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Working Paper on GATS Negotiations on Domestic Regulation:

Could a Foreign Investor Use GATS Disciplines in a BIT Claim?

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This paper is a preliminary effort to identify issues for discussion and further analysis. It presents the views of the authors and does not represent Georgetown University or our collaborators. We will revise this paper as we receive comments. To send comments or request subsequent versions of this paper, please contact Robert Stumberg at stumberg@law.georgetown.edu.

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Could a Foreign Investor Use GATS Disciplines in a BIT Claim?

Abstract

The World Trade Organization is negotiating "disciplines" on domestic regulation that could be more powerful than negotiators realize. They could transform the GATS, the General Agreement on Trade in Services, into the first trade agreement that foreign investors enforce through claims against governments for hundreds of millions of dollars. If so, the magnitude of disputes could change the course of development for a small state or a vulnerable economy.

The proposed GATS disciplines create legal obligations for how governments must treat investors with a commercial presence. Many WTO-member nations already have bilateral investment treaties (BITs) with each other, which means that service suppliers affected by the proposed disciplines are also protected as foreign investors under a BIT. They can bring claims directly against governments under BITs, but not through WTO dispute settlement. Could a foreign investor use GATS disciplines to strengthen a BIT claim? Some types of BIT clauses are designed to incorporate law from outside the BIT. These include obligations to provide "more favorable treatment" if it exists outside the BIT, compliance with "any obligation" pertaining to investment, and treatment "no less favorable" than that provided outside the BIT.

BIT arbitrators may choose to interpret some of these clauses according to their ordinary meaning. Thus, investors could claim that when a WTO member breaches a GATS discipline, it also breaches the BIT. Negotiators and their governments should analyze this BIT risk and consider their options to clarify or avoid the most far-reaching interpretations of the proposed disciplines.

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Summary

The World Trade Organization is negotiating "disciplines" on domestic regulation that could be more powerful than negotiators realize. They could transform the GATS, the General Agreement on Trade in Services, into the first trade agreement that foreign investors enforce through claims against governments for hundreds of millions of dollars. If so, the magnitude of disputes could change the course of development for a small state or a vulnerable economy.

Many WTO-member nations already have bilateral investment treaties (BITs) with each other, so the same service suppliers affected by the proposed disciplines are also protected as foreign investors under the BIT. Foreign investors can bring claims directly against governments under BITs, but not under WTO agreements. The number of new BITs has grown dramatically in the last two decades, as have investor claims against nation states. This paper explores the possibility that if the WTO adopts the proposed disciplines, investors may be able to use them in their BIT claims to win monetary damages from governments.

Many of the proposed GATS disciplines are analogous to investor protections under BITs as interpreted by arbitration tribunals. Disciplines in the current draft that could strengthen an investor's BIT claim include requirements that domestic regulations must be pre-established, based on objective and transparent criteria, and relevant to the supply of the services to which they apply. These proposed disciplines are ambiguous, with a likely meaning that would significantly depart from the practice of most nations. Investors could incorporate new disciplines into a BIT claim using one of several approaches.

1. *Directly incorporating a WTO obligation.* The first three approaches would directly incorporate GATS disciplines for purposes of seeking monetary compensation through BIT arbitration. We see three types of BIT clauses that foreign investors might be able to use:
   a. *A more-favorable-treatment (MFT) clause*, which typically incorporates treatment under domestic or international law that is "more favourable" than the BIT.
   b. *An umbrella clause*, which typically incorporates "any obligation" with regard to investments.
   c. *A most favored nation (MFN) clause*, which assures treatment no less favorable than that provided to a third-party investor (assuming that the host country is a GATS member). Even if an investor cannot use an MFN clause to enforce GATS disciplines directly, investors have used the clause to reach a broadly worded umbrella clause in another BIT of the same country.
2. *Interpreting a BIT obligation.* This approach would use GATS disciplines indirectly as evidence to support the investor's interpretation of a BIT standard of treatment. Investors have used WTO rules and decisions to interpret BIT obligations under National Treatment. Investors might also be able to use GATS disciplines as evidence to support their interpretation of the minimum standard of treatment (MST) under a BIT, including fair and equitable treatment.

This paper analyzes the first three direct approaches, which appear with a wide variety of language. Some apply only to specific investors, and some have explicit exceptions for international agreements. Many, however, are open-ended in their wording. Investors could claim that when a government breaches a GATS discipline, it also breaches the BIT's more-favorable-treatment, umbrella, or MFN clause, and this would allow the investors to strengthen a claim for monetary damages.

Only a subset of the 2,600 BITs contain clauses that are open enough in their wording to allow incorporation of the GATS disciplines by arbitrators. But if they do, MFN treatment would make them available to investors from most BIT countries. Negotiators should analyze this BIT risk and consider their options to clarify or avoid the most far-reaching interpretations of the proposed disciplines.

Could a Foreign Investor Use GATS Disciplines in a BIT Claim?

I. Introduction: The WTO verges into investment law

A. Purpose of this paper

There are over 2,600 bilateral investment treaties (BITs).[1] They exist outside the realm of the World Trade Organization (WTO). Although most countries with BITs are WTO members,[2] investment agreements like BITs have been largely irrelevant to trade law. Now in the drafting stage, however, is a set of WTO trade "disciplines" that verge into international investment law.

Under the WTO's General Agreement on Trade in Services (GATS),[3] the Working Party on Domestic Regulation (WPDR) is negotiating new disciplines to govern how a member state may regulate foreign service suppliers with a commercial presence in its territory. If there is a BIT between the host state and their home state, those service suppliers are protected as foreign investors. This overlap in coverage means the GATS disciplines may interact with BITs in unpredictable ways that could adversely affect domestic regulation of services. This paper raises questions about the BIT-GATS connections on three levels:

- Foreign investors can claim money damages from the host state for breach of a BIT. If the WTO adopts the proposed disciplines, could investors use them in their BIT claims?[4]
- What types of BIT clauses might expose a country to risk of such claims?
- Does the WPDR have options to manage the risk?

This paper is a preliminary effort to identify issues that deserve further examination. The remainder of part I introduces the legal context and the significance of the questions we raise, followed by our methodology for analyzing whether investors could use GATS disciplines directly in their BIT claims. In part II, we analyze three possible ways to incorporate GATS obligations into a BIT: Using a more-favorable-treatment (MFT) clause, an umbrella clause, and a most-favored-nation (MFN) clause. We then summarize some potential impacts on governments if investors make the claims we describe. In part III, the paper concludes with

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[1] United Nations Conference on Trade and Development [UNCTAD], Recent Developments in International Investment Agreements: IIA Monitor No. 3, at 2, U.N. Doc. UNCTAD/WEB/DIAE/IA/2009/8, *available at* http://www.unctad.org/en/docs/webdiaeia20098_en.pdf [hereinafter UNCTAD, Monitor No. 3]. UNCTAD maintains a searchable database of BITs, which contains over two thirds of existing BITs, at http://www.unctadxi.org/templates/DocSearch____779.aspx.

[2] *See* WTO: Understanding the WTO - Members, *available at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

[3] GATS: General Agreement on Trade in Services*,* Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, 284 (1999), 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994), *available at* http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm (last visited February 10, 2010) [hereinafter GATS].

[4] For discussion of *why* investors may seek to draw on the disciplines to strengthen their BIT claims, see Loukas Kozonis, *"Pre-Established" Regulations & Development Permits*, Harrison Institute for Public Law, Working Paper (forthcoming, 2010) and Max Levin, *"Pre-Established" Regulations and Financial Services*, Harrison Institute for Public Law, Working Paper (forthcoming, 2010), discussing how certain of the disciplines may be interpreted as more protective of investors than similar provisions in some BITs.

questions for WPDR negotiators and their governments to consider before committing to the proposed GATS disciplines.

B. The BITs and GATS context

1. BITs and other investment agreements

BITs are formed "for the promotion and protection of foreign investments"; they have quietly but exponentially proliferated in the past fifty years.[5] While BITs are negotiated between two countries, there are other investment agreements that cover multiple countries, such as in the investment chapter of a free trade agreement (FTA).[6] The contents of BITs and FTA investment chapters are similar, so we refer to BITs as shorthand for both in this paper. One important feature of FTAs, however, is the enforcement mechanism available under many of them. Investors' home governments can raise tariffs against a host government for breach of the FTA, sometimes without the need for approval by a tribunal. Non-compliance with BIT awards may also prompt such a remedy under an FTA, which would increase the negative impact of a BIT arbitration loss.[7]

Reasons for a state to negotiate a BIT include: to secure rights for their citizens who invest in the BIT partner's territory; and to encourage new investments in their own territory from the BIT partner's citizens.[8] The second purpose is a subject of debate as studies diverge on whether a BIT (or an FTA) increases foreign investment.[9] Even if it does, the host government may not be able to benefit from the increase.[10]

Most BITs allow foreign investors to bring claims directly against host state governments through international arbitration. The number of new BITs has grown dramatically in the last two decades,[11] as have investor claims against nation states.

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[5] ANDREW NEWCOMBE & LLUIS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT §§ 1.30, 1.50 (2009); UNCTAD, The Entry into Force of Bilateral Investment Treaties, U.N. Doc. UNCTAD/WEB/ITE/IIA/2006/9, *available at* http://unctad.org/en/docs/webiteiia20069_en.pdf.

[6] *See, e.g.*, chapter 11 of NAFTA, North American Free Trade Agreement [NAFTA] Ch. 11, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

[7] Won-Mog Choi, *The Present and Future of the Investor-State Dispute Settlement Paradigm*, 10 J. Int'l Econ. L. 725, 740-41 (2007).

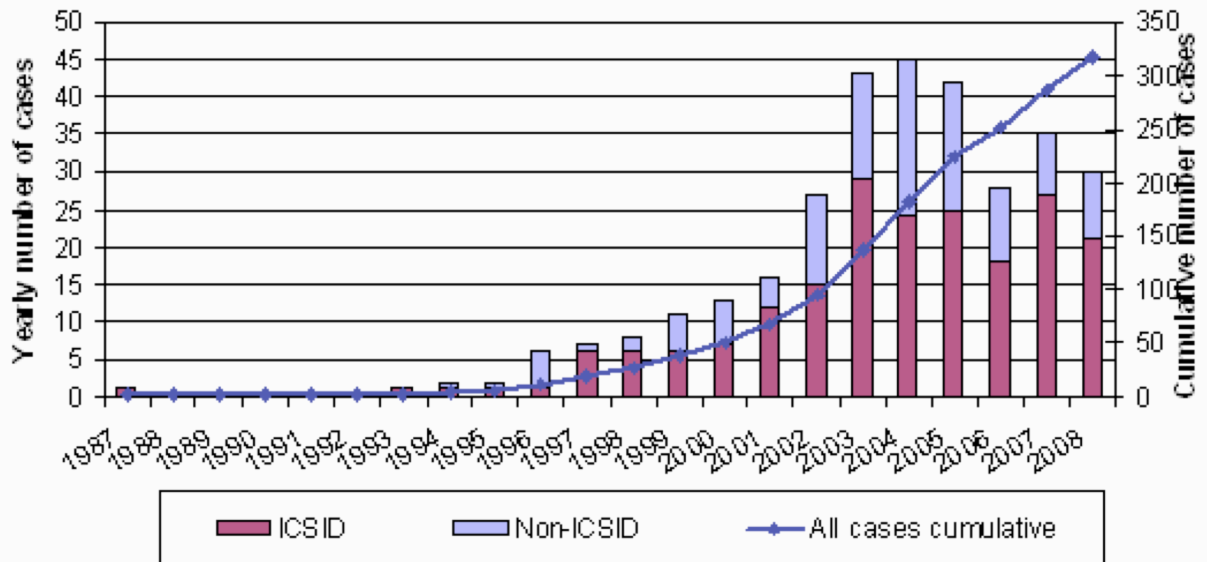
[8] NEWCOMBE & PARADELL, *supra* note 5, § 1.30.

