Journal of International Economic Law, 2018, 0, 1–29
doi: 10.1093/jiel/jgx034
Original article

OXFORD

THE USE OF MOST-FAVOURED-NATION CLAUSES TO IMPORT SUBSTANTIVE TREATY PROVISIONS IN INTERNATIONAL INVESTMENT AGREEMENTS

Facundo Pérez-Aznar*

ABSTRACT

The present work considers the use of Most-Favoured-Nation (MFN) clauses within Bilateral Investment Treaties (BITs), or other International Investment Agreements (IIAs), to import provisions, not included in the IIA (such as fair and equitable treatment provisions or umbrella clauses), by investment arbitral tribunals. Many tribunals have allowed the use of MFN clauses for this purpose, imported the absent standard in the treaty, and have subsequently considered whether or not there was compliance with the imported provision. This study analyses whether this is a proper use of MFN clauses in IIAs. It first examines the practice of some investment tribunals of importing substantive provisions through MFN clauses. Secondly, it analyses whether MFN clauses can be used to import a substantive provision in order to include a new obligation and, at the same time, confer jurisdiction to decide on breaches of imported provisions. In doing so it explores the nature, scope, and limits of MFN clauses as well as the principle of consent to international jurisdiction. Thirdly, it considers how tribunals should proceed when faced with this type of argument, focusing on the interpretation of the elements of MFN clauses. It is suggested that typical MFN clauses included in IIAs should not be used to import treaty provisions.

I. INTRODUCTION

The origins of Most-Favoured-Nation (MFN) clauses can be traced back to the 11th century.[1] Today, MFN clauses are used in many different areas of international law,[2] including trade, transport, consular relations, intellectual property, and the protection

* Senior Researcher, Geneva Center for International Dispute Settlement (CIDS), Switzerland; Associate Professor of International Economic Law, Master in International Relations, University of Buenos Aires, Argentina. Email: facundo.perez@graduateinstitute.ch. The author is grateful to Professors Pierre-Marie Dupuy, Joost Pauwelyn, Jorge Viñuales as well as the two anonymous reviewers for comments on earlier drafts. Any mistakes that the text may contain are the author's exclusive responsibility.

1 For an historical analysis of MFN clauses from eleventh to twentieth century, see Endre Ustor, 'First Report on The Most Favoured Nation Clause' II 21 Yearbook of the International Law Commission (1969) 157 ff.

2 See Endre Ustor, 'Second Report on The Most Favoured Nation Clause' II 22 Yearbook of the International Law Commission 198 (1970), at 213 ff.

© The Author(s) 2018. Published by Oxford University Press. All rights reserved.

Downloaded from https://academic.oup.com/jiel/advance-article-abstract/doi/10.1093/jiel/jgx034/4819240
by The Chinese University of Hong Kong user
on 25 January 2018

of foreign investments. MFN clauses appeared already in the first Bilateral Investment Treaties (BITs).[3] According to the United Nations Conference on Trade and Development (UNCTAD) database, of 2575 mapped BITs only 38 do not include an MFN clause.[4]

One of the characteristics of MFN provisions is that the treatment they cover has a dual aspect, one internal and another external: they encompass the more favourable treatment given by internal measures (e.g. laws and regulations) as well as the more favourable treatment granted by international measures (i.e. international agreements and unilateral acts).[5] This is the main difference from national treatment (NT) provisions, which focus on internal measures,[6] and is a consequence of using a comparator from a third country: under NT the comparators are 'nationals', 'investments' or 'investors' of the host state, while under MFN the comparators are 'nationals', 'investments' or 'investors' from a third state.

In relation to the first aspect referred to above, investors have invoked MFN provisions before arbitral tribunals in order to enjoy more favourable treatment afforded by internal measures to other foreign investors from third countries.[7] In these situations, tribunals have applied MFN clauses in the same way in which they have applied NT provisions: with some variations, they have analysed whether there was 'treatment' covered by the clause, whether there was a comparator that received 'less favourable' treatment, and whether the investor and the comparator were in 'like circumstances'.

3 See Agreement between the Federal Republic of Germany and the Federation of Malaya Concerning the Promotion and Reciprocal Protection of Investments, done at Kuala Lumpur, 22 December 1960, Articles 2(2) and 3.

4 See UNCTAD Investment Policy Hub http://investmentpolicyhub.unctad.org/IIA/mappedContent#iiaInnerMenu (visited 11 July 2017).

5 The 1936 resolution of the Institute of International Law already indicated: 'The most-favoured-nation clause confers upon the beneficiary the regime granted by the other contracting party to the nationals, goods and ships of any third country by virtue of its municipal law and its treaty law'. See Ustor, above n 1, at 181.

6 Endre Ustor, 'Fifth report on The Most Favoured Nation Clause' II 26 Yearbook of the International Law Commission (1974) 117, at 125, para 10 'Technically the most-favoured-nation clause is a *renvoi* to another treaty, whereas the national treatment clause is a *renvoi* to municipal law'.

7 See *Empresas Lucchetti v Peru*, ICSID Case No ARB/03/4, Award (7 February 2005) para 23; *Canfor v United States*, UNCITRAL, Decision on Preliminary Question (6 June 2006) paras 86–94; *Parkerings-Compagniet AS v Republic of Lithuania* (*Parkerings v Lithuania*), ICSID Case No ARB/05/8, Award on jurisdiction and merits (11 September 2007) paras 366–367; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan* (*Bayindir v Pakistan*), ICSID Case No ARB/03/29, Award (27 August 2007) paras 417–420; *AES Summit Generation Limited and AES-Tisza Erömü Kft v The Republic of Hungary* (*AES v Hungary*), ICSID Case No ARB/07/22, Award (23 September 2010) para 12.3.2; *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v The Government of Mongolia* (*Paushok v Mongolia*), UNCITRAL, Award on Jurisdiction and Liability (28 April 2011) paras 310–316; *GEA Group Aktiengesellschaft v Ukraine* (*GEA v Ukraine*), ICSID Case No ARB/08/16, Award (31 March 2011) paras 342–343; *Kardassopoulos v Georgia*, ICSID Case No ARB/05/18, Award (3 March 2010) para 622; *Cargill Incorporated v United Mexican States* (*Cargill v Mexico*), ICSID Case No ARB(AF)/05/2, Award (18 September 2009) paras 228–234; *Grand River Enterprises Six Nations, Ltd, et al v United States of America* (*Grand River v United States*), UNCITRAL, Award (12 January 2011) paras 158–172; *Convial Callao and CCI v Peru*, ICSID Case No ARB/10/2, Award (21 May 2013) paras 663–667; *Apotex Holdings Inc and Apotex Inc v United States of America* (*Apotex v United States*), ICSID Case No ARB(AF)/12/1, Award (24 August 2014) paras 8.59–8.78.

Downloaded from https://academic.oup.com/jiel/advance-article-abstract/doi/10.1093/jiel/jgx034/4819240
by The Chinese University of Hong Kong user
on 25 January 2018

In relation to the second aspect referenced above, i.e. the external aspect of such clauses (MFN and 'treatment' granted by international measures), the situation appears to be more chaotic. There are two issues concerning MFN and external measures that have been analysed by investment tribunals: first, MFN clauses have been used to alter limited Investor-State Dispute Settlement (ISDS) provisions in the base treaty (i.e. the treaty used as the basis for the jurisdiction of an arbitral tribunal and which includes the MFN clause)—the *Maffezini v Argentina* approach. Second, they have been used to 'import' or 'incorporate' substantive standards not included into the base treaty from other treaties[8] or to 'modify' existing substantive standards already included into the base treaty.[9]

The question of whether MFN clauses may be used to alter ISDS provisions contained in BITs has been the object of controversy in arbitral decisions and doctrine. However, if one analyses the cases in detail there appears to be a consensus in many respects. Starting with *Maffezini v Argentina*, MFN provisions have been invoked in relation to ISDS clauses for different purposes: (i) to avoid preconditions to arbitration, such as resorting to local tribunals for a period of time before going to investor–state arbitration;[10] (ii) to broaden the ISDS provision when that provision

8 In the present work the terms 'incorporation' and 'importation' are used as equivalents.

9 The present article focuses on the use of MFN clauses to 'import' provisions from other treaties. However, as we will see, the distinction between 'importation' and 'modification' of provisions through MFN clauses is not always clear and many of the elements described in the following pages could be applied to situations of 'modification' of provisions through MFN clauses. For cases dealing with 'modification' of provisions through MFN clauses see *Paushok v Mongolia* , above n 7, paras 562–573 and 596; *Garanti Koza LLP v Turkmenistan*, ICSID Case No. ARB/11/20, Award (19 December 2016), paras 372–377 and 393; and the NAFTA cases referred bellow.

10 *Emilio Agustin Maffezini v Kingdom of Spain (Maffezini v Spain)*, ICSID Case No ARB/97/7, Decision on objections to jurisdiction (25 January 2000); *Siemens AG v Argentina (Siemens v Argentina)*, ICSID Case No ARB/02/8, Decision on Jurisdiction (3 August 2004); *Gas Natural SDG SA v Argentina (Gas Natural v Argentina)*, ICSID Case No ARB/03/10, Decision on jurisdiction (17 June 2005); *Telefónica SA v Argentina (Telefónica v Argentina)*, ICSID Case No ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction (25 May 2006); *National Grid PLC v Argentina (National Grid v Argentina)*, UNCITRAL, Decision on Jurisdiction (20 June 2006); *Suez and ors v Argentina (Suez I)*, ICSID Case No ARB/03/17, Decision on Jurisdiction (16 May 2006); *Suez and ors v Argentina (Suez II)*, ICSID Case No ARB/03/19, Decision on Jurisdiction (03 August 2006); *Wintershall Aktiengesellschaft v Argentine Republic (Wintershall v Argentina)*, ICSID Case No ARB/04/14, Award (8 December 2008); *Impregilo SpA v Argentina (Impregilo v Argentina)*, ICSID Case No ARB/07/17, Final award (21 June 2011); *Hochtief AG v Argentina (Hochtief v Argentina)*, ICSID Case No ARB/07/31, Decision on Jurisdiction (24 October 2011); *ICS Inspection and Control Services Limited (United Kingdom) v The Republic of Argentina (ICS v Argentina)*, PCA Case No 2010-9, Award on jurisdiction (10 February 2012); *Daimler Financial Services AG v Argentine Republic (Daimler v Argentina)*, ICSID Case No ARB/05/1, Award (22 August 2012); *Teinver SA v Argentina (Teinver v Argentina)*, ICSID Case No ARB/09/1, Decision on jurisdiction (21 December 2012); *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v Turkmenistan (Kiliç v Turkmenistan)*, ICSID Case No ARB/10/1, Award (2 July 2013); *Dede and Elhüseyni v Romania (Dede v Romania)*, ICSID Case No ARB/10/22, Award (5 September 2013). See also *H&H Enterprises Investments Inc v Arab Republic of Egypt*, ICSID Case No ARB09/15, Decision on Jurisdiction (5 Jun 2012) at paras 356–358, concerning an attempt to avoid a fork-in-the-road clause through an MFN provision and *Ansung Housing Co Ltd. v People's Republic of China*, ICSID Case No ARB/14/25, Award (9 March 2017) at paras 136–141, concerning an attempt to avoid the 3 years limitation to submit the dispute to arbitration. The clasification in this and the subsequent paragraphs is similar to the one followed by Arbitrator Kohen. See *Venezuela US, SRL v Venezuela (Venezuela US v Venezuela)*, PCA Case No 2013-34, Interim Award on Jurisdiction (26 July 2016), Dissenting Opinion by M G Kohen.

