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# *Allocating Adjudicatory Authority: Most-Favoured-Nation Clauses as a Basis of Jurisdiction—A Reply to Zachary Douglas*

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The present article comments on Zachary Douglas, The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails, published in the February 2011 issue of this Journal. It supports Douglas' argument that arbitral tribunals should interpret investment treaties in accordance with general principles of law, and reason their decisions accordingly, in order to contribute to more consistency and coherence in the field. This, however, does not alleviate tribunals from taking a 'BIT by BIT'-approach to the interpretation of most-favoured-nation (MFN) clauses. Furthermore, the present article argues that general principles do not support Douglas' view that MFN clauses cannot serve as a jurisdictional basis in investment treaty arbitration. Much to the contrary, these principles, as enshrined in the jurisprudence of international and domestic courts, and codified by the International Law Commission in its 1978 Draft Articles on Most-Favoured-Nation Clauses, support exactly the effect Douglas sets out to deny. If one understands the issue at stake as one of allocating adjudicatory authority between domestic courts and arbitral tribunals, MFN clauses have been used by international and domestic courts precisely to that effect. Furthermore, the clauses have direct effect in extending more favourable treatment to foreign investors without the need to claim such treatment through an arbitration proceedings. Overall, the present article argues that MFN clauses in investment treaties can have the effect of allocating adjudicatory authority and thus serve as a basis of jurisdiction of an investment treaty tribunal.

## 1. *Applying MFN Clauses: A Question of Faith?*

Among international investment lawyers, the answer to the question of whether foreign investors can invoke a most-favoured-nation (MFN) clause in a bilateral investment treaty (BIT) to establish or expand a tribunal's jurisdiction has

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become—like so many other issues in the field—a matter of stating your faith. Either you side with the 'no school' or the 'yes school', as Zachary Douglas calls them;[1] either you are for it or against it. And together with stating your beliefs on that issue you are also seen as siding with even bigger ideational alliances in international investment law, which are heavily influenced by the system of party-appointment of arbitrators, that is being either pro-State or pro-investor. Middle grounds—the inbetweens, the 'it depends'—are more difficult to find.

What is more, in Douglas' view, there ought not be such 'it depends', as they endanger consistency, coherence and predictability in investment jurisprudence and are contrary to principled decision-making in an area where arbitral tribunals assume a key function in concretizing and further developing the vague principles of international investment law.[2] Yet, perhaps more than compromising the idea of investment *law* itself, an 'it depends' clouds its proponent's allegiance to either pro-State or pro-investor applications of international investment law and thus unsettles one of the few seemingly remaining guideposts for trying to rationalize and predict the decision-making of individual arbitrators in an otherwise little predictable area of international law. When on the high seas and in court, the saying goes, you are in God's hands. In investment treaty arbitration, one may add, you at least want to know who those gods are and what opinions they hold. Such orientation, however, gets lost, when the 'it depends' approach to applying and interpreting MFN clauses escalates among arbitrators.

So far, however, pro-investor or pro-State ideology seems to have been the prevailing factor in arbitral decision-making. Tellingly, a recent study by Julie Maupin, which analyses publicly available decisions by investment treaty tribunals on the very issue in question has concluded that 'neither the type of MFN clause nor the type of MFN question nor the set of reasons considered determined the outcome of MFN-based jurisdiction decisions'.[3] Instead, her study convincingly shows, the 'interpretative approach' of arbitral tribunals, that is the burden of persuasion arbitrators require for applying MFN clauses to matters of arbitral procedure and jurisdiction, appears to be outcome determinative.[4] While for some tribunals it is sufficient that an MFN clause can be 'plausibly' interpreted to apply to more favorable grants of jurisdiction in a host State's third-country investment treaty, others require that such an application be 'affirmatively established'.[5] Yet, behind what seems like a doctrinal debate about treaty interpretation, lurks nothing less than the familiar pro-investor/pro-State-dichotomy. As Maupin persuasively suggests, 'these

[1] Zachary Douglas, 'The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails', 2 J Int'l Disp Settlement (2011) 97, at 98.
[2] ibid, 98–101.
[3] Julie A. Maupin, 'MFN-Based Jurisdiction in Investor-State Arbitration: Is There Any Hope for a Consistent Approach?', 14 J Int'l Econ L (2011) 157, at 175.
[4] ibid, 175–80.
[5] ibid, 179.

debates are clouded by the growing perception . . . that the approach adopted by individual tribunals may be more closely linked to the personal predispositions of select arbitrators than to an objective appreciation of the proper interpretative approach to be applied under international law'.[6]

The quest for the proper interpretative approach is also at the heart of Douglas' contribution to the debate. He takes issue with the interpretative methodology of the 'it depends'-school, namely its 'BIT by BIT'-approach to interpretation, which focuses on the potentially different meanings of different MFN clauses and celebrates a 'cult of the dictionary'.[7] This approach, Douglas convincingly argues, disregards general principles of law relevant for interpreting MFN clauses. Douglas, however, goes further than taking issue with questions of interpretative methodology. He argues that these general principles mandate an interpretation of MFN clauses as not permitting investors to expand or modify the jurisdictional basis of an investment treaty tribunal by incorporating the broader jurisdictional mandate the host State has consented to under any other of its third-country investment treaties. Yet, in doing so, Douglas instrumentalizes his point about proper interpretative methodology to paint a picture of the impact of general principles on the interpretation of MFN clauses and their content that rather one-sidedly comes down with the 'no school', ultimately thereby upholding the pro-investor/pro-State-dichotomy that helps structure the application of international investment treaties rather neatly for dispute settlement purposes. In reality, however, international investment treaties more generally and MFN clauses in particular require more nuanced answers than either a straightforward yes, or a straightforward no.

At the outset, I agree with Douglas that general principles of law are largely, and incorrectly so, disregarded in the interpretation of MFN clauses in investment treaty arbitration. Similarly, I am opposed to case-specific, 'shallow and narrow' reasoning of investment treaty tribunals that does not clearly set out the normative background of the legal issues in question.[8] However, general principles cannot override the fact that MFN clauses terminologically follow different approaches namely in regard of their application to questions of arbitral jurisdiction. A 'BIT by BIT'-approach, in other words, is conceptually the correct approach to interpreting the scope of MFN clauses in BITs, even though that approach should not result in non-principled reasoning (see Section 2). Furthermore, Douglas, in my view, mischaracterizes the content of general principles relating to MFN clauses (see Section 3). Contrary to his assertion, these principles, as transpiring from the jurisprudence of international and domestic courts, and as codified by the International Law

[6] ibid, 178.
[7] Douglas (n 1) at 101.
[8] Cf Cass Sunstein, 'Beyond Judicial Minimalism', 43 Tulsa L Rev (2008) 825.