[9] *See, e.g.,* Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit…and They Could Bite* (The World Bank, Policy Research Working Paper Number 3121, 2003); *but see* UNCTAD, The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries 37, U.N. Doc. UNCTAD/DIAE/IA/2009/5.

[10] BITs often limit the ability of the host country to require technology transfer and require the free repatriation of profits. *See, e.g.*, the 2004 U.S. Model BIT; UNCTAD, The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries 39, U.N. Doc. UNCTAD/DIAE/IA/2009/5.

[11] NEWCOMBE & PARADELL, *supra* note 5, § 1.45; UNCTAD, Monitor No. 3, *supra* note 1; UNCTAD, Latest Developments in Investor-State Dispute Settlement: IIA Monitor No. 1, at 2, U.N. Doc. UNCTAD/WEB/DIAE/IA/2009/6/Rev1 [hereinafter UNCTAD, Monitor No. 1]; GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 32 (2007).

Investment Disputes
BITs and other Investment Agreements[12]



BITs cover a wide range of defined investments, including enterprises that have a commercial presence in the territory of the host nation.[13] Rudolf Adlung and Martin Molinuevo recently addressed this overlap:

> "The relevance of BITs in governing international trade in services, as captured by mode 3, is obvious, given that more than 60 per cent [sic] of world FDI [foreign direct investment] stocks (2004) pertain to service-related investments."[14]

BITs provide broad investor protections such as "fair and equitable treatment," which has been interpreted to require numerous elements of the GATS disciplines, such as transparency, a stable regulatory environment, and objectivity in application to multiple parties.[15]

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[12] UNCTAD, Monitor No. 3, *supra* note 1, at 2. ICSID, the International Centre for Settlement of Investment Disputes, provides a framework for investor-state arbitration. *See* http://icsid.worldbank.org.

[13] NEWCOMBE & PARADELL, *supra* note 5, § 1.51

[14] Rudolf Adlung and Martin Molinuevo, *Bilateralism in Services Trade: Is There Fire Behind the (BIT-)Smoke?* 4 (WTO Economic Research and Statistics Division, Staff Working Paper ERSD-2008-01).

[15] *See* IOANA TUDOR, THE FAIR AND EQUITABLE TREATMENT STANDARD IN THE INTERNATIONAL LAW OF FOREIGN INVESTMENT, Appendix VII (2008); Chris Yost, *A Case Review and Analyses of Legitimate Expectations Principle as it Applies within the Fair and Equitable Treatment Standard* 7-18, ANU College of Law Research Paper No. 09-01, http://ssrn.com/absractid=1364996.

2. **GATS disciplines on domestic regulation**

The proposed GATS disciplines cover domestic regulation of investments, and their purpose is "to facilitate trade in services."[16] This aligns with the purpose of BITs (to promote and protect foreign investment): some foreign investments provide trade in services, and GATS defines "trade in services" to include any business establishment that is subject to domestic regulation through its commercial presence in that country.[17] Renato Ruggiero, when Director General of the WTO, described the wide scope of the GATS in 1998:

> "It offers all the benefits which the GATT for 50 years has provided for goods trade, the most essential of which is the stability provided by a system of law and the binding commitments on market access which Member governments have assumed in their national schedules. Stability makes long term planning possible, and in service industries where direct investment in the market is often the only way to deliver the service efficiently, this is critical. But the GATS provides guarantees over a much wider field of regulation and law than the GATT; *the right of establishment and the obligation to treat foreign service suppliers fairly and objectively in all relevant areas of domestic regulation extend the reach of the Agreement into areas never before recognized as trade policy.*"[18] (emphasis added)

The WTO's seminal training course on GATS stated the point directly: "The GATS is the first multilateral agreement containing obligations on the treatment of foreign investors. It does not cover investment policies per se *but does to the extent that they relate to the supply of services*."[19] (emphasis added)

Investment lawyers are aware of the potential for using trade disciplines, notably under GATS, to support their BIT claims. Gaetan Verhoosel observes that "Foreign investors are often also traders. Approximately one-third of global trade takes place intra-firm, i.e., between [corporations and their subsidiaries] in another country. When a government measure affects trade between such subsidiaries, it may very well upset the business of an 'investment' by a 'foreign investor.'"[20] The BIT-GATS connection is not just based on overlapping coverage, but also on "pervasive disciplines on how States and their agencies should prepare, adopt and apply domestic regulations . . ."[21]

Many of the proposed GATS disciplines are analogous to investor protections under BITs, as interpreted by BIT arbitration tribunals.[22] For example, three disciplines that could

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16 WPDR Room Document, Draft Disciplines on Domestic Regulation Pursuant to GATS Article VI:4, Informal Note by the Chairman, (March 20, 2009) ¶ 2 [hereinafter Draft Disciplines].

17 GATS, *supra* note 3, art. I.2(c) (mode 3, commercial presence), art. XXVIII(d) (definition of commercial presence).

18 Renato Ruggiero, "Towards GATS 2000 – a European Strategy" (Address to the Conference on Trade in Services, Brussels, June 2, 1998), *available at* http://www.wto.org/english/news_e/sprr_e/bruss1_e.htm.

19 The World Trade Organization: A Training Package. Services: GATS. (WTO, 1999), *excerpted in* Allison Burrows, WTO Agreements: GATS18, Australia Dept. of Foreign Affairs and Trade, *available at* http://unstats.un.org/unsd/class/intercop/training/escap99/escap99-9.pdf.

20 Gaetan Verhoosel, *The Use of Investor-State Arbitration Under Bilateral Investment Treaties to Seek Relief for Breaches of WTO Law,* 6 J. Int'l Econ. L. 493, 494 (2003). Mr. Verhoosel is a BIT practitioner in the New York office of Debevoise & Plimpton and former staff member of the WTO's Legal Affairs Division in Geneva.

21 *Id.* at 494.

22 *See* Kozonis, *supra* note 4; Levin, *supra* note 4.

strengthen an investor's BIT claim are contained in paragraph 11 of the draft disciplines proposed by the Chair of the WPDR: "Measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards shall be pre-established, based on objective and transparent criteria and relevant to the supply of the services to which they apply."[23] All three of these proposed disciplines are ambiguous, with a likely meaning that would significantly depart from the practice of most nations.

(a) *Pre-established*
This one-word discipline could mean regulations must not apply retroactively, but it could also mean that regulations must be established before an investment began in order to apply to that investment. If the latter, then governments could face BIT claims when they attempt to update or reform a regulatory system.[24]

(b) *Based on objective criteria*
This discipline could simply mean that regulations must be rational, but it could also mean that regulations must not be subjective. If the latter, then governments could face BIT claims when regulators use "public interest" standards or multiple criteria that require balancing of competing interests.[25]

(c) *Relevant to the supply of a service*
Relevance could be intrinsic (e.g., quality or capacity to perform) or extrinsic (e.g., impact on the environment or community) to the service. While the extrinsic meaning is a common basis for regulation of utilities and environmental services, the intrinsic meaning reflects the text of GATS art. VI:4,[26] and it could support challenges to regulations that go beyond the quality of a service or the supplier's ability to supply the service.[27]

This paper focuses on the BIT connections to these proposed GATS disciplines on domestic regulation. However, we do not mean to suggest that other GATS obligations such as transparency or market access could not come within the reach of a BIT.[28]

[23] Draft Disciplines, *supra* note 16, ¶ 11.

[24] *See* Kozonis, *supra* note 4; Levin, *supra* note 4.

[25] *See* Jonathan Allen & Robert Stumberg, *GATS proposal that domestic regulations must be "objective,"* Harrison Institute for Public Law (March 1, 2007) (on file with author).

[26] GATS art. VI.4 provides that " . . . [The] disciplines shall aim to ensure that [domestic regulations] are, *inter alia*:
(a) based on objective and transparent criteria, such as *competence and the ability to supply the service*;
(b) *not more burdensome than necessary to ensure the quality of the service*;
(c) in the case of licensing procedures, not in themselves a restriction on the supply of the service." (emphasis added)

[27] *See* Orly Caspi, *LNG Facility Siting & GATS Negotiations: The Impact of GATS Domestic Regulation Rules on State & Local Authority*, Harrison Institute for Public Law (May 25, 2006) (on file with author).

[28] *See* Adlung & Molinuevo, *supra* note 14, at 21 (describing the importance of transparency obligations under GATS article III to foreign investors).

C. Overview of reasons for concern

WTO agreements are enforceable only through state-to-state claims in the Dispute Settlement Body.[29] Under that system, if a government enacts a domestic regulation that breaches a discipline, remedies could consist of retaliatory trade sanctions by other governments until the offending measure is changed. However, because of the overlap between the nascent GATS disciplines and the existing network of BITs, individual investors harmed by a regulation could use the disciplines as supporting evidence or as a direct basis for BIT claims. If successful, each investor's claim could result in monetary damages against the government. As Adlung and Molinuevo point out: "[D]ispute settlement mechanisms under investment treaties have been invoked far more frequently than their WTO counterpart. While the latter was used for no more than a handful of services-related disputes since the WTO/GATS entry into force . . . some 100 such cases were brought under investment treaties over the same period."[30]

Arbitrators look to the text of treaties to interpret their terms. The lack of clear definitions in the disciplines for terms like "pre-established" and "relevant to the supply of a service" will allow claimants to assert unpredictable and creative interpretations.[31] Investors could use these terms to clarify or support investor protections in BITs. However, before investors can take advantage of the disciplines, they would have to establish a connection between BITs and GATS.

D. Methodology for Connecting BITs and GATS

1. BIT options for incorporating GATS disciplines

BITs include numerous clauses that investors have successfully used to incorporate law from outside the BIT. Based on these precedents, we have identified four approaches that investors could advocate to strengthen a BIT claim by incorporating GATS disciplines. In this paper, we analyze the first three, which take the most direct route.

(a) *Directly incorporating a WTO obligation*
This approach would directly incorporate GATS disciplines for purposes of seeking monetary damages through BIT arbitration. We see three types of BIT clauses that foreign investors might be able to use:

1) *A more-favorable-treatment (MFT) clause*, which typically incorporates treatment under domestic or international law that is "more favourable" than the BIT.[32]

2) *An umbrella clause*, which typically incorporates obligations "with regard to investments."[33]

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[29] Agreement Establishing the World Trade Organization [WTO], Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter WTO Dispute Settlement Understanding], *available at* http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf.

[30] Adlung & Molinuevo, *supra* note 14, at 17.

[31] Draft Disciplines, *supra* note 16, ¶ 11.

[32] NEWCOMBE & PARADELL, *supra* note 5, § 6.48.

[33] *See, e.g., Eureko BV v. Poland*, Partial Award and Dissenting Opinion, ad hoc UNCITRAL arbitration, IIC 98 (2005); *see also SGS Société Générale de Surveillance SA v Philippines*, Decision on Objections to Jurisdiction and Separate Declaration, ICSID Case No. ARB/02/6, IIC 224 (2004).

