VCLT and the Peaceful Coexistence of Tax and Investment Treaties: A Case Study of Limited MFN Clauses and the FET Standard

Kuźniacki, B.; van Weeghel, S.

DOI
10.59403/32xh33c

Publication date
2025

Document Version
Final published version

Published in
World Tax Journal

Błażej Kuźniacki* and Stef van Weeghel**

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The general purpose of this article is to demonstrate that customary international law (CIL) has a significant role to play in connecting international tax law and international investment law. Bridging a gap between those sources of international law is not only an important endeavour in the theory of law but also in practice. This article purports to achieve the abovementioned general purpose by focusing on the application of the rule and principles of interpretation under the Vienna Convention on the Law of Treaties (VCLT), which represent a codification of CIL, to limited most favoured nation (MFN) clauses in tax treaties. The hypothesis of the authors is that a serious failure in a proper application of the VCLT to interpret the MFN clauses in tax treaties may lead to a violation of international investment agreements (IIAs), in particular the fair and equitable treatment (FET) standard. The analysis and conclusions are relevant to all tax treaties and IIAs containing the MFN clause and FET standard, respectively. They are also of relevance for the interpretation of all provisions of tax treaties, not only the limited MFN clauses, in accordance with the VCLT. Examining tax treaties through the lens of the FET standard allows the FET standard to be seen as a gateway for the systemic integration of tax treaties in accordance with the principle enshrined in article 31(3) (c) of the VCLT, because some of core elements of that standard are deeply rooted in sources of international law (general principles of law and custom).

Contents

* **Professor of Law Lazarski University (Warsaw); Research Affiliate Singapore Management University – Centre for AI & Data Governance; Senior Manager & Advisor at International Tax Services and Global Tax Policy, respectively, PwC Netherlands. Contact: blazej.kuzniacki@gmail.com.**

** **Full Professor of International Tax Law, University of Amsterdam; Director of the Amsterdam Centre for Tax Law; Chair of Board of Trustees IBFD; Member of Advisory Board Belt and Road Initiative Tax Administration Cooperation Mechanism. Contact: s.vanweeghel@uva.nl.**

1. Introduction

1.1. Similarities and differences among tax and investment treaties

Tax treaties are to some extent investment treaties and investment treaties are to some extent tax treaties. The former stems from the fact that the principal purpose of tax treaties is to promote exchanges of goods and services, and the movement of capital and persons, i.e. to promote cross-border investments. Tax treaties do so primarily by eliminating inter-

national double taxation without incentivizing tax avoidance and evasion.[1] The elimination of international double taxation materializes by the set of rules that allocate taxation rights between contracting states over the income and capital gains from cross-border investments. By comparison, investment treaties aim to promote-cross border investments by means of their protection mainly against discriminatory, arbitrary and unfair treatment as well as direct and indirect expropriation. This also but not only regards tax treatment insofar as taxation may be discriminatory, arbitrary, unfair and even expropriatory.[2]

The promotion of investment under investment treaties is to be achieved by the host state respecting the protection standards, which in turn should lead to a stable legal environment that favours foreign investments. The most important and powerful legal tool to enforce that protection is the right of individual investors to initiate arbitration against host states (the investment treaty arbitration or investor-state dispute settlement (ISDS) mechanism). This tool ensures that host states will respect the standards of investment protection under the investment treaties.[3] Otherwise, they may bear significant costs of defending and losing ISDSs, which will negatively affect their investment climate.[4] One may therefore say that just as tax treaties allocate taxation rights between contracting states over the income and capital gains from the cross-border investments, investment treaties allocate an obligation to compensation for losses to contracting states due to the misconduct of the host state in respect of the investments of the investor from its home state.

Already from the above introductory observation, it follows that tax and investment treaties differ in their scopes and purposes, despites their similarities, which boil down to fostering cross-border investments. The obvious difference in scope is that tax treaties focus on tax issues while investment treaties are not restricted like that. Thus, tax treaties could be regarded as *lex specialis* to investment treaties when it comes to incentivizing cross-border investments.

There are also other differences between tax and investment treaties. States negotiate the wording of tax treaties to a large extent on the basis of the Organisation for Economic Co-operation and Development (OECD) Model Tax Convention (OECD Model),[5] which is vastly replicated in the United Nations (UN) Model.[6] Tax authorities and courts across the globe routinely consult the wording of commentaries to those models while interpreting and applying tax treaties.

The tax treaty case law developed several anti-treaty abuse judicial doctrines such as substance over form and economic substance.[7] The prevention of abuse of tax treaties has also

1. B.J. Arnold, *Introduction to Tax Treaties* para. 46, p. 10 (UN 2015), available at http://www.un.org/esa/ffd/wp-content/uploads/2015/10/TT_Introduction_Eng.pdf.
2. For a thorough analysis of international arbitration case law in tax-related cases, *see* T.W. Wälde & A. Kolo, *Investor-State Disputes: The Interface Between Treat-Based International Investment Protection and Fiscal Sovereignty,* 35 Intertax 8/9, pp. 424-449 (2007); W.W. Park, *Tax and Arbitration*, 36 Arbitration International 2, pp. 166-197 (2020). For the more up-to-date state of affairs between taxation and investment treaties, *see* A. Sheppard, *Tax and arbitration (an ISDS update)*, 39 Arbitration International 2, pp. 314-336 (2023).
3. J.W. Salacuse, *The Law of Investment Treaties (3rd Edition)* p. 111 (Oxford University Press 2021).
4. Id., at p. 161.
5. *OECD Model Tax Convention on Income and on Capital* (21 Nov. 2017), Treaties & Models IBFD.
6. *United Nations Model Double Taxation Convention Between Developed and Developing Countries* (1 Jan. 2017), Treaties & Models IBFD.
7. F. Zimmer, *General Report*, in *Form and Substance in Tax Law* (IFA Cahiers vol. 87a, 2002), Books IBFD.

been possible through domestic anti-tax avoidance rules with general anti-avoidance rules at the forefront.[8] Since June 2017, more than 100 states around the world have signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (MLI), and committed to include in their tax treaties the principal purpose test (PPT) as a global minimum standard to prevent tax treaty abuse.[9]

Nothing like this exists in the world of investment treaties. Although investment treaties, like tax treaties, are typically bilateral,[10] there is no single model developed by a multilateral organization. Instead, several countries follow their own model bilateral investment treaties (BITs). In the absence of a multilaterally developed model BIT, no commentary that would provide guidance in the interpretation has been developed either.[11]

Investment treaty tribunals developed case law that is a far more permissive for treaty shopping than case law of domestic courts in relation to tax treaties.[12] In particular, arbitral tribunals usually strictly adhere to interpretation in accordance with article 31(1) of the Vienna Convention on the Law of Treaties[13] and the general principles of law (GPL). This interpretative approach considers the ordinary meaning of words as a functional vehicle of the common intention of the parties in good faith and the context and purpose of the international treaty.[14] The arbitral tribunals regularly based their reasoning on the "ordinary meaning" approach, so as to distinguish legitimate treaty shopping from that which is abusive under investment treaties.[15] Apart from an interposition of a company after the dispute with respect to the investment had arisen (the abuse of rights/abuse of process doctrine),[16] the arbitral tribunals accept a strategic interposition of special purpose entities predominantly or solely to benefit from the most favourable investment treaty with the host state.[17]

8. S. van Weeghel, *General Report*, in *Tax Treaties and Tax Avoidance: Application of Anti-Avoidance Provisions* (IFA Cahiers vol. 95a, 2010); P. Rosenblatt & M.E. Tron, *General Report*, in *Seeking Anti-Avoidance Measures of General Nature and Scope - GAAR and Other Rules* (IFA Cahiers vol. 103a, 2018).
9. There are 103 signatories to the MLI from across the world: *Signatories and Parties to The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, Status as of 27 June 2024, Primary Sources IBFD.
10. Thus tax treaties are regularly called double tax treaties while investment treaties are named bilateral investment treaties (BITs). There are also a few multilateral tax and investment treaties. All investment treaties are commonly called international investment agreements (IIAs). These agreements are divided into three types: (i) BITs, (ii) treaties with investment provisions (TIPs) and free trade agreements with investment chapters; and (iii) investment-related instruments (IRIs). United Nations Conference on Trade and Development, *International Investment Agreements Navigator*, in *Investment Policy Hub*, available at https://investmentpolicy.unctad.org/international-investment-agreements.
11. S. van Weeghel, *Tax and Investment Treaties: A Few Observations*, in *Thinker, Teacher, Traveler: Reimagining International Tax – Essays in Honour of H. David Rosenbloom* ch. 49.4 (G. Kofler, R. Mason & A. Rust eds., IBFD 2021), Books IBFD.
12. Id.
13. Done at Vienna on 23 May 1969. Internationally, it entered into force on 27 January 1980 in accordance with its art. 84(1), i.e. on the 30th day following the date of deposit of the 35th instrument of ratification or accession. *See* United Nations, Treaty Series, vol. 1155, p. 331.
14. *See* International Law Commission (ILC), *Draft Articles on the Law of Treaties with Commentaries 1966*, II Yearbook of the International Law Commission, paras 6, 11 at pp. 219, 221 (1966); I. Sinclair, *The Vienna Convention on the Law of Treaties* p. 118 (Manchester University Press 1984); F. Engelen, *Interpretation of Tax Treaties under International Law* pp. 172-185 (IBFD 2005), Books IBFD.
15. J. Baumgartner, *Treaty Shopping in International Investment Law* p. 284 (Oxford University Press 2016).
16. E.g. *Philip Morris Asia Limited v. The Commonwealth of* Australia, UNCITRAL, PCA Case No. 2012-12, Final Award (8 Mar. 2017), para. 588.
17. A. Yilmaz Vastardis, *The Nationality of Corporate Investors under International Investment Law* ch. 7 (Bloomsbury Publishing 2021). *See*, e.g. *Tokios Tokelės v. Ukraine*, The International Centre for Settlement of Investment Disputes (ICSID) Convention Arbitration, ICSID Case No. ARB/02/18, Majority Decision on Jurisdiction (29 Apr. 2004), para 36 (Dissenting: Prosper Weil, Presiding); a series of *Yukos v. Russia*

However, the tribunals denied access to investment treaties for entirely or almost entirely sham or empty structures and companies while decoding the meaning of "the real economic activities" in the definition of "investor"[18] and during the examination of the application of denial of benefits clauses with substantial business activity criteria under BITs.[19]

Prima facie, an interpretative approach of arbitral tribunal protects all formally compliant structures and heavily burdens states to manoeuvre around it by proving the investors' abusive behaviour.[20] However, it is unlikely that arbitral tribunals would consider that a host state violated an investment treaty because of a denial of tax treaty benefits to a purely or principally tax-avoidance-driven scheme.[21] Indeed, investment treaty jurisprudence demonstrates that taxation by a host state is deemed a breach of its investment treaties only in extreme circumstances such as a destruction of an investment by arbitrary and very aggressive tax assessments, far reaching in time retroactive taxation reversing its own supreme court judgment, discriminatory taxation that protects state-owned companies at the cost of privately owned businesses in the same sector, or imposing on windfall (extraordinary) profits a tax rate of nearly 100%.[22] There is therefore no actual risk that arbitral tribunals dismantle bona fide well-functioning tax systems in accordance with the rule of law. For instance, the arbitral tribunal in a recent ISDS case has already confirmed that a host state denying tax treaty benefits via its substance-over-form doctrine to a foreign company involved in tax avoidance treaty-shopping scheme is not violating its investment treaty in any way.[23]

Finally, mechanisms to resolve disputes in tax and investment treaties differ significantly.[24] Beyond domestic litigation, some tax treaty related disputes can be subject to a mutual agreement procedure (MAP). It focuses on issues related to unsolved double taxation of income under tax treaties or other difficulties or doubts arising as to the interpretation or application of the tax treaties, irrespective of their impact on the standards of investments' protection under investment treaties.[25] In the rare situations where tax treaties contain

cases – *Yukos Universal Ltd (Isle of Man) v. Russian Federation*, PCA AA 227 (Final Award) (18 July 2014); *Veteran Petroleum Ltd (Cyprus) v. Russian Federation*, PCA AA 228 (Final Award) (18 July 2014); *Hulley Enterprises Ltd (Cyprus) v. Russian Federation*, Permanent Court of Arbitration (PCA) AA 226 (Final Award) (18 July 2014), paras. 1368-1370. It is noteworthy that, in the *Yukos* case, however, the treaty shopping was tantamount to a sham/abusive practice under a Russian tax treaty with Cyprus according to two expert witnesses of the respondent (Stef van Weeghel and David Rosenbloom). The *Yukos* tribunal appeared to agree with them. This finding supported a significant (25%) reduction in the damages awarded to the claimant under the "contributory fault doctrine". Id., at paras. 1594, 1615-1621, 1637.

18. *Alps Finance and Trade AG v. The Slovak Republic*, UNCITRAL, Award (5 March 2011), paras. 217-218, 222-226; *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Rules, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections (1 June 2012), paras. 4.63-4.78.
19. *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Award (31 Jan. 2014), paras. 370-384.
20. B. Kuźniacki, *European Union Law and Global Investment Regime: Unshell Proposal as a Next (Mis)step of the EU Against Investment Treaty Arbitration?*, 50 Intertax 11, p. 800 (2023).
21. *LSF-KEB Holdings SCA and others v Republic of Korea* (*Lone Star* case), (ICSID Case No ARB/12/37) Award (30 Aug. 2022), para. 410.
22. *See* literature, *supra* n. 2.
23. *Lone Star* (2022). For the analysis, *see* B. Kuźniacki, *The Compatibility of the Substance over Form Doctrine with Tax and Investment Treaties: A Case Study of Lone Star v the Republic of Korea*, 39 ICSID Rev–FILJ 1, pp. 139-170 (2024).
24. For a high level overview of interplay between international tax law and public international law, including dispute resolution methods, *see* J. Chaisse & I. Mosquera, *Public International Law, International Taxation and Tax Dispute Resolution*, 31 Asia Pacific Law Review 1, pp. 192-203 (2023).
25. Art. 25(1)-(3) OECD Model (2017).

arbitration clauses, the arbitration becomes relevant, but only once a MAP has commenced without solving the issue at stake.[26] Both MAPs and tax treaty arbitration have a purely administrative nature, thereby "operating within an entirely non-transparent framework that seems like a relic of the past in which tax authorities exercised absolute power and taxpayers hardly had any rights".[27] Accordingly, MAPs and tax treaty arbitration are by no means comparable to the ISDS under investment treaties, which provide investors active and direct involvement in the arbitration procedure, for example by appointing one of usually three arbitrators and expert witnesses. Investors have often relative freedom to choose a dispute resolution procedure within the ISDS under investment treaties, which is strategically most beneficial to the enforcement of arbitral awards. Moreover, arbitral tribunals constitute an international and neutral forum, whereas arbitrators usually do not have the same nationality as the disputing parties (a host country and an aggrieved foreign investor).

All in all, ISDS is a truly powerful and unique legal measure to resolve conflicts between foreign investors and states.[28] Thus, even if tax disputes ("disputes concerning the taxability (including the tax-amount) of a specific transaction")) and tax-related investment disputes (disputes concerning "alleged violations of an investment treaty resulting from certain sovereign measures taken by the Respondent in the field of taxation"[29]) may sometimes relate to the same or very similar state's fiscal treatment, the right to initiate ISDS can be a game changer for an aggrieved foreign investor. For instance, an investor may be unsuccessful in convincing tax authorities and courts in the domestic tax litigation or MAP that a most-favoured-nation (MFN) clause shall apply under a tax treaty. But it can still have the right to reverse this negative tax outcome through ISDS, arguing that a denial to apply tax treaty MFN clause violates an investment protection standard.

26. Art. 25(5) OECD Model (2017). For an overview of the tax treaty arbitration proposals contained in the OECD report, *see Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint: Inclusive Framework on BEPS* (Blueprint) (OECD 2020), Primary Sources IBFD, in light of investment treaty arbitration, *see* H. Mann, *The Expanding Universe of International Tax Disputes: A Principled Analysis of the OECD International Tax Dispute Settlement Proposals*, 31 Asia Pacific Law Review 1, pp. 268-283 (2023).

27. P. Pistone, *General Report*, in *The Impact of Bilateral Investment Treaties on Taxation* ch. 1.8.2 (Michael Lang et al. eds., IBFD 2017), Books IBFD.

28. "Granting a private party the right to bring an action against a sovereign state in an international tribunal regarding an investment dispute is a revolutionary innovation that now seems largely taken for granted. Yet its uniqueness and power should not be overlooked." Salacuse, *supra* n. 3, at p. 182.

29. *Cairn Energy Plc Cairn UK Holdings Limited v Republic of India*, UNCITRAL, PCA Case No. 2016-7, Award (21 Dec. 2020), para. 793. *See* more on a distinction between tax disputes and investment treaty tax-related disputes in K. Bhukya, *Threading between Scylla and Charybdis: developing a framework for arbitrating investor-state tax disputes*, Arbitration International (2024). By the same token, i.e. that tax measures are arbitrable under investment treaties and they may violate their standards of investment protections such as the fair and equitable treatment (FET) or indirect expropriation, *see EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, Award (3 Feb. 2006), para. 177; *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability (14 Dec. 2014), para. 395; *Occidental Exploration & Production Co. v Republic of Ecuador*, LCIA Case No. UN3467, Final Award (1 July 2004), para. 85. In similar vein, *see* T.W. Wälde & A. Kolo, *Investor-State Disputes: The Interface Between Treat-Based International Investment Protection and Fiscal Sovereignty*, 35 Intertax 8/9, pp. 427, 432, 434 (2007); A.E. Gildemeister, *L'arbitrage des différends fiscaux*, L.G.D.J., p. 170 (2013); J. Chaisse, *Investor-State Arbitration in International Tax Dispute Resolution: A Cut above Dedicated Tax Dispute Resolution*, 41 Virginia Tax Review, pp. 158-165 (2016); Pistone, *supra* n. 27, at sec. 1.2.2.

1.2. A brief overview of the most-favoured-nation clause under tax treaties

In cross-border economic relations, MFN and national treatment (NT) clauses constitute the bedrock of non-discriminatory trade and investment policy.[30] The NT clause requires states to provide foreign businesses and investors with no less favourable treatment than that accorded to domestic businesses and investors, whereas under the MFN clause states agree to provide to businesses and investors from the other country treatment that is no less favourable than that provided to the businesses and investors of any other country.[31] Under tax treaties, an unlimited MFN clause requires one contracting state to not treat residents of another contracting state less favourably than residents from any other contracting state. Hence, the MFN clause in tax treaties intends to promote non-discrimination and parity in business and investment opportunities among contracting states.[32]

Although the OECD and UN Models do not contain a MFN clause,[33] MFN clauses are included in hundreds of tax treaties around the world[34] as a result of negotiating processes regarding the wording of tax treaties in line with the tax policies of contracting states that are often tied to the unique economic relationship between the two states.[35] Notably, many states decide to use MFN clauses in their tax treaties in order to reduce trade and investment distortions that would otherwise persist in light of the differing tax treatment offered by each tax treaty.[36]

30. *See* W. Schön, *World Trade Organization Law and Tax Law*, 58 Bull. Intl. Fisc. Docn. 7, pp. 283-329 (2004), Journal Articles & Opinion Pieces IBFD.
31. *See* A.J. Cockfield & B.J. Arnold, *What Can Trade Teach Tax? Examining Reform Options for Art. 24 (Non-Discrimination) of the OECD Model*, 2 World Tax J. 2, p. 141, Journal Articles & Opinion Pieces IBFD. *See also* the definition of the MFN treatment in ILC, art. 5, *Draft Arts on most-favoured-nation clauses*, ILC Yearbook 1978, p. 21.
32. *See* D. Kapoor, *The MFN clause in tax treaties is jeopardising tax revenue for lower-income countries*, International Centre for Tax and Development (23 Aug. 2021), available at https://www.ictd.ac/blog/mfn-clause-tax-treaties-jeopardising-tax-revenue-lower-income-countries/. *See*, however, ILC's observations that MFN clauses may not be appropriate when "striking inequality exists between the development of the States" and that "[t]o apply the most-favoured-nation clause to all countries regardless of their level of development would satisfy the conditions of formal equality, but would in fact involve implicit discrimination against the weaker members of the international community." *See* ILC, *Yearbook of the International Law Commission 1978*, vol. II, part 2 (1978), para. 11, p. 12.
33. In that regard, the OECD and UN clarify that the non-discrimination clause in art. 24 of their Models "cannot be interpreted as to require most-favoured-nation treatment". *See OECD Model Tax Convention on Income and on Capital: Commentary on Article 3* para. 2 (21 Dec. 2017), Treaties & Models IBFD; and *UN Model: Commentary on Article 24* para. 1 (2021), Treaties & Models IBFD.
34. A survey from 2005 shows that MFN clauses were used in almost 600 tax treaties across the globe. *See* I. Hofbauer, *Most-Favoured-Nation Clauses in Double Taxation Conventions - A Worldwide Overview*, 33 Intertax 10, pp. 445-453, (2005).
35. In respect of a permissible approach of contracting states to get access to their tax treaty networks, *see* S. van Weeghel, *The Improper Use of Tax Treaties: With Particular Reference to the Netherlands and the United States*, Law International, p. 122 (1998).
36. Some scholars argue that article 24 of the OECD Model is too narrow and ineffective to prevent cases where income taxes unduly discriminate against non-resident taxpayers. This allows contracting states to implement and apply income tax measures that discriminate against foreign businesses and foreign investors. *See* K. van Raad, *Nondiscrimination from the Perspective of the OECD Model and the EC Treaty - Structural and Conceptual Issues*, in R.S. Avi-Yonah, J.R. Hines & M. Lang eds., *Comparative Fiscal Federalism: Comparing the European Court of Justice and the US Supreme Court's Tax Jurisdiction*, Kluwer Law International, pp. 55, 62 (2007). However, MFN clauses may effectively eliminate obstacles for equal treatment only if the overall tax burden of two situations compared is carefully considered. *See* K. Vogel, *Problems of a Most-Favoured-Nation Clause in intra-EU Treaty Law*, 4 EC Tax Review, pp. 264-265 (1995).

Adding MFN clauses to tax treaties may be particularly useful if they apply to a limited extent, for instance only to cover certain items of income among a group of states belonging to the same geopolitical and geo-economic clubs. Such MFN clauses are called "limited". The obligations under limited MFN clauses could result in greater harmonization of the tax treaty's provisions negotiated between EU Member States or OECD member countries.[37] To that effect, some states add limited MFN clauses to their tax treaties (usually via protocols) in order to ensure that the level of taxation of dividends by a source state under the tax treaty is reduced whenever the source state has committed to further limit its taxing right in respect of dividend payments made to other states from the OECD membership.

This type of MFN clause strives to balance the interests of the source state to maintain a certain level of taxation for the time being while also protecting competitive neutrality for investors from the other contracting states that are OECD member countries.[38] Limited MFN clauses also play a specific role in determining the balance of the various mutual benefits accorded by the contracting states. In this context, such MFN clauses become a relevant treaty's "trade good",[39] for example by allowing to reach a compromise on the most disputed treaty provisions, such as those reducing taxation of passive income at source.[40]

An example of the limited MFN clause, as discussed in the paragraph immediately above, is the one added to the India-Netherlands Income and Capital Tax Treaty (1988)[41] via the protocol to that treaty[42] (hereinafter "1988 MFN clause"). The Dutch parliamentary proceedings imply that the 1988 MFN clause played an important role in finding a compromise in respect of taxation of dividends and other passive income sourced in India under the India-Netherlands Income and Capital Tax Treaty (1988) insofar as India was not willing to reduce the domestic withholding tax, particularly on participation dividends, to a significant extent.[43] The wording of 1988 MFN clause reflects the scope of that compromise:

> If after the signature of this Convention under any Convention or Agreement between India and a third State which is a member of the OECD India should limit its taxation at source on dividends, interest, royalties, fees for technical services or payments for the use of equipment to a rate lower or a scope more restricted than the rate or scope provided for in this Convention on the said items of income, then, as from the date on which the relevant India Convention or Agreement enters into force the same rate or scope as provided for in that Convention or Agreement on the said items of income shall also apply under this Convention.

37. In respect to the EU Member States, *see* Cockfield & Arnold, *supra* n. 31, at p. 151.
38. *See* W. Haslehner, *Art. 10*, in A. Rust & E. Reimer eds., *Klaus Vogel on Double Taxation Conventions, 4th edition* vol. 1, para. 83, pp. 832-833 (Wolters Kluwer Law & Business 2015).
39. In respect to MFN clauses in general, cf. *UN Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries* sec. II, D-Conduct of Negotiations, paras. 117-119 (2019). A footnote using the abbreviation "cf." (compare), as the present one, does not indicate that the view expressed in the text is directly supported by that book, article, decision or other source cited. It means that the topic is discussed in such a way that it is relevant for the understanding of the issue discussed in the text.
40. In respect to MFN clauses in tax treaties, cf. N. Jalan, G. Manzi & G. Greve Arcil, *Most Favoured Nation Clauses in Tax Treaties: Comparative Analysis and Main Issues*, 14 World Tax J. 2, p. 144 (2020), Journal Articles & Opinion Pieces IBFD.
41. *Convention between the Kingdom of the Netherlands and the Republic of India for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital* (signed 30 July 1988, entered into force 21 January 1989), Treaties & Models IBFD.
42. Art. IV(2) of a protocol of 30 July 1988. This protocol was signed at the moment of signing the *Neth.-India Income & Capital Tax Treaty* (30th July 1988) and entered into force on the same day as that treaty, i.e. 21 Jan. 1989. As stipulated in the protocol, it shall form an integral part of the *Neth.-India Income & Capital Tax Treaty*.
43. Dutch Lower House conference year 1988-1989, 20 913, No. 1.

Table 1. MFN clauses in Indian treaties with France and Switzerland

MFN clause in India-France treaty	MFN clause in India-Switzerland treaty
In respect of articles 11 (Dividends), 12 (Interest) and 13 (Royalties, fees for technical services and payments for the use of equipment), if under any Convention, Agreement or Protocol signed after 1-9-1989, between India and a third State which is a member of the OECD, India limits its taxation at source on dividends, interest, royalties, fees for technical services or payments for the use of equipment to a rate lower or a scope more restricted than the rate of scope provided for in this Convention on the said items of income, the same rate or scope as provided for in that Convention, Agreement or Protocol on the said items income shall also apply under this Convention, with effect from the date on which the present Convention or the relevant Indian Convention, Agreement or Protocol enters into force, whichever enters into force later.	In respect of Articles 10 (Dividends), 11 (Interest) and 12 (Royalties and fees for technical services), if under any Convention, Agreement or Protocol between India and a third State which is a member of the OECD signed after the signature of this Amending Protocol, India limits its taxation at source on dividends, interest, royalties or fees for technical services to a rate lower than the rate provided for in this Agreement on the said items of income, the same rate as provided for in that Convention, Agreement or Protocol on the said items of income shall also apply between both Contracting States under this Agreement as from the date on which such Convention, Agreement or Protocol enters into force.