Commission in its 1978 Draft Articles on Most-Favoured-Nation Clauses,[9] support exactly the effect Douglas sets out to deny. MFN clauses can serve, and in fact have served, as instruments to allocate adjudicatory authority between different dispute settlement mechanisms. Contrary to Douglas' account, the clauses have direct effect extending more favourable treatment to foreign investors without the need to claim such treatment through arbitration proceedings. Finally, Douglas' argument that international law has consistently separated substantive law and procedure has no bearing upon the question at issue. In sum, there is no reason to deny certain MFN clauses the effect of serving as a title of jurisdiction also for investment treaty tribunals. The key, in any event, is to understand the issue at stake as one of allocating adjudicatory authority between arbitral tribunals and domestic courts.

## 2. *International Law Liturgy: Principles of Treaty Interpretation*

Principles of treaty interpretation are accepted as one of the key elements of the common liturgy of international law. They are presented as a value-neutral and objective matrix for understanding what States intended to pursue by concluding a certain treaty, and by including certain treaty provisions in that treaty, and thus bridge different ideological and political perspectives on the functioning of international treaty law. Principles of treaty interpretation are also revered as enabling international courts and tribunals to apply general and abstract treaty provisions to fact-specific cases without tainting that process with political or ideological predispositions of the treaty interpreter.[10] This purity of interpretation, however, is little more than a commonly accepted fiction, as treaty interpretation, and in fact debates about proper interpretative methodology, are always clouded by subjective predispositions of the participants and are embedded in the larger social and political framework in which dispute settlement and legal interpretation takes place.[11] Interpretation, including treaty interpretation, and interpretative methodology thus become a mirror of underlying values even though the principles of treaty interpretation

[9] International Law Commission, *Report of the International Law Commission on the work of its thirtieth session 8 May-28 July 1978*, 30 ILC Ybk, Vol II, Part Two (1978) 16.

[10] Cf Jean-Marc Sorel and Valérie Boré Eveno, 'Article 31', in Olivier Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties – A Commentary* (Oxford University Press 2011), Vol I, at paras 1–9 (describing Article 31 of the Vienna Convention as 'a type of "sacrosanct" core' and as a 'compromise' between defenders of different interpretative approaches, which aims at 'releasing the exact meaning and the content of the rule of law that is applicable to a given situation', even though 'interpretation occupies a prime position on the crossroads between law and politics' and '[c]ontroversies regarding interpretation . . . translate into a battle for mastering the legal system, which turns the interpretative process into a variant for the battle for the law'). For the view that interpretation is, or should be, an entirely objective process see, for example, Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press 2008), at 285–96.

[11] See Robert Kolb, *Interprétation et création du droit international* (Bruylant 2006); see also Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (reissued with epilogue Cambrige University Press 2005), at 333–45 (on choice of method of treaty interpretation in international law). On interpretative choice and underlying predispositions of judges more generally Josef Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung* (Athenäum 1970).

are accepted as a common liturgy bridging different political and ideological beliefs. Interpretative methodology, in other words, can say much about ultimate purposes and interests pursued. It is by far less objective than the technicality of the subject suggests.[12]

Zachary Douglas, and myself, are no exception. Interestingly, we share a common belief in international investment law being a system, in which consistency, coherence, and predictability are core values, and in which arbitral tribunals occupy a central position not only in settling disputes, but also in forging the future content of international investment law.[13] Accordingly, I am very much in agreement with Douglas when he argues that the interpretation of BITs should take into account the general principles of international law and interpret every BIT, and every provision within those BITs, in conformity with general international law and in light of the jurisprudence of investment treaty tribunals on comparable clauses in other BITs. After all the treaty-overarching reliance on investment treaty precedent and interpretation *in pari materia* are two important elements for me to have argued that international investment law is one specialized field of international law and that the aggregate of by now many thousand bilateral, sectoral, and regional investment treaties, and investment chapters in free trade agreements constitute one, in its constitutive principles essentially multilateral, system of investment protection.[14] I am thus equally opposed to a 'BIT by BIT'-interpretation of identical or in essence similar clauses in different investment treaties if that approach leads to inconsistent and incoherent decisions. Instead, investment treaty tribunals should aim at coherence and take account in their interpretation of investment treaties, as well as their reasoning in decisions and awards, of the interpretation and reasoning of other treaty tribunals on similar provisions in other BITs.[15]

[12] Cf Oscar Schachter, 'The Invisible College of International Lawyers', 72 Nw UL Rev (1977) 217, at 218 (observing that '[e]ven highly technical subjects are frequently approached in quite different ways by those who differ in their conceptions of the ends to be served and of the ordering of values').

[13] See Douglas (n 1), at 99 (stressing the law-making function of investment treaty tribunals), and 101 (stressing consistency, coherence, and predictability as values to be pursued by investment treaty tribunals and international investment law more generally); similarly Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press 2009), xxiii–xxiv.

[14] See Stephan Schill, *The Multilateralization of International Investment Law* (Cambridge University Press 2009), in particular at 278–361 (on methods of treaty interpretation and use of precedent).

