Arbitration Brief

Volume 2 | Issue 1 Article 4

2012

A BIT at a Time: The Proper Extension of the MFN Clause toDispute Settlement Provisions in Bilateral Investment Treaties

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Recommended Citation
Parker, Stephanie L. "A BIT at a Time: The Proper Extension of the MFN Clause to Dispute Settlement Provisions in Bilateral Investment Treaties." The Arbitration Brief 2, no. 1 (2012): 30-63.

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A BIT AT A TIME: THE PROPER EXTENSION OF THE MFN CLAUSE TO DISPUTE SETTLEMENT PROVISIONS IN BILATERAL INVESTMENT TREATIES

By Stephanie L. Parker[1]

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Introduction

In the ever-growing and ever-expanding global economy of this ever-shrinking world, one would think that simplicity might be a virtue extolled by all. When it comes to bilateral investment treaties, however, simplicity is the exception, not the rule.[2] There are an estimated 2,700 bilateral investment treaties in force,[3] and the increasingly complex web overlaying the international investment community can make things, at the very least, difficult to navigate.[4]

A bilateral investment treaty ("BIT") is an agreement between two countries regarding the mutual promotion and protection of private investment by individuals and businesses of the States party to the treaty.[5] Although each investment treaty is unique, a BIT will typically: define investment; set up grounds for admission to each country; determine the appropriate form of compensation should any investments be expropriated; provide for free transfer of funds; set up dispute settlement mechanisms (for both individuals and States); and require national treatment, most-favored-nation treatment, and fair-and-equitable treatment.[6]

The purpose of the BIT is to attract and increase foreign investment.[7] One way bilateral investment treaties attract foreign direct investment is by creating a certain level of protection for the investors of each State involved.[8] This is typically accomplished through a combination

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[2] *See* Surya P. Subedi, International Investment Law: Reconciling Policy and Principle 176 (2008) (describing the current state of law as a "messy morass" that requires synchronization now more than ever).

[3] *See* M. Sornarajah, The International Law on Foreign Investment 172 (3d ed. 2010) (emphasizing that bilateral investment treaties appear to have peaked in the mid 1990's and although new ones continue to be negotiated, it is at a much slower rate).

[4] *See generally* Scott Vesel, *Clearing a Path Through a Tangled Jurisprudence: Most-Favored-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties*, 32 Yale J. Int'l L. 125 (2007) (clarifying the dense and often contradictory jurisprudence relating to the most-favored-nation clause's application to dispute settlement provisions).

[5] *See What Are BITs?,* United Nations Conference on Trade and Development, http://www.unctadxi.org/templates/Page1006.aspx, (last visited Mar. 15, 2012) (providing a basic explanation of bilateral investment treaties).

[6] *Id*.

[7] *See* 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, 111–12 (concluding that bilateral investment treaties substantially increase the amount of foreign direct investment flowing into States party to the treaty).

[8] Subedi, *supra* note 1, at 86.

of national treatment, fair-and-equitable treatment, and most-favored-nation treatment.[9] The most-favored-nation ("MFN") clause, which is a staple of most bilateral investment treaties,[10] remained relatively uncontroversial until 2000.[11] Although the application of MFN clauses to substantive provisions has long been accepted,[12] in 2000, an arbitration panel stunned the international investment community and sparked a debate that has raged since. This debate involved whether MFN clauses allow claimants to access more favorable dispute settlement provisions in third party treaties.[13]

This Article will argue that MFN clauses can be appropriately invoked to import more favorable dispute settlement provisions of third party treaties under the 1969 Vienna Convention on the Law of Treaties ("VCLT"), and should be invoked for this purpose. Part I of this Article will provide developmental history and jurisprudential background of the MFN clause. Part II will argue that the application of MFN clauses to dispute settlement provisions is in accord with Articles 31 and 32 of

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[9] *See* Sornarajah, *supra* note 2, at 201 (asserting that it is typical for a BIT to contain one article on standards of treatment, which then lists each type of treatment provided for in the treaty).

[10] *See* U.N. Conference on Trade and Development, *Most-Favored-Nation Treatment,* U.N. Doc. UNCTAD/ITE/IIT/10, at 39 (1999), *available at* http://www.unctad.org/en/docs/psiteiitd10v3.en.pdf (deeming the most-favored-nation clause a "core element of international investment agreements").

[11] Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction (Jan. 25, 2000), 5 ICSID Rep. 396 (2002). Unless otherwise noted, all awards are available at http://italaw.com.

[12] *See* Berschader v. Russian Fed'n, SCC Case No. 080/2004, Award of Apr. 21, 2006, ¶ 179 (Arbitration Inst. of the Stockholm Chamber of Commerce) (declaring that "it is universally agreed that the very essence of an [sic] MFN provision in a BIT is to afford to investors all material protection provided by subsequent treaties"); *see also* Yas Banifatemi, *The Emerging Jurisprudence on the Most-Favoured-Nation Treatment in Investment Arbitration*, *in* Investment Treaty Law: Current Issues III 241, 241–42 (Andrea K. Bjorklund et al. eds., 2009) (referring to most-favored-nation's application to classic substantive provisions as "straightforward").

[13] *Compare, e.g.,* Zachary Douglas, *The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails*, 2 J. Int'l Disp. Settlement 97, 114 (2011) (insisting that extension of the most-favored-nation clause to dispute settlement provisions will "undermine the possibility of a valid and binding arbitration agreement" and permit tribunals to run amok with order and justice in the international investment arena), *with, e.g.,* Stephan W. Schill, The Multilateralization of International Investment Law 193 (2009) (articulating that broad application of most-favored-nation clauses to dispute settlement provisions carries the goals of bilateral investment treaties forward).

the VCLT, and that only these articles need be relied upon while interpreting treaties.[14] Part III will demonstrate how proper treaty interpretation requires that States be held to the language of their treaties. Finally, this Article will conclude that the MFN clause is a proper vehicle for claimants to access more favorable dispute settlement provisions that will subsequently further the goals of bilateral investment treaties.

I. The Origins of the MFN Clause and Its Path to Dispute settlement Provisions

A typical MFN clause provides that States party to a treaty will provide treatment no less favorable than that offered to third parties.[15] This provides a sense of stability and security for both investors and host States: investors know they will not be driven out of business simply because a host State grants more favorable treatment to third parties,[16] and host States take comfort in knowing that they can generally adjust their international investment policies without necessarily renegotiating every existing treaty.[17] Where an important phrase is widely used, however, it is frequently misinterpreted and applied incorrectly.[18]

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[14] Vienna Convention on the Law of Treaties, arts. 31, 32, May 23, 1969, 1115 U.N.T.S. 331 [hereinafter Vienna Convention].

[15] *See, e.g.*, The 2004 Model Treaty between The Government of the United States of America and The Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment (2004) [hereinafter, U.S. Model BIT], *available at* http://www.state.gov/documents/organization/117601.pdf ("treatment no less favorable than it accords, in like circumstances, to investors of any non-Party.").

[16] *See* Subedi, *supra* note 1, at 68 (explaining that "foreign investors seek protection under the MFN principle to avoid any discrimination against them which would put them at a competitive disadvantage compared to other investors from third countries").

[17] *See* Vesel, *supra* note 3, at 142–43 (elaborating that one-step revision of international investment by States inherently favors liberalization of investment policy because to tighten a policy, States would have to rework each treaty).

[18] *See* Stanley K. Hornbeck, *The Most-Favored-Nation Clause: Part One*, 3 Am. J. Int'l L. 395, 395 (1909) (internal quotations omitted) ("Rarely does a conditional provision so extensively used and so vital in its bearing upon economic relations escape misinterpretation and avoid becoming the source of misunderstanding. The experience of the most-favored-nation clause has been no exception to the rule.").

It is a long accepted practice that MFN treatment refers to substantive provisions included in bilateral investment treaties.[19] Debates arise, however, over the applicability of MFN clauses to dispute settlement provisions. Examples of dispute settlement provisions typically found in bilateral investment treaties that a party might try to access through a MFN clause in the basic treaty are: a lack of or limited provision for arbitration of disputes, applicable arbitral rules or institutions, a requirement of exhaustion of local remedies prior to arbitration, barring arbitration if local remedies are first taken, or the passage of a "cooling period" prior to international arbitration.[20]

Though the basic concept behind the MFN clause remains the same, there are generally four types of MFN clauses that appear in bilateral investment treaties.[21] First are clauses that explicitly affirm they are intended to apply to dispute settlement provisions.[22] Second are Broad Clauses that refer generally to "all matters," "all rights," or "treatment," without express mention of dispute settlement provisions.[23] The third

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[19] *See* Berschader v. Russian Fed'n, SCC Case No. 080/2004, Award of Apr. 21, 2006, ¶ 179 (Arbitration Inst. of the Stockholm Chamber of Commerce) (declaring that "it is universally agreed that the very essence of an [sic] MFN provision in a BIT is to afford to investors all material protection provided by subsequent treaties").

[20] *See* Sornarajah, *supra* note 2, at 216–19 (offering several examples of dispute settlement provisions and their purposes).

[21] *See* Vesel, *supra* note 3, at 184 (highlighting the importance of determining the type of clause existing in the basic treaty when analyzing a tribunal's reasoning); Andrew Newcombe & Lluís Paradell, Law and Practice of Investment Treaties: Standards of Treatment 205 (2009) (suggesting that most bilateral investment treaties follow Broad and Narrow clauses, which do not clarify the scope of the most-favored-nation clause). *But see* Noah Rubins, *MFN Clauses, Procedural Rights, and a Return to Treaty Text*, 213, 216 *in* Investment Treaty Arbitration and International Law (T.J. Grierson Weiler, ed. 2008) (classifying most-favored-nation clauses into three distinct types: limited, general and broad).