Very similar limited MFN clauses have been included in the Indian tax treaties with France and Switzerland via protocols:[44]

Thus, whenever in this article reference is made to the 1988 MFN clause or MFN clauses, this refers to MFN clauses in the Indian tax treaties with the Netherlands, France and Switzerland, unless otherwise stated. Mutatis mutandis, the further analysis in this article is of relevance to all other MFN clauses.[45]

The interpretation and application of MFN clauses appear to pose challenges, not least due to their complicated and complex structure and the imprecise conditions for their activation (the temporal condition concerning the phrase "a third State which is a member of the OECD"). The lack of linguistic clarity of such MFN clauses could be seen as a hidden "by-purpose" of the treaty negotiators of the aforementioned tax treaties. More specifically, the lack of clarity of these MFN clauses stems from the work of the governments of the contracting states represented by the relevant ministries that are responsible for negotiating the content and structure of tax treaties (e.g. the 1988 MFN clause), not taxpayers (e.g. the Dutch, French or Swiss companies).[46] However, this interpretative challenge does not need to lead to unpredictable results, at odds with the principle of legal certainty, if the MFN clauses are interpreted in accordance with the rule and principles of interpretation under the VCLT. The importance of the VCLT in that regard cannot be overstated because neither the OECD nor the UN Model Commentaries provide for any interpretative guidance on the MFN clauses. This follows from the lack of such clauses in the Models.

44. I.e. para. 7 Protocol to the *Convention between the Government of the Republic of India and the Government of the French Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital* (signed 29 Sept. 1992, entered into force 1 August 1994), Treaties & Models IBFD; para. 5 Protocol to the *Agreement between the Republic of India and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income* (signed 2 Nov. 1994, entered into force 29 Dec. 1994), Treaties & Models IBFD.

45. MFN clauses in all tax treaties can be found at the IBFD Tax Research Platform, available at research.ibfd.org.

46. Cf. more broadly The Platform for Collaboration on Tax, *Toolkit on Tax Treaty Negotiations* (21 Mar. 2021), available at www.oecd.org/tax/treaties/toolkit-on-tax-treaty-negotiations.htm.

1.3. Scope and purpose of the article

This article looks closely at the interpretative challenge stemming from MFN clauses to verify whether the rules and principles of treaty interpretation in the VCLT can be useful in securing compatibility between the application of such clauses with the fair and equitable treatment (FET) standard under international investment agreements (IIAs), mainly bilateral investment treaties (BITs). This analysis aims to achieve a general purpose of the article, which is to demonstrate that the VCLT's rule and principles of interpretation, constituting customary international law (CIL),[47] have a significant role to play in connecting international tax law (tax treaties) and international investment law (IIAs). Bridging a gap between those sources of international law is not only an important endeavour in theory of law but also in practice, insofar as it may enhance their frictionless interoperability. The result may reduce investment treaty tax-related disputes and take the edge off for the remaining ones.

The hypothesis of the article is that a serious failure in a proper application of the VCLT to interpret the MFN clauses in tax treaties may lead to a violation of IIAs, in particular the FET standard which is habitually included in BITs and some of the multilateral investment treaties, e.g. the Energy Charter Treaty (ECT)[48] and the United States-Mexico-Canada Agreement (USMCA).[49] Although the article dives deeply into the most recent judiciary development to verify the hypothesis, the analysis and conclusions are relevant to all tax treaties and IIAs containing a limited MFN clause and FET standard, respectively. It also is of relevance for the interpretation of all provisions of tax treaties, not only the limited MFN clauses, in accordance with the VCLT. In general, such interpretation contributes to an application of tax treaties in a way that is compatible with IIAs. Moreover, examining the compatibility of tax treaties with the FET standard allows the FET standard to be seen as a gateway for the systemic integration of tax treaties in accordance with the principle enshrined in article 31(3)(c) of the VCLT because some of the core elements of that standard are deeply rooted in sources of international law (general principles of law and custom).[50] Ultimately, a peaceful co-existence of the FET standard under IIAs with all provisions under tax treaties ensures more stability and predictability in eliminating double taxation mainly because of one of the core elements of the FET: the principle of legal certainty.[51]

While prior literature has commented on tax treaties and investment treaties, and the interplay between them,[52] this article focuses on an unexplored area of particular correlation

47. *See* R.G. Wetzel & D. Rauschning, *The Vienna convention on the law of treaties: travaux preparatoires* pp. 4-79 (Metzner 1978); A.A. Skaar, *Permanent Establishment: Erosion of a Tax Treaty Principle (Second Edition)* p. 43 (Wolters Kluwer International 2020). Cf. K. Vogel & R.G. Prokisch, *General Report*, in *Interpretation of Double Taxation Conventions* p. 66 (IFA Cahiers vol. 78a, 1993); D.A. Ward, *The Interpretation of Income Tax Treaties with Particular Reference to the Commentaries on the OECD Model* pp. 15-16 (IBFD 2005). For the relevant international case law, *see* the International Court of Justice (ICJ) judgment of 13 December 1999, *Kasikili/Sedudu/Island* case, ICJ Reports 1999, p. 1059 and the European Court of Human Rights' (ECHR) judgment of 21 Feb. 1975, *Golder v. the United Kingdom* case, 57 ILR, pp. 213-214.
48. Opened for signature on 17 December 1994, entered into force on 16 April 1998.
49. A free trade agreement between the United States, Mexico and Canada that entered into force on 1 July 2020 replacing the 1994 North American Free Trade Agreement (NAFTA), available at https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement.
50. *See* secs. 2.1.-2.2.
51. *See further*secs. 2.2.-2.4.
52. *See* e.g. Wälde &. Kolo, *supra* n. 2; Park, *supra* n. 2; Sheppard, *supra* n. 2; Van Weeghel, *supra* n. 11; S. van Weeghel, *Tax and Investment Treaties: Further Thoughts*, in *Building Global International Tax Law, Essays in Honour of Guglielmo Maisto* ch. 26 (P. Pistone ed., IBFD 2022), Books IBFD; M. Davie, *Taxation-*

between the FET standard as a gateway to systemic integration of tax and investment treaties in accordance with article 31(3)(c) of the VCLT, and the interpretative role of the VCLT in general in ensuring a compatibility between those treaties.[53] By bridging international tax law and international investment law through the analysis of MFN and FET standards, the article provides a clear understanding of how these areas interact. In so doing, the article fills a current gap in the literature and aims to make a valuable resource for understanding complex treaty interactions in a global context.

To exemplify how an application of an MFN clause could raise questions about the compatibility of such clauses with IIAs, the article includes a case study of a recent major tax litigation between the Indian tax authorities and taxpayers (foreign investors) that has been finally concluded in favour of the former by the Supreme Court of India (SCI) in the judgment of 19 October 2023 in the *Assessing Officer Circle (International Taxation) New Delhi v. Nestlé and others* case (*Nestlé*).[54] Besides relevant Indian BITs in which the tax carve-outs are not applicable to FET standards,[55] the case study may be useful in assessing whether the interpretation of the MFN clause by the SCI could violate FET standards under other BITs,

Based Investment Treaty Claims, 6 Journal of International Dispute Settlement 1, pp. 202-227 (2015); J. Chaisse, *Investor-State Arbitration in International Tax Dispute Resolution: A Cut above Dedicated Tax Dispute Resolution*, 35 Virginia Tax Review (2015-2016); A. Martín Jiménez, *International Investment Agreements and Anti-Tax Avoidance Measures: Incoherencies in the International Law System, 'Systemic Interpretation' And Taxpayers' Rights*, in *Building Global International Tax Law, Essays in Honour of Guglielmo Maisto* (P. Pistone ed., IBFD 2022), Books IBFD.

53. Some authors touched upon the FET standard and the principle of systemic integration but from a different perspective and for a different purpose; namely to highlight the interpretative relevance of the OECD and the UN commentaries to determine whether taxation under domestic tax law is compatible with the FET. *See* R. J. Danon & S. Wuschka, *International Investment Agreements and the International Tax System: The Potential of Complementarity and Harmonious Interpretation*, 75 Bull. Intl. Taxn. 11/12, p. 697 (2021), Journal Articles & Opinion Pieces IBFD. *See also* R. Danon, *Relation between Dispute Resolution under Double Taxation Conventions and Investment Treaties*, in *Alternative Dispute Resolution and Tax Disputes* p. 237 (W. Haslehner et al. eds, Edward Elgar 2023): "[The OECD Commentaries] could, depending on the situation involved, become applicable to give content to the FET Standard and to determine whether, for example, in a tax assessment the host State has complied with its tax treaty obligations in a way that is compatible with this standard. In my view, the Model Commentaries would be the Model Commentaries would be 'relevant' where the guidance conveyed by these materials is based on principles which are also at the core of the FET Standard." However, another author begs for caution in following a suggestion of Danon. *See* Kuźniacki, *supra* n. 23, at p. 159: "tribunals must meticulously examine the views of the OECD through an independent analysis of the subject matter in accordance with the VCLT and the true nature, purpose and effect of the questioned tax measures towards tax treaties and IIAs. While referring to the OECD Commentaries, it should also be borne in mind that this documentation constitutes interpretative material of the utmost importance primarily for tax authorities, and does not necessarily reflect an appropriate and impartial interpretation of DTTs and their interactions with domestic tax laws of contracting States."

54. *Assessing Officer Circle (International Taxation) 2(2)(2) New Delhi Vs. M/s Nestlé SA*, 2023 INSC 928, (*Nestlé* case), available at https://main.sci.gov.in/supremecourt/2022/6394/6394_2022_8_1502_47832_Judgement_19-Oct-2023.pdf (accessed 29 Jan. 2024). In that regard, it is noteworthy that India is seen by tax experts as "one of the most litigious countries worldwide, and a complex country for gaining tax certainty". *See* A. Haines, *ITR Global Tax 50 2020-21: India's Income Tax Department*, International Tax Review (5 Feb. 2021), available at https://www.internationaltaxreview.com/article/2a6a7ujyukldlg2k4x2ps/itr-global-tax-50-2020-21-indias-income-tax-department.

55. I.e. *Agreement between the Republic of India and the Kingdom of the Netherlands for the promotion and protection of investments* (signed 6 Nov. 1995; entered into force 1 Dec. 1996; terminated 1 Dec. 2016; sunset clause until 30 Nov. 2031) [hereinafter *India-Neth. BIT*]; *Agreement between the Swiss Confederation and the Republic of India for the Promotion and Protection of Investments* (signed 4 April 1997; entered into force 16 Feb. 2000; terminated 6 April 2017; sunset clause until 5 April 2032) [*Switz.-India BIT*]; *Accord entre le Gouvernement de la République Francaise et le Gouvernement de la Republique de l'Inde Sur l'Encouragement et la Protection Reciproques des Investissements* (signed 2 Sept. 1997; entered into force 17 May 2000; terminated 15 April 2017; sunset clause until 14 April 2032) [*France-India BIT*].

if such interpretation is to be followed by the tax authorities and courts in other countries. It is nowadays of great practical importance because the SCI rejected the review petition filed by taxpayers on the *Nestlé* case on 6 August 2024.[56] Thus, the only legal measure to challenge the outcome of the SCI's judgment by Nestlé and other investors is now investment treaty arbitration (ITA) under Indian BITs with the Netherlands, France and Switzerland.[57]

Considering that the FET standard is most frequently invoked by foreign investors in ITA tax-related cases and in all other cases,[58] a claim under Indian BITs may arise from the alleged breach of FET provisions due to undermining the protection of legitimate expectations of investors in the operation of the limited MFN clauses under tax treaties of India with the Netherlands, France and Switzerland.[59] More broadly, the SCI's judgment is capable of leading to a considerable reduction of legal certainty in respect of the application of Indian tax treaties.

In that regard, it is worth noting the observations of arbitral tribunals in *Vodafone v. India* and *Cairn v. India*.[60] They observed that India, via its executive and legislative powers regarding (retroactive) taxation, violated FET under its BITs with the Netherlands and the United Kingdom because of the imposition of taxes on profits without a jurisdiction to tax and the retroactive changes in tax law aiming to provide India such jurisdiction. It deprived foreign investors of their ability to plan their activities in consideration of the legal consequences of their conduct, in breach of the principle of legal certainty, one of the core elements of the FET standard and of the rule of law more generally.[61]

Despites the termination of the mentioned Indian BITs, they remain effective in respect of investments made before the date of the terminations.

56. The original wording of the SCI's order rejecting the review petition is available at https://api.sci.gov.in/supremecourt/2023/48138/48138_2023_2_1006_54483_Order_06-Aug-2024.pdf.

57. In theory, order XLVIII Supreme Court Rules provides that the "Supreme Court can reconsider its final judgment or order by way of a curative petition on limited grounds after the dismissal of review petition." *See* at the official website of the SCI: https://www.sci.gov.in/jurisdiction/#:~:text=Order%20XLVIII%20of%20the%20Supreme,the%20dismissal%20of%20review%20petition. However, none of the legal grounds for a curative petition appear to be relevant in the *Nestlé* case insofar as they are as follows: (i) a violation of principles of natural justice, (ii) a question of bias against the presiding judge and (iii) abuse of the process of the court. *See* the SCI, judgment, 10 April 2002, *Rupa Ashok Hurra v. Ashok Hurra & Anr.* [(2002) 4. SCC 388. Although these grounds are not exhaustive, the SCI should consider such petitions only in rare circumstances to prevent frivolous litigation. For the overview of the relevant case law of the SCI in that regard, *see* A. Vora, *Curative Petitions: Court in Review*, Supreme Court Observer (20 June 2023), available at https://www.scobserver.in/journal/court-in-review-curative-petitions/.

58. D. Morris, Y. Kryvoi, S. Winter-Barker & T. Savaş, *Tax-Related Measures In Investor-State Arbitration* p. 20 (BIICL 2024), available at https://www.biicl.org/newsitems/16502/biicl-publishes-new-study-on-taxation-measures-in-investment-disputes.

59. Cf. Prabhash Ranjan, who argues that "[t]he Court's interpretation allows the executive to undo its international law obligations by not issuing the relevant notifications domestically", which makes India "susceptible to international claims under other instruments of international law". P. Ranjan, *A verdict that hampers international law obligations*, The Hindu (8 Nov. 2023), available at https://www.thehindu.com/opinion/op-ed/a-verdict-that-hampers-international-law-obligations/article67509677.ece.

60. For a recent overview of those cases from the perspective of an Indian scholar and in respect of the FET standard (the principle of legal certainty), *see* P. Ranjan, *Investor-state dispute settlement and tax matters: limitations on state's sovereign right to tax*, 31 Asia Pacific Law Review 1, pp. 227-229 (2023). For a closer look at the approach to determining the state's responsibility for a violation of international law by an arbitral tribunal in the *Cairn* case, and the respective reparation (compensation and restitution) in that case, *see* P. Ranjan, *Cairn Energy v India: Continuity in the Use of ILC Articles on State Responsibility*, 37 ICSID Rev—FILJ 1-2, pp. 543-555 (2022).

61. *See Vodafone International Holdings BV v. India (I)* (PCA Case No. 2016-35) (Award) (25 September 2020); *Cairn Energy*, *supra* n. 29. *See* an in-depth analysis of the *Cairn v. India* case, which is of high relevance also to the *Vodafone v. India* case (unpublished). B. Kuźniacki & S. van Weeghel, *When*

Furthermore, the very first case against India under a BIT, *White Industries v. India*, regarded the interpretation and the application of the MFN clause under the India-Australia BIT (1999).[62] This clause, in the tribunal's view, allowed the foreign investor (the claimant) to borrow the "effective means" provision present in the India-Kuwait BIT (2001).[63,64] As a result, and due to the fact that the Indian judicial system had been unable to deal with White Industries' jurisdictional claim in over 9 years, the tribunal held that the delay by Indian courts violated India's obligation to provide White Industries with an "effective means" of asserting claims and enforcing rights.[65]

The unique Indian context regarding MFN clauses in tax treaties and disputes under BITs justifies the selection of the SCI's judgment as the in-depth case study. The case study aims to answer to the question of whether the interpretation and application of MFN clauses under Indian tax treaties by the Indian tax authorities and the SCI could be seen as violation of the FET standard under the Indian BITs with the Netherlands, France and Switzerland. However, the relevance of the case study goes beyond the mentioned MFN and FET standards. It can be applied by analogy to all similar cases and to the interaction of tax treaties with BITs in general, paying due heed to legal and factual similarities and differences between the content of this article and any potential or pending case.

Considering the purpose of this article, section 2. introduces the FET standard and discusses its core elements and relevance in tax-related cases. Section 3, in turn, contains an in-depth case study that carefully examines the SCI's treatment of MFN clauses with a particular focus on the VCLT's rule and principles of interpretation and the SCI's perception of the concept of "subsequent practice" included therein. This section presents and applies the VCLT's rule and principles of interpretation on an ongoing basis in the course of critical analysis of the SCI's methodology and reasoning. Section 4. offers concluding remarks, integrating the key findings from sections 2. and 3. to answer the specific and general research questions. The specific questions arise out of the case studies: can the interpretation of the MFN clauses by the Indian executive and judiciary powers be reasonably considered as a violation of the FET standard under the Indian BITs with the Netherlands, France and Switzerland under the VCTL's rule and principles of interpretation? The general research question reads as follows: can the VCLT's rule and principles of interpretation assist in ensuring a compatibility between an application of the MFN clauses in tax treaties with the FET standards in IIAs?

Before the analysis unfolds, it is worth clarifying that the tensions between tax treaties and IIAs are not automatically and entirely excluded by means of the so called tax carve-outs or rules ensuring prevalence to tax treaties. The most frequent carve-outs regarding tax-

Retroactive Taxation not Justified by Prevention of Tax Avoidance Is Unfair and Inequitable, 39 Arbitration International 1 (2023).

62. *Agreement between the Government of Australia and the Government of the Republic of India on the Promotion and Protection of Investments* (26 Feb. 1999).

63. *Agreement between the State of Kuwait and the Republic of India for the Encouragement and Reciprocal Protection of Investment* (27 Nov. 2001).

64. *See White Industries Australia Limited v. The Republic of India*, UNCITRAL 1976 (Final Award) (30 Nov. 2011).

65. For summary and comments on that award, *see* P. Ranjan, *The White Industries Arbitration: Implications for India's Investment Treaty Program*, Investment Treaty News of the International Institute for Sustainable Development (IISD) (13 April 2012), available at https://www.iisd.org/itn/en/2012/04/13/the-white-industries-arbitration-implications-for-indias-investment-treaty-program/.

ation measures are only partial. It means that they exclude tax-related disputes from the investment treaty protection only for NT and MFN clauses. However, they typically do not exclude this protection under the FET standard.[66] As a result, a majority of IIAs may effectively protect investments under the FET standard against the improper application of tax treaties by the tax authorities and domestic courts.

Some IIAs provide prevalence to tax treaties to the extent of the inconsistency between them.[67] However, the improper application of tax treaties can still be tested by arbitral tribunals under the standards of investment treaty protection, for example the FET standard.

Accordingly, tax-related investment disputes, including those arising out of tax treaties, do not escape the cognition of arbitral tribunals, unless this is explicitly stated in a given IIA.[68] In the majority of IIAs, such exclusion will not apply to the FET standards. For instance, it does not apply to Indian BITs with the Netherlands, France and Switzerland.[69] In most IIAs, neither tax carve-outs nor the tax treaties' prevailing clauses exclude the right of arbitral tribunals to examine whether a serious error in an application of the VCLT to interpret tax treaties by the executive and the judiciary powers violate the FET standard.

Prospectively, the role of the FET standard in ensuring a proper application of MFN clauses in India and other states may decline due to termination of IIAs by states. For example, after the seminal judgment of the Court of Justice of the European Union (ECJ) on 6 March 2018 in *Achmea*,[70] the European Commission claimed that all intra-EU BITs are illegal

66. Pistone, *supra* n. 27, at sec. 1.3.2.

67. E.g. *Treaty between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment* art. 21(5) (2008): "Nothing in this Treaty shall affect the rights and obligations of either Party under any tax convention. In the event of any inconsistency between this Treaty and any such convention, that convention shall prevail to the extent of the inconsistency", available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2241/download. *See also 2012 U.S. Model Bilateral Investment Treaty* art. 21(4), available at https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf; and Canada's *Foreign Investment Promotion and Protection Agreement (FIPA) Model* art. 11(2) (2021), available at https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/2021_model_fipa-2021_modele_apie.aspx?lang=eng.

68. Cf. *Cairn* (2020), para. 797.

69. In the *Agreement between the Republic of India and the Kingdom of the Netherlands for the promotion and protection of investments* art. 4(4) (1996), only NT and MFN treatment are carved out from protection in respect of "any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation or arrangements consequent to such legislation relating wholly or mainly to taxation". In particular, art. 4(1) (FET) and non-discrimination are fully operative to protect investments negatively affected by the tax measures cited in art. 4(4). The same applies to protection ensured by art. 5 (non-expropriation) and art. 7 (repatriation of investment and returns). In art. 43 *Switz.-India Investment Treaty* (1997), only MFN in art. 4(1) is carved out from protection in respect of "matters of taxation". Instead, as art. 4(3) the second and the last sentence indicates, the MFN clause under the *India-Switz. Income Tax Treaty* applies to matters of taxation. It means that art. 3 FET is fully operative to protect investments negatively affected by the matters of taxation cited in art. 4(3). The same applies to protection ensured by art. 5 non-expropriation and art. 7 repatriation of investment and returns. Finally, art. 5(4) *Switz.-India Investment Treaty* (1997) excludes tax measures for the scope of NT and MFN clauses only. It means that other standards of protection apply to such measures, e.g. art. 4 FET, art. 6 non-expropriation and art. 7(1)a) free transfer of dividends.

70. DE: ECJ, 6 Mar. 2018, Case C-284/16, *Slowakische Republik (Slovak Republic) v. Achmea BV*, ECLI:EU:C:2018:158, paras. 41-61. *See* critically about the ECJ's reasoning and methodology in the *Achmea* judgment in respect of an interplay between EU law and international investment law, among others, A. Gourgourinis, *After Achmea: Maintaining the EU Law Compatibility of Intra-EU BITS Through Treaty Interpretation*, European Investment Law and Arbitration Review 3, pp. 282, 287-302 (2018); E. Gaillard, *The Myth of Harmony in International Arbitration*, 38 Swiss Arbitration Association Bulletin, pp. 763, 764-765 (2018); C. István Nagy, *Intra-EU Bilateral Investment Treaties and EU Law After Achmea:*

(incompatible with EU law)[71] resulting in the initiation of the process of termination of many intra-EU BITs under the 2020 termination agreement.[72] Another vivid example of such a policy occurs in India. The lost investment treaty arbitrations in the *Vodafone* and *Cairn* cases prompted India to give a notice of termination of its existing BITs to at least 74 states since 2017 and released India's Model BIT (2016) to replace the existing model from 2003. The new model, among others, seems to entirely exclude tax measures from its scope under a very broad tax carve-out under its article 2(4)(ii), completely omits the FET standard and insists on the investor exhausting the domestic remedies for at least 5 years before commencing an arbitration under the BIT. Such extremely restrictive wording in BITs is unheard of. Hence, according to some authors, India's Model BIT (2016) "seems more like a restatement of international law on sovereignty rather than a treaty meant to protect cross-border commercial transactions".[73] In the authors' view, a better policy approach would be to avoid the fiscal misconduct of states violating the FET standard rather than reducing such protection upfront to nil.[74] Indeed, although the United Nations Conference on Trade and Development (UNCTAD) recommends reducing the exposure of tax measures to the FET standard to tax and investment policymakers, it ultimately acknowledges that "the FET clause does not preclude States from adopting good faith regulatory or other measures that pursue legitimate policy objectives."[75] Thus, in our view, the FET standard does not make a wise tax policy vulnerable to investment treaty arbitration. In other words, states can implement tax measures in good faith and for legitimate policy objectives without a non-negligible risk of running afoul of the FET.

2. The Core Elements and Relevance of the FET Standard in Tax-Related Cases

2.1. General introduction to FET standard

The overwhelming majority of BITs and other IIAs contain a FET clause.[76] Even in IIAs without a FET clause, a protection under the FET standard is available to investors by means of the MFN clauses included therein.[77] The pervasiveness of the FET standard under

"Know Well What Leads You Forward and What Holds You Back, 19 German Law Journal 4, pp. 981-1016 (2018).

71. *Communication from the Commission to the European Parliament and the Council: Protection of intra-EU investment*, COM (2018) 547 final (19 July 2018), available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0547&rid=8 (accessed 5 May 2022).
72. Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, OJ L 169 (29 May 2020), available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22020A0529(01) (accessed 27 July 2022).
73. *See* A. Dwivedi, *India's Flawed Approach to Bilateral Investment* Treaties, The Diplomat (4 Dec. 2020). *See also* D. Thompson, *Vodafone Claim Still On after India Rules Out Tax Law Changes*, Global Arb Rev. (2014); *Cairn's Tax Liability Credit Negative for Vedanta: Moody's*, The Indian Express (17 Mar. 2015); G. Hanessian & K. Duggal, *The 2015 Indian Model BIT: Is This Change the World Wishes to See?,* 30 ICSID Rev-FILJ 3, pp. 729, 735 (2015).
74. Kuźniacki & Van Weeghel, *supra* n. 61, at p. 154.
75. UNCTAD, *International Investment Agreements and Their Implications for Tax Measures: What Tax Policymakers Need to Know* (2021), reform option 4.3.3, the third indent at p. 28.
76. As of 2015, the mentioned observation regarded all publicly available BITs apart from 75 (around 7% of all BITs at the time). *See* P. Dumberry, *The Importation of the Fair and Equitable Treatment Standard through MFN Clauses: An Empirical Study of BITs*, 32 ICSID Rev., pp. 117, 136 (2016).
77. The empirical studies of P. Dumberry show that all BITs without an FET clause (except for two) contain broad MFN clauses under which an importation of a FET standard from other BITs should be allowed. "Thus, there is no logical reason for the parties, on the one hand, to exclude a FET clause from their BIT and, on the other hand, to include a broadly drafted MFN clause that allows the importation of FET protection from other treaties. This is a fortiori the case when the MFN clause allows an investor to benefit

IIAs prompted some scholars to claim that it is "the most important standard in investment disputes".[78] The practice confirms that claim because the FET is the most frequently invoked investment protection standard by foreign investors in all cases, including those tax-related, as well as the standard most frequently found to be breached.[79] This outcome appears to follow from the very design of FET clauses: they are the broadest, the most capacious and the most flexibly phrased investment treaty protection clauses of all included in IIAs. This feature of the FET standard in conjunction with the fact that they are not uniformly drafted triggers interpretative challenges and criticism from the side of some academics and the masters of the treaties – the states.[80] For that reason, a new generation of Model BITs contains a new type of FET clause that includes an exhaustive list of measures that are considered to breach the FET, significantly restricting the level of protection given to foreign investors.[81] However, for the present analysis of the highest practical value are FET clauses included in the old generation IIAs without such restrictions. They constitute approximately 90% of all IIAs and were concluded in the 1980s, 1990s and 2000s.[82]

In practice, IIAs contain one of the three types of drafting of a FET clause: (i) the standard alone; (ii) the standard together with the full protection and security reference; and (iii) the standard together with the NT and the most favoured nation MFN treatment.[83] To exemplify their design, Tables 2 and 3 below include FET clauses in the India-Neth. BIT (1995) and the Switz.-India BIT (1997), as well as in the ECT and the USMCA, respectively. The bolded words represent the strict linguistic context of the FET standard while those bolded and in italics represent the three words which consist of that standard in a pure linguistic sense.

