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ARTICLES

PARTY AUTONOMY IN INVESTOR-STATE ARBITRATION: SUPREMACY OF TREATY AND THE FUTURE OF MOST-FAVORED NATION TREATMENT

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ABSTRACT

Most Favored Nation (MFN) Treatment in investor-state arbitration is a contentious issue. Although there is much tension between the "text" and the "intent" camps, it is largely beyond dispute that the clear and unambiguous text—the plain meaning—of a treaty trumps background principles of international law. This is entirely in keeping with the axiom in investor-state arbitration that even the default rules of an arbitral forum such as the International Centre for Settlement of Investment Disputes (ICSID) or United Nations Commission on International Trade Law (UNCITRAL) may be superseded by the specific terms of a treaty. Party autonomy's privileged status in investor-state arbitration explains this phenomenon.

Unlike the jurisdictional rules in United States federal courts—loosely described as top-down because they are derived from the United States Constitution, laws, or the pertinent federal rules of appellate, criminal or civil procedure—investor-state arbitration works more in a bottom-up manner. In the latter, specific signatories to a treaty want primacy over what the less granular concepts of international law or even forum rules indicate. In this respect, treaty interpretation in investor-state arbitration differs from the way legal instruments tend to be construed by United States's federal courts, where the parties' agreement alone may not usually displace the core rules of how the court operates or its Article III jurisdiction to resolve a case or controversy.

That said, there is a sense in which treaty interpretation in investor-state arbitration is similar to the way that legal instruments are interpreted by U.S. federal courts: both debate whether to give priority to the intentions of the parties over the plain text and vice versa. What emerges is that, among the general principles of international law, there are hierarchically organized categories. Party autonomy belongs at or near the top where treaty interpretation is concerned—certainly eclipsing any role of general international law principles or even forum rules.

Another important proposition—also derived from party autonomy—is that where a treaty's text is silent on the matter (or it so directs), an MFN guarantee imports the substantive and jurisdictional benefits afforded, in theory or reality, third parties by any of the signatories of the treaty in question. This is true even where such benefits have not actually been bestowed upon an identifiable third-party investor. The mere possibility that a third-party investor might get a better deal from any of the signatories than each other's investors is enough to constitute an MFN breach.

In 2008, the United States Supreme Court held that a non-self-executing treaty is not enforceable federal law that can trump states' prerogative of executing their lawfully attained judgments. The case was *Medellín v. Texas*.[1] In *Medellín*, the principal question concerned whether the International Court of Justice's (ICJ) determination that the Vienna Convention on the Law of Treaties (VCLT) precluded the application of a country's default rules (concerning

[1] 552 U.S. 491.

consular access to the foreign arrestees within a State) must be given domestic legal effect by federal and state courts within the United States.[2] Since the norm was not "self-executing," it could not be given operative legal effect, the Supreme Court held.[3] This keeps alive the possibility that a "treaty still may be self-executing if its terms indicate that the President and Senate so intended."[4]

Interestingly, the Supreme Court in *Medellín* reaffirmed the Court's willingness to utilize interpretive tools beyond the plain text of treaties but only when the text is ambiguous. The *Medellín* Court observed that, although treaty interpretation should "begin with [the treaty's] text," a ratified treaty is essentially "an agreement among sovereign powers."[5] Fundamentally, a treaty is a contract—as the Supreme Court has repeatedly observed.[6] Remarkably, Justice Breyer, who dissented in *Medellín*, pursued a contract analogy to explain why, in his view, the relevant treaties should be analyzed in a particular way.[7] To the Court, this meant that it was entitled to consult the "negotiation and drafting history of the treaty as well as 'the postratification understanding' of signatory nations."[8] In the Supreme Court's own words, treaty "interpretation normally is, like a contract's interpretation, a matter of determining the parties' intent."[9]

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[2] *Id*. at 498.

[3] *Id*. at 498-99; *see also* Daniel J. Freeman, *The Canons of War*, 117 YALE L.J. 280, 321 (2007) ("If the international law provision is not clearly enforceable-either through integration in a statute or express self-execution-then international law yields.").

[4] An example is the Warsaw Convention, which governs the liability of air carriers for passenger injuries and lost cargo. *See* Convention for the Unification of Certain Rules Relating to International Transportation by Air, opened for signature Oct. 12, 1929, 49 Stat. 3000. The Supreme Court has held that "no domestic legislation is required to give the [Warsaw] Convention the force of law in the United States." Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984). Whether or not the President and the Senate have indicated the treaty is self-executing, it cannot be so if it violates the constitutional rights of States.

[5] 552 U.S. at 501.

[6] *See*, *e.g.*, Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 533 (1987) ("In interpreting an international treaty, we are mindful that it is in the nature of a *contract* between nations, to which general rules of construction apply.") (emphasis added); BG Grp., PLC v. Republic of Arg., 572 U.S. 25, 37 (2014) ("As a general matter, a treaty is a *contract*, though between nations.") (emphasis added); Air France v. Saks, 470 U.S. 392, 399 (1985) (courts are obligated to afford "the specific words of the treaty a meaning consistent with the *shared expectations of the contracting parties*") (emphasis added); Sullivan v. Kidd, 254 U.S. 433, 439 (1921) ("[T]reaties are to be interpreted upon the principles which govern the interpretation of *contracts* in writing between individuals, and are to be executed in the utmost good faith, with a view to making effective the *purposes of the high contracting parties*") (emphases added); Wright v. Henkel, 190 U.S. 40, 57 (1903) ("Treaties must receive a fair interpretation, according to the *intention of the contracting parties*") (emphasis added).

[7] *Id*. at 547-48 (Breyer, J., dissenting).

[8] 552 U.S. at 507 (citing Zicherman v. Korean Air Lines Co., 516 U.S. 217, 226 (1996)).

[9] *BG Grp.*, 572 U.S. 25, 37 (2014) (citing *Saks*, 470 U.S. at 399).

This article points out that where investor-state dispute settlement (ISDS) is concerned, it is ordinarily the treaty that will prevail over the general principles of international law and most forum rules. This is true of both jurisdictional matters and substantive claims. The general principles pertinent to this inquiry often are derived from customary international law, *opinio juris*, and judgments and awards of international tribunals.

I. TREATIES' SUPREMACY OVER DEFAULT PRINCIPLES OR FORUM RULES

A. PLAIN MEANING OF TREATY TEXT

There is virtually no dispute that the text of the treaty and the intentions of the parties govern over the general principles of international law. Even the VCLT—in many respects, the seminal source or at least the *fons et origo* of modern international law—makes that postulate clear. "The 1969 Vienna Convention on the Law of Treaties extensively governs treaties between States. It not only regulates the conclusion, entry into force, amendment, and the termination of such treaties but also stipulates legally binding rules for treaty interpretation."[10]

A treaty's plain meaning is its "clear and ordinary" meaning to which the signatories most likely agreed.[11] It is elementary that "[t]he purpose of" and the entire project undergirding "interpreting texts of legal significance is to establish the meaning of the expressions and phrases used in it and, therefore, to analyze how the parties wanted the text to be applied under the circumstances related to a given question of interpretation."[12] Illustratively, the ISDS tribunal in *Cube Infrastructure Fund SIVAC v. Kingdom of Spain* emphasized the importance of the treaty text's plain and unambiguous meaning—in this case, the Energy Charter Treaty (ECT)—over any extrinsic sources (including general principles of international law).[13] That Tribunal observed:

> … that the words found in Article 26(1) ECT do not differentiate between different classes of Contracting Parties. The text speaks of Contracting Parties in general. If the drafters had seen any need to introduce a distinction between the Contracting Parties, they could have done so. It does not matter, in this regard, what the motives for the unitary model chosen by them were. It may well be that it did not occur to any one of the negotiating delegations that some kind of differentiation might be advisable. Or else one might surmise that the EU, which was the driving force behind the efforts to bring about an international legal instrument for the regulation of the energy market, saw no real chance to have such a discriminatory clause approved by the other partners, in particular those from outside the European Community. In any event, the wording of Article

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[10] Katharina Berner, *Authentic Interpretation in Public International Law*, MAX-PLANCK-INSTITUT 864, https://www.zaoerv.de/76_2016/76_2016_4_a_845_878.pdf.

[11] *See* EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic, ICSID Case No. ARB/03/23, Award, ¶ 795 (June 11, 2012); Eureko B.V. v. Republic of Poland, UNCITRAL, Partial Award, ¶ 246 (Aug. 19, 2005).

[12] OPPENHEIM'S INTERNATIONAL LAW 87 (9th ed.); *see id*. at 92-94.

[13] ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum (Feb. 19, 2019).

> 26(1) ECT is free from any additional words modifying the result that is obtained by a reading in accordance with the ordinary meaning of the terms. Accordingly, the [ECT's] literal meaning leaves no doubts.[14]

Indeed, it is believed that "few, if any, commentators would deny that the [judges and arbitrators resolving international disputes] give[] primacy to the text of a treaty over any textually unexpressed intentions of the contracting states."[15] However, "disagreement exists regarding how strong this preference for 'text' over [signatory] 'intention' actually is."[16] Indeed, Article 31 of the VCLT appears to be regarded as "a sort of bible when it comes to treaty interpretation."[17] This is because "[g]lobal, regional and domestic courts routinely cite it as providing the framework for the treaties they interpret."[18]

It is undoubtedly true that "[t]he goal of treaty interpretation under the VCLT is to determine the meaning of the treaty viewed from the perspective of the contemporary shared understanding of the parties to the treaties."[19] The parties are masters of the treaty. Indeed, in the words of former ICJ Judge James Crawford, the parties "own the treaty."[20] The dispute settlement system has the limited commission of resolving the dispute, without overstepping their admittedly-circumscribed role. This is true "even if it is certainly the case that their citizens, [businesses,] animals and plants (and those of other states) may well be affected by how that treaty is interpreted."[21] This is because, unless this limitation on their role were reasonably enforced, exceptions and exemptions—as a matter of principle, difficult to justify—would be sought and eventually they would swallow the rule. To that end, "the key evidence for interpretation will be the interactions of the parties insofar as it demonstrates that shared understanding."[22]

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[14] *Id*. at ¶ 124; *see also* Veteran Petroleum Ltd. (Cyprus) v. Russian Federation, PCA Case No. AA 228, Interim Award on Jurisdiction and Admissibility, ¶ 387 (Nov. 30, 2009) (dispositively resorting to "plain meaning" of treaty).

[15] Tony Cole, *The Boundaries of Most Favored Nation Treatment in International Investment Law*, 33 MICH. J. INT'L L. 537, 573-74 (2012) [hereinafter Cole, *MFN Boundaries*] ("Most controversially, commentators are split regarding whether clear evidence that the text as adopted does not accurately reflect the intentions of the contracting states should suffice to overrule otherwise clear treaty language, or if states must instead simply live with the agreements they sign.").

[16] *Id*.

[17] Steven R. Ratner, *International Law Rules on Treaty Interpretation*, *in* THE LAW AND PRACTICE OF THE NORTHERN IRELAND PROTOCOL 82 (Christopher McCrudden, ed., Cambridge Univ. Press, 2022) [hereinafter Ratner, *Treaty Interpretation*].

[18] *Id*.

[19] *Id*.

[20] James Crawford, *A Consensualist Interpretation of Article 31(3) of the Vienna Convention on the Law of Treaties*, *in* TREATIES AND SUBSEQUENT PRACTICE 29, 31 (Oxford Univ. Press 2013) [hereinafter Crawford, *Consensualist Interpretation*].

[21] Ratner, *supra* note 18, at 82.

[22] Ratner, *supra* note 18, at 82.

A related principle is that "[t]reaty interpretation is" sometimes determined to be "not just a task for tribunals."[23] This is because "[p]arties to treaties are constantly interpreting them, making claims against the other party in diplomatic settings, bilaterally and multilaterally, confidentially and publicly."[24] In fact, "[o]nly a small handful of these disputes will make it to tribunals due to jurisdictional obstacles and incentives that states have to avoid formal dispute settlement."[25] The treaty, therefore, is being construed to answer questions that arise and in planning for various scenarios long before a tribunal is called upon to resolve a dispute under it.

Treaty interpretation involves rules to deduce the most accurate meaning of the pertinent operative provisions. "[T]he VCLT's rules of interpretation are laid out in two articles," but it is believed that "treaty interpretation is not a formulaic exercise, where boxes are checked and then a decision reached."[26] Various indicators of a treaty's meaning—namely context and structure[27]—will affect that interpretation, as the text occupies a pivotal and central role. Even the most ardent textualist, who typically might eschew the subjective intentions of the treaty's drafters, consults "the purpose of the *text*, which is a vital part of its context."[28]

Along with the treaty text, its context, its structure, and the arbitral jurisprudence surrounding a matter affect how a treaty will be construed since the diction contained in the protections—Fair and Equitable Treatment (FET), Minimum Standards of Treatment (MST), [29] Full Protection and Security (FPS), National Treatment (NT), Most Favored Nation (MFN) Treatment, Non-Discrimination, Compensation, Public Purpose, and Due Process—often is

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[23] *Id*.
[24] *Id*.
[25] *Id*.
[26] *Id*.
[27] A treaty's words generally "mean what they conveyed to reasonable people at the time" the treaty was ratified. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 16 (2012). That makes sense in light of the fact that treaties, like domestic legislation, "convey meaning only because members of a relevant linguistic community apply shared background conventions for understanding how particular words are used in particular contexts." John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2457 (2003). Treaties, like statutes, are read "in their context and with a view to their place in the overall statutory scheme" (commonly regarded as statutory structure). FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000).
[28] SCALIA & GARNER, *supra*, at 33 (alterations made).
[29] Some questions about the overlap between FET and MST might linger, with a heterogeneity of voices supplying different answers. *See*, *e.g.*, *Enron Corp. and Ponderosa Assets, L.P. v. Argentina*, ICSID Case No. ARB/01/3 (2007), at ¶ 258 (stating that "the Fair and Equitable Treatment standard, at least in the context of the Treaty applicable to this case, can also require a treatment additional to, or beyond that of" Minimum Standards of Treatment or the international minimum standard); *Sempra Energy International v. Argentina,* ICSID Case No. ARB/02/16 (2007), at ¶ 302 (FET might be "more specific, less generic and spelled out in a contemporary fashion so that its application is more appropriate to the case under consideration.").

identical across treaties. For instance, "acts that would give rise to a breach of the minimum standard of treatment prescribed by the [applicable treaty] and customary international law as those that, weighed against the given factual context, amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards."[30] Concurrently, there appears to be something of "a general understanding among tribunals that some evidence will be more probative of the parties' contemporary understanding than others."[31]

What is more, "[t]reaty interpretation, like statutory interpretation, can" sometimes "yield more than one [plausible] interpretation of a treaty."[32] And "[j]ust as the state[] parties to a treaty may have *bona fide* differences of opinion regarding its meaning, so may judges" or arbitrators.[33] But the objective is to find the *best* interpretation of the pertinent treaty provision—*i.e.*, the most *accurate* meaning. In that enterprise, identifying the treaty signatories' intentions as expressed in the treaty text is believed to help to negate other, perhaps hypothetical or speculative, possibilities offered up by the parties disputing a matter.[34] Without that indispensable check, divergence from the meaning of the text (and thus, from the text itself) becomes a distinct possibility, one that invariably will undermine the task of interpretation and the role of the expositor. It will turn the interpreter of the treaty into its maker. And it goes without saying that where disputants are involved with some form of relief on the line, prevailing in the matter at hand might take on paramount importance. This is why the treaty signatories' intentions expressed *at the time of the treaty's ratification* are likely shorn of many ulterior motives that might tempt entities in the heat of battle.

It follows from these premises that the terms that signatories themselves devise and place in the treaty may supplant the default rules of treaty interpretation, be they from VCLT or elsewhere. For instance, signatories "are free to include clauses in the treaty, or in subsequent instruments, that offer (a) a particular interpretation of a clause, (b) a particular set of indicia to consider or exclude in future interpretations and (c) a specific process for interpretation that may differ from that in the VCLT [or anywhere else]."[35] This is true even when

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[30] Int'l Thunderbird Gaming Corp. *v. Mexico,* UNCITRAL Arb. Award (2006), ¶ 194; *see also* Alex Genin et al. v. Estonia, Award, ICSID Case No. ARB/99/2 (2001); S.D. Myers, Inc. v. Canada, First Partial Award, UNCITRAL (NAFTA) (2000); Mondev International Ltd. v. United States, ICSID Case No. ARB(AF)/99/2 (2002); ADF Group Inc. v. United States, Award, ICSID Case No. ARB(AF)/00/1 (2003); Azinian v. Mexico, Arbitral Award, ICSID Case No. ARB(AF)/97/2 (1999); Loewen Group v. United States, Award, ICSID Case No. ARB(AF)/98/3 (2003); Case concerning Elettronica Sicula SpA (ELSI) (United States v. Italy), 1989 I.C.J. 15 (July 20).

[31] Crawford, *Consensualist Interpretation*, at 31 (citing Jean-Marc Sorel & Valérie Boré Eveno, *Article 31: General Rule of Interpretation*, *in* 1 THE VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 804, 829 (2011)).

[32] Ratner, *supra* note 18, at 83.

[33] *Id*. (emphasis added).

[34] *Id*. ("At the same time, the tools of treaty interpretation generally succeed in narrowing the range of plausible interpretations, sometimes to one.").

[35] *Id*.