3) *A most-favored-nation (MFN) clause,* which assures treatment no less favorable than that provided to a third-party investor (assuming that the host country is a GATS member).[34] Even if an investor cannot use an MFN clause to enforce GATS disciplines directly, investors have used the clause to reach a broadly worded umbrella clause in another BIT of the same country.[35]

(b) *Interpreting a BIT obligation*
This fourth approach would use GATS disciplines indirectly as evidence to support the investor's interpretation of a BIT standard of treatment. Investors have used WTO rules and decisions to interpret BIT obligations under National Treatment.[36] Investors might also be able to use GATS disciplines as evidence to support their interpretation of the "minimum standard of treatment" (MST) under a BIT, including a common BIT provision requiring "fair and equitable treatment."[37]

2. Rules for interpreting treaties

(a) *Steps of analysis*
The method for determining whether a BIT clause can or cannot be used to directly incorporate the GATS disciplines is outlined by article 31 of the Vienna Convention on the Law of Treaties:[38]

"A treaty shall be interpreted in good faith in accordance with the ordinary meaning of the terms of the treaty in their context and in light of its object and purpose."[39] Thus, when determining the scope of a BIT clause, our steps of analysis are:

1) First, determine the ***ordinary meaning*** of the terms used in the clause in their context, and

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[34] *See, e.g., Maffezini v. Spain*, Award, ICSID Case No. ARB/97/7, IIC 86 (2000); *Siemens AG v. Argentina*, Decision on Jurisdiction, ICSID Case No. ARB/02/8, IIC 226 (2004); *MTD Equity Sdn Bhd and MTD Chile SA v. Chile* [MTD v. Chile], Award, ICSID Case No. ARB/01/7, IIC 174 (2004); *see also* Emmanuel Gaillard, *Establishing Jurisdiction Through a Most-Favored-Nation Clause*, 231 N.Y.L.J. 3 (2005).

[35] *See* MTD v. Chile, Award, *supra* note 34.

[36] *E.g.*, *SD Myers Inc. v. Canada*, Partial Award, ¶¶ 244-46, 291-93, ad hoc UNCITRAL arbitration, IIC 249 (2000); *Pope & Talbot Inc. v. Canada*, Award on the Merits of Phase 2, ¶¶ 45-63, ad hoc UNCITRAL arbitration, IIC 193 (2001).

[37] *See* Claimant Methanex Corporation's Counter-Memorial on Jurisdiction, § III.A.1, *Methanex v. United States,* Ad Hoc—UNCITRAL Arbitration Rules, IIC 166 (2001).

[38] "The first task of the Tribunal is to rule on the controversies existing in this respect by indicating what constitutes the true construction of the Treaty's relevant provisions in conformity with the sound universally accepted rules of treaty interpretation as established in practice, adequately formulated by l'Institut de Droit International in its General Session in 1956, and as codified in Article 31 of the Vienna Convention on the Law of Treaties." *Asian Agricultural Products Ltd. v. Sri Lanka*, Final Award on Merits and Damages, ¶ 38, ICSID Case No. ARB/87/3, IIC 18 (1990); see also the jurisprudence of international courts such as the Permanent Court of International Justice, International Court of Justice, the World Trade Organization's Dispute Settlement Body or the European Court of Human Rights, which treat the rules set forth by the Vienna Convention without any doubt as general, or customary international law; *see generally* RICHARD GARDINER, TREATY INTERPRETATION (2008).

[39] Vienna Convention on the Law of Treaties art. 31.1, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. Similar rules of treaty interpretation can be found in other instruments. *See, e.g.,* the 1935 Harvard Draft Convention on the Law of Treaties; see generally the International Law Commission's work on the law of treaties.

2) Second, check that the apparent ordinary meaning conforms to the ***object and purpose of the BIT***. If the ordinary meaning remains ambiguous, analyze the BIT'***s*** object and purpose in order to resolve the ambiguity.[40]

(b) *Ordinary meaning of clauses*
Before comparing specific clauses, we set the stage by reviewing a commonly used version of each type of clause.

The traditional steps to establish the ordinary meaning of terms are to (1) use a dictionary and (2) "contextualize" the treaty language by reading those terms as part of a complete sentence, a complete article, or a complete document.[41]

1) *The dictionary definitions of key terms*
The first step is to look at dictionary definitions of terms common to each type of clause. Any interpretation of a treaty clause should not contradict the plain meaning of its key terms. For example, a term common to all three types of clauses is investment. This term is different from the others we will examine: BIT parties often agree on definitions of "investment" and "investor" and include these definitions in the BIT text. They do this to clarify what the BIT covers and who can bring a claim under it. These definitions are far more detailed than the dictionary definition, but they conform to it:

Investment

1st meaning:	The investing of money (now also time or effort); an instance of this.
2nd meaning:	An amount of money invested. Also, anything in which money, etc. is or may be invested.[42]

We define other key terms that appear in each type of clause below, in the analysis section.

2) *The ordinary meaning of terms in context*
According to Article 31.2 of the VCLT, the relevant context is composed of the text, preamble, annexes, and any other agreement relating to the treaty between the same parties.[43] In terms of the text, the most helpful provisions are likely to be:

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40 NEWCOMBE & PARADELL, *supra* note 5**,** § 2.27; *see, e.g., Asian Agricultural Products Ltd. v. Sri Lanka*, *supra* note 38, at ¶ 40.

41 *See* Isabelle Van Damme, *Article 31 of the VCLT and 'Textualism'*, http://opiniojuris.org/2009/03/02/6904/.

42 Oxford English Dictionary (5th Ed.) [hereafter OED].

43 Art. 31.2 of the VCLT provides:
The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

- Terms of a clause that define or limit its reach.[44]
- Apart from the clause itself, exceptions or limits on the scope of other clauses that incorporate law that is external to the BIT (e.g., MFN or national treatment).
- The negotiating history of the BIT, if applicable (e.g., earlier drafts of the BIT).

(c) *The object and purpose of the BIT*
The object and purpose of most bilateral investment treaties is "the encouragement and reciprocal protection of investment."[45] This raises the question of how GATS defines the analogous scope of coverage through commercial presence (mode 3):[46]

1) GATS Article I.2(c): "For the purposes of this Agreement, trade in services is defined as the supply of service . . . by a service supplier of one Member, through ***commercial presence*** in the territory of any other Member."[47]
2) GATS Article XXVIII(d): "commercial presence" means any type of business or professional establishment, including through
    a) the constitution, acquisition or maintenance of a juridical person, or
    b) the creation or maintenance of a branch or a representative office, within the territory of a Member for the purpose of supplying a service.[48]

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[44] *E.g.*, Belgium-Malta BIT (1987) article 8(1): "Where a dispute arises between an investor of one of the Contracting Parties and the other Contracting Party affecting an investment of the former and relating to a matter with respect to which the latter has undertaken an obligation in favour of the other Contracting Party under this Agreement, such a dispute shall in the first instance be dealt with in pursuit of local remedies, unless some other method, including arbitration, has been agreed between the investor and the Contracting Party."

[45] S*ee generally* NEWCOMBE & PARADELL, *supra* note 5, § 2.29; in Eureko v. Poland, the arbitral tribunal said: "The context of Article 3.5 is a Treaty whose object and purpose is "the encouragement and reciprocal protection of investment," a treaty which contains specific provisions designed to accomplish that end, of which Article 3.5 is one." *See, e.g.,* the Netherlands-Poland BIT, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/netherlands_poland.pdf; *see also* the United States-Argentina BIT (1991), *available at* http://www.pca-cpa.org/upload/files/10%20US-Arg%20BIT.pdf.

[46] Adlung and Molinuevo suggest that BITs relate to GATS mode 3 (commercial presence) and perhaps to mode 4 (movement of natural persons). Adlung & Molinuevo, *supra* note 14, at 6. However, it is conceivable that foreign investors could have "investments" that do not require a commercial presence as defined by GATS. Examples include use or licensing of intellectual property, contracts for supply of a service, a franchise agreement, an import-export license, or an investment agreement prior to establishment of a commercial presence.

[47] GATS, *supra* note 3, art. I.2(c),

[48] *Id*., art. XXVIII(d).

II. Analysis

This paper addresses the question: Can a foreign investor use GATS disciplines in a BIT claim? As noted in part I:D, there are four approaches that investors could use to incorporate GATS disciplines.[49] This paper analyses the first three approaches, which entail direct incorporation of a WTO obligation. First we look at a textual comparison of more-favorable-treatment clauses, examining their plain language and their BIT context. Next, we do the same with umbrella clauses, then the same with MFN clauses. After examining the text, we examine the object and purpose of these three types of clauses and of BITs in general. Finally, we discuss potential impacts raised by this analysis.

A. More-Favorable-Treatment Clauses

More-favorable-treatment clauses instruct arbitrators to apply rules derived from sources outside the BIT if those rules obligate the host government to grant more favorable treatment to foreign investments than the BIT does. The history of investment arbitration is short and still developing, and there have been no claims based on this type of clause yet. Not much has been written about more-favorable-treatment clauses. There is not even an accepted term for them, so we use "more favorable treatment" following the example of one treatise.[50] The lack of discussion of these clauses may be partly because there is significant variation in the wording, placement within the BITs (including appearances in combination with other clauses), and the apparent purpose of the clauses. The examples included below represent only some of the wide variety. Some of them seem likely to support a claim based on GATS rules, and others seem to exclude the possibility of such a claim. Most, however, fall in between those extremes and provide no certainty in predicting a claim's success or failure.

More-favorable-treatment clauses in BITs often appear under the heading, "Application of Other Rules."[51] When arbitral tribunals interpret a broad more-favorable-treatment clause, they must decide which rules are applicable. They could interpret the clause literally to refer to any rules about treatment of investments, which could include the GATS disciplines. Or they could interpret the clause restrictively, as if to read in "only domestic regulations or specific contracts with investors." In some cases, arbitrators must also determine whether the phrase, "such rules shall prevail over this agreement," means that (a) they should apply the rules, or (b) they should avoid interference with application of the rules in another forum (e.g., WTO dispute settlement actions or domestic courts).

This section applies the method sketched in part I:D to a range of more-favorable-treatment clauses. In order to understand whether any such clause may encompass GATS rules, we will first look at the ordinary meaning of key terms and then compare various more-favorable-treatment clauses in their BIT context.

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[49] *See also* Mahnaz Malik, *The Expanding Jurisdiction of Investment-State Tribunals: Lessons for Treaty Negotiators* (International Institute for Sustainable Development, Issues in International Investment Law: Background Papers for the Developing Country Investment Negotiators' Forum — Singapore, October 1–2, 2007) (advising caution for BIT negotiators based on previous examples of incorporating contract disputes into BIT claims).

[50] NEWCOMBE & PARADELL, *supra* note 5, § 6.48.

[51] *See, e.g.*, China-Oman BIT (1995) article 11; Greece-Argentina BIT (1999) article 8; Guatemala-Czech Republic BIT (2003) article 10.

1. Dictionary definitions of key terms

More-favorable-treatment clauses are often similar to this one, from the United Kingdom-Mexico BIT (2006):

"If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain rules, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by this Agreement, such rules shall to the extent that they are more favourable prevail over this Agreement."[52] (emphasis added)

We start with the Oxford English Dictionary (5th Edition) to define the key terms: "obligation," "entitle," "investment," and "treatment."[53]

Obligation

1st meaning:	The action of constraining oneself by promise or contract to a particular course of action; a mutually binding agreement. Also, the course of action, etc. to which one commits oneself, a formal promise.
2nd meaning:	(Law) A binding agreement committing a person to a payment or other action; the document containing such an agreement, a written contract or bond. Also, the right created or liability incurred by such an agreement.
3rd meaning:	Moral or legal constraint; the condition of being morally or legally bound; the constraining power of a law, duty, contract, etc. An act or course of action to which a person is morally or legally obliged; what one is bound to do; a duty; an enforced or burdensome task or responsibility.

Entitle

1st meaning:	To furnish (a person) with a 'title' to an estate. Hence generally to give (a person or thing) a rightful claim to a possession, privilege, designation, mode of treatment, etc. Now said almost exclusively of circumstances, qualities, or actions; formerly often of personal agents.
2nd meaning:	To qualify, render apt.
3rd meaning:	To assign the possession of something; to settle (an estate) on a person.
4th meaning:	To regard or treat (a person) as having a title to something. Hence, to represent (a person or thing) as the agent, cause, or subject of a particular action, effect, condition, or quality.