[15] In my view, the approach taken by the Tribunal in *RosInvestCo v. Russia* to disregard the interpretation given by other investment treaty tribunals to MFN clauses in other arbitrations under different BITs is therefore problematic because it reduces the function of the tribunals to dispute settlement only and disregards the significant impact arbitral decisions have on international investment law-making. See *RosInvestCo UK Ltd v The Russian Federation* (SCC Case No V 079/2005), Award on Jurisdiction, October 2007, para 137 (observing that '[a]fter having examined them [i.e. decision of arbitral tribunals regarding MFN-clauses and arbitration clauses in other treaties], the Tribunal feels there is no need to enter into a detailed discussion of these decisions. The Tribunal agrees with the Parties that different conclusions can indeed be drawn from them depending on how one evaluates their various wordings both of the arbitration clause and the MFN-clauses and their similarities in allowing generalisations. However, since it is the primary function of this Tribunal to decide the case before it rather than developing further the general discussion on the applicability of MFN clauses to dispute-settlement-provisions, the Tribunal notes that the combined wording in [the MFN clause] and [the

At the same time, this aspiration towards multilateralism should not override the agreement of States in a BIT to opt out of what the general regime of international investment law, or rather prevailing State practice, provides. For that reason, attention to the wording of the provisions in BITs, including the wording of MFN clauses, matters. This requires a more differentiated approach than that suggested by Douglas, one that pays attention to the wording of each BIT and MFN clause at issue, and hence essentially a 'BIT by BIT'-approach. Certainly, such an approach does not allow arbitral tribunals to free themselves from interpretative strictures laying on them in view of other criteria relevant for treaty interpretation, including the general principles of law that may be at play, nor does the focus on the wording of the individual BIT allow tribunals to disentangle that wording from the ordinary meaning attributed to the underlying principle of international investment law. A 'BIT by BIT'-approach therefore cannot result in isolating each BIT from every other BIT and international law more generally. Instead, the wording of each BIT matters in order to determine whether the BIT at issue follows the general investment regime, or whether it opts out of that regime. In that sense, and for that purpose, a 'BIT by BIT'–approach is the correct approach that cannot be overridden by recourse to general principles of law. After all, the function of general principles is restricted to providing context in the process of treaty interpretation, as stated in Article 31(3)(c) of the Vienna Convention on the Law of Treaties.

A 'BIT by BIT'-approach is necessary when determining whether MFN clauses in BITs can serve as a basis of jurisdiction because there are different types of MFN clauses that deal differently with matters of dispute settlement.[16] There are, for example, MFN clauses that explicitly apply to more favorable treatment in connection with investor-State dispute settlement. The UK–Ethiopia BIT, for example, explicitly provides that 'for the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above [ie MFN treatment and national treatment] shall apply to the provisions of Articles 1 to 10 of this Agreement',[17] whereas investor-State dispute settlement is contained in Article 8 of the Agreement. In respect of such a clause, there should be no doubt that MFN treatment applies to questions of investor-State dispute settlement, even if it were true that there was a general principle to the contrary, as asserted by Douglas. At the other end of the spectrum, there are BITs that explicitly exclude application of an MFN clause to questions of investor-State dispute settlement. This is the case, for example, with the

arbitration clause] of the [applicable] BIT is not identical to that in any of such other treaties considered in these other decisions.').

[16] See, most recently, Maupin (n 3), at 163–7 (distinguishing between broad MFN clauses, general MFN clauses, MFN clauses tied to fair and equitable treatment, and narrow MFN clauses).

[17] Article 3(3) of the Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Federal Democratic Republic of Ethiopia for the Promotion and Protection of Investments, signed 19 November 2009 (not yet entered into force).

Central America-Dominican Republic-United States Free Trade Agreement, whose negotiation history makes clear that the Contracting States understood the MFN clause in the agreement not to make investors benefit from more favorable procedural and jurisdictional treatment accorded by the host State to third-country investors.[18] No general principles of law are necessary for interpreting the MFN clause in that agreement.

Only for any remaining, neutrally worded, MFN clauses is a 'BIT by BIT'-approach to interpretation that does not seek coherence across treaties problematic as it is difficult to fathom that States intended different meanings to attach to identically or essentially similarly worded clauses. Instead, one has to assume that States attribute an ordinary meaning to the principle of MFN treatment when they include treaty provisions in their BITs to that effect, above all because the treaties regularly follow model BITs the content of which is again coordinated in multilateral processes.[19] Both the reference in Article 31(1) of the Vienna Convention to the 'ordinary meaning' as well as general principles of law as mentioned in Article 31(3)(c) of the Vienna Convention suggest that such neutrally worded MFN clauses should be interpreted uniformly across all affected BITs. In those cases, common standards of interpretation and common results are what is expected of all those affected by international investment law. In other words, it is only with respect to these types of MFN clauses that I agree with Zachary Douglas' criticism of a 'BIT by BIT'-approach. It is only in respect of these types of clauses that MFN treatment emerges as an overarching principle of international investment law,[20] which follows a common doctrine and common interpretative principles that go much beyond the 'cult of the dictionary' Douglas rightly criticizes.

[18] See Article 10.4(2), footnote 1 of the Draft of the Central America - United States Free Trade Agreement, dated 28 January 2004, <http://www.sice.oas.org/TPD/USA_CAFTA/Jan28draft/Chap10_e.pdf> accessed 8 June 2011, where the negotiating countries included an 'anti-Maffezini'-clause making clear the shared understanding of the parties. It stated:

> The Parties agree that the following footnote is to be included in the negotiating history as a reflection of the Parties' shared understanding of the Most-Favored-Nation Treatment Article and the Maffezini case. This footnote would be deleted in the final text of the Agreement. . . . [T]he Most-Favored-Nation Treatment Article of this Agreement is expressly limited in its scope to matters 'with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.' The Parties share the understanding and intent that this clause does not encompass international dispute resolution mechanisms such as those contained in Section C of this Chapter, and therefore could not reasonably lead to a conclusion similar to that of the Maffezini case.

[19] On the argument that the conclusion of investment treaties as bilateral treaties is merely a question of form not of substance, that is the bilateral form of treaties is not an argument for assuming that the terms used have a bilateral meaning, Schill (n 14), at 88–120.

[20] See also Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, Vol I (Stevens & Sons 3rd ed, 1957), at 241 (pointing out that '[t]he difference between the most-favoured-nation standard and any particular most-favoured-nation clause corresponds to that between principles and rules of international law'). Accordingly, issues surrounding MFN clauses are generally regarded as issues of general international law, in particular the law of treaties. See International Law Commission, *Report of the International Law Commission on the work of its thiertieth session 8 May–28 July 1978*, 30 ILC Ybk, Vol II, Part Two (1978), at 14, paras 59-61.

