

SYMPOSIUM ON SIMON BATIFORT AND J. BENTON HEATH, “THE NEW DEBATE ON THE INTERPRETATION OF MFN CLAUSES IN INVESTMENT TREATIES: PUTTING THE BRAKES ON MULTILATERALIZATION”

MFN CLAUSES AND SUBSTANTIVE TREATMENT: A LAW OF TREATIES PERSPECTIVE OF THE “CONVENTIONAL WISDOM”

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On the big questions, [Simon Batifort and J. Benton Heath](#) are plainly right.<sup>1</sup> Dogmatic presumptions about the necessary effect of particular clauses and woolly notions of systemic teleology may distract the interpreter from the task of finding the meaning that represents the intentions of the parties, best articulated in the specific terms chosen. Customary rules on treaty interpretation, [reflected](#) in Articles 31 and 32 of the [Vienna Convention on the Law of Treaties](#) (VCLT),<sup>2</sup> are meant to be [flexibly adapted](#) to the case in hand.<sup>3</sup> But in applying their insight to the small print of the interpretative question, Batifort and Heath are less persuasive. Can most favored nation (MFN) clauses be generally relied upon to, as they put it, “import” substantive standards of treatment of investment protection law? The authors are critical of the apparent consensus in favor of an affirmative answer—they call it “conventional wisdom”—and in this regard seem to me to be significantly overstating their case.

My comment takes the perspective of the mainstream public international law of treaties. I will suggest that Batifort and Heath have understated the breadth of state practice in support of the “conventional wisdom.” The modest broader point is this: to approach the international legal argument with, as it were, *ICSID Reports* in hand and “ordinary meaning” [rather loose in the holster](#)<sup>4</sup> may well be a helpful technique for drafting a pleading. However, it reflects a restrictive conception of the international legal order, where “[conventional wisdom](#)” is not a pejorative but rather a shorthand description of the process by which the shared judgement on rules of international law is formed.<sup>5</sup>

*The Question*

Batifort and Heath argue that an interpreter of an investment treaty who determines the content of a party’s primary obligations by reference to another treaty<sup>6</sup> may commit a legal error in two ways: either by erroneously

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<sup>1</sup> Simon Batifort & J. Benton Heath, [The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization](#), 111 AJIL 873 (2018).

<sup>2</sup> [Maritime Delimitation in the Indian Ocean](#) (Som. v. Kenya), Preliminary Objections, para. 63 (ICJ, Feb. 2, 2017).

<sup>3</sup> Franklin Berman, [Why Do We Need a Law of Treaties?](#), 385 RECUEIL DES COURSES 17, 29 (2017).

<sup>4</sup> T.S. Eliot, [Choruses from the “Rock”](#), in THE POEMS OF T. S. ELIOT 165 (Christopher Rick & Jim McCue eds., 2015).

<sup>5</sup> James Crawford, [Chance, Order, Change: The Course of International Law](#), 365 RECUEIL DES COURSES 13, 21–22 (2013).

<sup>6</sup> To borrow from the still unsurpassed explanation of MFN clauses in PAUL REUTER, INTRODUCTION TO THE LAW OF TREATIES 106 (José Mico & Peter Haggenmacher trans., 1995).

identifying such an ordinary (or special) meaning of an MFN clause in the first place; or by giving it excessive weight in the interpretative process that downplays the significance of context.<sup>7</sup> It is a perfectly plausible argument about the character and interpretative weight of treaty language: after all, there is no such thing as “the” (or even “an”) MFN clause, but only a series of particular provisions, each of which is to be assessed on its own merits in context.

The argument must stand or fall against the traditional benchmark of consensus in state practice. Have states challenged the determination of their obligations in investment treaties by means of (particularly formulated) MFN clauses? Or have they generally endorsed this practice? It is a trite point that state practice is more difficult to identify in investment law than in other fields of international law, because formalized dispute settlement between investors and states pushes practice away from interstate relations where it is usually generated. But it is not impossible, and the last two decades reveal much about states’ views on MFN clauses and substantive treatment, as expressed in multilateral fora, international dispute settlement, and treaty-making.<sup>8</sup> It appears, in fact, that states have generally endorsed interpretation of variously drafted MFN clauses in investment treaties to determine the content of a party’s primary obligations by reference to another treaty.