(or perhaps especially when) the treaty carries broad, narrow, or otherwise inadvisable language regarding the arbitrators and judges.[36] It is the *signatories'* treaty—one that they took the trouble to negotiate (perhaps punctiliously), codify, and perhaps even ratify (depending on their domestic law requirements)—and it is their view that should govern.[37]

Along similar lines, it is important to remember that not every judge, arbitrator, or court believes that treaties should be construed in accordance with their plain meaning. In fact, "different tribunals have developed interpretive methodologies that are distinct from [the plain-meaning approach], or at least put a particular emphasis on one factor more than others."[38] Particularly, "both the European Court of Human Rights [(ECtHR)] and the [Court of Justice of the European Union] have endorsed a broadly teleological approach to treaty interpretation that emphasizes the overall purposes of the European human rights regime or the [European Union], respectively."[39] On top of that, the ECtHR lends credence to the "margin of appreciation" doctrine, appearing to suggest that sovereign states sometimes should receive some degree of deference from the international tribunals interpreting the European Convention on Human Rights ("ECHR")—something that the VCLT does not directly address (but also does not expressly preclude).[40]

There is no "explicit obligation on domestic courts to employ [any particular set of default interpretive rules] to interpret treaties."[41] As a result, "depending on each state party's approach to the direct application of treaties …, domestic courts will have a domestic law obligation to interpret the treaty in accordance with the

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[36] *See*, *e.g.*, *Eureko*, Partial Award, at ¶ 246 ("[t]he plain meaning-–the 'ordinary meaning'-of a provision prescribing that a State 'shall observe any obligations it may have entered into' with regard to certain foreign investments is not obscure . . . 'Any' obligations is capacious; it means not only obligations of a certain type, but 'any'-that is to say, all-obligations entered into with regard to investments of investors of the other Contracting Party."); *EDF*, Award, at ¶ 938 ("The 'umbrella clauses' in question are broadly worded. A clear and ordinary reading of these dispositions covers commitments undertaken with respect to investors, or undertaken in connection with investments.").

[37] This is not to undermine the gate-keeping mechanisms often used by certain courts, which can be inexorable. Under those circumstances, of course the treaty cannot force a court to render a procedural or substantive decision that goes against the laws that court is obligated to obey. A familiar example: A treaty may not force a federal court in the United States to entertain a dispute where the parties lack standing. *See*, *e.g.*, Lujan v. Defs. of Wildlife, 504 U. S. 555, 560-61 (1992).

[38] Ratner, *supra* note 18, at 83.

[39] *Id*.

[40] Andreas von Staden, *Deference or No Deference, That is the Question: Legitimacy and Standards of Review in Investor-State Arbitration*, IISD (July 19, 2012), https://www.iisd.org/itn/en/2012/07/19/deference-or-no-deference-that-is-the-question-legitimacy-and-standards-of-review-in-investor-state-arbitration/.

[41] Ratner, *supra* note 18, at 83.

VCLT."[42] The VCLT asserts, in Article 31(1) and (2), that this is how a treaty should be interpreted:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

Consequently, the VCLT supplies a "text-based starting point for treaty interpretation."[43] The prevailing view is that the "ordinary meaning [of] the terms of the treaty"—the ordinary, contemporary meaning of the salient provision—will govern the meaning of treaties. Yet, as part of following the customary international law, international tribunals tend to rely even on predominantly *domestic*-law interpretive canons such as *ejusdem generis* ("of the same kind"), *noscitur a sociis* ("a thing is known by the company it keeps"), *expressio unius est exclusio alterius* ("the expression of one thing is the exclusion of the other"), and *effet utile*.[44]

This last principle denotes that, like statutes, a treaty should "be interpreted to give it, as a whole, and the individual provisions within it meaningful effect."[45] In other words, it is the tribunal's duty to construe the different provisions of a treaty harmoniously in order to minimize tension between the treaty's provisions.[46] Making optimal sense of the whole document is the point of that endeavor. This is not unlike the way that statutes are interpreted because courts tend to avoid creating *surplusage*, *i.e.*, redundancies as to the meaning of the words or concepts in a statute.[47] The various approaches to *effet utile* adopted by international tribunals show that "treaty clauses must be interpreted to avoid either rendering them superfluous or depriving them of significance for the relationship

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[42] *Id*. at 83 n.5 (citing David Sloss, *Domestic Application of Treaties*, *in* THE OXFORD GUIDE TO TREATIES 367 (2012)).
[43] *Id*. at 84.
[44] *See infra*.
[45] Ratner, *supra* note 18, at 84.
[46] *See* Joel P. Trachtman, *WTO Trade and Environment Jurisprudence: Avoiding Environment Catastrophe*, 58 HARV. INT'L L.J. 273, 285 (2017) (stating that *effet utile* ordinarily "treat[s] the same words in the same treaty the same way.").
[47] *See*, *e.g.*, Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 837 (1988) (observing that courts "are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law"). That said, the canon against surplusage is believed to "assist[] only where a competing interpretation gives effect to every clause and word of a statute." Marx v. Gen. Revenue Corp., 568 U.S. 371, 385 (2013).

between the parties."[48] Only after all the canons of treaty interpretation, including *effet utile*, fail to provide ISDS tribunals with a determinate answer do the tribunals typically conclude that the pertinent treaty provision is, in fact, ambiguous.[49]

Now, on to the teleological or purposivist approach. Under this view, tribunals afford substantial weight to the purposes and contexts behind treaties over their plain meaning. With respect to the "object and purpose" of treaties, "tribunals have significant discretion in their mode of determining it, as well as its impact on the meaning of the text."[50] Of course, frequently, "the treaty's text will specify the agreement's purpose, either in the preamble or in an early article."[51] The concern with a tribunal's overreliance on a treaty's purpose is the heightened risk of tribunal arbitrariness and opportunism (real or perceived). Like actual judicial arrogations of authority, such perceptions can be damaging as well.

The "context" of the treaty is, in certain respects, "more concrete" than the somewhat more amorphous discussion of purposes.[52] For a treaty's context "consists of other written instruments concluded in connection with the treaty."[53] Some of the requirements: They must be written and agreed upon, "relat[ed] to the treaty," and have a "connection with the conclusion of the treaty." Typical examples include exchanges of notes between the parties that define terms or include additional commitments, and context might also include "negotiating history for purposes of Article 32 of the VCLT."[54] Furthermore, Article 31(3) of the VCLT contains additional indicators for context: "(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties."

The first element—(a) subsequent agreement between the parties—refers to the way that the signatories themselves construe the meaning of the treaty *after* it has come into force. For instance, subsequent agreements (a) refer to new treaties or other agreements (including oral agreements) where the parties clarify how they wish to construe or apply the treaty's provisions. "Such agreements are given significant, even dispositive, weight because they clearly demonstrate the parties'

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[48] Ratner, *supra* note 18,, at 84 (citing Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v Russ.), Preliminary Objections, 2011 I.C.J. Rep. 70, ¶ 134; Sorel & Eveno, *supra* note 32, at 830-32).

[49] *See*, *e.g.*, OPIC Karimun Corp. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/l0/14, Award, ¶¶ 103-06 (May 28, 2013) (citing other ISDS tribunals that have concluded that a provision is "confusing and imprecise;" is "ambiguous and obscure;" and is devoid of a "natural meaning.").

[50] Ratner, *supra* note 18, at 84.

[51] *Id*.

[52] *Id*. at 85.

[53] *Id*.

[54] *Id*.

contemporaneous understanding of the meaning of a treaty."[55]Sometimes, the treaty provisions can be in tension and the canons of interpretation might help resolve the thornier conundrums about the meaning of the more opaque or Delphic provisions.

The second element—(b) subsequent practice in the application of the treaty—is significantly "more difficult to identify [than (a)] because it is typically not reduced to a single document."[56] Interpreters have to assure themselves, and perhaps convince the world, that the two (or more) parties have truly agreed on what a particular provision of the treaty means, as opposed to simply agreeing on something else.[57] While some authorities are willing to ascribe a degree of deference to such amendments, many are reluctant to do so.[58] Most prominently, when the Federal Trade Commission issued detailed guidance (Notes) on the meaning of various North American Free Trade Agreement (NAFTA) provisions—particularly Minimum Standards of Treatment and Fair and Equitable Treatment[59]—ISDS tribunals were split on the revelatory value or authority of those Notes.[60]

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[55] *Id*. at 86.

[56] *Id*.

[57] Some tribunals tend to consult post-treaty practice. *See*, *e.g.*, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. Rep. 16 (Advisory Opinion of 21 June), ¶ 22.

[58] *See Report of the International Law Commission on the Work of its 65th Session*, UN Doc. A/68/10 (2013), at 21, A/CN.4/SER.A/2013/Add.1 (Part 2) ("The character of subsequent agreements and subsequent practice of the parties under article 31(3)(a) and (b) as 'authentic means of interpretation' does not ... imply that these means necessarily possess a conclusive, or legally binding, effect."); *see also* Hazel Fox, *Article 31 (3) (A) and (B) of the Vienna Convention and the* Kasikili/Sedudu Island *Case*, *in* TREATY INTERPRETATION AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: 30 YEARS ON 61.

[59] *See*, *e.g.*, 2001 FTC Notes, http://www.international.gc.ca; Metalclad Corporation v. Mexico, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000), ¶¶ 100 *et seq*.; SD Myers Incorporated v. Canada, Ad Hoc Tribunal (UNCITRAL), First Partial Award and Separate Opinion (Nov. 13, 2000), ¶¶ 224 *et seq*.; Pope & Talbot Incorporated v. Canada, Ad Hoc Tribunal (UNCITRAL), Award on the Merits of Phase 2 (Apr. 10, 2001), ¶¶ 110 *et seq.*

[60] *See*, *e.g.*, Pope & Talbot Incorporated v. Canada, Ad Hoc Tribunal (UNCITRAL), Interim Award (June 26, 2000) (rejecting FTC Notes or any post-treaty interpretation as retroactive amendment); see also Notice of Arbitration, Mondev International Limited v. United States, ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002) (making that same argument); Notice of Arbitration, ADF Group Incorporated v. United States, ICSID Case No. ARB(AF)/00/1, Award (Jan. 9, 2003) (same); Notice of Arbitration, Waste Management Incorporated v. Mexico, ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004) (same); ADF Group Incorporated v. United States, Award, *supra*, ¶¶ 177 et seq. (stating that there could not a "more authentic and authoritative source of instruction on what the Parties intended to convey in a particular provision of NAFTA" than the FTC Notes of 2001); Mondev International Limited v. United States, ICSID Case No. ARB(AF)/99/2, Award, *supra*, ¶ 121 (Oct. 11, 2002).

Lately, the United Nations' International Law Commission (ILC) has presented "detailed guidance to states and courts about the meaning of subsequent practice."[61] It has stated that "the range of acts that might constitute subsequent practice includes executive, legislative, judicial or other acts of the parties (but not of non-state actors), as a well as a conference, or joint institution, of the parties."[62] On this view, when the signatories' highest domestic tribunals "explicitly shared an understanding of a term in the treaty, and that understanding was not contradicted by other organs of the state, those court judgments would constitute the sort of state practice that is to be taken into account under sub-paragraph (b)."[63] This approach is not without its critics since, under their view, it is at the moment of a treaty's going into effect that its meaning is crystallized, and *post hoc* state conduct—regardless of the organ, agency, or instrumentality so doing—sheds no light on the meaning of the treaty itself. The latter might add new terms to be ratified in a new agreement but does not change the old treaty itself.

The third element—(c) relevant rules of international law applicable in the relations between the parties—arguably is the most malleable of the prongs. It leaves treaties open to being scrutinized in light of extraneous international agreements and treaties in different related or less related areas, not to mention much of customary international law. True, international tribunals often rely on customary international law (specifically, the rules of state responsibility) to determine when a signatory is responsible for some treaty-breaching behavior.[64] Tribunals sometimes do rely on "obviously relevant treat[ies] for the purpose of interpreting another treaty" but that enterprise should be circumscribed so as to avoid denying the immediate treaty's signatories their primacy.[65] And indeed, difficult, close cases occasionally do arise, "where the parties or judges" may be tasked with "interpret[ing] whether a particular norm is a 'rule;' whether it is 'relevant;' and" of course "whether it is 'applicable in the relations between the parties.'"[66]

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[61] Ratner, *supra* note 18, at 86.

[62] *Id*.; *see also Draft Conclusions on Subsequent Agreement and Subsequent Practice in Relation to the Interpretation of Treaties*, conclusion 5–6, 11(3), 12(2), U.N. Doc A/73/10 (2018), *reprinted in* 2 Y.B. Int'l L. Comm'n (part two) (2018).

[63] Ratner, *supra* note 18, at 87 (citing Whaling in the Antarctic (Australia v Japan, NZ Intervening), 2014 I.C.J. Rep. 224, ¶ 83 (Mar. 14)).

[64] Ratner, *supra* note 18, at 87 (citing Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v Serbia), 2007 I.C.J. Rep. 43, ¶¶ 385, 398 (Feb. 26)).

[65] *Id*.

[66] *Id*. (cleaned up). *See also* Bruno Simma & Theodore Kill, *Harmonizing Investment Protection and International Human Rights: First Steps towards a Methodology*, *in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 678 (Oxford Univ. Press 2009).

B. OTHER "SUPPLEMENTARY" CONSIDERATIONS AFFECTING AUTHORITATIVE TREATY INTERPRETATION

Article 32 of the VCLT recommends that international tribunals consider "supplementary" criteria when construing a treaty:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable.[67]

Such supplementary materials might include the "negotiating history of" and other preparatory work regarding a treaty—*travaux préparatoires*—when trying to ascertain a treaty's meaning.[68] Critics would demur because, in their view, only the text of the treaty is the authoritative instrument, and even negotiating history that reveals the areas of agreement are not necessarily authoritative. It is one thing for treaty signatories to agree on matters, quite another for them to ensconce it into their treaty.

In any event, under Article 32, international "tribunals are not constrained in when they may turn to these supplementary means, as such means can be used to either confirm or rebut what has been found from the deployment of Article 31."[69] Undoubtedly, a certain amount of negotiation history may be absent from the record since either notes were not taken at certain meetings or "those taking notes of the negotiation never wrote down what the parties meant to agree on—or to avoid agreeing on."[70] Certainly, "[t]he negotiating history could be confidential, thereby requiring an interpreting body to request it from the parties."[71] It is said that

> [t]his [unavoidable and commonplace] uncertainty over the availability and reliability of the *travaux préeparatoires*, combined with a view that these materials should matter less than those showing the contemporaneous understanding of the parties, may render them ultimately of little use for interpreting some treaties, though tribunals take them into account when they can find them.[72]

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[67] Ratner, *supra* note 18, at 88.

[68] *Id*. *See also* Richard Gardiner, *The Vienna Convention Rules on Treaty Interpretation*, *in* THE OXFORD GUIDE TO TREATIES 475, 479-80, 487-89 (2012). *But see* Julian D. Mortensen, *The Travaux of Travaux: Is the Vienna Convention Hostile to Drafting History?*, 107 AM. J. INT'L L. 780, 781-84 (2013) (noting criticisms of ways in which VCLT is hostile to the use of *travaux*).

[69] Ratner, *supra* note 18, at 88.

[70] *Id*. It is sometimes contended that the absence of recorded support for one point of view or another might mislead one into thinking that overwhelming support was in one direction or the other.

[71] *Id*.

[72] *Id*.

No matter what, though, the *travaux* or other supplementary means can never supplant what is clearly expressed in the treaty's text.[73] It is only in cases of ambiguity that the supplementary means have any probative value for the purposes of interpreting the treaty. As is explored later, the debate, at this point, becomes one of what constitutes sufficient textual clarity. Whereas some scholars and arbitrators believe that a clear command may be deduced through inferences from the treaty's text, context, and structure—notably, resort to extrinsic sources need not be had in order for an interpretation to qualify as a sufficiently clear one—others demand an explicit statement in the treaty. Typically, it is only after all the traditional canons of interpretation have been exhausted to no avail that a treaty provision may be said to be sufficiently indeterminate or ambiguous. That might explain why some tribunals give treaties their "plain and ordinary meaning, in circumstances where [a party has not] demonstrate[d] that the term should be given a different meaning."[74]

Moreover, Article 32's ambit stretches further than the preparatory process.[75] It "includes any other material related to the conclusion of the treaty not covered in Article 31(2), including statements by the negotiators to their legislature during debates over the latter's approval of the treaty."[76] Moreover, in the ILC's view, this scope "includes the conduct" and actions "of one or all parties to the treaty when that practice does not demonstrate the agreement of the parties required for that practice to be considered under Article 31(3)(b)."[77] As a consequence, ISDS tribunals find themselves encouraged by the VCLT to consider "the interpretation of the treaties by the parties to demonstrate that a particular understanding is not shared."[78]

In this framework, peremptory—or *jus cogens*—norms occupy a unique but nuanced status. To be sure, in the hierarchy of Article 53 of the VCLT, *jus cogens* norms have primacy over treaties.[79] This is for the purpose of being recognized by international law and the community of nations.[80] Though omnipotent (and thus susceptible to nullifying contrary treaty provisions), *jus cogens* norms rarely will come into play.[81] This is because the scope of *jus cogens* norms is highly restricted, essentially to "the prohibition of aggression, slavery and slave trade,

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[73] *See id.*

[74] *See*, *e.g.*, Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)04/6, Award, ¶ 134 (Jan. 16, 2013).

[75] *See* Ratner, *supra* note 18, at 89.

[76] *Id*.

[77] *Id*. *See also* ILC Draft Conclusions, *supra* note 63§§ 4–5.

[78] Ratner, *supra* note 18, at 89.

[79] *See id.*

[80] *See id.*; *see also* Kamrul Hossain, *The Concept of* Jus Cogens *and the Obligation Under The U.N. Charter*, 3 SANTA CLARA J. INT'L L. 72, 76 (2005) (stating that the criteria to determine whether a norm qualifies as *jus cogens* are: "(1) status as a norm of general international law; (2) acceptance by the international community of states as a whole; (3) immunity from derogation; and (4) modifiable only by a new norm having the same status.").