The wording of cited FET clauses reveals that they stem from the type 2 design. It is noteworthy that only the USMCA clarifies that the FET standard shall be understood and applied within the scope of the customary international law minimum standard of treatment (MST).[84] This an important feature of the FET standard because the prevailing case

from 'more favourable treatment' found in already existing BITs that do contain FET protection." *See* id., at p. 136.

78. *See* C. Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 Journal World Investment & Trade, p. 357 (2005).

79. Morris, Kryvoi, Winter-Barker & Savaş, *supra* n. 58, at p. 20; N. Blackaby et al., *Arbitration under Investment Treaties*, in *Redfern and Hunter on International Law* para. 8.96. (A. Redfern & M. Hunter eds., 6th ed., Oxford University Press 2014).

80. UNCTAD, *The Global Minimum Tax and Investment Treaties: Exploring Policy Options*, IIA Issues Note 4, p. 7 (2023): "Owing to its open-ended and largely undefined nature, the FET standard, especially as it has been drafted in old-generation IIAs, has turned into an all-encompassing provision that investors have used to challenge any type of governmental conduct that they deem to hurt their interests."; K. Leite, *The Fair and Equitable Treatment Standard: A Search For a Better Balance in International Investment Agreements*, American University International Law Review, p. 371 (2016-2017): "Future IIAs may shield states against the broad powers granted to investors by incorporating a stronger, more specific formulation of the FET standard that expressly states the consequences of liability-creating conduct on behalf of the State. Furthermore, the creation of a more structured arbitral tribunal and review mechanism within the investor-state dispute settlement mechanism would promote better consistency, transparency, and fairness in investment treaty arbitration. These modifications would bring the FET clause in U.S. investment treaty practice in line with international principles of state sovereignty by providing a more effective framework to balance the interests of the investor and State."

81. *See* e.g. art. 9(2)-(6) draft *Netherlands Model Investment Agreement* (2018), art. 3 *Indian Bilateral Investment Treaty, Model Text* (2015) and art. 5 *US Model Bilateral Investment Treaty* (2012).

82. UNCTAD, *supra* n. 80, at p. 2.

83. *See* I. Knoll-Tudor, *Fair and Equitable Treatment*, Jus Mundi (updated 20 Feb. 2024), available at https://jusmundi.com/en/document/publication/en-fair-and-equitable-treatment.

84. The same connection between the FET and the MST could be found in art. 1105 of the predecessor of the USMCA – the North America Free Trade Agreement (NAFTA).

Table 2. FET clauses in Indian BITs with the Netherlands and Switzerland

Art. 4(1) India-Neth. BIT	**Art. 3(2) Switz.-India BIT**
Investments of investors of each Contracting Party **shall at all times be accorded *fair and equitable treatment*** and shall enjoy full protection and security in the territory of the other Contracting Party.	Investments of investors of each Contracting Party shall enjoy full protection and security in the territory of the other Contracting Party and **shall at all times be accorded *fair and equitable treatment***.

Table 3. FET clauses in the ECT and the USMCA

Art. 10(1) ECT	**Art. 14.6(1)-(2) USMCA**
Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties *fair and equitable treatment*. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable 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.	1. Each Party **shall accord to covered investments treatment in accordance with customary international law, including *fair and equitable treatment*** and full protection and security. 2. For greater certainty, paragraph 1 prescribes **the customary international law minimum standard of treatment of aliens as the standard of treatment to be afforded to covered investments**. The concepts of ***"fair and equitable treatment"*** and "full protection and security" ***do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights***. The obligations in paragraph 1 to provide: a. ***"fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world***; and b. "full protection and security" requires each Party to provide the level of police protection required under customary international law.

law of the arbitral tribunals and the investment treaty scholars indicate that in all other IIAs in which a FET clause is not explicitly linked with the MST, e.g. the IIAs cited above in Tables 1 and 2 apart from the USMCA, the FET is an independent investment treaty standard with an autonomous meaning from the MST.[85] This remains correct even if some

85. *See* A. Newcombe & L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* pp. 263-264 (Kluwer 2009); P. Dumberry, *A Guide to General Principles of Law in International Investment Arbitration* p. 314 (Oxford University Press 2020). *See* e.g. *Inmaris Perestroika v. Ukraine*, ICSID, Award (1 Mar. 2012), para. 265: "There is nothing in the BIT that limits Article 2(1) to the standard required by customary international law. In the absence of such a statement, the Tribunal interprets the language as written, i.e., the government is obligated to accord fair and equitable treatment to foreign investments, and therefore there is no need to establish that the government's actions were in breach of customary international law in order to establish a breach of Article 2(1)." Only a few arbitral tribunals have interpreted a FET standard as an implicit reference to international law/MST, e.g. *Siemens AG v. Argentina*, Award (17 Jan. 2007), ICSID No. ARB/02/8, para. 291: "The specific provision of the Treaty on fair and equitable treatment is found also in Article 2(1) after the commitment to promote and admit investments in accordance with the law and regulations and as an independent sentence: "In any case [the parties to the Treaty] shall treat investments justly and fairly ('En todo caso tratará las inversiones justa y equitativamente')." There is no reference to international law or to a minimum standard. However, in applying the Treaty, the Tribunal is bound to find the meaning of these terms under international law bearing in mind their ordinary meaning, the evolution of international law and the specific context in which they are used."

of core elements of the FET standard correspond with the MST, e.g. the proscription of arbitrary treatment.[86]

The above methodological observations are of a high practical importance insofar as the FET standard disconnected from the MST in a given IIA is more favourable to investors (or: less favourable to host states) than the FET standard explicitly tied with the MST. The former provides more extensive protection than the latter, i.e. a FET clause without an explicate connection with the MST provides foreign investors more rights.[87] This is also an important observation for all investors who cannot rely on the FET standard because of the lack of a relevant IIA, i.e. whenever there is no IIA at all between the home state of the investor and the state hosting the investor, or where there is an IIA, but it carves out all tax measures from the scope of the FET. In these scenarios, article 31(3)(c) of the VCLT would allow the MST to be relied on as the only investment protection against improper application of tax treaties. It is of the utmost relevance to investors present in India and other states that decide to terminate their IIAs or change them through the inclusion of full tax carve-outs.

The abovementioned approach to define the meaning of the FET standard and the MST has been applied by the *Cairn* tribunal:

> The Respondent has argued that recent State practice confirms that States that agreed to establish an FET obligation in fact meant it to be limited to the MST. The Tribunal is not persuaded. Simply because certain States have clarified their intent does not mean that all States are bound by that clarification. The Respondent has provided no appropriate evidence that this was the Contracting Parties' shared intent.
>
> The Tribunal thus concludes *that the FET standard contained in Article 3(2) of the BIT is an autonomous standard and does not as a general proposition operate a renvoi to the MST*. This does not mean however that it may not share elements with the MST. As the Respondent has correctly pointed out, the history of how the FET standard has been included in investment treaties suggests that the FET standard was inspired by the MST.
>
> As discussed further below, *the FET standard and the MST standards share certain core elements*. Indeed, as noted by Newcombe and Paradell, "fair and equitable treatment has been interpreted to include, at the very least, the protections afforded by the minimum standard of treatment." As a result, *the Tribunal must examine the BIT's FET standard (and in particular, the compatibility of retroactive taxation with that standard) independently from the minimum standard of treatment under customary international law*. This is not to suggest that the Tribunal will disregard general international law. As discussed below, pursuant to Article 31(3)(c) of the VCLT, when interpreting a treaty the Tribunal shall take into account, together with the context, "any relevant rules of international law applicable in the relations between the [Contracting Parties]".[88] [Emphasis added; footnotes omitted.]

Furthermore, the FET standard cannot be invoked by an investor under an IIA, apart from within the MST (custom), if a reference to "fair and equitable treatment" exists only in the preamble of the IIA. Such a preambular references does not generate an obligation towards the host state. For example, the arbitral tribunal in *Muhammet Çap v. Turkmenistan* case observed:

86. *See* C. Henckels, *Legitimate Expectations and the Rule of Law in International Investment Law*, in *Investment Protection Standards and the Rule of Law* pp. 59-60 (A. Reinisch & S.W. Schill eds., Oxford University Press 2023).
87. *See* P. Dumberry, *The Importation of 'Better' Fair and Equitable Treatment Standard Protection Through MFN Clauses: An analysis of NAFTA Article 1103*, 14 Transnational Dispute Management 1, pp. 4-5 (2017).
88. *Cairn* (2020), paras. 1703-05.

> Claimants' argument regarding the FET obligation consists in conferring on the Preamble a normative value from which a binding obligation could be derived. Such an interpretation runs contrary to the customary rules of interpretation as codified by the VCLT.
>
> In the Beagle Channel case, the tribunal stated:
>
> Although Preambles to treaties do not usually—nor are they intended to— contain provisions or dispositions of substance (in short they are not operative clauses) it is nevertheless generally accepted that they may be relevant and important as guides to the manner in which the Treaty should be interpreted, and in order, as it were, to "situate" it in respect of its object and purpose.
>
> Likewise, other tribunals have held that *a preamble "cannot be relied upon as a source of independent or free-standing legal rights or obligations"* or that "[d]espite the use of the verb 'agree', *it is doubtful that, in the absence of a specific provision in the BIT itself, the sole text of the preamble constitutes a sufficient basis for a self-standing fair and equitable treatment obligation under the BIT*
>
> On the basis of the general rules of treaty interpretation, the Tribunal does not consider that the Preamble of the BIT creates a free-standing obligation to accord FET.[89] [Emphasis added, footnotes omitted.]

However, article 31(1) of the VCLT requires to take into account the wording of preambles to IIAs to interpret the FET standard included therein insofar as the preambles typically express objects and purposes of IIAs.[90]

Due to the extreme linguistic shortness of the FET standard in the vast majority of IIAs (only three words), a proper interpretation of it must necessarily consider the contents of the IIAs and a broader context of that standard. As neatly put by the *Vivendi (II)* tribunal:

> Defining the words "fair and equitable," given their generality, vagueness, and the diverse ways in which those terms may be understood in various cultures and countries creates an especially difficult challenge. As the tribunal in Saluka stated after making its own strenuous efforts in this regard:
>
> The "ordinary meaning" of the "fair and equitable treatment" standard can only be defined by terms of almost equal vagueness. In MTD, the tribunal stated that: "In their ordinary meaning, the terms "fair" and "equitable" [...] mean "just", "even handed", "unbiased" "legitimate." On the basis of such and similar definitions, one cannot say more than the tribunal did in S.D. Myers by stating that an infringement of the standard requires "treatment in such an unjust or arbitrary manner that the treatment rises to a level that is unacceptable from an international perspective.
>
> As a result, analyzing the ordinary meaning of the terms "fair and equitable treatment" as they are used in the three BITs applicable to the present dispute yields little additional enlightenment.
>
> The context of the term "fair and equitable" largely depends upon the contents of the treaty in which it is employed. Thus, *the term must be interpreted not as three words plucked from the BIT text but within the context of the various rights and responsibilities, with all their various conditions and limitations, to which the Contracting Parties agreed.* However, conducting such analysis in abstracto, namely without addressing specific relations between specific provisions of the BITs, would not take us further than the analysis of the ordinary meaning of the terms "fair and equitable".[91] [Emphasis added; footnotes omitted.]

89. *Muhammet Çap & Sehil v. Turkmenistan*, ICSID Case No. ARB/12/6, Award (4 May 2021), paras. 796-799.
90. *Vivendi v. Argentina (II)*, ICSID Case No. ARB/03/19, Decision on Liability (30 July 2010), para. 215.
91. Id., at paras. 213-214.

Interestingly, the studies of the OECD Investment Committee indicate that the FET standard is considered as one of the three sources of international law in accordance with article 38(1)c) of the Statute of the International Court of Justice (ICJ),[92] i.e. the GPL recognized by civilized nations.[93] However, there is no single arbitral award concluding that the FET standard is a GPL. It also does not seem logical to assume that the FET standard is a GPL for the two fundamental reasons inexorably related to the two principal functions of GPLs: (i) a gap-filling function[94] and (ii) a means of interpretation of uncertain and ambiguous treaty and custom norms such as broadly formulated substantive standards of treatment, e.g. the FET.[95]

First, the FET standard applies under virtually all IIAs in force, which means that law in action does not recognize a gap to be filled by a GPL in respect of that standard. Thus there is not much practical legal value to consider the FET standards as a GPL.[96]

Second, an arbitral tribunal will not apply the entire FET standard as a GPL to interpret the very same FET standard because it would be circular and pointless.

Accordingly, it may be preferable to assume that the FET standard is not itself a GPL but "contains elements which are considered as GPL and, as such, will be relevant for the interpretation and concrete application of the FET standard."[97] For instance, this pertains to good faith, proportionality and non-discrimination.[98] These GPLs elucidate the interpretation of broadly formulated substantive standards of treatment such as the FET.[99] Indeed, arbitral tribunals attempt to determine the meaning of the FET standard with assistance of GPLs that consist of core elements of the FET standard but not by the FET standard itself as a whole considered as a GPL.[100] The FET standard may also be seen as a gateway for the systemic integration of other sources of international law in accordance with the principle enshrined in article 31(3) (c) of the VCLT[101] exactly because some of its core elements are

92. Signed 26 June 1945, entered into effect 24 October 1945, available at https://www.icj-cij.org/statute.
93. *See* OECD, *International Investment Law: A Changing Landscape. A Companion Volume to International Investment Perspectives* pp. 97-98 (OECD 2005).
94. *See* e.g. V-D Degan, *General Principles of Law (A Source of General International Law)*, The Finnish Yearbook of International Law 3, p. 94 (1992); M. Hirsh, *Sources of International Law* in *International Investment Law and Soft Law* p. 35 (A.K. Bjorklund & A. Reinisch eds., Edward Elgar 2012).
95. Cf. S.W. Schill, *General Principles of International Law and International Investment Law*, in *International Investment Law: The Sources of Rights and Obligations* p. 157 (T. Gazzini & E. De Brabandere eds., Brill 2012). In a similar vein, *see* Hirsh, *supra* n. 94, at p. 27.
96. *See*, however, A. Diehl, *The Core Standard of International Investment Protection. Fair and Equitable Treatment* (Kluwer Law International 2012).
97. Dumberry, *supra* n. 85, at p. 320. *See also* R. Kläger, *Fair and Equitable Treatment' in International Investment Law* p. 272 (Cambridge University Press 2011).
98. For the relevant ISDS case law and scholarship and their analysis, *see* Dumberry, *supra* n. 85, at pp. 141-145 (for the principle of good faith), pp. 291-301 (for the principle of proportionality) and p. 320 (for the principle of non-discrimination). More broadly on the last principle, *see* S. Farrior, *Equality and Non-Discrimination under International Law*, Vermont Law School Paper No. 3-15, pp. 1-19 (2015). The principle of non-discrimination is also seen as one of the core elements of the rule of law. *See* A. Reinisch & S. W. Schill eds., *Introduction*, in *Investment Protection Standards and the Rule of Law* p. 17 (Oxford University Press 2023).
99. Cf. Schill, *supra* n. 95, at p. 157; Hirsh, *supra* n. 94, at p. 27.
100. Dumberry, *supra* n. 85, at p. 322.
101. "There shall be taken into account, together with the context: any relevant rules of international law applicable in the relations between the parties." *See more* C. McLachlan, *The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention'*, International & Comparative Law Quarterly 2, p. 280 (2005).

deeply rooted in sources of international law (GPLs and custom).[102] For example, the FET standard may constitute a gateway for the systemic integration of tax treaties.[103]

The next subsection identifies core elements of the FET standard as recognized by arbitral tribunals and a way of their identification.

2.2. Core elements of the FET standard and a way to identify them

This section relies on the investment treaty arbitration case law in order to elucidate the core elements of the FET standard, as phrased in most IIAs. The example of such phrasing is included in Table 2.

Despite the unsettled nature of the FET standard,[104] arbitral tribunals managed to concretize the core constituent elements of that stand by means of the VCLT's rule and principles of interpretation and GPLs (principle-based identification)[105] and an analysis of facts and circumstances of a given investment treaty case (the objectified identification).[106] By refer-

102. *See* R. Kläger, *Fair and equitable treatment in international investment law* pp. 111, 272, 278 (Cambridge University Press 2011).

103. The support for this methodology to some extent appears to be found in the OECD documentation on tax treaties. *See* para. 5.1 *OECD Model: Commentary on Article 25* (2017) (concerning the mutual agreement procedure): "the competent authorities are obliged to seek to resolve the case in a fair and objective manner, on its merits, in accordance with the terms of the Convention and applicable principles of international law on the interpretation of treaties." Some authors also claim that the systemic integration between tax treaties and international investment agreements can take place by the use of the OECD Commentaries to determine the content of the FET standard. *See* Danon, *supra* n. 53, at p. 237. Cf. Kuźniacki, *supra* n. 23, at p. 159.

104. *See* e.g. *EDF v. Romania*, ICSID, Award (8 Oct. 2009), para. 215: "As in all other investment treaties, there is no definition in the BIT of 'fair and equitable treatment' (FET), nor is there a general consensus on the meaning of this phrase by ICSID tribunals"; *Suez v. Argentina*, ICSID, Decision on Liability (30 July 2010), paras 195-96: "An effort to determine the ordinary meaning of 'just' or 'fair and equitable treatment' does not result in an answer of great precision and specificity. At the outset, it should be noted that neither of the BITs applicable to this case define the three key words: 'fair,' 'equitable,' and 'treatment'. [(…)] Defining the words 'fair and equitable,' given their generality, vagueness, and the diverse ways in which those terms may be understood in various cultures and countries creates an especially difficult challenge."

105. *See* e.g. *Cairn* (2020), paras. 1708, 1715: "In order to ascertain the content of the FET obligation contained in the BIT, the Tribunal must interpret Article 3(2) of the BIT in accordance with the rules of treaty interpretation contained in the VCLT. [(…)]. In the case of the FET standard and of investment protection standards in general, the most useful guidance can often be found in general principles of law"; *Total S.A. v. Argentina*, ICSID, Decision on Liability (27 Dec. 2010, para. 125: "The Tribunal will, therefore, proceed to further interpret the 'fair and equitable treatment' standard looking also at general principles and public international law in a non-BIT context. This approach is consistent with the interpretation of Article 3 of the France-Argentina BIT by the *Vivendi IF* tribunal which has expressed the view we have developed above, namely, that: 'The Tribunal sees no basis for equating principles of international law with the minimum standard of treatment... the reference to principles of international law supports a broader reading that invites consideration of a wider range of international law principles than the minimum standard'. The views expressed by commentators on the French model BIT, from which the phrase derives, are consistent with these conclusions."; *Kuntur Wasi and Corporación América v. Peru*, ICSID Case No. ARB/18/27, Decision on Jurisdiction, Liability and Certain Aspects of Quantum, With Further Directions on Quantum (11 Aug. 2023), paras. 673: "In the Tribunal's view, FET claims are highly factual in nature. They involve an assessment of whether the conduct of a State, viewed in its totality, has crossed a line from permissible to impermissible in relation to the investor's legitimate expectations. It is not a case of a Tribunal substituting its own judgment for the policy or other decisions of the State, but rather looking for those facts and circumstances that are probative on the question of whether key factors, reflecting fundamental principles of international law, have been violated."

106. *See* e.g. *Addiko Bank v. Montenegro*, ICSID, Award (Excerpts) (24 Nov. 2021), para. 549: "The Tribunal agrees with these observations. A judgment of what is fair and equitable must depend on the facts of the particular case."; *Agility v. Iraq*, ICSID, Final Award (22 Feb. 2021), para. 160: "The Tribunal agrees with the Claimant's position that the standard is a broad and flexible protection, requiring a fact-specific

encing the investment treaty arbitration scholarship,[107] the *Cairn* tribunal observed that GPLs are the most useful in gleaning the meaning of the FET standard:

> In the case of the FET standard and of investment protection standards in general, the most useful guidance can often be found in general principles of law. Other sources of international law, such as treaties and customary international law, traditionally regulate State-to-State affairs and offer limited guidance as to the particularities of the relationship between an individual and the State. General principles of law, in turn, have emerged mostly in the context of municipal laws and contain various principles of individual-to-State relations that are usually at stake in the context of investment protection. This includes core principles such as the rule of law, legal certainty, transparency and predictability, non-arbitrariness and non-discrimination. For instance, the principle of protection of legitimate expectations, which is commonly employed by investment treaty tribunals, may be understood to have found its way into the core of the FET standard precisely as a general principle of law common to many municipal laws, at least as to a general proposition, the exact contours of which are far less clear. Indeed, some commentators have argued that the FET standard reflects general principles of law, while others argue that the FET standard "should properly be understood as an embodiment of the concept of the rule of law (or Rechtsstaat in the German, état de droit in the French tradition)". [Emphasis added; footnotes omitted.]

This shows that GPLs play a dual role in respect of the FET standard: (i) the important interpretive guidance and (ii) the core elements (some but not all). Those of the core elements of the FET standard that are not GPLs find their way there through GPLs. Indeed, many arbitral tribunals recognized GPLs as core elements of the FET standard, as well as other elements that are not GPLs. For instance, the *Infinito Gold* tribunal summed up that:

> While formulations may vary across awards, a consensus emerges as to the core components of FET, which encompass the protection of legitimate expectations, the protection against conduct that is arbitrary, unreasonable, disproportionate and lacking in good faith, and the principles of due process and transparency.[108]

assessment to determine whether conduct is 'fair' and 'equitable' in the context and the particular circumstances of the dispute"; *Global Telecom Holding v. Canada*, ICSID, Award (27 Mar. 2020), para. 488: "In assessing whether the FET obligation has been breached, a tribunal must determine whether, in all of the circumstances of the particular case, the conduct properly attributable to the State has met the treaty requirement that it be "fair and equitable."

107. A. Newcombe & L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* pp. 271, 279 (Kluwer Law International 2009); I. Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* pp. 85-104 (Oxford University Press 2008); S. Schill, *Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law*', Transnational Dispute Management 5, p. 9 (Dec. 2005).

108. *Infinito Gold v. Costa Rica*, ICSID Case No. ARB/14/5, Award (3 June 2021), para. 355. *See also Rumeli v. Kazakhstan*, ICSID Case No. ARB/05/16, Award (29 July 2008), para. 583: "As it emerges from the arbitral case law, the principle encompasses, inter alia, the following concrete principles: - the State must act in a transparent manner (Metalclad, Tecmed); - the State is obliged to act in good faith (Tecmed, Waste Management); - State conduct cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process (Waste Management); - the State must respect procedural propriety and due process (Amco, Azinian, Fabiani, Brown)"; *Lemire v. Ukraine (II)*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (14 Jan. 2010), para. 284: "The threshold must be defined by the Tribunal, on the basis of the wording of Article II.3 of the BIT, and bearing in mind a number of factors, including among others the following: - whether the State has failed to offer a stable and predictable legal framework; - whether the State made specific representations to the investor; - whether due process has been denied to the investor; - whether there is an absence of transparency in the legal procedure or in the actions of the State; - whether there has been harassment, coercion, abuse of power or other bad faith conduct by the host State; - whether any of the actions of the State can be labeled as arbitrary, discriminatory or inconsistent."

While the proportionality and good faith are GPLs, the protection of legitimate expectations is not.[109]

It also is worth noting that one of the core elements of the FET standard is the prohibition of denial of justice.[110] This element of the FET standard is considered as a part of international custom, as evidence of a general practice accepted as law, under article 38(1)b) of the ICJ Statute.[111]

Moreover, some arbitral tribunals explicitly connect the FET standard with the rule of law. The *Casinos Austria* tribunal observed:

> Fair and equitable treatment has been interpreted, inter alia, to protect covered investors and their investments against the arbitrary exercise of public powers, as well as against harassment by public authorities, to require public authorities to administer the applicable law in good faith, to entitle foreign investors and their investments to due process, and to protect an investor's legitimate expectations.
>
> These rule of law-elements flowing from fair and equitable treatment have been found to apply not only to action taken directly vis-à-vis the claimant-investor, but also to action the host State has taken in relation to a company in which the investor is a shareholder. In such situations, the shareholder-investor has been considered to have a right, and consequently standing, under the fair and equitable treatment standard that the company in which she has invested is treated in accordance with the above mentioned rule of law-elements.[112] [Emphasis added; footnotes omitted.]

Although there are good reasons to understand the FET standard as a positive expression of the rule of law, this should not allow for loosening the methodology in determination of the core elements of that standard. This task shall always rely on the VCLT's rule and principles of interpretation and GPLs. Thus, even if the rule of law is powerful in reconstructing investment treaty case law on the FET standard, "it should be treated with caution in providing normative guidance for the interpretation and application of FET."[113]

Furthermore, the rule of law frames the consistency demand in respect of the FET standard. Julian Arado made in that regard an observation that also encompasses MFN clauses:

> The inconsistencies in the MFN and treaty–contract case law fundamentally distort the possibility of planning ex ante, and creates the potential for unfair surprise across all legal questions ex post. Pervasive inconsistency as to these systemic matters may fall short of even the basic expectations of duty. It certainly undermines the commercial utility of the rule of law which investment treaties are supposed to promote. Moreover, there is little reason to suspect that

109. *See* Dumberry, *supra* n. 85, at pp. 141-145 (for the principle of good faith), pp. 291-301 (for the principle of proportionality) and p. 339 (for the principle of protection of legitimate expectations).
110. *See* e.g. *Arif v. Moldova*, ICSID, Award (8 April 2013), para. 442: "The second caveat concerns the issue of exhaustion of national remedies. The responsibility of States not to breach the fair and equitable treatment standard through a denial of justice is engaged if and when the judiciary has rendered final and binding decisions after fundamentally unfair and biased proceedings or which misapplied the law in such an egregiously wrong way, that no honest, competent court could have possibly done so."
111. I.e. a part of MST. Id., at pp. 312-313 with references to the converging views of scholars, the OECD and the UNCTAD.
112. *Casinos Austria v. Argentina*, ICSID Case No ARB/14/32, Decision on Jurisdiction (29 June 2018), paras. 242-43. For the connection of the rule of law with the FET standard in partly tax-related investment treaty case, *see Horthel v Poland*, PCA Case No. 2014-31, Final Award (16 Feb. 2017), para. 285. For the analysis of that award, *see* F. Balcerzak, *Horthel v Poland: Fair and Equitable Treatment Embodies the Rule of Law, Whereas 'Tax' Is Not Always a Tax*', 38 ICSID Rev—FILJ 1, pp. 25-38, 2023).
113. *See* Reinisch & Schill, *supra* n. 98, at p. 7 with the reference to M. Paparinskis, *The Rule of Law and Fair and Equitable Treatment*, in Reinisch & Schill, at pp. 23-41.