### *Multilateral State Practice*

The International Law Commission’s (ILC’s) work on MFN clauses, resulting in its adoption of [Summary Conclusions on the Most-Favoured-Nation clause](#) in 2015,<sup>9</sup> provided an opportunity for states to express their views in the Sixth Committee of the General Assembly. Some states objected to application of MFN clauses to substantive standards. [Venezuela](#) noted that “States generally had no idea how the concept of most-favoured-nation was applied, even with respect to substantive matters. In fact, the concept was unworkable in investment treaties.”<sup>10</sup> For [Cuba](#), the practice was problematic in both legal and policy terms: it “was blatantly contrary to the principles of treaty interpretation and application as established by the Vienna Convention,” “affected the balance of the investment protection agreements and impinged upon the sovereignty of the host State in respect of policymaking.”<sup>11</sup>

But most states to address the issue endorsed, whether explicitly or by necessary implication, application of MFN clauses to substantive rules in other treaties. Thus, [Austria](#) thought that “[t]he question of the proper

<sup>7</sup> I am unfamiliar with the “top-down” and “bottom-up” language that structures the argument, and therefore have translated it into the technical VCLT parlance (without misrepresenting it, hopefully).

<sup>8</sup> It is worth noting, as an example of earlier perceptions, that the finest law of treaties lawyer of the last century argued the greatest MFN clause case in the same terms challenged by the authors. See [Ambatielos Case](#) (Greece v. UK), 1953 ICJ Pleadings 406 (Mar. 26, 1953) (Fitzmaurice on behalf of the UK) (“[O]ur adversaries have at various times reproached us for objecting to their invocation of other treaties ... on the ground that we did the same thing in the *Anglo-Iranian Oil Company* case. But of course, the truth is, we have no objection of principle to the invocation of other treaties, provided they are relevant. We have no objection to the process as such.”).

<sup>9</sup> Int’l Law Comm’n, [Report on the Work of the Sixty-Seventh Session](#), UN Doc. A/70/10, at para. 42 (2015) [hereinafter 2015 Summary Conclusions]. The ILC also welcomed with appreciation the Final Report of the Study Group on the Most-Favoured-Nation clause, *id.* at para. 41, Annex. Note that the ILC did not endorse the Final Report. See Int’l Law Comm’n, [Provisional Summary Record of the 3264th Meeting](#), UN Doc. A/CN.4/SR.3264, at 4–5 (July 6, 2015) (McRae, Nolte, Kittichaisaree), Int’l Law Comm’n, [Provisional Summary Record of the 3277th Meeting](#), UN Doc. A/CN.4/SR.3277, at 11 (July 23, 2015).

<sup>10</sup> Sixth Committee, [Summary Record of the 19th Meeting](#), UN Doc. A/C.6/70/SR.19, at para. 49 (Nov. 4, 2015); see also *id.* at para. 37 (Jamaica).

<sup>11</sup> Sixth Committee, [Summary Record of the 25th Meeting](#), UN Doc. A/C.6/68/SR.25, at para. 74 (Nov. 5, 2013).

scope of most-favoured-nation clauses ... depended primarily on ... whether it included or excluded procedural and jurisdictional matters.”<sup>12</sup> [Australia’s](#) position was that, “[i]n interpreting a treaty where the ambit of the MFN obligation with respect to dispute settlement was not specified, it was not appropriate to assume that MFN obligations applied broadly in a manner that would negate the negotiated procedural requirements.”<sup>13</sup> [Italy](#) described the question as “whether, in investment treaty arbitration, MFN clauses should apply only to substantive obligations.”<sup>14</sup> The Netherlands referred to its “Model Bilateral Investment Agreement, on the basis of which MFN clauses were usually specified in that they were limited to treatment for ‘investment’ and were not applicable to provisions regarding dispute settlement.”<sup>15</sup> [India](#) echoed the ILC on “a new dimension” of the recent decisions that went beyond “confining the [MFN] clause to the substantive obligations imposed under bilateral investment treaties.”<sup>16</sup> In Thailand’s view, “such clauses should be narrowly interpreted as to whether or not they should apply beyond substantive obligations.”<sup>17</sup> [Malaysia](#) suggested that “[t]he clause should be interpreted in such a way that it applied only to substantive preferential treatment provided for in treaties.”<sup>18</sup> The Philippines was concerned that “the provisions of such clauses in bilateral investment treaties could extend from substantive obligations.”<sup>19</sup> Taking stock of this practice as a whole, states that directly engage with the issue overwhelmingly endorse application of MFN clauses to substantive rules; this includes (traditional) home and host states, developed and developing states, and states with various domestic legal traditions and attitudes to international dispute settlement.