Downloaded from https://academic.oup.com/jiel/advance-article-abstract/doi/10.1093/jiel/jgx034/4819240
by The Chinese University of Hong Kong user
on 25 January 2018

is limited to questions relating to the 'amount of compensation' due in an expropriation or to 'expropriation' alone;[11] (iii) to import a definition of 'investment' or 'investor';[12] (iv) to apply the International Investment Agreement (IIA) retroactively;[13] (v) to invoke other dispute settlement mechanisms, such as ICSID instead of UNCITRAL arbitration;[14] and (vi) to import investor–state arbitration in a treaty that does not have a valid investorstate arbitral provision.[15] With the exception of

11 *Salini Costruttori SpA and Italstrade SpA v The Hashemite Kingdom of Jordan (Salini v Jordan)*, ICSID Case No ARB/02/13, Decision on Jurisdiction (15 November 2004); *Vladimir Berschader and Moïse Berschader v The Russian Federation (Berschader v Russia)*, SCC Case No 080/2004, Award and Correction (21 April 2006) para 185; *Telenor Mobile Communications AS v The Republic of Hungary (Telenor v Hungary)*, ICSID Case No ARB/04/15, Award (22 June 2006); *RosInvest Co UK Ltd v Russian Federation*, Jurisdiction award, SCC Case No V079/2005 (5 October 2007); *Renta 4 SVSA Ahorro Corporación Emergentes FI, Ahorro Corporación Eurofondo FI, Rovime Inversiones SICAV SA, Quasar de Valors SICAV SA, Orgor de Valores SICAV SA, GBI 9000 SICAV SA v Russian Federation (Renta 4 v Russia)*, SCC Case No 24/2007, Award on Preliminary Objections (20 March 2009); *Tza Yap Shum v Peru*, ICSID Case No ARB/07/6 196, Decision on Jurisdiction (19 June 2009); *Austrian Airlines v Slovakia*, UNCITRAL, Final Award (09 October 2009); *European American Investment Bank AG (EURAM) v Slovak Republic* (*EURAM v Slovak Republic)*, UNCITRAL, Award on Jurisdiction (22 October 2012); *Les Laboratoires Servier v Republic of Poland*, UNCITRAL, Award (14 February 2012) para 519; *Accession Mezzanine Capital LP v Hungary (Accession Mezzanine v Hungary)* ICSID Case No ARB/12/3, Decision on Respondent's Objection under ICSID Arbitration Rule 41(5) (16 January 2013); *Emmis International Holding, BV v Hungary*, ICSID Case No ARB/12/2 , Decision on respondent's objection under ICSID Arbitration Rule 41(5) (11 March 2013); *ST-AD GmbH v Republic of Bulgaria (ST-AD v Bulgaria)*, UNCITRAL, PCA Case No 2011-06, Award on Jurisdiction (18 July 2013); *Sanum Investments Limited v Lao People s Democratic Republic*, UNCITRAL, PCA Case No 2013-13, Award on Jurisdiction (13 December 2013) para 357; *Ivan Peter Busta and James Peter Busta v Czech Republic,* SCC Case No V 2015/014, Final Award (10 March 2017) paras 163–169 and *Beijing Urban Construction Group Co Ltd v Republic of Yemen (Beijing Group v Yemen)*, ICSID Case No ARB/14/30, Decision on Jurisdiction (31 May 2017) paras 112–121.

12 *Yaung Chi Oo Trading Pte Ltd v Myanmar,* ASEAN Case No ARB/01/1, Award (31 March 2003); *Société Générale v Dominican Republic*, UNCITRAL, LCIA Case No UN 7927, Award on Preliminary Objections to Jurisdiction (19 September 2008); *HICEE BV v Slovakia*, PCA Case No 2009-11, Partial Award (23 May 2011); *Vannessa Ventures Ltd v Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)04/6, Decision on Jurisdiction (22 August 2008) para 133; *Rafat Ali Rizvi v Republic of Indonesia*, ICSID Case No ARB/11/13, Award on Jurisdiction (16 July 2013) para 221; *Metal-Tech Ltd v Republic of Uzbekistan*, ICSID Case No ARB/10/3, Award (4 October 2013); *Berschader v Russia,* above n 11, para 188. See also *Canadian Cattlemen for Fair Trade v United States (Canadian Cattlement v United States)*, UNCITRAL, Award on jurisdiction (28 January 2008).

13 *Técnicas Medioambientales Tecmed SA v Mexico* ICSID Case ARB(AF)/00/2, Award (29 May 2003); *MCI Power Group v Ecuador,* ICSID Case No ARB/03/6, Award (26 July 2007).

14 *Plama Consortium Limited v Republic of Bulgaria (Plama v Bulgaria)*, ICSID Case No ARB/03/24, Decision on Jurisdiction (8 February 2005) para 40; *Garanti Koza LLP v Turkmenistan (Garanti Koza v Turkmenistan)*, ICSID Case No ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent (3 July 2013) para 38.

15 See *Walter Bau AG v Thailand*, UNCITRAL, Award (1 July 2009) (during the proceedings the Claimant acknowledged that the provision it was invoking was not really an MFN clause) and *Venezuela US, SRL v Venezuela*, PCA Case No 2013-34, Interim Award on Jurisdiction (26 July 2016). See also *EURAM v Slovak Republic*, above n 11, para 447 and *Hochtief v Argentina* above n 10, paras 79–82. In *Menzies v Senegal* since there was no Luxembourg-Senegal BIT one of the claimants alleged that the MFN clause in art II:1 of the General Agreement on Trade in Services (GATS) obliged Senegal to offer the same consent to arbitration to Luxembourg nationals as it already did to British and Dutch 'service suppliers', in the Senegal–UK and Senegal–Netherlands BITs. See *Menzies Middle East and Africa SA and Aviation Handling Services International Ltd v Senegal (Menzies v Senegal)*, ICSID Case No ARB/15/21, Award (5 August 2016). In addition, MFN clauses have been invoked (unsuccessfully) to avoid emergency

Downloaded from https://academic.oup.com/jiel/advance-article-abstract/doi/10.1093/jiel/jgx034/4819240
by The Chinese University of Hong Kong user
on 25 January 2018

the first situation where there are opposing views, tribunals have consistently rejected the use of MFN clauses to alter the scope of the ISDS provisions or to create consent, with only three exceptions (the tribunals in *RosInvest v Russia*, *Garanti Koza v Turkmenistan* and *Venezuela US v Venezuela*). This shows that, in general, tribunals have rejected the application of MFN provisions to broaden the jurisdiction of investment tribunals *ratione temporis, materiae, personae* or *volontatis*. As for the first of the above six situations (i.e. the use of MFN clauses to avoid preconditions to arbitration), numerous tribunals have accepted this possibility[16] while other tribunals (generally more recent ones) have concluded this is not possible.[17]

The second issue concerning MFN and external measures referred to above concerns the use of MFN clauses to import absent substantive provisions into the base treaty and is the object of study of the present article. While there are an important number of tribunals that have dealt with this issue, doctrinal analysis of this situation is rather rare.[18] Investment tribunals have not followed a consistent methodology in cases dealing with MFN treatment and the importation of substantive treatment provisions from other treaties, and have very often disregarded the elements of the MFN provisions. They have limited themselves to asking whether the provision invoked is absent from the base treaty or if it is broader than its counterpart in the base treaty and, if the answer to either question is 'yes', tribunals have proceeded to import a provision through the MFN clause within the base treaty. Following this analysis, they have not determined whether or not there was a breach of the MFN clause itself but have instead directly analysed the facts of the case in light of the imported clause, thus considering whether or not the imported clause had been breached.

The use of MFN provisions to import new treaty standards broadens the jurisdiction of a tribunal in a more radical way than in those cases where MFN clauses are used to broaden limited ISDS provisions (the *Maffezini v Argentina* approach). In the cases dealing with MFN and ISDS provisions, the substantive provision is already included in the base treaty but the arbitral tribunal does not have jurisdiction to establish whether there is a breach of that provision. In other words, in these cases states are obliged to comply with the standard but the arbitral tribunal has no

clauses or exceptions in IIAs. See CMS v Argentina, ICSID Case No ARB/01/8, Award (25 April 2005) para 377; and Mesa Power Group, LLC v Government of Canada (Mesa v Canada), UNCITRAL, PCA Case No 2012-17, Award (24 March 2016), para 401.

16 *Maffezini v Spain*, above n 10; *Siemens v Argentina*, above n 10; *Gas Natural v Argentina*, above n 10; *Telefónica v Argentina*, above n 10; *National Grid v Argentina*, above n 10; *Suez I*, above n 10; *Suez II*, above n 10; *Impregilo v Argentina*, above n 10; *Hochtief v Argentina*, above n 10; *Teinver v Argentina*, above n 10.

17 *Wintershall v Argentina*, above n 10; *ICS v Argentina*, above n 10; *Daimler v Argentina*, above n 10; *Kılıç v Turkmenistan*, above n 10; *Dede v Romania*, above n 10.

18 See Facundo Pérez-Aznar, *Non-Discrimination and Most-Favoured-Nation Clauses in International Investment Law* (PhD Thesis, Graduate Institute of International and Development Studies, No 1090, Geneva, 2015); David D. Caron and Esmé Shirlow, 'Most-Favored-Nation Treatment: Substantive Protection', in Meg Kinnear, Geraldine R. Fischer, Jara Minguez Almeida, Luisa, Fernanda Torres and Mairée Uran Bidegain (eds), *Building International Investment Law: The First 50 Years of ICSID* (Alphen aan den Rijn: Wolters Kluwer, 2015), 399–413; Tomoko Ishikawa, 'Interpreting the Most-Favoured-Nation Clause in Investment Treaty Arbitration', in Charles Sampford and Spencer Zifcak (eds), *Rethinking International Law and Justice* (Farnham: Ashgate, 2015), 127–148; Patrick Dumberry, 'The Importation of the FET Standard through MFN Clauses: An Empirical Study of BITs', 31 ICSID Review 1 (2016), at 116–137; Patrick Dumberry, 'The Importation of 'Better' Fair and Equitable Treatment Standard Protection Through MFN Clauses: An analysis of NAFTA Article 1103', 14 TDM 1 (2017).

Downloaded from https://academic.oup.com/jiel/advance-article-abstract/doi/10.1093/jiel/jgx034/4819240
by The Chinese University of Hong Kong user
on 25 January 2018

jurisdiction to decide whether there has been a breach of it. This is something very common in international law. However, in cases dealing with MFN treatment and the importation of substantive standards the effect is twofold: the tribunal 'imports' the standard into the base treaty and it gives to itself the 'jurisdiction' to decide whether there is compliance or not with the imported provision.

As a reaction to the broad approach that has been taken by investment tribunals, it is increasingly common for contracting parties to include a provision in newly negotiated IIAs that prevents the importation of substantive obligations through MFN clauses. For example, the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union, in its article referring to MFN treatment, provides that 'Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute "treatment", and thus cannot give rise to a breach of this article, absent measures adopted by a Party pursuant to such obligations'.[19]

It is in this context that the present work first analyses the practice of investment tribunals as relates to the importation of substantive provisions through MFN clauses. Secondly, it analyses whether MFN clauses can be used to import a substantive provision in order to include a new obligation and to give a tribunal jurisdiction to decide on breaches of imported provisions, thus exploring the nature, scope, and limits of MFN clauses and the principle of consent to international jurisdiction. In doing so, it revisits core decisions of international courts and tribunals, which are central to understanding the scope and nature of MFN clauses, as well as the works of the International Law Commission (ILC) concerning MFN clauses, and state practice. Thirdly, this work explores how tribunals should proceed when faced with this type of argument, focusing on the interpretation of the elements of the MFN clauses themselves and on the potential determination of damages. This analysis will show that the legal framework applicable to MFN clauses strongly militates in favour of the proposition that the standard MFN clauses included in IIAs should not be used to import treaty provisions from other treaties.

II. THE PRACTICE OF INVESTMENT TRIBUNALS CONCERNING IMPORTATION OF SUBSTANTIVE PROVISIONS

A. Most-favoured-nation, fair and equitable treatment and umbrella clauses

Investment tribunals have generally accepted the possibility of importing fair and equitable treatment (FET) provisions through MFN clauses. Normally, the steps that they follow are threefold: first, they import the provision; secondly, they analyse the facts in light of the imported provision; and, thirdly, they decide whether there was a breach of the imported standard, not the MFN clause. Tribunals have generally analysed the issue of importation as an issue of jurisdiction. They do not often embark upon a profound analysis of the content of the MFN provision or the ISDS provision in the base treaty.

19 Comprehensive Economic and Trade Agreement Between Canada and the European Union, signed 30 October 2016, Article 8.7(4). See also Investment Cooperation and Facilitation Agreement between the Federative Republic of Brazil and the Republic of Colombia, signed on 9 October 2015, Article 5.3 and Japanese–EU Economic Partnership Agreement (JEEPA), Investment Chapter, Article x.4 available at http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155710.pdf (visited 11 July 2017).