What is necessary in this respect, and here I am entirely with Douglas, is a more principled approach to the interpretation of the neutrally worded type of MFN clauses in question and to the reasoning of decisions of arbitral tribunals in that respect. Such a principled approach, however, cannot start, and stop, with noting that international law provides *no precedent* for permitting a private party or a State 'to modify the jurisdictional mandate of an international tribunal'[21] by relying on the operation of an MFN clause prior the decision in *Maffezini v Spain*. Where, after all, should one find *specific* precedent for resolving legal questions relating to the functioning of a novel and unique treaty-based system of investor-State arbitration such as the current BIT system?[22] If the existence, or inexistence, of specific precedent is the criterion, Douglas is correct in adhering to the 'no school'. Yet, specific precedent can hardly be the criterion for resolving the many questions of first impression that have arisen in the past decade, and still arise at present, in investment treaty arbitration. Answers to the question of whether MFN clauses can function as a basis of jurisdiction instead need to be given by going beyond specific precedent and looking at the rationale of such precedent, as well as doctrine on MFN clauses, and trying to deduce general principles from them.

Much in this endeavour will depend on how the issue at stake is framed and understood. To start with, it bears noting, however, that precisely such a principled approach to the functioning and operation of MFN clauses has been developed by the International Law Commission (ILC) in a project that is, undeservedly so, largely overlooked by investment treaty tribunals themselves and is also only mentioned in passing by Douglas: the Draft Articles on Most-Favored-Nation Clauses, which were developed by the ILC in the 1960s and 1970s and submitted to the UN General Assembly in 1978.[23] Certainly, the UN General Assembly only adopted a decision on 9 December 1991, bringing the Draft Articles 'to the attention of Member States and of intergovernmental organizations for their consideration in such cases and to such extent as they deem appropriate',[24] without acting upon the ILC's recommendation to use them as a basis for a multilateral convention. Still, the Draft Articles retain their value as an interpretative aid for MFN clauses in international investment treaties. Not only did the ILC understand the Draft Articles as applying to MFN clauses independently of a specific area of

[21] Douglas (n 1), at 101.

[22] Certainly, every singly feature of the BIT system, such as the applicable law, arbitration as a dispute settlement mechanism under international, and access of individuals to international legal dispute settlement is not novel as such. Yet, the combination of all these features, coupled with the fact that consent to investment treaty arbitration is prospective and applies to all investors qualifying under the treaty without the need to exhaust local remedies, creates a regime that has never existed before. See Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press 2007), at 8–9; Schill (n 14), at 249–56; Santiago Montt, *State Liability in Investment Treaty Arbitration* (Hart Publishing 2009), at 12–16.

[23] See Draft Articles on Most-Favoured-Nation Clauses, 30 ILC Ybk., Vol II, Part Two (1978) 16. Douglas mentions these only in passing, see Douglas (n 1), at 105 and 106.

[24] See Endre Ustor, 'Most-Favoured-Nation Clause', in Rudolf Bernhardt and Peter Macalister-Smith (eds), *Encyclopedia of Public International Law*, Vol III (North-Holland 1997) 468, at 473.

international practice;[25] moreover, they were always considered as guidelines for the interpretation of MFN clauses. Thus, even if the Draft Articles had been transformed into an international treaty, this treaty merely would have established interpretative rules for MFN clauses contained in other international treaties.[26]

Furthermore, the reasons why the Draft Articles have never been taken further is unrelated to the general interpretative principles they set out. Instead, their transformation into a general convention stranded because of two rather narrow issues: (i) the relationship between MFN clauses and customs unions, respectively regional trade agreements,[27] and (ii) the relationship between MFN clauses and general systems of preferences for developing countries.[28] Today, both of these trade-related issues are addressed within the WTO. This suggests that the general provisions of the Draft Articles can continue to be viewed as an agreed understanding of how MFN clauses should be implemented and interpreted, including in international investment treaties.[29] The general provisions of the Draft Articles can accordingly be considered as reflecting the general principles applicable in the context of interpreting and applying MFN clauses. The ILC Draft Articles should therefore receive more attention from investment treaty tribunals than currently is the case when interpreting and applying MFN clauses in international investment treaties.

## 3. *The Content of General Principles Relating to MFN Clauses*

A deeper analysis of the ILC Draft Articles and the understanding it conveys of the operation of MFN clauses suggests that certain assertions made by Douglas about why MFN clauses should not be able to function as a basis of jurisdiction are not in sync with the general principles on MFN treatment deriving from State practice and from the decisions of national and international courts. This is particularly the case if one understands the question at issue as one relating to the allocation of adjudicatory authority between

[25] See *ILC Report of the 30th Session* (n 20), at 14, para 61 (observing that 'the clause as a legal institution' extended beyond the sphere of international trade 'to the operation of the clause in as many spheres as possible').

[26] This was, for example, the express view of Luxemburg, which stated that 'the sole purpose of the provision of the draft is the establishment of rules of interpretation or presumptions, intended to establish the meaning of the most-favoured-nation clause in default of stipulations to the contrary'. See Nikolai Ushakov, 'Report on the Most-Favoured-Nation Clause', 30 ILC Ybk, Vol II, Part One (1978) 1, at para 328. This view was also shared by the ILC's Special Rapporteur himself. ibid, at paras 330–31. It was also enshrined in the final recommendation of the ILC Draft Articles to the UN General Assembly. See *ILC Report of 30th Session* (n 20), 8, at 14 (pointing out that the ILC's study understands MFN clauses as an aspect of the general law of treaties with close connections to the rules contained in the Vienna Convention on the law of Treaties).

[27] See International Law Commission, 59th session, 'Most-Favoured-Nation Clause', Report of the Working Group (20 July 2007), Annex, at para 14 <http://untreaty.un.org/ilc/documentation/english/a_cn4_l719.pdf> accessed 8 June 2011.

[28] ibid, Annex, at para 15.

[29] It is precisely for this reasons that the ILC's decision in 2007 to establish a Working Group in order to examine the possibility of reconsidering the topic of MFN clauses, in particular in view of the problems concerning the interpretation of the clauses in international investment treaties, builds upon the work done by the ILC in the 1960s and 1970s. See ibid, at paras 4–6.

investment treaty tribunals and the domestic courts of the host State.[30] After all, the domestic courts of the host State would be competent to adjudicate the investor's underlying claim if the MFN clause in question did not allow the investor to bring that claim under the authority of the arbitral tribunal constituted based on the State's consent found in the investment treaty. When put into this perspective, it becomes clear that the issue at stake, when asking whether an MFN clause can confer jurisdiction on an investment treaty tribunal, is essentially one relating to the allocation of adjudicatory authority between domestic courts and investment treaty tribunals.[31]

Viewed in this perspective, it appears that the ILC Draft Articles invalidate central elements of Douglas' argumentation that MFN clauses cannot grant jurisdiction to an investment treaty tribunal. Unlike Douglas argues, MFN clauses have direct effect in extending more favourable treatment to the beneficiary of the clause without the need to claim such benefits through an arbitral proceeding. Furthermore, even though MFN clauses may not have been applied to the specific issue at stake, namely that of conferring jurisdiction to an international court or tribunal, MFN clauses have been applied in the past, including by the International Court of Justice, as instruments to allocate adjudicatory authority between different dispute settlement bodies. There is no reason to treat the adjudicatory authority exercised by an investment treaty tribunal differently from that of any other domestic or international court or tribunal. Understanding the issues in this broader perspective, that of allocating adjudicatory authority, also shows that the distinction between substance, on the one hand, and dispute settlement procedure and jurisdiction, on the other, is a distinction that has no bearing on the issue at stake. Rather, the allocation of adjudicatory authority between domestic courts and international arbitral tribunals is a question relating to access to justice and thus ultimately a question of substantive investment protection.