[22] *E.g.,* Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and The Government of [Country] for the Promotion and Protection of Investments, art. 3(3) (2005) (amended 2006) [hereinafter U.K. Model BIT], *reprinted in* Zachary Douglas, The International Law of Investment Claims 559 (2009) (clarifying that the most-favored-nation clause applies to each article contained in the treaty).

[23] *E.g.,* Plama Consortium Ltd. v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction (Feb. 8, 2005), 20 ICSID Rev. 262 (2005) ("treatment which is not less favorable"); Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction (Jan. 25, 2000), 5 ICSID Rep. 396 (2002) ("all matters relating to").

type are Narrow Clauses—perhaps containing non-exhaustive lists—that make no specific reference to dispute settlement provisions.[24] The fourth type of clause expressly prohibits application to dispute settlement provisions.[25] However, this does not mean that a clause that clearly prohibits the application of the MFN clauses to dispute settlement provisions should be applied as such. But where there is ambiguity—in Broad and Narrow clauses—the clauses can and should be determined to apply to dispute settlement provisions. Although both the Broad and Narrow Clauses can be interpreted to allow for the MFN clause application to dispute settlement provisions, Broad Clauses are easiest to extend in this manner.[26]

A. Groundwork Laid by Early Jurisprudence

The question of MFN clause application to dispute settlement provision did not arise during its initial foray into the international investment field.[27] Rather, a series of cases created the early jurisprudence that eventually led to the question before the international legal and investment community. In *Anglo-Iranian Oil Co*.,[28] the International Court of Justice ("ICJ") for the first time, in dicta, relied on a party's intent when interpreting the meaning and scope of the MFN clause.[29] This case also created the vocabulary that is still commonly used when discussing

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[24] *E.g.,* North American Free Trade Agreement art. 1103(1)–(2), U.S.-Can.-Mex., Dec. 17, 1992, 107 Stat. 2057, 32 I.L.M. 289 (1993) (providing non-exhaustive lists of specific situations in which most-favored-nation treatment should be accorded to investors and investments, without mentioning dispute settlement mechanisms).

[25] *E.g.,* Dominican Republic-Central America-United States Free Trade Agreement, 43 I.L.M. 514 (2004) (prohibiting most-favored-nation treatment application to World Trade Organization Dispute Settlement actions).

[26] *See* Vesel, *supra* at note 3, at 185 (imploring tribunals to respect parties' clearly demonstrated intentions in the first and fourth examples).

[27] The first BIT was signed in 1959 between Pakistan and Germany. The first claim brought seeking to extend the most-favored-nation clause of a BIT to dispute settlement provisions did not occur until 2000. Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction (Jan. 25, 2000), 5 ICSID Rep. 396 (2002).

[28] Anglo-Iranian Oil Co. (U.K. v. Iran), Judgment on Preliminary Objection, 1952 I.C.J. 93 (July 22).

[29] *Id.* at 106–07. The ICJ ultimately dismissed the case for lack of jurisdiction. *Id.* at 114.

MFN clauses and bilateral investment treaties.[30] The ICJ continued to shape MFN clause interpretation in *Rights of U.S. Nationals*,[31] holding that, so long as both the basic treaty and the third party treaty were valid and in force,[32] the claimant could easily invoke the most extensive privileges provided in third party treaties in the matter of consular jurisdiction.[33] Finally, in the *Ambatielos Case*,[34] the ICJ, applying the *esjudem generis*[35] principle, concluded that: "[I]t cannot be said that the administration of justice, in so far as it is concerned with the protection of these rights [of traders], must necessarily be excluded from the field of application of the MFN clause, when the latter includes 'all matters relating to commerce and navigation.'"[36] This language created the basis for many of the modern arbitration panels to conclude that the MFN clause applies to dispute settlement provisions.[37]

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[30] The ICJ used the term "basic" to describe the treaty containing the most-favored-nation clause that was being invoked, *id.* at 109; the term "juridical link" to describe the connection between the claimant and the third party treaty created by the most-favored-nation clause, *id*.; and the phrase "confers upon that State the rights enjoyed by a third party" to describe the effect of an most-favored-nation clause, *id.*

[31] Rights of Nat'ls of the United States of America in Morocco (Fr. v. U.S.), 1952 I.C.J. 93, 176 (Aug. 27).

[32] *See id.* at 224 (detailing that both treaties must be valid as a prerequisite to extending most-favored-nation treatment).

[33] *See id.* at 187 (recognizing that provisions contained in the basic treaty "enured automatically and immediately to the benefit of the other Powers by virtue of the operation of the most-favoured nation clauses").

[34] Ambatielos Case (Gr. v. U.K.), 12 R.I.A.A. 91, 106 (Mar. 6, 1956) (claiming that Greece had not been afforded treatment in accord with "justice," "right," "equity," and the "principles of international law" that had been assured to nations of other States).

[35] *Esjudem generis* is "[a] canon of construction holding that when a general word or phrase follows a list of specific words, the general word or phrase will be interpreted to include only items of the same type as those listed." Black's Law Dictionary 594 (9th ed. 2009). The *esjudem generis* principle essentially restricts any broad words or phrases by the preceding list. *Id.* The International Law Commission's ("ILC") Draft Articles on Most-Favored-Nation Clauses to the UN General Assembly endorsed the doctrine of *esjudem generis* when interpreting most-favored-nation clauses. Draft Articles on Most-Favoured-Nation Clauses, 30 Y.B. Int'l L. Comm'n 27 (1978), Commentary to Articles 9 and 10, ¶ 1.

[36] *Ambatielos*, 12 R.I.A.A. at 107.

[37] *See* Abby Cohen Smutny & Lee A. Steven, *The Most-Favored-Nation Clause: What are its Limits?, in* Arbitration Under International Investment Agreements: A Guide to the Key Issues 351, 362 (Katia Yannaca-Small, ed. 2010) (indicating that the acceptance of "administration of justice" as referring to dispute settlement provisions has not be universal).

B. The First Crack in Tradition

The MFN clause lay relatively dormant in terms of discussion until *Maffezini v. Kingdom of Spain*[38] in 2000. For the first time, a claimant used the MFN clause of the basic treaty to circumvent a dispute settlement provision.[39] Maffezini, an Argentinean, brought a claim before the International Centre for the Settlement of Investment Disputes ("ICSID") regarding the treatment he received for an investment dealing with a chemical distribution company in Spain.[40] Spain objected to ICSID's jurisdiction because Maffezini had failed to comply with Article X of the Argentina-Spain BIT, which allowed access to international arbitration only if a competent domestic tribunal rendered a decision that failed to resolve the dispute or eighteen months of litigation passed—whichever came first.[41] Maffezini asserted that this procedural cooling period did not apply because the MFN clause allowed him to attach to the Chile-Spain BIT that contained no such required cooling period.[42] The Tribunal concluded that "dispute settlement arrangements are inextricably related to the protection of foreign investors" and permitted Maffezini to proceed with his claim.[43]

C. Modern Jurisprudence Subsequent to *Maffezini*

1. Cases Against MFN Application to Dispute Settlement Provisions

The first major case to come out in opposition to *Maffezini* was *Tecmed v. Mexico*[44] in 2003. In *Tecmed*, the Tribunal refused to allow the claimant to access provisions in other treaties that would allow him to bring claims based on conditions precedent to the basic treaty and avoid the three-year time limit on claims.[45] The Tribunal declared that it should be presumed that the parties to a treaty specifically negotiated

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38 ICSID Case No. ARB/97/7, Decision on Jurisdiction, ¶ 45 (Jan. 25, 2000), 5 ICSID Rep. 396 (2002).

39 *Id.*

40 *Id.* ¶ 1.

41 *Id.* ¶ 8.

42 *Id.* ¶ 39.

43 *Id.* ¶ 54.

44 Técnicas Medioambientales Tecmed, S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award of Tribunal (May 29, 2003), 19 ICSID Rev. 158 (2004).

45 *Id.* ¶ 69.

for the dispute settlement provisions, and thus that the parties would not have entered into the agreement had it not been for those provisions.[46]

Several tribunals have followed *Tecmed* and denied claimants access to more favorable dispute settlement provisions through the MFN clause. For example, in *Salini v. Jordan*,[47] the Italian claimant attempted to bring a claim before ICSID regarding a dispute over the final payment due to two Italian construction companies.[48] The relevant bilateral investment treaty, however, allowed for ICSID arbitration only in instances of treaty violation.[49] If a contract provided for another form of dispute settlement, that clause would prevail.[50] The claimant, however, sought arbitration under ICSID based on Jordan's treaty with the United States that allowed parties to bring contractual disputes before ICSID.[51] The Tribunal, claiming it lacked jurisdiction, refused to rule on the merits of the case.[52]

The Tribunal in *Plama v. Bulgaria*[53] seemingly attempted to undo what the *Maffezini* Tribunal had started.[54] The basic treaty under question—the Cyprus-Bulgaria BIT—had been negotiated while Bulgaria was under communist control, and generally did not allow

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[46] *Id.*

[47] ICSID Case No. ARB/02/13, Decision of the Tribunal on Jurisdiction (Nov. 9, 2004), 20 ICSID Rev. 148 (2005), *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC635_En&caseId=C218.

[48] *Id.* ¶¶ 1–2.

[49] *Id.* ¶¶ 18–19.

[50] The investment contract at issue indeed required for disputes to be settled in Jordanian courts unless the parties agreed to a different form of settlement. *Id.* ¶ 71.

[51] *Id.* ¶ 21.

[52] *See id.* ¶ 119 (denying jurisdiction because the most-favored-nation clause did not apply to dispute settlement provisions).

[53] ICSID Case No. ARB/03/24, Decision on Jurisdiction (Feb. 8, 2005), 20 ICSID Rev. 262 (2005).