Downloaded from https://academic.oup.com/jiel/advance-article-abstract/doi/10.1093/jiel/jgx034/4819240
by The Chinese University of Hong Kong user
on 25 January 2018

The first tribunal to accept the possibility of 'importing' an FET provision through an MFN clause was the *Bayindir v Pakistan* tribunal. The Turkey–Pakistan BIT does not include an FET clause. The investor asserted that it was entitled to such treatment, as was provided in other treaties entered into by Pakistan, through the base treaty's MFN clause. At the jurisdictional stage, the tribunal referred to the MFN provision in the base treaty and noted that other BITs concluded by Pakistan contained FET clauses.[20] The tribunal stated that under these circumstances '*prima facie*, Pakistan is bound to treat investments of Turkish nationals "fairly and equitably"'.[21] The tribunal relied on *Pope & Talbot v Canada* to support 'the general possibility to "import" a fair and equitable treatment provision contained in another BIT'.[22] As to the merits, the tribunal applied the FET provision contained in another treaty.[23] The tribunal found that the ordinary meaning of the words used in the MFN provision, together with the limitations to the clause provided for in the same article 'show that the parties to the Treaty did not intend to exclude the importation of a more favourable substantive standard of treatment accorded to investors of third countries'.[24] However, ultimately, after analysing the facts of the case in light of the imported provision, the tribunal concluded that Pakistan 'has not breached the fair and equitable treatment standard applicable through the operation of [the MFN provision] of the Treaty'.[25]

Subsequent tribunals have followed a similar approach.[26] Some tribunals have based their reasoning in part upon the fact that State parties to the BIT have, within the preamble, declared the importance of the promotion of investments, or included a reference to FET.[27] Furthermore, some respondents have not objected to the alleged importation.[28] In general, tribunals allowing the importation of FET provisions have referred to the broad scope of the MFN clauses without embarking on a profound interpretation of such provisions in the base treaty.

More recently, the tribunal in *İçkale v Turkmenistan* followed a more restrictive approach.[29] The tribunal rejected the importation of an FET provision from another

20 *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan (Bayindir v Pakistan)*, ICSID Case No ARB/03/29, Decision on Jurisdiction (14 November 2005) paras 225–235.

21 Ibid, para 232.

22 Ibid, footnote 89, quoting *Pope & Talbot Inc v The Government of Canada (Pope v Canada)*, UNCITRAL, Award and merits of phase 2 (10 April 2001) paras 111 and 115.

23 *Bayindir v Pakistan*, above n 7, para 155.

24 Ibid, para 157.

25 Ibid, Title V.a.

26 *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v Republic of Kazakhstan (Rumeli v Kazakhstan)*, ICSID Case No ARB/05/16, Award (29 July 2008) paras 560, 575 and 581–619; *LESI SpA and ASTALDI SpA v People's Democratic Republic of Algeria (LESI v* Algeria), ICSID Case No ARB/05/3, Award (12 November 2008) paras 150–164; *ATA Construction, Industrial and Trading Company v The Hashemite Kingdom of Jordan (ATA v Jordan)*, ICSID Case No ARB/08/2, Award (18 May 2010) paras 125 and 133.3; *OAO Tatneft v Ukraine (OAO Tatneft v Ukraine)*, UNCITRAL, Award (29 July 2014), para 365; *Hesham T M Al Warraq v Republic of Indonesia (Warraq v Indonesia)*, UNCITRAL, Final Award (15 December 2014) paras 551-555 and 683; *Mamidoil Jetoil Greek Petroleum Products Societe SA v Republic of Albania (Mamidoil v Albania)*, ICSID Case No ARB/11/24, Award (30 March 2015) paras 273 and 583. See also *Paushok v Mongolia* , above n 7, paras 562–573 and 596; *Pantechniki v Albania,* ICSID Case No ARB/07/21, Award (30 July 2009) para 86; *EURAM v Slovak Republic*, above n 11, para 447.

27 *LESI v Algeria*, above n 26, para 59; *ATA v Jordan*, above n 26, para 125.

28 *Rumeli v Kazakhstan*, above n 26, para 575; *Mamidoil v Albania* , above n 26, para 582.

29 *İçkale İnşaat Limited Şirketi v Turkmenistan*, ICSID Case No ARB/10/24, Award (8 March 2016).

Downloaded from https://academic.oup.com/jiel/advance-article-abstract/doi/10.1093/jiel/jgx034/4819240
by The Chinese University of Hong Kong user
on 25 January 2018

treaty on the basis that the MFN obligation 'exists only insofar as the investments of the investors of the home State and those of the investors of the third State can be said to be in "a similar situation"'.[30] It considered that the phrase, 'treatment accorded in similar situations', as used in the MFN clause suggested that the MFN clause 'requires a comparison of the factual situation of the investments of the investors of the home State and that of the investments of the investors of third States' and consequently 'given the limitation of the scope of application of the MFN clause to "similar situations," it cannot be read, in good faith, to refer to standards of investment protection included in other investment treaties between a State party and a third State'.[31]

The analysis of North American Free Trade Agreement (NAFTA) Chapter 11 tribunals in relation to MFN and international agreements has focused on whether it is possible to invoke a free standing FET provision from another treaty as an alternative to Article 1105 ('Minimum Standard of Treatment') through the MFN clause in Article 1103. The tribunal in *Pope &Talbot v Canada* suggested that this was possible.[32] However, this produced a reaction by NAFTA members, who have subsequently adopted a binding interpretation of Article 1105.[33] As such, later NAFTA tribunals appear to have been more cautious on the issue.

In *ADF v United States* the claimant argued that one effect of NAFTA Article 1103 was that investors were 'entitled to benefit' from the better of the treatment provided in any BIT entered into by the US with non-NAFTA parties, rather than the treatment provided for by customary international law, invoking the FET and 'full protection and security' clauses in the US-Albania and US-Estonia BITs.[34] The tribunal considered that by virtue of the exceptions provided for in Article 1108 the provisions of Article 1103 were not applicable in respect of government procurement by a contracting State.[35] However, the tribunal set out some useful guidelines that reflect general international law rules and which should apply when invoking rules from another treaty through an MFN clause. The tribunal considered that the claimant, first, 'ha[d] not been able persuasively to document the existence of such autonomous standards', i.e. that the FET and 'full protection and security' clauses in the other treaties establish standards of treatment distinct from the specific requirements of customary international law. Secondly, it had not shown that 'the U.S. measures are reasonable characterized as in breach of such standards'.[36] Thirdly, the tribunal added that 'the investor still has not thereby shown violation of Article 1103 by the Respondent'.[37] Finally, it suggested that the investor had to "demonstrat[e]

30 Ibid, para 328.

31 Ibid, para 329.

32 *Pope v Canada*, above n 22, paras 111 and 117; and *Pope v Canada,* UNCITRAL, Award in Respect of Damages (31 May 2002) para 66 and footnote 54.

33 Notes of Interpretation of Certain Chapter 11 Provisions, NAFTA Free Trade Commission (31 July 2001) http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp (visited 11 July 2017).

34 *ADF Group Inc v United States of America (ADF v United States)*, ICSID Case No ARB(AF)/00/1, Award (9 January 2003).

35 Ibid, para 170.

36 Ibid, para 194.

37 Ibid, para 196.

Downloaded from https://academic.oup.com/jiel/advance-article-abstract/doi/10.1093/jiel/jgx034/4819240
by The Chinese University of Hong Kong user
on 25 January 2018

the "more favourable" nature of the Albanian and Estonian treaty provisions'.[38] A similar analysis was followed in *Chemtura v Canada*.[39]

Even where the arguments before a NAFTA tribunal have focused more on the 'modification' of an existing provision than on the 'importation' of a new one, that distinction is not always clear. NAFTA disputing parties and tribunals refer to FET as an 'autonomous' standard, they resort to the references to 'importation' or 'incorporation' of an external provision, and claimants have also requested the importation of 'full protection and security', 'non-impairment' and 'effective means' provisions, which would be external provisions. Furthermore, there may be different views as to whether the standard invoked is really a new standard, not included in the base treaty, or an alteration of an existing standard. Nevertheless, it is interesting to note that tribunals outside of the NAFTA context have used the analysis of the tribunal in *Pope & Talbot v Canada* as a basis for importing provisions through MFN clauses.[40] It is for these reasons that the guidance of the *ADF v Unites States* tribunal could be useful in analysing the arguments for importing external provisions through MFN clauses outside NAFTA.

Investment tribunals have also dealt with the issue of whether it is possible to import an umbrella clause through the MFN provision in a base treaty. In a first group of cases, for varying reasons, tribunals did not decide on the issue.[41] In *Paushok v Mongolia*, the tribunal accepted the potential application of the MFN provision to import substantive rights, but it rejected the importation of an umbrella clause because the treaty specifically limited the application of the MFN clause to FET.[42] In *Impregilo v Argentina*, the tribunal found the issue of importation of an umbrella clause was theoretical because neither the respondent nor the claimant were a party to the contract at issue.[43] However, the tribunal noted that the substantive protection of the MFN clause was very wide in so far as it related to 'all matters' regulated by the BIT. The tribunal considered that 'the reference to matters regulated by the BIT sets an outer limit, and it is debatable whether contractual breaches are matters regulated by the BIT'.[44]

The *EDF v Argentina* tribunal was the first one that allowed the importation of an umbrella clause contained in another treaty through an MFN clause.[45] The tribunal

38 Ibid, para 197.

39 *Chemtura Corporation v Government of Canada (Chemtura v Canada)*, UNCITRAL, Award (2 August 2010) paras 236 and 237. See also *Apotex v United States*, above n 7, paras 17–18 and 9.70–9.72 and *Mesa v Canada*, above n 15, paras 401 and 507.

40 See *Bayindir v Pakistan*, above n 7, para 232; *Warraq v Indonesia*, above n 26, para 542.

41 *Impregilo v Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction (22 April 2005) paras 96 and 223; *Siag and Vecchi v Egypt*, ICSID Case No ARB/05/15, Award (1 June 2009) para 464; *Romak SA v Uzbekistan*, UNCITRAL, PCA Case No AA280, Award (26 November 2009) paras 126–131 and 242; *Nova Scotia v Venezuela*, UNCITRAL, Award (30 August 2010) para 150 and *Ampal-American Israel Corporation and others v Arab Republic of Egypt*, ICSID Case No ARB/12/11, Decision on Liability (21 February 2017) paras 229, 292 and 348.

42 *Paushok v Mongolia*, above n 7, paras 565 and 570.

43 *Impregilo v Argentina*, above n 10, para 186.

44 Ibid, para 184. A similar reasoning was followed in *Teinver v Argentina*, where the tribunal refused to import an umbrella clause. See *Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v The Argentine Republic* (*Teinver v Argentina*), ICSID Case No. ARB/09/1, Award (21 July 2017), paras 884–892.

45 *EDF International SA, SAUR International SA and León Participaciones Argentinas SA v Argentine Republic* (*EDF v Argentina*), ICSID Case No ARB/03/23, Final award (11 June 2012) para 937.

Downloaded from https://academic.oup.com/jiel/advance-article-abstract/doi/10.1093/jiel/jgx034/4819240
by The Chinese University of Hong Kong user
on 25 January 2018

considered that '[its] competence rests on the alleged violation of the "umbrella clause" in the relevant investment treaties as incorporated through the MFN clause in the Argentina–France BIT'.[46] The tribunal considered that Argentina 'breached its obligation[] to ... respect specific commitments undertaken in connection with Claimants' investment'.[47] Similarly, in *Arif v Moldova* the tribunal considered it was able to import an umbrella clause and 'therefore [it] has jurisdiction over Claimant's "specific commitments" claim via the MFN clause'.[48] However, ultimately, it rejected the claim because it deemed the breach of specific undertakings inadmissible.[49]

It has been observed that of the tribunals that have analysed whether it was possible to invoke umbrella clauses through MFN provisions, no tribunal has rigorously interpreted the relevant provisions in the base treaty, nor have they ensured compliance with the *ejusdem generis* principle.[50] Recently, however, the tribunal in *İçkale v Turkmenistan* followed a more restrictive approach and rejected the importation of an umbrella clause and other provisions from another BIT for the reasons discussed above.[51]

B. Most-favoured-nation and other provisions

The idea that an MFN clause in a BIT can be used to import provisions from other sources can be traced back to the *AAPL v Sri Lanka* award. The tribunal in that case considered that the base treaty, the Sri Lanka–UK BIT, 'is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through *implied incorporation methods,* or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature'.[52] For the tribunal '[s]uch extension of the applicable legal system resorts clearly from [the MFN provision], and [the "compensation for losses" clause]' of the BIT.[53]

In the *CME v Czech Republic* case, in the partial award of 2001 the majority of the tribunal considered a 'most-favoured-rule' clause[54] to be a clause allowing the

46 Ibid, para 931. See also para 935.

47 Ibid, dispositive part para 1. Cf. *EDF International SA, SAUR International SA and León Participaciones Argentinas SA v Argentine Republic (EDF v Argentina)*, ICSID Case No ARB/03/23, Annulment, para 237.