Investment

1st meaning:	The investing of money (now also time or effort); an instance of this.

[52] United Kingdom-Mexico BIT (2006), art. 24.

[53] OED, *supra* note 42.

2nd meaning: An amount of money invested. Also, anything in which money, etc. is or may be invested.

Treatment

1st meaning: Conduct, behavior; action or behavior towards a person, etc.; usage.

2nd meaning: Entertainment, feasting; an entertainment, banquet.

3rd meaning: Management in the application of remedies; medical or surgical application or service.

2. Ordinary meaning of "entitle"

One term common to a number of more-favorable-treatment clauses is "entitle," as in "obligations under international law . . . entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by this Agreement . . ."[54] (emphasis added) As noted above, the ordinary meaning of "entitle" can be to give an investor a "rightful claim" to a "mode of treatment."[55] Many trade agreements, including the GATS disciplines, do not allow claims by individuals for their breach; only member nations may bring claims to the WTO dispute settlement body. However, a member nation can lay claim to a mode of treatment specified in the disciplines on behalf of a private investor. This is an established practice in international law known as "espousing" the individual's claim.[56] This process could lead to an award in the WTO dispute settlement system affirming the investor's right to the level of treatment described in the disciplines. Consequently, although the GATS does not directly entitle an investor to bring a claim for mistreatment, the treatment specified in the disciplines is (through nation states) enforceable under the GATS.

In addition, the BIT clauses entitle investments, not investors, to more favorable treatment. This is significant because the remedy granted in a WTO dispute may be an instruction to improve the level of treatment granted to an investment (with noncompliance to result in retaliatory measures such as increased export tariffs), even though the investor who owns the investment has no direct mechanism to make a claim.[57]

3. Ordinary meaning of other terms in context

More-favorable-treatment clauses appear in various formulations in BITs. We compare some examples below, paying attention to common terms and the meaning of any potential limitations or exceptions.

(a) *United Kingdom-Mexico BIT (2006), Article 24*

> "If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain rules, whether general or specific, entitling

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[54] United Kingdom-Mexico BIT, *supra* note 52, art. 24.

[55] OED, *supra* note 42, "entitle," first meaning.

[56] WTO Dispute Settlement Understanding, *supra* note 29, art. 2.1; s*ee, e.g.*, Preliminary Objections ¶ 39, Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo) 2007 I.C.J. 103 (May 24).

[57] WTO Dispute Settlement Understanding, *supra* note 29, arts. 3.7, 22.1-3.

investments by investors of the other Contracting Party to a treatment more favourable than is provided for by this Agreement, such rules shall to the extent that they are more favourable prevail over this Agreement."[58] (emphasis added)

This is a typical more-favorable-treatment clause, which is broad enough to potentially incorporate the GATS disciplines. It mentions domestic legislation and obligations under international law as possible sources of more favorable treatment. As noted in part I:D:2, an "obligation" is a promise, a mutually binding agreement that conveys rights or liabilities.[59] This broad reference to international obligations established between the parties could encompass the GATS disciplines, unless "between the Contracting Parties" is taken to mean only bilateral obligations. But "bilateral" is not specified in the clause. The clause declares that rules from the types of sources mentioned shall prevail over the BIT rules, insofar as the rules from those sources are more favorable to the investor.

The clause mentions both general and specific provisions, so it is not limited to measures concerning only the investor in question. The explicit reference to existing or future agreements means that even if the BIT was signed before the GATS disciplines were contemplated, that would not prevent incorporation of the disciplines into the BIT.

(b) *Czech Republic-Bulgaria BIT (1999), Article 11*

"Should national legislation of the Contracting Parties or other specific contracts or present or future international agreements applicable between the Czech Republic and the Republic of Bulgaria or other international agreements, to which they are parties, contain regulations, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such regulation shall, to the extent that is more favourable, prevail over the present Agreement."[60] (emphasis added)

This more-favorable-treatment clause lists several possible sources of other rules, including present or future international agreements. Countries may argue that "international agreements" refers only to other investment agreements, but the presence of investment chapters in various trade agreements and other international agreements weakens that argument.[61] The GATS disciplines are an international agreement governing the treatment of foreign investments.[62]

As in the previous example, this clause indicates that the more favorable rules from other sources "shall . . . prevail" over the BIT. This could mean nothing more than an inability to overturn decisions in other fora based on those other rules that affect the BIT dispute. The title of the BIT article containing this clause and many others, however, is "Application of Other Rules." This may indicate a more active role for the tribunal: to apply the other rules to the BIT dispute rather than simply to refrain from interfering with

[58] United Kingdom-Mexico BIT, *supra* note 52, art. 24.

[59] OED, *supra* note 42, "obligation," first and second meanings.

[60] Czech Republic-Bulgaria BIT (1999), art. 11.

[61] UNCTAD Monitor No. 1, *supra* note 11, at 1.

[62] See the discussion of the ordinary meaning of "investments" in part II:B:2.

the operation of the outside rules. The imperative word "shall" also may support this active role for a tribunal.

(c) *China-Oman BIT (1995), Article 11*

"If the treatment to be accorded by one Contracting party to investors of the other Contracting party in accordance with its laws and regulations or other specific provisions is more favourable than that accorded by this Agreement, the more favourable treatment shall be accorded."[63] (emphasis added)

The source of the other rules to be applied using this more-favorable-treatment clause is more uncertain. Domestic regulations are mentioned, followed by "specific provisions." A tribunal could interpret this to mean only agreements or contracts between the specific investor and the host government; a number of other clauses indicate that meaning by discussing "specific provisions of contracts."[64] Alternatively, this clause could encompass specific provisions of international agreements as well. We saw in the clauses above that general or specific provisions of international agreements would apply, so the word "specific" here does not eliminate the possible reach to international agreements such as the GATS disciplines. Without additional detail, this clause leaves room for various interpretations.

The end of this clause uses stronger language than many other clauses. It declares that the more favorable treatment from sources outside the BIT "shall be accorded." Many other clauses simply provide that the other treatment shall "prevail" over the BIT,[65] which makes it plausible but not inevitable that the tribunal should apply the other rules directly in the BIT claim.

(d) *Belgium-South Africa BIT (1998), Article 7*

"1. If provisions in the legislation of either Contracting Party or in international agreements entitle investments by investors of the other Contracting Party to treatment more favourable than is provided for by this Agreement, the investors of the other Contracting Party shall be entitled to avail themselves of the provisions that are the most favourable to them, subject, however, to the provisions of paragraphs (4) and (5) of Article 3.

2. Each Contracting Party shall observe any obligation it has assumed with regard to investments in its territory by investors of the other Contracting Party." (emphasis added)

[Article 3:

(4) The provisions of paragraphs (2) and (3) shall not be construed and applied so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege which may be extended by the former Contracting Party by virtue of

[63] China-Oman BIT (1995), art. 11.

[64] *E.g.*, Guatemala-Czech Republic BIT (2003), art. 10.

[65] *E.g.*, United Kingdom-Mexico BIT, *supra* note 52, art. 24.

(a) an agreement establishing a free trade area, a customs union, a common market or a similar regional organisation; or
(b) any agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation.

(5) For the avoidance of doubt, it is confirmed that the principles provided for in paragraphs (2) and (3) of this Article shall apply to the provisions of Articles 1-11, but shall not be applicable in relation to special advantages, such as in the field of taxation, accorded to development finance institutions.][66]

Clause (1) is a more-favorable-treatment clause with a possibility of reaching GATS disciplines. There is an exception: the clause refers to part of article 3 of the BIT, quoted above. This is a common exception to BIT MFN clauses. It removes taxation measures and regional economic arrangements (e.g., the European Union treaties and some regional trade agreements) from the applicable outside rules. The exception does not carve out the GATS disciplines: they are international rather than regional, and they do not create any organization similar to the ones mentioned (such as a customs union).

The clause declares that investors "shall be entitled to avail themselves" of the other provisions. This could mean that investors may base their BIT claims on rules from outside the BIT, and that arbitrators may grant relief based on those rules. Alternatively, it could mean that investors are free to bring claims in other fora to enforce the other rules. The latter is unlikely, however, because the exception would seem superfluous in that case. In addition, the other clauses upon which the exception operates (MFN and MST clauses) are definitely legitimate bases for investor BIT claims. Applying the exception to this more-favorable-treatment clause along with those clauses indicates that investors can base BIT claims on this clause as well.

Clause (2) is a broad umbrella clause that could also potentially reach the disciplines, as we see in part II:B.

(e) *Guatemala-Czech Republic BIT (2003), Article 10*

"1. Where a matter is governed simultaneously both by this Agreement and by another international agreement to which both Contracting Parties are parties, <u>nothing in this Agreement shall prevent</u> either Contracting Party or any of its investors who own investments in the territory of the other Contracting Party from taking advantage of whichever rules are more favourable to his case.

2. If the treatment to be accorded by one Contracting Party to investors of the other Contracting Party in accordance with its laws and regulations or other <u>specific provisions of contracts</u> is more favourable than that accorded by the Agreement, the more favourable shall be accorded."[67] (emphasis added)

Clause (1) is an example of a "non-derogation" clause. These clauses are related to more-favorable-treatment clauses, but they are less protective of investors: Non-derogation clauses specify that nothing shall interfere with other rights of investors, but

[66] Belgium-South Africa BIT (1998), art. 7.

[67] Guatemala-Czech Republic BIT, *supra* note 64, art. 10.

do not necessarily provide a substantive right to make a BIT claim based on other rules.[68] More-favorable-treatment clauses arguably do provide a substantive right.

Clause (2) is a restrictive example of a more-favorable-treatment clause. It would not allow for incorporation of the GATS disciplines because the other rules to be applied only include domestic regulations of the host country and specific provisions of contracts.

To summarize, would certain types of more-favorable-treatment clauses enable investors to incorporate GATS disciplines into a BIT claim?

- ***Yes*** – Those that explicitly incorporate general international treaty provisions are most likely to allow investor claims based on the more-favorable-treatment clause to reference GATS disciplines. Examples: UK-Mexico BIT and Czech Republic-Bulgaria BIT.
- ***Ambiguous and open*** – Those with less explicit language about which other rules may apply, or whether an investor may make a BIT claim based on the clause. Examples: China-Oman BIT, Belgium-South Africa BIT.
- ***No*** – Those that explicitly cover only specific provisions of contracts and domestic regulations are not likely to allow investor claims based on the more-favorable-treatment clause to reference GATS. Example: Guatemala-Czech Republic BIT.

More-favorable-treatment clauses can appear in conjunction with umbrella clauses, and investors may submit claims based on all types of clauses simultaneously.

B. Umbrella Clauses

This part analyzes another type of clause that may be used to directly incorporate GATS disciplines into a BIT claim: the umbrella clause. As its name implies, an umbrella clause extends the scope of a BIT to cover a broader circle of law than the BIT's investor protections. Typical umbrella language obligates a BIT party to comply with "any obligation it may have entered into with regard to investment."[69] The question we analyze is whether a set of GATS disciplines, focused as they are on businesses with a commercial presence, is such an obligation with regard to investments. At the outset, we note that variations in these clauses may leave GATS in or out of the umbrella. Here are two contrasting examples:

- *US-Argentina BIT, Article II.2(c) (1994)*
  "Each Party shall observe <u>any obligation</u> it may have entered into with regard to investments."[70] This is what we refer to as a broad umbrella clause. There are no limits or qualifiers on the obligations that the umbrella covers.