[54] *See* Vesel, *supra* note3, at 173 ("If *Salini* applied the brakes to the idea that MFN clauses should be interpreted as being presumptively applicable to dispute settlement provisions, then the Tribunal in *Plama* sought to reverse course, arguing in favor of a presumptively narrow interpretation of MFN clauses.").

for international arbitration.[55] Regardless, the claimant sought to bring a dispute before ICSID through the MFN clause.[56] The Tribunal both denied the claimant's arguments[57] and broadly denounced the principle that *Maffezini* had established.[58]

Many other cases have denied a claimant the ability to import more favorable dispute settlement provisions through a most-favored-nation clause. Examples of such cases include: using the MFN clause to import the entry into the force date of another treaty,[59] bringing a claim for breach of fair-and-equitable treatment as provided by other bilateral investment treaties concluded by one of the States party to the basic treaty,[60] expansion of the types of claims that could be submitted to arbitration,[61] and broadening the subject matter scope of a tribunal's jurisdiction.[62]

2. Cases Supporting MFN Application to Dispute Settlement Provisions

Others, however, have continued the fight against a restrictive interpretation of *Maffezini* and have applied the MFN clause to dispute

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[55] The Bulgaria-Cyprus BIT only provided for arbitration if a domestic court concluded that expropriation had occurred and a dispute existed regarding the amount of compensation due to the claimant. Agreement between The Government of the People's Republic of Bulgaria and The Government of the Republic of Cyprus on Mutual Encouragement and Protection of Investments, Bulg.-Cyprus, ¶ 187, *published in* State Gazette No. 108/24.12.1993, *in force since* May 18, 1988 [hereinafter Bulg.-Cyprus BIT].

[56] *Plama*, 20 ICSID Rev. 262, ¶ 1.

[57] *See id.* ¶ 227 (holding that the most-favored-nation clause cannot create jurisdiction under ICSID).

[58] *See id.* ¶ 224 (lamenting that the *Maffezini* Tribunal "attempt[ed] to neutralize such a provision that is nonsensical from a practical point of view").

[59] M.C.I. Power Grp., L.C. v. Republic of Ecuador, ICSID Case No. ARB/03/6, Decision on the Application for Annulment (July 31, 2007).

[60] Telenor Mobile Commc'ns A.S. v. Republic of Hungary, ICSID Case No. ARB/04/15, Award (Sept. 13, 2006), 21 ICSID Rev. 603 (2006).

[61] *See* Berschader v. Russian Fed'n, SCC Case No. 080/2004, Award of Apr. 21, 2006, ¶ 179 (Arbitration Inst. of the Stockholm Chamber of Commerce) (limiting possible claims to determining the proper amount and mode paid in expropriation claims).

[62] Tza Yap Shum v. Republic of Peru, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence (June 19, 2009).

settlement provisions. *Siemens v. Argentina*[63] was an important extension of *Maffezini* because, even though it involved a narrower MFN clause than *Maffezini*,[64] the Tribunal nonetheless allowed it to extend to dispute settlement provisions.[65] Closely resembling *Maffezini*, this case involved an Argentinean treaty that required a claimant to submit to domestic litigation for a period of time prior to pursuing international arbitration.[66] The Tribunal ignored Argentina's attempt to distinguish from *Maffezini* based on the narrow clause and grounded its interpretation in the VCLT.[67] The Tribunal also considered the issue of importing certain sections of the dispute settlement provisions and not others, and concluded that such "cherry-picking" was permissible.[68]

Argentina's bilateral investment treaties have proven to be the largest source of unrest regarding MFN clauses in BITs, as at least five prominent decisions involved Argentina as a party. The first, *Camuzzi v. Argentina*,[69] added little to the discourse but was notable because Argentina did not bother to argue that the claimant could not use the MFN clause to invoke more favorable dispute settlement provisions.[70]

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[63] Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8, Decision on Jurisdiction, ¶ 81 (Aug. 3, 2004).

[64] *See* Tratado entre la República Federal de Alemania y la República Argentina sobre Promoción y Protección Reciproca de Inversiones [Treaty Between the Federal Republic of Germany and the Republic of Argentina Regarding the Reciprocal Promotion and Protection of Investments], Arg.-Ger., arts., 3(1)–(2), Apr. 9, 1991 [*hereinafter* Arg.-Ger. BIT] (applying "treatment no less favorable" both investments (3(1)) and activities related to investments (3(2))). Unless otherwise noted, all BITs are available at http://www.unctadxi.org/templates/docsearch____779.aspx.

[65] *See Siemens*, ICSID Case No. ARB/02/8, ¶¶ 85, 103 (interpreting "treatment" as referring to treatment generally, and holding that "activities related to the investments" is broad enough to include dispute settlement provisions).

[66] *Id.* ¶ 51.

[67] *See id.* ¶ 81 (prefacing analysis with the statement that the treaty should be interpreted according to the Vienna Convention, and neither more liberally nor restrictively than provided for in that treaty); *see also* Vesel, *supra* note3, at 164–65 (noting the Tribunal also considered context in regard to the Vienna Convention more than *Maffezini* had).

[68] *See Siemens*, ICSID Case No. ARB/02/8, ¶ 109 ("[C]laiming a benefit by the operation of an [most-favored-nation] clause does not carry with it the acceptance of all the terms of the treaty which provides for such benefit whether or not they are considered beneficial to the party making the claim.").

[69] ICSID Case No. ARB/03/7, Decision on Jurisdiction (June 10, 2005).

[70] *Id.* ¶ 17.

The *Gas Natural v. Argentina*[71] Tribunal strongly affirmed the proposition that had been suggested in *Maffezini*: that dispute settlement protections are "essential to a regime of protection of foreign direct investment."[72] *National Grid v. Argentina*[73] rejected outright *Plama*'s encouragement of consistently applying a narrow construction of MFN clauses in dispute settlement provisions instances.[74] *Suez v. Argentina*[75] refused to apply either a narrow or a broad base to the MFN clause, but rather concluded through basic treaty interpretation that the claimant was entitled to the more favorable provision contained in a third party treaty.[76] The most recent addition to the MFN clause debate is the 2011 Award in *Impregilo v. Argentina*,[77] in which the Tribunal rejected the respondent's objections to its jurisdiction and ruled that the claimant could use the MFN clause contained in the basic treaty to access the more favorable Argentina-U.S. BIT that provided him a choice between international and domestic arbitration when the basic treaty did not provide a choice.[78]

D. A Primer in Treaty Interpretation

In the chaos created by BITs and their MFN clauses, one must remember that interpretation of BITs is governed by Articles 31 and 32

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[71] ICSID Case No. ARB/03/10, Decision on Jurisdiction (June 17, 2005).

[72] *Id.* ¶ 29.

[73] June 20, 2006, (UNCITRAL).

[74] *Id.* ¶ 92.

[75] ICSID Case No. ARB/03/17, Decision on Jurisdiction (May 16, 2006).

[76] *Id.* ¶ 64.

[77] Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17 (June 21, 2011).

[78] *Id.* ¶ 98-101. Professor Brigette Stern wrote a scathing dissent lambasting the application of MFN clauses to dispute settlement provisions and warning of the "great dangers" of doing so. *Id.* The dissent has caused new fervor around the debate regarding the MFN clause's application. *See* Mike McClure, *Most Favoured Nation Clauses – No favoured view on how they should be interpreted*, Kluwer International, *available at* http://kluwer.practicesource.com/blog/2011/most-favoured-nation-clauses-—-no-favoured-view-on-how-they-should-be-interpreted/.

of the VCLT, provided that both parties are states party to the VCLT.[79] Article 31 instructs the interpreter to emphasize the text itself, joined with a teleological approach.[80] Article 32 allows for the subjective intent of the parties to be considered when interpretation based on Article 31 would lead to an "ambiguous or obscure" or "manifestly absurd or unreasonable result," or merely to confirm the conclusion reached under Article 31.[81]

Despite the VCLT's attempt to lay out the proper method for treaty interpretation, there are still three commonly acknowledged and distinct styles of interpreting treaties. The first is textualism, which places the most emphasis on the words of the treaties themselves and their common meaning.[82] The second is intentionalism, which looks to the intentions of the drafters at the time they formed the treaty.[83] In international law, this includes examining the *travaux préparatoires*,[84] or the negotiating

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[79] Vienna Convention, *supra* note 19, arts. 31, 32. To date, 111 States have ratified Most Favoured Nation Clauses – No favored view on how they should be interpreted under the Vienna Convention, and many other States recognize its provisions as binding under customary international law. See Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 Va. J. Int'l L. 431, 443 (2004) (voicing that although the Vienna Convention is not binding as a matter of domestic treaty law, "many of the principles codified in the Convention have force nonetheless as expressions of customary international law"); Rubins *supra* note 20, at 214 (calling the Vienna Convention "the most authoritative statement of customary international law in the area of treaty interpretation").

[80] *See* Vienna Convention, *supra* note 19, art. 31 ("[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 light of its object and purpose.").

[81] *See id.* art. 32 ("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: (1) leaves the meaning ambiguous or obscure; or (2) leads to a result which is manifestly absurd or unreasonable.").

[82] *See* Myres S. McDougal et al., The Interpretation of International Agreements and World Public Order: Principles of Content and Procedure xviii (1994) (defining textuality as having "an ascription of meaning to words taken as final").

[83] *See* McDougal, *supra* note 113, at 82–83 (advancing that the suggested aim of interpreting treaties is to eventually understand the intent of the parties).

[84] *Travaux préparatoires* are defined as "[m]aterials used in preparing the ultimate form of an . . . international treaty." Black's Law Dictionary 1638 (9th ed. 2009).

history.[85] The third is commonly referred to as teleological.[86] Under this theory, those interpreting a treaty will look at the overall purpose of the treaty, and then adopt the best measures to accomplish that goal.[87]

II. Ambiguous MFN Clauses Should Apply to Dispute Settlement Provisions

The outrage that cases like *Maffezini* have left behind them is unnecessary. First, as long as tribunals closely follow the analysis required under the VCLT—which requires analyzing the text in light of its *object and purpose*—the MFN clause can be used to its intended full extent and provide important added protection to BITs.[88] Second, by closely adhering to the VCLT, arbitrators are afforded the necessary "escape hatch" that will allow them to restrict the MFN clauses' applicability in instances of an absurd or obscure result.[89] Third, absent assertions of fraud or duress, host states must be held to the provisions included in their treaties.