48 *Mr Franck Charles Arif v Republic of Moldova (Arif v Moldova),* ICSID Case No ARB/11/23, Award (8 April 2013) paras 395 and 396.

49 Ibid, para 398.

50 See T Gazzini and A Tanzi, 'Handle with Care: Umbrella Clauses and MFN Treatment in Investment Arbitration' 14 Journal of Word Investment and Trade (2013) 978.

51 *İçkale İnşaat Limited Şirketi v Turkmenistan*, above n 29, paras 326–332. See also *WNC Factoring Limited v The Czech Republic,* PCA Case No 2014-34, Award (22 February 2017) paras 348–358 (the tribunal refused to import an umbrella clause because the ISDS provision did not include jurisdiction over the MFN clause) and *Teinver v Argentina*, above n 44.

52 *Asian Agricultural Products Ltd. v Republic of Sri Lanka, (AAPL v Sri Lanka)* ICSID Case No ARB/87/3, Award (27 June 1990), para 21 (emphasis added).

53 Ibid.

54 Article 3(5) of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, 1 October 1993, provides: 'If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain

Downloaded from https://academic.oup.com/jiel/advance-article-abstract/doi/10.1093/jiel/jgx034/4819240
by The Chinese University of Hong Kong user
on 25 January 2018

tribunal to decide whether there was a breach of customary international law.[55] In the final award, from 2003, the majority used the 'most-favoured-rule' clause for other purposes. The clause on expropriation in the base BIT provided for 'just compensation'. The majority, quoting *Maffezini v Spain*, reasoned that the determination of compensation on the basis of 'fair market value' found 'further support' in the alleged 'MFN' provision.[56] In *MTD v Chile* the claimants relied on the umbrella clause appearing in the Denmark–Chile BIT together with the 'non-impairment' provision and the obligation to 'grant the necessary permits in accordance with its laws and regulations' appearing in the Croatia–Chile BIT, through the MFN clause in the base treaty, the Malaysia–Chile BIT. The tribunal referred to the MFN clause and 'satisfie[d] itself that its terms permit[ed] the use of the provisions of the Denmark BIT and Croatia BIT as a legal basis for the claims submitted to its decision'.[57]

Using applicable MFN provisions, investors have sometimes sought the importation of 'full protection and security', 'effective means' and 'arbitrariness' provisions appearing in other BITs, but these issues have not been generally decided by tribunals.[58] In *Warraq v Indonesia* the tribunal briefly observed that the standard of protection and security included in a BIT with a third state was 'applicable by virtue of the MFN clause in Article 8 of the OIC Agreement'.[59] By contrast, in *İçkale v Turkmenistan* the tribunal rejected the importation of full protection and security and non-discrimination obligations from another treaty.[60] In *White Industries v India*[61] the tribunal allowed the importation of an 'effective means' provision through the MFN clause. After analysing the facts of the case under the 'effective means' provision, the tribunal concluded that India '[was] in breach of [the MFN provision] of the BIT'.[62] In the dispositive part of its analysis, the tribunal stated that India had breached its obligation to provide 'effective means', which was 'incorporated' from another BIT pursuant to the MFN provision in the base BIT.[63] However, again, in *Garanti Koza v Turkmenistan* the tribunal rejected the importation of elements of the

rules, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such rules shall to the extent that they are more favourable prevail over the present Agreement'. On the distinction between MFN and 'most-favoured rule' provisions see *Walter Bau AG v Thailand*, above n 15, paras 9.46–9.52.

55 *CME Czech Republic B.V. v The Czech Republic* (*CME v Czech Republic*), UNCITRAL, Partial Award (13 September 2001), paras 614 and 624.

56 *CME Czech Republic B.V. v The Czech Republic* (*CME v Czech Republic*), UNCITRAL, Final Award (14 March 2003), para 500. Cf Separate opinion by C N Brownlie paras 11–12.

57 *MTD Equity Sdn. Bhd. and MTD Chile S.A. v Republic of Chile*, ICSID Case No. ARB/01/7 *(MTD v Chile)*, Award (25 May 2004), para 100. See also ibid, paras 103, 104 ans 203. Cf *MTD v Chile*, Decision on Annulment (21 March 2007), para 64.

58 *Romak SA v Uzbekistan*, above n 41, paras 126–131 and 242; *Impregilo v Argentina*, above n 10, para 334; *EDF v* Argentina, above n 45, para 1101.

59 *Warraq v Indonesia*, above n 26, para 630. See also *OAO Tatneft v Ukraine*, above n 26, para 426 and *Teinver v Argentina*, above n 44, paras 895–897.

60 *İçkale İnşaat Limited Şirketi v Turkmenistan*, above n 29, paras 326–332.

61 *White Industries Australia Limited v India (White Industries v India)*, UNCITRAL, Final award (30 November 2011), paras 11.2.4–11.2.7.

62 Ibid, para 11.4.20.

63 Ibid, para 16.1.1(a).

Downloaded from https://academic.oup.com/jiel/advance-article-abstract/doi/10.1093/jiel/jgx034/4819240
by The Chinese University of Hong Kong user
on 25 January 2018

expropriation and the non-impairment clauses of other treaties via the MFN clause, following an analysis similar to the one used by NAFTA tribunals.[64]

Investors have also invoked provisions from treaties of a different nature than BITs. In *Romak v Uzbekistan*, the claimant invoked Articles III and VII of the 1959 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), among other provisions. However, the tribunal did not analyse these claims, because it considered it lacked jurisdiction.[65] In *Frontier Petroleum v Czech Republic*[66] the claimant argued that, by operation of MFN in the base treaty it had a right to expeditious proceedings before a court as established in Article 6(1) of the European Convention on Human Rights (ECHR). The tribunal dealt with this issue briefly, considering that the fact that 'rights under the ECHR accrue to everyone, regardless of nationality . . . obviates Claimant's need to rely on the BIT to invoke such rights' and since '[t]he Parties have not pleaded the jurisprudence of the ECHR in these proceedings . . . this Tribunal makes no finding as to whether any standard set by the ECHR is applicable here and has been breached'.[67]

III. EXPLORING THE FUNCTION OF MFN CLAUSES

A. The nature of MFN and NT clauses

There is a close relationship between MFN and NT clauses. The similarities between these types of clauses lead the Special Rapporteur, Endre Ustor from the ILC, to propose the inclusion of articles on NT in the Draft Articles on the MFN clause.[68] The apparent parallels evidence a common nature between these two provisions.

Firstly, both rules are conventional. Ustor noted that the proposition that 'neither most-favoured-nation treatment nor national treatment can be claimed from another State unless the latter has a legal obligation to extend it seems to be beyond dispute'.[69] Secondly, both cover discrimination based on nationality. Here, Ustor observed that '[b]oth national treatment, or "inland parity", and most-favoured-nation treatment, or "foreign parity", are anti-discriminatory, i.e., both guarantee equality'.[70] Thirdly, both are relative standards that require a comparison between categories (e.g. between 'nationals', 'investments' or 'investors') with some sort of 'likeness'. Investment tribunals usually recognize that MFN and NT provisions are relative standards that require a comparison.[71] Fourthly, one of the comparators (the beneficiary) always has a foreign aspect (e.g. foreign 'nationals', 'investors' or 'investments'). Fifthly, in both the *ejusdem generis*

64 *Garanti Koza v Turkmenistan*, above n 9, paras 372–377 and 393.

65 *Romak SA v Uzbekistan*, above n 41, paras 126–131 and 242.

66 *Frontier Petroleum Services Ltd v Czech* Republic, UNCITRAL, Final Award (12 November 2010).

67 Ibid, para 338.

68 International Law Commission, 1330th meeting [1975] 27 Yearbook of the International Law Commission II, at 131, para 7; and Ustor, above n 6, at 124–129.

69 Endre Ustor, 'Sixth report on The Most Favoured Nation Clause' II 27 Yearbook of the International Law Commission 1 (1975), at 3.

70 Ustor, above n 6, at 124.

71 *Gas Natural v Argentina*, above n 10, para 31; *Plama v Bulgaria*, above n 9, para 208; *ICS v* Argentina, above n 10, para 318; *Daimler v Argentina*, above n 10, para 241; *Garanti Koza v Turkmenistan*, above n 9, para 88.

Downloaded from https://academic.oup.com/jiel/advance-article-abstract/doi/10.1093/jiel/jgx034/4819240
by The Chinese University of Hong Kong user
on 25 January 2018

principle applies.[72] Sixthly, it has been argued that their purpose is similar. Schwarzenberger argued that the MFN standard 'fulfils the function of generalizing the privileges granted under the national standard to any third State among the beneficiaries of Most Favoured Nation treatment in the same field'.[73]

Finally, and very importantly, both MFN and NT are substantive obligations that involve rules of conduct (i.e. how the contracting states in a treaty must act with regard to foreign investments or investors), whose breach produces a wrongful act. Authors have noted that investment tribunals should only hear claims concerning MFN clauses for breaches of these provisions.[74] International tribunals applying MFN clauses to internal measures have applied them in that way.[75] In turn, many claimants have recognized that it should be proven that there is *a breach* of the MFN provision.[76] In *Menzies v Senegal*[77] the tribunal noted that even if the MFN clause in Article II of the General Agreement on Trade and Services (GATS) would apply to investment arbitration, which for the tribunal had not been demonstrated, 'il serait seulement de nature à créer une obligation pour les Etats signataires d'offrir l'arbitrage dans le futur et ne représente pas un consentement à l'arbitrage ou à l'extension d'une offre d'arbitrage'.[78] The tribunal considered that 'les Etats gardent toujours la faculté de refuser de respecter une obligation, qui reste une prérogative inéluctable de leur souveraineté'.[79] Similarly, Arbitrator Kohen in *Venenezuela US v Venezuela* considered that the MFN clause in the Barbados–Venezuela BIT 'is a substantive provision containing MFN and NT obligations'.[80] He noted that 'even if Venezuela is obliged to grant to Barbadian investors the right granted to Ecuadorian investors to have access to UNCITRAL arbitration, the question is whether Venezuela has indeed implemented that right to Barbadian investors, by offering them such arbitration'.[81]

The connection between MFN and NT provisions in the field of international investment law is also reinforced by the fact that, (i) they are very often included in the same provision or they have a very similar language, (ii) many BITs provide

72 Ustor, above n 69, at 5, para 1 'The national treatment clause is just as much subject to the *ejusdem generis* rule as the most-favoured-nation clause'.

73 Georg Schwarzenberger, 'The Most-Favoured-Nation Standard in British State Practice' 22 British Yearbook of International Law 96 (1945), at 119.

74 Alejandro Faya Rodriguez, 'The Most-Favored-Nation Clause in International Investment Agreements: A Tool for Treaty Shopping' 25 Journal of International Arbitration 89 (2008), at 99 'The tribunal's role is to examine a breach and, if found, award damages, not to grant or guarantee ex ante a right to the investor, when the tribunal is importing a provisions related to legal standards or procedure from third treaties, what it is actually doing is making the state fulfil an obligation (that does not really exist) before it is allegedly breached'. See also Zachary Douglas, 'The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails' 2 Journal of International Dispute Settlement 1 (2011), at 9.

75 See above n 7.

76 See for example *Gold Reserve v Venezuela*, ICSID Case No ARB(AF)/09/1, Award (22 September 2014) para 629 and *White Industries v India*, above n 61, paras 4.4.1–4.4.4.

77 *Menzies v Senegal*, above n 15.

78 Ibid, para 140.

79 Ibid, para 137. See also paras 142 and 143.

80 *Venezuela US v Venezuela*, Dissenting Opinion, above n 9, para 26.

