.³⁸²

Scholars have criticized the approach of removing the MFN provision in the new model BIT by stating that this practice may lead to discriminatory treatment and that it tilts the balance of BITs in favor of the host state.³⁸³ It is correct that the MFN clause protects investors against discriminatory treatment by the host states;³⁸⁴ however, scholars who lamented that the Indian government removed the MFN provision from the new model BIT³⁸⁵ have failed to inquire as to whether the state's behavior has any legitimacy, or what the underlying reasons were behind such strong reactions. States, as the primary lawmakers in international law, are expected to react strongly when treaty provisions are interpreted in a manner that was not originally intended by the states.³⁸⁶

B. The Draft Netherlands Model BIT and Australia-Indonesia CEPA

The analysis below will show that states have started to draft their new investment agreements with caution. In particular, the language of the MFN clause has been drafted to ensure that its application is restricted to internal measures only. These carefully drafted MFN provisions are examples of the inclination of states towards a restricted interpretation of MFN provisions. For example, Article 8 (2) of Netherlands Draft Model BIT provides that

381. Ranjan & Anand, *supra* note 380, at 17.

382. *Id.*

383. *Id.* at 24–25.

384. Schill, *Multilateralizing Investment Treaties through Most-Favored-Nation Clauses*, *supra* note 7, at 521.

385. Sharma, *supra* note 381; Ranjan & Anand, *supra* note 381; Hanessian & Duggal, *supra* note 381.

386. There is a tendency among investment tribunals to ignore the rules of general international law while interpreting provisions in BITs. For more about this, see SURYA SUBEDI, *INTERNATIONAL INVESTMENT LAW: RECONCILING POLICY AND PRINCIPLE 2–3* (2016); Nicolette Butler & Surya Subedi, *The Future of International Investment Regulation: Towards a World Investment Organisation?*, 65 *NETH. INT'L. L. REV.* 43, 47 (2017).

Each Contracting Party shall accord to an investor of the other Contracting Party and/or to an investment of an investor of the other Contracting Party, treatment no less favorable than the treatment it accords *in like situations*, to investors of a third country and to their investments with respect to the conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in *its territory*.³⁸⁷

Similarly, Article 14.5 of Australia-Indonesia Comprehensive Economic Partnership Agreement (CEPA) provides:

1. Each Party shall accord to investors of the other Party treatment no less favourable than it accords, *in like circumstances*, to investors and their investments of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments *in its territory*.
2. Each Party shall accord to covered investments treatment no less favourable than it accords, *in like circumstances*, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.
3. For greater certainty, the treatment referred to in this Article shall not encompass international dispute resolution procedures or mechanisms, such as those included in Section B (Investor-State Dispute Settlement).³⁸⁸

The relevance of these provisions lies in two factors: first, the use of “in like situations” and “in its territory” are phrases that point toward the use of MFN provisions for internal measures only, and second, Article 14.5(3) of the Australia-Indonesia CEPA clearly provides that MFN clauses shall not be used to borrow dispute settlement provisions.³⁸⁹ Thus, this recent state behavior emphasizes the fact that an MFN provision should not be interpreted the way that it is currently being interpreted

387. Netherlands Draft Model BIT, *supra* note 149 (emphasis added).

388. Australia-Indonesia Comprehensive Economic Partnership Agreement, Aust.-Indon., <https://dfat.gov.au/trade/agreements/not-yet-in-force/iacepa/iacepa-text/Pages/iacepa-chapter-14-investment.aspx> (emphasis added).

389. *Id.* art. 14.5(3).

by tribunals and scholars; for example, to borrow provisions from third-party BITs.

VI. IS MFN INTERPRETATION PATH DEPENDENT?

This article argues that MFN interpretations that allow for the importation of favorable provisions are path dependent. Joost Pauwelyn³⁹⁰ and Wolfgang Alschner,³⁹¹ in their separate works on “path dependency,” have greatly influenced the development of this argument. The concept of path dependency posits that past decisions limit subsequent choices and shape the development of an institution in the future.³⁹²

Pauwelyn gives an excellent example, which he calls a “winding road,”³⁹³ to explain path dependency:

Centuries ago, a fur trader cut a path through dense woods. To avoid a wolves’ den, he took a winding, indirect route. Later, travellers dragged wagons along the same winding path the fur trader chose, deepening the grooves and clearing away some trees. Industry came and settled in the road’s bends, even though the wolves’ den was long gone. Housing developments were constructed that fit the road and industry. The path got widened and paved to allow for today’s trucks. The winding road we now have, dependent on the path taken centuries ago by the fur trader, is not the one that the authorities would build if they were choosing their road today. However, society, having invested in the path itself and in the resources alongside the path, is better off keeping the winding road than razing the factories and houses along the bends and paying to build a new, straight path. If the road winds too much, new technologies will develop that will allow vehicles to take the bend without giving up too much speed. If this increases the noise too much, sound walls may be built along the road. Drivers may have to be better trained,

390. Joost Pauwelyn, *At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed*, 29 ICSID REV. 372, 411 (2014).

391. Wolfgang Alschner, *Locked-In Language: Historical Sociology and The Path Dependency of Investment Treaty Design*, in RESEARCH HANDBOOK ON THE SOCIOLOGY OF INTERNATIONAL LAW 352 (Moshe Hirsch et al. eds., 2018).

392. James Mahoney, *Path dependence in historical sociology*, 29 THEORY SOC. 507, 507–48 (2000).

393. Pauwelyn, *supra* note 390, at 411.

and speed limits may be stricter than if the road were a simple, straight one. The result will not be ideal, but the transportation system will adapt.³⁹⁴

This passage asserts that, despite the possibility of more efficient pathways, the road chosen by the fur trader was later followed by other travelers, even when the reasons for which the fur trader chose that path did not exist. It is because society has invested so much in the road that it is difficult to move away from such investment.