A. The First Step for International Arbitration Tribunals Must Be the Ordinary Meaning of the Text in Light of the Object and Purpose of the Treaty.

When a tribunal determines an MFN clauses' scope of applicability to dispute settlement provisions in BITs, it must begin with an analysis of the plain and ordinary meaning of the words, reviewing that meaning

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[85] *See* Gardiner, *supra* note 114, at 307 (citing Sir H. Wadlock, *Third Report on the Law of Treaties*, 2 Y.B. Int'l L. Comm'n 58, ¶ 20 (1964)) (cautioning that *travaux préparatoires* should not necessarily be seen as conclusive evidence of the intentions of the parties).

[86] *See* Shaw, *supra* note 112, at 933 (raising that many believe teleological interpretation usurps the judge's role as determiners of objects and purposes of documents).

[87] *See* McDougal, *supra* note 81, at 214 (suggesting that there are two types of teleological interpretation: the objectives of society as a whole and the objectives of the individual parties).

[88] *See*, e.g., *Suez*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, ¶ 64 (May 16, 2006) (applying the traditional interpretation method to provide claimant with more favorable, faster access to international arbitration).

[89] *See infra*, notes 222–23 and accompanying text (concluding that pre-defined public policy considerations are unnecessary under an Article 32 analysis).

through the lens of the object and purpose of the treaty.[90] Article 31 of the VCLT provides: "[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."[91] The International Law Commission has clarified that all elements within Article 31—ordinary meaning and teleological analysis—are meant to be read as a whole, and not subsequent to one another.[92]

1. Broad Clauses and the ordinary meaning of "treatment"

A typical example of a Broad Clause is one in which States simply accord investors "treatment no less favorable" than that provided to third parties.[93] Consequently, it is first necessary to look to the ordinary meaning of the term "treatment" to determine the scope of application of the MFN clause.[94] If treatment is deemed to include dispute settlement, then the MFN clause also encompasses dispute settlement provisions.

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[90] *See* Arnold Duncan McNair, The Law of Treaties 285 n.1 (1938) (insisting that each treaty requires an independent examination because there is no definitive most-favored-nation clause); *see also* Vesel, *supra* note 3, at 128 (chastising the generalizations made in *Maffezini*, *Plama*, and *Gas Natural*, and proffering instead that traditional rules of treaty interpretation should apply); Rubins, *supra* note 20, at 214 (asserting the problem with tribunals' interpretations thus far is that they have strayed from the treaty text and settled into a policy based analysis); Martins Paprinksis, *MFN Clauses and International Dispute Settlement: Moving beyond Maffezini and Plama?*, 26 ICSID Rev. vol. 2, 14, 20-21 (Fall 2011) (detailing that during the drafting of the Vienna Convention, the drafters consciously decided not to provide special rules of interpretation for MFN clauses) . Although most States are party to the Vienna Convention, all States are bound by its rules because it is a codification of customary international law. *See* Rubins, *supra* note 20, at 214 (referring to the Vienna Convention as "the most authoritative statement of customary international law").

[91] Vienna Convention, *supra* note 19, art. 31.

[92] *See* International Law Commission, *Reports of the Commission to the General Assembly*, 2 Y.B. Int'l L. Comm'n 218, U.N. Doc. A/6309/Rev. 1/1966 (1966) *reprinted in* 3 United Nations Conference on the Law of Treaties 38 (2001) (characterizing the interaction between all elements in Article 31 as providing the "legally relevant interpretation").

[93] *E.g.*, U.S. Model BIT, *supra* note 20, art. 3 (demanding "treatment no less favorable" than that accorded to third parties).

[94] *See* Vienna Convention, *supra* note 19, art. 31(1) (requiring treaty terms to be interpreted in accordance with their ordinary meaning).

Treatment is defined as "the act or manner of treating, as conduct or behavior towards another party."[95] Specifically in BITs, treatment is "a broad term which . . . refers to the legal regime that applies to investments once they have been admitted by the host State."[96] A State tailors its behavior towards investors in a certain way to comport with the substantive "treatment" required under a BIT.[97] For example, a State could alter its conduct by more liberally granting permits for new businesses to accommodate a BIT that includes a national treatment clause. During dispute settlement, a State likewise "conducts" itself a certain way "towards" the investor.[98] The State must make decisions regarding prosecution, negotiation, and settlement. Thus, the ordinary meaning of treatment does not appear to limit the term "treatment" to substantive provisions. Because Broad Clauses—which only mention "treatment"—are expansive in scope by nature, they require little interpretation, and are the easiest type of MFN clause to extend to dispute settlement provisions.[99]

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[95] Webster's New International Dictionary 2435 (3d ed. unabridged 2002). As the Vienna Convention requires interpretation according to a word's ordinary meaning, Vienna Convention, *supra* note 19, art. 31(1), tribunals often use dictionaries as a starting point for the definition of a word, *see, e.g.,* Alpha Projektholding GmbH v. Ukraine, ICSID Case No. ARB/07/16, Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz, ¶ 37 (Mar. 19, 2010) (using Webster's Dictionary to define "manifest" at the beginning of legal analysis, and stating that doing so is "keeping with the rules of interpretation of the Vienna Convention").

[96] Rudolf Dolzer & Margrete Stevens, Bilateral Investment Treaties 58 (1995) (citations omitted).

[97] *See* Newcombe & Paradell, *supra* note 20, at 203 (clarifying the important distinction between conduct and treatment as the former consisting of an act or omission and the latter referring to the final result of a State's conduct).

[98] *See* Todd Weiler, *Good Faith and Regulatory Transparency: The Story of Metalclad v. Mexico*, *in* International Investment Law and Arbitration: Leading Cases From the ICSID, NAFTA, Bilateral Treaties and Customary International Law 701, 704 (Todd Weiler ed., 2005) (detailing that the only enforceable regulation of the "conduct" of states regarding the protection of rights of individuals is through the multitudes of bilateral investment treaties' dispute settlement provisions).

[99] The exception to this is any most-favored-nation clause that expressly provides or denies that it applies to dispute settlement provisions. *See* Vienna Convention, *supra* note 19, art. 31(4) (upholding that parties can choose to assign a specific meaning to a phrase).

For "treatment" to refer only to substantive provisions, it must have a special meaning outside of its ordinary meaning.[100] The VCLT allows parties to give special meanings to words,[101] but requires that they be clear in their intention to impart a non-traditional meaning into a word used in the treaty.[102] Where no express alternate definition is provided for, either in the treaty or in a supplemental agreement,[103] the phrase "treatment" should be interpreted by its plain and ordinary meaning.[104] As illustrated above, this includes dispute settlement provisions.[105]

Unfortunately, the *Maffezini* Tribunal did not openly discuss the scope of the word "treatment." The Tribunal did, however, indirectly consider the definition of the word "treatment" when it looked to *Anglo-Iranian Oil* to determine the MFN clause' scope.[106] Interestingly, the Tribunal expressly mentioned Article 31 of the VCLT and the need to interpret all clauses in the treaty at issue in accordance with Article 31

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[100] *See* Vesel, *supra* note 3, at 145–46 (relaying the argument of opponents to the ordinary meaning of "treatment" that, within the BIT context, "treatment" refers explicitly to government actions that would create an actionable claim for an investor).

[101] Vienna Convention, *supra* note 19, art. 31(4) ("A special meaning shall be given to a term if it is established that the parties so intended.").

[102] *See* Vesel, *supra* note 3, at 146 (discussing that the Vienna Convention "places the burden squarely on the shoulders of the party advocating the special meaning").

[103] *See* Vienna Convention, *supra* note 19, art. 31(3)(a) (instructing that subsequent agreements between parties providing further instructions for interpretation be considered when analyzing the text of a treaty).

[104] *See* Vienna Convention, *supra* note 19 (requiring parties to interpret treaties based on their ordinary meaning and a teleological analysis).

[105] *See supra* text accompanying notes 130–39 (concluding treatment is a general phrase referring to all forms of conduct, and thus includes dispute settlement provisions); *see also* Vesel, *supra* note 3, at 146 (affirming that broadly-worded treaties should be interpreted to include dispute settlement provisions).

[106] *See* Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction, ¶ 45 (Jan. 25, 2000), 5 ICSID Rep. 396 (2002) (determining scope to be "the subject matter to which the clause applies"). Perhaps the best evidence that the Tribunal considered the definition of "treatment" appears in paragraph fifty-four: "[n]otwithstanding the fact that the basic treaty containing the clause does not refer expressly to dispute settlement as covered by the most favored nation clause, the Tribunal . . . conclude[s] that today dispute settlement arrangements are inextricably related to the protection of foreign investors." *Id.* ¶ 54. In this sentence, the Tribunal acknowledges that "treatment" under the basic treaty does not expressly include dispute settlement provisions. *Id.* Because the Tribunal was not provided with a list of what the parties intended "treatment" to cover, it presumably considered what the term "treatment" on its own meant. *Id.*

during its analysis of Article X of the Argentina-Spain BIT, which outlined dispute settlement procedures.[107] The Tribunal thus demonstrated that it both recognized Article 31 and how to correctly interpret treaty provisions. Regrettably and incorrectly, it failed to do so for all of the clauses at issue in the case.