[81] *See id*.

genocide, racial discrimination and apartheid, the basic rules of international humanitarian law applicable in armed conflict and the principle of self-determination."[82]

The interpretive principles underlying Articles 31 and 32 "are routinely applied by international, regional and domestic courts and arbitral bodies—and of course by treaty parties themselves in their interactions regarding the implementation of treaties."[83] Robust scholarship exists in this space, though many international tribunals, notably the EU's Court of Justice, have a *sui generis* approach to adjudication.[84] If predictability and consistency in international law are objectives worth aspiring to, more clarity and uniformity may help intra-institutionally as well as inter-institutionally (to help harmonize the doctrines used and deployed by international tribunals, where appropriate).[85]

Importantly, this VCLT-facilitated approach is somewhat different from the way that federal courts in the United States these days construe statutes, with extra-textual considerations (for purposes of ascertaining what the treaty means) being largely *verboten* there.[86] The prevailing approach of statutory interpretation in American federal courts is that because it is the *statute* that was enacted through a complex and constitutionally-stipulated process of bicameralism and presentment, the legislative history that came before the enactment (or, for that matter, Presidential signing statements that may have come at the time of enactment) and the post-enactment legislative or executive assertions are less illuminating as to what that law means. The latter are vulnerable to charges of indulging in gamesmanship and opportunism. The Supreme Court has alerted us over a period of time that "if judges could freely invest old statutory terms with new meanings, we would risk amending legislation outside the 'single, finely wrought and exhaustively considered, procedure' the Constitution commands."[87] Under this view, only the statute's "ordinary, contemporary, common meaning" governs.[88]

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[82] *See Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Commentaries, Art. 40, ¶¶ 4-6, *in* REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FIFTY-THIRD SESSION, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001); G.G. Fitzmaurice (Special Rapporteur), *Third Report on Law of Treaties, Commentary on art. 17*, ¶ 76, U.N. Doc. A/CN.4/115., *reprinted in* 2 Y.B. Int'l L. Comm'n 41 (1958); *see also* S. Knuchel, *State Immunity and the Promise of* Jus Cogens, 9 NW. J. HUM. RTS. 149, 154 n. 19 (2011).

[83] Ratner, *supra* note 18, at 89 n.24 (citing VCLT Art. 26, Art. 60, and Art. 62).

[84] *See id*. at 90-91 (citing Jed Odermatt, *The Use of International Treaty Law by the Court of Justice of the European Union*, 17 CAMBRIDGE Y.B. EUR. LEGAL STUD. 121 (2015)).

[85] *See id.*

[86] *Compare* Digital Realty Trust, Inc. v. Somers, 583 U.S. 149, 169-71 (2018) (Sotomayor, J., concurring), *with id*. at 171-73 (Thomas, J., concurring in part and concurring in judgment).

[87] New Prime Inc. v. Oliveira, 586 U.S. 105, 112-14 (2019) (quoting INS v. Chadha, 462 U.S. 919, 951 (1983)).

[88] Perrin v. United States, 444 U.S. 37, 42 (1979).

C. PARALLELS WITH TEXTUALISM IN INTERPRETATION OF STATUTES IN U.S. COURTS

Unlike the jurisdictional rules in United States federal courts—which are loosely described as top-down because they are derived from the United States Constitution, laws, or pertinent federal rules—investor-state arbitration works more in a bottom-up manner. In ISDS, the intentions of specific signatories to a treaty are given primacy over what the less granular concepts of international law or even forum rules indicate. Should the ISDS parties wish to forego a default presumption of international law or the practice of a given forum, they generally can. They are masters of their own destiny in this regard. ISDS exists to facilitate dispute settlement on the terms of *their* choosing. Not the other way around.

Contrast this with the way that many domestic courts operate. Notably, the effect is different in the United States's federal courts, where the jurisdiction or substantive rules of the federal courts ordinarily do not permit parties to waive the court's rules, and the federal courts (under Article III of the Constitution) are not only empowered, but required, to ensure they have jurisdiction to resolve disputes brought to them. As the Supreme Court has repeatedly stated, litigants should adhere to standing, justiciability, and other threshold jurisdictional requirements, regardless of how strong or importunate the claims might be on the merits.[89]

In this respect, treaty interpretation in investor-state arbitration differs from the way legal instruments tend to be construed by United States federal courts, where subject-matter jurisdiction is usually strict in the sense that parties' agreement alone may not displace the core rules of how the court operates or its choice of law to be invoked. However, treaty interpretation in investor-state arbitration is also similar to the way that legal instruments are interpreted by U.S. federal courts: both debate whether to give primacy to the intentions of the parties over the plain text and *vice versa*. Furthermore, both approaches give primacy to what that instrument actually says instead of any default rules it dispels. Put simply, both for ISDS tribunals interpreting a treaty and U.S. federal courts interpreting statutes, these days, the words of a law "mean what they conveyed to reasonable people at the time they were written"—their ordinary, contemporary meaning—not what they *ought to have said* in light of futuristic concerns.[90]

None of this is to deny that "the meaning of language depends on the way a linguistic community uses words and phrases in context."[91] "[O]ne can make sense of others' communications only by placing them in their appropriate social

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[89] *See*, *e.g.*, Biden v. Nebraska, 600 U.S. 477, 488-93 (2023); TransUnion LLC v. Ramirez, 594 U.S. 413, 422-24 (2021) (litigant needs a "personal stake" in the case); Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1992) (litigant must have injury in fact-a "concrete," "particularized," and "actual or imminent" harm to a legally protected interest, like property or money-that is "fairly traceable" to the challenged conduct and likely to be redressed by the lawsuit) (cleaned up).

[90] SCALIA & GARNER, READING LAW, *supra* note 28, at 16; *see also* Tanzin v. Tanvir, 592 U.S. 43, 48-50 (2020); Sandifer v. U.S. Steel Corp., 571 U.S. 220, 227 (2014).

[91] John F. Manning, *What Divides Textualists From Purposivists?*, 106 COLUM. L. REV. 70, 78 (2006).

and linguistic context."[92] Undoubtedly, "statutes convey meaning only because members of a relevant linguistic community apply shared background conventions for understanding how particular words are used in particular contexts."[93]

Under this view, "[w]ords are arbitrary signs, having meaning only to the extent writers and readers share an understanding."[94] This is so because "[l]anguage in general, and legislation in particular, is a social enterprise to which both speakers and listeners contribute, drawing on background understandings and the structure and circumstances of the utterance."[95] Whether words are from treaties or from domestic legislation, their meaning is influenced by conventions and understandings, and unambiguous text signals that their meanings are determinative and what that text has said it is. In the Supreme Court's own words, a "plain and unambiguous" text "must" be enforced "according to its terms."[96] Put a little differently (and as suggested earlier), "[t]he [legal] inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent."[97] Whenever a legal instrument expressly mandates an unambiguous command, that is the governing meaning to which the tribunal must give effect, even (or especially) if the tribunal views that mandate as injudicious or otherwise undesirable.

D. PARTY AUTONOMY

Binding these subthemes together is the atom of party autonomy in ISDS. The core concept is that the principal aim of ISDS is *not* to make ISDS succeed or to follow a consistent set of rules (irrespective of what the treaty signatories want)—instead, it is to resolve disputes arising out of investment treaties. When the signatories want a particular system, there is a presumption that they have worked out the issues in their own way and are subject to their own constraints. It is not the place of the ISDS infrastructure to interfere with those choices to which the signatories have already committed themselves. Party autonomy is a priority where treaty interpretation is concerned and eclipses any role of general international law principles or even forum rules.

As established, there is a powerful impetus to defer to party autonomy and, thus, to the party's chosen forum.[98] But the importance of predictability requires

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[92] *Id*. at 79–80.
[93] John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2457 (2003).
[94] Herrmann v. Cencom Cable Assocs., Inc., 978 F. 2d 978, 982 (7th Cir. 1992)
[95] *Id*.; *see also* Continental Can Co. v. Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund, 916 F. 2d 1154, 1157 (7th Cir. 1990) ("You don't have to be Ludwig Wittgenstein or Hans-Georg Gadamer to know that successful communication depends on meanings shared by interpretive communities").
[96] Hardt v. Reliance Standard Life Ins. Co., 560 U. S. 242, 251 (2010).
[97] Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002).
[98] Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Arg. Republic, ICSID Case No. ARB/97/3, Decision, 6 ICSID Rep. 330 (2002); SGS Société Générale de Surveillance SA v. Republic of the Phil., Decision on Objections to Jurisdiction and

that rules not be changed drastically in the middle of the dispute. Notably, "[t]he jurisdiction of a Tribunal established according to the . . . [relevant] Convention is an objective matter determined by its constitutive instruments, and the Parties cannot either increase or reduce it by agreement or acquiescence."[99]

In the coming decades, this will effloresce through the lens of consistency. Whereas parties and even drafters of conventions and trade agreements retain the freedom to be inconsistent, unpredictable, and somewhat arbitrary, international tribunals worry constantly about their own legitimacy and are less likely to behave inconsistently. Parties typically know what their needs and earlier agreed-upon rules are. Thus, tribunals might overreach their neutral and adjudicatory roles and become super-drafters, thereby exceeding their province and remit.

II. MOST FAVORED NATION'S POTENCY

A. BACKGROUND OF MFN GUARANTEES

When treaties contain MFN clauses, they effectuate both non-discrimination as well as a tactical advantage.[100] Fundamentally, it follows, that where a treaty's text is silent on the matter (or it so directs), an MFN provision may, and indeed must, incorporate the full panoply of procedural and substantive benefits afforded third-party investors by either of the pertinent treaty's signatories of other treaties even where they have not been applied to the benefit of an identifiable investor.

MFN guarantees, in some shape or form, have an ancient pedigree. They stretch back to time immemorial for as long as there have been treaties.[101] Nor are they artificially constricted to the economic context—any more than treaties are. They can be political or social as well.[102] It is noteworthy that "the rise of international commerce in the late medieval period saw states adopting MFN clauses as a means of ensuring that their traders would compete in foreign markets on at least equal terms with traders from third states."[103] To give the reader some idea, MFN guarantees have been traced back "to the early Holy Roman Empire" and "to the medieval period."[104] It is further believed that "the rise of international

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Declaration, 8 ICSID Rep. 515 (2004); Tokios Tokelės v. Ukraine, Decision on Jurisdiction, 11 ICSID Rep. 313 (2004).

[99] Sociedad Anónima Eduardo Vieira v. República de Chile, ICSID Case No. ARB/04/7, Memorial of Objections, at ¶ 13 (Prof. Vaughan Lowe) (2006) ("Either the dispute is within the BIT or it is not. Express or implied assertions by the Parties cannot alter the position."); Ceskoslovenska Obchodni Banka, A.S. v. The Slovk. Republic, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, at ¶33, *et seq*. (1999); Autopista Concesionada de Venez., CA v. Bolivarian Republic of Venez., Decision of the Tribunal on Objections to Jurisdiction, at ¶ 61, *et seq*. (2001).

[100] Cole, *MFN Boundaries*, *supra* note 15, at 537, 543.

[101] *See id*. at 544-47.

[102] *See id.* at 544.

[103] *See id*. at 544-45.

[104] *Id*. at 544. *See also* Georg Schwarzenberger, *The Most-Favoured Nation Standard in British State Practice*, 22 BRIT. Y.B. INT'L L. 96, 97 (1945) [hereinafter Schwarzenberger, *MFN*] (mentioning "[i]mperial grants of customs privileges to cities

commerce in the late medieval period saw states adopting MFN clauses as a means of ensuring that their traders would compete in foreign markets on at least equal terms with traders from third states."[105]

A remarkable evolution in the deployment of MFN guarantees has occurred over the centuries. Although MFN guarantees today "are generally recognized as applicable to any benefit granted within a specified substantive area, including those benefits granted after the MFN clause comes into effect," that was not the case in the beginning.[106] In fact, "early MFN clauses referenced specific benefits already being received by specific third parties and principally constituted an agreement to extend those specific privileges to the beneficiary of the MFN clause."[107] In sum, originally, "MFN clauses were … not generalized promises that no third state would at any time be treated more favorably than the beneficiary of the MFN clause."[108] This approach did not endure.

MFN protections initially "were unilateral, specific, and retrospective."[109] Those guarantees usually were "agreement[s] by one state alone to extend MFN treatment to the other (*i.e.*, they were unilateral)."[110] What is more, such protections "were not a generalized promise that no third state would receive better treatment than that given to the state benefiting from the MFN clause."[111] As a matter of fact, those provisions tended to "identif[y] specific benefits that were already being provided to a third state, and constituted an undertaking that these same benefits would also be provided to the state benefiting from the MFN clause (*i.e.*, they were specific)."[112] In addition, these protections "applied solely to treatment already being given to one or more third states."[113] Crucially, "[t]hey

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within the Holy Roman Empire on the basis of favours obtained 'by whatsoever other town"'); Eugene J. Conroy, *American Interpretation of the Most Favored Nation Clause*, 12 CORNELL L. REV. 327, 338 (1927) [hereinafter Conroy, *MFN*] ("There had been occasional crude quasi-most favored nation clauses in antiquity, and a few among the commercial cities of the Mediterranean during the Middle Ages, but the clause did not come into any sort of regular use until the seventeenth century, with the rise of the mercantile system, and the bitter competition for trade and colonies that it brought in.").

[105] Cole, *MFN Boundaries*, *supra* note 15, at 544-45. *See also* John M. Kline & Rodney D. Ludema, *Building a Multilateral Framework for Investment: Comparing the Development of Trade and Investment Accords*, 6 TRANSNAT'L CORP. 1, 6 (1997) ("The term 'most favoured nation' appears to have originated with the 1692 treaty between Denmark and the Hanse cities.").

[106] Cole, *MFN Boundaries*, *supra* note 15, at 545 (cleaned up).

[107] *Id*. *See also* Stanley K. Hornbeck, *The Most-Favored-Nation Clause*, 3 AM. J. INT'L L. 395, 399-400 (1909) [hereinafter Hornbeck, *MFN*] (noting that "[i]n the beginning, this extension of favors was made but to one or two specified states.... The next step was to extend the advantages to include such favors as should be granted to certain other specified nations; then to include advantages granted to any nation whatsoever.").

[108] Cole, *MFN Boundaries*, *supra* note 15, at 545.

[109] *Id*.

[110] *Id*.

[111] *Id*.

[112] *Id*.

[113] *Id*.

did not require the state offering MFN treatment to maintain the equality of the state benefiting from the MFN clause by also extending to it any benefits granted to third states in the future (*i.e*., they were retrospective)."[114]

It is often maintained that the sole purpose of "early MFN clauses" was to ensure that "a sufficiently important trading partner [could] secure state benefits that were currently being received by major competitors."[115] It is also thought that such protections were borne of economic necessity rather than "any form of principled commitment to equality of treatment or impose serious constraints upon the freedom of a state to control its economic policies."[116] That said, many suggest that the MFN assurance's grantor "remained completely free to provide more favorable treatment to states not mentioned in the clause, and also to provide additional benefits to the named third states in the future."[117] Importantly, therefore, "MFN clauses at this time were used only as a means of expansive drafting in a context of limited information"—"ensuring that the beneficiary state received all benefits currently received by its major competitors, rather than only those of which it was currently aware."[118]

Around the seventeenth and eighteenth centuries, though, something was changing in this space. At this time, "the growth in global trade and commerce had resulted in these clauses becoming a standard feature of international economic agreements."[119] It was around then that the erstwhile "unilateral" MFN guarantees now began to appear as "bilateral" protections.[120] Furthermore, "they were also usually both general and prospective, applying to any benefit given to any third state within a particular substantive field, usually tariffs, and to both already-existing benefits and those given in the future."[121]

Unsurprisingly, MFN protections were being used "tactically by states."[122] Stratagems, opportunism, and benefits were often the principal drivers for providing MFN assurances. Such protections "were incorporated into agreements

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[114] *Id*.
[115] *Id*. at 546.
[116] *Id*.
[117] *Id*.
[118] *Id*.
[119] *Id*. *See also* Hornbeck, *MFN*, *supra* note 106, at 401 ("During the nineteenth century, the use of the clause increased and became so common, in one or another of its various forms, that its appearance came to be looked upon almost as a matter of course.").
[120] Cole, *MFN Boundaries*, *supra*, at 546. *See also* Conroy, *MFN*, *supra* note 103, at 330 ("The [bilateral clause] is the regular form; the unilateral clause is exceptional, and its presence indicates a position of hopeless inferiority in the promisor nation.").
[121] Cole, *MFN Boundaries*, *supra* note 15, at 546 (cleaned up). *See also* Schwarzenberger, *MFN*, *supra* note 103, at 97 ("The privileges granted to the beneficiary are no longer necessarily defined with reference to one or several specifically named countries ...."); RICHARD POMFRET, THE ECONOMICS OF REGIONAL TRADING ARRANGEMENTS 17 [hereinafter POMFRET, TRADING ARRANGEMENTS] (1997) ("The instrument for ensuring that tariff reduction was accomplished by diminishing discrimination among trading partners was the inclusion of the most-favoured-nation clause in commercial treaties.").
[122] Cole, *MFN Boundaries*, *supra* note 15, at 547.

to provide political benefits."[123] Such deployment of MFN protections became a commonplace American practice in the nineteenth century when the United States was negotiating treaties with foreign sovereigns.[124] "Upon its emergence into international commerce in the late eighteenth century, the United States found itself in an international market heavily geared against it."[125] The United States needed to and relied on "export[ing]" its agricultural products so it could "generate the income necessary to pay for the importation of manufactured products from Europe."[126]

Still, the countries of Europe had imposed significant tariffs on agricultural goods—a problem the United States needed to tackle in order for such goods to be competitive in Europe.[127] In other words, the United States felt it necessary to negotiate decreased tariffs with European countries. Effectively, the United States needed to figure out how to provide MFN guarantees without giving away tariff diminutions to numerous countries.[128]

A sensible way forward had to be devised. So it worked out conditional MFN guarantees, *viz*., "[a]s soon as more favorable treatment was provided to any third state, the state benefiting from the MFN clause immediately gained the right to the same treatment without having to offer anything in return."[129] This meant that "the state benefiting from the MFN clause had to offer the United States a concession equivalent to that given by the third state to gain access to any more favorable treatment granted to a third state."[130] This also meant that "[i]f no equivalent compensation was offered," the United States had "no obligation to

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[123] *Id*. *See also* POMFRET, TRADING ARRANGEMENTS, *supra* note 120, at 33 ("Between 1860 and 1930 the principle of non-discrimination governed the commercial policies of the major trading nations.... At the same time, there were frequent deviations from non-discriminatory policies [that] ... provided evidence of governments viewing discriminatory trade policies as serving national purposes."); Robert Pahre, *Most-Favored-Nation Clauses and Clustered Negotiations*, 55 INT'L ORG. 859, 873 (2001) (stating that "MFN must be understood as a regime norm chosen for political reasons independent of the tariff bargaining problem").