- *Energy Charter Treaty (ECT), Article 10(1) (1994)*
  "Each Contracting Party shall observe any obligations it has entered into <u>with an Investor</u> or an Investment of an Investor of any other Contracting Party."[71] (emphasis added) This covers only obligations entered into with specific investors (e.g., contracts), which excludes more general legal obligations created by domestic or international law.

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[68] *See* NEWCOMBE & PARADELL, *supra* note 5, § 6.48.

[69] NEWCOMBE & PARADELL, *supra* note 5, § 9.8.

[70] United States-Argentina BIT, *supra* note 45, art. II.2(c).

[71] Energy Charter Treaty (1994) [ECT], art. 10(1).

When arbitral tribunals are faced with a broad umbrella clause, they have considerable latitude. They could interpret the umbrella literally to cover "any" obligation, which could include the obligation to comply with GATS disciplines. Or they could interpret the umbrella restrictively, as if to read in "obligations entered into with specific investors."

When applied to our more specific inquiry, the question becomes whether to read this clause literally, including obligations under GATS mode 3 in the umbrella's coverage; or to read it restrictively, deciding that obligations under GATS mode 3 are not covered.

This section applies the method sketched in part I:D to a range of umbrella clauses. In order to understand whether any umbrella clause may encompass obligations under GATS, we will look at:

- the dictionary definitions of key terms in BIT umbrella clauses;
- the ordinary meaning of key terms in BIT umbrella clauses;
- a comparison of BIT umbrella clauses in their BIT context; and
- in part D: the object and purpose of BIT umbrella clauses.

1. Dictionary definitions of key terms

Umbrella clauses usually refer to "any obligation [the host state] has entered into with regard to investments." The key terms are "any," "obligation," and "investment." Here are the Oxford English Dictionary (5th Edition) definitions.[72]

Any

1st meaning:	No matter which, of what kind, or how many.
2nd meaning:	A quantity or number of, however great, or however small.
3rd meaning:	Of any kind or sort whatever; one or some, however imperfect.

Obligation

1st meaning:	The action of constraining oneself by promise or contract to a particular course of action; a mutually binding agreement. Also, the course of action, etc. to which one commits oneself, a formal promise.
2nd meaning:	(Law) A binding agreement committing a person to a payment or other action; the document containing such an agreement, a written contract or bond. Also, the right created or liability incurred by such an agreement.
3rd meaning:	Moral or legal constraint; the condition of being morally or legally bound; the constraining power of a law, duty, contract, etc. An act or course of action to which a person is morally or legally obliged; what one is bound to do; a duty; an enforced or burdensome task or responsibility.

Investment

1st meaning:	The investing of money (now also time or effort); an instance of this.

[72] OED, *supra* note 42.

2nd meaning: An amount of money invested. Also, anything in which money, etc. is or may be invested.

2. Ordinary meaning of "investments" in umbrella clauses

The common reference point for umbrella clauses is that they cover obligations with regard to "investments." As noted above, the dictionary meaning of "investment" is quite broad: anything in which money is invested.[73] Virtually all BITs define "investment" to mean any kind of asset, which includes a business enterprise as well as legal rights or privileges, including licenses.[74]

For a BIT umbrella clause to reach GATS disciplines, GATS must cover the same kind of measures as BITs, which cover measures that affect "investments." As noted above, GATS covers measures that affect trade in services, including trade in the form of "commercial presence" (mode 3).[75] GATS defines "commercial presence" as "any type of business or professional establishment . . . within the territory of a Member for the purpose of supplying a service."[76] Commercial presence under GATS is squarely within the scope of investments covered by BITs.[77]

In addition to general coverage under GATS, the specific investment at issue in a BIT dispute must also be covered by the GATS disciplines. Otherwise, the disciplines would not be an "obligation" in terms of the umbrella clause. The scope of obligations under GATS disciplines is defined by two criteria:

(a) First, the measure must affect businesses within the service sectors where a host state has a GATS commitment for commercial presence (mode 3).[78] Mode 3 accounts for half of all trade covered by GATS.[79]

(b) Second, a measure must "[relate] to licensing requirements and procedures, qualification requirements and procedures, and technical standards . . ."[80]

Beyond these requirements, in order for an umbrella clause claim to incorporate the disciplines, the disciplines must plausibly fit into the meaning of "obligations" as that term appears in the particular BIT's umbrella clause.

3. Ordinary meaning of "obligations" and other terms

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73 OED, *supra* note 42, "investment," second meaning.

74 *See, e.g.,* U.S. Model BIT 2004, art. 1; United Kingdom-Cameroon BIT art. 1(a) (1985).

75 GATS, *supra* note 3, art. I.2(c).

76 GATS, *supra* note 3, art. XXVIII(d).

77 *See* Working Group on the Relationship between Trade and Investment, Communication from Japan (April 2003), *available at* http://www.international.gc.ca/assets/trade-agreements-accords-commerciaux/pdfs/W156-e.pdf. Note that mode 4, movement of natural persons, and possibly mode 1, cross-border supply, may also fall within the scope of some BITs.

78 *See* WTO country schedules of commitments, *available at* http://tsdb.wto.org/default.aspx.

79 Adlung & Molinuevo, *supra* note 14, n3.

80 Draft Disciplines, *supra* note 16, ¶ 2.

Umbrella clauses in BITs are common but not ubiquitous.[81] Where they exist, they take a variety of forms, which vary primarily in terms of how they describe the obligations that they cover. Here are some examples:[82]

(a) *Energy Charter Treaty (1994), Article 10(1)*

> "In no case shall such Investments be accorded treatment less favorable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party."[83] (emphasis added)

This article is notable because it contains a compelling minimum standard of treatment (MST) clause (mentioned briefly in part I:D) followed by an umbrella clause. In the first sentence (the MST clause), the ECT explicitly mentions adherence to treaty obligations; it leaves little doubt that under this investment agreement, the ECT, GATS disciplines would be part of the minimum standard of treatment the host nation must provide to investments. By contrast, the next sentence (the umbrella clause) explicitly refers to obligations with specific investors, which (a) reinforces the broader reach of the previous sentence, and (b) distinguishes this narrow umbrella from a broad umbrella in the next example.

(b) *Finland-Philippines BIT (1999), Article 5*

> "If the legislation of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to this Agreement contain a regulation, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favorable than is provided for by this Agreement, such a regulation shall to the extent that it is more favorable prevail over this Agreement. Each Contracting Party shall observe any other obligation it has assumed with regard to investments in its territory by investors of the other Contracting Party."[84] (emphasis added)

This is another broad construction in two parts. The first sentence is a more-favorable-treatment clause similar to those in part II:A; it mentions domestic legislation and obligations under international law as possible sources of more favorable treatment. The second sentence is the umbrella clause; it refers to "any other obligation," which could mean other than the obligations in the more-favorable-treatment clause (domestic legislation or international agreements). Taken together, these parts cover all of the possible options for obligations pertaining to investment: domestic legislation, international law, private contract law, and possibly unilateral sovereign acts (such as public declarations).

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[81] Approximately 40% of BITs have umbrella clauses. Katia Yannaca-Small, *Interpretation of the Umbrella Clause in Investment Agreements* 5, OECD Working Paper No. 2006/3 (Oct. 2006).

[82] For further discussion of umbrella clause variations, see Craig S. Miles, *"Where's My Umbrella? An 'Ordinary Meaning' Approach to Answering Three Key Questions That Have Emerged from the 'Umbrella Clause' Debate*, in INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW (TJ Grierson Weiler, ed., 2008).

[83] ECT, *supra* note 71, art. 10(1).

[84] Finland-Philippines BIT (1999), art. 5.

(c) *US-Argentina BIT (1994)*, *Article II.2(c)*

"Each Party shall observe any obligation it may have entered into with regard to investments."[85]

This is a broad umbrella clause, which is open to an interpretation that GATS disciplines are a BIT obligation. As noted above, "any" obligation connotes all kinds of obligations,[86] however many there are.[87] The term "obligation" is a promise, a mutually binding agreement[88] that conveys rights or liabilities.[89] These open terms are consistent with incorporating obligations under GATS disciplines, and there are no terms in this umbrella clause that would limit its reach to GATS.

(d) *Germany-Pakistan BIT (1959), Article 7*

"Either Party shall observe any <u>other</u> obligation it may have entered into with regard to investments by nationals or companies of the other Party."[90] (emphasis added)

This clause, while more detailed than the previous example, is probably no more limited in scope. Any service supplier asserting a claim for a GATS violation under a BIT would necessarily be a national or company of the other party. The reference to "any <u>other</u> obligation" connotes that such obligations are of the same kind as investor protections provided by the BIT. Consequently, it is more difficult to argue that this umbrella pertains only to obligations to individual investors and not to "other" treaty obligations such as GATS. The early date of this BIT, 1959, could be important because GATS was not even on the horizon. Thus, it could be argued that the early BIT framers were not contemplating obligations in the nature of multilateral trade agreements. However, that argument is only persuasive if arbitrators see the object and purpose of GATS disciplines as <u>not</u> creating an obligation to protect investments.

(e) *Netherlands-Poland BIT (1992), Article 3(5)*

"Each Contracting Party shall observe any obligation it may have entered into <u>with regard to investments</u> of investors of the other Contractual Party."[91] (emphasis added)

This is a common umbrella clause formulation, with an ordinary meaning equivalent to the previous example. That is because it refers to obligations "with regard to investments" (which could include GATS disciplines), as opposed to "obligations it has entered into with an investor," as does the ECT umbrella clause.

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85 US-Argentina BIT, *supra* note 45, art. II.2(c).

86 OED, *supra* note 42, "any," first meaning.

87 *Id.,* "any," second meaning.

88 *Id.,* "obligation," first meaning.

89 *Id.,* "obligation," second meaning (in law).

90 Germany-Pakistan BIT (1959), art. 7.

91 Netherlands-Poland BIT (1992), art. 3(5).

(f) *Germany-China BIT (2003), Article 10(2)*

"Each Contracting Party shall observe any other obligation it has entered into with regard to investments in its territory by investors of the other Contracting Party."[92] (emphasis added)

Like the Germany-Pakistan BIT, this clause refers to any *other* obligation, which connotes that the clause brings in obligations outside of this BIT of the same kind as this BIT (which could include GATS disciplines). Unlike that early BIT, the Germany-China BIT was minted eight years after GATS became effective and while negotiations on GATS disciplines were well underway.

(g) *Switzerland-Philippines BIT (1997), Article 10(2)*

"Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party."[93] (emphasis added)

The reference to "specific investments" indicates that this umbrella clause would not reach the GATS disciplines, and the reference to "assuming" obligations connotes a scenario involving transfer of companies or contractual obligations. This clarity with respect to specific contracts stands in contrast to open umbrellas that refer to "any obligation" and omit the word "specific."

To summarize, would certain types of umbrella clauses enable investors to incorporate GATS disciplines into a BIT claim?

- ***Ambiguous and open*** – Those that cover "any obligation" or "any other obligation" with regard to investments. Examples: US-Argentina BIT, Germany-Pakistan BIT, Germany-China BIT, Netherlands-Poland BIT, Finland-Philippines BIT. For this class of broad umbrella clauses, arbitrators are likely to consider the object and purpose of the BIT to discern whether GATS disciplines would come within reach of the umbrella.
- ***No*** – Those that explicitly cover only obligations under specific investments. Example: Switzerland-Philippines BIT, Energy Charter Treaty.

Some restrictive umbrella clauses appear alongside other types of clauses that do reach international treaty obligations like the GATS (e.g., the ECT and the Finland-Philippines BIT). Even if none of these clauses enable access to GATS disciplines, there is another potential tool for this purpose: the most favored nation clause.