#### *State Practice in Dispute Settlement*

Reasonable people may disagree about whether states’ pleadings in favor of their position carry much weight in identifying international law more generally. But there is a [stronger case](#) for taking pleadings as expressing a general position when states accept or at least do not challenge an argument that directly and unfavorably affects their rights.<sup>20</sup> That is how most states have dealt with invocation of (variously drafted) MFN clauses regarding substantive standards in bilateral investment treaty (BIT) disputes. [Kazakhstan](#), for example,

accepts that, under the MFN clause, it was obliged to treat Claimants in accordance with any more favourable treatment afforded to nationals of other countries. ... To interpret the obligations claimed by Claimants that are not in the Turkey-Kazakhstan itself, Respondent will refer only to the United Kingdom-Kazakhstan BIT. This contains all of the obligations Claimants allege they were owed and

<sup>12</sup> Sixth Committee, [Summary Record of the 20th Meeting](#), UN Doc. A/C.6/67/SR.20, at para. 117 (Nov. 2, 2012).

<sup>13</sup> Sixth Committee, [Summary Record of the 24th Meeting](#), UN Doc. A/C.6/68/SR.24, at para. 54 (Nov. 4, 2013); *see also id.* at para. 55.

<sup>14</sup> Sixth Committee, [Summary Record of the 17th Meeting](#), UN Doc. A/C.6/70/SR.17, at para. 56 (Nov. 2, 2015).

<sup>15</sup> *Id.* at para. 77.

<sup>16</sup> Sixth Committee, [Summary Record of the 18th Meeting](#), UN Doc. A/C.6/70/SR.18, at para. 27 (Nov. 3, 2015).

<sup>17</sup> *Id.* at para. 66.

<sup>18</sup> Sixth Committee, [Summary Record of the 19th Meeting](#), UN Doc. A/C.6/70/SR.19, at para. 9 (Nov. 4, 2015).

<sup>19</sup> *Id.* at para. 14.

<sup>20</sup> *Cf.* Draft Conclusions on Identification of Customary International Law, Int’l Law Comm’n, [Report on the Work of the Sixty-Eighth Session](#), UN Doc. A/71/10, at 100 (2016) (Draft Conclusion 10, Commentary 7); Draft Conclusions on Subsequent Agreement and Subsequent Practice in Relation to the Interpretation of Treaties, *id.* at 122 (Draft Conclusion 10(2)).

Respondent accepts that, were Claimants United Kingdom companies, the standards of that treaty would be applicable to them.<sup>21</sup>

[Chile](#),<sup>22</sup> [Jordan](#),<sup>23</sup> and [Ukraine](#)<sup>24</sup> have similarly accepted such invocation of MFN clauses.

Other states have accepted the general argument but distinguished its application in particular circumstances. [Algeria](#) argued that the MFN clause could not apply to rules on protection of investment because it was included in the section on promotion.<sup>25</sup> [Pakistan](#) objected to application of the MFN clause to treaties already in force.<sup>26</sup> [Mongolia](#) noted the limitation of the MFN clause to the operation or disposal of investments.<sup>27</sup> [India](#) objected because “both Contracting Parties placed a strong and *unusual* emphasis on the application of national laws to investments.”<sup>28</sup> [Argentina](#) and [Moldova](#) argued against application of MFN clauses to umbrella clauses because they were different in kind from properly international obligations.<sup>29</sup> For technical legal purposes, an argument of this kind that explains why a general proposition is distinguishable counts as an endorsement of that proposition, i.e., that MFN clauses usually apply to substantive standards.