First, already the way in which Douglas frames the functioning and effect of an MFN clause is misleading. The issue in the present context is not whether the jurisdiction of an investment treaty tribunal can be 'expanded', 'modified'

[30] The notion of adjudicatory authority is used primarily in the context of private international law to manage competing claims of jurisdiction of domestic courts of different States. See Arthur T. von Mehren, *Adjudicatory Authority in Private International Law – A Comparative Study* (Martinus Nijhoff 2007). It is equally useful, however, in the present context as investment treaty tribunals are often an alternative to dispute settlement in domestic courts. Questions of jurisdiction in investor-State dispute settlement thus have to be seen against the background of competing claims to exercise adjudicatory authority by domestic courts and investment treaty tribunals.

[31] This view relies on the understanding that investment treaty tribunals are (also) functional substitutes for the otherwise competent domestic courts of the host State. It thus breaks with the more traditional perspective to understand the relationship between international courts and tribunals and domestic courts as modeled on dualism and separation and aims at a more integrated vision of investment law as international public law. See Stephan Schill, 'International Investment Law and Comparative Public Law – An Introduction', in Stephan Schill (ed), *International Investment Law and Comparative Public Law* (2010), 3, at 10–17. On the different ways to conceptualize the relationship between national and international courts see Yuval Shany, *Regulating Jurisdictional Relations between National and International Courts* (2007) at 78–106.

or 'amended' after an investor has initiated an arbitration.[32] Instead, the issue is whether jurisdiction itself can be grounded on the more favourable consent given by the host State in the third-country BIT to investors covered under that treaty in connection with the MFN clause in the basic treaty. The issue, in other words, is not whether a jurisdictional agreement based on the dispute settlement provisions of the basic treaty can be retroactively amended, but whether the MFN clause itself, in connection with the broader consent in another BIT, constitutes a title of jurisdiction. Once understood and framed in this way, there is no question of the MFN clauses changing the rules of the arbitration to the detriment of the respondent State, breaching the fundamental principle of equality of the parties.[33] The Tribunal in *Renta 4 v Russia* expressed this point clearly when it observed:

> To be clear: the Claimants are not seeking to establish that Russia breached an obligation under the basic treaty (the Spanish BIT) by failing *explicitly* to grant to Spanish investors the same access to international arbitration as the access the Claimants say is enjoyed by Danish investors. The question is instead simply whether [the MFN clause] of the Spanish BIT evidences Russia's consent that this Tribunal's jurisdiction should have an ambit beyond that of [the basic treaty's dispute settlement clause].[34]

The issue thus is whether the investment treaty tribunal has adjudicatory authority under the MFN clause, not whether it can extend its adjudicatory authority granted under the dispute settlement provisions of the basic treaty by means of the MFN clause after the dispute has been initiated.

The reason, and this leads to my second point, why Douglas frames the issue as one of retroactively changing the jurisdictional basis of an investment treaty tribunal is that he has a different understanding of the effect of MFN clauses. He claims that '[t]he MFN clause does not, in truth, operate to "incorporate" provisions of a third treaty so that all that remains for a tribunal to do is to interpret the amended text of the basic treaty'.[35] Instead, in his view, 'the more favourable treatment granted in a third treaty must be claimed *through* the MFN clause in the basic treaty'.[36] MFN treatment, for Douglas, then is merely a right that needs to be claimed and asserted through the MFN clause in the basic treaty.[37] Actually receiving the more favourable treatment, in turn, for Douglas is a remedy flowing from an otherwise internationally wrongful act.[38] This view of the effect of MFN clauses, however, is contradicted by how both the ICJ and the ILC have expressed their understanding of the functioning and

[32] This is the central assumption of Douglas (n 1), at 102–08.
[33] In this sense, however, Douglas (n 1), at 104.
[34] *Renta 4 SVSA et al v The Russian Federation*, SCC No. 24/2007, Award on Preliminary Objections, 20 March 2009, para 83 (emphasis in the original).
[35] Douglas (n 1), at 105.
[36] ibid, at 106 (emphasis in the original).
[37] ibid, at 107.
[38] ibid.

effect of MFN clauses. Thus, the ICJ clarified in *Rights of Nationals of the United States of America in Morocco* that, before the more favorable treatment extended to third countries by Morocco had ceased, 'the United States *acquired* by virtue of the most-favoured-nation clauses, civil and criminal consular jurisdiction in all cases in which United States nationals were defendants'.[39] The effect thus was that the more favorable treatment was extended *ipso iure* to the United States. The effect of the MFN clause was that civil and criminal consular jurisdiction was vested in the United States, not that the United States only had a claim against Morocco to be granted such jurisdiction.

Similarly, Article 9(1) of the ILC Draft Articles provides that 'the beneficiary State *acquires*, for itself or for the benefit of persons or things in a determined relationship with it',[40] the more favourable treatment accorded to third States or their nationals. Article 9(1) of the Draft Articles, as well as all other Articles in the ILC Draft relating to the position of the beneficiary of an MFN clause, stipulate that the effect of the clause is for the beneficiary to *acquire* the more favourable treatment. This suggests that, by virtue of the operation of the MFN clause, the beneficiary State not only has a claim to any more favourable rights, but title to such more favorable treatment.[41] In fact, the ILC Commentary clarifies that '[t]he effect of the most-favoured-nation process is, by means of the provisions of one treaty, to attract those of another'.[42] Most notably, Article 20 of the Draft Articles stresses that the 'rights of the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, to most-favoured-nation treatment . . . arises at the moment when the relevant treatment is extended by the granting State to a third State or to persons or things in the same relationship with that third State'.

