instrument to expand the scope of the ISDS system (based on more favorable provisions found in third-party treaties), there are clear signs in recent investment treaties of the willingness to curtail the use of the MFN provision as a way to extend the procedural and substantive protections of investors. This seems to be the current position, for example, of both the United States and the European Union (EU). Third, when it comes to the apparent disappearance of the absolute standards of treatment in some of the treaties being negotiated by the European Union (such as with Japan), this is more simply due to a question of the nature of the EU external competence in commercial matters. In its recent opinion on the EU-Singapore FTA, the Court of Justice of the EU has determined that the EU does not have *exclusive* competence to conclude agreements covering non-FDI and ISDS. The EU has thus responded to such opinion by splitting investment protection (with ISDS) from the rest of the trade agreement, thus keeping investment liberalization (including market access and national treatment) in the latter. In this way, while the trade agreement will fall under the exclusive competence of the EU, the former will still require ratification by each member state. While it is not clear whether the backlash vis-à-vis investment protection and ISDS in some quarters within some of the member states will eventually lead to the end of EU investment treaties, a decision in this sense has not yet been taken by EU institutions.

IV.

Julian Arato

So far, we have been focusing on NT—but what about MFN? In trade MFN has proven less problematic, though its importance for regional integration is paramount. But in investment, MFN has been extremely impactful and controversial. Can you elaborate on the typical controversies regarding importation, as well as the new debate on MFN clauses?

Remarks by Simon Batifort*

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In international investment law, some MFN claims mirror the use of MFN in international trade law. Other MFN claims are more expansive and controversial.

MFN clauses in trade agreements are typically invoked in connection with benefits, such as preferential tariffs, that have a concrete impact on the day-to-day flow of goods and services among economic actors. Investors sometimes invoke MFN clauses in investment treaties in a similar way: in the ICSID arbitration *Parkerings v. Lithuania*, for example, a Norwegian operator of parking garages complained that Lithuania had denied it permission to build its facility on a given site whereas it had authorized a Dutch investor in like circumstances to build on the same site. The notion that investors can invoke MFN clauses in connection with such concrete benefits resulting from state measures is not controversial, although it is not always easy to demonstrate that other investments in like circumstances in fact received better treatment.

But claimants in investment treaty arbitration have also invoked MFN clauses in an entirely different manner, arguing that MFN allows them to "import" or "incorporate" into the applicable treaty any provisions contained in other investment treaties entered into by the respondent state. Thus, investors have argued that MFN clauses allow them to disregard the dispute settlement provisions of the applicable treaty, disregard the provisions defining its scope of application (e.g. the definition of "investor"), ignore the absence of a given standard of treatment or any limitations

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placed on such a standard in the applicable treaty, compose what is effectively a "fantasy treaty" by mixing and matching any jurisdictional provisions and standards of treatment they like in the universe of treaties entered into by the respondent state , and then invoke that "fantasy treaty" to claim damages from the state in arbitration proceedings. This is not an isolated strategy—it has become a standard argument advanced by claimants in almost every investment treaty arbitration.

Unlike the first use of MFN clauses mentioned above, this second use is very controversial. The controversy has for a long time focused on the so-called "*Maffezini* issue" of whether claimants should be entitled to use MFN clauses to import jurisdictional provisions, as distinguished from substantive standards of treatment. In 2000, the tribunal in *Maffezini v. Spain* allowed the claimant to brush aside the dispute settlement provisions of the applicable investment treaty and rely instead on allegedly more favorable dispute settlement provisions contained in a third-party treaty. Since then, numerous tribunals have rendered conflicting decisions on this issue, and many commentators have voiced divergent opinions on the appropriateness of this use of MFN.

Meanwhile, the use of MFN clauses to import substantive standards of treatment has generally been treated as unremarkable. Many arbitral tribunals have allowed claimants to use MFN to import standards of treatment, such as fair and equitable treatment (FET), from one investment treaty to another. However, they have generally provided very little or no justification for this practice, and have appeared to rely on an assumption that all MFN clauses allow such importation. Moreover, very few scholars have analyzed this issue, and the commentaries that do touch upon it are generally limited to noting that the importation of substantive provisions is uncontroversial.