Few states challenge “conventional wisdom” directly. Only [Turkmenistan](#) appears to have done so in a BIT dispute (highlighted by Batifort and Heath)<sup>30</sup>—but it has not made the same argument either in the Sixth Committee or in earlier disputes raising MFN issues, and this inconsistency must diminish the weight of its position. North American Free Trade Agreement practice is more helpful to the authors’ argument. But there is greater nuance in positions of different states on different legal issues (and at different points in time) than they admit. At least the United States apparently has [avoided](#) articulating its position in these terms, e.g., it objected to the argument for application of MFN treatment to Article 1105 because of the binding interpretation by the Free Trade Commission that could not be circumvented, rather than because it accepted the limited applicability of the MFN clause.<sup>31</sup> Taking stock of dispute settlement practice as a whole, despite a limited number of weak objections, the core consensus is formed by failure to challenge or even clear acceptance of an unfavorable argument by states. Such conduct goes against the grain of expectation in a procedural setting and therefore constitutes strong endorsement of the “conventional wisdom” that Batifort and Heath challenge.

<sup>21</sup> [Rumeli Telekom A.S. v. Kaz.](#), ICSID Case No. ARB/05/16, Award, paras. 572, 574, (July 29, 2008). Kazakhstan did not raise the issue in annulment proceedings. See [Rumeli Telekom A.S. v. Kaz.](#), ICSID Case No. ARB/05/16, Decision of the Ad Hoc Committee (Mar. 25, 2010).

<sup>22</sup> [MTD Equity Sdn. Bhd. v. Chile](#), ICSID Case No. ARB/01/7, Award, para. 100 (May 25, 2004). In annulment, Chile challenged confusion between MFN and fair and equitable treatment but not the principle. See [MTD Equity Sdn. Bhd. v. Chile](#), ICSID Case No. ARB/01/7, Decision on Annulment, paras. 63–64 (Mar. 21, 2007).

<sup>23</sup> [ATA Construction, Industrial & Trading Co. v. Jordan](#), ICSID Case No. ARB/08/2, Award, sec. V.2 (May 18, 2010) (investor relied on an MFN clause and Jordan did not address the argument).

<sup>24</sup> [OAO Tatneft v. Ukr.](#), Award on the Merits, para. 365 (UNCITRAL, July 29, 2014).

<sup>25</sup> [L.E.S.I. S.p.A. v. Alg.](#), ICSID Case No. ARB/05/3, Award (Nov. 12, 2008).

<sup>26</sup> [Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pak.](#), ICSID Case No. ARB/03/29, Award, paras. 146, 151–52, 162 (Aug. 27, 2009).

<sup>27</sup> [Paushok v. Mong.](#), Award on Jurisdiction and Liability, para. 246 (UNCITRAL, Apr. 28, 2011).

<sup>28</sup> [White Industries Australia Limited v. India](#), Final Award, para 5.4.2 (UNCITRAL, Nov. 30, 2011) (emphasis added).

<sup>29</sup> [EDF International S.A. v. Arg.](#), ICSID Case No. ARB/03/23, Decision, para. 234 (Feb. 5, 2016); [Arif v. Mold.](#), ICSID Case No. ARB/11/23, Award, para. 143 (Apr. 8, 2013).

<sup>30</sup> [İçkale İnşaat Limited Şirketi v. Turk.](#), ICSID Case No. ARB/10/24, Award, paras. 320–21 (Mar. 8, 2016).

<sup>31</sup> [Mesa Power Group LLC v. Can.](#), PCA Case No. 2012–17, Submission of the U.S., para. 10 (July 25, 2014). Another example of skilful avoidance of this (as well as another contested) issue is [Apotex Holdings Inc. v. U.S.](#), ICSID AF Case No. ARB(AF)/12/1, Counter-Memorial on Merits and Objections to Jurisdiction of the U.S., para 384 (Dec. 14, 2012).

### *Treaty Practice*

Batifort and Heath are right to discuss developments in recent treaty practice, although examples that illuminate shifting policy preferences may be without obvious relevance to a technical interpretative argument. Treaty drafting that adds a “for greater certainty” proviso may suggest the position of states on the ordinary (or special) meaning of the particular term more generally, including in other treaties. But the small print is important. Take Article 8.7(3) of the EU-Canada Comprehensive Economic and Trade Agreement (CETA), which explains “for greater certainty” that “treatment” in the MFN clause is inapplicable to substantive obligations in other treaties. Did that explanation carry any interpretative weight before September 21, 2017, when CETA [became provisionally applicable](#)?<sup>32</sup> What is the effect of the “[only in so far as foreign direct investment is concerned](#)” qualification in the decision on provisional application?<sup>33</sup> Does the explanation reflect the legal position of EU member states before ratification? Is it limited to MFN clauses with “like circumstances” language?<sup>34</sup> Some of these questions have clearer answers than others, but the broader point is that treaty practice, just as any other legal argument, comes with nuances, qualifications, and conditions, and putting favorable examples forward *en masse* is not particularly illuminating.