> the consistency problems in the context of MFN, the treaty-contract relationship, or the rules of integrative treaty interpretation reflect intentional drafting choices. Unlike with FET, where some degree of flexibility at least arguably reflects an intentional trade-off, it seems unlikely that treaty drafters intended to delegate to adjudicators the discretion to work out secondary rules about applicable law, norm priority, and opt-out ex post, on a case-by-case basis. Inconsistency, here, does not appear to be a by-product of enhanced flexibility or any other value. Here, then, is a failure of the rule of law.[114] [Emphasis added; footnotes omitted.]

This doctrinal observation indicates that the rule of law does not prohibit some inconsistency in respect of broad standards such as the FET standard but does so in respect of bright-line rules such as the MFN clause. This observation is very useful in the strict context of this article because it allows us to assume that an inconsistent interpretation and application of MFN clauses in tax treaties, which precludes taxpayers (investors) from reasonably foreseeing their effects, may be at odds with the rule of law and thus the FET standard. Any conclusion in that regard, of course, requires determining a violation of the FET standard by examining its core elements in accordance with the VCLT's rule and principles of interpretation and GPLs rather than only via the prism of the rule of law.

After analysing a rich body of investment treaty case law, Stephan Schill concluded that arbitral tribunals have identified the following core principles of the FET standard:

> (1) the requirement of stability, predictability and consistency of the legal framework, (2) the principle of legality, (3) the protection of investor confidence or legitimate expectations, (4) procedural due process and denial of justice, (5) substantive due process or protection against discrimination and arbitrariness, (6) the requirement of transparency and (7) the requirement of reasonableness and proportionality.[115]

In that regard, it is noteworthy that a violation of the FET standard by a state may be caused by the breach of only one of core elements of that standard, e.g. legitimate expectations or non-discrimination,[116] although this may vary depending on facts and circumstances.[117]

A close presentation and analysis of each core element of the FET standard goes beyond the scope of this article.[118] However, considering its purpose, it is worth highlighting that some of core elements of the FET standard seem more relevant to tax-related investment treaty cases than others.

Accordingly, the next subsection will focus on the relevance of the FET standard's core elements in tax-related cases. The next subsection will also address the question of defending by host states the use of tax measures that appear at odds with investment treaty protection standards. A successful defence may lead to the full or partial justification for tax measures,

114. *See* J. Arato, *Two Moralities of Consistency*, in Reinisch & Schill, *supra* n. 98, at pp. 254-55.
115. Schill, n. 107, at p. 11., as cited in *Cairn* (2020), para. 1722. *See also Petrobart Limited v. Kyrgyzstan*, SCC Case No. 126/2003, Award (29 Mar. 2005), para. 75; Concurring and Dissenting Opinion of Arbitrator Born, 28 June 2016, *Philip Morris v. Uruguay*, ICSID Case No ARB/10/7, Award (8 July 2016), paras. 40-42, 51, 57, 61-62, 69, 81, 133. *See also* OECD, *Draft Convention on the Protection of Foreign Property, Text with Notes and Comments* art. 3 Commentary 5(a), (b), art. 1 Commentary 4(a), available at https://icsid.worldbank.org/sites/default/files/parties_publications/C3765/Claimants%27%20Amended%20Memorial/Legal%20Authorities/CL-0020.PDF.
116. Cf. Dumberry, *supra* n. 85, at p. 337.
117. Cf. the case law indicated in *supra* n. 103.
118. Such analysis can be found in the literature referenced above in this article, in particular those in the present sec. 2.2.

leading to the dismissal of the investors' claims regarding an allegation of violation of the FET standard in tax-related investment treaty cases.[119]

2.3. The relevance of core elements of the FET standard in tax-related cases and a defence of tax measures by host states

2.3.1. Introductory remarks and fundamentals of investment treaty arbitration in tax-related cases

The FET standard is principle-based and must be applied in an objective way, paying due heed to the relevant facts and circumstances of a given case.[120] Thus, for instance, the scope, the purpose and the effect of tax measures, as well as the facts and circumstances in one case can pull more towards the protection of investor's legitimate expectations and the principle of legal certainty,[121] while in another to the prohibition of discrimination and arbitrariness.[122] In other words, the relevance of the FET standard's core elements in tax-related cases requires a close examination of the facts and circumstances of a case. The interpretation and application of tax measures by a host state constitute a part of the facts and circumstances subject to the factual examination. Such a close examination occurs in section 3 below. This section, in turn, presents and analyses only the main observations of arbitral tribunals concerning investment treaty tax-related cases in which the FET standard played a key role. The sections below contain an analysis of a defence of tax measures by host states in light of the FET standard and a way for arbitral tribunals to consider the defence an on ongoing basis, i.e. while analysing the cases rather than in a separate section. This reflects the unity of the reasoning of arbitral tribunals in the selected cases. They did not analyse a

119. This, of course, is relevant to all investment treaty cases, not only those tax-related.

120. *See* sec. 2.1.

121. *See* e.g. *Cairn* (2020), para. 1757: "On the basis of the Parties' submissions and the authorities reviewed above, the Tribunal finds that the principle of legal certainty (and its corollaries, stability and predictability) provides significant guidance when determining whether retroactive taxation is compatible with the FET standard provided at Article 3(2) of the BIT. As the Rule of Law Checklist of the Venice Commission makes clear, one of the essential elements of the principle of legal certainty is precisely that '[p]eople must be informed in advance of the consequences of their behaviour' and that laws should 'enable legal subjects to regulate their conduct in conformity with it.' For this reason, the rule is that the law operates prospectively. By their very nature, retroactive laws do not allow individuals to predict the legal consequences of their conduct. An individual that is subjected to retroactive legislation is thus deprived of the ability to make an informed choice and plan his/her activities in consideration of the legal consequences of his/her conduct, for the simple reason that it is impossible to alter events or actions that have already occurred. Thus, in accordance with the principle of legal certainty, the general rule in a system governed by the rule of law is that the law applies prospectively. Subject to exceptions where this is justified by a specific public purpose as discussed below, the retroactive application of legislation constitutes a fundamental affront to the principle of legal certainty and runs afoul of the guarantee of predictability of the legal environment."

122. *See* e.g. *ADM v. Mexico*, ICSID Case No. ARB(AF)/04/5), Award (21 Nov. 2007), paras. 212-213: "The evidence on the record shows the Tax discriminated between sugar and HFCS [high-fructose corn syrup]; designed to afford protection to the production of cane sugar, which is in line with the measures taken by Mexico before the imposition of the Tax. The WTO [World Trade Organization] Panel and Appellate Body Report held that: 'Dissimilar taxation imposed on directly competitive or substitutable imports (HFCS) and domestic products (cane sugar) is applied in a way that affords protection to domestic production, and that the tax measures are therefore inconsistent with Article III:2, second sentence, of the GATT 1994 (WTO Panel Report, p. 132, para. 8.96).' In the present case, the Tribunal also finds that the IEPS Amendment imposed dissimilar taxation on directly competitive products (HFCS and cane sugar) which is discriminatory and contrary to the national treatment principle under Article 1102. The Tax was applied in a way that afforded protection to the domestic cane sugar industry, targeting the HFCS industry, which is largely owned by foreign U.S. investors, including the Claimants. For the reasons stated above, the Arbitral Tribunal concludes that the Tax denied national treatment to the Claimants and their investment in violation of Article 1102 of the NAFTA." [Text in square brackets added.]

defence of host states separately but as a final part of the examination of a compatibility of tax measures with the FET standard.

The analysis below regards the two recent investment treaty tax-related cases – *Cairn v. India*[123] and *Lone Star v. Korea*.[124] The *Cairn v. India* case is evidently very relevant for the case study in the next section, not only because India was the respondent state but also due to the fact that this case probably constitutes the most comprehensive analysis of taxation measures in international arbitration case law so far.[125] In turn, the major reason for the relevance of the *Lone Star v. Korea* case in light of this article's purposes is that it is one of the latest investment awards in which the tribunal examined whether an interpretation and application of a tax treaty by a host state was compatible with a BIT.[126] A closer look at the reasoning of arbitral tribunals in those cases will be helpful in determining the role of the VCLT in securing compatibility between limited MFN clauses in tax treaties and the FET standard in BITs in general and in respect of the case studies. For that purpose, the entire analysis in section 2 above and other cases and materials will also be of use.

In both *Cairn v. India* and *Lone Star v. Korea*, arbitral tribunals decided on merits, which allowed for the examination of the compatibility of tax measures with the FET standard. The latter feature of the selected cases is worth a brief explanation before being analysed.

An arbitral tribunal in investment treaty arbitration must first decide whether or not it has a competence to arbitration and, if so, whether claims are admissible. It means that arbitral tribunals are judges of their own competence (the doctrine of *kompetenz-kompetenz*). Only once that jurisdictional phase is successfully completed does the arbitral tribunal decide a case on merits, for example by examining the compatibility of tax measures with the FET standard under an IIA.[127] In tax-related investment treaty cases, an arbitral tribunal may

123. *Cairn* (2020).
124. *LSF-KEB Holdings SCA and others v. Republic of Korea*, ICSID Case No ARB/12/37, Award (30 Aug. 2022).
125. For an in-depth analysis, *see* Kuźniacki & Van Weeghel, *supra* n. 61.
126. For an in-depth analysis of tax-related part of that case, *see* Kuźniacki, *supra* n. 23.
127. For a fluid distinction in investment treaty arbitration between jurisdiction and an admissibility, *see* e.g. Dissenting Opinion of Keith Highet (Arbitral Award), *Waste Management v. Mexico (I)*, ICSID Case No. ARB(AF)/98/2, Award (2 June 2000), paras. 57-58: "lack of jurisdiction refers to the jurisdiction of the Tribunal and inadmissibility refers to the admissibility of the case. [(…)] Jurisdiction is the power of the tribunal to hear the case; admissibility is whether the case itself is defective—whether it is appropriate for the tribunal to hear it. If there is no title of jurisdiction, then the tribunal cannot act." In literature, *see* M. Waibel, *Investment Arbitration: Jurisdiction and Admissibility*, The University of Cambridge Faculty of Law Legal Studies Research Paper Series, Paper No. 9/2014, pp. 1-2 (Feb. 2014): "Jurisdiction refers to 'the power of a court or judge to entertain an action, petition or other proceeding'. [(…)] State consent is central to international adjudication. The State parties need to vest power in a tribunal to decide a case, either before or after a dispute arises. In investment arbitration, consent is typically given by the host State on the basis of investment treaties, in national legislation or through negotiated arbitration clauses in investor-State contracts. By contrast, admissibility concerns the power of a tribunal to decide a case at a particular point in time in view of possible temporary or permanent defects of the claim. With admissibility, the question is whether the claim is ready for decision at this stage. Whereas jurisdiction typically looks at the dispute as a whole, admissibility is concerned with particular claims. Even though the distinction between jurisdiction and admissibility is a longstanding one in international law, the delimitation of the two is not always straightforward, and in addition the terminology is sometimes inconsistent. In investment arbitration, the boundary between jurisdiction and admissibility is particularly fluid." Occasionally, arbitral tribunals reject inadmissibility arguments altogether, since in their view the concept of admissibility of claims does not exist at all. *See* e.g. *Methanex Corporation v. USA*, NAFTA/UNCITRAL, Jurisdiction (7 Aug. 2002), para. 126. For literature on this controversy, *see* C. Söderlund & E. Burova, *Is There Such a Thing as Admissibility in Investment Arbitration?*, 33 ICSID Rev—FILJ, p. 525 (2018). *See* more S.A. Pauker & B. Winston, *The Concept of (In)admissibility in Investment Treaty Arbitration: Limited Yet Indispensable*, 36 ICSID Rev—FILJ, pp. 189–218 (2021).

deny having a jurisdiction if, for instance, a measure undertaken by a host state falls outside the entire scope of an IIA via a tax carve-out, or does so partly in respect of a relevant investment treaty protection standard (e.g. FET), or the dispute is a tax dispute rather than a tax-related investment dispute.

The former applies to fundamental tax questions, such as whether a measure undertaken by a host state is a tax measure (largely a legal question), or whether it is a bona fide tax measure (largely an evidence-based question).[128] In addition to deciding about the jurisdiction and the admissibility of claims, these questions are also relevant for an arbitral tribunal to decide whether to bifurcate, i.e. split an arbitration into the two separate phases, which most often involves splitting jurisdictional issues from the merits, in order to increase the efficiency in highly complex investment treaty arbitration cases.[129]

In turn, deciding whether a dispute is a tax dispute or a tax-related investment dispute matters for all of the abovementioned and may specifically play an important role in rebutting the jurisdictional counterclaims of host states. For example, in *Cairn v. India*, the respondent state contended that taxation disputes are not arbitrable. In that regard, the *Cairn* tribunal clarified that

> the present dispute is a tax-related investment dispute, not a tax dispute. More precisely, this dispute concerns alleged violations of an investment treaty resulting from certain sovereign measures taken by the Respondent in the field of taxation, also referred to as fiscal measures. This type of dispute must be distinguished from *tax disputes proper, which are disputes concerning the taxability (including the tax-amount) of a specific transaction*. The distinction is significant. *In a tax dispute, the question is whether and how a particular transaction is taxable under the applicable (municipal) law or, possibly laws of several countries if the transaction is international. In tax-related investment disputes, on the other hand, the tribunal is tasked with determining whether the respondent State has breached substantive standards of treatment under the investment treaty through the exercise of its authority in the field of taxation, and whether liability arises as a result*. The issue at stake is thus not a matter of domestic tax law; it is rather whether the fiscal measures taken by the State, valid or not under its own tax laws, violate international law.[130] [Emphasis added.]

In conformity with the *Cairn* tribunal's dichotomy between a tax dispute and a tax-related investment dispute, the *Lone Star* tribunal decided that it had jurisdiction to examine the compatibility of the fiscal conduct of Korea – a denial of benefits under the Belgium-Korea (Rep.) Income Tax Treaty (1977)[131] – with the Belgium-Luxembourg Economic Union

128. *See* more on those fundamental tax-related issues for investment treaty arbitration in Van Weeghel, *supra* n. 11, at ch. 49; Van Weeghel, *supra* n. 52, at ch. 26; Park, *supra* n. 2, at pp. 166-197; Wälde & Kolo, *supra* n. 2, at pp. 305-362.

129. *See* M. Kinnear et al., *Investment Disputes Under NAFTA: An Annotated Guide to NAFTA* ch. 11 (Kluwer Law International 2006). *See also* L. Greenwood, *Does Bifurcation Really Promote Efficiency?*, 28 Journal of International Arbitration 2, p. 111 (2011): "The assumption that bifurcation is always beneficial in terms of saving costs and time in international arbitration may not always be warranted and, as ever, each case should be looked at on its own merits." For an analysis of the three questions that are indispensable for arbitral tribunals whether to bifurcate, namely (i) is the jurisdictional objection serious and substantial (i.e. does the objection have a reasonable chance of success)?; (ii) will the jurisdictional objection, if sustained, result in a material reduction (or complete elimination) of the merits phase of the proceedings?; and (iii) is the jurisdictional objection so intertwined with the merits that bifurcation is impractical?, *see* M. Carlson, *Bifurcation in Investment Treaty Arbitration*, Lexology (23 July 2020), available at https://www.lexology.com/library/detail.aspx?g=75049305-1fc9-4d08-b77e-e23b9541e457.

130. *Cairn* (2020), para. 793.

131. *Convention between the Republic of Korea and the Kingdom of Belgium for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (signed 29 Aug. 1977, entered into force 19 Sept. 1979), Treaties & Models IBFD.

(BLEU)-Korea (Rep.) BIT (2006),[132] although it clearly did not have jurisdiction under the tax treaty:[133]

> A central issue in the tax litigation brought by Lone Star is whether Korea's 'Substance Over Form' doctrine is compliant with the Korea–Belgium Tax Treaty or, if it is, whether it has been applied in conformity with the BIT.[134]

Thus, the obvious lack of the *Lone Star* tribunal's jurisdiction under the tax treaty did not remove its analysis of the interplay between the Korean fiscal measures and the tax treaty from the ambit of the investment treaty arbitration insofar as that analysis aimed to verify the compatibility of that conduct with the BIT.

This clarifies that a state's power to tax is not immune to the scrutiny under IIAs by arbitral tribunals. The jurisdiction of arbitral tribunals in such cases is excluded only if this is explicitly stated in the text of the IIAs. The consent to arbitration under IIAs is derived from the same source as the power to tax: the sovereignty of a state. Whenever such consent exists in an IIA, an arbitral tribunal may be called by a foreign investor to examine an alleged violation of standards of investment protection by a state's fiscal conduct entirely in line with that state's sovereign rights.[135] For example, this regards the consent to arbitration given by India and its treaty partners under the India-Neth. BIT (1995), the Switz.-India BIT (1997) and the France-India BIT (1997). Thus, the compatibility of interpretation and application of MFN clauses under Indian tax treaties by Indian executive and judiciary powers with the FET standard under Indian BITs is within the range of jurisdiction of arbitral tribunals.

2.3.2. Cairn v. India

The *Cairn v. India* case focused on the compatibility of the legislative amendment of section 9(1)(i) of the Income Tax Act (ITA) in 2012 with retroactive effect from 1 April 1962 (the 2012 Amendment)[136] and executive tax measures with the FET standard under the UK-India BIT (1994)[137] (article 3(2)).[138] Article 3(2) reads as follows: "Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party"

132. *Agreement between the Government of the Republic of Korea and the Belgium–Luxembourg Economic Union for the Reciprocal Promotion and Protection of Investments* (signed 12 December 2006, entered into force 27 March 2011) [hereinafter *BLEU-Korea (Rep.) BIT*].
133. *Lone Star* (2022), paras. 296 and 372(b).
134. Id., at para. 390.
135. Kuźniacki & Van Weeghel, *supra* n. 61, at p. 130. Cf. C. Marian, *The State's Power to Tax in the Investment Arbitration of Energy Disputes: Outer Limits and the Energy Charter Treaty* p. 52 (Kluwer Law International 2020).
136. In practice, the tax liability could arise "retrospectively", albeit only for 6 years, given that section 161 of the ITA provides that no tax can be levied beyond the 6-year time limit. Thus the Indian Tax Department (ITD) could only pursue to tax retroactively transactions occurring after 1 April 2006. The 2006 Transactions of Cairn Energy and Cairn UK Holdings Limited (CUHL) took place between October and December 2006, which means that they felt within the limitation period. Thus the mentioned retroactive amendment in tax law applied to the Claimants. *Cairn* (2020), paras. 1066, 1255-1259. Likewise, this amendment grasped the transactions of Vodafone in an earlier investment treaty arbitration (still not public); *see Vodafone* (2020).
137. *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India for the Promotion and Protection of Investments* (14 Mar. 1994) [hereinafter *UK-India BIT*].
138. *Cairn* (2020), paras. 878 ff.

The executive tax measures concerned the transactions by Cairn Energy and other companies from the Cairn group, i.e. in 2006, Cairn consolidated all 27 subsidiaries under a single Indian company, Cairn India Limited (CIL), a wholly owned subsidiary of Cairn UK Holdings Limited (CUHL) (the 2006 Transactions).[139] The consolidation involved the transfer of shares in non-Indian companies that owned assets in India. These shares were initially transferred to CUHL and then by CUHL to Cairn India Holdings Limited (CIHL), Cairn Energy's wholly owned subsidiary incorporated in Jersey. The final step of the consolidation involved the acquisition of CIHL's shares by CIL from CUHL. The *Cairn* tribunal's main task was to explore whether the assessment of capital gains tax on the CIHL acquisition on the basis of a retroactive tax measures, more than 7 years after it occurred, was unfair and inequitable. An additional important fact was that the mentioned retroactive legislative amendment took place several months after the SCI's judgment in the *Vodafone* case decided in favour of the taxpayer.[140] The *Vodafone* judgment regarded taxation of offshore indirect transfers (OITs),[141] which would result in exactly the same tax consequences for Vodafone as for Cairn: non-taxation in India due to the fact that they took place outside the Indian jurisdiction to tax. Only after the 2012 Amendment was introduced, a gain stemming from a transfer by a non-resident of a share in a company incorporated abroad entered the ambit of the extended Indian jurisdiction to tax, if the share derived, directly or indirectly, its value substantially from assets located in India. The transactions in the *Vodafone* case and the 2006 transactions regarding the consolidation in the Cairn case, in particular the CIHL acquisition, felt squarely within the scope of this retroactive legislation of OITs. It led to approximately USD 4.4 billion of tax assessment (including interest) to by paid by CUHL on the income (gains) stemming from transactions conducted in 2006.[142]

After a careful consideration of facts, the VCLT's rule and principles of interpretation and GPLs, the *Cairn* tribunal found out that "the principle of legal certainty (and its corollaries, stability and predictability) provides significant guidance when determining whether retroactive taxation is compatible with the FET standard provided at Article 3(2) of the BIT."[143] The tribunal later pointed out that it

> *does not intend to base its decision on an application of the 'legitimate expectations' doctrine.* Having said that, *the doctrine*, which is aimed at protecting an investor's reliance upon assurances or representations as to how the State will act in the future, *does share some common ground with the principle of legal certainty* which is, in the Tribunal's view, the correct principle to apply in the present case. [(…)]
>
> Thus, when scrutinising retroactive changes to the legal framework, the search for specific commitments is of limited relevance. *Rather, as a result of the principles of legal certainty / stability / predictability, investors have an expectation that, even absent specific assurances, existing laws and regulations will be applied as they stand at the time when the legally relevant transaction takes*

139. In its turn a wholly-owned subsidiary of Cairn Energy Plc. Cairn Energy Plc and CUHL were the claimants in the arbitration.
140. *See Vodafone International Holdings BV v. Union of India* (2012), 6 SCC 613 (20 Jan. 2012).
141. In international tax jargon, OITs are transfers of shares in a non-resident company that owns assets in a country by another non-resident company. Non-resident company means a company not resident under the applicable tax rules of the country in which the assets are located. Often tax residence in a country is a consequence of incorporation or registration under the laws of that country. Accordingly, non-resident is often used interchangeably with incorporated in a foreign country. *See also*, for OITs, *The Taxation of Offshore Indirect Transfers— A Toolkit*, The Platform for Collaboration on Tax, pp. 5, 7 (2020).
142. *Cairn* (2020), paras. 146-186.
143. *Cairn* (2020), para. 1757.

> *place and in compliance with the then existing regulatory framework*. While, as discussed below, this principle is not absolute, it is the general rule.[144] [Emphasis added.]

Accordingly, the *Cairn* tribunal identified the principle of legal certainty as the core element of the FET standard, as included in article 3(2) of the UK-India BIT (1994). The principle of legal certainty was the most suitable to examine a compatibility of the retroactive taxation in that case with the FET standard.

In the final stage of the analysis, the tribunal examined the defence of India, which principally considered combatting abusive tax practices. It has been recognized by the tribunal as a relevant specific public purpose that could justify the retroactive taxation in question.[145] The principle of proportionality played a key role in the tribunal's examination of the defence of India:

> *When balancing the State's public purpose and the investor's interests, the principle of proportionality becomes relevant*. Under this principle, the measures should not be more burdensome for the individual's rights and interests than required by the pursued public purpose, especially if a less burdensome measure would be available to satisfy the same public purpose.[146] [Emphasis added; footnotes omitted.]

This balancing exercise under the principle of proportionality is appropriate to manage the tensions between the different principles at stake in investor-state disputes.[147]

The justification (defence) of India failed entirely in law and facts. It failed in law because the retroactive tax law amendment targeted all OITs transferring assets situated in India, irrespective of their abusive tax avoidance nature.[148] It failed in facts because no systemic abusive tax avoidance via OITs was identified before 2012.[149] Moreover, the Indian judicial substance-over-form doctrine was at that time considered a legal measure to prevent abusive tax avoidance.[150] In that regard, the tribunal carefully went through an in-depth and comprehensive analysis of Indian case law,[151] as provided by the disputing parties, and con-

144. Id., at paras. 1771, 1786.
145. *Cairn* (2020), paras. 1786-1787, 1812.
146. Id., at para. 1788.
147. *See* V. Vadi, *Proportionality, Reasonableness and Standards of Review in International Investment Law and Arbitration* (Edward Elgar 2018); J. Chaisse, *Investor-State Arbitration in International Tax Dispute Resolution: A Cut above Dedicated Tax Dispute Resolution*, Virginia Tax Review, p. 149 (2016); B. Kingsbury & S. Schill, *Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest – The Concept of Proportionality*, in *International Investment Law and Comparative Public Law* (S. Schill ed., Oxford University Press 2010); E. De Brabandere, P. Baldini & M. da Cruz, *The Role of Proportionality in International Investment Law and Arbitration: A System-Specific Perspective*, 89 Nordic Journal of International Law, p. 471 (2020). However, some authors claim that the principle of proportionality was not applied by the *Cairn* tribunal in a classical way to solve tensions between the principle of legal certainty, typically securing the interests of investors, with the principle of tax equity, favouring the budgetary interests of host states, but to delineate "the proper territorial limits of the State's fiscal powers" beyond which the FET standard may be violated. *See* R. G. Antón & T, Marzal, *Proportionality and the fight against international tax abuse: comparative analysis of judicial review in EU, international investment and WTO law*, 30 Asia Pacific Law Review [Special Issue 2022], p. 9 (2022).
148. *Cairn* (2020), para. 1786, with reference to: P. Baker, *Retrospective tax legislation and the European Convention on Human Rights*, British Tax Review (2005); H. Gribnau & M. Pauwels, *Retroactivity of Tax Legislation*, EATLP International Tax Series (2013), Books IBFD.
149. In fact, OITs were rarely seen in India back then, as admitted by the Respondent. *Cairn* (2020), para. 1813.
150. *Cairn* (2020), para. 1815. For that doctrine in action, *see CIT v. Ramal Ammal* [1982] 135 ITR 292 (7 Mar. 1981). *See also* S.R. Wadhwa & P.K. Sahu, *India*, in *Form and Substance in Tax Law* (IFA Cahiers vol. 87a, 2002), Books IBFD.
151. Some references were made to the English and other Commonwealth case law insofar as it was incorporated by the Indian courts.

cluded that the transactions among the companies within the Cairn Energy group did not constitute abusive tax avoidance and yet the retrospective tax law targeted them.[152]

In the light of the foregoing, the tribunal concluded that the retroactive tax law amendment and its application to taxpayers (members of the Cairn Energy group) failed to adequately balance the claimants' protected interest of legal certainty and its corollaries (stability and predictability) on the one hand, and the Respondent's power to regulate in the public interest on the other.[153] This retroactive taxation

> deprived the Claimants of their ability to plan their activities in consideration of the legal consequences of their conduct, in violation of the principle of legal certainty, which the Tribunal considers to be one of the core elements of the FET standard, and of the rule of law more generally. [(…)] In the words of the ICJ in ELSI, this unjustified retroactivity is "not so much something opposed to a rule of law, as something opposed to the rule of law", and "shocks, or at least surprises, a sense of juridical propriety". Having considered the full factual record of this case, the Tribunal finds that the retroactive taxation of the CIHL Acquisition was, to quote Waste Management II, "grossly unfair." The Tribunal thus concludes that the Respondent breached its obligation under Article 3(2) of the BIT to accord the Claimants' investments FET.[154] [Emphasis added; footnotes omitted.]