The *Siemens* Tribunal provided the correct analysis, and also demonstrated that a MFN clause need not be as broad as the one in *Maffezini* to allow claimants access to more favorable dispute settlement provisions.[108] The Tribunal in *Siemens* began its treaty interpretation with discussion of Article 31 of the VCLT, and pledged to interpret the terms "neither liberally nor restrictively," as neither term is included within Article 31.[109] The Tribunal ultimately refused respondent's plea to impart specific meanings into words for which the parties had clearly not provided for.[110] Restraining itself to interpret the treaty according to its basic meaning in accord with Article 31,[111] the Tribunal concluded that "treatment" meant "behavior in respect of an entity or a person."[112] To complete the analysis under Article 31, the Tribunal finally concluded that access to dispute settlement features was part of the treatment of investors as defined by the purpose of the treaty.[113]

The *Plama* Tribunal had an opportunity to analyze a Broad Clause, and reached the wrong conclusion because it did not properly apply Article 31 of the VCLT. In this case, the clause in question provided: "Each Contracting Party shall apply to the investments in its territory by investors of the other Contracting Party a treatment which is not

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[107] *See id.* ¶ 27 (failing to apply similar analysis to the most-favored-nation clause).

[108] *Siemens* addressed a most-favored-nation clause that did not contain a clause indicating that it applied to "all matters subject to this agreement." *Compare* Arg.-Spain BIT, *supra* note 146, art. 4(1) (in all matters relating to this agreement) (author's translation), *with* Arg.-Ger. BIT, *supra* note 92, arts. 3(1)–(2) ("treatment less favorable") (author's translation).

[109] Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8, Decision on Jurisdiction, ¶ 81 (Aug. 3, 2004).

[110] *See id.* ¶ 106 ("[T]he term 'treatment' is so general that the Tribunal cannot limit its application except as specifically agreed by the parties.").

[111] *But see* Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction, ¶ 163 (Jan. 25, 2000), 5 ICSID Rep. 396 (2002) (grappling with creating public policy exceptions based on instinct, not treaty interpretation).

[112] *See Siemens*, ICSID Case No. ARB/02/8, ¶ 102 (demonstrating restraint from imparting preconceived notions about "treatment" by giving it a broad definition).

[113] *See id.* (adding that access to more favorable dispute settlement provisions is one of the benefits of a most-favored-nation clause).

less favorable than that accorded to investments by investors of third states."[114] This MFN clause is similar to that in *Siemens*, though it is admittedly narrower in terms of language than that present in *Maffezini* because there is no expansive term included in the statement.[115] Despite being non-expansive, the clause was also non-restrictive, and so the ordinary meaning of the word treatment should apply.[116]

The Tribunal decided that it was "not clear whether the ordinary meaning of the term 'treatment' . . . includes or excludes dispute settlement" and ultimately denied the claimant's request to import a more favorable dispute settlement provision from a third party treaty.[117] If the Tribunal, however, had correctly followed the analysis required by the VCLT, it would have also conducted a teleological analysis after deeming the ordinary meaning of "treatment" inconclusive.[118] At that point, the Tribunal would have had an opportunity to recall that the purpose of the treaty in question was to "promote investment,"[119] and hopefully concluded that the MFN clause should have been interpreted as including dispute settlement provisions to maximize the purpose of the treaty.

2. Narrow Clauses and "treatment" under the *esjudem generis* principle

Narrow Clauses provide a non-exhaustive list of what constitutes "treatment" without specifically mentioning dispute settlement

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[114] Bulg.-Cyprus BIT, *supra* note 83.

[115] *Compare Maffezini*, 5 ICSID Rep. 396 (addressing "all matters relating to this agreement"), *with* Plama Consortium Ltd. v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction (Feb. 8, 2005), 20 ICSID Rev. 262 (2005) (containing no such clause).

[116] *See Suez*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, ¶¶ 63–64 (May 16, 2006) (refusing to apply a liberal or restrictive approach to a non-expansive, non-restrictive most-favored-nation clause); *see also* Schill, *supra* note 18, at 174 (evaluating open-ended most-favored-nation clauses as falling first and foremost to interpretation under Article 31 and 32 of the Vienna Convention).

[117] *Plama*, 20 ICSID Rev. 262, ¶ 189.

[118] *See* Vienna Convention, *supra* note 19, art. 31(1) (requiring both analysis of a phrases' ordinary meaning and teleological analysis); *see also* International Law Commission, *Reports of the Commission to the General Assembly*, 2 Y.B. Int'l L. Comm'n 218, U.N. Doc. A/6309/Rev. 1/1966 (1966) *reprinted in* 3 United Nations Conference on the Law of Treaties 38 (2001) (articulating that the nexus between textual and teleological creates the proper interpretation of treaties).

[119] *See* Bulg.-Cyprus BIT, *supra* note 83, pmbl. (listing the objective of the treaty as "the creation of favourable conditions for investments").

provisions.[120] In these instances, the *esjudem generis* principle must be applied to determine if dispute settlement provisions belong to the same category of subject as that to which the clause itself relates.[121] If dispute settlement provisions are deemed to be in the same category, then the MFN clause will apply to these provisions.

For example, the Germany-Thailand BIT provides a non-exhaustive list immediately following its MFN clause to demonstrate what the parties intend "treatment" to mean.[122] The only non-specific term included in that list is "any other measures having similar effects."[123] If a tribunal looking at this type of provision were to allow a party to access more favorable dispute settlement provisions contained in another treaty, it would have to first determine that the parties intended the clause "any other measures having similar effects" to include dispute settlement provisions. The preceding defined list includes purchase of materials of production and marketing of products within the host State.[124] This list can be viewed narrowly or broadly. Broadly, it could be argued that Germany and Thailand intended to only include treatment once the investor is already in the country, as the list does not address unequal treatment in granting entry to the country. As dispute settlement only occurs once the investor is already in the host State, dispute settlement provisions could fall under the MFN clause.[125] If this list were to be

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[120] *E.g.*, North American Free Trade Agreement art. 1103(1)–(2), U.S.-Can.-Mex., Dec. 17, 1992, 107 Stat. 2057, 32 I.L.M. 289 (1993) (providing non-exhaustive lists of specific situations in which most-favored-nation treatment should be accorded to investors and investments, without mentioning dispute settlement mechanisms).

[121] *See supra* note 50 (specifying that the *esjudem generis* principle requires that any term at the end of a list be interpreted so that it fits within the previous terms).

[122] *See* Treaty between the Kingdom to Thailand and the Federal Republic of Germany, Concerning the Encouragement and Reciprocal Protection of Investments, art. 3(2), June 24, 2002 [hereinafter Ger.-Thai. BIT], (defining treatment as restrictions on purchase of materials, energy, fuel, or any kind of means of production, impeding the market of a particular product, or "any other measures having similar effects").

[123] *Id*.

[124] *Id.* art. 3(2).

[125] Even if the *esjudem generis* principle as applied restricted the most-favored-nation clause application to events occurring once already in the State, dispute settlement provisions could reasonably be included in this category, as entry into the marketplace is a pre-requisite to filing a claim. *See also*, Newcombe & Paradell, *supra* note 20, at 204 (admitting that the *esjudem generis* rule is difficult to apply generally, and that most-favored-nation clauses provide additional strife for interpreters because of their wide variances).

read narrowly—for example, to only include transactions—then dispute settlement procedures may be outside the purview of the MFN clause.

The *Salini* Tribunal addressed a Narrow Clause.[126] The Italy-Jordan BIT, in a subsection after the general MFN treatment clause, provides:

> All the activities relating to the procurement, sale and transport of raw and processed materials, energy, fuels and production means shall be accorded . . . no less favourable treatment than the one accorded to similar activities taken by . . . investors of Third States. The provisions of this article shall also apply to the activities connected with an investment.[127]

The Tribunal ultimately concluded that the claimant could not access the more favorable dispute settlement provision contained in the U.S.-Jordan and U.K.-Jordan BITs through the basic treaty's MFN clause.[128]

The Tribunal could have applied the MFN clause to dispute settlement provisions, had it decided that "the activities connected with an investment" included dispute settlement provisions.[129] Again, whether dispute settlement provisions are determined to fall under the MFN clause will depend largely on whether the terms were decided broadly or narrowly.[130] The inclusion of the "shall also apply" phrase followed by the broad "all activities connected with the investment," supports a

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[126] *See* Agreement between the Government of the Hashemite Kingdom of Jordan and the Government of the Italian Republic on the Promotion and Protection of Investments, It.–Jordan, art. 3(1), July 21, 1996 [hereinafter It.-Jordan BIT] (limiting the most-favored-nation clause to claims "within the bounds of their own territory shall grant investments effected by, and the income accruing to").

[127] *Id.* art. 3(4). This article may provide for a more difficult application of the *esjudem generis* principle because the "open clause" appears in a new sentence, and not at the end of a list of restrictive terms.

[128] *See* Salini Construttori & Italstrade v. Hashemite Kingdom of Jordan, ICSID Case No. ARB/02/13, ¶ 119, Decision on Jurisdiction (Nov. 29, 2004), 20 ICSID Rev. 148 (2005) (misinterpreting the most-favored-nation clause because it did not provide an expansive "in all matters" clause similar to that in *Maffezini*).

[129] The list restricts which areas of the treaty to which the most-favored-nation clause can apply. *Id.* The first three clauses do not include any mention of dispute settlement provisions. *Id.* Thus, a tribunal would have to find that the one expansive clause—"any other measures having similar effects"—provides a basis to apply the most-favored-nation clause to the dispute settlement provision.