[124] *See* Cole, *MFN Boundaries*, *supra* note 15, at 547.

[125] *Id*. *See also* Conroy, *MFN*, *supra* note 105, at 337-38 ("The introduction and rise of the conditional form of the clause was due to ... an attempt by the United States to break down the impossible tariffs and ironclad monopolies which the mercantile system, then at its height, had established in Europe.").

[126] Cole, *MFN Boundaries*, *supra* note 15, at 547; *see also* Conroy, *MFN*, *supra* note 103, at 339.

[127] *See* Cole, *MFN Boundaries*, *supra* note 15, at 547.

[128] *See id.*; *see also* Carl Kreider, *The Most-Favored-Nation Clause*, 39 AM. ECON. REV. 1039, 1041 (1949).

[129] *See* Cole, *MFN Boundaries*, *supra* note 15, at 547; *see also* POMFRET, REGIONAL TRADING ARRANGEMENTS, *supra* note 122, at 18 ("From its first commercial treaty, with France in 1778, until 1923 the USA maintained that MFN pledges must be interpreted as conditional, even when the precise wording of a treaty was unclear.").

[130] Cole, *MFN Boundaries*, *supra* note 15, at 548.

extend the more favorable treatment to the beneficiary."[131] In practice, "the conditional MFN clause" became "just an invitation to renegotiate the terms of the original treaty."[132] Some scholars have argued that conditional MFN empowered the United States, as arbiter of what constituted equivalent value, to determine when and under what circumstances MFN treatment was warranted.[133]

Due to the wide trading network to which the United States and European countries subscribed, even "a single unconditional MFN clause" could "completely undermine the operation of a conditional MFN clause."[134] That is why "a state that has signed even a single unconditional MFN clause would gain no benefit from negotiating conditional MFN clauses."[135] The United States' nascent treaty partner role and its "continued insistence" on conditional MFN guarantees enabled it to deploy them.[136] But it was turbulent all around. And when the United States did grant an unconditional MFN guarantee, it "terminated the

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[131] *Id*. *See also* Chester Lloyd Jones, *The American Interpretation of the 'Most Favored Nation' Clause*, 32 ANNALS AM. ACAD. POL. & SOC. SCI. 119, 123 (1908) ("Even when the second nation offers the same nominal concessions as given by the first it cannot secure identical treatment under the clause unless the treaty-making power considers the second sacrifice actually equal to the first.").

[132] Cole, *MFN Boundaries*, *supra* note 15, at 548. *See also* Conroy, *MFN*, *supra* note 105, at 336 ("The claiming of a favour under the conditional clause necessitates a great deal of negotiation."); Jacob Viner, *The Most-Favored-Nation Clause in American Commercial Treaties*, 32 J. POL. ECON. 101, 122 (1924) ("The grantor of concession to one country for compensation is itself the judge of the equivalent compensation offered for the same concessions by other countries. If it does not wish to extend its concession to third countries, it need only deny the equivalence of the compensation offered.").

[133] Cole, *MFN Boundaries*, *supra* note 15, at 548-49. *See also* Henri Hauser, *The Most-Favored-Nation Clause: A Menace to World Peace*, 156 ANNALS AM. ACAD. POL. & SOC. SCI. 101, 103 (1931) [hereinafter Hauser, *MFN*] ("[T]he United States maintains that the rule of reciprocity does not preclude the granting of special favors to contiguous states, i.e. to Canada and Mexico, nor does it prevent the United States from granting whatever privileges it desires to its 'protectorates' in the Caribbean."). That being said, it would be unfair to insinuate that the United States was solely responsible for conditional MFN clauses. It was not. In fact, European countries began to use such clauses in their own treaties. *See* Cole, *MFN*, *supra*, at 548; *Stephan W. Schill*, *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses*, 27 BERKELEY J. INT'L L. 496, 511 (2009). And it was *France* that had suggested to the United States the use of a conditional MFN guarantee (for a treaty between the two nations). *See* Cole, *MFN Boundaries*, *supra* note 15, at 548-49; *see also* POMFRET, REGIONAL TRADING ARRANGEMENTS, *supra* note 120, at 18 ("The sole important practitioner of conditional MFN treatment was the United States."); Hornbeck, *MFN*, *supra* note 106, at 405-06 ("This form appears in most of the treaties of the United States.... [T]he special limiting clause which expresses the American idea and forms the basis of the American interpretation was first inserted in treaties made by the United States.").

[134] Cole, *MFN Boundaries*, *supra* note 15, at 550.

[135] *Id*. at 551.

[136] *Id*. *See also* POMFRET, REGIONAL TRADING ARRANGEMENTS, *supra* note 120, at 17 (stating that "a single treaty with an unconditional clause rendered inoperative any conditionality in MFN clauses of treaties involving the same countries").

treaty as soon as the first claim was made under it."[137] For their part, European countries "would adhere closely to the order in which they negotiated treaties as a means of controlling the benefits that they would gain or give through any applicable MFN clauses."[138] The upshot was that by the late Victorian age, the very concept of "the MFN clause largely fell out of favor with states."[139] MFN guarantees earned such a bad reputation in some countries that "all [the] treaties containing MFN clauses were denounced;" and in France, the government enacted a statute banning MFN guarantees in treaties.[140]

Still, MFN guarantees came back into fashion soon enough.[141] And in the interregnum between World Wars I and II, MFN protections re-emerged with prominence.[142] By 1923, unconditional MFN guarantees were accepted even by the United States, allegedly due in no small part to its trade imperatives.[143] In essence, then, "a practice of bilateral, prospective, general, and unconditional MFN clauses began, and has remained, the dominant approach to the present day."[144] It is important to remember that ISDS occupies a special and potentially all-encompassing role that cannot be compartmentalized to trade matters; rather, it implicates consequential sovereignty-based concerns and the regulatory power of the states—balanced, of course, with the treaty-based rights of investors who are nationals of the signatories.[145]

In fact, it is worth mentioning that ISDS sometimes is perceived as "disadvantag[ing]" not only sovereigns but also "those individuals who stand to

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[137] Cole, *MFN Boundaries*, *supra* note 15, at 551. *See also* POMFRET, REGIONAL TRADING ARRANGEMENTS, *supra* note 120, at 18.
[138] Cole, *MFN Boundaries*, *supra* note 15, at 552.
[139] *Id*. *See also* POMFRET, REGIONAL TRADING ARRANGEMENTS, *supra* note 120, at 20, 25 ("Between 1870 and 1914 trade became less free and discrimination became more common.... On the whole the decade after Versailles continued the post-1870 trend of increasing tolerance for discriminatory trade policies."); Hauser, *MFN*, *supra* note 132, at 102 ("From about 1880 to 1914, this clause embittered the relations of France with practically every foreign power ....").
[140] Cole, *MFN Boundaries*, *supra* note 15, at 552. *See also* POMFRET, REGIONAL TRADING ARRANGEMENTS, *supra* note 120, at 27; Hauser, *MFN*, *supra*, at 102.
[141] *See* Cole, *MFN Boundaries*, *supra* note 15, at 552-53.
[142] *See id*.
[143] *See id*. *See also* POMFRET, REGIONAL TRADING ARRANGEMENTS, *supra* note 122, at 23 ("The United States, with the conditional MFN bargaining tool, received less favourable treatment for exports to continental Europe than did free trade Britain, which had nothing to offer in return for MFN treatment.").
[144] Cole, *MFN Boundaries*, *supra* note 15, at 552-53. *See also Comm. of Experts for the Progressive Codification of Int'l Law, Rep. of the Sub-Comm., The Most-Favoured-Nation Clause*, League of Nations Doc. C.205.M.79 1927 V (1927), reprinted in 22 AM. J. INT'L L. (Special Supplement) 133, 137 (1928) (stating that "[t]he unconditional form is practically universal now").
[145] *See* Cole, *MFN Boundaries*, *supra* note 15, at 552-53; RIDDHI DASGUPTA, INTERNATIONAL INTERPLAY: THE FUTURE OF EXPROPRIATION ACROSS INTERNATIONAL DISPUTE SETTLEMENT 274-85 (2013) [hereinafter DASGUPTA, INTERNATIONAL INTERPLAY].

benefit from business regulation that is now foreclosed by investment treaties or from other public initiatives, the cost of which is made too high or uncertain by the threat of investor claims."[146] Adverse awards hanging like the Sword of Damocles or the uncertainty (or substantial risk) thereof might have a chilling effect on sovereign behavior in this space.Unsurprisingly, predictable ISDS doctrines can clarify to and assure governments about the permissibility and lawfulness of their plans.

MFN expands the space in which tribunals may regulate sovereign activity. To this end, "[t]he growth of international investment law in the second half of the twentieth century … has created a [whole] *new* field in which MFN clauses have just as central a role as in the regulation of tariffs."[147] Domestic, interstitial forces within a country often seek MFN protections to eschew "shackling [that country's] investors to an agreement superseded by more favorable agreements negotiated with other states."[148] Unsurprisingly, it was the fecund inception of international investment law in its most recent incarnation that led to MFN guarantees attaining their current high frequency, significance, and status.[149]

Customary international law, which guaranteed certain rights to foreign investors, also "contained restrictions limiting the freedom of host states in their treatment of foreign investors."[150] Since countries "receiving foreign investments also had citizens and corporations of their own investing in other countries, each state actively participating in international investment had an interest in agreeing to at least minimal protections of foreign investors."[151] Due to the economic imbalance that often existed between countries, "[t]he developed state's law governed because the vastly superior bargaining power of capital-exporting states allowed them to insist upon consular jurisdiction treaties, in accordance with which nationals of a developed state would remain under its sole jurisdiction even when operating in a developing state."[152] The inevitable practical consequence

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[146] Gus Van Harten, ITA AND PUBLIC LAW 10 (2008); *see also* M. Waibel et al, THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY xxxviii-xxxix (2010); M. L. Satterthwaite, *Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers*, 8 YALE HUM. RTS. & DEV. L. J. 1, 2 (2005).
[147] Cole, *MFN Boundaries*, *supra* note 15, at 553-54 (emphasis added).
[148] *Id*. at 554. *See also* Marie-France Houde, *Most-Favoured-Nation Treatment in International Investment Law*, *in* INTERNATIONAL INVESTMENT LAW: A CHANGING LANDSCAPE 127, 142 n.36 (2005) [hereinafter Houde, *MFN*] ("'[The MFN clause] contributes greatly to the rationalization of the treaty-making process and leads to the automatic self-revision of treaties which are based on the most-favoured-nation standard.'") (quoting 1 GEORG SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 243 (1957)).
[149] *See* Cole, *MFN Boundaries*, *supra* note 15, at 553-54.
[150] *Id*. at 554. *See also* ANDREW NEWCOMBE & LLUIS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES 11 (2009) [hereinafter NEWCOMBE & PARADELL, INVESTMENT TREATIES].
[151] Cole, *MFN Boundaries*, *supra* note 15, at 554.
[152] *Id*. at 554-55. *See also* Stephen D. Sutton & Emilio Augustin, Maffezini v. Kingdom of Spain *and the ICSID Secretary-General's Screening Power*, 21 ARB. INT'L 113, 119 (2005) ("Many states entered into treaties (sometimes called 'capitulations') with Asian

was that "the investor-friendly policies of developed states would apply even where the host state in question applied fundamentally different rules to its own investors."[153]

Now, the end of the global Gilded Age, along with the concomitant "growth of genuinely global business in the twentieth century, the rise to influence of socialist thought, and the wave of decolonization that occurred immediately after World War II combined to produce the collapse of the largely pro-investor consensus that had long underwritten the customary law on the protection of international investments."[154] All of this led, in the late 1950s, to the surge of Bilateral Investment Treaties (BITs).[155] Investors availing themselves of protections contained in BITs could go beyond the protections of BITs and supplement their claims and arguments with specific treaty provisions. Investors like having the assurance that treaty-protected rights may be enforced against signatory states, *especially* "unwilling" ones.[156] This has effloresced to more than 2500 treaties in the modern day, thereby "enshrining individualized agreements regarding investor protection between countries from all corners of the world, representing all levels of economic development."[157]

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and African states as the result of which subjects, when entering into the territory of Asian and African states, remained wholly under the jurisdiction of their home states, and their consuls exercised jurisdiction over their fellow subjects.").

[153] Cole, *MFN Boundaries*, *supra* note 15, at 554.

[154] *Id*. at 555. *See also* Andrew T. Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 641 (1998) ("In the years that followed World War II, … developing countries questioned the Hull Rule, claiming the right to determine how they would treat investors and the standard of compensation that should apply if that treatment was sufficiently harmful. This challenge to the Hull Rule proved successful, and by the mid 1970s (and perhaps sooner), the Hull Rule had ceased to be a rule of customary international law.").

[155] Cole, *MFN Boundaries*, *supra* note 15, at 555-56. *See also* RUDOLF DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES 10-11 (1995). The first ever BIT was concluded between Germany and Pakistan on 25 November 1959. UNCTAD, The Entry into Force of Bilateral Investment Treaties (BITs), IIA Monitor, no. 3, 2006 at 3, U.N. Doc. UNCTAD/WEB/ITE/IIA/2006/9.

[156] Cole, *MFN*, *supra*, at 555-56. *See also* Joshua Boone, *How Developing Countries Can Adapt Current Bilateral Investment Treaties to Provide Benefits to Their Domestic Economies*, 1 GLOB. BUS. L. REV. 187, 190 (2011) ("[A]lmost all of these treaties provide ADR provisions that allow states to bring claims regarding the interpretation or application of a treaty provision as well as allow investors to bring claims against states for treaty violations, often referred to as investor-State Arbitration."); Susan D. Franck, *The Nature and Enforcement of Investor Rights Under Investment Treaties: Do Investment Treaties Have a Bright Future?*, 12 U.C. DAVIS J. INT'L L. & POL'Y 47, 53-54 (2005) ("BITs also provide procedural rights that permit the enforcement of the substantive rights .... [I]nvestors can directly bring a claim against a Sovereign for violation of a treaty, functioning in a manner similar to private attorneys general in the protection of the public interest.").

[157] Cole, *MFN Boundaries*, *supra* note 15, at 556. *See also* Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67, 67 (2005).