2.3.3. Lone Star v. Korea

In *Lone Star*, in respect of tax-related claims, the tribunal considered whether the refusal to accord the claimants the benefits under the Belgium-Korea (Rep.) Income Tax Treaty (1977) via a domestic (Korean) substance-over-form doctrine (SOFD) violated standards of investment protection under the BLEU-Korea (Rep.) BIT (2011) with the FET at the forefront. The FET standard under article 2(2) of the BIT required that the claimants' investments in Korea "shall at all times be accorded fair and equitable treatment".[155] Although allegations were also made with respect to a breach of other investment treaty protection standards, the tribunal rejected all of them due to the lack of any persuasive factual or legal foundation.[156] However, one of them, the umbrella clause in article 10 of the BLEU-Korea (Rep.) BIT (2011), is worth a consideration because of its partial overlap with the FET standard, i.e. to the extent to which both standards are relevant to protect legitimate expectations.[157] In that regard, the argument of the claimants was that Korea violated the investment protection standard under the umbrella clause in article 10 of the BLEU-Korea (Rep.) BIT (2011) by disrespecting its written obligations under the Belgium-Korea (Rep.) Income Tax Treaty (1977), i.e. by denial of benefits under that tax treaty via the Korean SOFD.

152. *Cairn* (2020), para. 1815.
153. Id., at para. 1816.
154. Id.
155. It was included in a type 2 FET clause (*see supra* sec. 2.1.), which reads in full: "Investments made by investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full and continuous protection and security in the territory of the other Contracting Party."
156. Id., at paras. 382-386, 469-489.
157. The main difference is that an umbrella clause typically protects legitimate expectations that arise from contractual obligations between a host state and an investor, while such limitation is not applicable to the FET standard, allowing it to protect such expectations beyond contractual arrangements. *See* UNCTAD, *supra* n. 80, at p. 10. In practice, however, this distinction varies a lot and is fluid. Especially when an umbrella clause is interpreted broadly while legitimate expectations under the FET standard are interpreted narrowly, then the difference between them in respect of the scope of protection towards the legitimate expectation may be negligible. *See*, for a narrow interpretation of legitimate expectations under the FET standard, *Cairn* (2020), para. 1770, and for a broad interpretation of an umbrella clause *Eureko B.V. v. Republic of Poland*, Partial Award (19 Aug. 2005), para. 246.

The Korean SOFD is a general domestic anti-tax avoidance doctrine, as developed by Korean case law and partly codified in domestic statutory tax law.[158] This doctrine relies on a broad and vague anti-tax avoidance concept of economic substance, which consists of the non-tax avoidance business purpose, the non-tax economic benefit and the engagement in non-tax avoidance related business activities.[159]

The *Lone Star* case can be traced back to the Asian Debt Crisis in 1997-98, which impacted many Asian states, including Korea. Lone Star, a private equity fund from Texas specializing in undervalued assets in time of economic distress, was one of the foreign investors starting to invest in Korea at the time.[160] It followed an indirect route from the level of "upper tier" limited partnerships from Delaware via various intermediate entities in jurisdictions such as Bermuda, and then via special purpose entities (SPEs) from Belgium, which became the direct owners of the assets (shares and real estate) located in Korea.[161] One such SPE was LSF-KEB Holdings SCA, a Belgian company. This indirect route to invest in Korea aimed to eliminate or limit Korean taxes on the returns from the investments by a combination of preferable domestic tax laws of the resident states of SPEs and benefits under their tax treaties ratified with Korea.[162] The Belgian company made a major investment in 2003 by acquiring a controlling interest in the Korean Exchange Bank (KEB). Lone Star also made other investments in Korea, including through another Belgian SPE, Star Holdings SCA, i.e. the acquisition of shares in Star Tower Corporation, Kukdong Engineering and Construction Co., Ltd. and Star Leasing and Finance Co. (Star Lease).[163]

Years later, the income stemming from four Korean investments was taxed in Korea by denying LSF-KEB and Star Holdings SCA benefits under the Belgium-Korea (Rep.) Income Tax Treaty (1977) via the application of the Korean SOFD by the Korean National Tax Service (NTS) and Korean courts. Presumably, had such benefits been granted, nearly USD 1.5 billion of withholding taxation in Korea would be avoided by Lone Star.[164] The tribunal decided to have jurisdiction only in respect of denial of benefits in respect of the taxation of

158. *See* e.g. the following judgments of the Supreme Court of Korea: Case No 65Nu91 (7 Feb. 1967); Case No 90Nu1663 (12 Oct. 1990); Case No 91Nu7170 (13 Dec. 1991); Case No 90Nu10384 (27 July 1993); Case No 92Nu18603 (22 Feb. 1994); Case No 99Do2165 (9 Apr. 2002); Case No 2008Du8499 (19 Jan. 2012); Case No 2010Du15179 (26 Apr. 2012); Case No 2010Du25466 (25 Oct. 2012); Case No 2011Du4411 (11 July 2013); Case No 2010Du11836 (24 June 2014); Case No 2010Du11836 (24 June 2014); Case No 2013Du7711 (26 Mar. 2015); Case No 2015Du2611 (15 Dec. 2016); Case No 2013Du53084 (26 Oct. 2017); Case No 2017Du59253 (28 Dec. 2017). In the literature, *see* H. Park & S. Young Kim, *International Tax Cases Involving Substance over Form Rules in Korea*, 72 Bull. Intl. Taxn. 6, pp. 398-400 (2018), Journal Articles & Opinion Pieces IBFD; K-B. Ahn, *Korea*, in *Form and Substance in Tax Law* pp. 391-404 (IFA Cahiers vol. 87a, 2002), Books IBFD; K.G. Lee, *Korea*, in *Tax Treaties and Tax Avoidance—Application of Anti-Avoidance Provision* pp. 469-72, 475-80 (IFA Cahiers vol. 95A, 2010); B. Kim & H. Park, *Korea*, in *Anti-Avoidance Measures of General Nature and Scope—GAAR and Other Rules* pp. 5-24 (IFA Cahiers vol. 103, 2018), Books IBFD.

159. *Lone Star* (2022), paras. 396, 403 with references to the Supreme Court of Korea's judgment, Case No 2010Du15179 (26 Apr. 2012) and the Seoul Administrative Court's Judgment, Case No 2007Guhap37650 (16 Feb. 2009). In literature, *see* Park & Kim, *supra* n. 158, at pp. 11-12; J-H Yoon, *A Giant Leap for Fairer Tax or Blind Compromise with Public Opinion?—A Review of the New Case Law on "Substance-over-Form" by the Supreme Court of Korea*, 13 J. Korean Law 1, p. 152 (2013).

160. *Lone Star* (2022), paras. 114, 118, 146.

161. Id., at paras. 115-16, 119.

162. Cf. *S. Korea Wants to Rewrite its Tax Treaties,* Hankyoreh Daily (10 July 2007), available at https://www.hani.co.kr/arti/english_edition/e_business/221456.html.

163. *Lone Star* (2022), paras. 147-49.

164. Id., at para. 361: "The tax-related claims account for almost USD 1.5 billion of the total of almost USD 4.7 billion claimed in compensation."

dividends paid by KEB between 2008 and 2011 and the sale of the remaining 51% of shares in the KEB.[165] The tax treaty's benefits denied were reduced taxation on dividend payments (article 10(2)) and exemption from taxation of capital gains from the sale of shares (article 13(5)).

The Korean tax authorities (NTS) considered Belgian companies as mere conduit companies interposed between their subsidiaries in Korea and their parents in Bermuda and the United States solely, or at least mainly, to benefit from the Belgium-Korea (Rep.) Income Tax Treaty (1977).[166] The tax litigation between the Lone Star and the NTS unfolded. It was first decided in favour of the NTS by the Seoul Administrative Court. The Tribunal reiterated the Court's observations that:

> Lone Star had created the corporate structure to avoid paying taxes. In their view, Star Holdings SCA was *established solely for the purpose of obtaining tax exemptions under the Korea-Belgium Tax Treaty*. Star Holdings SCA was a *"conduit" company without any purpose other than tax avoidance*. Lone Star Fund had paid for all the transactions in Star Holdings SCA's name. The officers of Star Holdings SCA and its upper level holding companies were all related to Lone Star and appointed by Lone Star. Thus, it was appropriate to employ the Substance Over Form doctrine and deny the capital gains exemption under Article 13 of the Korea-Belgium Tax Treaty.[167] [Emphasis added.]

Similar facts were decisive to consider LSF-KEB as a conduit company with the sole purpose to avoid withholding taxation in Korea.[168] In both cases, the Seoul Administrative Court scrutinized the evidence according to which:

- Star Tower Corp. did not perform any other business activities nor did Star Holdings SCA other than transferring Star Tower Corp. shares.
- Star Holdings only had a single employee in 2003.
- On 29 December 2004, one day after the sale of the Star Tower Building closed, Star Holdings SCA's Board of Directors met and agreed to liquidate the company. Star Holdings SCA was liquidated on 31 March 2005.
- The Court also noted "there is no specific material supporting that SH [Star Holdings SCA] and its upper-level holding companies conducted substantive business activities in their resident country other than their investing in the Star Tower Building.[169]

The Supreme Court of Korea upheld the lower courts' decisions in the three judgments.[170] In regard of that tax litigation, it is important to note that the claimants have not alleged that there has been a denial of justice.[171]

165. Other tax-related claims were outside the tribunal's jurisdiction insofar as they took place before the *BLEU-Korea (Rep.) BIT* entered into force and the claimants' investments did not qualify for treaty protection under the earlier BIT (1976). *See Lone Star* (2022), paras. 17(c), 280, 430-31.
166. Id., at paras. 432, 447.
167. Id., at paras. 448-49.
168. Id., at para. 460 with a reference to the evidence discussed by the Korean tax tribunal's judgment, Case No Guk-shim2007Seo5223 (21 July 2010): "LSF-KEB Holdings SCA was a conduit company established for the purpose of tax avoidance, and, as a conduit company, it was not entitled to the benefits of the Korea–Belgium Tax Treaty."
169. Id., the text in footnote 579 to the last sentence of para. 449.
170. *See* the following judgments of the Supreme Court of Korea: Case No 2015Du2611 (15 Dec. 2016); Case Nos 2014Du3044 and 2014Du3051 (Consolidated) (12 Oct. 2017); and Case No 2017Du59253 (28 Dec. 2017).
171. *Lone Star* (2022), paras. 443, 465, 469, 479.

The *Lone Star* tribunal's approach to applying the FET standard to the case was remarkable. In contrast to the *Cairn* tribunal, it neither applied the VCLT's rule and principles of interpretation nor GPLs to first determine which core standard(s) of the FET under the BLEU-Korea (Rep.) BIT (2011) shall apply to examine the compatibility of an application of the Korean SOFD with that standard. Instead, the tribunal essentially based its conclusion on the opinions from expert witnesses called by the Respondent (Professor Stef van Weeghel) and the Claimants (Professor Luc De Broe)[172] regarding the content and interpretative importance of the OECD Commentaries on the compatibility of the substance over form doctrine with tax treaties based on the OECD Model, such as the Belgium-Korea (Rep.) Income Tax Treaty (1977).[173] As a result, the *Lone Star* tribunal concluded that:

> Korea's application of the Substance Over Form doctrine did not violate the BIT because, as referenced by Dr. [the expert witness of the Claimants, i.e. Luc de Broe], *the doctrine forms "part of the basic rules for determining the facts that give rise to tax liability."* It is only after the facts have been determined that the tax consequences are assessed, and it is only at the tax consequence stage, not the earlier fact-determination stage, that the Treaty provisions come into play. Here the judicial proceedings initiated by the Lone Star companies resulted in a rejection in the relevant cases of Lone Star's version of facts. The Korean courts adequately explained why the application of Substance Over Form *was not arbitrary but grounded in the evidence. Nor, in the opinion of the Tribunal, as will be discussed, was the application discriminatory.* …
>
> The Respondent acted *well within the legal boundaries of internationally-accepted tax policy.* …
>
> As noted above, the application of Substance Over Form was not arbitrary. The "Substance Over Form" doctrine in *a rational public policy and on the facts found by the Korean Courts* (and not persuasively challenged in this arbitration) the application was consistent with this policy and the applicable law.
>
> [T]he tax treatment of the KEB dividends and the withholding tax on the sale to Hana and the tax on the sale to Hana of the KEB shares *did not amount to harassment but was a routine application of a tax system whose relevant provisions were quite consistent with international standards including the OECD Guidelines*.[174] [Emphases added; footnote omitted.]

This shows that the *Lone Star* tribunal did not undertake a self-standing analysis of the compatibility of the Korean SOFD's application with the FET under the BLEU-Korea (Rep.) BIT (2011) via relevant sources of interpretation of BITs and tax treaties. However, it apparently relied on the prohibition of arbitrary and discriminatory conduct as the core element of the FET standard without explaining why this element is adequate and decisive in the *Lone Star* case. The tribunal omitted the OECD view that the compatibility of the substance over form doctrine with tax treaties is subject to a guiding principle.[175] Without having

172. Although the names of the expert witnesses were removed from the text of the Award, they are still publicly available in the earlier document submitted to the tribunal. *See Lone Star v Korea*, ICSID Case No ARB/12/37, the Respondent's Counter-Memorial on Jurisdiction and Merits (21 Mar. 2014), e.g. para. 50, available at https://www.italaw.com/sites/default/files/case-documents/italaw11847.pdf.

173. *Lone Star* (2022), paras. 405-409.

174. Id., at paras. 410, 469-471, 480.

175. Indeed, the main part of the tribunal's reasoning was based on the consideration of the substance-over-form doctrine and other domestic anti-tax avoidance rules by the OECD as "part of the basic rules for determining the facts that give rise to tax liability, that they are not addressed in tax treaties and that therefore they are not affected by them". (The citation comes from L. De Broe, *First Expert Report*, para. 99, as cited by the tribunal in para. 407. *See also Lone Star* (2022), para. 410. This consideration was reflected in paras. 9.2 and 22.1 of the *OECD Model: Commentary on Article 1* (2003). The tribunal, however, in the Award, did not refer to the following sentence in para. 22.1: "Thus, as a general rule and having regard to paragraph 9.5, there will be no conflict". It clearly means that the compatibility of domestic rules such as substance-over-form doctrines with tax treaties is not absolute and universal but subject to

performed independent analysis of the OECD Commentary, the tribunal observed that the Korean SOFD is exclusively or at least essentially a fact-determination rule not affected by tax treaties, including the 2011 BLEU-Korea (Rep.) BIT.[176]

As for the claims stemming from the umbrella clause in article 10 of the BLEU-Korea (Rep.) BIT (2011),[177] the tribunal rejected them for the two reasons, without connecting the investment protection stemming from that clause with legitimate expectations, relevant also for the FET standard. First, the tribunal stated that the contracting states of the BLEU-Korea (Rep.) tax treaty (1979) agreed to bring enforcement within the scope of investor-state arbitration and that "even if the Claimants could bring their tax claim within the Umbrella Clause, it would fail on the facts."[178] Thus, the ingenious argument according to which investors have the right to get protection under umbrella clauses against violation of tax treaties by states was not actually tested yet. It could have been different, if the *Lone Star* tribunal had applied the VCLT and GPLs to determine the FET standard and connect it with the umbrella clause via the right of claimants to legitimate expectations that benefits under the Belgium-Korea (Rep.) Income Tax Treaty (1977) will be available to them despite the Korean SOFD. Even though the conclusion would probably have stayed the same, the reasoning would have shed more light on that argument. The vital question remains whether "any other written obligation" (the crucial phrase in the umbrella clause under the 2011 BLEU-Korea (Rep.) BIT) means any obligation of contracting states expressed in their tax treaties, for example the reduced taxation or the exemption from withholding taxation of dividends or capital gains, respectively. Moreover, the mentioned argument presupposes that the respondent state violated a tax treaty, which requires an analysis similar to that carried out by the *Lone Star* tribunal.[179] Hence, a potential violation of a tax treaty and a protection following from an umbrella clause under a BIT are interconnected.

"a guiding principle", then included in art. 1, para 9.5. *See* B.J. Arnold, *Tax Treaties and Tax Avoidance: The 2003 Revisions to the Commentary to the OECD Model*, 58 Bull. Intl. Taxn. 6, p. 260 (2004), Journal Articles & Opinion Pieces IBFD. This also follows from the PPT insofar as the OECD claims that the PPT is merely a codification of the 2003 guiding principle. *See* para. 169 *OECD Model: Commentary on Article 29(9)* (2017). Cf. G. Maisto, *Counteracting Tax Treaty Abuses from a European Perspective: Frictions and Interactions between the OECD PPT and the ATAD GAAR*, in *Thinker, Teacher, Traveler: Reimagining International Tax. Essays in Honor of H. David Rosenbloom* (G. Kofler, R. Mason & A. Rust eds., IBFD 2021), Books IBFD.

176. *See further* Kuźniacki, *supra* n. 23, at pp. 156-162.

177. It reads as follows: "Each Contracting Party shall observe any other written obligation that may have entered into force with regard to investments in its territory by investors of the other Contracting Party." *See* more on umbrella clauses: L. Carroll, *What Place Does an Umbrella Clause Have in the New Generation of Bilateral Investment Treaties?*, 40 Journal of International Arbitration 2, p. 126 (2023); K. Yannaca-Small, *Interpretation of the Umbrella Clause in Investment Agreements*, OECD Working Papers on International Investment, pp. 15-21 (2003); J. Wong, *Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes*, 14 George Mason Law Review, p. 164 (2006). *See* more about the functioning of umbrella clauses in investment treaty arbitration tax-related cases in: Van Weeghel, *supra* n. 52, at sec. 26.2.5.; P.H.M. Simonis, *BITs and Taxes*, 42 Intertax 2, p. 275 (2014). For the case law of arbitral tribunals, *see* e.g. *Compañía de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic*, ICSID Case No ARB/97/3, Decision on Annulment (3 July 2002), paras. 95, 96; *Compañía de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie Générale des Eaux) v Argentine Republic*, ICSID Case No ARB/97/3, Decision on Annulment (3 July 2002), paras. 95, 96; *Eureko* (n. 113), para. 246; *Consutel Group SpA in liquidazione v People's Democratic Republic of Algeria*, PCA No 2017-33, Award (3 Feb. 2020), para. 325.

178. *Lone Star* (2022), paras. 486-487.

179. *See* Kuźniacki, *supra* n. 23, at pp. 156-157.

Altogether, the methodology of the *Lone Star* tribunal raises questions.[180] On the one hand, the tribunal did not seem to decide the tax-related part of the claims incorrectly, because the claims had been litigated locally without a denial of justice and the Lone Star investment has been realized via a quite blatant treaty-shopping tax avoidance scheme. On the other, the tribunal could have examined the compatibility of the Korean SOFD with the BIT and the tax treaty via the VCLT's rule and principles of interpretation and GPLs with the principle prohibiting abuse of rights, which it has not.[181]

2.4. Preliminary points on the most relevant core elements of the FET standard in light of the purpose of this article and the case study

The analysis so far allows the authors to make preliminary points on the most relevant core elements of the FET standard in light of the purpose of this article and the case study.

First, the core elements of the FET standard must always be determined on the basis of the relevant facts and circumstances of a given case in accordance with the VCLT and GPLs.[182] While the reasoning of the *Cairn* tribunal is clear in this regard, that of the *Lone Star* raises questions.[183] There also is another reason why the *Lone Star* tribunal's reasoning provides limited guidance: the tribunal relied heavily on the views of expert witnesses of disputing parties regarding the OECD Commentaries while MFN clauses in tax treaties are not clarified in such Commentaries due to the lack of such clauses in the OECD Model.

Second, out of all identified core elements of the FET standard in arbitral tribunal case law and investment treaty scholarship, the following come across as the most relevant in light of the purpose of this article and the case study: the requirement of stability, predictability and consistency of the legal framework and the principle of legality.[184] As follows from *Cairn v. India*, the mentioned elements of the FET standard can be seen as constituencies of the principle of legal certainty. It is a self-standing core element of the FET standard and can be applied as such.

The *Cairn* tribunal observed that although the protection of legitimate expectations of investors shares "some common ground with the principle of legal certainty",[185] the latter seems broader insofar as it does not require any specific commitments such as an obtainment of an advance tax ruling in respect of taxation of a transaction or the lack of taxation.[186] The principle of legal certainty encompasses the investor's expectation that, "even absent specific assurances, existing laws and regulations will be applied as they stand at the time when the legally relevant transaction takes place and in compliance with the then

180. Cf. Brigitte Stern (dissenting opinion in *Lone Star* (n. 82)) paras. 3-4: "I cannot refrain from expressing my *profound concern regarding the form of the Award, i.e., the structure and developments of the Tribunal's analysis*, which mixes the Parties' positions with the Tribunal's statements and 'Tribunal's Ruling[s],' in a manner that does not appear orderly and could lead to misinterpretations, thus making it often difficult to follow the Tribunal's reasonings in the Award from point A to point B. This being said, my main concern is that I consider that the majority has not applied the proper international law on State responsibility to the facts of the case, neither relating to attribution, nor to causation." [Emphasis added.]
181. *See* Kuźniacki, *supra* n. 23, at p. 170.
182. *See* sec. 2.1.
183. *See* secs. 2.3.2-2.3.3.
184. *See* sec. 2.2.
185. *Cairn* (2020), para. 1770.
186. Id., at para. 1771.

existing regulatory framework".[187] That is not necessarily the case for the protection of investor's legitimate expectations.

Accordingly, while both elements of the FET standard aim at "protecting an investor's reliance upon assurances or representations as to how the State will act in the future" (their common ground),[188] only the protection of an investor's legitimate expectations seem to require specific assurances or representations from the host state to play a key role under the FET standard.[189] Consequently, while the protection of legitimate expectations may not necessarily be the most relevant core element of the FET standard in light of the purpose of this article and the case study, the principle of legal certainty is, including its part which overlaps with the protection of legitimate expectations. Thus, eventually, the protection of legitimate expectations may only tangentially matter for the principles of legal certainty as the core element of the FET standard.

Third, the rule of law and one of its elements, which is also the element of the FET standard – the principle of legal certainty, demand a certain degree of consistency in terms of the interpretation and application of law. This degree varies depending on the wording of legal provisions under IIAs that formulate the investment protection standards and their purpose. This matters also for legal measures applied by a host state and their compatibility with the investment protection standards under IIAs, e.g. MFN clauses under tax treaties and domestic legal measures which condition the operation of tax treaties.

The international investment law literature indicates that the FET standard deliberately enhances flexibility, which means that the degree of consistency in its interpretation and application does not need to be high to respect the rule of law and the principle of legal certainty. The opposite is true in respect of MFN clauses under BITs insofar as they are designed to have little flexibility, as bright-lines rules do.[190] By analogy, the same observation appears correct in respect of MFN clauses under tax treaties.[191] Thus, the lack of sufficient consistency in the interpretation and application of MFN clauses under tax treaties can upset the rule of law and the principle of legal certainty. This may be at odds with the FET standard.

Fourth, in addition to the rule of law, the principle of good faith (one of the GPLs) impacts the way the FET standard and one of its core elements – the principle of legal certainty – operate. The interpretation in good faith is at the core of the interpretation of international treaties – including BITs and tax treaties – in the sense that it accompanies the whole process of interpretation.[192] This GPL has a particularly strong significance for tax treaties due to the fact that they are concluded only between two states (it is easier to reconstruct the common intention of two parties than it is in the case of more than two parties) and usually

187. Id., at para. 1786.
188. Id., at para. 1771.
189. Thus the protection of investors' legitimate expectations may be relevant under the FET standard even "where a foreign investor merely relies on the general legal framework without any specific commitments or intention on behalf of the host state to attract foreign investors," but it " may only have a more marginal scope of application", i.e. mainly in respect of retroactive law. *See* Schill, *supra* n. 107, at p. 28.
190. Arato, *supra* n. 114, at pp. 254-55. *See also* sec. 2.2.
191. Cf. sec. 1.1.
192. *See* M. Villager, *Art. 31*, in *Commentary on the 1969 Vienna Convention on the Law of Treaties* para. 7 (Brill 2008).

based on one model – the OECD Model.[193] The OECD Commentary (2017) explicitly recognizes the principle of good faith as crucial to delineating a proper application of tax treaties by taxpayers (the prevention of abuse of rights under tax treaties)[194] and tax authorities (the prevention of abuse of fiscal power under tax treaties).[195] The OECD articulates the former as follows:

> Other States prefer to view some abuses as being abuses of the convention itself, as opposed to abuses of domestic law. These States, however, then consider that a proper construction of tax conventions allows them to *disregard abusive transactions*, such as those entered into with the view to obtaining unintended benefits under the provisions of these conventions. This interpretation *results from the object and purpose of tax conventions as well as the obligation to interpret them in good faith* (see Article 31 of the Vienna Convention on the Law of Treaties).[196] [Emphasis added.]

While the latter reads as follows:

> Generally, where the application of provisions of domestic law and of those of tax treaties produces conflicting results, the provisions of tax treaties are intended to prevail. This is *a logical consequence of the principle of "pacta sunt servanda" which is incorporated in Article 26 of the Vienna Convention on the Law of Treaties*. Thus, if the application of specific anti-abuse rules found in domestic law were to result in a tax treatment that is not in accordance with the provisions of a tax treaty, this would conflict with the provisions of that treaty and *the provisions of the treaty should prevail under public international law*.[197] [Emphasis added; footnote omitted.]