C. Most Favored Nation clauses

Most favored nation (MFN) clauses appear in virtually every BIT. They require states to treat investors from the BIT partner nation no less favorably than they treat investors from any other nation. To claim that an MFN clause has been breached, an investor can show a more favorable

[92] Germany-China BIT (2003), art. 10(2).

[93] Switzerland-Philippines BIT (1997), art. 10(2).

provision the host state has committed to in another treaty.[94] Another way to claim a breach is to demonstrate that a similarly situated investor or investment was treated more favorably than the claimant. We focus on the first type of claim to analyze whether a BIT MFN claim can incorporate the GATS disciplines as the other treaty. As with more-favorable-treatment and umbrella clauses, the wording of MFN clauses and exceptions to them varies from BIT to BIT. Here are two contrasting examples.

- *Chile-Egypt BIT, Article 4(2) (1999)*

  "Each Contracting Party shall accord investments of the investors of the other Contracting Party in its territory a treatment which is <u>no less favorable</u> than that accorded to investments made by its own investors or by investors of any third country, whichever is more favorable."[95] (emphasis added)

  This typical MFN clause is combined with a "national treatment" clause (the reference to investors from the host country), but that does not change the MFN function of the clause. This one is broadly worded. Like most MFN clauses, it does not limit its application to certain types of investments or treatment.

- *New Zealand-Singapore FTA, Article 28 (2000)*

  "Except as otherwise provided for in this agreement, each Party shall accord to investors and investments of the other Party, <u>in relation to</u> the establishment, acquisition, expansion, management, conduct, operation, liquidation, sale, transfer (or other disposition), protection and expropriation (including any compensation) of investments, treatment that is no less favorable than that it accords <u>in like situations</u> to investors and investments from any other State or separate customs territory which is not party to this Agreement."[96] (emphasis added)

  This clause appears to be more restrictive than the previous example. Specific limitations are placed on what investment activities the treatment must relate to. Yet the listed applications are quite broad, and some are similar to areas covered under the GATS.[97] The clause also specifies that the less favorable treatment must occur "in like situations."[98]

This section applies the method sketched in part I:D to a range of most favored nation clauses. In order to understand which MFN clauses may encompass GATS rules, we will first look at the dictionary definitions of key terms, and then compare the ordinary meaning of the terms in various BIT MFN clauses.

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[94] *Maffezini v. Spain, supra* note 34, Decision on Jurisdiction ¶¶ 53-56; *MTD v. Chile, supra* note 34, ¶¶ 103-06; *Siemens v. Argentina, supra* note 34, ¶ 120; *Gas Natural SDG, S.A. v. Argentina,* Decision on Objections to Jurisdiction ¶ 28, ICSID Case No. ARB/03/2 (2005); *National Grid plc v. Argentina,* Decision on Jurisdiction ¶ 93, Ad hoc—UNCITRAL arbitration rules, IIC 178 (2006); *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal v. Argentina,* Decision on Jurisdiction ¶ 65, ICSID Case No. ARB/03/19.

[95] Chile-Egypt BIT (1999), art. 4(2).

[96] New Zealand-Singapore FTA (2000), art. 28.

[97] GATS regulation regarding technical standards, for example, can affect operations of a service supplier.

[98] This is an important concept, addressed in the object and purpose section below. It is sometimes read into MFN clauses that do not contain it.

1. Dictionary definitions of key terms

MFN clauses require host states to treat investors from the BIT partner country no less favorably than they treat investors from other countries. Some key terms are "investment," "favorable," and "treatment." Here are the Oxford English Dictionary definitions.[99]

Investment

1st meaning: The investing of money (now also time or effort); an instance of this.

2nd meaning: An amount of money invested. Also, anything in which money, etc. is or may be invested.

Favorable

1st meaning: Winning favour; hence, pleasing, agreeable, beautiful, comely.

2nd meaning: Gracious (said of a superior); kindly, obliging.

3rd meaning: Showing undue favour, partial.

4th meaning: [C]onced[ing] what is desired.

5th meaning: Attended with advantage or convenience; facilitating one's purpose or wishes; advantageous, helpful, suitable.

Treatment

1st meaning: Conduct, behavior; action or behavior towards a person, etc.; usage.

2nd meaning: Entertainment, feasting; an entertainment, banquet.

3rd meaning: Management in the application of remedies; medical or surgical application or service.

[99] OED, *supra* note 42.

2. Ordinary meaning of key terms in context

(a) *Argentina-Spain (1991), Article 4(2)*

"In all matters subject to this Agreement, this treatment shall not be less favorable than that extended by each Party to the investments made in its territory by investors of a third country."[100] (emphasis added)

This is a broadly worded MFN clause. It covers "all matters" subject to the BIT, not only certain articles. Like most MFN clauses, it uses imperative language to require treatment that is no worse than an investment from a non-party to the BIT receives. This clause refers to treatment of investments, not investors; an even broader clause would mention both of those. There are no limitations or exceptions to this clause that would prevent an investor from using it to attempt to incorporate GATS disciplines into the BIT.

(b) *Cameroon-Belgium BIT (1981), Article 11*

"In all matters governed by this Convention, nationals or companies of both Contracting Parties shall enjoy, in the territory of the other Party, most-favoured-nation treatment."[101] (emphasis added)

This is another broad MFN clause. It refers to "all matters" as well, and to treatment of nationals or companies rather than investments as in Spain-Argentina. Like most MFN clauses, the treatment is limited to within the territory of the BIT party. This clause uses the term "most-favoured-nation," rather than defining that term exactly as in most MFN clauses. Nothing in this clause would prevent an attempt to incorporate GATS disciplines.

(c) *Germany-Ghana BIT (1995), Article 3*

"(1) Neither Contracting Party shall subject investments in its territory owned or controlled by nationals or companies of the other Contracting Party to treatment less favourable than it accords to investments of its own nationals or companies or to investments of nationals or companies of any third State.

(2) Neither Contracting Party shall subject nationals or companies of the other Contracting Party, as regards their activity in connection with investments in its territory, to treatment less favourable than it accords to its own nationals or companies or to nationals or companies of any third State.

(3) Such treatment shall not relate to privileges which either Contracting Party accords to nationals or companies of third States on account of its membership of, or association with, a customs or economic union, a common market or a free trade area.

(4) The treatment granted under this Article shall not relate to advantages which either Contracting Party accords to nationals or companies of third States by virtue of a double

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[100] Argentina-Spain BIT (1991), art. 4(2).

[101] Cameroon-Belgium BIT (1981), art. 11.

taxation agreement or other agreements regarding matters of taxation."[102] (emphasis added)

Sentence (1) limits covered investments to those in the territory of the BIT party that are owned or controlled by nationals or companies of the other BIT party, rather than mentioning investors or investments and leaving the term open-ended (although many BITs define these terms elsewhere in the treaty). This sentence grants MFN in combination with National Treatment. Sentence (2) specifies that the treatment must be in connection with investments, not simply general treatment of any kind. This clause also contains exceptions for treatment granted due to customs unions, common markets, free trade areas, and taxation agreements. The GATS is not a regional or tax agreement, which means an investor could use this clause to claim for failure to provide treatment as specified in the GATS disciplines.

(d) S*ri Lanka-China BIT (1987), Articles 4 and 5*

"Article 4: Subject to Article 5, 6 and 11, neither Contracting Party shall in its territory subject investments . . . or returns of nationals and companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of nationals and companies of any third State.

Article 5: The provisions of this Agreement relating to the grant of treatment not less favourable than that accorded to the nationals and companies of any third State shall not be constructed so as to oblige one Contracting Party to extend to the nationals and companies of the other Contracting Party the benefit of any <u>treatment, preference or privilege</u> resulting from:

(a) any regional or <u>international</u> arrangement for customs, monetary, tariff or <u>trade matters</u> (including a free area) or any agreement designed to lead in the future to such an arrangement;

(b) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation."[103] (emphasis added)

(Article 6 deals with expropriation, and Article 11 is an exception for public health and safety)

Most BITs do not contain exceptions for international agreements (other than certain types of regional agreements) in their MFN clauses. The plain language of exception (a) above may exclude the GATS disciplines if they are an "international arrangement for . . . <u>trade</u> matters." This language is not as explicitly exclusive of GATS as the US-Jamaica BIT, but it is more limited than BITs with exceptions for only regional agreements.

The exception removes the obligation to extend the benefit of "any treatment, practice or privilege" resulting from certain types of agreements. This is more restrictive (a broader

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[102] Germany-Ghana BIT (1995), art. 3.

[103] Sri Lanka-China BIT (1987), arts. 4-5.

exception) than Netherlands-Lithuania, which removes only "special fiscal advantages" from the treatment before allowing a comparison.

(e) *Netherlands-Lithuania BIT (1994), Article 4*

"With respect to taxes, fees, charges and to fiscal deductions and exemptions, each Contracting Party shall accord to investors of the other Contracting Party who are engaged in any economic activity in its territory, treatment not less favourable than that accorded to its own investors or to those of any third State, whichever is more favourable to the investors concerned. For this purpose, however, there shall not be taken into account any special fiscal advantages accorded by that Contracting Party:

a. under an agreement for the avoidance of double taxation; or
b. by virtue of its participation in a customs union, economic union or similar institution; or
c. on the basis of reciprocity with a third State."[104] (emphasis added)

As we discussed in part I.B, the GATS disciplines and BITs affect some of the same foreign investors and investments, and they overlap in subject matter. This substantive overlap can satisfy the *ejusdem generis* principle.[105] The principle has been applied to MFN claims attempting to incorporate a substantive provision from another BIT.[106] It requires, at least, that the outside treaty regulates the same subject matter as the BIT, so that the treatment provisions are plausibly in "like circumstances" or "like situations."[107] The MFN clause above covers treatment "with respect to . . . fees," so an investor could use the clause to demand fee-related treatment specified in the GATS disciplines: "Each Member shall ensure that any fees relating to qualification procedures are commensurate with the costs incurred by the competent authorities and do not in themselves restrict the supply of the service."[108] That is just one example; as the Chair of the WPDR noted in March 2010, "each substantive obligation in the disciplines informs a Member [nation]'s right to regulate with regard to specific types of measures."[109]

This BIT takes a piecemeal approach to MFN (combined with National Treatment), applying it to various provisions separately rather than using one MFN clause that applies to all of its provisions. The clause above applies MFN specifically to taxes and fees. Articles 3(2) and 7 of this BIT contain similar MFN language regarding expropriation and full protection and security of investments, respectively. This piecemeal approach to MFN could restrict investors from claiming to incorporate outside provisions when those

[104] Netherlands-Lithuania BIT (1994), art. 4.

[105] Andreas R. Ziegler, *Most-Favored-Nation (MFN) Treatment*, *in* STANDARDS OF INVESTMENT PROTECTION 74 (August Reinisch, ed., 2008); *Maffezini v. Spain*, *supra* note 34.

[106] *Maffezini v. Spain, supra* note 34, ¶¶ 41, 46, 49-56.

[107] Ziegler, *supra* note 105, at 74.

[108] Draft Disciplines, *supra* note 16, ¶ 39.

[109] WPDR Room Document, Draft Disciplines on Domestic Regulation Pursuant to GATS Article VI:4, Informal Note by the Chairperson, (March 14, 2010) ¶ 15.

are not substantively analogous to the BIT provisions that include MFN clauses. It is an extreme and concrete expression of the *ejusdem generis* principle.

This MFN clause has an exception for taxation agreements, customs unions, and the like, similar to the exception in the Sri Lanka-China BIT except that this one does not mention specifically regional agreements. The clause contains an additional exception for "reciprocity with a third state." This allows specific reciprocal arrangements between a BIT party and a third country to grant better treatment exclusively to each other, avoiding the risk of an MFN BIT claim for the better treatment. The reference to reciprocity "with a third state" appears not to include multilateral treaties such as the GATS disciplines, however. Because none of the above exceptions exclude the GATS disciplines, this MFN clause may be used to incorporate a discipline that is substantively similar to the BIT provisions. . . .