Treaties enabled and accelerated competition among countries "for advantage" economically and politically. "Any state negotiating a BIT will … do so with full knowledge of how to ensure that its investors are treated at least as well as, and ideally better than, those of any third state."[158] As a consequence, "[t]he investment treaties' role as protector against more favorable future agreements are even more important, as the public availability of the contents of a BIT will ensure that states negotiating future agreements, with either state party to the original BIT, will attempt to achieve more favorable terms than the original [treaty]."[159] That is one reason that MFN guarantees will continue to be used in treaties.[160] And it is just as true that "MFN clauses in BITs" tend to be "generalized promises of MFN treatment with respect to all areas addressed by the BIT, modified sometimes by certain limited carve-outs."[161]

There is some suggestion that "[t]he generality of MFN clauses in BITs results in difficulties similar to contemporary treaties that address an enormously wide variety of potential government actions and are framed in very broad and vague language."[162] Most spaces of sovereignty become subject to investment treaties.[163] Consequently, what might seem to be "a generalized MFN clause in a [treaty] can potentially be applicable to any action taken by a government that affects a foreign investor."[164] While some thinkers view such capacious scope of investment treaties as infringing on sovereign autonomy, others view it as protecting foreign investors, encouraging investment in the country or zone, and taking a step to become part of the community of nations—treaty by investment

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[158] Cole, *MFN Boundaries*, *supra* note 15, at 556.
[159] *Id*. at 556-57.
[160] *See id*.; U.N. CONF. ON TRADE & DEV. [UNCTAD], MOST-FAVOURED-NATION TREATMENT, at 13, U.N. Doc. UNCTAD/ITE/IIT/10 (Vol. III), U.N. Sales No. E.99.II.D.11 (1999) ("With regard to investment, the development of MFN became common in the 1950s with the conclusion of international investment agreements, including BITs. The MFN standard was included in such treaties from the beginning ....").
[161] Cole, *MFN Boundaries*, *supra* note 15, at 557. *See also* UNCTAD, *supra*, at 2; Pia Acconci, *Most-Favoured-Nation Treatment*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 368-69 (Peter Muchlinski et al. eds., 2008).
[162] Cole, *MFN Boundaries*, *supra* note 15, at 557. *See also* UNCTAD, *supra*, at 4 ("MFN applies both in the trade and the investment fields. However, contrary to trade, where the MFN standard only applies to measures at the border, there are many more possibilities to discriminate against foreign investment.").
[163] *See* Cole, *MFN Boundaries*, *supra* note 15, at 557. *See also* Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121, 146 (2006).
[164] Cole, *MFN Boundaries*, *supra* note 15, at 557. *See also* Kamal Saggi & Frank Sengul, *On the Emergence of an MFN Club: Equal Treatment in an Unequal World*, 42 CAN. J. ECON. 267, 269 (2009) ("We find that the formation of an MFN club enhances aggregate world welfare, and the larger the club, the more desirable it is from a welfare perspective.").

treaty.[165]

B. MERE POSSIBILITY OF THIRD-PARTY INVESTOR'S PREFERMENT IS ENOUGH TO TRIGGER AN MFN VIOLATION

This is how the non-discrimination analysis tends to proceed in ISDS: first, "(*i*) identify the comparators that are in 'like circumstances' with the investor; and then (*ii*) determine whether the investor received *less* favorable treatment than the comparators."[166] In this step of the analysis, whether and to what extent the effect of the alleged discrimination can be outcome-determinative remains an unresolved question. That being said, several ISDS "tribunals openly admit that the measure's practical *effect* is the main factor in deciding if the claimant received less favorable treatment."[167]

Famously, the ISDS tribunal in *S.D. Myers v. Canada* (2000) observed that "evidence of [the respondent state's] intent is not required to win a discrimination claim."[168] Along similar lines, the ISDS tribunal in *International Thunderbird Gaming Corp. v. Mexico* (2006) did not require the claimant to demonstrate "*separately* that the less favorable treatment was motivated because of nationality."[169] Unsurprisingly, "showing patterns of evidence pointing to protectionist intent can go a long way" in a claimant's establishing discrimination, especially since investment treaties typically disfavor such a motive and do not deem it a legitimate public interest.[170]

In practical terms, ISDS tribunals must first determine "the expropriating sovereign's intent,[171] and secondly, [ascertain] how to adjust the evidence requirement to the [treaty's] own [specific] context."[172] Therefore, as part of the non-discrimination analysis the preliminary inquiry "is whether the expropriatory

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[165] Cole, *MFN Boundaries*, *supra* note 15, at 557-58. *See also* Efraim Chalamish, *The Future of Bilateral Investment Treaties: A De Facto Multilateral Agreement?*, 34 BROOK. J. INT'L L. 303, 305 (2009) ("Through their inclusion of most-favored-nation ('MFN') clauses, these agreements form a complex network that resembles a de facto multilateral agreement.").

[166] Rahim Moloo & Justin Jacinto, *Environmental and Health Regulation: Assessing Liability Under Investment Treaties*, 29 BERKELEY J. INT'L L. 1, 57 (2011) [hereinafter Moloo & Jacinto, *Environmental and Health Regulation*]; *see also* Pope & Talbot v. Canada, NAFTA/UNCITRAL, Award on the Merits of Phase 2 (2001), at ¶¶ 73-104.

[167] DASGUPTA, INTERNATIONAL INTERPLAY, *supra* note 146, at 338.

[168] NAFTA/UNCITRAL, Partial Award, at ¶ 252-54 (2000); *see also* NEWCOMBE & PARADELL, INVESTMENT TREATIES, *supra* note 151, at 232-319.

[169] UNCITRAL (NAFTA), Award, at ¶ 177.

[170] DASGUPTA, INTERNATIONAL INTERPLAY, *supra* note 146, at 338.

[171] Although most ISDS tribunals see some role for "intent," some would consider precluding the intent requirement wholesale. *See* Siemens AG v. Argentina, ICSID Case No. ARB/02/08, Award (2007), at ¶ 299.

[172] DASGUPTA, INTERNATIONAL INTERPLAY, *supra* note 146, at 338-39. Yet, that leaves the following key questions unanswered: "[S]hould these changes be made through the amendment process or even by returning to the drawing board to create a new treaty? Do the inherently tenuous international tribunals have the competence to fill in all the gaps?" *Id*.

measure has a legitimate regulatory purpose."[173] The permissibility of such a purpose would, of course, depend on the text and structure of the treaty. For instance, blatantly protectionist regulatory motives might not suffice when confronted with a treaty that strikes a different balance, perhaps one expressly rejecting protectionism.[174]

Of course, should the sovereign deploy "a legitimate basis" in "differentiat[ing] between the claimant and the comparators, then they are not similarly situated or in "'like circumstances.'"[175] In the *Methanex v. United States* (2004) award,[176] for instance, the tribunal deemed the claimant's investment to be physically located away from where the comparators' investments were located—and this difference was understood to be outcome-determinative. In doing so, the tribunal accepted the government's position that the claimant's investment was located "in an environmentally sensitive area or utilized an environmentally harmful production process."[177] In the interest of completeness, it is fitting to note that the United States had successfully distinguished the claimant's investment from the unaffected investments by stating:

> [R]egulations limiting business activities in certain environmentally sensitive areas or imposing additional limitations on emissions where air pollution is more severe will not *ipso facto* violate national treatment even though some of these regulations may be applied to some operations and not to other, competing operations. In those cases, direct competitors may be deemed not to be in like circumstances for the purpose of the measure at issue because of their operations' differing locations.[178]

It is sometimes contended "that this is really a test of whether the State could show that its differential treatment was justified and, importantly, that its public interest was necessary enough to encroach on investor rights."[179] It is the second part of this formulation that runs into some textual trouble. Undoubtedly, treaties seem not to afford the latitude to excuse public interest-based discrimination.[180] As an example, NAFTA "Chapter Eleven's sweep covers all bases with regard to

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[173] *Id*.
[174] *See*, *e.g.*, Moloo & Jacinto, *Environmental and Health Regulation*, *supra* note 165, at 54.
[175] *See*, *e.g.*, *Pope & Talbot v. Canada*, *supra* note 165, at ¶ 79; *see also* RUDOLF DOLZER & CHRISTOPHER SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 181-83 (2008).
[176] Final Award of the Tribunal on Jurisdiction and Merits, 44 I.L.M. 1345 (NAFTA Ch. 11 Arb. Trib. 2005) [hereinafter Final Award].
[177] Moloo & Jacinto, *Environmental and Health Regulation, supra* note 165, at 55.
[178] Methanex v. United States, supra note 176, U.S. Rejoinder on the Merits, (23 Apr. 2004) ¶ 159.
[179] DASGUPTA, INTERNATIONAL INTERPLAY, *supra* note 146, at 340. *See also* M. N. KINNEAR ET AL., INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER ELEVEN 1102 (2009).
[180] *See* DASGUPTA, INTERNATIONAL INTERPLAY, supra note 146, at 340.

investment-related activities and gives tribunals no authority to excuse a public interest-based encroachment *once* investment rights of a foreigner are acknowledged."[181]

Then the tribunals' authority to do so must come from somewhere. And in exercising that authority, they must be attuned to the respect and deference they owe the parties themselves (for reasons of party autonomy that this article has already mentioned). Tribunals invoking the public-interest exemption in approving discriminatory treatment relied on "the [treaty] drafters' intentions."[182] The other side would claim: "Had the treaty's drafters wanted to thus authorize the tribunals on an important issue, they would have said so."[183]

The level of scrutiny deployed by ISDS tribunals to assess whether the respondent state had discriminated against the claimant. Many ISDS tribunals ask only "whether there is a reasonable nexus between the measure and a rational, non-discriminatory government policy"[184]—"not whether the action was actually necessary"[185] (much less, that it was compelling). This deference to the sovereign's disparate levels of treatment is not uncommon. Tribunals frequently ask just whether there was any "rational justification in the record" for the discriminatory treatment.[186] On the other hand, other ISDS tribunals have expressed consternation at pretextually devised purported "justification[s]"[187] trying to circumvent the pertinent treaty's non-discrimination guarantee. One conciliatory solution floated on occasion is that while a substantial degree of deference to the respondent may be appropriate where discriminatory *effect* (disparate impact) results—such an approach permits the sovereign to engage in the business of governance without being concerned about the disparate-impact consequences across the board—the deference owed the sovereign should be significantly lower where discriminatory *intent* is concerned.[188] The ostensible reason for this view of the world in tranches is that because the latter is within the sovereign's control, the sovereign may be held accountable due to any malintent it is shown to possess.[189]

An important view arising from all this tribunal dialectic is that no matter how much deference to the public interest tribunals may think themselves empowered to give in disputes arising under FET, MST, FPS, or Due Process—or any other substantive standard—usually the treaty texts of *non-discrimination* protections do not empower tribunals to heed such interests. Observe that an ISDS tribunal in 2009 required a "*prima facie* showing of legitimacy under the [FET

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[181] *Id*.
[182] Final Award, *supra* note 174, at ¶ 142.
[183] DASGUPTA, INTERNATIONAL INTERPLAY, supra note 146, at 340.
[184] *Pope & Talbot v. Canada*, Award, *supra* note 165, at ¶ 81.
[185] DASGUPTA, INTERNATIONAL INTERPLAY, supra note 146, at 341.
[186] *Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award (2002) ¶ 182.
[187] *Pope & Talbot v. Canada*, *supra* note 165, at ¶¶ 80-81.
[188] DASGUPTA, INTERNATIONAL INTERPLAY, supra note 146, at 341.
[189] *See id.*

and Due Process] standard[s]."[190] However, it is contended by some scholars that the non-discrimination standards "typically provide full protection against nationality-based discrimination" and, therefore, do not permit such allowances to governmental objectives like the public interest.

The non-discrimination protections are able to reach into spaces of a sovereign's behavior that the substantive standards cannot. As a related matter, "[w]hile legislative or executive acts of direct or regulatory expropriation are understandably deemed compensable under various standards, there is a logical limit" to all this.[191] For example, "[a]cts of treasury policy such as adjustment of interest rates, federal funds rates, discount rates, and money supply" could be "better limited to [the] non-discrimination [context]."[192] The reason is "the fear that recognizing a generalized breach concerning matters of treasury policy, *outside* the obvious, limited and sequestered-off province of non-discrimination, might in the long-run prove to be an unprecedented encroachment of the prerogatives of a sovereign."[193]

Arbitral involvement in certain kinds of reticulated and complex subject areas could be easier to justify under the aegis of non-discrimination than, for example, whether a tribunal thinks it fair and equitable or comporting with MST. After all, international tribunals frequently are concerned about not pushing the sovereign so hard that it no longer remains worthwhile for them to participate in ISDS—and the concern is that uber-intrusive jurisprudence might "break the [proverbial] camel's back."[194] And unravel the ISDS system itself.[195] That being said, sometimes the policies do violate substantive standards such as FET, MST, or Due Process in so undeniable a manner that claimants may, and would be advised to, invoke those standards as well.

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MFN Protections

The general idea behind MFN is that should "a country makes two MFN promises to two different countries, then it cannot treat them both better than it treats the other."[196] That country is then duty-bound to "give [its fellow signatories] equal treatment—that is, unless the MFN clause of Treaty-*One* is not even enforceable in some *other* treaty's arbitration."[197] "Why," it is asked, would a signatory state "enter into an MFN guarantee if the other signatory has already promised MFN treatment to another party and the other MFN clause is not enforceable in arbitration (unless there are sectoral, time, or other distinctions)?"[198]

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[190] Glamis Gold, Ltd. V. United States, Award, ¶ 356 (NAFTA Ch. 11 Arb. Trib. June 8, 2009).
[191] DASGUPTA, INTERNATIONAL INTERPLAY, supra note 146, at 341.
[192] *Id*.
[193] *Id*.
[194] *Id*.
[195] *See id.*
[196] *Id*. at 342.
[197] *Id*.
[198] *Id*.

Several ISDS awards have interpreted the MFN guarantee to secure for foreign investors the optimal level of treatment.[199] The tribunal in *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. Mexico* (2007), for instance, observed that "[c]laimants and their investment are entitled to the best level of treatment available to any other domestic investor or investment operating in like circumstances."[200] The MFN guarantee was interpreted by the tribunal in *Loewen Group v. United States* (2000) to require "a comparison between the standard of treatment accorded to a claimant and the most favourable standard of treatment accorded to a person in like situation to that claimant."[201] And the ISDS tribunal in *Methanex* stated that "the investor or investment of another party is entitled," under the MFN guarantee, "to the most favourable treatment accorded to some members of the domestic class."[202]

(i) Substantive Obligations

Let us begin with the simple prototype: Where the right at issue is a *substantive* right—such as FET, MST, Due Process, FPS, or anything else—there is no doubt that the MFN clause in a treaty presumably imports that protection from third-party treaties into which the respondent state has entered.[203] Substantive obligations will, by default, be imported through the MFN guarantee.

All in all, scholars have observed that "the [MFN] clause imposes a substantive treaty obligation on the host state to comply with its undertakings towards investments, including contractual commitments."[204] This means that "[a]ny non-compliance with or breach of such undertakings, even if of a commercial nature, constitutes a violation of this treaty obligation."[205] There is also some support for the proposition that, especially in the modern era—in which distinctions between commercial and other treaties have frayed—a commercial treaty may protect "certain economic and consular rights."[206] Indeed, most of the international jurisprudence concerning FPS and much of FET is predicated on this very principle.

It was aptly observed by an ISDS tribunal that "tribunals have tended to construe MFN clauses broadly and they have regularly accepted to import substantive rights into an investment treaty from treaties that the host State has

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[199] *See id.*

[200] ICSID Case No. ARB (AF)/04/5, at ¶ 205.

[201] ICSID Case No ARB(AF)/98/3, at ¶ 140.

[202] Final Award, *supra* note 174, at ¶ 21.

[203] See, e.g., CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. India, PCA Case No. 2013-09, Award on Jurisdiction and Merits, ¶ 496, 25 July 2016 (permitting importation of FPS guarantee through MFN clause); Hesham T. M. Al Warraq v. Republic of Indonesia, UNCITRAL, Final Award, ¶ 388, 15 Dec. 2014 (permitting importation of FET guarantee through MFN clause due to Netherlands-Indonesia BIT, Singapore-Indonesia BIT, and India-Indonesia BIT).

[204] NEWCOMBE & PARADELL, INVESTMENT TREATIES, *supra* note 149, at 466.

[205] *Id*.

[206] Republic of Ecuador v. United States of America, PCA Case No. 2012-5, Award, ¶ 203, 29 Sep. 2012 (citing *Rights of US Nationals in Morocco*).

signed with other countries."[207] Interestingly, there is not much discourse present in international arbitral and judicial opinions since this position is believed to be axiomatic and non-controversial. Those disputes do not generally arise these days because that debate, if it ever existed at all, has long become overcome by the sheer and overwhelming weight of jurisprudence and international authority.

Instead, tribunals are more likely to state, as an initial matter, that "MFN clause[s] appl[y] to substantive obligations" before going on to address closer questions.[208] This is true whether those substantive obligations "give a means of protection for contractual and other undertakings" or a "standard of behaviour."[209] Nothing in this approach is surprising because the very *raison d'être* of MFN clauses would be nugatory and pointless if even a substantive obligation were to go unredressed through an MFN guarantee. After all, "[t]he [very] purpose [of an MFN guarantee] is to create a level playing field among foreign investors and to import obligations from third-party treaties to give effect to that purpose."[210]

Of course, a treaty could take pains to carve out a very specific kind of MFN guarantee that applies only to some *category* of substantive obligations, but there, too, the default presumption would be in favor of deeming all substantive obligations to be covered by the MFN clause. Only clear and unambiguous treaty language could undercut that presumption. This overall argument is deemed to be so elementary and undeniable that sovereign governments that are ISDS respondents do not typically challenge this principle (perhaps, in part, out of fear that they would lose precious credibility before the tribunals).[211]

A substantive right, unlike a procedural or jurisdictional right, does not implicate questions of forum, venue, or other secondary rules of accessing justice (or vindication of the substantive and primary rights).[212] Whatever good-faith

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[207] Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia, UNCITRAL, Award on Jurisdiction and Liability, ¶ 565, 28 Apr. 2011.

[208] Mr. Franck Charles Arif v. Republic of Moldova, ICSID Case No. ARB/11/23, Award, ¶ 396, 8 Apr. 2013.

[209] *Id*.

[210] Hesham T. M. Al Warraq v. Republic of Indonesia, UNCITRAL, Final Award, ¶ 386, 15 Dec. 2014.

[211] *See*, *e.g.*, *id*. n. 152 ("Respondent admits that substantive standards included in other agreements could be "imported" to the dispute at hand pursuant to the application of the MFN clause.").

[212] It goes without saying that parties may not artificially expand the scope of the treaty, for example the umbrella term of which "investments" or "investors" are subject to it, through an MFN guarantee. That is because "one must fall within the scope of the treaty, which is in particular circumscribed by the definition of investment and investors, to be entitled to invoke the treaty protections, of which MFN treatment forms part. Or, in fewer words, one must be *under* the treaty to claim *through* the treaty." Metal-Tech Ltd. v. Republic of Uzb., ICSID Case No. ARB/10/3, ¶ 145, Award, 4 Oct. 2013; *see also* Louis Dreyfus Armateurs SAS v. Republic of India, PCA Case No. 2014-26, Final Award, ¶ 281 (referring to this aspect of treaty scope as "gateway"); HICEE B.V. v. The Slovk. Republic, UNCITRAL, PCA Case No. 2009-11, Partial Award, 23 May 2011, ¶ 149; ST-AD GmbH v. Republic of Bulg., PCA Case No. 2011-06, Award on Jurisdiction, 18 July

disagreement there might be about the importability of "dispute resolution provisions" through MFN clauses, there could be none about the importability of substantive rights.[213] The dispute-resolution provisions applicable to the MFN guarantees pertain to the *ways* in which the substantive and primary rights are vindicated—not to *what* those rights are.