Consequently, the principle of good faith influences the interpretation of the principle of legal certainty, as the core element of the FET standard, in respect of MFN clauses under tax treaties. It restricts the scope of fiscal conduct of contracting states in accordance with the FET standard (legal certainty) proportionally to their engagement in bad faith behaviour: the less good faith in their fiscal conduct, the more likely that they violate the core element of the FET. An example of bad faith fiscal conduct of a contracting state may be an interpretation and application of MFN clauses under its tax treaties on the basis of a serious misapplication of the VCLT's rule and principles of interpretation solely for budgetary reasons. Even if the *Cairn* tribunal stated that maximizing the revenue by a host state is "a valid policy justification for prospective taxation",[198] this statement neither factors in the principle of good faith in the host state's fiscal conduct nor a potential misapplication of the VCLT's rule and principles of interpretation. The latter factor could not be considered by the *Cairn* tribunal because the case did not regard a fiscal conduct of India based on a tax treaty but under Indian domestic tax law to which the VCLT does not apply.

The good faith applies symmetrically to taxpayers: the less good faith in their business and investment conduct that impacts the tax burden, the less protection under the principle of legal certainty. Indeed, the principle of legal certainty does not equally protect taxpayers actively seeking to abusively avoid taxation and the taxpayers who in the course of ordinary day-to-day business or investment practices benefit from tax advantages in a full compli-

193. *See* R. Vann, *Interpretation of Tax Treaties in New Holland*, in *A Tax Globalist: Essays in Honour of Maarten J. Ellis* p. 147 (H. Van Arendonk et al. eds., IBFD 2005), Books IBFD.
194. *See further* Van Weeghel, *supra* n. 35; S. van Weeghel, *A Deconstruction of the Principal Purposes Test*, 11 World Tax J. 1, pp. 5, 10-11, 15-16 (2019), Journal Articles & Opinion Pieces IBFD.
195. *See further* V. Arruda Ferreira, *The Improper Use of Tax Treaties by Contracting States* (IBFD 2021), Books IBFD.
196. Para. 59 *OECD Model: Commentary on Article 1* (2017).
197. Id., at para. 70.
198. *Cairn* (2020), para. 1814.

ance with the letter and the purpose of tax law.[199] The latter act in good faith during their business and investment conduct and therefore the relevant core element of the FET standard – the principle of legal certainty – protects them in full scope.

Fifth, the principle of legal certainty mandates that tax provisions, including MFN clauses in tax treaties, will be applied as they stand at the time when the legally relevant transaction takes place and in accordance with then-existing tax regulatory framework.[200] This appears to neatly coexist with a dynamic interpretation of tax treaties. The terms used in tax treaties, as well as in other international agreements such as in IIAs, deliberately use capacious (flexible) formulations to allow for their dynamic interpretation. Such an interpretative approach helps to achieve the common intention of the parties at the moment they apply the provisions in accordance with the legal, social and economic reality at that time.[201] In this way, international agreements, including tax treaties, are living instruments that, as a rule, are subject to interpretation in light of present-day conditions.[202] Through article 3(2) of their Models, the OECD and the United Nations also point to a dynamic interpretation as the appropriate one, i.e. the one that takes into account the meaning of a treaty term in accordance with domestic tax law at the time of applying the tax treaty, unless the context otherwise requires.[203] This all does not mean, however, that a dynamic approach to interpretation brings the same results as invoking the principle of legal certainty under the FET. While the principle of legal certainty aims to ensure the predictability and stability of the legal environment at the time when the investment is made and later on when relevant transactions take place, the very same results may or may not follow from dynamic interpretation. Moreover, the FET always provides investors more legal certainty than dynamic interpretation because only the FET is a legally binding standard of investment protection that can be enforced via investment treaty arbitration. Dynamic interpretation best fits as an interpretative means to enhance the principle of legal certainty (the core element of the FET) under tax treaties rather than as a concurring and alternative to the FET path to investment protection. Section 2.2. sheds light on the role of dynamic interpretation to properly interpret the MFN clause under Indian tax treaties in respect of the word "is".

199. *See* J. Freedman, *Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance Principle*, British Tax Review, p. 356 (2004): "There will be no deficit in the rule of law if the area of uncertainty is one that does not affect day-to-day transactions and is governed not by arbitrariness but rather by procedures that attract the support of the compliant members of the tax community." However, it is worth bearing in mind that the borderline between abusive tax avoidance and acceptable tax planning is very thin and context-sensitive. Therefore "[t]hose who deliberately and with open eyes try to balance on the borderline of acceptable tax planning should not be surprised if they have to realize that they fall down on the wrong side." F. Zimmer, *In Defence of General Anti-Avoidance Rules*, 72 Bull. Intl. Taxn. 4, sec. 5 (2019), Journal Articles & Opinion Pieces IBFD.

200. Cf. *Cairn* (2020), para. 1786.

201. *See* E. Bjorge, *The Evolutionary Interpretation of Treaties* pp. 9-12 (Oxford University Press 2014); G. Fitzmaurice, *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain other Treaty Points*, 28 British Yearbook of International Law, p. 8 (1951); M. Sørensen, *Do the Rights Set forth in the European Convention on Human Rights have the Same Significance in 1975?*, in *A Bibliography, Report presented by Max Sørensen to the Fourth International Colloquy about the European Convention of Human Rights* pp. 54-55 (M. Sørensen ed., Aarhus University Press 1988).

202. *See*, in relation to the European Convention on Human Rights, the ECHR's judgment of 25 April 1978, *Tyrer v. United Kingdom* (1978) 58 ILR, pp. 339, 353.

203. *See* para. 11 *OECD Model: Commentary on Article 3* and para. 21 *UN Model: Commentary on Article 3*. A corresponding amendment to the text of art. 3(2) *OECD Model*, articulating explicitly the principle of dynamic interpretation, was added in 1995 to the OECD Model and to the Commentary.

Finally, the principle of proportionality plays a decisive role while examining the host state's defence of its tax measures.[204] However, it is not easy to envision a defence of a host state in respect of the principal research theme of this article, i.e. a proper versus improper application of the VCLT to interpret MFN clauses under tax treaties. In other words, it would be odd to consider that a host state can justify a misapplication of the VCLT to interpret and apply such clauses. Hence, a role of the principle of proportionality in respect of the host state's defence of legal (tax) measures does not seem to be adequate for the purposes of the article insofar as it focuses on a higher level of interplay between the state's conduct and investment treaty protection, i.e. the application of the VCLT to interpret MFN clauses under tax treaty.[205] Indeed, a host state may try to justify a deviation from the VCLT's rule and principles of interpretation by the need to comply with purely domestic legal measures, e.g. the Indian constitutional setting regarding the operation of Indian tax treaties and a requirement of separate notification under section 90 of the ITA to provide benefits under the tax treaties.[206] The principle of proportionality could be relevant to verify whether the domestic measures constitute a reasonable and proportionate interference with the taxpayer's interest of legal certainty.[207] Nevertheless, the principles enshrined in articles 26-27 of the VCLT – *pacta sunt servanda* and no justification in violating a treaty (including a tax treaty) by references to domestic law – make the mentioned use of the principle of proportionality redundant.

3. In-Depth Case Study of the Most Recent Supreme Court Judgment on MFN Clauses in Tax Treaties in Light of the VCLT's Rule and Principles of Interpretation

3.1. Preliminary points and background to the dispute

3.1.1. Initial interpretational (non-VCLT party and application of the VCLT) and factual (the core of the dispute) points

This section contains an in-depth case study of a recent major tax litigation between the Indian tax authorities and taxpayers (foreign investors). It has been finally concluded in favour of the tax authorities by the SCI in the judgment of 19 October 2023 in the *Assessing Officer Circle (International Taxation) New Delhi v. Nestlé and others* case (*Nestlé* case).[208] The case study therefore sheds light on one of the most recent supreme court judgments on MFN clauses in tax treaties in order to examine the compatibility of limited MFN clauses in tax treaties and the FET standard in BITs via the prism of a proper application of the VCLT's rule and principles of interpretation. The analysis aims to assist in answering the research question: can the interpretation of the MFN clauses by the Indian executive and judiciary powers be reasonably considered a violation of the FET standards under the Indian BITs due to a serious misapplication of the VCTL's rule and principles of interpretation?

204. *See supra* sec. 2.3.2.
205. *See supra* sec. 2.3.2. for a typical role of the principle of proportionality in respect of the host state's defence of legal measures. For the interaction between the principle of proportionality in investment treaty arbitration (mainly on the FET standard) and the case law of the Court of Justice of the European Union (ECJ) in direct tax cases, *see* P. Pistone & I. Lazarov, *The Fundamental Right to Fair and Equitable Treatment in the Cross-Border Recovery of Taxes within the EU: A Need for a Common Minimum Standard*, 15 World Tax J. 1 (2023), Journal Articles & Opinion Pieces IBFD. Cf. Danon & Wuschka, *supra* n. 53, at p. 697; Martín Jiménez, *supra* n. 52, at secs. 4 and 5.
206. *See* secs. 3.2.3-3.2.4.
207. *Cairn* (2020), para. 1801.
208. *Nestlé* (2023).

Due to the fact that India is not a signatory to the VCLT, the research question can be challenged. However, this challenge cannot be sustained. The Indian tax treaties with the Netherlands, France and Switzerland constitute treaties covered by the VCLT (article 2(1)(a)). The rule and principles of interpretation under the VCLT represent a codification of CIL. It means that they are legally binding and are applicable between states that are not signatories to the VCLT, such as India, and any opposition to the provisions of the VCLT leaves the state with the burden of establishing the invalidity of the provision cited.[209] These observations are valid also in respect of other rules embodied in the VCLT, in particular in articles 26-27, which express the principle of international law *pacta sunt servanda*: "Every treaty in force is binding upon the parties to it and *must be performed by them in good faith*."

The Supreme Court of India either implicitly or explicitly acknowledged in tax cases the legal obligation of India, as stemming from CIL, to respect the VCLT for the interpretative purposes of tax treaties. A similar approach to the interpretation of tax treaties occurs in other countries, which are not signatories of the VCLT, including the United States, a state which also is not a signatory to the VCLT.[210] In a similar vein, many other courts across the

209. *See* R.G. Wetzel & D. Rauschning, *The Vienna convention on the law of treaties: travaux preparatoires* pp. 4-79 (Metzner 1978); A.A. Skaar, *Permanent Establishment: Erosion of a Tax Treaty Principle (Second Edition)* p. 43 (Wolters Kluwer International 2020). Cf. Vogel & Prokisch, *supra* n. 47, at p. 66; D.A. Ward, *The Interpretation of Income Tax Treaties with Particular Reference to the Commentaries on the OECD Model* pp. 15-16 (IBFD 2005). For the relevant international case law, *see* the International Court of Justice's (ICJ) judgment of 13 Dec. 1999, *Kasikili/Sedudu/Island*, ICJ Reports 1999, p. 1059 and the ECHR judgment of 21 Feb. 1975, *Golder v. the United Kingdom* case, 57 ILR., pp. 213-214.

210. Although the US signed the VCLT on 24 Apr. 1970, the US Senate has not given its advice and consent to the treaty. Nonetheless, the US government considers many of the provisions of the VCLT to constitute customary international law on the law of treaties, including arts. 31-33 (rule of interpretation) VCLT (*see* https://2009-2017.state.gov/s/l/treaty/faqs/70139.htm). *See also* US Foreign Relations Law, *Treaties Approved* sec. 106, available at https://www.thealiadviser.org/us-foreign-relations-law/treaties-approved/: "Interpretation of Treaties, updates and elaborates upon the issues addressed in § 325 and parts of § 326 of the Restatement Third. This Section addresses the relationship between the rules for interpretation of treaties under the Vienna Convention on the Law of Treaties and U.S. judicial practice, and generally finds the two approaches to be compatible. The prior Restatement did not recognize the Vienna Convention Articles 31 and 32 as fully reflecting customary international law regarding the rules for treaty interpretation and identified some potential divergence between the U.S. approach to interpretation of treaties and that of the Vienna Convention. However, subsequent developments in international law and state practice in applying the Vienna Convention principles, and in the U.S. domestic approach to interpretation of treaties, have both solidified international acceptance of the Vienna Convention standard and narrowed any perceived divergence in approach." Indeed, the following two US judicial principles of interpretation are compatible with art. 31(1) VCLT: (i) looking beyond words whenever it contributes to the intent or expectations of the contracting states to the tax treaty; and (ii) liberal understanding of tax treaties, meaning that if a provision lends itself to two interpretations – one granting benefits and the other restricting or denying them – the more liberal interpretation in favour of granting benefits is preferred. Principle (i) has been applied by the US Supreme Court in *Maximov v. United States* regarding the interpretation of the *Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains* (24 July 2001), Treaties & Models IBFD. In particular, in para. 54, the Court voiced that "[i]t is particularly inappropriate for a court to sanction a deviation from the clear import of a solemn treaty between this Nation and a foreign sovereign, when, as here*, there is no indication that application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories*." [Emphasis added.] The second principle can be found in *United States v. Stuart* regarding the interpretation of the *Convention between Canada and the United States of America with Respect to Taxes on Income and on Capital* (26 Sept. 1980), Treaties & Models IBFD. In para. 368, the Court observed that given that "a treaty should generally be 'construe[d] . . . liberally to give effect to the purpose which animates it' and that, '[e]ven where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred,' *Bacardi Corp. of America v. Domenech*, 311 U. S. 150, 311 U. S. 163 (1940) (citations omitted),

world acknowledge the legally binding force of the VCTL to interpret tax treaties and apply it to determine the meaning of the provisions of tax treaties.[211]

In the *Azadi Bachao Andolan* case,[212] the SCI observed that:

> As we have already emphasised, the whole purpose of the DTAC [the Double Tax Avoidance Convention, i.e. the tax treaty] is to ensure that *the benefits thereunder are available even if they are inconsistent with the provisions of the Indian Income-tax Act*. In our view, therefore, the principle of piercing the veil of incorporation can hardly apply to a situation as the one before us.
>
> The respondents banked on certain observations made in Oppenheim's International Law. All that is stated therein is a reiteration of the general rule in municipal law that contractual obligations bind the parties to their contracts and not a third party to the contract. *In international law also, it has been pointed out that the Vienna Convention on the Laws of Treaties*, 1969 reaffirms the general rule that a treaty does not create either obligations or rights for a third party state without its consent, based on the general *principle pacta tertiis nec nocent nec prosunt*.
>
> The Federal Court emphasised that *in interpreting and applying treaties the Courts should be prepared to extend "a liberal and extended construction" to avoid an anomaly which a contrary construction would lead to*. The Court recognized that "we cannot expect to find the same nicety or strict definition as in modern documents, such as deeds, or Acts of Parliament; it has never been the habit of those engaged in diplomacy to use legal accuracy but rather to adopt more liberal terms". [Emphasis added.]

Thus, the SCI in the *Azadi Bachao Andolan* case enhanced the liberal interpretation of tax treaties according to which the tax treaties shall be given prevalence to the extent of their conflict with the Indian domestic tax law. This reflects the principles enshrined in articles 26-27 of the VCLT and the principle of effectiveness of international law – *ut res magis valeat quam pereat*, which stems from the principle of good faith. It requires that international treaties should be interpreted in such a way as to ensure that their provisions are as effective as possible, achieving the object and purpose of a treaty as fully as possible.[213] The principle of effectiveness takes the form of a directive of *effet utile*, which dictates that international treaties should be interpreted in such a way as to (i) ensure their effectiveness and (ii) give effect to the purposes of the treaty, while at the same time (iii) prohibiting interpretations that render the provisions of the treaty ineffective or impossible to apply in practice. The principle of effectiveness therefore amounts to recognizing that each provision of an international treaty has a meaning (a prohibition on interpretation *per non est*)[214] and reflects

the evident purpose behind Articles XIX and XXI -- the reduction of tax evasion by allowing signatories to demand information from each other -- counsels against interpreting."

211. *See*, for example, the Dutch Supreme Court's judgment of 19 Jan. 2018, 16/03321, BNB 2018/68; The Swiss Federal Tribunal's judgments of 3 July 2019, 2C_306/2017 and of 19 May 2019, 2C_880/2018; the Norwegian Supreme Court's (*Høyesterett*) judgment of 8 June 2004, *PGS Exploration AS v. State of Norway* case, 7 ITLR 51; The High Court of Australia's judgment of 16 Nov. 2016, *Bywater Investments Ltd v. Commissioner of Taxation* case and *Hua Wang Bank Berhad v. Commissioner of Taxation* case, [2016] HCA 45 [2015] FCAFC 176; the South African Supreme Court of Appeal's judgment of 20 Aug. 2015, *Krok v. The Commissioner For The South African Revenue Services (CSARS)*, (20230/2014, 20232/2014) [2015] ZASCA 107; 2015 (6) SA 317 (SCA); [2015] 4 All SA 131 (SCA); the Supreme Court of the United Kingdom's judgment of 1 July 2015, *Anson v Her Majesty's Revenue and Customs (HMRC)*, [2015] UKSC 44.
212. *See* the Supreme Court of India's judgment of 7 Oct. 2003*, Union of India v Azadi Bachao Andolan* case, [2003] 10 SCC 1, available at https://indiankanoon.org/doc/1960330/.
213. *Award in the Arbitration regarding the Iron Rhine ('Ijzeren Rijn') (Railway between the Kingdom of Belgium and the Kingdom of the Netherlands)*, PCA, Award (25 May 2005), vol. 27, RIAA, paras. 49, 64.
214. Therefore, an interpretation that renders the text of an international treaty unworkable, superfluous, absurd or unreasonable is contrary to the general rule of interpretation under art. 31 VCLT. Cf. art. 32(b) VCLT.

some of the treaty's purposes.[215] It is one of the most essential interpretative tools to ensure that the common intention of the parties of international treaties, including tax treaties, is appropriately enforced.[216]

In *Ram Jethmalani*,[217] the SCI explicitly acknowledged (paragraph 60) the "General Rule of Interpretation" in article 31 of the VCLT as legally binding for India (a part of CIL) to interpret tax treaties:

> Article 31, "General Rule of Interpretation", of the Vienna Convention of the Law of Treaties, 1969 provides that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." *While India is not a party to the Vienna Convention, it contains many principles of customary international law, and the principle of interpretation, of Article 31 of the Vienna Convention, provides a broad guideline as to what could be an appropriate manner of interpreting a treaty in the Indian context also.* [Emphasis added.]

A similar acknowledgement by the SCI in *Nestlé* (para. 74):

> Article 31 of the VCLT reflects the general rules of treaty interpretation. India is not a signatory to the convention. However, the convention has been accepted by consensus as reflecting the customary international law on general rules of treaty interpretation, and is thus still relevant in the Indian context.

Consequently, it is clear that India is legally obliged under CIL to apply the VCLT to interpret tax treaties and its highest courts acknowledged it. The real question is therefore about a proper application of the VCLT. In general terms, a country can be considered as failing to meet that obligation if it misapplies one or more of the principles of interpretation under articles 31-32 of the VCLT causing its domestic law to displace its obligations under tax treaties. To verify this, a careful examination of the VCLT's rule and principles of interpretation needs to be done in light of the dispute between the taxpayers and the tax authorities in respect to an interpretation of MFN clauses under tax treaties. The next section contains relevant analysis. Before it unfolds, the authors outline a brief introduction to the core of the dispute.

The issue addressed in the *Nestlé* case regarded the taxing rights of India under relevant tax treaties to levy withholding taxation (WHT) on income of foreign investors from France (*Steria*), the Netherlands (*Concentrix*) and Switzerland (*Nestlé*) that operated in the Indian market via local subsidiaries. Two questions constituted the core dispute between the Indian tax authorities and the foreign investors (taxpayers of WHT in India):

(1) Must a separate notification be issued by the Indian tax authorities in accordance with section 9o of the ITA to activate MFN clauses under Indian tax treaties with France, the Netherlands and Switzerland to provide taxpayers with more preferable tax treatment in respect of WHT in India as stipulated under other tax treaties granting such treatment?

(2) Are such MFN clauses activated if, under any tax treaty, India agrees on a more favourable tax treatment (regarding income subject to WHT in India) with a third state, even

215. M. Fitzmaurice, *The Practical working of the Law of the Treaties*, in *International Law* pp. 189-190 (M. Evans ed. Oxford University Press 2003).
216. B. Kuźniacki, *Beneficial Ownership in International Taxation* pp. 49-50 (Edward Elgar 2022).
217. *See* Supreme Court of India's judgment of 4 July 2011, *Ram Jethmalani & Ors vs Union Of India & Ors*, 2011 8 SCC 1.

if such state becomes a member of the OECD after the entry into force of such tax treaty?

The negative and the affirmative answers to the questions (1) and (2), respectively, would allow *Steria* to rely on the narrower definition of "fees for technical services" under the India-United Kingdom Income Tax Treaty (1993)[218] in comparison to the definition of that term under the France-India Income and Capital Tax Treaty (1992),[219] and, as a result, to be exempt from WHT in India in respect of the income generated there from various management services.[220] Such answers in respect to *Concentrix* and *Nestlé* would allow them to benefit from 5% WHT on dividend payments by their Indian subsidiaries in accordance with the relevant provisions of Indian tax treaties with Slovenia (2003),[221] Lithuania (2011)[222] or Columbia (2011)[223] instead of 10% under Indian tax treaties with Switzerland (1994)[224] and the Netherlands (1988).[225]

Of course, *Steria*, *Concentrix* and Nestlé (taxpayers/investors) took the position that the mentioned answers are correct. By contrast, the Indian tax authorities disagreed, denying the access to more preferential tax treatments via the relevant MFN clauses. Their argument in the *Steria* case was that the MFN clause included in the protocol to the France-India Income and Capital Tax Treaty (1992) is not self-operational as far as to operate, i.e. a separate notification under section 90 of the ITA has to be issued by the Indian tax authorities. The same argument was used in respect of *Concentrix* and *Nestlé* as well as the argument that MFN clauses under the treaty with Netherlands (1988) and Switzerland (1994) cannot be applicable, and, as a result, no separate notification can be issued under section 90 of the ITA to enable the operation of MFN clauses, because Slovenia, Lithuania and Columbia were not members of the OECD, on the date when they executed tax treaties with India. The

218. *Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains* (signed 25 Jan. 1993, entered into force 25 Oct. 1993), Treaties & Models IBFD.

219. *Convention between the Government of the Republic of India and the Government of the French Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital*, (signed 29 Sept. 1992, entered into force 1 August 1994), Treaties & Models IBFD.

220. I.e. such income did not fall within the scope of the definition of "fees for technical services" under the *U.K.-India Income Tax Treaty* and, therefore, by means of the MFN clause under the *France-India Income and Capital Tax Treaty*, it shall not enter the ambit of the definition of "fees for technical services" under the *France-India Income and Capital Tax Treaty*, leaving such income outside the scope of WTH in Indian in accordance with that treaty.

221. *Convention between the Government of the Republic of India and the Government of the Republic of Slovenia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (signed 13 Jan. 2003, entered into force 17 Feb. 2005), Treaties & Models IBFD.

222. *The Agreement between the Government of the Republic of India and the Government of the Republic of Lithuania for the Avoidance of Double taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital* (signed 26 July 2011, entered into force 10 July 2012), Treaties & Models IBFD.

223. *Convention between the Government of the Republic of India and the Government of the Republic of Colombia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (signed 13 May 2011, entered into force 7 July 2014).

224. *Convention between the Government of the Republic of India and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income* (signed 2 Nov. 1994, entered into force 29 Dec. 1994), Treaties & Models IBFD.

225. I.e. by means of the MFN clauses under the *India-Switz. Income Tax Treaty* and the *India-Neth. Income and Capital Tax Treaty*, dividend income will be subject to reduced 5% tax rate in India, as regulated in the *India-Slovn. Income Tax Treaty*, the *India-Lith. Income and Capital Tax Treaty* or *Colom.-India Income Tax Treaty*, instead of 10% under the *India-Switz. Income Tax Treaty* and the *India-Neth. Income and Capital Tax Treaty*.

taxpayers challenged the decisions of the Indian tax authorities before the Delhi High Court (DHC). The DHC in all cases decided in favour of taxpayers.[226]

3.1.2. Steria *case – the DHC's judgment of 28 July 2016*

In the judgment of 28 July 2016, in the *Steria* case, the DHC observed that the MFN clause included in the protocol to France-India Income and Capital Tax Treaty (1992) constitutes an integral part of that tax treaty, which stemmed directly from the wording of the preamble to that protocol.[227] Since that treaty was notified by the Indian government by issuing a notification under section 90 of the ITA and the protocol to it with the MFN clause constitutes an integral part of that tax treaty, there is no need for the protocol itself to be separately notified or for the beneficial provisions in some other tax treaty and another OECD country to be separately notified to form part of the France-India Income and Capital Tax Treaty (1992). Thus, the MFN clause applies automatically after meeting all conditions of its application without a separate notification being necessary.[228]

As a side note, it is worth pointing out that slightly more than three months after the DHC decided in *Steria*, the French tax authority (*Direction Générale des Finances Publiques*) issued a position (the French Bulletin) on 4 Nov. 2016, according to which the MFN clause under the France-India Income and Capital Tax Treaty (1992) replaces the 15% rate with a 5% rate on dividends from the India-Slovenia Income Tax Treaty (2003).[229] The fact that Slovenia became a member of the OECD (21 August 2010) 5 years after the entry into force of the tax treaty with India (17 February 2005) is not discussed in the French Bulletin, tacitly implying that the MFN clause operates also in such situations, i.e. when a third state with which India has concluded a tax treaty becomes OECD member after the conclusion and entry into force of that tax treaty.