Mahoney gives the example of the QWERTY computer keyboard design, stating that it has become so entrenched through self-reinforcing processes that it is difficult to move away from QWERTY, despite the existence of better models (like the Dvorak Model) that allow for faster typing.³⁹⁵ Alschner gives three reasons to explain the forces that create path dependency: efficiency, socialization, and cognitive biases.³⁹⁶ Efficiency is based on the law of increasing returns, which articulates that the cost of entrenched initial choices grows over time and this makes switching to more efficient models difficult, even to the most rational actors.³⁹⁷ Socialization revolves around the internalization of a social community's practices.³⁹⁸ For example, a law student builds their understanding based on the principles developed in past cases.³⁹⁹ Cognitive biases explain the behavior of people who tend to lean more towards the status quo rather than making new choices.⁴⁰⁰

When path dependency theory is applied to MFN interpretation, it is difficult to accept that MFN interpretations are developed from scratch. Once the tribunal in *AAPL v. Sri Lanka*⁴⁰¹ made an interpretation that the MFN provision could be used to borrow third-party provisions,⁴⁰² many tribunals and scholars built upon this interpretation rather than looking into whether there was any alternative interpretation. In fact, there are various tribunals that have completely abandoned the task

394. *Id.*

395. Mahoney, *supra* note 392.

396. Alschner, *supra* note 391, at 352–53.

397. *Id.* at 353.

398. *Id.*

399. *Id.*

400. *Id.*

401. *AAPL v. Sri Lanka*.

402. *Id.* at 246.

of justifying broad MFN interpretation in international law, assuming that earlier interpretations made by previous tribunals were completely correct.⁴⁰³ This tendency toward the status quo, when challenged, starts a cerebation in academia.⁴⁰⁴ It is argued, therefore, that the current interpretation of the MFN clause, which allows for the importing of favorable provisions from third-party BITs, is path dependent and certainly not the most efficient model for interpreting MFN provisions.

CONCLUSION

It is difficult to understand and accept the basis of the “conventional wisdom” of using MFN provisions to borrow provisions from third-party BITs. In fact, it appears that before *AAPL v. Sri Lanka*,⁴⁰⁵ such a practice did not even exist in the BIT regime. This judicial adventurism, started by *AAPL v. Sri Lanka*,⁴⁰⁶ was later followed by various tribunals.⁴⁰⁷ The path dependency by these tribunals to such interpretation of MFN provisions, supported by various scholars,⁴⁰⁸ created this notion of “conventional wisdom.”

Despite having a questionable basis in international law, this practice is sometimes cherished as creating “multilateral rules of investment protection.”⁴⁰⁹ Such an assertion, as this article explains, is problematic. The interpretation of treaty provisions in a manner that was never intended by the states is bound to create problems. In the absence of clear and unambiguous substantiation for the conventional use of an MFN provision, it is

403. *White Industries v. India*.

404. Schill, *MFN Clauses as Bilateral Commitments to Multilateralism*, *supra* note 7; Batifort & Heath, *supra* note 4; Andrea K. Bjorklund, *The Enduring But Unwelcome Role of Party Intent in Treaty Interpretation*, 112 AM. J. INT'L L. UNBOUND 44 (2018); Paporinskis, *supra* note 5; Perez-Aznar, *supra* note 195; Michael Waibel, *Putting the MFN Genie Back in the Bottle*, 112 AM. J. INT'L L. UNBOUND 60 (2018); McRae, *supra* note 194.

405. *AAPL v. Sri Lanka*, at 246.

406. *Id.*

407. *EDFI v. Argentina*; *Arif v. Moldova*; *Al Warraq v. Indonesia*; *Ansung Housing v. China*; *Garanti Koza v. Turkmenistan*, Decision on the Objection to Jurisdiction for Lack of Consent; *Teinver v. Argentina*, Decision on Jurisdiction; *AAPL v. Sri Lanka*.

408. *See, e.g.*, Schill, *Multilateralizing Investment Treaties through Most-Favored-Nation Clauses* (2009), *supra* note 7; Schill, *MFN Clauses as Bilateral Commitments to Multilateralism*, *supra* note 7.

409. *Id.*

argued that such practice amounts to fraud on the sovereignty of states. Further, the interpretative methodologies followed by tribunals do not seem to have conformed to the interpretative steps provided under the VCLT. Nor is there any justification to follow other interpretative methodologies.

It is submitted, therefore, that using an MFN provision to borrow provisions from third-party BITs is not a sound practice for the following reasons: (1) there is no inquiry about the relevant comparator and, in the absence of such an inquiry, it becomes difficult to establish discriminatory practices; (2) its rationale and basis in general international law is questionable; (3) the economic and non-rationale of using an MFN provision to borrow clauses from third-party BITs are not well founded nor entirely correct; (4) the relevant rules of international law should be used to interpret MFN provisions, as provided under Article 31 of the VCLT, to determine the scope of the provisions; (5) the complications created by such use of an MFN provision are highly problematic for the investment regime because they give rise to problems like treaty-shopping, free-ridership, and jurisdictional issues; (6) recent state behavior shows a trend against the conventional use of MFN provisions; and (7) there is a requirement for an objective test to determine the actual discrimination due to the favorable language of a BIT. In the absence of such a test, the interpretation of MFN provisions remains highly subjective and malleable. For the aforementioned reasons, it is submitted that use of MFN provisions to borrow clauses from third-party BITs is a problematic practice, having a dubious basis in general international law, and should therefore be put to rest.