81 Ibid, para 27.

Downloaded from https://academic.oup.com/jiel/advance-article-abstract/doi/10.1093/jiel/jgx034/4819240
by The Chinese University of Hong Kong user
on 25 January 2018

MFN or NT, whichever is more favourable,[82] and (iii) BITs generally provide for exceptions that do not distinguish between MFN and NT.[83]

Investment tribunals have recognized the similarities between MFN and NT clauses and have applied some common interpretative methodologies when analysing them. In *Parkerings v Lithuania* the tribunal stated that these two provisions 'are by essence very similar' and 'have similar conditions of application and basically afford indirect advantages to their beneficiaries, namely a treatment no less favourable than the one granted to third parties'.[84] The tribunal concluded that its 'analyses of the National Treatment standard will therefore also be useful to discuss the alleged violation of the MFN standard'.[85] In *Canadian Cattlemen v United States* the tribunal stated that the MFN and NT provisions in NAFTA Chapter 11 are 'in structure and substance, identical (except for the comparator class)'.[86] In *Cargill v Mexico*, the tribunal considered that 'the requirement for MFN treatment tracks that of the national treatment requirement'.[87] In *Bayindir v Pakistan* the tribunal considered that both in MFN and NT the 'purpose is to provide a level playing field between foreign and local investors as well as between foreign investors from different countries'.[88] In *Apotex v United States* the tribunal observed that 'the requirements for establishing a violation of NAFTA Article 1103 are the same as establishing a violation of NAFTA Article 1102, except that the applicable comparator' and that its 'legal analysis regarding NAFTA Article 1102 . . . applies, *mutatis mutandis*, to NAFTA Article 1103'.[89] In addition, many tribunals analyse whether there is a breach of an MFN and a NT provision jointly.[90] It is also common for the disputing parties in a case, as well as tribunals, to resort to analysis under one of the provisions to interpret the other.[91]

The similarities between MFN and NT imply that investment tribunals, while interpreting an MFN clause, should perform the same detailed analysis undertaken by other tribunals when interpreting an NT provision, paying close attention to all the elements of the clause. Recently, the tribunal in *EURAM v Slovakia* supported the idea that MFN clauses in BITs could play a double role: first, making a claim for relief for an alleged breach of the MFN clause and, secondly, allowing the benefit of

82 See, for example, Treaty between the USA and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, done at Washington, 11 May 1997, Article II (1).

83 See, for example, Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the promotion and protection of investments, done at London, 19 February 1993, Article 7.

84 *Parkerings v Lithuania,* above n 7, para 366.

85 Ibid.

86 *Canadian Cattlemen v United* States, above n 12, para 135.

87 *Cargill v Mexico*, above n 7, para 228.

88 *Bayindir v Pakistan,* above n 7, para 387.

89 *Apotex v United States*, above n 7, paras 8.5 and 8.60.

90 *Consortium RFCC v Morocco*, ICSID Case No ARB/00/6, Award (22 December 2010) paras 52–53; *Grand River v United States*, above n 7, paras 158–172; *GEA v* Ukraine, above n 7, paras 332–345; *Electrabel SA v Hungary*, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012), paras 7.160–7.164.

91 See *Parkerings v Lithuania,* above n 7, para 368 (using the 'like circumstances' analysis applied to NT in a claim on MFN). See also *Total SA v Argentina,* ICSID Case No ARB/04/1, Decision on Liability (27 December 2010), para 213 (applying to a NT provision the analysis in *Parkerings v Lithuania* concerning an MFN provision with no express reference to 'like circumstances').

Downloaded from https://academic.oup.com/jiel/advance-article-abstract/doi/10.1093/jiel/jgx034/4819240
by The Chinese University of Hong Kong user
on 25 January 2018

higher standards of protection provided for in other treaties. The tribunal considered that the role of the MFN provisions in these two scenarios would be different.[92] There is however no basis for applying MFN clauses differently in these two scenarios. Whatever the treatment an investor invokes under an MFN clause, it cannot escape the application of all the elements of the clause and ultimately the determination of whether or not there has been a breach of the provision.

B. The relationship between MFN clauses and treaties

The traditional approach, as to what the effects are of invoking the better treatment included in another treaty through an MFN provision, has been that by granting better treatment through another treaty, States could breach the MFN provision and that this would create an incentive for States to grant more favourable treatment, as had been included in other treaties.

The ILC has noted that the effect of MFN clauses is not to create new obligations. Ustor pointed out that in the *Anglo-Iranian Oil Company (UK v Iran)* case before the ICJ, Iran's counsel Henri Rolin argued that the role of subsequent treaties 'is not to give rise to new obligations towards the State beneficiary of the clause but to alter the scope of the former obligation'. Ustor noted that the 'majority of the members of the Court—as is well known—upheld this latter view',[93] quoting the passage of the ICJ in *Anglo-Iranian Oil Company (UK v Iran)* that states:

> The treaty containing the most-favoured-nation clause is the basic treaty . . . 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*.[94]

The relationship between MFN clauses in IIAs and the obligations included in other international agreements has been the object of analysis by States. However, these discussions have tended to focus on whether an MFN provision *obliges* the contracting parties to provide certain treatment not included in a treaty or whether that latter treatment is discriminatory, and not on whether an MFN provision 'imports' obligations from other treaties. For example, in 1979, Switzerland analysed whether the MFN provisions included in its BITs could oblige it to grant the treatment included in certain multilateral agreements on intellectual property.[95] Similarly, in

92 *EURAM v Slovak Republic*, above n 11, para 435.

93 Endre Ustor, 'Third Report on the Most-Favoured-Nation Clause' II 24 Yearbook of the International Law Commission 161 (1972), at 169 quoting ICJ Pleadings 616, 'Réplique du Professeur Rolin (Iran) '.

94 *Anglo-Iranian Oil Co (United Kingdom v Iran)* (Judgment, Jurisdiction, 22 July 1952) 1952 ICJ Rep 93, 109.

95 See *Mémoire du 18 may 1979* prepared by the Direction du droit international public at the Département Federal des Affaires Étrangères, in Lucius Caflisch, 'Pratique Suisse' 36 Annuaire Suisse de Droit International 174 (1980), 175 '[On doit] dès lors [se demander] si la Suisse ne pourrait pas à *être obligée*, par le jeu des articles 8 (définitions) et 2, chiffre 2 (clause de la nation la plus favorisée), de l'API, accorder les droits découlant de ces conventions et traités aux États envers qui elle est liée par un API mais qui ne sont parties aux conventions multilatérales citées plus haut' (emphasis added).

Downloaded from https://academic.oup.com/jiel/advance-article-abstract/doi/10.1093/jiel/jgx034/4819240
by The Chinese University of Hong Kong user
on 25 January 2018

the negotiations surrounding the framework of the Multilateral Agreement on Investment (MAI), experts discussed the relationship between the MFN/NT clause and obligations in intellectual property and multilateral environmental agreements. However, this discussion concerned whether the provision would fall under the scope of the MFN clause or whether there would be a breach of that clause.[96]

Something similar happens in the framework of the law of the World Trade Organization (WTO). The WTO dispute settlement organs have to rule on whether or not there is a breach of the MFN provisions under the relevant agreements of the WTO treaty. Such provisions do not have the function of 'importing' a certain treatment. This is so even though Article I:1 of the GATT 1994 requires that '[w]ith respect to customs duties . . . any advantage . . . granted by any [Member] to any product originating in . . . any other country shall be *accorded immediately* and unconditionally to the like product originating in . . . all other [Members]'.[97] The WTO Appellate Body has observed that MFN and NT provisions in WTO law are each concerned with granting 'equality of competitive opportunities' of like products.[98] The Appellate Body has also held that '[t]he essence of the non-discrimination obligations is that like products should be treated equally, irrespective of their origin'.[99] Furthermore, it has noted that the MFN clause 'also serves as an incentive for concessions, negotiated reciprocally, to be extended to all other Members on an MFN basis'.[100] However, these characteristics do not imply an effect of 'importation'.

Douglas argues that the MFN clause 'does not, in truth, operate automatically to "incorporate" provisions of a third treaty so that all that remains for a tribunal to do is to interpret the amended text of the basic treaty'.[101] He notes that such treatment can be granted to an investor of a third State by means of a domestic legislative enactment or by any other act of state (judicial decision, administrative circular and so on), adding that '[i]t would be wrong to suppose that the documents recording this treatment are "incorporated" into the basic treaty by the operation of the MFN clause. It is the "treatment" represented by these documents that can be invoked by the investor claiming through the MFN clause in the basic treaty'.[102]

On the other hand, Schill argues that the reference to an 'acquisition' of rights in the 1978 ILC Draft Articles on the MFN clause and the reference in *Rights of Nationals of the United States of America in Morocco*, stating that 'the United States

96 See OECD, Report to the negotiating group on intellectual property (26 March 1997) 97 13, 2 'The MAI could provide that National Treatment and MFN . . . would *apply* to intellectual property . . . [or] . . . would have no application to intellectual property'. Relationships between the MAI and selected multilateral environmental agreements (MEAS), Revised analysis by the OECD Secretariat (17 March 1998) 6 'Therefore, measures adopted in pursuance of the above provisions, even if applicable in some way to MAI investors or investments, would not appear to be *in violation* of the NT and MFN obligations'.

97 See for example WTO Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry* (Canada – Autos), WT/DS139/AB/R, WT/DS142/AB, adopted 31 May 2000, para 81.

98 WTO Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* (EC – Seals), WT/DS400/AB/R, WT/DS401/AB/R, adopted 18 June 2014, para 5.82.

99 See WTO Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas,* WT/DS27/AB/R, adopted 25 September 1997, para 190.

100 See Apellate Body Report, *Canada – Autos*, above n 97, para 83.

101 Douglas, above n 74, at 9.

102 Ibid.

Downloaded from https://academic.oup.com/jiel/advance-article-abstract/doi/10.1093/jiel/jgx034/4819240
by The Chinese University of Hong Kong user
on 25 January 2018

acquired by virtue of the most-favoured-nation clauses, civil and criminal consular jurisdiction in all cases in which United States nationals were defendants', would be proof that MFN provision allows to import treaty obligations.[103]

However, that reference to 'acquisition' by the ICJ does not appear to be recognition of an effect of importation of MFN clauses. By virtue of the MFN provision, a beneficiary 'acquires' rights which fall within the limits of the subject matter of the clause. Following the example of *US Nationals in Morocco*, in practice, this means that US nationals could have invoked consular jurisdiction in Morocco by relying on the MFN provision, but this does not mean that consular jurisdiction would have been imported into the base treaty. If Morocco would have refused consular jurisdiction it would have breached the MFN clause, not a 'right' to consular jurisdiction. As already noted, international tribunals (apart from some investment tribunals) that deal with MFN clauses have tended to determine whether there is or there is not a breach of the applicable MFN provision. Clear examples of such analysis can be found is the treatment of MFN clauses within WTO law and, in particular, in the decision in *Ambatielos* that we will discuss below. In addition, the ICJ has rejected the acquisition of consular rights when the more favourable right had ended. Thus, the reference to 'acquisition' cannot be equated with that of a vested right.[104] Finally, the particularities of the consular jurisdiction and its foundations, based upon the inequality of States, appears not to give consular jurisdiction the legitimacy required to justify the operation of an MFN clause to import obligations.

With regards to the reference to an 'acquisition' of rights in the ILC's 1978 Draft Articles, this does not appear to be a recognition by the ILC of the possibility of importing an external provision by way of an MFN clause. Article 9(1) of the ILC Draft Articles provides that 'the beneficiary State acquires, for itself or for the benefit of persons or things in a determined relationship with it, only those rights which fall within the limits of the subject matter of the clause'.[105] Similarly, the Draft Articles use the word 'acquire' in the draft NT provisions.[106] If the ICL's reference to acquisition had such meaning that would imply that NT provisions would have the effect of importing all more favourable treatment given by internal legislation into the treaty. There is no doubt that this is not the purpose of NT provisions. In addition, the ILC Draft Articles recognise that it is a function of the MFN clauses that the beneficiary of such a clause may *claim* advantages: '[t]he essence of the rule is that the

103 Stephan W Schill, 'Allocating Adjudicatory Authority: Most-Favoured-Nation Clauses as a Basis of Jurisdiction—A Reply to Zachary Douglas' 2 Journal of International Dispute Settlement (2011) 364. See *Case concerning rights of nationals of the United States of America in Morocco,* Judgment of August 27th, 1952, ICJ Rep 1952 176, 190.