3.1.3. Concentrix *– the DHC's judgment of 22 April 2021*

In the judgment of 22 April 2021, in the *Concentrix* case, the DHC first referred to its earlier judgment in the *Steria* case, fully reiterating the previous reasoning about the self-operational legal nature of MFN clauses included in Indian tax treaties via relevant protocols (in the *Concentrix* case, it regarded the treaties with Netherlands (1988) and Switzerland (1994)).[230] The DHC then focused on the meaning of the word "is" in the phrase "which is a member of the OECD" included in the MFN clauses. In that regard, it observed that "the word 'is' describes a state of affairs that should exist not necessarily at the time when the subject DTAA [tax treaty] was executed but when a request is made by the taxpayer or withholding agent for issuance of a lower rate withholding tax certificate under Section 197 of the Act."[231] Being both autological and heterological, the word "is" has the potential of developing into several forms or supporting multiple interpretations, which was not very

226. For the first judgment, *see Steria (India) Ltd. v. Commissioner of Income Tax-Vi & Anr.*, 28 July 2016, W.P.(C) 4793/2014. For the next judgment, *see Concentrix Services Netherlands B.V. v. Income-tax Officer (TDS)*, 22 April 2021, W.P.(C) 882/2021. For the last judgment, *see Nestlé SA v. Assessing Officer Circle (International Taxation) (ACIT)*, 4 June 2021, WP(C) 3243/2021.
227. I.e., "the undersigned have agreed on the following provisions [including the MFN clause] which *shall form an integral part of the Convention*". [Text in square brackets and emphasis added.]
228. *Steria* (2016), paras. 16-18.
229. BOI-INT-CVB-IND-20161104, N 30, available at https://bofip.impots.gouv.fr/bofip/1188-PGP.
230. *Concentrix* (2021), paras. 14-15.
231. Id., at para. 17.4.

helpful in determining the core disputed aspect of the MFN clauses. Therefore, a different interpretative tool was needed in the Court's view to glean the intent of contracting states decoded in the MFN clauses.[232]

The DHC considered the principle of common interpretation as the main interpretative tool. In its view, this principle aims to ensure consistency in the interpretation of the tax treaty's provisions by the tax authorities and courts of the concerned contracting state[233] as well as to effectuate the core function of a tax treaty, i.e. "to aid commercial relations and equitable distribution of tax revenues in respect of income which falls for taxation in both the contracting States."[234] Apparently, the DHC assumed that the principle of common interpretation requires respecting the position expressed by the other contracting state insofar as the conclusive part of the judgment heavily relies on the Dutch State Secretary for Finance in a Decree issued on 28 February 2012 in relation to the India-Netherlands Income and Capital Tax Treaty (1988) (Dutch Decree).[235]

According to the Dutch Decree, the 5% rate applies to dividends covered by article 10(2) of the treaty with Netherlands (1988), with retroactive effect from 21 July 2010, on the basis of the 1988 MFN clause. The underlying premise of the position taken in the Dutch Decree is that the referred "third state" in the 1988 MFN clause is not required to already be a member of the OECD at the time of entry into force of the tax treaty between India and the third state that provides for the more favourable rate. In other words, the MFN clause is also activated if the third state becomes a member of the OECD after the entry into force of the treaty with India. In that regard, the Dutch Decree includes an explicit reference to Slovenia as the third state and to 5% rate under the treaty with Slovenia (2003).

The DHC fully corroborated with the Dutch Decree, confirming that 5% tax rate set forth in the Slovenia treaty (2003) will be applicable on the date when Slovenia became a member of the OECD, i.e., from 21 July 2010, although that treaty came into force on 17 February 2005.[236]

Indeed, the DHC gave significant interpretative value to the Dutch Decree, identifying it with the result of the application of the principle of common interpretation.[237]

3.1.4. Nestlé *case – the DHC's judgment of 4 June 2021*

The DHC's judgment in the *Nestlé* case is just a short (three-paragraph) statement according to which its previous judgment in the *Concentrix* case is fully applicable on merits. Hence, *Nestlé* is entitled to 5% WHT on dividends under the Switzerland treaty (1994) as per the application of the MFN clause in that tax treaty.

It is noteworthy that the Swiss Federal Department of Finance issued an official letter of 13 August 2021 regarding the MFN clause under the Switzerland treaty (the Swiss Publication) very much reflecting the reasoning included in the Dutch Decree and the

232. Id., at para. 17.4-17.5.
233. Id., at para. 17.8.
234. Id., at para. 19.4
235. Decree of 28 February 2012, No. IFZ 2012/54M on the application of the *India-Neth. Income and Capital Tax Treaty*.
236. *Concentrix* (2021), para. 17.6.
237. Id., at para. 19, 19.4.

DHC's judgment in the *Concentrix* case.[238] It says that a 5% rate on dividends is applicable under the Switzerland treaty as per the activation of the MFN clause due to the accession of Lithuania and Colombia to the OECD on 5 July 2018 and 28 April 2020, respectively. The fact that tax treaties with those states entered into force on 10 July 2012 and 7 July 2014 did not create any obstacle for the cited conclusion in the Swiss Publication. It further explains that Indian tax residents receiving dividends from Swiss source as of 5 July 2018 or 28 April 2020 can claim a refund of the (excess) WHT on dividends in accordance with the established Swiss procedures. The final point in the Swiss Publication regarded the principle of reciprocity: "Should reciprocity in the interpretation of the most favored nation clause not be guaranteed by the Indian competent authority, the Swiss competent authority reserves the right to reverse this interpretation and to readjust the treaty rates applicable to income accruing as of 1 January 2023."

3.1.5. Appeal to the SCI by the Indian tax authorities and other relevant factors

The Indian tax authorities, i.e. the Assessing Officer of Circle (International Taxation) (ACIT) appealed all the presented judgments of the DHC to the SCI. Moreover, the Central Board of Direct Taxes (CBDT), Department of Revenue, Ministry of Finance published the Circular No. 3/2022 of 3 February 2022 (Circular)[239] to express a disagreement with the position expressed in the Dutch Decree, the French Bulletin and the Swiss Publication. It stated that the MFN clauses in question clearly state that the reduced rate takes effect from the date of entry into force of the Indian tax treaty with the third state. The MFN clauses cannot be effective from that date if the third state was not a member of the OECD on such date of entry into force. That is why such clauses could be applicable only if the third state was a member of the OECD at the time of entering into force of the relevant treaty and never later.[240]

It also of relevance to observe that the Indian tax authorities neither challenged the positions of the taxpayers as beneficial owners of income received from India[241] nor considered their structures in India as abusive tax avoidance under tax treaties or domestic law. The investments and business operations of *Steria*, *Concentrix* and *Nestlé* in India constituted genuine and good faith international commerce between their states of origin and India.

3.2. The structure, logic, reasoning and conclusions of the supreme court – the critical analysis

After presenting the facts, arguments of the parties and the relevant statutory provisions (mainly section 90 of the ITA and provisions of Indian tax treaties),[242] the SCI traversed to the analysis structured as follows: A. General; B. The interpretation of the term "is"; C. Treaty practice of India, in relation to DTAAs and their Protocol, and practices of Netherlands, France and Switzerland; D. International perspectives and practices; and E.

238. Available at https://www.estv.admin.ch/dam/estv/fr/dokumente/intsteuerrecht/themen/auslaendische-quellensteuern-pro-land/i/indien-fachmitteilung-mfn.pdf.download.pdf/indien-fachmitteilung-mfn.pdf (accessed 31 Jan. 2024).
239. F.No.S03/1/2021-FT&TR-1.
240. *See* the Circular at sec. 4.3.
241. For the most recent and in-depth analysis of the concept of beneficial ownership in international tax law, *see* Kuźniacki, *supra* n. 216.
242. *Nestlé* (2023), paras. 1-37.

Vienna Convention on Law of Treaties. In the conclusions, the SCI entirely agreed with the Indian tax authorities, deciding that all their appeals succeed because MFN clauses under Indian tax treaties with France, the Netherlands and Switzerland:

(1) cannot be activated automatically by means of the interpretation and application of these tax treaties but it requires a separate notification under section 90 of the Income Tax Act (ITA); and
(2) can be activated if, under a tax treaty, India agrees on a more favourable rate on dividends with a third state only if such state is a member of the OECD at the time of the entry into force of such tax treaty.[243]

The remainder of this section includes the succinct presentation of the crucial observations of the SCI and a critical analysis. The subsections below reflect the structure of the analysis, as established by the SCI, to reveal its logic and reasoning in a chronological way. It gives an important insight into what the SCI prioritized (looked at first) and which interpretative sources and tools appeared to be decisive to it reaching its conclusions, by contrast to interpretative means used only supplementarily (to confirm the conclusions de facto already reached).

This article's central contention relating to that part of the analysis is that the SCI gave so much interpretative importance to the Indian domestic law and practice that it failed to determine the common intention of the parties to the international treaties in question (known as *effet utile*).[244] In particular, the SCI's approach of relying on the VCLT to interpret and apply Indian tax treaties comes across as supplementary to the domestic means of interpretation only. Its approach to one of the primary interpretative means – "subsequent practice" under article 31(3)b) of the VCLT – seems to not recognize the need for a common practice, or even "a mutual awareness of a shared understanding", of contracting states of a tax treaties that could lead to the establishment of such practice.[245] Consequently, the SCI's reasoning reflected a unilateral view via domestic means of interpretation rather than the common intention of contracting states of Indian tax treaties through the rule and principles of interpretation in accordance with the VCLT. This appears contrary to public international law.

3.2.1. "General" – prevalence of domestic legislative legal setting over the VCLT in respect of an interpretation and application of MFN clauses under tax treaties

Section 3.1.1. explained that the VCLT's rule and principles of interpretation are legally binding to the Indian tax authorities and courts, which is duly acknowledged by the SCI, including in the *Nestlé* case, and reflects a widely recognized practice of courts around the world in respect of the interpretation of tax treaties.

Despite the lack of any formal hierarchy between the principles of interpretation in international practice under article 31(1) of the VCLT, an important role is attributed to linguistic

243. Id., at paras. 88-89.
244. *See* the ICJ's judgment of 18 July 1966, *South West Africa, Second Phase*, [1966] ICJ Repository 6, para. 91.
245. Cf. ILC, *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries 2018*, Adopted by the International Law Commission at its seventieth session, in 2018, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/73/ 10), para. 8, p. 77.

interpretation, in the sense that linguistic interpretation constitutes the beginning of the process of every treaty interpretation.[246]

An analogous approach to linguistic interpretation follows from the canon of interpretation of tax law in accordance with the Indian Constitution. For instance, in light of article 265 of the Constitution of India, "[n]o tax shall be levied or collected except by authority of law", the Supreme Court of India in the *Vodafone* judgment[247] quoted the passage from Rowlatt[248] expressing the mentioned principle in the following words:

> In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.

Although this approach to interpretation cannot be per se transposed to Indian tax treaties since the SCI in *Azadi Bachao Andolan* case enhanced liberal interpretation of tax treaties rather than following rules of interpretation applicable domestically,[249] the interpretation of Indian tax treaties in accordance with the Constitution of India cannot be ignored insofar as it contributes to the principle of legal certainty, articulated in the tax treaty case law of the SCI,[250] as well as foreign courts.[251] Moreover, the principle of legal certainty is one of the core elements of the FET standard[252] that protect an investor's expectation that, "even absent specific assurances, existing laws and regulations will be applied as they stand at the time when the legally relevant transaction takes place and in compliance with the then existing regulatory framework",[253] including the interpretation of MFN clauses under Indian tax treaties in accordance with the VCLT's rule and principle of interpretation[254] under BITs, including Indian BITs with the Netherlands, France and Switzerland.

Considering the above, it could be reasonably expected that the SCI, explicitly or implicitly, begins the analysis (interpretation) of MFN clauses under Indian tax treaties with the acknowledgement of the legally binding force of the VCLT's rule and principles of treaty interpretation in India, the important role of linguistic interpretation and to apply such interpretation, i.e. to start with a close linguistic scrutiny of the wording of MFN clauses. However, none of this took place. Instead, the SCI started by acknowledging that article 253 of the Indian Constitution requires a treaty, including tax treaties, to be legislated by

246. *See* R. Weeramantry, *Treaty Interpretation in Investment Arbitration* paras. 3.70-3.71 (Oxford University Press 2012). *See further* R. Gardiner, *Treaty Interpretation* (Oxford University Press 2017).
247. *Vodafone* (2012), para. 169.
248. *See* the Court of Appeal's judgment of 11 Feb. 1921, *Cape Brandy Syndicate v. IRC* case, (1921) 1 KB 64, p. 71 (Rowlatt, J.).
249. *See* the citation *supra* n. 213 in section 3.1.1 above.
250. *See* e.g. the SCI's judgment of 2 March 20221 in *Engineering Analysis Centre of Excellence Private Ltd v. Commissioner of Income Tax and another* case, LL 2021 SC 124, para. 159, available at https://indiankanoon.org/doc/170521216/.
251. We acknowledge that judicial decisions (case law) constitute "subsidiary means for the determination of rules of law" under art. 38(d) ICJ Statute, available at: https://www.icj-cij.org/en/statute. In that regard, scholars point out that "while settling disputes, a judge applies and interprets a rule of law. He is not compelled to follow the same solution that justified the decision he had previously made, but he will be inclined to do so in order to ensure legal certainty through 'consistency with its own past case law'". *See* G. Guillaume, *Can Arbitral Awards Constitute a Source of International Law under Article 38 of the Statute of the International Court of Justice*, in *Precedent in International Arbitration* p. 107 (E. Gaillard & Y. Banifatemi eds., Juris Publishing, Inc. 2008).
252. *See supra* secs. 2.2.-2.4.
253. *Cairn* (2020), para. 1786. *See further* sec. 2.3.2.
254. *See supra* sec. 3.1.1.

an Act of Parliament to be assimilated with Indian domestic law and thus to be enforceable in India.[255] Next, by discussing common law scholarship and Indian case law, the SCI observed, inter alia, that:

(1) "In the event of any ambiguity in the provision or law, which brings into force the treaty or obligation, the court is entitled to look into the international instrument, to clear the ambiguity or seek clarity";[256] and
(2) tax treaties "are not by their own force binding upon Indian nationals", and thus do not confer them any rights, until "appropriate notifications are issued, in terms of Section 90(1)."[257]

There is nothing wrong per se with starting the analysis of the legal issue arising out of tax treaties by discussing the constitutional legal setting of relevance to the implementation of treaties into domestic law. However, the main introductory observations of the SCI imply something hardly justifiable in the international legal setting to which Indian tax treaties belong; that it is the wording of domestic law, specifically procedural provisions regarding the notifications of the implementation of tax treaties, that will be decisive in solving the dispute (*see* point 2 above). Additionally, the international instrument (presumably the wording of a tax treaty, perhaps also the VCLT) appears to be applicable only to "clear the ambiguity or seek clarity" of domestic law assimilating the wording of tax treaties into the Indian domestic legal regime (*see* point 1 above). The further analysis will show that the SCI ascribes the decisive role to section 90 of the ITA to solve the interpretative dispute under Indian tax treaties (*see*, in particular, section 3.2.3.) and that the VCLT (international instrument) seemed to serve only as a supplementary means of interpretation to "clear the ambiguity or seek clarity" in determining the understanding and the application of MFN clauses (*see* in particular section 3.2.5.).[258] This way of setting the scene is a questionable start of an interpretation in good faith of Indian tax treaties that aim to achieve the purposes of such treaties in accordance with the common intention of contracting states, i.e. India and the counterparties to its tax treaties. Indeed, it can be reasonably assumed to be at odds with articles 26-27 and 31(1) of the VCLT.

3.2.2. The interpretation of the term "is" – the meaning of the word "is" in MFN clauses under Indian tax treaties determined solely based on the non-tax related Indian case law

The SCI in the next part of the analysis moved to the linguistic interpretation of the MFN clauses but did it in a peculiar way: namely, instead of interpreting the wording of the entire clause, it examined only one, and then two and four words only out of 113 words consisting of that clause. That is to say, the SCI looked closer at the word "is", and then the phrases "is a member" and "third party" ("third state") in respect of the membership of that state of the

255. *Nestlé* (2023), paras. 38-40.
256. Id., at para. 44(vii).
257. Id., at para. 46.
258. Considering that art. 32 VCLT is treated as "supplementary means of interpretation" and shall apply only to confirm or clarify (or to eliminate a result which is manifestly absurd or unreasonable) the meaning stemming from the primary means of interpretation (art. 31(1) VCLT), it is not an exaggeration to say that the SCI appears to treat the VCLT as supplementary means of interpretation of Indian tax treaties, whereas Indian domestic means seem to be considered by it as the primary means of interpretation. This observation follows from the comparison of the wording of the SCI's judgment, as cited above in point (1), with the wording of art. 32 VCLT.

OECD.[259] Such compartmentalization of tax treaties for the purposes of interpretation may mislead as to the meaning of the smaller pieces of the bigger provisions, such as MFN clauses. This interpretative approach may run afoul of the linguistic interpretation and closely associated with it a prohibition on interpretation *per non est*. It means that each provision of an international treaty has a meaning and reflects some of the treaty's purposes. It also means that an interpretation that renders the text of an international treaty unworkable, absurd or unreasonable is contrary to the general rule of interpretation under article 31(1) in conjunction with supplementary means of interpretation under article 32(b) of the VCLT. That is to say, a prohibition of interpretation *per non est* is a core part of the principle of effectiveness, which is widely considered one of the most essential interpretative tools to ensure that the common intention of the parties to international treaties, including tax treaties, is appropriately enforced.[260]

It will be seen later in this section that the conclusion of the SCI on the meaning of the word "is" under MFN clauses may indeed lead to absurd or unreasonable results in the operation of such clauses. This could be seen as the proof that the interpretative approach chosen and applied by this court, as presented below, is not in accordance with the prohibition on interpretation *per non est* and the principle of effectiveness under tax treaties.

In contrast to the DHC in the *Concentrix* case,[261] the SCI considered the interpretation of the word "is" helpful in deciding about the temporal point in which a third state shall be a member of the OECD to let MFN clauses be operative. Remarkably, however, it did so by making reference to the non-tax related Indian case law on criminal procedure as well as arbitration and conciliation[262] without any explicit consideration given to the general rule of interpretation of tax treaties included in article 3(2) of the concerned Indian tax treaties that enhances dynamic interpretation of tax treaties, despite the fact that this provision was discussed by counsel for the Indian tax authorities.[263] This interpretative approach prompted two observations of the SCI: (i) "the expression 'is' has a present signification and it derives meaning from the context"; and (ii) "when a third-party country enters into DTAA with India, it should be a member of OECD, for the earlier treaty beneficiary to claim parity."[264] This interpretation and the observations stemming from it appear at odds with international law (VCLT) and remarkable against the background of the cited Indian case law for at least two reasons discussed in the subsections below.

3.2.2.1. The word "is" – its context and the prohibition of interpretation *ad absurdum*

Domestic case law cited by the SCI in paragraph 50 of its judgment did not indicate that "is" has the meaning of presence but that its meaning shall be gleaned from the context in which it is used in legal provisions subject to interpretation. The cited case law implies that such context stems foremost from the juxtaposition of that word and the words surrounding it:

259. *Nestlé* (2023), paras. 48-49.
260. *See* Fitzmaurice, *supra* n. 215, at pp. 189-190.
261. *See* sec. 3.1.3.
262. I.e. *Jagir Kaur v. Jaswant Singh*, (1964) 2 SCR 73; *P. Anand Gajapati Raju v. P.V.G Raju*, (2000) 4 SCC 539; *Vijay Kumar Prasad v. State of Bihar*, (2004) 5 SCC 196.
263. *Nestlé* (2023), para. 17.
264. Id., at para. 51.

> The juxtaposition of the words "is" and "last resided" in the subsection also throws light on the meaning of the word "resides".[265]
>
> Although the expression [is] normally refers to the present, often it has a future meaning. It may also have a past signification as in the sense of "has been". (See F.S. Gandhi v. CWT [(1990) 3 SCC 624: 1990 SCC (Tax) 364: AIR 1991 SC 1866].) The true intention has to be contextually culled out.[266]

The SCI did not explain what the context is to give the meaning to the word "is" in MFN clauses and how it gives to that word a present signification, thereby requiring for an activation of such clauses the membership of a third state of the OECD at the time of entering by that state in a tax treaty with India.

The Circular of the CBDT suggests that such context is given by the phrase "then, as from the date on which the relevant India Convention or Agreement enters into force", used in the 1988 MFN clause.[267] The word "is" used much earlier in that clause must have a present signification because otherwise the cited phrase would become redundant, in accordance with a prohibition on interpretation *per non est*. What that interpretative approach is missing is that *per non est* is a part of the principle of effectiveness under tax treaties and shall be applied to ensure that the common intention of the parties to tax treaties is appropriately enforced. This is clearly not the case when *per non est* is used to interpret provisions under tax treaties in a way that may render their text unworkable, absurd or unreasonable.[268]

The interpretative approach to *per non est* applied by the CBDT, and tacitly approved by the SCI, may render MFN clauses entirely unworkable in all cases in which a third state was not the OECD's member at the time of concluding the tax treaty with India. In all other cases, it may lead to absurd or unreasonable results in the operation of such clauses insofar as they may be activated even if the third state were no longer a member of the OECD during the mentioned activation at the time at which taxpayers claim the benefit granted to them via MFN clauses. This regards all situations in which the third state was a member of the OECD at the time of the entry into force of the tax treaty with India. This would also manifestly err with the interpretation under article 32(b) of the VCLT and with the so-called golden rule of interpretation (in its traditional (original) formulation), which is expressed by the maxim *absurd a sunt vitanda* ("absurdity and nonsense must always be avoided").[269] Because a scenario in which a State will cease to be a member of the OECD is rather theoretical, albeit not inconceivable,[270] the actual purpose of the CBDT was most likely to permanently deactivate MFN clauses whenever a third state was not a member of the OECD at the time of concluding a tax treaty with India. That is an example of an interpretation contrary to good

265. *Jagir Kaur v. Jaswant Singh* (1964).
266. *Vijay Kumar Prasad v. State of Bihar* (2004).
267. *See* sec. 3.1.5.
268. *See* sec. 3.2.2.
269. It amounts to the selection of the least absurd or nonsensical result in the interpretation of the law (narrower scope) or even to a modification of the linguistic meaning of a legal text to avoid absurd or nonsensical results of the application of the law (broader scope). The original formulation of the golden rule of interpretation, especially in its wider scope, arouses controversy, particularly due to the encroachment of the judge into the role of the legislator and the risk of violating the principle of legalism (rule of law). *See* F. Crownie, A. Bradley & M. Burton, *English Legal System in Context* p. 131 (3rd ed., Oxford University Press 2005); R. Sullivan, *Statutory Interpretation* p. 155 (Concord 1997).
270. Consider, for example, Brexit: just as it was hard to imagine that a Member State of the European Union leaves that supra-national organization, it is still difficult to believe in such a scenario towards an OECD member country.

faith. Therefore, the SCI's support of such interpretation of the word "is" comes across as questionable under international law, e.g. articles 26 and 31(1) of the VCLT.

By contrast, if to the word "is" under MFN clauses is given a meaning according to which its application is triggered if – at the time when a taxpayer receiving dividends from India claims the benefit under the MFN clauses – a third state was an OECD member, then the mentioned absurd, unreasonable and bad faith outcome of the interpretation and application of these clauses never occurs. In that regard, it is noteworthy to refer to article 10(1) of the India-Netherlands Income and Capital Tax Treaty (1988),[271] which says that "[d]ividends paid by a company which is a resident of one of the States to a resident of the other State may be taxed in that other State." Just as the Dutch company receiving dividends from the Indian company must be a resident of the Netherlands at the time of receipt of such dividends to benefit from article 10, the third state must at that time be the OECD member to let the 1988 MFN clause meet the condition in line with the temporal point of its operation regarding the OECD's membership. To this end, however, neither the Dutch company nor the third state must be the Dutch tax resident and the OECD member at the time of the conclusion/entry into force of the treaty with the Netherlands (1988) and the treaty between the third state and India, respectively.

A different operation of the 1988 MFN clause would require a different wording of that clause. For example, the Lithuania-Switzerland Income and Capital Tax Treaty (2002) says that the MFN clause may be activated if there is a tax treaty between Lithuania and "a third state which is a member of the Organisation for Economic Co-operation and Development *at the date of signature of this Convention*"[272]) with more preferential tax treatment of interest or royalties[273] [emphasis added]. By comparison, Indian tax treaties with the Netherlands, France and Switzerland do not include the underlined temporal condition regarding the OECD's membership by a third state at the time of signing the tax treaty with India. In fact, India has the limited MFN clause in several more tax treaties but in none of them expressed the intention to limit their application by referring to the OECD's membership by a third state at the time of signing the tax treaty with India or at the time of entering of that tax treaty into force.[274]

3.2.2.2. General rule of interpretation of tax treaties under article 3(2) of Indian tax treaties, OECD and UN Models – the role of contextual and dynamic interpretation

The word "is" in Indian tax treaties shall be first and foremost interpreted by the SCI by considering articles 3(2) of Indian tax treaties with the Netherlands, France and Switzerland

271. An analogous interpretative result stems from art. 10(1) *India-Switz. Income Tax Treaty* and art. 11(1) *France-India Income and Capital Tax Treaty*.
272. *Convention between the government of Lithuania and the Swiss Federal Council for the avoidance of double taxation with respect to taxes on income and on capital* (signed 27 May 2002, entered into force on 18 December 2002), Treaties & Models IBFD.
273. *See* Protocol to the *Switz.-Lithuania Income and Capital Tax Treaty*, Systematic Collection of Federal Law (RS) 0.672.948.71, paras. 8 and 10.
274. *See*, for example: Protocol to the *Agreement between the Government of the Republic of India and the Government of the Kingdom of Belgium for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (signed 26 Apr. 1993; entered into force 1 Oct. 1997), Treaties & Models IBFD; Protocol to the *Convention between the Republic of India and the Republic of Hungary for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income* (signed 3 Nov. 2003; entered into force 4 Mar. 2005), Treaties & Models IBFD; Protocol to the *Convention between the Government of the Kingdom of Sweden and the Government of the Republic of India for the*

that are based on article 3(2) of the OECD Models from 1977 onwards and the UN Model from 1980 onwards. This interpretative approach follows from the fact that article 3(2) is the general rule of interpretation of tax treaties. At the same time, it is the *lex specialis* rule of interpretation of tax treaties compared to the general rule of interpretation of international treaties, as set out in article 31 of the VCLT. This means that, as a rule, the interpretation of a term used in the tax treaty ("a treaty term"[275]) should first be made in accordance with the principle contained in article 3(2).[276] Still, the general rule of interpretation of international treaties in article 31 of the VCLT is fully applicable to the interpretation of article 3(2) of a tax treaty itself and to other provisions of the tax treaty.[277]

The wording of article 3(2) in all of the three Indian tax treaties, indicated above, is nearly identical and reads as follows (almost as that in the OECD/UN Models):

> As regards the application of the Convention by one of the States any term not defined herein shall, *unless the context otherwise requires*, have the meaning which it has under the law of that State *concerning the taxes* to which the Convention applies.[278] [Emphases added.]

Thus, the SCI could not extrapolate the meaning of "is" in MFN clauses from Indian case law regarding criminal procedure, arbitration and conciliation in accordance with the general rule of interpretation of Indian tax treaties because such case law does not constitute the law of India *concerning the taxes* to which the tax treaties apply.

In the absence of any definition under tax treaties and Indian income tax law (the ITA), one would expect the SCI to strive to determine the meaning of the word "is" in a treaty-autonomous way via its contextual interpretation (*strictly the context* of MFN clauses). If that would bring no solution, or an unacceptable solution, the general rule of interpretation in article 31 of the VCLT should be applied to determine the meaning of "is". None of this, however, took place in the SCI's reasoning. Had the SCI applied article 3(2), then it could not conclude that the word "is" has a present significance under MFN clauses for the reasons provided in section 3.2.2.1. above. Moreover, restricting the application of MFN clauses only to situations in which a third state was an OECD member at the time of entering into force of a tax treaty with India seems to aim solely or mainly to extend Indian rights to levy WHT under tax treaties. Such an interpretative outcome appears as impermissible by the context under article 3(2). This can be deduced from the OECD Commentary and international case law on article 3(2).[279]

Article 3(2) contributes to the use of linguistic interpretation dynamically rather than statically insofar as the interpretation of tax treaties is a continuous dialogue between the text of

Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital (signed 24 June 1997; entered into force 25 Dec. 1997), Treaties & Models IBFD.