That bifurcation was stated pithily (albeit in a different context that one should hesitate to extrapolate too much from) by Dean Roscoe Pound: "Procedure is the means; full, equal and exact enforcement of substantive law is the end."[214] For all these reasons, tribunals have maintained that even "broad applications" of substantive obligations may be imported through a third-party MFN clause.[215] While this principle is not limitless—for example, the principle of extraterritoriality applies here (namely, "[w]here an MFN clause applies only to treatment in the territory of the host State, the logical corollary is that treatment outside the territory of the host State does not fall within the scope of the clause")—it undoubtedly is capacious.[216] It stands for the proposition that substantive rights, even comprehensively applicable ones, may be imported through the MFN guarantees of third-party treaties. And that ISDS tribunals unreservedly should honor such importations and incorporations.

This is not to say that such importation should be indiscriminate or that it can be taken out of context, however. Along those lines, a brief digression concerning the *Ambatielos* award around the mid-1950s—a product of state *versus* state arbitration—is appropriate.[217] In a dispute between Greece and the United Kingdom, the latter argued that an MFN guarantee "can only attract matters belonging to the same category of subject as the clause itself relates to."[218] This meant that since the MFN protection Greece invoked pertained exclusively to "matters relating to commerce and navigation," it could not be extrapolated away to other contexts, namely matters concerning "the administration of justice."[219] The international tribunal constituted to resolve this matter accepted this *ejusdem*

2013, RLA-63, ¶ 397; Vannessa Ventures Ltd. v. Bolivarian Republic of Venez., ICSID Case No. ARB(AF)/04/6, Award, 16 January 2013, ¶ 133; Société Générale v. Dominican Republic, UNCITRAL, LCIA Case No. UN 7927, Award on Preliminary Objections, 19 September 2008, ¶¶ 40-41. "Similarly, tribunals have rejected the use of MFN provisions to extend the temporal scope of application of a BIT." Krederi Ltd. v. Ukraine, ICSID Case No. ARB/14/17, Award, ¶ 295, 2 July 2018 (citing Technicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 69).

[213] AsiaPhos Limited and Norwest Chemicals Pte Ltd v. China, ICSID Case No. ADM/21/1, Award, ¶ 208, 16 Feb. 2023.

[214] The Etiquette of Justice, 3 Proceedings Neb. St. Bar Assn. 231 (1909).

[215] See, e.g., *Sergei Paushok, supra* note 205, at ¶ 573.

[216] ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Arg., UNCITRAL, PCA Case No. 2010-9, Award on Jurisdiction, ¶ 308, 10 Feb. 2011.

[217] *See* Ambatielos Claim (Greece v. U.K.), 12 R.I.A.A. 83 (Comm'n Arb. 1956).

[218] *Id*. at 106 (quoting the Treaty of Commerce and Navigation, Gr. Brit.-Greece, art. X, Nov. 10, 1886, 1886 U.K.T.S. 08252).

[219] Cole, *MFN Boundaries*, *supra* note 15, at 566-67.

generis principle, meaning that it pertained to matters "of the same kind."[220] And it said, in effect, that "an MFN clause only gives a right to more favorable treatment in those fields to which the MFN clause itself relates."[221] The tribunal hardly was writing on a blank slate—anything but.[222] In the circumstances of that particular dispute, the MFN application of issues concerning "the administration of justice" was limited to "matters relating to commerce and navigation."[223] In short, if the MFN guarantee contained in a treaty was about Topics A, B, and C, then it could not be extended beyond them and apply to Topics X, Y, and Z.

The broader implications of the *ejusdem generis* principle are that "just as MFN clauses are only able to affect the terms of the treaty in which they are contained, ... they are substantively circumscribed by the nature and character of that treaty."[224] In other words, an MFN guarantee contained in an international *investment* agreement addressing the general subject matters of such treaties easily covers another international investment agreement (IIA). A human rights treaty is covered by another such treaty. So on and so forth. In conclusion, the *Ambatielos* tribunal went a significant way towards delineating the boundaries of the functioning of MFN clauses in public international law, including ISDS.

(ii) Procedural or Jurisdictional Obligations

Now, we might consider a slightly different prototype: Where the right at issue is a *procedural* right, there is perhaps greater divergenceof opinion as to whether the MFN clause in a treaty presumably imports that protection from third-party treaties into which the respondent state has entered. But even that divergence is breaking in favor of presuming such importation.

Consider this *a fortiori* inference: Since, even for procedural rights, there is at least strong support for third-party MFN clauses' importability, then that importability is ironclad for substantive rights.[225] Whereas some jurists seem to find an arguable basis for requiring clear and unambiguous treaty text in order to import procedural guarantees through MFN clauses, no such presumption is applicable to substantive obligations.[226] That is because few, if any, treaties or

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[220] *See*, *e.g.*, Houde, *MFN*, *supra* note 147, at 127 ("The *ejusdem generis* principle provides that an MFN clause can attract the more favourable treatment available in other treaties only in regard to the 'same subject matter,' the 'same category of matter,' or the 'same class of matter.'").

[221] Cole, *MFN Boundaries*, *supra* note 15, at 566.

[222] *See*, *e.g.*, GENNADII MIKHAILOVICH DANILENKO, LAW-MAKING IN THE INTERNATIONAL COMMUNITY 58 (1993) ("According to the prevailing opinion [in *Ambatielos*], the sovereign equality of states excludes any automatic effect of treaties on third states which remain for them *res inter alios acta*.").

[223] Cole, *MFN Boundaries*, *supra* note 15, at 566-67.

[224] *Id*. at 567.

[225] *See*, *e.g.*, UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary, ICSID Case No. ARB/13/35, Decision on Preliminary Issues of Jurisdiction, 3 March 2016.

[226] *See*, *e.g.*, Hesham T. M. Al Warraq v. Republic of Indonesia, UNCITRAL, Final Award, ¶ 389, 15 Dec. 2014 (permitting importation of FET guarantee through MFN

tribunals require any clear or unambiguous treaty text to justify importing substantive obligations through MFN guarantees.

The background is that this procedural *vis-à-vis* substantive right divergence has deep roots in the provenance of international law and in the treaty infrastructure of ISDS mechanisms. As one tribunal put it, "whether an MFN clause in an investment treaty should be construed as extending not only the most favoured *substantive* treatment but also the most favoured *procedural* and *jurisdictional* treatment contained in other treaties" is the key issue—and it distinguishes between the two camps.[227] Substantive rights are in; procedural obligations are a maybe (heavily leaning towards being importable).

Consider the ISDS award in *Maffezini v. Spain* (2000).[228] It is seminal in this enclave of jurisprudence—as it makes procedural rights, including investor-state dispute settlement mechanisms, importable through third-party MFN guarantees. In the *Maffezini* tribunal's own words: "[I]f a third-party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause as they are fully compatible with the *ejusdem generis* principle."[229] The *Maffezini* tribunal remarked twenty years ago "that today dispute settlement arrangements are inextricably related to the protection of foreign investors."[230] That remains true even today. It is also fair to say that "*Maffezini* deduced from this principle that an international tribunal could import a substantive or procedural right … so long as *some* related international obligation connects the respondent to the tribunal at issue."[231] By 2010, Professor Zachary Douglas would go on to characterize the *Maffezini's* MFN analysis as "the first time that a party has been permitted to rely upon an MFN clause to modify the jurisdictional mandate of an international tribunal."[232]

To be fair, the *Maffezini* tribunal limited its decision in certain ways. To begin, it stated that "[a]s a matter of principle, the beneficiary of the clause should not be able to override public policy considerations that the [C]ontracting [P]arties might have envisaged as fundamental conditions for their acceptance of the agreement in question, particularly if the beneficiary is a private investor, as will often be the case."[233] That is because "[t]he scope of the clause might thus be narrower than it appears at first sight."[234] Four examples of such limitations that

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clause because "[t]his BIT does not specifically limit the scope of the treaty to those investments 'granted admission in accordance with the Foreign Investment Law.'").

[227] Beijing Everyway Traffic and Lighting Company Limited v. Ghana, PCA 2021-15, ¶ 268, Final Award on Jurisdiction (Save as to Costs), 30 Jan. 2023 (emphases added).

[228] ICSID Case No. ARB/97/7, at ¶ 54 (Decision on Jurisdiction) (2000).

[229] *Id.* at ¶ 56.

[230] *Id*.

[231] DASGUPTA, INTERNATIONAL INTERPLAY, supra note 146, at 345.

[232] *The MFN Clause in Investment Treaty Arbitration: Treaty Interpretation off The Rails*, 2 J. INT'L DISP. SETTLEMENT 97, 101 [hereinafter Douglas, *MFN Clause*].

[233] *Maffezini*, Award, *supra* note 226, at ¶ 62.

[234] *Id*.

the *Maffezini* tribunal provided: (i) exhaustion of local remedies requirement; (ii) fork in the road provisions; (iii) "if the agreement provides for a particular arbitration forum, such as ICSID, for example, this option cannot be changed by invoking the clause, in order to refer the dispute to a different system of arbitration"; and (iv) "if the parties have agreed to a highly institutionalized system of arbitration that incorporates precise rules of procedure."[235] To what extent all these limitations will endure in light of the rest of *Maffezini*? It will take some more time to become evident.

Maffezini undoubtedly has its defenders. Prominent ones. Respected in the field of public international law, Professor Jan Paulsson has described as "beyond cavil" the concept "that national investment laws may create compulsory arbitration without privity."[236] As far as Paulsson and the other *Maffezini* proponents are concerned, the *Maffezini* era heralds "a new world of arbitration where the claimant need not have a contractual relationship with the [respondent]."[237] In effect, a claimant no longer needs direct privity with the treaty whose jurisdictional treatment it wishes to invoke. Douglas, in seeming contrast, appears to regard this development as more avulsive than auspicious.[238] He writes that "[a]cross the hundreds of years of activity of international courts and tribunals leading up to *Maffezini*, there had only been judicial pronouncements *against* such a device."[239]

In the eyes of many thinkers, *Maffezini* invites some prudential misgivings: "Does," for example, "a tribunal have the authority to import new procedural requirements from a third-party treaty in the guise of interpretation?" Is MFN not too thin a reed to serve as a basis for transitive importation of jurisdictional rights, particularly where difficult, volatile, controversial matters are concerned? "[M]ight it not be the better, more prudent interpretation for a tribunal to leave this to be worked out between the parties" as a mark of respecting party autonomy (returning to the thread running through this Article)? Here, there are clear echoes of the clear-statement canon of legal interpretation—this means that a tribunal might choose to avoid reconfiguring, in the guise of interpretation, a sensitive and vigorously debated question like procedural rights through MFN guarantees.[240]

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[235] *Id*. at ¶ 63.

[236] Jan Paulsson, *Arbitration Without Privity*, *in* THE ENERGY CHARTER TREATY 325 (1996) [hereinafter Paulsson, *Arbitration Without Privity*].

[237] *Id*. at 325.

[238] Douglas, *MFN Clause, supra* note 231, at 5.

[239] *See id.* (referring to *Anglo-Iranian Oil* Co, United Kingdom v *Iran*, Judgment, Jurisdiction, [1952] ICJ Rep 93, and the *Aroa Mines Case*, UNRIAA, Vol. IX, pp. 402-445 (1903)).

[240] *See*, *e.g*., *Nebraska*, 600 U.S. at 507 (Barrett, J., concurring) ("There are many [clear-statement] canons on the books, including constitutional avoidance, the clear-statement federalism rules, and the presumption against retroactivity."); *West Virginia v. Environmental Protection Agency*, 597 U.S. 697, 735-38 (2022) (Gorsuch, J., concurring) (setting forth clear-statement canon for retroactive liability and sovereign immunity); John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 403 (2010).

The award in *Siemens AG v. Argentina* (2004)[241] observed that investment treaties, "as a distinctive feature," possess "special dispute settlement mechanisms not normally open to investors. Access to these mechanisms is part of the protection offered under the Treaty. It is part of the treatment of foreign investors and investments … ."[242] MFN inherently meant that "the import of more favorable procedural rights" had to be permitted.[243] Under this view, "for MFN third-party purposes it could not make the least possible difference if the right at issue were procedural or substantive."[244] In all events, "the right" of automatic importation of third-party jurisdictional privileges through the MFN guarantee, quite simply, "existed."[245] It did not need any further explicitness or elucidation in any treaty.

It remains as true today as it was when a decade ago that "[a]lthough *Maffezini* has been controversial because of the widely applicable and explosive implications it wrought, both doctrinally and financially, it does not seem to have been roundly rejected in the [ISDS] community."[246] If anything, the opposite has happened. Since *Maffezini* was decided, it has not shown itself to be non-administrable or isolated from the rest of MFN jurisprudence.[247] In fact, tribunals frequently do rely on it or act in a manner heeding its core prescriptions and guardrails. And to some extent, "investor and [s]tate expectations have already been built up."[248] In the face of that reliance, "[a]lleged treaty violations, or at least claims arising from alleged facts connected to [treaty breaches], happening *between* the time that *Maffezini* is repudiated and some remedy is found will face confusion."[249] The idea of merely turning the clock back to the pre-*Maffezini* era has not attracted enough international jurists in part because no consensus has coalesced around what the replacement for *Maffezini* should be. For these reasons

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[241] ICSID Case No. ARB/02/8, at ¶ 102 (Decision on Jurisdiction) (2004) (emphasis added).
[242] *Id*. at ¶ 102-03.
[243] *Sergei Paushok*, Award, *supra* note 205, at ¶ 565.
[244] DASGUPTA, INTERNATIONAL INTERPLAY, supra note 146, at 345. Indeed,
[r]ationales backing this up state that access to arbitration is either a jurisdictional protection "inextricably related" (*Maffezini, supra,* at ¶ 54) to substantive treatment, a natural "part of the treatment of foreign investors and investments," (*Siemens AG, supra,* at ¶ 102) "an integral part of the investment protection regime," (*Suez, supra*, at ¶ 57) or inherently (and this goes the furthest) "a substantive protection" (*Gas Natural SDG, S.A. v. Argentina,* ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction (2005), at ¶ 31). DASGUPTA, INTERNATIONAL INTERPLAY, supra note 146, at 345 n.289.
[245] DASGUPTA, INTERNATIONAL INTERPLAY, supra note 146, at 345.
[246] DASGUPTA, INTERNATIONAL INTERPLAY, supra note 146, at 348; *see also* Francisco Orrego Vicuña, *Reports of [Maffezini's] Demise Have Been Greatly Exaggerated*, 3 J. INT'L DISP. SETTLEMENT 479-81 (2012).
[247] *See* DASGUPTA, INTERNATIONAL INTERPLAY, supra note 146, at 348-49; *see also id*. ("Many more ISDS awards than not have relied on *Maffezini* and will be jeopardized if *Maffezini* is repudiated. There is no guarantee that IIA signatories will issue a reinterpretation-or that the signatories in other IIAs would.").
[248] *Id*. at 347.
[249] *Id*. at 347-48.

and more, the movement to discredit *Maffezini* does not appear to be on the brink of success.[250]

As suggested earlier, *Maffezini*, of course, is not universally revered.[251] That disfavor should be explored a little more. Some ISDS tribunals demand a clear and unambiguous statement in the treaty itself.[252] To that end, it has been contended that the *Maffezini* award was not oblivious to the need to distinguish "between the legitimate extension of rights and benefits by means of the operation of the clause, on the one hand, and disruptive treaty-shopping that would play havoc with the policy objectives of underlying specific treaty provisions, on the other hand."[253] A subsequent ISDS tribunal would go on to suggest "one, single exception" to the broader *Maffezini* doctrine: "[A]n MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them."[254]

Several other ISDS tribunals have reinforced this point,[255] "including on the basis that Article 31 of the Vienna Convention on the Law of Treaties would be

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[250] *See id.* at 347-49.

[251] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction (2004), and *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (2005), appear to have been early decisions "not entirely consistent" with *Maffezini*. DASGUPTA, INTERNATIONAL INTERPLAY, *supra*, at 349 n.296.

[252] *See*, *e.g.*, *Beijing Everyway*, *supra* note 225, at ¶ 270 ("[Some post-*Maffezini*] investment treaty tribunals held that an MFN clause does not incorporate a provision for investor-state dispute settlement through arbitration, unless it is clear that the contracting parties intended that the MFN clause extends to jurisdictional provisions of another treaty"); Telenor Mobile Communications A.S. v. The Republic of Hung., ICSID Case No. ARB/04/15, Award, 13 September 2006, § 92 ("It is one thing to stipulate that the investor is to have the benefit of MFN investment treatment but quite another to use an MFN clause in a BIT to bypass a limitation in the very same BIT when the parties have not chosen language in the MFN clause showing an intention to do this, as has been done in some BITs.").

[253] *Maffezini*, Award, *supra* note 226, at ¶ 63.

[254] Plama Consortium Limited v. Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction (2005), at ¶ 223; *see also id*., at ¶ 198 ("... [A]n agreement of the parties to arbitrate . . . should be clear and unambiguous."); *id*., at ¶ 200 ("[The] reference [in the MFN clause] must be such that the parties' intention to import the arbitration provision of the other agreement is clear and unambiguous"); *id*., at ¶ 204 ("the intention to incorporate dispute settlement provisions must be clearly and unambiguously expressed."); *id*., at ¶ 218 ("an arbitration clause must be clear and unambiguous and the reference to an arbitration clause must be such as to make the clause part of the contract (treaty)."); *see also* DASGUPTA, INTERNATIONAL INTERPLAY, supra note 146, at 345-48. *See infra*, for further discussion.