However, as my co-author and I argued in an article published in the *American Journal of International Law* in 2018, the conventional wisdom that all MFN clauses permit the importation of substantive standards of treatment is not justified.[1] We recalled that since MFN is a treaty-based standard and not a customary international law norm, it is necessary to verify in each case that the MFN clause in the applicable treaty permits this type of importation, in accordance with the normal rules of treaty interpretation. We also pointed out that MFN clauses in investment treaties come in a wide variety, and they rarely if ever provide expressly that investors are entitled to invoke standards of treatment contained in other investment treaties. Instead, their scope is usually defined through terms such as "treatment" and "in like circumstances." Like national treatment provisions, the scope of such MFN clauses may well be limited to addressing actual state measures affecting concrete economic interests—i.e., the first use of MFN clauses discussed above—rather than importation of treaty provisions, whether substantive or jurisdictional. In support of our view, we also pointed to three sets of materials that have often been overlooked: (1) the first published arbitral award, rendered in 2016 in *İçkale v. Turkmenistan*, finding that an MFN clause could not be used to import any substantive provisions from other treaties; (2) the repeated opposition of the three NAFTA states to the claimants' attempts in specific investment arbitrations to use MFN to import standards of treatment, as set forth in the states' briefs and non-disputing party submissions; and (3) the wording of several new treaties, such as the EU-Canada CETA, that clarify "for greater certainty" that importation of substantive or procedural provisions is impermissible. Based on the foregoing, we argued that MFN importation of substantive standards can no longer be treated as uncontroversial, and we called for a fundamental reconsideration of this issue.

[1] 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). *See also 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,"* 112 AJIL UNBOUND 38 (2018).

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Our call for a new debate coincided with recent efforts by international organizations to alert states about the MFN importation issue. UNCTAD has characterized the MFN clause as "a crucial provision for IIA reform" and has laid out various options available to states to address it, including omitting the MFN clause from investment treaties altogether, or limiting its use to nationality-based discrimination resulting from state measures.[2] The OECD Secretariat has also placed the issue of "MFN shopping"—as it calls it—on its agenda, and organized a conference for states and other stakeholders in March 2018 to discuss the policy implications of this practice.[3] As I explained at that conference, it is easy to understand why states are reacting against "MFN shopping." Apart from the significant cost of litigating this issue in case after case in investment treaty arbitration, the alleged benefits of MFN importation are dubious, and seem to boil down to the position that rules that favor investors are always better, all the time, and in all circumstances. Indeed, proponents of MFN importation usually argue that this practice is beneficial because it results in harmonization of investment protection. But in this context, "harmonization" is a euphemism for the maximization of investment protection, which few states (if any) view as the overriding objective of the international investment regime. That issue is particularly salient with respect to new treaties: why would the EU and Canada negotiate detailed dispute resolution provisions and calibrated standards of treatment in the CETA, and then allow investors to disregard this carefully crafted package by invoking MFN? Moreover, there is no reason to analogize the disparate standards of treatment in investment treaties to discriminatory tariffs in the trade context, as proponents of MFN importation sometimes do. While discriminatory tariffs can have serious *ex ante* effects on trade, the availability or absence of a given standard of treatment in an investment treaty—whose application to a particular case is known only *ex post*, after a dispute arises—is different in nature.

To conclude, the real question today regarding MFN clauses in investment treaties is whether states, tribunals, and scholars will engage in a fundamental reconsideration of the issue of MFN importation. I believe there are clear signs that we are going in that direction.

V.

Julian Arato

It seems as though some states are catching on that there is a problem here—with using MFN to bootstrap extraneous treaty protections into a BIT. However, states have seemed to differ in how far to go toward addressing it. Can you elaborate on some of the recent approaches to constraining MFN in recent marquee regional treaties?

Emi Nagaoka

There are very interesting differences in how the "tailored" MFN clause is drafted in the JEEPA and the CETA. Both the second sentence of CETA paragraph 4 of Article 8.7 (MFN) and JEEPA paragraph 5 of Article [x4 (MFN)] as of today (April 5, 2018)[1] are related to importing substantive

[2] UNCTAD's Reform Package for the International Investment Regime 29–31 (Dec. 2017).

[3] See the background materials prepared by the OECD Secretariat for the 4th Annual Conference on Investment Treaties, *Treaty Shopping and Tools for Treaty Reform*, at 9–11, *available at* http://www.oecd.org/daf/inv/investment-policy/4th-Annual-Conference-on-Investment-Treaties-agenda.pdf.

[1] Paragraph 4 of Article 8.7(MFN) of the CETA reads as follows:

> 4. [] Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute "treatment", and thus cannot give rise to a breach of this Article, *absent measures adopted or maintained by a Party pursuant to those obligations*.

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protections from the other IA to the CETA or the JEEPA, and both clauses articulate conditions on that importation as well. That condition of the CETA MFN is considered stricter than that of the JEEPA MFN. The reason is as follows.

What is remarkable on the CETA MFN is the last line, which reads "absent measures adopted or maintained by a Party pursuant to those obligations," which holds that substantive protections from the other IA can be imported in so far as the actual measures to the investments and/or investors of non-party (who are the investors of the party under the other IA) are adopted or maintained, in other words, the actual measures and actual investments and/or investors under the other IAs must exist when importing substantive protections from the other IAs to the CETA.