(f) *US-Jamaica BIT (1994), Article 2*

"1. a) Each Party shall permit and treat <u>investments, and activities associated therewith</u>, on a basis no less favorable than that accorded <u>in like situations</u> to investments or associated activities of its own nationals or companies ("national treatment"), or of nationals or companies of any third country ("most favored nation treatment"), whichever is the most favorable, subject to the right of each Party to make or maintain <u>exceptions</u> falling within one of the sectors or matters listed in the Annex to this Treaty. The treatment accorded investments and activities associated therewith pursuant to any exceptions to national treatment shall be that of most favored nation treatment, unless specified otherwise in the Annex. . . . .

9. The most favored nation provisions of this Agreement shall not apply to advantages accorded by either Party to nationals or companies of any third country by virtue of:

a) that Party's binding obligations that derive from full membership in a free trade area or customs union, or from some other relationship which satisfies the requirements for a free trade area or customs union as set forth in Article XXIV of the General Agreement on Tariffs and Trade; or

b) that Party's binding obligations under <u>any multilateral international agreement under the framework of the General Agreement on Tariffs and Trade</u>."[110] (emphasis added)

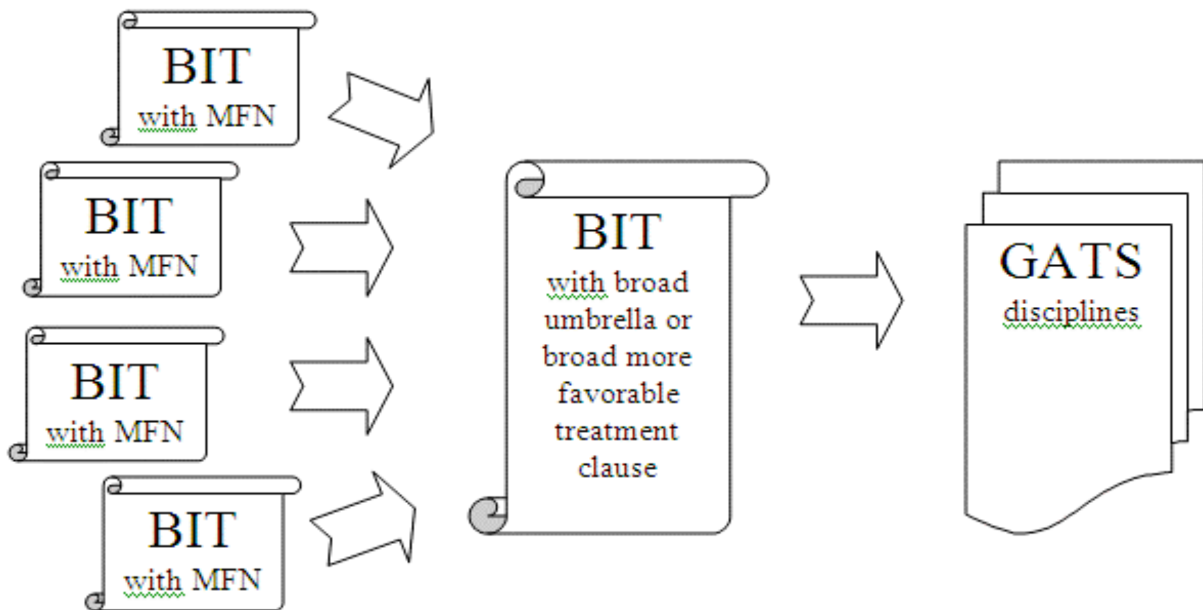
This BIT explicitly excludes the GATS disciplines, because they will be a multilateral international agreement under the framework of the GATT (the precursor to the WTO). The BIT parties also agreed to allow each other to exclude certain economic sectors from the reach of MFN claims. They did so in an annex to the BIT. The types of investment activity are not limited to a list here; it covers "investments, and activities associated therewith." The investment activity covered is more open-ended than in the New Zealand-Singapore BIT above; there are many BITs of both styles.

MFN clauses are ubiquitous in BITs. Not all of them are broad enough to directly incorporate the GATS disciplines, but all of them can incorporate other BIT provisions. This presents another

[110] US-Jamaica BIT (1994), art. 2.

option for investors to reach the GATS disciplines, even without any broadly worded clauses in their own BIT: linking to GATS through third-party BITs. In this two-step process, an investor could: (1) use their MFN clause to incorporate a broadly worded more-favorable-treatment clause or umbrella clause from another one of the host country's BITs;[111] and (2) assert that the GATS disciplines are "applicable rules" under that more-favorable-treatment clause or an "obligation" under that umbrella clause.

This means that a country with just one BIT clause broad enough to potentially reach the GATS disciplines could be vulnerable to investor claims from all of their BIT-partner countries. For instance, if a host country has a broad umbrella clause in just one of their BITs, investors from all of its other BIT partners could incorporate that clause into their BITs using MFN.



This two-step approach could be available to a far greater number of investors than the direct methods outlined above. In effect, it could allow investors to use those methods whether or not their BIT contains a suitable clause. Such widespread access to this approach could be particularly damaging to countries' ability to govern without exposing themselves to liability.[112]

To summarize, would certain types of MFN clauses enable investors to incorporate GATS disciplines into a BIT claim?

- ***Ambiguous and open*** – Those without limitations or exceptions that would exclude the GATS disciplines. Most BITs have this type of MFN clause. Examples: Germany-Ghana BIT, Cameroon-Belgium BIT, Argentina-Spain BIT. Most MFN clauses apply generally to an entire BIT, but in those BITs with piecemeal MFN clauses for specific

[111] *E.g.*, in MTD v. Chile, *supra* note 34, ¶¶ 100-104, the Chile-Malaysia BIT's MFN clause was used to incorporate the umbrella clause from the Chile-Denmark BIT in order to challenge Chile's refusal to grant MTD a permit.

[112] There is also concern that the MFN provisions of trade agreements on services could obligate countries to make arbitration remedies available to foreign investors (investor-state dispute settlement), even in the absence of a BIT. *The European Union and United States' Approach to International Investment Agreement with Developing Countries: Free Trade Agreements and Bilateral Investment Treaties,* South Centre Analytical Note, SC/TDP/AN/EPA/24 (April 2010) ¶ 41.

provisions, only similar provisions in the GATS disciplines could be accessed. Example: Netherlands-Lithuania BIT.

- ***No*** – Those with explicit exceptions for international multilateral agreements like the GATS disciplines. Example: US-Jamaica BIT, possibly Sri Lanka-China BIT.
- ***Two-step combination of clauses*** – Almost any MFN clause could serve to initiate this method. If the host country has any BIT containing a broadly worded umbrella or more-favorable-treatment clause, all its other BITs could potentially incorporate that clause using MFN. If that first step succeeds, the second step is to use the incorporated clause to reach GATS disciplines as described in part II:A or II:B.

For the class of broad MFN clauses, as well as the open-ended umbrella and more-favorable-treatment clauses, arbitrators are likely to consider the object and purpose of the BIT to discern whether GATS disciplines would come within reach of the BIT claims.

D. The object and purpose of BIT clauses

Many of the 2,600 BITs have broad MFN and umbrella clauses, and some have broad more-favorable-treatment clauses. To date, BIT awards have held that government obligations covered by BIT umbrella clauses include each of these categories: private commercial contracts between host state and foreign investor, domestic laws of the host state, and unilateral public commitments (e.g., public statements by government ministers).[113] Other awards have held that such commitments are not covered.[114] Awards interpreting MFN clauses have incorporated umbrella clauses from other BITs, and procedural as well as substantive provisions from other BITs.[115] There have been no cases based on more-favorable-treatment clauses as of yet.

According to the Vienna Convention on the Law of Treaties, these clauses should be interpreted in light of the object and purpose of the BIT overall, as described in part I:D. This favors a pro-investor outcome, as the tribunal in *SGS v. Philippines* stated, and this could be a deciding factor in interpreting the many ambiguous BIT clauses:

> "The object and purpose of the BIT supports an effective interpretation of [its umbrella clause]. The BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble it is intended "to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other". It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments."[116]

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[113] See the awards in BIT arbitration cases: Eureko v. Poland, *supra* note 33; SGS Société Générale de Surveillance SA v. Philippines, Decision on Objections to Jurisdiction and Separate Declaration, ICSID Case No. ARB/02/6, IIC 224 (2004); Enron Corporation and Ponderosa Assets, LP v. Argentina, Award, ICSID Case No. ARB/01/3, IIC 292 (2007); Azurix Corp. v. Argentina, Award, ICSID Case No ARB/01/12, IIC 24 (2006) (finding the public statements of a government Minister of Public Works and others to have harmed foreign investments and thereby breached BIT provisions).

[114] *E.g.*, SGS Société Générale de Surveillance SA v. Pakistan, Decision on Objections to Jurisdiction, ICSID Case No. ARB/01/13, IIC 223 (2003).

[115] *See* Maffezini v. Spain*, supra* note 34; MTD v. Chile*, supra* note 34.

[116] SGS Société Générale de Surveillance SA v Philippines, *supra* note 33, ¶ 116.

Literal interpretations of broadly worded umbrella, more-favorable-treatment, and MFN clauses tend to correspond to the object and purpose of BITs. In *Eureko v. Poland,* the arbitral tribunal said: "The context of Article 3.5 [the umbrella clause] is a Treaty whose object and purpose is "the encouragement and reciprocal protection of investment," a treaty which contains specific provisions designed to accomplish that end, of which Article 3.5 is one."[117] The tribunal interpreted the umbrella clause according to its ordinary meaning:

> [T]he "ordinary meaning" . . . of a provision prescribing that a State "shall observe any obligations it may have entered into" with regard to certain foreign investments is not obscure. The phrase, "shall observe" is imperative and categorical. "Any" obligations is capacious; it means not only obligations of a certain type, but "any" – that is to say, all – obligations entered into with regard to investments of investors of the other Contracting Party."[118]

These tribunals would likely take a similarly literal view of a broad more-favorable-treatment clause. Particularly when two or more of these types of clauses are combined or appear next to each other in a BIT, the resulting repeated references to various other obligations and rules would imply that the scope of the clauses reach far outside the BIT.

However, not all arbitrators have taken this liberal, literal stance. Some have chosen to read even broad clauses narrowly.[119] In the absence of explicit language that compels a broad reading, these arbitrators resolve the ambiguity according to their view of the policy implications. One implication is that a broad reading of most favorable treatment, umbrella, or MFN clauses has the effect of geometrically expanding the reach of BITs as they interact with other international agreements. In other words, a restrictive reading may well be prudent for purposes of preserving policy space. For instance, some would limit umbrella clauses to their apparent function when they first emerged: protecting individual investors in their investment contracts with sovereigns.[120] There is a vigorous debate about the scope of "other" obligations, including commercial contracts and investment agreements between investors and sovereigns, which may be covered by umbrella clauses. It is not clear that the two types of contracts are fully distinguishable.[121]

In cases where investors attempt to reach GATS through an MFN BIT clause, arbitrators may consider whether the GATS disciplines are similar enough to BITs in object and purpose, covered investments and investors, and substance to allow them to interact through MFN.[122]
The tribunal in the *Maffezini* case asserted that in a specific treaty, demonstrable policy considerations of the parties (often manifested in exceptions to and limitations on the BIT's MFN

[117] Eureko v. Poland*,* *supra* note 33, ¶ 248.

[118] *Id.*, ¶ 246.