The underlying mechanism is thus one of automatic extension of the substance of the more favourable treatment, not merely a contract-like obligation to be granted that treatment. This means that the beneficiary under the basic treaty can rely on the more favorable treatment *ipso iure* without any additional act of transformation.[43] Furthermore, although MFN clauses constitute inter-State obligations, they directly extend the more

[39] *Rights of Nationals of the United States of America in Morocco (France v United States)*, Judgment, 27 August 1952, ICJ Reports 1952, 176, at 190 (emphasis added).

[40] Emphasis added.

[41] See Arts 9(2), 10(1) and (2), 11, 12, and 13 of the ILC Draft Articles on MFN Clauses.

[42] See *ILC Report of the 30th Session* (n 20), at 30, para 11.

[43] Similarly, *Renta v Russia* (n 34), para 77 (observing that '[t]he third-party treaty is incorporated by reference into the basic treaty without any additional act of transformation'). Note that the ICJ decision in *Anglo-Iranian Oil Company (United Kingdom v Iran)*, Judgment, 22 July 1952, ICJ Reports 1952, 93, at 107–10, cannot be read as reflecting the principle that a tribunal is prevented from interpreting the MFN clause and from basing its jurisdiction on it. The decision in *Anglo-Iranian Oil Company* does not require that an international court or tribunal, in order to interpret an MFN clause and to base its jurisdiction upon it, has jurisdiction over the clause under the jurisdictional provisions of the treaty that contains the MFN clause; nor does it stand for the proposition that MFN clauses could not constitute a jurisdictional basis for an international court or tribunal. What the decision in *Anglo-Iranian Oil Company* stands for is the proposition that MFN clauses cannot circumvent jurisdictional requirements that are part of the constitutive foundation of the dispute settlement

favourable treatment to covered investors in the context of investment treaties. An investor covered by a BIT with an MFN clause therefore can immediately invoke the benefits granted to third-party nationals by another BIT of the host State; henceforth they govern as the relevant treatment imported by the MFN clause its relations with the host State. The technical effect of an MFN clauses, provided that its scope applies to more favourable consent to arbitration, then is that the investor covered by the basic treaty can accept a more favorable offer to arbitrate made by the host State vis-à-vis investors covered under a different BIT. The MFN clause thus has the effect of broadening the scope of offerees *ratione personae* of the offer to arbitrate made in the third-country BIT.[44] The arbitral tribunal thus constituted receives its jurisdictional mandate not from the dispute settlement provisions in the basic treaty. Instead, it is constituted based on the consent to arbitrate given by the host State in the third-country treaty which the investor covered under the basic treaty can accept through the operation of the MFN clause. The investor is thus not limited to claiming breach of MFN treatment under the basic treaty in the context of arbitration proceedings initiated under the basic treaty's dispute settlement provisions as Douglas considers.

Third, once it is settled that MFN clauses allow an investor to immediately rely on any more favorable benefits granted to investors under the host State's third-country BITs, the issue must be considered whether the MFN clause in question actually applies to the more favorable procedural or jurisdictional treatment the investor from the third country receives. This issues goes to the *ejusdem generis* principle contained in Article 9(1) of the ILC Draft Articles. In this context, as most MFN clauses relatively neutrally, or inconclusively, refer to 'treatment', much will depend on whether 'treatment' can be understood to encompass a host State's consent to arbitration under a third-country BIT. Douglas is right when he states that one should 'not pretend that a tribunal's mandate in any given reference is confined to consulting a dictionary on the meaning of the word "treatment".'[45] Notwithstanding, the word 'treatment' is sufficiently broad to encompass more favourable procedural and jurisdictional requirements.[46] Yet, a literary approach remains inconclusive, and indeed many tribunals, just as Douglas himself, invoke various reasons, or rather interpretative presumptions, that arguably constitute context for the interpretation of neutrally worded MFN clauses and are viewed as militating against their application to issues of jurisdiction. I will here only deal with the one reason

institution seized. These constitutive foundations in *Anglo-Iranian Oil Company* were limitations established by the Statute of the International Court of Justice. See Schill (n 14), at 192–93.

[44] ibid, at 181.

[45] Douglas (n 1), at 113.

[46] Schill (n 14), 174–5.

Douglas expands on in his article,[47] namely the distinction between 'substantive obligations in an investment treaty and the provisions creating a jurisdictional mandate for an international tribunal'.[48]

This distinction, for Douglas, is so fundamental as to conclude that substantive obligations and instruments addressing the jurisdiction of a court or tribunal are necessarily not *ejusdem generis*, thus excluding the application of MFN clauses as a basis of jurisdiction.[49] None of the authority he cites for this proposition, however, has any impact on the precise issue at stake: namely determining by recourse to general principles of treaty interpretation the scope *ratione materiae* of the MFN clause in question. Thus, the judgment by the ICJ in the *Armed Activities* case, relied upon by Douglas,[50] simply reaffirms that the jurisdictional mandate of an international court or tribunal requires a State's consent. Nothing else is the purpose of determining the scope *ratione materiae* of an MFN clause in the exercise we face. Likewise, the severability doctrine, which Douglas invokes to illustrate the fundamental difference between substantive obligations and arbitration agreement,[51] is inconclusive in the present context. This doctrine has been developed to safeguard the jurisdictional mandate of a contract-based arbitral tribunal against attacks challenging the validity of the contract that contains the arbitration clause. It simply has no bearing for determining what is *ejusdem generis* in respect of the subject-matter scope of an MFN clause. Instead, that more favourable treatment relating to dispute settlement can, in principle, be included within the subject-matter scope of an MFN clause, is also confirmed if we consider that most MFN clauses explicitly include exceptions for benefits stemming from customs unions or double taxation treaties. Among the benefits granted by such instruments undoubtedly also are benefits relating to dispute settlement.[52]

The substance-procedure distinction, however, is also little convincing if we think about MFN clauses, in the present context, as instruments allocating adjudicatory authority. In that context, access to an arbitral tribunal that a host State grants to investors from third countries under their BIT is not different from granting access to a limited class of investors to any other dispute settlement mechanism, whether domestic or international, whether in a permanent court or before a one-off arbitral tribunal. Access to arbitration, in this context, is simply one form of granting access to justice. Consenting to arbitration vis-à-vis investors from one country, but not from another then is no different from setting up two different court systems, with different