104 Ibid, 191

105 International Law Commission, above n 68, at 27.

106 Draft Article 11 provides 'Effect of an unconditional national treatment clause' read 'Under an unconditional national treatment clause the beneficiary State acquires the right to national treatment from the granting State without the obligation to reciprocate the same treatment in kind to the latter State'; draft Article 12 provides 'Effect of a national treatment clause conditional on material reciprocity' read 'Under a national treatment clause conditional on material reciprocity the beneficiary State acquires the right to national treatment from the granting State against reciprocating the same treatment in kind to the latter State'. See Ustor, above n 6, at 126.

Downloaded from https://academic.oup.com/jiel/advance-article-abstract/doi/10.1093/jiel/jgx034/4819240
by The Chinese University of Hong Kong user
on 25 January 2018

beneficiary of a most-favoured-nation clause cannot claim from the granting state advantages of a kind other than that stipulated in the clause'.[107]

C. The forgotten aspect of Ambatielos

The *Ambatielos* case, before the Commission of Arbitration,[108] is a seminal case for its analysis of MFN provisions. In this case, the Commission broadly interpreted the MFN clause in Article X of the Treaty of Commerce and Navigation between Greece and UK of 1886[109] as referring to 'all matters relating to commerce and navigation', so as to include 'the administration of justice'.[110] In its 2015 Final Report, the ILC's Study Group on MFN clauses noted that the proposition that MFN provisions apply to ISDS provisions of BITs, as adopted by the tribunal in *Maffezini v Argentina* and other subsequent tribunals, 'may have been based initially on a misinterpretation of what the Commission of Arbitration in *Ambatielos* meant when it referred to "the administration of justice"'.[111] Apart from this, one point that is often forgotten about *Ambatielos,* is that while the Commission was ready to determine whether there was a breach of the MFN provision it was not willing to use the MFN clause for other purposes.

Ambatielos was concerned with a contract for the purchase of nine steamships. In that case, Greece contended that the treatment of Mr Ambatielos by English courts constituted 'a breach of Article X [the MFN provision] of the 1886 Treaty under which Greece and Greek subjects have the benefit of other treaties into which the United Kingdom had entered' (the 1886 Treaty). It also invoked clauses on 'denial of justice' and of 'full protection', included in seven treaties concluded by the UK with third countries.[112] In addition, Greece claimed there had been a denial of 'free access to the courts' under Article XV of the 1886 Treaty.[113] The Commission noted that at the hearing it had asked the counsel for Greece to 'indicate . . . the Article or Articles of the Treaty of 1886 to which each of these facts, according to the Greek Government, was referable'.[114] In answering this question, the Chief Counsel for Greece stated: 'I accept that in order to succeed in this claim the Greek Government must be able to establish that there was a breach of some provision, some Article of the 1886 Anglo-Greek Treaty'.[115] In considering the matter, the Commission explained:

> It is apparent, therefore, that the essential task of the Commission is *to determine*, in the light of such facts as it may consider duly established by the

107 International Law Commission, above n 68, at 30, para 12.
108 *Ambatielos Case (Greece v United Kingdom)* (Award, 6 March 1956) [1956] 12 RIAA 83.
109 Treaty of Commerce and Navigation and accompanying Declaration between Greece and United Kingdom of Great Britain and Northern Ireland (signed and entered into force 10 November 1886).
110 *Ambatielos Case*, above n 108, at 107.
111 Study Group on the Most-Favoured-Nation Clause, Final Report, Annex to the Report of the International Law Commission (14 August 2015), at 28, para 162.
112 *Ambatielos Case*, above n 108, at 101.
113 Ibid, at 102.
114 Ibid, at 105.
115 Ibid.

Downloaded from https://academic.oup.com/jiel/advance-article-abstract/doi/10.1093/jiel/jgx034/4819240
by The Chinese University of Hong Kong user
on 25 January 2018

> Claimant Government on whom the burden of proof obviously lies whether or not Articles X and XV of the Treaty of 1886, or either of them, have been *violated* by the Government of the United Kingdom.[116]

The Commission went on to state that '[i]n view of this decision as to the proper interpretation of Article X [the MFN provision] the Commission finds it unnecessary to consider expressly whether any of the 11 allegations of fact which, in their totality, are alleged to *constitute a breach* of Article X, have been established'.[117] Thus, the position of the Commission of Arbitration was that the function of the MFN provision is to determine whether or not there had been a breach of that provision. It follows that the MFN provisions could not be used for purposes of 'importing' or 'displacing' provisions in the base treaty. As the Commission explained, 'the essential task of the Commission is to determine . . . whether or not [the MFN provision] ha[s] been violated'.[118]

D. MFN and the consent to international jurisdiction

The previous subsections have shown that it is not the function of MFN clauses to import a provision into the base treaty, that is not otherwise included, in order to impose a wholly new obligation on contracting States. If the tribunal cannot import a provision, much less it can give itself the power to determine whether there has been a breach of an imported provision.

There is a difference between being bound by an international obligation and the existence of an international jurisdiction that can determine whether there is a breach of that obligation. It has been noted that '[t]he scope of the substantive protections granted in an international treaty does not have to be . . . coextensive with the scope of the dispute settlement mechanisms'.[119]

The ICJ and other international tribunals have on many occasions confirmed the 'fundamental principle of consent' to jurisdiction in international adjudication.[120] The ICJ has repeatedly noted that it is 'a well-established principle of international law embodied in the Court's Statute, . . . that the Court can only exercise jurisdiction over a State with its consent'.[121] In *Certain Questions of Mutual Assistance in Criminal*

116 Ibid (emphasis added).

117 Ibid, at 110 (emphasis added).

118 Ibid, at 105.

119 *ST-AD v Bulgaria*, above n 11, para 361.

120 *Western Sahara* (Advisory Opinion, 16 October 1975) 1975 ICJ Rep 12, para 33; *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* (Advisory Opinion, 15 December 1989) 1989 ICJ Rep 177, para 33; *Fisheries Jurisdiction (Spain v Canada)* (Judgment, Jurisdiction, 4 December 1998) 1998 ICJ Rep 432, para 127; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Judgment on preliminary objections, 1 April 2011) ICJ GL No 140, para 131; *Abyei Arbitration (Sudan v The Sudan People's Liberation Movement/Army)* (Award, 22 July 2009) para 507. See also *Philip Morris v Uruguay* , ICSID Case No ARB/10/7, Decision on Jurisdiction (2 July 2013) para 141.

121 *Monetary Gold Removed from Rome in 1943 (Italy v France and ors)* (Preliminary Question, Judgment, 15 June 1954) 1954 ICJ Rep 19, 32. That jurisprudence was applied by the ICJ in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (Judgment on Jurisdiction and Admissibility, 26 November 1984) 1984 ICJ Rep 392, 431, para 88; *Frontier Dispute (Burkina Faso v Mali)* (Merits, Judgment, 22 December 1986) 1986 ICJ Rep 554, 579, para 49; *Land, Island and Maritime Frontier*

Downloaded from https://academic.oup.com/jiel/advance-article-abstract/doi/10.1093/jiel/jgx034/4819240
by The Chinese University of Hong Kong user
on 25 January 2018

Matters, Djibouti v France, the ICJ summarised its jurisprudence as to the existence and the scope of consent in the following terms:

> The consent allowing for the Court to assume jurisdiction must be certain . . . As the Court has recently explained, whatever the basis of consent, the attitude of the respondent State must 'be capable of being regarded as 'an unequivocal indication' of the desire of that State to accept the Court's jurisdiction in a 'voluntary and indisputable' manner.[122]

The principle of consent to jurisdiction is crucial in determining whether an MFN clause can be used as a basis to provide jurisdiction to assess whether or not there has been a breach of an obligation from another treaty. Most non-NAFTA tribunals have considered that the issue of importation through MFN clauses is an issue that affects its jurisdiction,[123] however they have not paid much attention to the principle of consent to jurisdiction. By contrast, when NAFTA tribunals have faced arguments regarding alleged better treatment provided for in other IIAs through the MFN clause, they have dealt with the issue on the merits phase and normally they do not refer to the possibility of having jurisdiction over provisions not included in NAFTA Chapter 11.[124]

Another important element, that is useful to understanding whether an MFN can provide a tribunal with the jurisdiction to determine the existence of a breach of an imported provision, is the concept of the 'offer to arbitrate'. The consent of contracting States to investor–state arbitration is provided in an IIA in the form of a unilateral offer to arbitration.[125] This unilateral offer in an IIA must be accepted by the

Dispute (El Salvador v Honduras) (Judgment, Application to Intervene, 13 September 1990) 1990 ICJ Rep 92, 114–116, paras 54–56, and 112, para 73; *Certain Phosphate Lands in Nauru (Nauru v Australia)* (Preliminary Objections, Judgment, 26 June 1992) 1992 ICJ Rep 240, 259–262, paras 50–55; and in *East Timor (Portugal v Australia)* (Jurisdiction, Judgment, 30 June 1995) 1995 ICJ Rep 90, para 35.

122 *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* (Judgment, 4 June 2008) ICJ General List no 136, para 62. Quoting *Armed Activities on the Territory of the Congo (Congo v Rwanda)* (Judgment, Jurisdiction and Admissibility, 3 February 2006) [2006] ICJ GL No 126, para 18. See also *Corfu Channel (United Kingdom v Albania)* (Judgment, Preliminary Objection, 25 March 1948) [1948] ICJ Rep 15, 27; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Judgment, Preliminary Objections, 18 November 2008) [2008] ICJ GL No 118, para 40.

123 See e.g. *Paushok v Mongolia*, above n 7, para 560; *Impregilo v Argentina*, above n 10, para 183, *Arif v Moldova*, above n 48, para 396; *EDF v Argentina*, above n 45, para 931.

124 *Pope v Canada,* above n 22, para 111; *ADF v United* States, above n 34, para 196; *United Parcel Service of America Inc. v Government of Canada*, (*UPS v Canada),* ICSID Case No. UNCT/02/1, para 184; *Chemtura v Canada*, above n 39, para 236; *Apotex v United States*, above n 7, para 9.72.

125 *Ceskoslovenska Obchodni Banka,A.S. v The Slovak Republic* (*CSOB v Slovakia)*, ICSID Case No ARB/97/4, para 44*; Siemens v Argentina,* above n 10, para 202; *Bogdanov v Moldova*, SCC Case No V091/2012, Award (16 April 2013) para 26; *Jan de Nul v Egypt*, ICSID Case No ARB/04/13, Decision on jurisdiction (16 June 2006) para 108; *Kılıç v Turkmenistan*, above n 10, para 6.2.1; *Achmea B.V. v The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13, para 222; *Generation Ukraine v* Ukraine, ICSID Case No ARB/00/9, Award (16 September 2003) para 12.7; *Caratube v Kazakhstan*, ICSID Case No ARB/08/12, Award (5 June 2012) para 331; *Al-Bahloul v Tajikistan,* SCC Case No V (064/2008), Final Award (8 June 2010) para 122; *Ethyl Corporation v. The Government of Canada*, *(Ethyl v Canada),* UNCITRAL, Award on Jurisdiction (24 June 1998), para 3.2.4; *SGS v Paraguay*, ICSID Case No ARB/07/29, Decision on Jurisdiction (12 February 2010) para 70.

Downloaded from https://academic.oup.com/jiel/advance-article-abstract/doi/10.1093/jiel/jgx034/4819240
by The Chinese University of Hong Kong user
on 25 January 2018

investors in order for the agreement to arbitrate to exist.[126] It is commonly acknowledged that the investor can only accept the unilateral offer to arbitrate in the IIA, but it cannot modify it.[127]

The offer to arbitrate is generally included in the ISDS provision of an IIA, although that provision redirects to other clauses in the treaty, such as the definitions of 'investment' or 'investor', in order to define the contours of consent. This redirection usually does not include MFN clauses.