[255] *See*, *e.g*., Telenor Mobile Communications A.S. v. Hungary, ICSID Case No. ARB/04/15, at ¶ 90, Award (2006) (stating that "[t]his Tribunal wholeheartedly endorses the analysis and statement of principle furnished by the *Plama* tribunal."); *id*. at ¶ 92 ("In the absence of language or context to suggest the contrary, the ordinary meaning of 'investments shall be accorded treatment no less favourable than that accorded to

violated by a contrary interpretation."[256] The VCLT sets forth certain canons of interpretation that provide uniformity, logic, and stability to the interpretive process for treaties and other international law instruments.[257] But others contend that "putting so high a burden runs contrary to the notion that the treaty, including its consent clause, must be interpreted fairly, neither restrictively nor liberally—nor with undue solicitude for the principle of *effet utile*."[258]

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investments made by investors of any third State' is that the investor's *substantive rights* in respect of the investments are to be treated no less favourably than under a [treaty] between the host State and a third State, and there is no warrant for construing the above phrase as importing *procedural rights* as well."); Vladimir Berschader and Moïse Berschander v. The Russ. Federation, SCC Case No. 080/2004, at ¶ 90, Award (2006) (articulating that "the present Tribunal will apply the principle that an MFN provision in a BIT will only incorporate by reference an arbitration clause from another BIT where the terms of the original BIT clearly and unambiguously so provide or where it can otherwise be clearly inferred that this was the intention of the contracting parties."); Wintershall Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/04/14, at ¶ 167, Award (2008) (stating that "ordinarily and without more, the prospect of an investor selecting at will from an assorted variety of options provided in other treaties negotiated with other parties under different circumstances, dislodges the dispute resolution provision in the basic treaty itself-unless of course the MFN Clause in the basic treaty clearly and unambiguously indicates that it should be so interpreted: which is not so in the present case.").

[256] DASGUPTA, INTERNATIONAL INTERPLAY, supra note 146, at 345-47. *See also Telenor Mobile, supra*, at ¶ 91 ("Article 31 of the [VCLT] requires a treaty to be interpreted 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purposes.' In the absence of language or context to suggest the contrary, the ordinary meaning of 'investments shall be accorded treatment no less favourable than that accorded to investments made by investors of any third State' is that the investor's substantive rights in respect of the investments are to be treated no less favourably than under a BIT between the host State and a third State, and there is no warrant for construing the above phrase as importing procedural fights as well. It is one thing to stipulate that the investor is to have the benefit of MFN investment treatment but quite another to use an MFN clause in a BIT to bypass a limitation in the very same BIT when the parties have not chosen language in the MFN clause showing an intention to do this, as has been done in some BITs.").

[257] And, as already discussed, some of the VCLT's canons and related international-law practices have engendered concern.

[258] DASGUPTA, INTERNATIONAL INTERPLAY, supra note 146, at 346-47; *see also* Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objections, 2003 I.C.J. 4, ¶ 35 (separate opinion by Higgins, J.) ("It is clear from the jurisprudence of the Permanent Court and of the International Court that there is no rule that requires a restrictive interpretation of compromissory clauses. But equally, there is no evidence that the various exercises of jurisdiction by the two Courts really indicate a jurisdictional presumption in favour of the plaintiff. (I make no reference in these observations as to the jurisdictional standards applicable for establishing a competence sufficient for the ordering of provisional measures.) The Court has no judicial policy of being either liberal or strict in deciding the scope of compromissory clauses: they are judicial decisions like any other."); Amco Asia Corporation v. Republic of Indonesia (Jurisdiction), (1983) 1 ICSID Rep. 389, at 394 (". . . like any other conventions, a convention to arbitrate is not

What the ISDS tribunals have said about the clear-statement requirement should be discussed. In *Beijing Everyway Traffic and Lighting Company Limited v. Ghana*, for instance, the ISDS tribunal asserted:

> For an interpretation to support the incorporation, through an MFN clause, of an arbitration clause into a treaty which provides for no arbitration, except for a very limited category of disputes (i.e. concerning the amount of compensation of expropriation), the parties' intention to extend the scope of an MFN clause to arbitration must be *clear and unambiguous*.[259]

Under this view, because "an MFN clause does not create a separate direct relationship between an investor and a contracting state," "an MFN clause cannot operate as a substitute of consent for arbitration which a state offers directly to investors and, thus, cannot extend the arbitration offer to categories of disputes beyond those set out in the investment treaty itself in the absence of clear language of the two contracting states."[260]

In *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, moreover, the ISDS tribunal stated:

> The present Tribunal will apply the principle that an MFN provision in a BIT will only incorporate by reference an arbitration clause from another BIT where the terms of the original BIT clearly and unambiguously so provide or where it can otherwise be clearly inferred that this was the intention of the contracting parties.[261]

Then, in *ST-AD GmbH v. Republic of Bulgaria*, the ISDS tribunal stated:

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to be construed restrictively, nor, as a matter of fact, broadly or liberally. It is to be construed in a way which leads to find out and to respect the common will of the parties: such a method of interpretation is but the application of the fundamental principle *pacta sunt servanda*, a principle common, indeed, to all systems of internal law and to international law. Moreover – and this is again a general principle of law–any convention, including conventions to arbitrate, should be construed in good faith, that is to say by taking into account the consequences of their commitments the parties may be considered as having reasonably and legitimately envisaged."); SPP v. Egypt, Decision on Jurisdiction, 14 April 1988, 3 ICSID Rep. 143 ("Thus, jurisdictional instruments are to be interpreted neither restrictively nor expansively, but rather objectively and in god faith, and jurisdiction will be found to exist if-but only if-the force of the arguments militating in favor of it is preponderant."); Mondev Int'l Ltd. v. United States, ICSID Case No. ARB(AF)/99/2 (2002), at ¶ 43 ("[T]here is no principle either of extensive or restrictive interpretation of jurisdictional provisions in treaties. In the end the question is what the relevant provisions mean, interpreted in accordance with the applicable rules of interpretation of treaties."); Fisheries Jurisdiction Case (Spain v. Canada), 1998 I.C.J. Rep. 432, 451-52, at ¶¶ 37-38, 452-56, at ¶¶ 44-56.

[259] PCA 2021-15, ¶ 285, Final Award on Jurisdiction (Save as to Costs), 30 Jan. 2023 (emphasis added).

[260] *Id*. at ¶ 287.

[261] SCC Case No. 080/2004, Final Award, 21 April 2004, § 181.

> [T]he Tribunal is in agreement with the *Berschader* tribunal, which observed that 'an MFN provision in a BIT will only incorporate by reference an arbitration clause from another BIT where the terms of the original BIT clearly and unambiguously so provide or where it can otherwise be clearly inferred that this was the intention of the contracting parties.'[262]

Supporters of this clear-statement principle believe that a treaty can easily use explicit terms—unambiguous ones—to require, through MFN protections, the importation of jurisdictional benefits given to a third party.[263] So when it does no such thing, the presumption should cut against such importation, they argue.[264] Ideally, no reasonable observer would have any doubt as to the importability of the jurisdictional benefits. As one tribunal a decade ago put it, "the absence of the expression 'all matters'—a phrase that is indicative of an intention on the part of some contracting State parties to cover the largest scope possible—... constitutes a supplementary indication that [the signatories] did maintain a distinction between" the MFN importability of substantive obligations *vis-à-vis* procedural rights.[265] The former carried over and could be imported (even without clear and unambiguous expression in the treaty so authorizing), whereas the latter could not.

Yet, the anti-*Maffezini* forces need to address the perennial quandary bedeviling a clear-statement rule. In particular, the degree of clarity, or (more to the point) explicitness,[266] required in the legal instrument needs to be set forth in advance. Otherwise, the application of this doctrine would become malleable and amorphous and thus sow the seeds of its own destruction. Would it suffice for the treaty to contain any specific magic words (or their counterparts)? Need it say that the treaty incorporates jurisdictional issues for MFN purposes? Might a clear rule—one derived from the foundational treaty-based principles—be devised to

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[262] PCA Case No. 2011-06 (ST-BG), Award on Jurisdiction, 18 July 2013, § 391; see also European American Investment Bank AG v. The Slovk. Republic, PCA Case No. 2010-17, 22 October 2012, § 447 ("If a BIT has no provision for investor-State arbitration, there is no offer of arbitration and thus no scope for the creation of an arbitration agreement. Even if that BIT contains a broadly worded MFN clause, that clause cannot substitute for the arbitration provision and make it possible for an investor successfully to bring arbitration proceedings against a State Party to the BIT, no matter what provisions for arbitration that State Party might have agreed to include in its other BITs. By contrast, if a BIT contains no provision on fair and equitable treatment, an investor may nonetheless be able to derive from the MFN clause contained in that BIT a right to be accorded such treatment by one of the States Parties, provided that there is at least one other BIT concluded by that State which contains a provision for fair and equitable treatment.").

[263] *See* DASGUPTA, INTERNATIONAL INTERPLAY, supra note 146, at 348-52.

[264] *See id.*

[265] Daimler Financial Services AG v. Argentine Republic, ICSID Case No. ARB/05/1, Award, ¶ 236, 22 Aug. 2012.

[266] As should be clear by now, the clear-statement rule is a misnomer in such circumstances because what that doctrine actually demands is an *explicit* statement from the treaty.

determine what qualifies as a clear (explicit) statement and what does not?[267] And why would the inclusion of jurisdictional issues not exclude other issues from MFN's scope and ambit? If ISDS jurisprudence can coalesce around consensus regarding these queries, that would help obviate many of the concerns harbored by *Maffezini's* supporters (as they could then exercise an abundance of caution during the treaty-drafting process).

Truth be told, it appears that even the *Maffezini* skeptics are coming around, and there are far fewer of them today than there were a decade ago. To illustrate, one ISDS tribunal rejected *Maffezini's* motivation of "harmoniz[ing] and enlarg[ing] … the scope of such [MFN] arrangements."[268] It maintained that when "an investor has the option to pick and choose provisions from the various BITs," that is an invitation to "chao[s];" is "actually counterproductive to harmonization;" and it, for these and related reasons, "cannot be the presumed intent of Contracting Parties."[269] This is an analytical criticism of *Maffezini* relating to how *Maffezini* works in practice—how it is mechanized.

Other, more fundamental criticisms of *Maffezini* have also been leveled. Notably, Brigitte Stern has contended that "the jurisdictional treatment is *never* inherent in the substantive treatment on the international level."[270] Harkening back to the difference between domestic and international orders, she promoted the view that unlike in most domestic systems, before international tribunals, "most rights cannot be enforced through a jurisdictional process."[271] She continued, stating that "it is only when, exceptionally, the State has given its consent—consent to other States for accepting the jurisdiction of the [particular tribunal]—that such a 'jurisdictional treatment' complements the substantive treatment granted by the international rules."[272]

From the anti-*Maffezini* point of view, the fulcrum of this dispute is consent.[273] It does not quarrel with the axiom that substantive rights contained in a third-party treaty may be imported through the MFN guarantee. Its point is only that "[i]nternational tribunals depend on the explicit consent of the States to have [the jurisdictional] aspect of their MFN commitments (*outside* the currently-disputed [treaty]) considered."[274] This view claims support from the axiom that even principles as universal and vital as self-determination cannot "overcome the limitations of jurisdiction on the basis of consent."[275] This is true also because international tribunals retain jurisdiction "only because" and only to the extent

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[267] Even if tribunals accept *Maffezini*, how they apply it-what qualifies as a clear statement-will vary. This formula needs to be elucidated.
[268] *Maffezini, supra* note 226, at ¶ 62.
[269] *Plama*, *supra* note 250, at ¶ 219.
[270] Impregilo S.p.A. v. Argentina, ICSID Case No. ARB/07/17, at ¶ 45 (Final Award) (2011) (Professor Brigitte Stern, Arbitrator) (concurring and dissenting opinion).
[271] *Id*.
[272] *Id*.
[273] DASGUPTA, INTERNATIONAL INTERPLAY, supra note 146, at 350.
[274] *Id*.
[275] IAN BROWNLIE, THE RULE OF LAW IN INTERNATIONAL AFFAIRS: INTERNATIONAL LAW AT THE FIFTIETH ANNIVERSARY OF THE UNITED NATIONS 42 (1998).

that "the parties have so desired."[276] As a result, the argument deduced that "State A's safeguard against State B is that neither state may ordinarily be taken before an international tribunal for a particular claim without its consent."[277] And consent's consequential role in this calculus meant that this consent—to have jurisdictional issues imported through MFN—had to be unambiguously stated in the treaty.[278]

Yet, the sort of drafting history evidence beyond clear and unambiguous text that could qualify as probative— for instance, negotiators' speeches or "government interpretations in which other the [signatory or] signatories concurred (restatements and add-ins)"—could just as easily be misleading and undermine the analysis.[279] This is to say nothing about the motives of the drafters. As certain domestic courts repeatedly have admonished, "inquiries into legislative motives 'are a hazardous matter.'"[280] The same is true of treaty drafters' motives. Furthermore, the United States Supreme Court has noted that "[e]ven when an argument about legislative motive is backed by statements made by legislators who voted for a law, [courts] have been reluctant to attribute those motives to the legislative body as a whole."[281] That is because "'[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it.'"[282] And no legislature or executive, any more than a constellation of treaty signatories, would agree to achieve a purpose at *all* costs, no matter what.[283]

It is sometimes believed that "[t]he reinterpretations and insertions may come from governments hedging their bets, not putting a potentially deal-breaking

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[276] Declaration of Judge *ad hoc* Verhoeven, Armed Activities on the Territory of the Congo, 2001 I.C.J. Rep. 684; see also *Status of Eastern Carelia*, PCIJ (series B, No 5) 27 (noting that "no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement."); *Rights of Minorities in Upper Silesia*, PCIJ (ser A, No 15) 1928, 22; *Corfu Channel,* 1948 *I.C.J. Rep.* 27; *Anglo-Iranian Oil Co.,* 1952 *I.C.J. Rep.* 103*; Monetary Gold,* 1954 *I.C.J. Rep*. 32; *Continental Shelf,* 1984 *I.C.J. Rep. 22; Land, Island and Maritime Frontier Dispute,* 1990 *I.C.J. Rep.* 133*; East Timor,* 1995 *I.C.J. Rep.* 101.

[277] DASGUPTA, INTERNATIONAL INTERPLAY, supra note 146, at 344.

[278] *See id.* at 343-44.

[279] *Id*. at 350-51; Whitman v. American Trucking Ass'ns, 531 U.S. 457, 468 (2001); *see also* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000); Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L L.J. 435, 438, 440, 448, 485-488 (2009).

[280] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 253 (2022) (quoting United States v. O'Brien, 391 U.S. 367, 383 (1968)).

[281] *Id*.

[282] *Id*. (quoting *O'Brien*, 391 U.S. at 384).

[283] "[N]o legislation" or treaty "pursues its purposes at all costs." *Rodriguez v. United States,* 480 U.S. 522, 525-26 (1987). In the statutory context, for example, "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice-and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Id*. *See also* Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHICAGO-KENT L. REV. 441, 444 (1990).

provision on the negotiating table, and instead hoping to influence future tribunal awards based on these reinterpretations."[284] Yet "[a]nother problem with add-on government *interpretations* is that, whether or not the process is transparent, it does not engage [all the pertinent actors] in the same in-depth way that the original compact does."[285] And that is not all. "[The] add-ons typically [do not] require ratification by the Legislature (that some signatory nations might require the Executive to attain for international compacts)."[286] The perceived reality of treaty negotiation by other scholars and practitioners has led to sharp criticism of Stern's approach. One such practitioner has noted that Stern's approach

> in a somewhat absurd manner, impl[ies] that dispute resolution provisions are more specifically negotiated than other treaty provisions. It is, however, presumed that, when entering into a treaty, the State parties intend to write what they write. There is no difference in nature, in terms of drafting, between the fair and equitable standard, the prohibition of expropriations without compensation, the prohibition of discriminatory or arbitrary conduct, or dispute resolution provisions.[287]

Often, ISDS tribunals these days presuppose that "*Maffezini* is a governing principle and then decide whether the imported procedural rights were violated."[288] The furor concerning it has calmed down significantly. The importability of jurisdictional protections through MFN guarantees is part of the ISDS mainstream today. As a consequence, it would serve negotiators and drafters well to be aware of this default presumption as they draft treaties.[289] In sum, substantive obligations are automatically and inexorably covered by MFN guarantees, whereas the coverage of jurisdictional and procedural rights is slightly more nuanced in many quarters—but the consensus is steadily growing in favor of permitting its importation as well. This does not necessarily mean that the clear-statement canon of interpretation is rejected. It means simply that the MFN guarantee is deemed to be sufficiently (even amply) clear to elicit that result.