[47] For the rejection of other interpretative presumptions see ibid, at 176–7, 184–7; see further Maupin (n 3), at 175–88.
[48] Douglas (n 1), at 104.
[49] ibid, at 102–4.
[50] ibid, at 103.
[51] ibid.
[52] See *Austrian Airlines v The Slovak Republic*, Final Award, 9 October 2009, Separate Opinion of Charles N Brower, at para 5.

procedures, different judges, and differences in how the respective proceedings develop, one for investors from country A and one for investors from country B. In consequence, what appears as a part of the jurisdictional mandate of an investment treaty tribunal, namely consent to arbitration, is nothing else than granting access to justice more generally. MFN clauses, in this context, merely require that no differentiation in regard of such access is made because of the nationality of the claimant. While consent to arbitration constitutes the jurisdictional mandate of an investment treaty tribunal, and thus also imposes restrictions on the power of that tribunal, by consenting to arbitrate the host State also affords investors access to justice and thereby substantive treatment. In that sense, the consent to arbitrate is not only addressed to the arbitral tribunal,[53] but also to the other contracting party of a BIT and its investors.

That access to arbitration and access to justice in regular courts is functionally equivalent, and thus constitutes substantive treatment afforded by the host State, becomes clear when we look at the jurisprudence of the European Court of Human Rights, which has held that the implied guarantee in Article 6(1) of the European Convention on Human Rights for individuals to have access to courts,[54] can be satisfied by a Member State by submitting to arbitration. Thus, in *Lithgow v United Kingdom*, the Court observed that

> the word 'tribunal' in Article 6 para. 1 (art. 6-1) is not necessarily to be understood as signifying a court of law of the classic kind, integrated within the standard judicial machinery of the country . . .; thus, it may comprise a body set up to determine a limited number of specific issues, provided always that it offers the appropriate guarantees.[55]

A Member State of the Convention, in other words, can fulfil its obligation to grant access to justice under Article 6(1) of the Convention by consenting to arbitration. From the perspective of Article 6(1), in other words, arbitration is an equivalent to dispute settlement in a domestic court. Consenting to arbitration in this perspective hence is a form of affording affected individuals the treatment they are entitled to receive under the Convention's substantive obligation to be granted access to justice.

Finally, Zachary Douglas also interprets the practice of international and domestic courts on whether MFN clauses can serve as a jurisdictional basis in a very limited fashion. While it is true that before the decision in *Maffezini v Spain* no international court or tribunal has based its jurisdiction on the operation of an MFN clause, this lack of precedent is by no means a reason to suggest that *Maffezini v Spain* breaks with the general principles of

[53] This however is the view of Douglas (n 1), at 104.

[54] *Golder v United Kingdom*, Judgment, 21 February 1975, ECHR Series A No. 18, at paras 28–36; recently confirmed in *Cudak v Lithuania*, Judgment, 23 March 2010, at para 54.

[55] *Lithgow and Others v United Kingdom*, Judgment, 8 July 1986, ECHR Series A No 102, at para 201; recently confirmed in *Regent Company v Ukraine*, Judgment, 3 April 2008, at para 54.

international law relating to the interpretation and application of MFN clauses.[56] Instead, if one views the decision of an arbitral tribunal to base its jurisdiction on an MFN clause as one form of allocating adjudicatory authority between different dispute settlement bodies, there is plenty of evidence in international and domestic court decisions to conclude that MFN clauses indeed can have the very effect Douglas denies.

Most importantly, in *Rights of Nationals of the United States of America in Morocco* the ICJ was to interpret a provision in a treaty between the United States and Morocco that provided for MFN treatment with respect to commerce in Morocco.[57] Under treaties with Great Britain, Morocco, *inter alia*, had granted to Great Britain 'consular jurisdiction in all cases, civil and criminal, when British nationals were defendants'.[58] The ICJ concluded that, when Great Britain was granted such benefits, '[a]ccordingly, the United States acquired by virtue of the most-favoured-nation clauses, civil and criminal consular jurisdiction in all cases in which United States nationals were defendants'.[59] Even though MFN treatment in this context concerned the grant of jurisdiction to the authorities of a foreign State to the detriment of Moroccan courts, the ICJ's reasoning is equally applicable to granting jurisdiction to an arbitral tribunal in lieu of the domestic courts or other adjudicatory bodies of another State. The ICJ held precisely that an MFN clause could serve as an instrument to allocate adjudicatory authority—the same issue that is at stake when an investment treaty tribunals assumes jurisdiction based on reliance of an investor on the MFN clause in the basic treaty in connection with the broader consent given by the host State under a third-country BIT.

What is more, the ICJ's decision in this regard is in line with a significant number of decisions by domestic courts, including the highest courts in France, Italy, Argentina, and the United States. These courts all accepted that consular jurisdiction could be extended, based on MFN clauses, contained in commercial treaties to the representative of a foreign sovereign in the host State.[60]

[56] See Douglas (n 1), at 101–2.

[57] *Rights of Nationals of the United States of America in Morocco (France v United States)*, Judgment, 27 August 1952, ICJ Reports 1952, 176, at 190. Article 14 of the Treaty provided:

> The commerce with the United States shall be on the same footing as is the commerce with Spain, or as that with the most favored nation for the time being; and their citizens shall be respected and esteemed, and have full liberty to pass and repass our country and seaports whenever they please, without interruption.

Article 24 of the Treaty provided in relevant part that 'it is further declared, that whatever indulgence, in trade or otherwise, shall be granted to any of the Christian powers, the citizens of the United States shall be equally entitled to them'.

[58] ibid.

[59] ibid.

[60] Walid Ben Hamida, 'Clause de la Nation la Plus Favorisée et Mécanismes de Règlement des Différends: Que Dit l'Histoire?', 134 J Droit Int'l (2007) 1127, at 1151–3 (with discussion of the case law of domestic courts). Similarly, domestic courts have accepted the application of MFN clauses in respect of other matters relating to procedure and jurisdiction. See ibid, at 1153–4.