### *Subsidiary Means for the Determination of Rules of Law*

States’ general acceptance of determination of content of primary investment obligations by reference to another treaty is confirmed by subsidiary means for the determination of rules of law. The [Institute of International Law](#) (IIL) endorsed it by necessary implication,<sup>35</sup> as did the ILC by noting that “new dimension[s]” were brought to the discussion when MFN clauses were not “limit[ed] to substantive obligations.”<sup>36</sup> (For some, the ILC “[tended to state the obvious](#),”<sup>37</sup> but that only speaks to the strength of professional consensus.)

The approach is also reflected in arbitral decisions, even if the authors are unimpressed by arbitral reasoning. The first point to note is the key reason for arbitral brevity: few disputing parties raised the issue. Pursuit of international judicial function may sometimes push tribunals beyond the consensual elements of dispute settlement, but, in the world of ever-longer decisions, few people will call for expansive *proprio motu* exploration of issues that reflect shared consensus of disputing parties as well as the broader community. The second point relates to the quality of decision-makers. International (investment) arbitration is highly decentralized, and the quantity of decisions in support of a proposition is often less important than the caliber of people who make them. The great minds are divided on many questions of international law. But in this instance those who endorse the “conventional wisdom” include some of the (if not *the*) greatest public international lawyers of our times. If their decisions have been brief, perhaps it is because they were dealing with a “but of course” issue. The third and broader point is this: IIL, ILC, and international arbitral tribunals, whatever their imperfections, are the best institutions that the modern international legal order has to offer for the determination of rules of international law in this field. One should perhaps pause before sweepingly rejecting the consensus that they have helped to generate.

<sup>32</sup> [Press Release, EU-Canada Trade Agreement Enters into Force](#), EUROPEAN COMMISSION (Sept. 20, 2017).

<sup>33</sup> [Council Decision 2017/38 of 28 October 2016 on the Provisional Application of the Comprehensive Economic and Trade Agreement \(CETA\) between Canada, of the one Part, and the European Union and its Member States, of the other Part](#), art 1(1)(a), 2017 O.J. (L 11) 1080 (EU).

<sup>34</sup> Cf. [Ickale](#), *supra* note 30, at para. 329.

<sup>35</sup> Institute of International Law, [Resolution on Legal Aspects of Resource to Arbitration by an Investor Against the Authorities of the Host State under Inter-State Treaties](#), art. 12(1), (3) (2013).

<sup>36</sup> Int’l Law Comm’n, [2015 Summary Conclusions](#), *supra* note 9, at para. 42 [d].

<sup>37</sup> Sixth Committee, [Summary Record of the 18th Meeting](#), UN Doc. A/C.6/70/SR.18, at para. 62 (Nov. 3, 2015) (Spain).

*Conclusion*

I have considerable sympathy for an argument that takes seriously the rules on sources and interpretation and that evaluates critically the output of international institutions and tribunals against these benchmarks. But Batifort and Heath significantly overstate their contrarian claim that almost all tribunals have gotten the issue wrong and therefore states have to be saved from the wider consequences of their agreements by the dint of “interpretation.” When one considers what states have actually said and done, it appears, rather less excitingly, to be in line with the near-consensus in curial circles.

A different approach may well replace the current consensus. The authors put forward a perfectly coherent argument that (*pace* [Stephan Schill](#)<sup>38</sup>) is not out of line with systemic teleology. But it cannot be willed into legal existence by mere assertion: a change in the ordinary (special) meaning would have to take place through the traditional international legal process. When states generally start to articulate their claims in these terms in international organisations, international disputes, international treaties, and elsewhere, and generally persuade international tribunals about their correctness, the legal position will change. Reasonable people may disagree on how significant the first steps in the direction of change have been, but we are still quite far from overturning the “conventional wisdom” of the last two decades. Whether or not it is wise, it is generally accepted, and that is what counts for the purpose of an international legal argument.

<sup>38</sup> Stephan W. Schill, [MFN Clauses as Bilateral Commitments to Multilateralism: A Reply to Simon Batifort and J. Benton Heath](#), 111 AJIL 914 (2018).