[130] Broadly or narrowly, the clause must still be interpreted according to its ordinary meaning and in light of its object and purpose. Vienna Convention, *supra* note 19, art. 31(1).

finding that the MFN clause was intended to cover all provisions in the treaty, even procedural ones.[131] "All activities connected with an investment" seems to plainly include dispute settlement clauses.[132] Because the VCLT requires words to be interpreted based on their plain meaning, the Tribunal erred by imparting previously decided meanings onto the words of the treaty.[133]

3. Ordinary meaning viewed in light of the object and purpose of the treaty

Article 31 of the VCLT requires treaty interpreters not only to look at the ordinary meaning of the text of the treaty, but also requires interpreters to look at that text in light of the "object and purpose" of the treaty.[134] The purpose of any treaty is typically listed in the preamble, which in itself may not give rise to affirmative duties, but when viewed through the lens of the MFN clause, may create duties to treat States party to the treaty the same as third party States.[135] The typical purpose of a BIT is for parties to mutually encourage and protect the investments made by one another.[136] Because the substantive provisions in a BIT further the purpose of the treaty—to promote and protect investments—it follows that any discrepancy in the text should be interpreted

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[131] *See* Gardiner, *supra* note 114, at 144 (describing terms as the starting point for treaty interpretation).

[132] Through an "ordinary meaning" analysis, Vienna Convention, *supra* note 19, art. 31(1), an interpreter would likely determine that because "connected with" is substantially vague, Webster's New International Dictionary 480 (3d ed. unabridged 2002) (defining connected as "having the parts or elements logically related"), and because this vague term is simultaneously coupled with the broad phrase "all activities," it would include dispute settlement as an "activity" "connected with" investments.

[133] *See* Schill, *supra* note 18, at 146 (demanding that the most-favored-nation clause only be interpreted according the Vienna Convention without prior tainting by a tribunal).

[134] *See* Vienna Convention, *supra* note 19, art. 31(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.").

[135] *See id.* at 189 (stating that prefatory statements do not often create affirmative duties, except possibly those to provide treatment as favorable as that given to third parties to the claimant).

[136] *See id.* at 188 (contending that all bilateral investment treaties are based on the belief that foreign direct investment is beneficial to both states involved in the agreement).

to also promote and protect investments. Consequently, MFN clauses would include dispute settlement provisions.

Despite arriving at the right conclusion through flawed reasoning,[137] the *Maffezini* Tribunal's interpretation remains within the bounds of the "object and purpose" of the Argentina-Spain BIT.[138] Specifically, the listed purpose—to create favorable conditions for investments—generally requires States to adjust policies to encourage and protect investments.[139] Dispute settlement provisions are a crucial part in attaining this goal, and should therefore be included under MFN treatment.[140] The *Maffezini* Tribunal itself stated: "dispute settlement arrangements are inextricably related to the protection of foreign investors."[141] An investor is more likely to invest if he knows that he would have unfettered access to a neutral international forum if a dispute arose.[142] The *Maffezini* Tribunal thus admirably engaged in a teleological analysis to determine whether exhaustion of local remedies was required prior to the claimant being able to access ICSID, but regrettably did not provide a similar analysis to the MFN clause and its ability to import more favorable dispute settlement provisions.[143]

The *Siemens* Tribunal more accurately comported with the VCLT. In its initial analysis of the MFN clause, the Tribunal noted that it would be "guided by the purpose . . . 'to protect' and 'to promote' investments

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[137] *See infra* text accompanying notes 231–36 (condemning *Maffezini*'s superfluous restrictions based in public policy considerations).

[138] *See*, Arg.-Spain BIT, *supra* note 146, pmbl. (articulating that the parties formed the treaty based on a mutual desire to increase economic cooperation and create favorable conditions for investments).

[139] *See* Sornarajah *supra* note 2, at 189 (providing that preambles, while not binding, can create an affirmative duty to provide most-favored-nation treatment).

[140] *See* Gas Natural SDG S.A. v. The Argentine Republic, ICSID Case No. ARB/03/10, Decision on Jurisdiction, ¶ 29 (June 17, 2005) (describing arbitration provisions as "perhaps the most crucial element" in the "bundle of protections granted to foreign investors by host states").

[141] Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction, ¶ 54 (Jan. 25, 2000), 5 ICSID Rep. 396 (2002).

[142] *See generally* Salacuse & Sullivan, *supra* note 6 (concluding that bilateral investment treaties promote foreign direct investment by providing stability and insurance for investors).

[143] *See Maffezini*, 5 ICSID Rep. 396, ¶ 27 (failing to extend proper Vienna Convention interpretation to all portions of the treaty after demonstrating the Tribunal's capability to do so).

. . . as expressed in [the treaty's] title and preamble."[144] The Tribunal's awareness of its duty to interpret the treaty "in light of its object and purpose"[145] may explain why the Tribunal concluded that "treatment" necessarily included dispute settlement mechanisms even though the MFN clause at issue was arguably narrower than that in *Maffezini*.[146] By assuring the claimant-investor quick access to a neutral forum,[147] the Tribunal indirectly encouraged others to invest.[148] Through short and simple consideration, the Tribunal furthered the object and purpose of the treaty by extending the MFN clause to the dispute settlement provisions at issue.[149] This analysis is one that future tribunals would benefit from following.

B. Article 32 Provides the Necessary "Out" for Tribunals to Avoid Using the MFN Clause to Create Jurisdiction

As previously discussed, Article 32 of the VCLT allows treaty interpreters to engage in an intentionalist analysis only to confirm the meaning drawn from the ordinary meaning of the words and their purpose, or if that meaning creates a manifestly absurd result.[150] Tribunals need only look to Article 32 for the ideal loophole through which to escape if asked to use an MFN clause for a manifestly absurd reason.[151]

However, the MFN clause should not apply in all situations. There are instances in which claimants should never be able to use the MFN clause to access more favorable provisions in third party treaties. For

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[144] Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8, Decision on Jurisdiction, ¶ 81 (Aug. 3, 2004).

[145] *Id.*; *see also* Arg.-Ger. BIT, *supra* note 92, pmbl. ("[W]ith the goal of creating favorable conditions for the investments of the nationals or societies of one State within the bounds of the other State.") (author's translation).

[146] *See Siemens*, ICSID Case No. ARB 02/8, ¶ 103 (admitting the formulation of the most-favored-nation clause in the basic treaty is narrower than that in *Maffezini*, and nonetheless concluding "that the term 'treatment' and the phrase 'activities related to the investments' are sufficiently wide to include settlement of disputes").

[147] *See id.* ¶ 78 (allowing the investor to bypass the eighteen month waiting period).

[148] *See supra* note 194 and accompanying text (acknowledging that increased protection of investors through bilateral investment treaties encourages investment).

[149] *See Siemens*, ICSID Case No. ARB 02/8, ¶¶ 102–03 (protecting investors rights and furthering the goals of the BIT).

[150] Vienna Convention, *supra* note 19, art. 32.

[151] *See* Criddle, *supra* note 108, at 439–41 (finding that the threshold for judicial recourse to Article 32 is fairly low, and suggesting that Article 31 and 32 are to be read cumulatively, and not consecutively).

example, in *M.C.I. v. Ecuador*,[152] the claimant sought to access an earlier entry into force date from a third party treaty.[153] By doing so, the claimant would have had an actionable claim under the basic treaty that had not come into force at the time the grievances began.[154] Under Article 18 of the VCLT, States have a duty to "refrain from acts which would defeat the object and purpose of a treaty" after signing and prior to the entry into force date, but nowhere in the Convention does it mandate States to provide retroactive application of an agreement.[155] As set out by the *Rights of U.S. Nationals* Tribunal over sixty years ago, both the basic treaty and the more favorable third party treaty must be valid and in force for the MFN clause to have any effect.[156] States should therefore not be able to create a valid treaty where none exists by way of the MFN clause.[157] Consequently, allowing a State to import an earlier entry into force date leads to a manifestly absurd result, and thus the *M.C.I.* Tribunal was correct in denying claimant access to this provision.

The *Maffezini* Tribunal tried to resist against these over-extensions of the MFN clause by articulating multiple public policy considerations that would prohibit access to more favorable provisions in certain instances.[158] Although the Tribunal correctly limited some things, such as clauses requiring a specific arbitration forum or specific procedural

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[152] M.C.I. Power Grp., L.C. v. Republic of Ecuador, ICSID Case No. ARB/03/6, Decision on the Application for Annulment, Sec. B (July 31, 2007).

[153] *Id.*

[154] *Id.*

[155] Vienna Convention, *supra* note 19, art. 18; *cf.* Anglo-Iranian Oil Co. (U.K. v. Iran) 1952 I.C.J. 93 (establishing that the most-favored-nation clause can confer no benefit to third parties once a treaty has come to an end).

[156] *See Anglo-Iranian Oil*, 1952 I.C.J. 93 (asserting that Iran is only bound to obligations under the treaty so long as it is in force).

[157] *See M.C.I. Power Grp.*, ICSID Case No. ARB/03/6 (depriving claimant of the ability to use the most-favored-nation clause to import that entry into force date of another treaty, such that the alleged improper actions would be covered by the treaty).

[158] *See* Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction, ¶ 63 (Jan. 25, 2000), 5 ICSID Rep. 396 (2002) (recommending, unnecessarily, that exceptions be carved out for all most-favored-nation clauses). Examples of public policy considerations listed by the *Maffezini* Tribunal as situations in which the most-favored-nation clause may not be used are: exhaustion of local remedies; a "fork in the road" provision; and clauses requiring a specific arbitration forum or specific dispute settlement rules of arbitration. *Id.*

rules of arbitration, it was more by luck than design.[159] The Tribunal went on to limit the MFN clause beyond what would have been a proper stopping point under Article 31 of the VCLT, which requires only that the treaty be interpreted according to the ordinary meaning of the words and in light of the treaty's purpose.[160] The Tribunal stated that a requirement to exhaust local remedies could not be avoided by invoking a MFN clause, and that any "fork in the road" provision—such that parties are required to submit their claim to either domestic courts or international arbitration, but not both—was deemed "too far" for the MFN clause's reach.[161]

Instead, these types of dispute settlement provisions are an ideal situation in which to invoke an MFN clause. The Tribunal, by its own admission, stated that "dispute settlement arrangements are inextricably related to the protection of foreign investors," and that creating protection is the purpose of BITs.[162] If the Tribunal is right in this statement, then it is logical to afford investors every type of protection that can be reasonably interpreted under Article 31 of the VCLT.[163] The public policy considerations suggested by *Maffezini* are unnecessary if a proper analysis of the VCLT is applied.