On the other hand, when it comes to the JEEPA MFN, what is remarkable is the footnote 4, which reads: "For greater certainty, the entrepreneurs (if in other IAs, 'investors') [] or covered enterprises (if in the other IAs, 'covered investments') would be entitled to receive such treatment (in other words, substantive protections of the other IAs), even in the absence of enterprises (investments) when the comparison is made," which holds that substantive protections from the other IA can be imported even though the actual measures and actual investments and/or investors under the other IAs do not exist when importing substantive protections from the other IAs to the JEEPA.

Simon Batifort

I would point to a couple of other notable examples in recent practice, starting with India's approach to MFN clauses in investment treaties. In the *White Industries* arbitration, India was forced to pay damages based on a controversial interpretation of a standard of treatment—"effective means"—that did not appear in the applicable treaty, but which the tribunal had allowed the claimant to import through MFN. India subsequently omitted MFN from its revised model investment treaty. India also addressed MFN clauses in past treaties by proposing a draft interpretive statement to its treaty partners, which in some cases led to the conclusion of joint interpretive statements. India's draft interpretive statement clarifies that MFN clauses cannot be used to import either procedural or substantive provisions, and that such clauses are limited to addressing state measures that discriminate among investments in like circumstances.

Another interesting example is the MFN clause in the CPTPP. It clarifies that MFN cannot be used to import more favorable dispute settlement provisions, but does not expressly address the issue of importation of substantive standards of treatment. However, this does not necessarily mean that it allows such importation. Indeed, the MFN clause in the CPTPP is almost identical to the MFN clauses in NAFTA and in the recent CETA, and the states party to those treaties—which include states that are also party to the CPTPP (e.g. Canada)—often have firmly opposed

Paragraph 5 of Article [x4 (MFN)] of the JEEPA, text presented on the European Commission's website as of December 8, 2017, under the legal scrubbing procedure, reads as follows:

> 5. Substantive provisions in other international agreements concluded by a Party with a non-Party (FN3) do not in themselves constitute "treatment" under this Article. For greater certainty, actions or inactions of a Party in relation to such provisions can constitute treatment (FN4) and thus can give rise to establishing a breach of this Article to the extent that the breach is not established solely based on the said provisions.
>
> (FN3) For greater certainty, the mere transposition of such provisions into domestic legislation does not change their qualification as international law provisions and consequently their coverage under this paragraph.
>
> (FN4) *For greater certainty, the entrepreneurs of the other Party or their covered enterprises would be entitled to receive such treatment even in the absence of enterprises established by entrepreneurs of the non-Party at the time when the comparison is made*.

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importation of standards of treatment via MFN. It is likely that at least some of those states (and probably others) do not view the MFN clause in the CPTPP as allowing any form of "MFN shopping," regardless of the lack of an express clarification.[1]

VI.

Julian Arato

What do you think accounts for the different evolutions of the non-discrimination doctrine in trade and investment law? Is it a matter of mentality? Or do you find that fundamental differences in the trade and investment regimes may account for the different approaches/problems cropping up with non-discrimination across these fields?

Jennifer Thornton

The member states of the WTO established the international trade regime to advance their collective, macroeconomic welfare through the elimination of both tariff and non-tariff barriers to market access for goods and services. Trade disputes are inherently political—governments decide which ones to bring after weighing the interests of competing domestic constituencies, as well as when to come into compliance with an adverse decision from the WTO. Accordingly, elected officials from the member states are frequently engaged in the WTO's dispute resolution process at every phase of the proceedings.

In contrast, governments created the international investment regime to address microeconomic problems experienced by individual investors seeking to mitigate risk when they invest abroad, as well as to signal that their economies are hospitable to foreign investment. Governments designed the regime with a view to depoliticizing investment claims and eliminating the need for their espousal. For this reason, governments empowered ISDS tribunals with the authority to issue only certain kinds of remedies and retained for themselves the right to refuse to modify measures deemed non-compliant with their commitments.

For these reasons, governments may have contemplated greater scrutiny of domestic measures by the WTO than of comparable measures by ISDS arbitration panels simply because they envisioned additional political checks on the WTO dispute-resolution process. Notwithstanding this fact, persistent criticism of the level of deference accorded to governments when adopting domestic public welfare measures in both dispute resolution mechanisms remains.

[1] Certain states party to the CPTPP have adopted schedules in which they have reserved the right "to adopt or maintain a measure that accords differential treatment to countries under any bilateral or multilateral international agreement in force or signed prior to the date of entry into force" of the CPTPP. *See, e.g.*, CPTPP, Annex II, Schedule of Canada. While there is no published arbitral decision interpreting this kind of reservation, Canada has argued that the similar schedule it included in Annex IV of NAFTA "simply takes an exception for treatment given, for example by way of regulatory measures, under a provision of a pre-NAFTA BIT" and that "[t]his exception does not open the door to 'standard shopping' in all BITs post-NAFTA." Chemtura Corporation v. Government of Canada, Canada's Rejoinder, para. 239 (UNCITRAL July 10, 2009).

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