[119] *See, e.g*., El Paso Energy International Co. v. Argentina, Decision on Jurisdiction, ICSID Case No. ARB/03/15, IIC 83 (2006); Joy Mining Machinery Ltd v. Egypt, Award on Jurisdiction, ICSID Case No. ARB/03/11, IIC 147 (2004).

[120] NEWCOMBE & PARADELL, *supra* note 5, §9.3.

[121] For an examination of the arbitral jurisprudence on the scope of umbrella clauses, *see* Yannaca-Small, *supra* note 81, at 15-21.

[122] *See* UNCTAD, MOST-FAVOURED-NATION TREATMENT, UNCTAD/ITE/IIT/10 (UNCTAD Series on Issues in International Investment Agreements, Vol. III) (1999); NEWCOMBE & PARADELL, *supra* note 5, §§ 5.1, 5.5.

clause)[123] may outweigh its general object and purpose when they are contradictory, but possibly only if they were essential to the successful negotiation of the treaty.[124]

Experts and tribunals diverge sharply in their views on how broadly to apply umbrella and MFN clauses where there is uncertainty in the text.

The biggest umbrella controversy is over whether commercial contracts between investors and governments are umbrella obligations. If they are, contract disputes could be brought to BIT arbitration. This effectively negates the contract's dispute resolution provisions.[125] The same concern applies to BIT claims based on GATS disciplines: This would circumvent the WTO system of dispute resolution, which would otherwise be the only way to hold governments accountable for violating the disciplines.[126]

The biggest MFN controversy is over whether or not an MFN clause may be used to incorporate a dispute resolution provision from another treaty. Some opponents of this assert that not even a broadly worded clause should make this possible because MFN doctrine does not encompass procedural provisions, only substantive ones. Dispute resolution provisions are arguably procedural, but others take the broader view that dispute resolution provisions can constitute substantive treatment of investors. These provisions vary in how favorable they are towards investors, and along with choice of law provisions they can effectively determine the outcome of investor-state disputes.[127] Ensuring that investors are treated as well as other investors is the overarching purpose of MFN.[128] As a result, those arbitrators with broad interpretations of MFN on this issue may also believe that MFN clauses can be used to reach the GATS disciplines. Both situations provide claimants with greater access to powerful tools. One is the ability to bring a claim in international arbitration at all, and the other is the ability to base their claims on the GATS disciplines.

As with the existing umbrella- and MFN-related disagreements, experts could diverge on the question of whether the GATS disciplines are an obligation under the umbrella, whether they are applicable rules under a more-favorable-treatment clause, and whether they can demonstrate better treatment of investors in an MFN claim. Arbitration outcomes could be unpredictable because of the divergent opinions.

In short, some arbitrators may interpret BIT clauses narrowly for pro-government (defensive) policy reasons, but others have taken a broad interpretation for pro-investor (offensive) policy reasons.[129] The textual ambiguity has produced unpredictable outcomes. Consider this history of BIT disputes, and consider that the ordinary meaning of broadly worded clauses favors a broad

[123] Exceptions and limitations to MFN clauses are discussed in part II:C.

[124] Maffezini v. Spain, *supra* note 34.

[125] Malik, *supra* note 49, at 12.

[126] The SGS v. Philippines award, *supra* note 33, states that choice of forum for dispute resolution should not be overridden except expressly.

[127] Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentina, Decision on annulment, ICSID Case No. ARB/97/3 (2002).

[128] NEWCOMBE & PARADELL, *supra* note 5, § 5.10.

[129] *See* Eureko v. Poland, supra note 33; Maffezini v. Spain, *supra* note 34.

interpretation. Negotiators of the GATS disciplines have reason to think carefully about the potential impact if investors can incorporate new disciplines into their BIT claims against the very countries that the negotiators represent.[130]

E. Impact

The above analysis suggests foreign investors may be able to use GATS disciplines to strengthen their BIT claims against nation states. It is not a simple "yes" or "no" answer as to whether this would happen. Rather, it depends on what kind of BIT clauses would make each country vulnerable to investor claims. We analyzed more-favorable-treatment clauses, umbrella and MFN clauses, which are only three out of four approaches available to foreign investors (the fourth being evidence to support interpretation of BIT obligations such as fair and equitable treatment). Some clauses of each type are likely to empower investors; some clearly will not; and most are ambiguous and open to incorporating GATS disciplines into BIT claims. There are several potential impacts on their governments that WTO negotiators should have in mind.

1. Direct liability to investors?

Rather than answering only to other states' complaints for their GATS violations, governments could be directly liable to private investors. Investors are more likely than governments to file claims, and their claims can result in awards of monetary damages. BIT claims have increased sharply in the last decade, and damages can mount quickly. One successful investor claim could seriously impair the government of a developing country, depending on the circumstances. Developing countries have voiced their concern about losing their regulatory autonomy under investment[131] and services agreements.[132]

2. Unpredictable outcomes

(a) Ambiguous terms in the proposed disciplines such as "pre-established" leave open a wide variety of interpretations, which could result in awards against governments for regulations the WPDR negotiators did not intend to prohibit. Arbitrators disagree on "ordinary meaning" interpretations of BITs, so they are not likely to produce consistent decisions when interpreting the disciplines.

(b) There is no rule of precedent in arbitrations,[133] which means that results are uncertain every time an issue is litigated.

(c) There is theory and case law to support all of the approaches we describe for connecting BITs to GATS disciplines. The approaches are likely to be added on top of each other in

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[130] The Multilateral Agreement on Investment that was attempted in the late 1990s faced a range of choices regarding what kind of umbrella clause to insert in the agreement. *See* Report of the Drafting Group Concerning the Protection of Investor Rights Arising from Other Agreements, OECD Negotiating Group on the MAI, DAFFE/MAI/DG1(96)1/REV1 (Mar. 18, 1996), *available at* http://www1.oecd.org/daf/mai/pdf/dg1/dg1961r1e.pdf.

[131] *The European Union and United States' Approach to International Investment Agreement with Developing Countries: Free Trade Agreements and Bilateral Investment Treaties,* South Centre Analytical Note, SC/TDP/AN/EPA/24 (April 2010) ¶ 104.

[132] *See The state of play in the GATS negotiations: Are developing countries benefiting?,* South Centre Policy Brief (November 2009) 6 (concern about erosion of right to regulate and opposition to necessity tests)*; see generally,* Working Party on Domestic Regulation, Report of the Meeting Held on 1 April 2009, Note by the Secretariat, S/WPDR/M/40 (May 12, 2009), ¶¶ 12, 23, 25 (developing countries).

[133] *But see* NEWCOMBE & PARADELL, *supra* note 5, § 2.23.

a claim, providing investors with more chances to succeed in obtaining a favorable outcome.[134]

III. Conclusion: Questions to answer before adopting GATS disciplines

If GATS Disciplines on Domestic Regulation go into effect, there will be a written, enforceable international agreement regulating the domestic treatment of investors by governments. Investors would probably interpret the vague disciplines to their advantage and attempt to invoke or incorporate them in every possible way in their BIT claims.

Even without the lure of GATS rules as a basis for investor claims, the number of claims has increased dramatically as more BITs are signed. Investors could incorporate the new disciplines into a BIT claim using one of the following four approaches, the first three of which we have explained above.

1. *Directly incorporating a WTO obligation*
   This approach would directly incorporate GATS disciplines for purposes of seeking monetary compensation through BIT arbitration. We see three types of BIT clauses that foreign investors might be able to use:
   a. *A more-favorable-treatment (MFT) clause*, which typically incorporates treatment under domestic or international law that is "more favourable" than the BIT.
   b. *An umbrella clause*, which typically incorporates "any obligation" with regard to investments.
   c. *A most favored nation (MFN) clause*, which assures treatment no less favorable than that provided to a third-party investor (assuming that the host country is a GATS member). Even if an investor cannot use an MFN clause to enforce GATS disciplines directly, investors have used the clause to reach a broadly worded umbrella clause in another BIT of the same country.

2. *Interpreting a BIT obligation*
   This approach would use GATS disciplines indirectly as evidence to support the investor's interpretation of a BIT standard of treatment. Investors have used WTO rules and decisions to interpret BIT obligations under National Treatment. Investors might also be able to use GATS disciplines as evidence to support their interpretation of the minimum standard of treatment under a BIT, including fair and equitable treatment.

As proposed by the WPDR chair, several key disciplines are ambiguous. Most of the possible meanings are favorable to foreign investors who are also service suppliers under GATS. They would be able to apply those interpretations in their BIT claims. Each arbitration tribunal would choose between them independently, with uncertain results and substantial risks for governments when they lose a dispute. Developing countries are particularly vulnerable, because they stand to lose more of their total resources on BIT awards and because foreign investment is vital to their economies. In light of these risks, we offer the following questions for WPDR negotiators and their governments to address before finalizing the GATS disciplines on domestic regulation.

[134] *See* TUDOR, *supra* note 15, Appendix III.

A. For individual negotiators and their governments

1. Risk posed by more-favorable-treatment clauses in BITs

GATS rules may be applicable to BIT claims as provisions of an international agreement providing more favorable treatment of investments than some BITs. If they are, investors could claim that more-favorable-treatment clauses enable them to strengthen their BIT claims by incorporating the GATS disciplines. Does at least one of your BITs have a more-favorable-treatment clause that might reach GATS?

2. Risk posed by umbrella clauses in BITs

GATS rules are arguably "obligations with regard to investment." If they are, investors could claim that umbrella clauses enable them to strengthen their BIT claims by incorporating the GATS disciplines. Does at least one of your BITs have an umbrella clause that might reach GATS?

3. Risk posed by MFN clauses in BITs

(a) The GATS disciplines contain provisions on treatment of investments. Some of these are substantively similar to common BIT provisions and arguably more favorable. An investor could invoke a broad BIT MFN clause to incorporate these GATS provisions into their BIT.

(b) Alternatively, an investor could incorporate GATS disciplines using the two-step method detailed in part II:C. This means that a host country with just one BIT clause broad enough to reach GATS disciplines could potentially be vulnerable to claims under all of its other BITs as well.

1) Does at least one of your BITs have an umbrella or more-favorable-treatment clause broad enough to reach GATS?

2) If so, could the MFN clauses in your other BITs incorporate your broadest BIT's provision, allowing foreign investors from any of your BIT partners to reach GATS?

2. Risk Management

If you thought investors could bring a BIT claim against your government for violating proposed disciplines, would you:

(a) Implement a long-term strategy to renegotiate or renounce (withdraw from unilaterally) your BITs that introduce this risk? Some countries have done this.[135]

(b) Change your model BIT or your approach to current BIT negotiations to expressly limit the reach of more-favorable-treatment and umbrella clauses?

[135] For instance, in 2004 the U.S. updated its model BIT to clarify the intended effect of other international agreements on various BIT provisions. See U.S. Model Bilateral Investment Treaty, arts. 5.3, 6.5, 8.3(b), 14.4 (2004), *available at* http://www.state.gov/documents/organization/117601.pdf.

B. For the Working Party on Domestic Regulation

In light of the potential risk of GATS disciplines strengthening BIT claims against governments, is there a way to:

1. **Expressly decouple GATS from BITs in the disciplines themselves?**
   For example, the WPDR could adopt a statement that the GATS rules are not intended to be obligations under BIT claims. Note that even if this works to limit the reach of umbrella clauses, investors would still be able to cite GATS disciplines as evidence of what the minimum standard of treatment should be.

2. **Clarify the meaning of particular disciplines**?
   Several disciplines lend themselves to supporting a BIT claim, including the general disciplines of article 11 (pre-established, based on objective criteria, and relevant to supply of the service) and the obligation to publish detailed information about domestic regulations. Clarification of these disciplines would minimize the risk of investor claims based on interpretations of ambiguous language.