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[159] *See id.* (circumscribing the most-favored-nation clause to the same degree which it would have been under an Article 32 analysis).

[160] Vienna Convention, *supra* note 19, art. 31(1). The *Maffezini* Tribunal, however, dreamt up "public policy exceptions" to restrain the new doctrine that they had just created moments before. *See Maffezini*, 5 ICSID Rep. 396, ¶ 70 (basing the public policy exceptions on independent reasoning, not previous authority); *see also* Schill *supra* note 12, at 188 (flouting that the only possible explanation for the Tribunal's "public policy exceptions" is the consent of the States party to the treaty, and as such, need not be called "public policy exceptions"); Newcombe & Paradell, *supra* note 20, at 217 (condemning the *Maffezini* Tribunal for creating "public policy" limitations that were unsupported by the Vienna Convention).

[161] *See Maffezini*, 5 ICSID Rep. 396, ¶ 63 (enumerating a few unsubstantiated limitations placed on the most-favored-nation clauses).

[162] *Id.* ¶ 54.

[163] By wandering away from the Vienna Convention analysis, the Tribunal lost sight of the object and purpose of the treaty, and placed too much limitation on the most-favored-nation clause. If the goal of bilateral investment treaties is to protect investors, and dispute settlement provisions are inextricably linked to protection of investors, then it logically follows that any ambiguities in treaty language should be decided in favor of the purpose of the treaty. Vienna Convention, *supra* note 19, arts. 31, 32; *accord* Dolzer & Stevens, *supra* note 133 (affirming that any ambiguity in language should be resolved in the way that would most benefit the protection of the investor).

C. States Must be Held to the Provisions of Their Treaties

Tribunals must remember that bilateral treaties are essentially contracts between two States, and that parties to a contract are held to the clauses included in that contract.[164] Thus, as long as two States include an MFN clause in their investment treaty, they must be held accountable for it.[165] Doing so will not fragment the international investment community beyond functionality. As reliance on this doctrine for reviewing substantive provisions has shown, this use of the MFN clause leads to very workable solutions for providing increased protection to investors.

Tribunals must hold parties accountable for the clauses they include in their treaties.[166] Because MFN treatment is not required by customary international law,[167] an MFN clause in a treaty is voluntarily and consciously added by the drafters of the treaty.[168] Further, absent evidence of coercion, States are presumed to have read and understood all of the provisions in the treaty.[169]

In practice, however, many tribunals do not make States responsible for the clauses included in their treaties. There are two frequently cited reasons for not holding States accountable for the clauses they chose to include in their treaties. First, several tribunals have asserted that applying the MFN clause to dispute settlement provisions would create

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[164] *See generally* 1 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 1:1 (4th ed. 1993 & Supp. 1999) (defining "contract" as a promise, that if broken, will be redressed).

[165] *See* Vienna Convention, *supra* note 19, art. 11 (establishing that States manifest their intent to be bound by the terms of a treaty through "signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed").

[166] *See* Vienna Convention, *supra* note 19, art. 11 (codifying that when States sign, ratify, accept, approve or exchange notes constituting a treaty, they manifest their agreement to be bound to its terms).

[167] *See* Dolzer & Schreuer, *supra* note 24, at 186 (delineating that, as there is no consistent, widespread practice based on *opinion juris*, most-favored-nation treatment cannot be customary). If most-favored-nation treatment were customary international law, then States party to a treaty would not need to include a clause saying as much in a treaty. Nonetheless, States would be required to follow the general premise of most-favored-nation treatment. *See also* Schill, *supra* note 12, at 122 (proffering that the most-favored-nation clause actually works against customary international law by preventing States from entering in quid pro quo bargains, a customarily used tactic).

[168] *See* Banifatemi *supra* note 16, at 270 (maintaining that the most-favored-nation clause itself must be specifically negotiated for).

[169] Sornarajah, *supra* note 2, at 179.

uncertainty among the international investment community.[170] Second, tribunals have expressed concern that claimants will begin treaty-shopping to piece together their ideal treaty, destroying the treaties that States work diligently to create.[171]

Although the most cited reason for denying MFN clause application to dispute settlement provisions is the creation of uncertainty,[172] this fear does not justify failure to hold a State to the words of its treaty.[173] More than ten years after the *Maffezini* decision, it is safe to say there is no longer a "threat" of uncertainty, but that in fact the uncertainty already exists.[174] Indeed, even nations who think they have guarded themselves against the "invasion" of the MFN clause may be wrong. For example, the United States did not believe that the expansion of the MFN clause would be a problem for its BITs—specifically in its 1994 and 2004 model—because of the specific language provided in each.[175]

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[170] *E.g.*, Telenor Mobile Commc'ns A.S. v. Republic of Hungary, ICSID Case No. ARB/04/15, Award, ¶ 91 (Sept. 13, 2006), 21 ICSID Rev. 603 (2006) (disregarding the Vienna Convention's forms of interpretation and listing the creation of uncertainty and instability as a "compelling reason" not to allow the most-favored-nation clause to apply to dispute settlement provisions).

[171] *E.g.*, Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction, ¶ 63 (Jan. 25, 2000), 5 ICSID Rep. 396 (2002) (distinguishing between legitimate extensions of benefits and unchecked treaty shopping that could destroy the "policy objectives underlying specific treaty provisions").

[172] *See, e.g.*, *Telenor*, 21 ICSID Rev. 603, ¶ 94 ("[T]he wide interpretation [of a most-favored-nation clause] also generates both uncertainty and instability in that at one moment the limitation in the basic BIT is operative and at the next moment it is overridden by a wider dispute resolution clause in a new [treaty] entered into by the host State.")

[173] *See* Schill *supra* note 18, at 123 (recommending that broad use of the most-favored-nation clause actually promotes certainty and harmonization of treatment afforded to investors).

[174] *Maffezini* was not an outlier case. Over half-a-dozen prominent arbitration decisions issued in the last decade declare that the most-favored-nation clause can apply to dispute settlement provisions. *E.g.*, Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8, Decision on Jurisdiction (Aug. 3, 2004) (applying the most-favored-nation clause even when the clause does not contain an expansive phrase). Thus, it cannot be said that the threat of one outlier case has come and gone. This idea will remain until it is settled.

[175] *See* Vesel, *supra* note 3, at 133 (charging that the U.S. acted out of concern for dispute settlement predictability rather than out of a desire to restrict arbitration options for investors, and thus may not have created the clearest most-favored-nation clause possible).

A Tribunal in the *Suez & Vivendi v. Argentina*[176] decision, however, allowed the claimant to access more favorable dispute settlement provisions through a MFN clause that consisted of language nearly identical to that used in the U.S. Model BIT.[177]

The uncertainty that already exists[178] regarding the general application of the MFN clause can be remedied by adopting a policy that MFN clauses always apply to dispute settlement provisions.[179] Resolving the uncertainty in favor of restricting the MFN clause to substantive provisions is only a step back in terms of investor protection.[180] Rather than fight this so-called "expansion" of the MFN clause, States should look

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[176] *Vivendi*, ICSID Case No. ARB/03/19, Decision on Jurisdiction (Aug. 3, 2006), 21 ICSID Rev. 342.

[177] *Compare* Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, Arg.-U.K., art. 3, Dec. 11, 1990 [hereinafter Arg.-U.K. BIT] (delineating that the most-favored-nation clause applies to the "management, maintenance, use, enjoyment or disposal of investments"), *with* U.S. Model BIT, *supra* note 20 (providing that the most-favored-nation clause contained therein applies to "the establishment, acquisition, expansion, management, conduct, operation and sale of other disposition of covered instruments").

[178] *See* Newcombe & Paradell, *supra* note 20, at 218 (positing that "uncertainty is likely to continue until states clarify the scope of MFN clauses"). *Compare* Wintershall Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/04/14, Award (Dec. 8, 2008) , http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1492_En&caseId=C39 (declining to extend MFN clause to dispute settlement provisions), *with Siemens*, ICSID Case No. ARB/02/8 (interpreting the same treaty as that in *Wintershall* but holding that "the term 'treatment' and the phrase 'activities related to the investments' [in the MFN clause] are sufficiently wide to include settlement of disputes").

[179] Because States wishing to expressly manifest their desire for the most-favored-nation clause to apply to dispute settlement provisions would likely be required to create a new document providing as such, this adaptation of previous bilateral investment treaties does not contradict the notion that each provision must be bargained for by the parties. This Article does not purport that States can unilaterally decide the fate of the scope of their most-favored-nation clauses contained in their bilateral investment treaties.

[180] *See* Schill, *supra* note 18, at 152 (intimating that restrictive interpretation of bilateral investment treaties "impede[s] the enforcement of rights granted under" that by causing "delay[s of] efficient dispute settlement").

at it as an opportunity to expand the protection afforded to investors and investments.[181]

States can—and should—clarify the proper interpretation of the MFN clause in their treaties.[182] The U.K. has admirably included a note clarifying that the MFN clause is intended to apply to dispute settlement provisions in its Model BIT.[183] After the *Siemens* decision, Argentina and Panama exchanged diplomatic notes clarifying that they do not intend the MFN clause to apply to dispute settlement provisions.[184] These ex-post diplomatic notes will still be relevant if the treaty were to ever come before an arbitration panel, because the VCLT allows all subsequent agreements regarding the interpretation of the treaty to be taken into account.[185] The United States has altered several of its BITs to demonstrate that the MFN clause does not apply to dispute settlement provisions.[186] Switzerland has included an annex in its BIT concluded with Columbia that the MFN clause contained therein would not apply to dispute settlement provisions.[187]

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[181] To date, only a few States have expressly stated their stance on the most-favored-nation clause's applicability to dispute settlement provisions. *Compare* U.K. Model BIT, *supra* note 35, art. 3(3) (including dispute settlement provisions in the most-favored-nation clause), *with* Agreement between Canada and the Republic of Peru for the Protection and Promotion of Investments, Can.-Peru, Annex B.4, Nov. 14, 2006 [hereinafter Can.-Peru BIT] (denying most-favored-nation clause applicability to dispute settlement provisions). Although this Article suggests that States embrace the most-favored-nation clause as applying to dispute settlement provisions, if uncertainty is the main cause of concern for investors and States, then it is better for States to clarify either way, rather than leave the scope of their treaties ambiguous.