In any event, however, the fragmentation in international law should be addressed. Unlike domestic courts (at least in the common-law world), ISDS only has horizontal *stare decisis*. With miniscule exceptions (such as jurisdictionally-limited annulment committees of ICSID), there is no vertical *stare decisis* in ISDS. "By contrast to the binding nature of the judgments of superior [*domestic*]

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[284] DASGUPTA, INTERNATIONAL INTERPLAY, supra note 146, at 351.
[285] *Id*.
[286] *Id*.
[287] Yas Banifatemi, *The Emerging Jurisprudence on the MFN Treatment*, *in* INVESTMENT TREATY LAW: CURRENT ISSUES III 269 (Andrea Björklund et al. eds, 2009).
[288] DASGUPTA, INTERNATIONAL INTERPLAY, supra note 146, at 351. *See also* Indian Metals & Ferro Alloys Ltd v. Republic of Indon., PCA Case No. 2015-40, Award, ¶ 266, 29 Mar. 2019 ("Even if *arguendo* the Tribunal accepts that the Claimant can incorporate Article 4(1) of the Indonesia-Germany BIT into the Treaty, the Tribunal cannot accept the Claimant's claim regarding the alleged breach of the full protection and security obligation.").
[289] DASGUPTA, INTERNATIONAL INTERPLAY, supra note 146, at 351.

courts," "autonomous" ISDS tribunals are tasked with persuading one another through their reasoning.[290] No higher ISDS tribunal can mandate or police what the ISDS tribunals of first instance will do or which doctrines they will adhere to. As a result, the most potent weapon in the arsenal for *Maffezini* (and proponents of all theories) is persuasion. Since there is no controlling precedent, unless a tribunal is convinced of the soundness of a specific doctrine, it is not obliged in any binding sense to follow it. So it goes for the fate and future of *Maffezini* as well.

In conclusion, where a treaty's text is silent on the matter (or it so directs), an MFN guarantee imports the substantive and jurisdictional benefits afforded, in theory or reality, to third parties by either of the signatories of the treaty in question. This is true even where such benefits have not been afforded to an identifiable third-party investor.[291] The mere possibility that a third-party investor might get a better deal from either of the signatory countries than one other's investors would suffice to breach treaty-based MFN protections.

C. PARALLELS WITH THE UNITED STATES SUPREME COURT'S FREE EXERCISE CLAUSE ANALYSIS

MFN in international investment law has strong parallels with the way that the First Amendment's Free Exercise Clause is construed, namely that regardless of whether a secular entity has *actually* been treated better than a religious entity, the fact that there is the possibility of a secular entity being treated differently is sufficient to declare the policy invalid.

To begin with, the United States Constitution, in its First Amendment, gives everyone subject to its jurisdiction the right to freely exercise religious faith. The Supreme Court repeatedly has held that under that Amendment's Free Exercise Clause, "restrictions on religious exercise that are not 'neutral and of general applicability' must survive strict scrutiny."[292] And "the minimum requirement of neutrality is that a law not discriminate on its face,"[293] and "[t]he Free Exercise Clause bars even 'subtle departures from neutrality' on matters of religion."[294]

The Supreme Court reaffirmed just three years ago, in *Fulton v. City of Philadelphia*, that "laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and

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[290] Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999, 1039—40 (2004) (citing Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003); William W. Burke-White, *A Community of Courts: Toward a System of International Criminal Law Enforcement*, 24 MICH. J. INT'L L. 1 (2002)).

[291] Often, treaties do not require that in order for the MFN guarantee to have been breached, at least one investor need have been given preferment.

[292] Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 531 (1993).

[293] *Id*. at 533.

[294] Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 584 U.S. 617, 637-39 (2018) (quoting *Church of Lukumi*, 508 U.S. at 534).

generally applicable."[295] To this end, courts have held that the "[g]overnment fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature."[296]

Under this line of precedent, a law is not considered generally applicable if it "invites the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'"[297] A corollary is that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[298] Otherwise, the delicate balance struck by the Free Exercise framework would fall apart.

Based on these principles, the Supreme Court has held laws not generally applicable under the following circumstances: the "good cause" standard to receive unemployment benefits (due to religious reasons) enabled the government to grant exemptions based on the individual circumstances underlying each application (in *Sherbert v. Verner* (1963)[299]); ordinances prohibiting animal sacrifice surgically targeted religion because they "did not regulate hunters' disposal of their kills or improper garbage disposal by restaurants," which all posed public-health risks (in *Church of Lukumi Babalu Aye, Inc. v. Hialeah* (1993)[300]); and city contracts requiring adoption agencies to be open on equal terms to straight and gay prospective foster parents but permitting exemptions at the "sole discretion of" the government decision-maker (in *Fulton*[301]).

Just like with international investment law's MFN jurisprudence, the Supreme Court has maintained that whether or not an exemption is actually granted, "[t]he [very] creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless of whether any exceptions have actually been given, because it invite[s] the government to decide which reasons for not complying with the policy are worthy of solicitude."[302] This was largely consistent with the Court's time-honored precedents holding that "[t]he Free Exercise Clause 'protect[s] religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status.'"[303]

At this point in the analysis, the governmental policy will survive strict scrutiny only if it advances "interests of the highest order" and is narrowly tailored to achieve those interests.[304] Courts must not examine any of the asserted interests

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[295] 593 U.S. 522, 531-33 (2021).
[296] *Id*. at 1877.
[297] 141 U.S. at 1877 (cleaned up).
[298] *Id*.
[299] 374 U.S. 398, 401 n.4.
[300] 508 U.S. 520, 531-34.
[301] 593 U.S. at 533-34, 536-38 (referring to *Church of Lukumi*, 508 U.S. at 544-45).
[302] *Id.*
[303] Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 458 (2017) (quoting *Church of Lukumi*, 508 U.S. at 533, 542).
[304] *Lukumi*, 508 U.S. at 546.

at a high level of generality but instead must "scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants."[305]

Governmental interests that might, in the abstract, appear important will not necessarily justify the denial of a religious exemption in a given case. And the burden decidedly rests on the government, for "[t]he [very] creation of a system of exceptions . . . undermines the [government's] contention that its . . . policies can brook no departures."[306] In recent years, the Supreme Court has not upheld a single governmental interest in the face of such searing strict scrutiny analysis.[307] The Court's actions speak volumes. The Court has pretty much suggested that it is inconceivable when successful governmental interests could even exist. At this step of the analysis, such invocations of governmental interests will be "moribund" and deemed to "retain[] [little] vitality."[308] On the whole, then, "denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest 'of the highest order.'"[309]

Putting an even finer point on all this, in a related 2020 case, *Calvary Chapel Dayton Valley v. Sisolak*, Justice Brett Kavanaugh accurately divided the world of laws targeting religion into four categories: "(1) laws that expressly discriminate against religious organizations; (2) laws that expressly favor religious organizations; (3) laws that do not classify on the basis of religion but apply to secular and religious organizations alike; and (4) laws that expressly treat religious organizations equally to some secular organizations but better or worse than other secular organizations."[310]

The first category of laws easily offends the Free Exercise Clause. Laws that obviously discriminate against religion are, in the recent words of the Supreme Court, "odious to our Constitution."[311] The second and third categories would be subject to case-by-case analysis, dealing with competing Free Exercise and Establishment Clause challenges.[312] The fourth category, though, is the most pertinent and interesting for our purposes.[313]

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[305] Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 431 (2006).
[306] *Fulton*, 593 U.S. at 542-43.
[307] *See*, *e.g.*, *id.* at 540-43; *Trinity Lutheran*, 582 U.S. at 465-66.
[308] Edwards v. Vannoy, 593 U.S. 255, 271-73 (2021).
[309] *Trinity Lutheran*, 582 U.S. at 458 (quoting McDaniel v. Paty, 435 U.S. 618, 628 (1978) (plurality opinion)).
[310] 140 S. Ct. 2603, 2610 (opinion dissenting from denial of stay).
[311] Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2610-11 (2020) (Kavanaugh, J., dissenting from denial of application for injunctive relief) (citing Espinoza v. Montana Dept. of Revenue, 591 U.S. 464, 489 (2020); *Trinity Lutheran*, 582 U.S. 449; Good News Club v. Milford Central School, 533 U.S. 98 (2001); Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995); Larson v. Valente, 456 U.S. 228 (1982); McDaniel v. Paty, 435 U.S. 618, 629 (1978) (Brennan, J., concurring in judgment)); *see also* Murphy v. Collier, 140 S. Ct. 465 (2019) (Kavanaugh, J., concurring in grant of application for stay); *cf. Church of Lukumi*, 508 U.S. 520.
[312] *Calvary Chapel*, 140 S. Ct. at 2611 (opinion of Kavanaugh, J.).
[313] *See id*. at 2611-12 (opinion of Kavanaugh, J.).

There, the question is whether "laws ... that supply no criteria for government benefits or action, but rather divvy up organizations into a favored or exempt category and a disfavored or non-exempt category" violate the Free Exercise guarantee of the First Amendment.[314] "Those laws," Justice Kavanaugh argued, "provide benefits *only* to organizations in the favored or exempt category and not to organizations in the disfavored or non-exempt category."[315] To that end, the "free-exercise" analysis is the same as the "equal-treatment" analysis—and analogous to an MFN analysis.[316]

"The question," it has been asked, "is whether the legislature is required to place religious organizations in the favored or exempt category rather than in the disfavored or non-exempt category."[317] The Supreme Court has long stated that "[u]nless the State provides a sufficient justification otherwise, it must place religious organizations in the favored or exempt category."[318] And long-time esteemed constitutional scholar of the Constitution's Religion Clauses, Douglas Laycock, has explained that the Supreme Court's Free Exercise jurisprudence confers "something analogous to most-favored nation status" to religious organizations.[319]

Along those lines, in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, for example, the United States Supreme Court explained that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason."[320] Similarly, then-Judge Alito stated that the First Amendment required a police department to exempt Sunni Muslims from its no-beard policy because the police department made "exemptions from its policy for secular reasons and has not offered any substantial justification for refusing to provide similar treatment for officers who are required to wear beards for religious reasons."[321] In other words, "when a law on its face favors or exempts some secular organizations"—even if it does not favor other such organizations—"as opposed to religious organizations, a court entertaining a constitutional challenge by the religious

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[314] *Id*. (opinion of Kavanaugh, J.).
[315] *Id*. at 2612 (opinion of Kavanaugh, J.).
[316] *Id*. (opinion of Kavanaugh, J.).
[317] *Id*. (opinion of Kavanaugh, J.).
[318] *Id*. (opinion of Kavanaugh, J.). That is why, in a case dealing with New York's COVID restrictions, the Supreme Court struck down a measure under the First Amendment because it had treated "large retail establishments, factories, schools, liquor stores, bicycle repair shops, and pet shops" better than it had houses of worship even though it was also said by some to have not extended that preferment to "theaters and concert halls." *Fulton*, 593 U.S. at 611 (Alito, J., concurring in judgment) (citing *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14 (2020)).
[319] Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 49 (1990).
[320] 494 U.S. 872, 884 (1990); *see also Church of Lukumi*, 508 U.S. at 537-38. While declining to disturb *Smith's* core holding, the Supreme Court in *Fulton* interpreted neutrality and general applicability capaciously. 141 U.S. at 1877.
[321] Fraternal Order of Police Newark Lodge No. 12 v. Newark, 170 F.3d 359, 360 (3rd Cir. 1999).

organizations must determine whether the State has sufficiently justified the basis for the distinction."[322] In other words, *any* preferment over the covered entity violates the Free Exercise Clause.

So too for MFN in ISDS. Indeed, the aforementioned approach renders the constitutional MFN analysis a fundamental two-step inquiry:

> First, does the law create a favored or exempt class of organizations and, if so, do religious organizations fall outside of that class? That threshold question does not require judges to decide whether a church is more akin to a factory or more like a museum, for example. Rather, the only question at the start is whether a given law on its face favors certain organizations and, if so, whether religious organizations are part of that favored group. If the religious organizations are not, the second question is whether the government has provided a sufficient justification for the differential treatment and disfavoring of religion.[323]

While the Free Exercise Clause "do[es] not require that religious organizations be treated more favorably than all secular organizations," it does "require that religious organizations be treated equally to the favored or exempt secular organizations, unless the State can sufficiently justify the differentiation."[324] To be clear, courts have held that "[i]n seeking to justify the differential treatment in those kinds of cases, it is not enough for the government to point out that other secular organizations or individuals are also treated unfavorably."[325] Rather than focusing on "whether one or a few secular analogs are regulated," "[t]he question is whether a single secular analog is not regulated."[326]

Specifically, a "subtle" theme of the Supreme Court's Free Exercise Clause jurisprudence demonstrates that "the government must articulate a sufficient justification for treating some secular organizations or individuals more favorably than religious organizations or individuals."[327] As a general principle, the Supreme Court has established that no religious entity may be treated any worse than any secular entity by the government. In the same way, no treaty signatory entitled to an MFN guarantee may be treated worse than any other third-party country—treaty signatory or not with the treaty partner of the MFN beneficiary—may receive superior treatment. MFN clauses in treaties need not and typically do not say that someone invoking an MFN guarantee must show that an identifiable investor from a third-party country actually received superior treatment. It is enough, just as in the Free Exercise Clause context, that the host state may have,

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[322] *Calvary Chapel*, 140 S. Ct. at 2612-13 (opinion of Kavanaugh, J.).
[323] *Id*. (opinion of Kavanaugh, J.).
[324] *Id*. at 2613 (opinion of Kavanaugh, J.).
[325] *Id*. (opinion of Kavanaugh, J.).
[326] Douglas Laycock & Steven Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 22 (2016).
[327] *Calvary Chapel*, 140 S. Ct. at 2614 (Kavanaugh, J., dissenting from denial of stay).

was obligated to have, or in its discretion could have granted her better treatment. ISDS tribunals and indeed all international tribunals should continue to robustly apply this principle.

D. THE EXPECTATIONS FOR MFN

MFN clauses occupy their exalted status in international investment law due mainly to the fact that they hold treaty-breaching sovereigns responsible and ensure a level of equality among investors. No foreigner going, at least voluntarily, into a host state wants to feel second-best. MFN guarantees have thus been tactically necessary for nations to attract foreign investors. Nonetheless, there is the distinct possibility that MFN guarantees strike some as inconvenient and susceptible to circumvention by limiting their procedural or substantive scope. Such temptations regarded in many circles as myopic and injudicious.

The MFN discourse is controversial only as far as importing procedural and jurisdictional rights is concerned. Substantive obligations, as we have learned, are easily and incontrovertibly covered by MFN guarantees.[328] While "there has been [a significant amount of] transnational judicial dialogue and [substantial] efforts have been undertaken to induce this dialogue," more "intra-system dialogue among the various negotiati[ng]" entities could be had.[329] Indeed, "[t]ransnational dialogue and cooperation (judicial or otherwise) is laudatory, and most diplomatic and economic crisis-resolution has this dialogue as its inception."[330]

The ISDS system, like any tribunal infrastructure (domestic or international), will gain and preserve its legitimacy in the eyes of the public only by sincerely following the commands of law. And to be viewed as doing precisely that. The citizenry expects tribunals to behave dispassionately, neutrally, and objectively. Judges and arbitrators must not put their own thumbs on the scales of justice. The arbitral system should work impartially, justly, effectively, and efficiently. Accordingly, tribunal efforts to deliver crowd-pleasing outcomes—whether by distorting MFN or other international law principles—will be counterproductive. And may invite the miasma of illegitimacy.[331] To be sure, a tribunal may gain

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[328] *See* Part II(2)(i), *supra*; *see also* J. Anthony VanDuzer, *Enhancing the Procedural Legitimacy of Investor-State Arbitration Through Transparency and Amicus Curiae Participation*, 52 MCGILL L.J. 681, 706-08 (2007).

[329] DASGUPTA, INTERNATIONAL INTERPLAY, supra note 146, at 356-57; *see also* Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487 (2005).

[330] DASGUPTA, INTERNATIONAL INTERPLAY, *supra*, at 357.

[331] W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L.. 866, 868-69 (1990) ("Political legitimacy . . . was to derive from popular support; governmental authority was based on the consent of the people in the territory in which a government purported to exercise power. At first only for those states in the vanguard of modern politics, later for more and more states, the sovereignty of the sovereign became the sovereignty of the people: popular sovereignty. It took the formal international legal system time to register these profound changes. Another century beset by imperialism, colonialism and fascism was to pass, but by the end of the Second World War, popular sovereignty was firmly rooted as one of the fundamental postulates of

legitimacy by speaking in an explanatory manner to the stakeholders.[332] Such a process "may trigger a dialectical chain reaction with the other participants in society."[333] And it is possible to undertake without, in any way, compromising or infringing on the inviolability or integrity of the decision-making process. But should tribunals even absentmindedly step into the sacrosanct terrain of letting their extra-judicial consciousness affect the substance of their decisions or the process by which they are undertaken, then that inviolability would be breached. Perhaps irreparably.

III. CONCLUSION

Treaties would be effectively nugatory if they were not interpreted in light of their plain meaning, in accordance with the intentions of their respective signatories. The treaty text is the repository and source of those intentions. There is no clearer indication of the views of a treaty's drafters and signatories than its text. The reason for this prioritizing is party autonomy, which is the organizing principle of all international investment law. And it is party autonomy that generally counsels in favor of giving MFN guarantees their due weight: An MFN guarantee is understood in ISDS jurisprudence to incorporate and import all the procedural and substantive benefits afforded third-party investors by either of the pertinent treaty's signatories, even where they have not been applied to the benefit of an identifiable investor. As the United States Supreme Court's Free Exercise Clause analysis shows, the very possibility of such a third-party actor's benefit makes it importable through the MFN guarantee in the ISDS system. At its core, ISDS, unlike many domestic law systems, exists principally for dispute resolution arising out of treaties—not for other, more institutional reasons (though it may end up serving those interests as well). The way to preserve the legitimacy of this occasionally fragile infrastructure of international law is to understand, internalize, and apply this principle in practice.

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political legitimacy. Article 1 of the [United Nations] Charter established as one of the purposes of the United Nations, to develop friendly relations between states, not on any terms, but 'based on respect for the principles of equal rights and self-determination of peoples.'") (internal footnotes omitted).

[332] *See* DASGUPTA, INTERNATIONAL INTERPLAY, supra note 146, at 356-57.

[333] *Id*.