There is, in other words, plenty of evidence that MFN clauses in international treaties can function so as to allocate adjudicatory authority even before the ICSID tribunal in *Maffezini v Spain* allowed the investor-claimant not only to shorten a waiting period, but to circumvent the requirement to litigate in domestic courts for 18 months before turning to international arbitration. Douglas does not take account of this practice, when he states that never before the *Maffezini* case had an international court found MFN clauses to apply to questions of jurisdiction.[61]

In sum, the jurisprudence of national and international courts therefore supports the argument that MFN clauses can encompass aspects of dispute settlement and jurisdiction under more favorable third-party treaties. Consequently, there is no reason to approach the application and interpretation of MFN clauses restrictively and limit the clauses to the incorporation of more favorable substantive rights. In sum, unlike suggested by Zachary Douglas, the *Maffezini* case and its progeny do not represent a departure from the hitherto existing conception of the function of MFN clauses in international law. Overall, the practice of the ICJ and of domestic courts confirms that MFN clauses have also been viewed as instruments to allocate adjudicatory authority. Nothing else is done by investment treaty tribunals who apply MFN clauses to serve as a title of jurisdiction for their own adjudicatory mandate. General principles of law justify such an interpretation provided the clause's subject matter encompasses the issue in question.

## 4. *Conclusion*

My statement of faith on the operation of MFN clauses, as becomes apparent from the preceding discussion, is that I align, in terms of interpretative methodology, at least from the outset, with the 'it depends'-school, Zachary Douglas criticizes as unprincipled. Yet, I do not subscribe to the motives Douglas suggests are the reason for why that schools follows a 'BIT by BIT'-approach. Instead, as regards the objectives of consistency, coherence, and principled reasoning I have the same outlook as Douglas. Investment treaty tribunals have to interpret investment treaties and MFN clauses, and should reason their decisions, against the background of international law generally as

[61] Douglas (n 1) at 101–2. A strict separation between substance and procedure was also not drawn by the Commission of Arbitration in the *Ambatielos Claim (Greece v United Kingdom)*, UNRIAA, Vol XII (1963), 101, at 107 (observing that 'it cannot be said that the administration of justice, in so far as it is concerned with the protection of these rights, must necessarily be excluded from the field of application of the most-favoured-nation clause, when the latter includes "all matters relating to commerce and navigation"'). Similarly in the context of the national treatment standard in Article III(4) GATT *United States-Section 337 of the Tariff Act of 1930*, GATT Panel Report, 7 November 1989, at para 5.10 (holding that 'enforcement procedures cannot be separated from the substantive provisions they serve to enforce. If the procedural provisions of internal law were not covered by Article III:4, contracting parties could escape the national treatment standard by enforcing substantive law, itself meeting the national treatment standard, through procedures less favourable to imported products than to like products of national origin'.).

well as investment treaty practice and arbitral jurisprudence more specifically. At the same time, they have to pay close attention whether the BIT at issue follows the general pattern of BIT practice or diverges from it.

More fundamentally, however, I disagree with Douglas on the possibility of MFN clauses to serve as a basis of jurisdiction for investment treaty tribunals. In my view, Douglas is mistaken in his perception that MFN clauses could not have direct effect to the benefit of investors covered under the basic treaty. Provided that this is part of the subject-matter of MFN clauses, they extend *ipso iure* any more favorable consent given by the host State to investors covered under third-country BITs. The evidence that this is the function of MFN clauses is solid, with both the ICJ and the ILC having made affirmative statements to that effect. With this premise falling, Douglas' argument of general principles of law militating for the 'no school' collapses. It can of course be upheld as an interpretative choice made, or a preference given, regarding the interpretation of MFN clauses, but it cannot be presented as following from the general principles of law as enshrined in the jurisprudence of international and domestic courts.

Let me conclude with a statement on my own underlying ideological preferences for a broad application of MFN clauses, provided the text of the MFN clause at issue so permits. My general support for the 'yes school' is by no means a pro-investor choice. Rather, it is a choice pro-international law and pro-international dispute settlement at the expense of settling disputes in domestic courts. In addition, it is a testimony to taking non-discrimination of foreign investors seriously. In my view, it makes no differences whether investors of different nationality are treated according to different substantive standards, such as granting fair and equitable treatment to some, but not all foreign investors, or full compensation for expropriation to some, but not all foreign investors, or whether investors of different nationality do not enjoy the same scope of access to dispute settlement, whether in domestic court or in investment treaty arbitration. Both differences in substantive and procedural treatment can have equally harmful effects and contravene the objective of MFN treatment, namely to "maintain at all times fundamental equality without discrimination among all of the countries concerned."[62] Procedural inequalities may unsettle the level-playing field among foreign investors that MFN clauses aim at creating.[63] Such inequalities should not be accepted lightly.

Furthermore, the potentially broader access to arbitration connected to the wider interpretation of neutrally worded MFN clauses has, in my view, positive effects in enhancing compliance of States with investment treaty obligations. After all, investment treaty arbitration is not only a mechanism to resolve

[62] *Rights of Nationals of the United States of America in Morocco (France v United States)*, Judgment, 27 August 1952, ICJ Reports 1952, 176, at 192.
[63] See Schill (n 14), at 180–2.

disputes between foreign investors and States, but also a mechanism to make States comply with their obligations under international investment treaties. A broader interpretation of such MFN clauses, in particular with respect to jurisdictional issues, therefore makes BITs more efficient and effective in governing international investment relations. This accords with the structure of international law and the most fundamental duty it imposes on States, namely to comply with its international obligations.[64]

The reason why I support the 'yes school' in interpreting neutrally worded MFN clauses is therefore not driven by a pro-investor approach to international investment law, but by the conviction that broader compliance with international law, adherence to international dispute settlement procedures, and ultimately observance of the rule of law are values worth pursuing in investment treaty arbitration. These objectives, however, do not justify departing from the strictures and methods international law imposes on international dispute settlement and on the interpretation and application of investment treaties. Faithfulness to these methods with the aim of upholding the legitimacy and authority of international law is what unites international lawyers in their common enterprise beyond differences about the proper application and interpretation of certain norms of international law, including the application of MFN clauses as a title of jurisdiction of an investment treaty tribunal. Ultimately, and here Zachary Douglas and I seem to agree, a possible future *jurisprudence constante* and an emerging consensus among States as expressed in their treaty practice has to clarify and settle this vexed and heavily contested point. Until that is the case, a critical consideration of the various arguments and a debate about underlying preferences is necessary. Disagreement, in that context, will move the debate forward and bring about better results.

[64] See ibid, at 182–4.