[182] *See* Vesel, *supra* note 3, at 189 (imploring States to clarify the intended scope of their most-favored-nation clauses as quickly and clearly as possible).

[183] U.K. Model BIT, *supra* note 35, art. 3(3).

[184] *See* Nat'l Grid plc v. Argentine Republic, June 20, 2006, ¶ 85 (UNCITRAL) (contrasting this renunciation of the most-favored-nation clauses' application to dispute settlement provisions with the U.K.'s express agreement to that end).

[185] Vienna Convention, *supra* note 19, art. 31(3)(a).

[186] Can.-Peru BIT, *supra* note 264, Annex B.4 ("For greater clarity . . . [MFN Treatment] does not encompass dispute resolution mechanisms.").

[187] *See* Swiss Federal Council, Dispatch to the Swiss Parliament regarding the Agreements on the Promotion and Protection of Investments with Serbia and Montenegro, Guyana, Azerbaijan, Saudi Arabia and Colombia, Sept. 22, 2006, *Official Gazette* 8455, 8460, *available at* http:/www.admin.ch/ch/d/ff/2006/8455.pdf (announcing that most-favored-nation treatment no longer "encompasses mechanisms for the settlement of investment disputes").

The second most cited reason for denying MFN application to dispute settlement provisions, "treaty shopping," does not excuse adopting an inherently narrow interpretation of MFN clauses and consequently limiting them to substantive provisions. Opponents of the MFN clause's application to dispute settlement provisions point out that it encourages "treaty shopping."[188] The fear is that claimants could pluck more favorable clauses from any existing treaty.

The Article asserts this is *precisely* what the MFN clause is designed to do.[189] The MFN clause makes it so that no treaty can be isolated from all others, and that any treaty containing a MFN clause is connected to all other valid treaties made with the other State party to the treaty.[190] The MFN clause is, by definition, a promise by the States party to a treaty that they will provide treatment to one another that is at least as favorable as the treatment provided to all other treaties.[191] For the MFN clause to work, it demands that first claimants learn of provisions included in other treaties. This purpose invites and encourages individuals governed by a certain treaty to peruse other treaties covering agreements of a similar nature to find more favorable treatment, and then allows them to demand such treatment.[192]

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[188] *See, e.g.*, Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction, ¶ 63 (Jan. 25, 2000), 5 ICSID Rep. 396 (2002) (misinterpreting treaty shopping as "play[ing] havoc on with the policy objectives of underlying specific treaty provisions").

[189] *See* Schill, *supra* note 18, at 187 ("Seeking the most favorable protection offered by the BITs of a specific host state is . . . not shopping for unwarranted advantages, but the core objective of MFN clauses."); *see also* Rubins, *supra* note 20, at 222–23 (calling the fact that the *Telenor* panel thought that most-favored-nation clauses should not operate to override provisions in bilateral investment treaties "odd").

[190] *See* Sornarajah, *supra* note 2, at 201 (construing the most-favored-nation treatment standard as external to the basic treatment as it is directly tied to standards of treatment in third party treaties); *see* Rights of Nat'ls of the United States of America in Morocco (Fr. v. U.S.), 1952 I.C.J. 176, 193–94 (Aug. 27) (holding that most-favored-nation clauses imply that when more extensive rights and privileges are granted by a State, these enure automatically and immediately to the benefit of other beneficiaries of a most-favored-nation clause).

[191] *See* Sornarajah, *supra* note 2, at 204 (suggesting that the clause can create a complicated system where investors can access provisions in past or future treaties).

[192] *See* Rubins, *supra* note 20, at 226 ("[T]reaty shopping . . . is an important part of what States intend when they draft most-favored-nation clauses and include them in investment protection treaties.").

The purpose, function, and workability of the MFN clause are demonstrated by its use for substantive provisions in the treaty.[193] The MFN clause has provided investors with more favorable substantive treatment by allowing access to the fair-and-equitable treatment standard,[194] more favorable definitions of "fair value,"[195] and more liberally awarding permits to operate a business.[196] These decisions have resulted in workable results that provide investors with stronger protections. Even more interestingly, at least one commentator has suggested that dispute settlement provisions have become so important to BITs that they are now substantive clauses.[197] The substantive provisions of the treaties provide protection for investments, which carries out the purpose of the treaties. However, none of these protections would be real—or enforceable—if they were not also accompanied by dispute settlement provisions.[198] The dispute settlement provisions assure that investors have redress if any of the rights promised them are violated.

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[193] *See, e.g.*, MTD Equity Sdn. Bhd. v. Republic of Chile, ICSID Case No. ARB/01/7, Award (May 25, 2004) (involving the awarding of permits subsequent to approval of investment and fulfillment of contractual obligations).

[194] *See, e.g.*, Pope & Talbot, Inc. v. Canada, Apr. 10, 2001, ¶ 117 (UNCITRAL) (accessing the fair-and-equitable treatment standard listed in the North American Free Trade Agreement); Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Decision on Jurisdiction (Nov. 14, 2005) (invoking the fair-and-equitable treatment standard contained in multiple other bilateral investment treaties).

[195] *See, e.g.*, CME Czech Republic B.V. v. Czech Republic, Mar. 14, 2003 (UNCITRAL) (allowing the most-favored-nation clause to import a more favorable method of determining "fair value" in an expropriation compensation case).

[196] *See, e.g.*, *MTD Equity*, ICSID Case No. ARB/01/7 (awarding permits subsequent to approval of investment and fulfillment of contractual obligations).

[197] *See* Yannick Radi, *The Application of the Most-Favoured-Nation Clause to the Dispute Settlement Provisions of Bilateral Investment Treaties: Domesticating the 'Trojan Horse'*, 18 Eur. J. Int'l L. 757, 763 (2007) ("Moreover, the intellectual distinction between dispute settlement and substantive provisions, which is at the basis of the severability concept, is rendered moot by the protective dimension of the dispute settlement mechanism in international investment law.").

[198] *See* Gas Natural SDG S.A. v. The Argentine Republic, ICSID Case No. ARB/03/10, Decision on Jurisdiction, ¶ 29 (June 17, 2005) (describing arbitration provisions as "perhaps the most crucial element" in the "bundle of protections granted to foreign investors by host states.")

Finally, treaty shopping is not necessarily an undesirable practice.[199] Treaty shopping may provide incentive for a more universal and consistent approach to solving issues as they arise in the international investment community.[200] It likely encourages better treatment of investors.[201] If a State knows that a claimant will be able to invoke more favorable provisions in other treaties through the MFN clause, then States may be more likely to provide that favorable treatment to third party investors of its own volition.[202] This would ultimately lead to less litigation, and thus less money and time spent debating claimants' protective rights to which they are entitled.[203]

Conclusion

The MFN clause must be used to its proper and full potential, both by tribunals and by treaty drafters. To achieve this, MFN clauses can be invoked to import more favorable dispute settlement provisions of third party treaties under the VCLT.

Amid the current state of uncertainty in the international investment community, prudent States should clarify the scope of the MFN clauses contained in their BITs. They may clarify their position on current treaties through additional documents. In the future, States may choose to expressly delineate the outer boundaries of the MFN clause in the treaty itself. To continue to encourage and increase the flow of foreign direct investment, however, continued favorable treatment towards investors

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[199] *See* Schill, *supra* note 18, at 187 (inferring that most-favored-nation clauses allow for positive treaty-shopping that affords States and investors the ability to reach the most desirable protection attainable).

[200] *See* Schill, *supra* note 18, at 188 (refuting the claim that treaty shopping harms international relations by concluding that treaty shopping through most-favored-nation clauses "harmonizes compliance procedures of host States for their obligations under investment treaties").

[201] *See* Georg Schwarzenberger, *The Most-Favoured-Nation Standard in British State Practice*, 22 Brit. Y.B. Int'l L. 96, 99–100 (1945) (articulating that States bargain the "never-ending uneasiness" caused by the most-favored-nation clause for its creation of the highest possible protection that can be afforded to investors).

[202] Schill *supra* note 18, at 123 (reasoning that bilateral investment treaties harmonize investor protection standards, and as the most-favored-nation clause is a ratchet in favor of more favorable treatment, investors would receive better treatment).

[203] Schill, *supra* note 18, at 193 (applauding the multilateralizational effects of the most-favored-nation clause and the decreased conflict and uncertainty it will ultimately create).

is absolutely necessary. The MFN clause should therefore be treated as a valuable tool that ensures that investors receive the highest available level of treatment.[204]

Prior to States clarifying their stance on MFN clauses, tribunals can aptly protect investors with the current source available to them: the VCLT. The VCLT allows arbitrators to generally provide claimants access to more favorable dispute settlement provisions in third-party treaties when the MFN clause allows. Article 32 of the VCLT provides tribunals the necessary ability to restrict application of the MFN clause to dispute settlement provisions in instances where doing so would provide a manifestly absurd result.

By its current design, the MFN clause provides investors with the protection they want, and States with the flexibility they need. The power to decide the fate of the clause lies with the States themselves. In the meantime, tribunals should stop patronizing States, and instead hold them accountable for the clauses included in their treaties.

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[204] *See* SCHILL, *supra* note 18, at 193 (observing that broad application of most-favored-nation clauses to dispute settlement provisions carries the goals of bilateral investment treaties forward).