In addition, many IIAs expressly provide, within their ISDS provisions, that the jurisdiction of the arbitral tribunals is limited to assessing whether or not there is breach of the obligations under the IIA itself. For example, under NAFTA Articles 1116 and 1117, an investor Party may submit a claim to arbitration alleging that another Party 'has breached an obligation under . . . Section A'. That section is concerned with the substantive obligations relating to investments, including Article 1103.[128] Other treaties provide, within their ISDS provision, that the arbitral award shall be limited to determining whether there has been a breach of an obligation under the agreement at issue, and whether such breach has caused damages to the investor concerned.[129] Since MFN clauses are substantive provisions that include obligations, the only thing a tribunal could do with these clauses is to determine whether there is a breach or not of these obligations.[130] In other words, tribunals cannot use an MFN clause for other purposes, such as to permit the importation of provisions or to alter the scope the tribunal's jurisdiction by, for example, extending it to permit a determination as to whether or not there has been a breach of an obligation not included in the base treaty.

In this respect, it is important to highlight the different nature between MFN and ISDS clauses. First, MFN clauses are substantive in nature, not procedural.[131] It has been noted that 'MFN clauses are not and should not be interpreted or applied to create new causes of action beyond those to which consent to arbitrate has been given by the Parties'.[132] Secondly, in *EURAM v the Slovak Republic*, the tribunal

126 Zachary Douglas, *The International Law of Investment Claims* (Cambridge: Cambridge University Press, 2009) 75; *Wintershall v Argentina*, above n 10, para 116.

127 *Kılıç v Turkmenistan*, above n 10, para 6.2, *Hochtief v Argentina*, above n 10, para 24.

128 See also Treaty between the Government of the United States of America and the Government of the Republic of Georgia concerning the encouragement and reciprocal protection of investment, done at Washington, 10 August 1999, Article IX(1).

129 E.g. Agreement between the Government of the United Mexican states and the Government of the Republic of Argentina for the promotion and reciprocal protection of investments, done at Buenos Aires, 2 June 1998, Article 10(6).

130 *Venezuela US v Venezuela*, Dissenting Opinion, above n 9, para 36.

131 E.g. *Kiliç v Turkmenistan*, above n 10, paras 7.3.1 and 7.3.9. On the distinction between substantive and procedural provisions, see for example, *Jurisdictional Immunities of the State (Germany v Italy)* (Judgment, 3 February 2012) ICJ Rep 2012, 99, paras 93–95. In that case the Court observed that the fact that a rule has the status of *jus cogens* does not alter the application of the customary international law regarding the immunity of one state from proceedings in the courts of another. The Court furthermore considered that 'the law of immunity is essentially procedural in nature[, i]t regulates the exercise of jurisdiction in respect of particular conduct and is thus entirely distinct from the substantive law which determines whether that conduct is lawful or unlawful' (ibid, para 58).

132 *Accession Mezzanine v Hungary*, above n 11, para 73.

Downloaded from https://academic.oup.com/jiel/advance-article-abstract/doi/10.1093/jiel/jgx034/4819240
by The Chinese University of Hong Kong user
on 25 January 2018

noted that, unlike the other provisions in a BIT (including the MFN clause), the ISDS provision is the only one which 'makes possible the creation of – a direct relationship between one of the States Parties to the BIT and an investor . . . a clause which provides for the investor of one State Party to arbitrate with the other States Party . . . not only as an undertaking between the States Parties but also as an offer by each State Party to qualifying investors of the other State Party'.[133]

It is theoretically possible that an MFN provision may constitute part of the offer to arbitrate. However, as explained bellow, the text, the nature of MFN provisions, and the principle of consent seem to indicate that this would be possible only when there is unequivocal evidence that that was the intention of the parties.[134]

IV. THE INTERPRETATION OF MFN CLAUSES AND THE ISSUE OF IMPORTATION

A. The interpretation of the elements of MFN clauses

The theoretical framework necessary to interpret and apply an MFN clause included in an international agreement is provided for by general international law. This framework includes the customary rules of interpretation codified in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties (VCLT), including the text and context of the provision, which imply also paying attention to the principles of international law such, as the principle of consent to international jurisdiction, as well as to the nature of MFN clauses, which are substantive provisions and relative standards.

When applying MFN clauses, investment tribunals very often state that, as a matter of interpretation, each provision must be regarded on its own merits in accordance with customary international law norms. This statement, with which the author completely agrees, deserves some clarification. Firstly, tribunals that have endorsed this statement have reached opposite conclusions, even when interpreting provisions with similar or identical wording. Secondly, this statement sometimes disregards the nature of MFN clauses, more subtle principles of interpretation, or key principles of international law such as consent to international jurisdiction.

In accordance with the analysis above, the parallels between MFN and NT provisions show the common nature of these two provisions. As such, when applying an MFN clause, an investment tribunal, should perform the same detailed analysis undertaken by other tribunals when interpreting NT provisions and pay attention to all the elements of the clause. It is for these reasons that, in order for an investor to avail itself of the MFN provision in a BIT to benefit from a provision from another BIT, several preconditions under an MFN clause should be satisfied: there should be a 'treatment', 'in like circumstances', which should be 'less favourable' than that accorded to investors of third countries. The exact wording of each MFN clause may change but these three requirements, with some variations, will be inherent to any MFN clause. In addition, the claimant has the burden of proving that each one of these elements is satisfied. In doing this, it is necessary to perform a textual analysis

133 *EURAM v Slovak Republic*, above n 11, para 445.
134 Ibid, para 450.

Downloaded from https://academic.oup.com/jiel/advance-article-abstract/doi/10.1093/jiel/jgx034/4819240
by The Chinese University of Hong Kong user
on 25 January 2018

of the MFN provision, in its proper context. However, this benefit does not imply an importation of treatment.

With regards to the interpretation of the term 'treatment', the discussion on this issue, as it relates to the framework of MFN and NT clauses, can be very significant. This includes the analysis of tribunals called upon to analyse the use of MFN clauses to broaden ISDS provisions, which have focused on whether the 'treatment' covered refers to procedural or substantive matters. There is no doubt that those treaty provisions that are normally invoked in cases dealing with importation are substantive, such as the FET or umbrella clauses. However, since the alleged importation implies the inclusion of a new obligation into the base treaty and an attendant determination of whether there has been a breach of the imported provision, ultimately, there is a broadening of the tribunal's jurisdiction. Thus, much of the analysis relating to the meaning of the term 'treatment', usually performed by tribunals dealing with MFN and ISDS provisions, is relevant here.[135] The recent treaty practice of different states generate doubts as to whether substantive obligations included in other IIAs in themselves constitute 'treatment' for purposes of an MFN clause.[136]

Another issue is whether the treatment granted by international agreements constitutes 'treatment in the territory' of the contracting parties, a requirement that appears in numerous MFN and NT provisions included in IIAs. In *Berschader v Russia* the tribunal considered that the use of the expressions 'treatment' and 'in its territory' 'appears to indicate that what the Contracting Parties had in view was the material rights accorded to investors within the territory of the Contracting States'.[137] On this analysis it appears that substantive obligations included in other IIAs do not constitute in themselves 'treatment in the territory' for purposes of the MFN clause.

In relation to the 'less favourable' treatment requirement inherent in MFN clauses, investment tribunals usually recognize that MFN provisions are relative standards that require a comparison.[138] This should imply, for instance, an analysis on whether the treatment granted to an investor or an investment under the base treaty is less favourable than the treatment to an investor or an investment of a third state.

When considering 'like circumstances', investment tribunals dealing with MFN clauses and internal measures have undertaken a similar approach to tribunals analysing NT provisions.[139] This analysis has been less clear in cases dealing with MFN clauses and the treatment granted by international agreements. Non-NAFTA

135 See for example, *ICS v Argentina*, above n 10, paras 289–290; *Daimler v Argentina*, above n 10, paras 218–224; *Kiliç v Turkmenistan*, above n 10, para 7.3.9.

136 See above n 19.

137 *Berschader v Russia*, above n 11, para 185. See also *Beijing Group v Yemen*, above n 12, para 120.

138 *Gas Natural v Argentina,* above n 10, para 31; *Plama v Bulgaria,* above n 9, para 208; *ICS v Argentina,* above n 10, para 318; *Daimler v Argentina,* above n 10, para 241; *Garanti Koza v Turkmenistan*, above n 9, para 88.

139 *AES v Hungary*, above n 7, para 12.3.2; *Paushok v Mongolia*, above n 7, paras 313–316; *GEA v Ukraine*, above n 7, para 342; *Cargill v Mexico*, above n 7, para 228; *Grand River v United States*, above n 7, paras 165–166.

Downloaded from https://academic.oup.com/jiel/advance-article-abstract/doi/10.1093/jiel/jgx034/4819240
by The Chinese University of Hong Kong user
on 25 January 2018

tribunals dealing with MFN clauses and international agreements have not conducted 'like circumstances' analysis, simply proceeding to a somewhat automatic importation.[140] On the other hand, in the context of NAFTA, the *ADF v United States* tribunal and the three NAFTA member states support the idea that there should be an analysis of all the elements of the MFN provision, including 'like circumstances', when invoking a provision from another treaty.[141] The ILC Study Group on the MFN clause has noted that 'interpretations of phrases such as "in like circumstances" or "in similar situations" in the context of national treatment can provide important guidance for the interpretation of those terms in the context of MFN clauses'.[142] Moreover, it is generally accepted that the 'like circumstances' requirement, even if not expressly provided, is implicit in any non-discrimination provision, including MFN clauses.[143]

Furthermore, the intention of the treaty's contracting parties is important. It is quite common for tribunals to refer to the intention of the contracting parties when interpreting an MFN provision and also when interpreting ISDS provisions, in spite of the fact that 'intention' is not a requirement expressly included in Article 31 of the VCLT.[144] It must be remembered that the intention of the contracting parties to a treaty is highly relevant in determining the scope of the jurisdiction of an international tribunal.

In considering this issue, it is also necessary to analyse the *ejusdem generis* principle. That principle is codified within Article 9.1 of the 1978 ILC Draft Articles on the MFN clause, which provides that under an MFN provision the beneficiary acquires 'only those rights which fall within the limits of the subject-matter of the clause'.[145] The ILC has also provided some tools for analysing this issue. The ILC has explained that; firstly, the common intention of the parties plays a central role in interpreting this concept because 'the clause can only operate in regard to the subject-matter which the two States had in mind when they inserted the clause in their treaty;'[146] secondly, '[t]he comparison cannot take place *in globo,* which would have no sense, but point by point, in detail'; [147] thirdly, the 'process is strictly confined to cases where there is a substantial identity between the subject matter of the two sets of clauses concerned';[148] fourthly, 'States cannot be regarded as being bound beyond the obligations they have undertaken'.[149] It has been held that the

140 Cf *İçkale İnşaat Limited Şirketi v Turkmenistan*, above n 29, paras 328–329.

141 *ADF v United States,* above n 34, paras 194 and 196.

142 Study Group on the Most-Favoured-Nation Clause, above n 111, at 19, para 77. See also *İçkale İnşaat Limited Şirketi v Turkmenistan*, above n 29, para 329.

143 See, for example *Elettronica Sicula SPA (ELSI),* Judgment, ICJ Rep 1989, 15, paras 122 and 134 and International Law Commission, above n 68, 31, para 18.

144 See for example, *Ambatielos Case*, above n 108, para 107; *Salini v Jordan*, above n 11, para 110; *Berschader v Russia*, above n 11, para 201; *Wintershall v Argentina*, above n 10, paras 78 and 103; *Renta 4 v Russia*, above n 11, para 89; *Daimler v Argentina*, above n 10, para 215; *Telenor v Hungary*, above n 11, para 95; *Garanti Koza v Turkmenistan*, above n 9, para 23.

145 International Law Commission, above n 68, 27, Article 9.1.

146 Ibid, para 1.

147 Endre Ustor, 'Working Paper on the MFN Clause' II Yearbook of the International Law Commission 165 (1968), at 169.

148 International Law Commission, above n 68, at 30, para 11.

149 Ibid.

Downloaded from https://academic.oup.com/jiel/advance-article-abstract/doi/10.1093/jiel/jgx034/4819240
by The Chinese University of Hong Kong user
on 25 January 2018

ejusdem generis principle proscribes the MFN clause in a BIT from importing substantive protections of a kind not explicitly contained in the treaty itself.[150]

In addition to the issues set out above, a further issue arises when seeking to determine whether an MFN provision in an IIA can be used to invoke provisions from treaties of a different nature. This issue is of particular significance in the context of the *ejusdem generis* principle.[151] In 1960 the Swiss–Italian Conciliation Commission endorsed the view that the MFN clause cannot ensure the enjoyment of advantages granted under a treaty of a different kind, namely a peace treaty.[152] Other authors share this view.[153] Ustor, however, has rejected this view.[154] This latter view may be supported by the fact that the express exceptions to the MFN clauses that tend to appear in IIAs, such as tax treaties and regional economic integration organisation (REIO) exceptions, refer to treaties of a different nature than IIAs.

B. The determination of damages

The text and nature of most MFN clauses included within BITs suggest that, in cases concerning MFN clauses and treatment under international agreements, a tribunal should compare the treatment of the claimant under the base treaty with the treatment of investors under the reference treaty. It is only after such analysis that, if appropriate, a tribunal should make any finding that an MFN clause has been violated (i.e. instead of examining the violation of the imported provision). Where a tribunal makes such a finding, it is then necessary to consider the compensatory measures available in cases concerning MFN clauses and treatment granted by international agreements. Arbitral decisions dealing with compensation in cases where there has been a breach of an MFN or NT clause are unusual. Only two known investment tribunals have ruled that there had been a breach of an MFN clause itself, however, they did not perform an analysis of the damages available under that clause.[155] Decisions by investment tribunals relating to compensation in cases of breaches to NT provisions are not extensive either (only a few tribunals have found there to have been a breach to an NT provision[156]) and tribunals have not so far

150 See *Impregilo v Argentina*, above n 10, para 184. Cf. *EDF v Argentina*, above n 45, para 237.

151 See *Warraq v Indonesia*, above n 26, para 544 'the *ejusdem generis* rule would still apply. The two treaties would still have to deal with the same subject matter, as is the case with the protection of investments treaties'.

152 Italy, Ministry of Foreign Affairs, *Atti Relativi alia Vertenza per Applicazione ai Cittadini Svizerri dell'Imposta Straordinaria Italiana sul Patrimonio* 25 International Law Reports (1960) 313. Endre Ustor, 'Fourth report on The Most Favoured Nation Clause' II 25 Yearbook of the International Law Commission 98 (1973), at 105–107.

153 Arnold McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1938), at 302–303. P Pescatore, 'La clause de la nation la plus favorisée dans les conventions multilaterals' 53 Annuaire de l'Institut de droit international 1 (1969), at 207–209.

154 Ustor, above n 152, at 107 and International Law Commission, 'Draft Articles on The Most Favoured Nation Clause' 30 Yearbook of the International Law Commission II, Part II, (1978) at 30. See also Edouard Sauvignon, *La clause de la nation la plus favorisée* (Grenoble, France: Presses Universitaires de Grenoble, 1972), at 73–74.

155 *ATA v Jordan*, above n 26, para 125 and *White Industries v India*, above n 61, para 11.4.20.

156 See *SD Myers Inc v Canada*, UNCITRAL, Second Partial Award (21 October 2002), paras 222, 228 and 311; *Feldman Karpa v Mexico*, ICSID Case No ARB(AF)/99/1, Award (16 December 2002), paras

Downloaded from https://academic.oup.com/jiel/advance-article-abstract/doi/10.1093/jiel/jgx034/4819240
by The Chinese University of Hong Kong user
on 25 January 2018

defined a methodology for awarding damages in such cases.[157] Basically, a remedy under the NT and MFN provisions should place the comparators in equivalent positions.[158]

In order to establish a methodology for dealing with damages as they relate to MFN clauses and international agreements, it is important to recall the general principles of reparation applied in case of an international wrongful act. The ILC's Articles on State Responsibility indicate that every international wrongful act implies the obligation to make 'full reparation for the injury caused'.[159] There must exist a 'link . . . between the wrongful act and the injury in order for the obligation of reparation to arise.'[160] This would imply, in the case of an MFN clause, a *causal link* between the wrongful act (i.e. the breach of an MFN clause by failing to provide an investor the same treatment granted to an investor protected under a third party treaty) and the injury. In practical terms an investor could claim damages because the State did not provide the same treatment than that provided to an investor protected under a third party treaty—to the extent that such damages and a causal link exist—but not because there was a breach of an external obligation not included in the treaty.

This causality analysis could have important effects in an hypothetical quantum analysis, since the causal link between (i) treating an investor protected under the base treaty not in conformity with a provisions appearing in a third party treaty (e.g. FET), (ii) the fact of not having included that provision in the base treaty (i.e. the base treaty not including FET), and (iii) a breach of an MFN clause (i.e. because the treaty does not include FET), appears to be distant. In other words, the damage to the investor protected under the base treaty would be produced by not treating an investor fairly and equitably, and not by not granting MFN treatment. A similar causal analysis should be made when applying other forms of reparation apart from compensation (i.e. restitution and compensation), provided that they are available under the base treaty.

Another element affecting the scope of reparation that is important for establishing damages in the case of a breach to an MFN provision, is the question of

189–195; *Occidental Exploration and Production Company v Ecuador*, LCIA Case No UN3467, Final Award (1 July 2004), paras 198–210; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas Incorporated v Mexico*, ICSID Case No ARB(AF)/04/5, Award (21 November 2007), paras 269–304; *Cargill Incorporated v Republic of Poland*, ICSID Case No ARB(AF)/04/2, Final Award (29 February 2008), paras 577–690; *Cargill v Mexico*, above n 7, paras 431–540; *Corn Products International Inc. v United Mexican States*, ICSID Case No ARB (AF)/04/1, Decision on Responsibility (15 January 2008) paras 109–143 (the award dated 18 August 2009 is not public); *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc v Canada*, UNCITRAL, PCA Case No 2009-04, Award on Jurisdiction and Liability (17 March 2015) paras 685–725, (at the time of writing there was no decision on damages in this case).

157 See Thomas W Wälde and Borzu Sabahi, 'Compensation, Damages, and Valuation', in Peter T. Muchlinski, Federico Ortino and Christoph H. Schreuer (eds.) *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008), 1053, 1084.

158 Ibid.

159 International Law Commission, Commentaries to the Draft Articles on Responsibility of States for internationally wrongful acts, International Law Commission, Fifty-third session (2001) Official Records of the General Assembly, Fifty-sixth session, Supplement No 10 (A/56/10), chapter IV E.2, 91, Article 31.1.

160 Ibid, 92, para (10)

Downloaded from https://academic.oup.com/jiel/advance-article-abstract/doi/10.1093/jiel/jgx034/4819240
by The Chinese University of Hong Kong user
on 25 January 2018

'mitigation of damage'.[161] In the case of an MFN clause, the application of this concept would imply that the investor should request the State to provide the same treatment as that included in a third party treaty before claiming compensation from an investment tribunal.

An additional comment deserves the issue of 'cessation'. Cessation is 'concerned with securing an end to continuing wrongful conduct'.[162] It could happen that a state is responsible for a continuing wrongful conduct by not granting MFN to a foreign investor. In that scenario cessation could take two forms: (i) the state could expand the better treatment granted to an investor from a third state to the investor under the base treaty, or (ii) it could withdraw the better treatment granted to an investor from a third state so the two treatments are equalled. However, not including in the base treaty a provision from a reference treaty is not a continuing wrongful act as such, i.e. a continuing breach of the MFN clause. In order to find a breach of an MFN clause as regards another international agreement it will be necessary to find an 'investor' or an 'investment' receiving 'treatment', which is 'more favourable', in 'like circumstances'.

V. CONCLUSION

To date, those investment tribunals that have dealt with MFN treatment and the importation of substantive treatment from other treaties have very often disregarded the nature and elements of the MFN provisions themselves. Most tribunals have limited themselves to assessing whether the provision invoked is not within the base treaty or is broader than its counterpart in the base treaty and, where either of those two situations arise, they have proceeded to import a provision through the MFN clause within the base treaty. Once they have undertaken this analysis, they have not determined whether or not there was a breach of the MFN clause, but have instead directly analysed the facts of the case in light of the imported clause, considering whether or not there was a breach of the imported clause itself.

This article has argued that typical MFN clauses included within BITs cannot be used to import a provision that is not included in the base treaty in order to create a new obligation. MFN provisions are both substantive standards that require a comparison and primary rules that require the determination of a breach. MFN clauses can oblige a state to offer the same treatment, but it cannot create new obligations enforceable directly under the base treaty. The use of MFN clauses in other areas of international law shows that such clauses are not generally used to import new provisions. For example, the *Ambatielos* tribunal was ready to determine whether there had been a breach of the MFN provision but it was not willing to import a new obligation into the base treaty. Similarly, the WTO dispute settlement organs are empowered to determine whether a breach of the MFN provisions included within the WTO agreement has taken place, but they do not import the better treatment standard in the new provision directly into the WTO agreement for direct enforcement. In other words, as the ILC has emphasized, the role of MFN clauses is not to impose new obligations on the State beneficiary of the clause but to alter the scope

161 Ibid, 93, para (11).
162 Ibid, 88, para (1).

Downloaded from https://academic.oup.com/jiel/advance-article-abstract/doi/10.1093/jiel/jgx034/4819240
by The Chinese University of Hong Kong user
on 25 January 2018

of the MFN treatment obligation. To paraphrase the ICJ, the treaty containing the MFN clause 'establishes the juridical link between the [beneficiary state] and the third party treaty and confers upon that State the rights enjoyed by the third party'.[163] This would imply, in practical terms, that the obligation always remains the grant of MFN treatment, but that the content of that obligation can change depending on the nature and scope of the better treatment or on whether that better treatment has been withdrawn or not.

At the same time, a tribunal may not use this alleged function of importation via the MFN provisions to grant itself jurisdiction to decide whether or not there has been a breach of the imported provision. There is a difference between being able to invoke a provision of another treaty through an MFN clause and ensuring that a tribunal has jurisdiction to establish whether or not there has been a breach of that imported clause. The existence of obligations in a treaty, without having an international jurisdiction to determine whether there was compliance with these obligations, is common in international law. The way that certain investment tribunals have interpreted the MFN clauses before them circumvents the real purpose of MFN clauses and provides a method for expanding the jurisdiction of investment tribunals—in a way not intended by the contracting States—to decide on obligations not included in the base treaty.

As the *ICS v Argentina* tribunal has shown, the theoretical framework necessary to interpret and apply an MFN clause in an international agreement includes consideration of the customary rules of interpretation codified in the VCLT (including the text and context of the provision), the principle of consent to international jurisdiction, as well as the nature of MFN clauses, which are substantive provisions and relative standards.[164] Any analysis of an MFN clause must closely consider the specific wording of the MFN clause in accordance with the rules of interpretation in the VCLT. In particular, any potential application of an MFN provision requires an analysis of all the elements of the clause, including the existence of 'treatment' in 'like circumstances' that is 'less favourable', as has been suggested by many NAFTA tribunals. The common nature and similarities between MFN and NT, recognized by numerous tribunals, implies that, when interpreting an MFN clause, investment tribunals should perform the same detailed analysis undertaken by other tribunals in interpreting NT provisions and pay close attention to all the elements of the clause. This has been the approach followed by investment tribunals when dealing with MFN clauses and internal measures and there is no reason why tribunals should perform a different analysis when interpreting the same provision with respect to external measures.

The nature and the text of most MFN clauses included within BITs suggest that, in cases concerning MFN clauses and treatment granted by international agreements, a tribunal should compare the treatment of the claimant under the base treaty with the treatment of investors under the reference treaty (as it was suggested by the tribunal in *İçkale v Turkmenistan*), and then, if appropriate, they should find a violation of the MFN clause (as the *ADF v United States* tribunal suggests), instead of going

163 See above n 94.

164 See *ICS v* Argentina, above n 10, paras 274–282 and 318–319.

Downloaded from https://academic.oup.com/jiel/advance-article-abstract/doi/10.1093/jiel/jgx034/4819240
by The Chinese University of Hong Kong user
on 25 January 2018

and examining the violation of a new provision from the reference treaty. The legal framework applicable to MFN clauses, as presented in this work, strongly militates in favour of the proposition that the standard MFN clauses included in IIAs should not be used to import treaty provisions from other treaties unless a clear and unambiguous intention of the contracting parties can be identified in the terms of the base treaty itself or, paraphrasing the ICJ, when a consent wich is 'certain' in that regard can be identified.

Downloaded from https://academic.oup.com/jiel/advance-article-abstract/doi/10.1093/jiel/jgx034/4819240
by The Chinese University of Hong Kong user
on 25 January 2018