275. I.e. a term used in the tax treaty irrespective of its definition in the tax treaty.

276. A. Rust, *Article 3* in *Klaus Vogel on Double Taxation Conventions* para. 110, p. 207 (A. Rust & E. Reimer eds., 4th ed., Wolters Kluwer Law & Business 2015).

277. *See* J. Avery Jones, *Treaty Interpretation*, in *Global Tax Treaty Commentaries* sec. 4.1. (R. Vann ed., IBFD 2017).

278. This citation comes from art. 3(2) *Neth.-India Income & Capital Tax Treaty*.

279. *See* para. 13 *OECD Model: Commentary on Article 3(2)* (2017); NL: HR [Supreme Court], 19 June 2009, Judgment in Case Nos. 43.978, 07/13267, 08/02288, BE: Cass. [Supreme Court], 5 Dec. 2003, Judgment in Case No. F.J.F. 2004.63; UK: EWHC Ch, 1 Mar. 1982, Judgment in *IRC v. Exxon Corporation* [1982], STC 356.

tax treaties and its interpreter, both statically and dynamically.[280] The same can be derived from the definition of the word (verb) "is" by Black's Law Dictionary: "This word, although normally referring to the present, *often has a future meaning*, but is not synonymous with '*shall have been*'. It may have, however, a past signification, as in the sense of '*has been*'." The dictionary meaning of the word "is" clarifies that it is not only linked to the present, but also has a meaning linked to the future and the past. A strict linguistic interpretation of the word "is" in conjunction with the phrase "a member of the OECD" means therefore that a third state's membership of the OECD could be subsequent to the signing and entering into force of a treaty with India in order to activate the MFN clause in the absence of a specific date indicated in that clause in respect of the OECD membership of the third state.[281]

Such approach to an interpretation of the term "is" neatly fits the principle of legal certainty, which aims to ensure the stability and predictability of the legal environment when relevant transactions take place.

Accordingly, the SCI's interpretation of the word "is" does not pass muster under the general rule of interpretation under Indian tax treaties, as well as the OECD and UN Models. The same point is valid in light of the dynamic interpretation of Indian tax treaties. It is also questionable in light of articles 26-27 and 31(1) of the VCLT due to the reliance on the domestic non-tax sources of interpretation to give meaning to a term under tax treaties.

3.2.3. India's tax treaty practice and the tax treaty practice of the Netherlands, France, and Switzerland – considering section 90 of the ITA as "maker" or "breaker" of Indian tax treaties

The next part of the SCI's analysis is a comprehensive extension of its general points on the importance of section 90 of the ITA in rendering tax treaties enforceable in India. This is also the biggest part of its entire analysis, spanning 15 (32-47) out of 37 pages.

The two most perplexing aspects of that part of the SCI's analysis are: (i) it completely ignores the primary (authentic) means of interpretation under article 31(1) of the VCLT; and (ii) contrary to the SCI's conclusions,[282] there is nothing in the widely cited and referenced materials[283] that would indicate that a separate notification under section 90 has ever been needed to render MFN clauses enforceable in India. Most importantly, there is nothing to that end in the materials analysed by the SCI, which would confirm that the mentioned notification was needed at the time of investments made in India by Steria, Concentrix and Nestlé. Rather, the presented materials merely confirm that such notifications are needed to render all provisions of Indian tax treaties enforceable in India, in addition to signing such treaties by both contracting states and completing by them relevant constitutional legislative procedures. The same is valid in respect to protocols added to Indian tax treaties introducing MFN clauses that constitute their integral parts.

280. *See supra* sec. 2.4. For the opposite view, supporting a static interpretation of tax treaties and the term "is" under MFN clauses in Indian tax treaties, *see* K. Prakash, *The Indian Supreme Court's Ruling in Nestlé and the Static Interpretation – An Analysis*, 30 Asia Pacific Tax Bulletin 1, sec. 4.1.1.-4.1.3. (2024).
281. Cf. Jalan, Manzi & Greve Arcil, *supra* n. 40, at pp. 162-163.
282. *Nestlé* (2023), paras. 72, 88 b).
283. I.e. wording of Indian tax treaties (including protocols) with the Netherlands, France, Switzerland and Canada along with notifications issued by the Indian tax authorities under sec. 90.

Accordingly, all materials cited by the SCI confirm that once the Indian government notifies under section 90 of the ITA a protocol amending an Indian tax treaty, no other requirement is provided in the law to render an MFN clause included in such protocol enforceable in India. In particular, neither article 253 of the Constitution of India nor section 90 of the ITA require issuing additional notifications to render MFN clauses enforceable in India. Thus, only the wording of MFN clauses can require additional notifications for their application. While this is the case in respect of MFN clauses in some Indian tax treaties,[284] this is not the case for MFN clauses under Indian tax treaties with the Netherlands, France, or Switzerland. Such knowledge was the only one that Steria, Concentrix and *Nestlé* possessed or could have possessed at the time at which they made investments in India.

Moreover, the SCI erred in referring to article 16 of the first protocol instead of article 14 of the amending protocol to the India-Switzerland Income Tax Treaty (1994) by requiring contracting states to notify each other through diplomatic channels "that all the legal requirements and procedures for giving effect to this Amending protocol have been satisfied".[285] The SCI also did not consider that such notifications were completed between the two governments on 7 October 2011 (Switzerland) and 27 December 2011 (India), rendering the MFN clause under that tax treaty enforceable in both states without any further requirement. Instead, it observed that an additional notification must be issued to render that MFN clause enforceable in India.[286]

This all implies that the SCI neglected to undertake a comprehensive and careful review of its own state practice concerning the requirement for notification to give effect to MFN clauses under Indian tax treaties.

The SCI also rejected the interpretative value of the positions of the Dutch, French and Swiss governments regarding the application of MFN clauses[287] because of different constitutional procedural requirements for the enforcement of tax treaties in those states in comparison to India.[288] Still, it is difficult to understand why the SCI assumed that such differences are of any importance to solving the dispute. The positions of Dutch, French and Swiss governments concerned the application of MFN clauses under tax treaties with India based on their wording. No reference is made to constitutional requirements for the enforceability of tax treaties in their legal systems. It was of no relevance. Methodologically, it would be more correct to consider the official positions of other contracting states either as the *context* or *subsequent practice* of the MFN clauses under article 31(1) or 31(3)b) of the VCLT, or, at least, as supplementary means of their interpretation under article 32 of the VCLT. The SCI did not acknowledge it at all.

284. *See* e.g. art. II Protocol to the *Agreement between the Republic of India and the Republic of Finland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (signed 15 Jan. 2010; entered into force 19 Apr. 2010) *in fine*: "The competent authority of India shall inform the competent authority of Finland without delay that the conditions for the application of this paragraph have been met *and issue a notification to this effect for application of such exemption or lower rate*." [Emphasis added.]
285. *Nestlé* (2023), para. 63.
286. Id.
287. *See* secs. 3.1.2.-3.1.4.
288. *Nestlé* (2023), paras. 67-72.

3.2.4. International perspectives and practices – domestic procedural technicalities "morphed" into internationally recognized standards of enforcement of tax treaties

The penultimate part of the SCI's analysis includes a long citation from the Klaus Vogel Commentary on Double Taxation Conventions without any observation provided by the Court.[289] One may only second guess that the reason to add the citation by the SCI was to "morph" domestic procedural technicalities under section 90 of the ITA into internationally recognized standards of enforcement of tax treaties described in the Klaus Vogel Commentary.

Nevertheless, even the cited commentary in paragraph 51 indicates that it is usually "established by explicit treaty rules", at which point in time the material consequences of tax treaties take effect. Thus, despite acknowledgment of different constitutional requirements among states in the cited commentary, it indicated the need for a close scrutiny of the wording of explicit treaty rules to determine the moment from which each of the treaty provisions starts to have material consequences, e.g. from when an MFN clause applies to granting reduced WHT in India.

3.2.5. Vienna Convention on Law of Treaties (VCLT) – incorrect application of the rule and principles of interpretation under the VCLT

The final part of the SCI's analysis explicitly refers to the VCLT. It is strange that the Court did so at such a late stage in the analysis. It also is puzzling how the Court referred to and applied the VCLT. As the analysis below shows, the SCI appears to turn the VCLT into a "relevant" supplementary tool of interpretation of Indian tax treaties of an uncertain legal value in India. The Court also applied article 31 of the VCLT in a very peculiar way, by almost entirely ignoring all of principles of treaty interpretation, apart from article 31(3)(b) of the VCLT. Even that principle was applied by the SCI ipso facto as a tool to override Indian tax treaties with the Netherlands, France and Switzerland contrary to article 51(c) of the Indian Constitution and articles 26-27 of the VCLT.

3.2.5.1. Turning VCLT into a "relevant" supplementary tool of interpretation of Indian tax treaties of an uncertain legal value in India

After stating that India is not a signatory to the VCLT, the SCI acknowledged that article 31 of the VCLT reflects "the customary international law on general rules of treaty interpretation".[290] Therefore it is "still relevant in the Indian context".[291] Considering the VCLT "relevant in the Indian context" comes across as a big understatement. Article 51(c) of the Indian Constitution enshrines that India "shall endeavour to foster respect for international law and treaty obligations in the dealings of organised peoples with one another". The VCLT constitutes international law and therefore must be respected by Indian courts as so under the Indian supreme law. A wide application of the VCLT by Indian courts to interpret and apply treaties, including tax treaties,[292] confirms that the VCLT is not only relevant in the Indian context, but that its appropriate application is legally required by the Indian con-

289. Id., at para. 73.
290. Id., at para. 74.
291. Id.
292. *See* sec. 3.1.1.

stitution. Of course, it is also legally required by customary international law, which is one of the sources of international law in accordance with article 38(1)(b) of the ICJ Statute.[293]

However, the SCI turned the VCLT into a "relevant" supplementary tool of interpretation of Indian tax treaties of an uncertain legal value in India. This implicit degradation of the legal value of the VCTL in India by the SCI seems to be a foundation for further misapplication with a severe consequence of treaty override.

3.2.5.2. Starting with article 31(3)b) instead of article 31(1) of the VCLT and for the wrong reason, i.e. treaty implementation instead of treaty interpretation

The VCLT general rule of interpretation of international treaties consists of several principles. The most important are expressed in article 31(1) of the VCLT:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

This provision contains the following primary principles of treaty interpretation: (i) in good faith; (ii) in accordance with the ordinary meaning given to the terms of the treaty (linguistic interpretation); (iii) in their (ordinary meaning of the terms) context and in light of the object and purpose of the treaty (contextual and purposive interpretation). There is deliberately no formal hierarchy imposed between these three principles, since it was the intention of the ILC to create a single, general rule of interpretation of international treaties consisting of a closely integrated principle of bona fide interpretation, the principle of linguistic interpretation and the principles of contextual and purposive interpretation.[294] This integrated (holistic) approach to interpretation reflected (and still reflects) the methodology of the ICJ for the interpretation of international treaties.[295]

Accordingly, in order to decode MFN clauses under Indian tax treaties with the Netherlands, France and Switzerland, one must first apply integrated linguistic, contextual and purposive interpretation in good faith. This interpretative process begins with linguistic interpretation, as the language of the law always constitutes a point of departure for every legal interpretation, and such interpretation is given a dominant role under article 31(1) of the VCLT. Such an interpretative approach to interpreting an MFN clause under a tax treaty is apparent in tax treaty judicial practice:

> What is clear from the Tax Court's decision is that extrinsic material such as oral evidence of the original intention of one of the parties cannot be used to establish the ordinary meaning of treaty text because ordinary meaning is purely a legal and not a factual question for which the written text is always the point of departure.[296]

293. Signed 26 June 1945, entered into effect 24 Oct. 1945.
294. *See* ILC, *Draft Articles on the Law of Treaties with Commentaries 1966*, Yearbook of the International Law Commission 1966, Nol. II, part 2, pp. 219-221 (1966); ILC, *Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties 2013*, ILC Report UN Doc A/68/10, p. 19 (2013).
295. *See* S. Torres Bernardez, *Interpretation of Treaties by the International Court of Justice Following the Adoption of the 1969 Vienna Convention on the Law of Treaties* in *Liber Amicorum: Professor I. Seidl-Hohenveldern in honour of his 80th birthday* pp. 744, 747-748 (G. Hafner et al. eds, Kluwer Law International 1998), and the ICJ's case law cited there.
296. *See* J. Hattingh, *ABC Proprietary Ltd v. Commissioner for the South African Revenue Services*, 22 International Tax Law Reports, p. 171 (2019), with a reference to the Supreme Court of Appeal of South Africa's judgment of 15 Mar. 2012, N*atal Joint Municipal Pension Fund v. Endumeni Municipality* case,

However, the SCI completely disregarded article 31(1) and focused only on article 31(3)(b) of the VCLT. This is surprising, especially because in paragraph 82 of its judgment, by reference to the work of Sir Gerald Fitzmaurice,[297] the SCI acknowledged that taking

> as a reference point the ICJ's case law between 1951 and 1954, Fitzmaurice formulated the major principles of treaty interpretation that formed the basis for the ILC draft provisions on treaty interpretation. He outlined three subsidiary principles of interpretation, 'effectiveness', 'subsequent practice', and 'contemporaneity', which he saw as complementary to the three primary ones: 'actuality', the 'natural and ordinary meaning', and 'integration'.

The reference to the work of Fitzmaurice, preceding the VCLT, clearly indicates that "subsequent practice" is a subsidiary principle of treaty interpretation among the others to the principle of linguistic interpretation ("natural and ordinary meaning"), which is one of primary principles of treaty interpretation.

This approach to treaty interpretation is to a large extent reflected in article 31 of the VCLT as far as "subsequent practice" in article 31(3)(b) "shall be taken into account, together with the context" to interpret a treaty. Considering the wording of article 31(1)-(2) of the VCLT, the text of the treaty itself is the primary source of its *strict* context. The *strict* context of a tax treaty also consists of the preambles and protocols that are considered to be the inherent parts of the text of the tax treaty and thus the closest context of the interpreted provision.

In the case of MFN clauses, the closest and therefore the most relevant context for interpretative purposes constitutes the very text of the clauses, i.e. the context under article 31(1) and (2) indicated the first sentence (before sub-paragraphs (a) and (b)) of the VCLT. The "subsequent practice" under article 31(3)(b) of the VCLT, if at all existing in respect of MFN clauses under Indian tax treaties, does not constitute the strict context of such clauses but may, in certain circumstances, represent their evolving context.[298] Moreover, it shall be taken into account *together with* the mentioned strict context of MFN clauses, not in isolation from it as a standalone and conclusive means of their interpretation. The SCI did not apply article 31(3)(b) of the VCLT in that way.

Furthermore, the SCI did not apply article 31(3)(b) of the VCLT at all in the manner intended for it – to interpret a treaty *together with* the context – but asserted that India's practice of affording beneficial treatment to the provisions of a third state via MFN clauses in Indian tax treaties with the Netherlands, France and Switzerland needs to be notified under section 90 of the ITA as an additional requirement. That is to say, the SCI applied article 31(3)(b) of the VCLT to assert the unilateral Indian practice regarding *implementation* of tax treaties into domestic law, not their *interpretation*. In fact, the interpretation of tax treaties occurs only after their implementation. Therefore, the SCI's reliance on article 31(3) of the VCLT,

(920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA), para. 18., available at http://www.saflii.org/za/cases/ZASCA/2012/13.html.

297. *See* Fitzmaurice, *supra* n. 201, at p. 8.

298. Cf. J.E. Alvarez, *Limits of Change by Way of Subsequent Agreements and Practice*, in *Treaties and Subsequent Practice* p. 123 (G. Nolte ed., Oxford University Press 2013): "treaties adapt to new circumstances through the deployment of subsequent practice and/or subsequent agreements, but that is only one way for treaties to adapt or evolve over time. We should not attempt to put the entire burden of legal adaptation on arts. 31(3)(a) and (b) VCLT."

which pertains to interpretation, in determining the implementation of tax treaties into domestic law was contrary to the rule and principles of interpretation of the VCLT.

3.2.5.3. Conception and application of "subsequent practice" and "silence" for purposes of articles 31(1), 31(3)b) and 32 of the VCLT

The SCI understanding of "subsequent practice" under article 31(3)b) of the VCLT raises further doubts. Going beyond its function to sanction Indian practice to implement tax treaties into its domestic law, the SCI appears to rely on "subsequent practice" as an authentic means of interpretation of tax treaties with the Netherlands, France and Switzerland by interpreting from them the non-articulated requirement of additional notification under section 90 of the ITA. However, the ILC is clear that only "subsequent agreement" under article 31(3)a) of the VCLT

> *ipso facto* has the effect of constituting an authentic means of interpretation of the treaty, whereas a "subsequent practice" only has this effect if its different elements, taken together, show "the common understanding of the parties as to the meaning of the terms.[299]

The evidence gathered in *Nestlé* demonstrates that the parties to the tax treaties did not share the common understanding as to the meaning of the terms contained in MFN clauses. The contrary seems to be true: the Dutch, French and Swiss governments published their positions as to the meaning of terms contained in MFN clauses included in protocols to their tax treaties with India in contradiction to the position expressed by Indian government.[300] Consequently, the unilateral Indian practice to which the SCI referred could not constitute an authentic means of interpretation of MFN clauses under the mentioned Indian tax treaties. It could not be seen and applied as the source of evolving context under article 31(1) of the VCLT. In such circumstances, it could, at most, constitute a supplementary means of interpretation under article 32 of the VCLT.[301] However, even such interpretative value of Indian practice is doubtful because it clearly expresses views not bilaterally agreed with the Netherlands, France and Switzerland, while the purpose of article 32 of the VCLT is to supplement the general rules of treaty interpretation under article 31 of the VCLT, first and foremost by relying on materials stemming from a bilateral exchange of views surrounding the conclusion of the treaty.[302] Otherwise the process of treaty interpretation could violate the principle of good faith and fail to reflect the common intentions of contracting states. The SCI did not pay attention to those as a consequence of an overreliance on Indian practice regarding the implementation of tax treaties for purposes of interpretation and the application of MFN clauses.

The SCI also seems to apply the concept of "silence" to establish "subsequent practice" under 31(3)b) of the VCLT. In paragraph 78, the Court referred to the work of the ILC, according to which:

299. *See* ILC, *supra* n. 294, at para. 9, p. 30.
300. *See* secs. 3.1.2.-3.1.4.
301. ILC, *supra* n. 294, at Conclusion 4(2) and (3): "A subsequent practice as a supplementary means of interpretation under article 32 consists of conduct by one or more parties in the application of the treaty, after its conclusion."
302. Cf. the views of Richard Gardiner, who observed that although art. 32 VCLT does not preclude looking for materials extraneous to the text of a treaty, the purpose of that provision is to rely on such materials in "controlled conditions" so that "the agreement of the parties is not to be replaced by the content of unconsummated [(…)] proposals and arguments that preceded finalization of the treaty". *See* Gardiner, *supra* n. 246, at p. 307.

> Silence on the part of one or more parties may constitute acceptance of the subsequent practice when the circumstances call for some reaction. Agreement between the parties in respect of subsequent conduct or practice may be established by acquiescence of parties not actively participating in the practice, or the absence of objections (characterized as 'passive conduct').[303]

Presumably, the SCI assumed that silence of Dutch, French and Swiss governments in respect of the unilateral practice of India under tax treaties established "subsequent practice" under 31(3)b) of the VCLT:

> The role of practice which is, as the previous discussion demonstrates, not bilateral or joint practice, but practice by one, accepted generally by the international community as operating in that particular sphere, which is relevant, and at times determinative.[304]

The importance of silence then allowed the SCI to establish "subsequent practice" only by India. The SCI disregarded the official positions of the Dutch, French and Swiss governments on MFN clauses included in protocols to their tax treaties with India because in its view their positions were "dictated by conditions peculiar to their constitutional and legal regimes."[305]

In that regard, three points may be raised with respect to the SCI's views.

First, the position of the Indian tax authorities, as endorsed by the SCI, is dictated by conditions peculiar to the Indian constitutional regime. Thus, it shall be equally disregarded for purposes of interpretation of MFN clauses as the positions of the Dutch, French and Swiss governments, if the SCI's remark mentioned above is to be given an interpretative value.

Second, "silence" has a very ambiguous and debatable relevance to establish "subsequent practice" under 31(3)b) of the VCLT. In particular, according to the authors, silence has never "spoken" to establish "subsequent practice" for interpretative purposes of tax treaties. The ILC commented that silence or inaction can establish subsequent practice but only "when the circumstances call for some reaction".[306] Using cases on boundary delineation to illustrate the difficulty in identifying the precise circumstances in which silence can establish subsequent practice, the ILC formed the view that "circumstances will only very exceptionally call for a reaction with respect to conduct that runs counter to the delimitation... [and i]n such situations, there appears to be a strong presumption that silence or inaction does not constitute acceptance of a practice."[307] The ILC admitted that decisions of international courts and tribunals demonstrate that acceptance of a practice by one or more parties by way of silence or inaction is not easily established.[308] The finality of the circumstances and the party's awareness of them might be two factors to consider in that regard.[309] The "circumstances" that will "call for some reaction" include the particular setting in which the states interact with each other in respect of the treaty, e.g. when acting

303. ILC, *supra* n. 294, at Conclusion 10(2); ILC, *Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur*, Extract from the Yearbook of the International Law Commission 1964, vol. II, UN Doc A/CN.4/167, para. 24, p. 59 (1964).
304. *Nestlé* (2023), at para. 86.
305. Id., at para. 87.
306. ILC, *supra* n. 294, at Conclusion 10(2).
307. Id., at para. 17, p. 80.
308. Id., at para. 18, p. 80.
309. D. A. Lewis, N. K. Modirzadeh & G. Blum, *Quantum of Silence: Inaction and Jus ad Bellum*, The Harvard Law School Program on International Law and Armed Conflict, p. 22 (2019).

within the framework of an international organization.[310] In the opinion of the authors, such circumstances did not occur in the setting of the *Nestlé* case. Precisely, they did not allow the establishment of subsequent practice solely by the silence of the Dutch, French and Swiss governments. Their silence also is questionable as far as they expressed their positions in the subject matter contradictorily to what was later decided by the Indian tax authorities and the SCI. Thus, there was no relevant silence.

Third, the Dutch, French and Swiss governments expressed their positions on 28 February 2012, 4 November 2016 and 13 August 2021, respectively, while the Indian government contradicted them only on 3 February 2022. Hence, there was a decade of silence on the side of India in respect of the position of the Dutch government, and years in remaining scope. It could be seen as silence establishing subsequent practice squarely in contradiction to the position later expressed by Indian tax authorities and endorsed by the SC if an interpretative value is given to such silence under 31(3)b) of the VCLT.

3.2.5.4. Treaty overriding by the SCI

In the authors' opinion, the overall result of the SCI's decision led to an override of Indian tax treaties with the Netherlands, France and Switzerland by adding to their MFN clauses a non-existent requirement of an additional notification under section 90 of the ITA to render those clauses enforceable in India. That is to say, the SCI used article 31(3)b) of the VCLT as a quasi-legislative tool to read into MFN *clauses the requirement that is articulated, e.g. in article II of the Protocol to the Finland-India Income Tax Treaty* in fine.

In a similar vein, the SCI used earlier Indian non-tax related case law to add to MFN clauses an additional temporal point to activate them: for example, as in the Lithuania-Switzerland Income and Capital Tax Treaty (2002), the MFN clause may be activated if there is a tax treaty between Lithuania and "a third state which is a member of the Organisation for Economic Co-operation and Development *at the date of signature of this Convention*".

The SCI's interpretation of Indian tax treaties with the Netherlands, France and Switzerland is not compatible with the principle of good faith under both articles 31(1) and 26 of the VCLT and, as treaty override,[311] constitutes a violation of article 51(c) of the Indian Constitution. As per article 27 of the VCLT, the reliance on Indian domestic law cannot justify such a breach of superior law.

The SCI's judgment contributed to treaty override, violating public international law and Indian constitutional law. The main cause of it was the misapplication of the VCLT by giving a prevalence to domestic legal sources over international ones and a negligence in an application of the VCLT's rule and principles of interpretation, contrary to articles 26-27 and 31 of that Convention.

310. *See* Application of the Interim Accord of 13 Sept. 1995, *the former Yugoslav Republic of Macedonia v. Greece*, judgment of 5 Dec. 2011, ICJ Reports 2011, paras. 99-101, pp. 675-676.

311. According to the OECD, "treaty overriding" refers to "a situation where the domestic legislation of a State overrules provisions of either a single treaty or all treaties hitherto having had effect in that State. Legislation may take the form of a provision that treaty provisions are to be disregarded in certain circumstances (e.g. in cases of treaty shopping or other forms of abuse). Legislation can also have the effect of overriding treaties, even where no reference is made in the legislation to treaty provisions as such, because the domestic interpretation of the effect of that legislation in relation to treaty provisions has the same effect in practice." OECD, *Tax Treaty Override*, adopted by the OECD Council on 2 Oct. 1989, para. 2, Primary Sources IBFD.

4. Conclusions

The analysis demonstrates that the SCI erred in its interpretation of the Indian tax treaties in deciding against taxpayers, namely investors from the Netherlands, France and Switzerland. Notably, the Court did not apply primary (authentic) means of interpretation of treaties under VCLT, while its application of subsidiary means of interpretation of treaties was improper. A big part of the SCI's reasoning focused on the domestic legal setting concerning the implementation of tax treaties into the Indian domestic law. The Court did not give enough attention to the wording of Indian tax treaties and the VCLT. The Indian unilateral practice of application of tax treaties was transformed by the Court to "subsequent practice" under article 31(3)b) of the VCLT, with the effect of implicitly rewriting MFN clauses included in Indian tax treaties with the Netherlands, France and Switzerland, contrary to the common intention of contracting states. As a result, the SCI added the two non-existing requirements in these clauses in order to render them enforceable in India by taxpayers: (i) the need for extra notification under section 90 of the ITA; and (ii) the need for a third state to be an OECD member at the time of entry into force of its tax treaty with India. Doing so, to paraphrase the Permanent Court of International Justice's (PCIJ) advisory opinion on the *Acquisition of Polish Nationality* case, was tantamount not to an interpretation of MFN clauses by the SCI but to a reconstruction of it.[312] That this violates the prohibition on adding requirements for the application of international treaties that do not exist in their text is confirmed – as an interpretation *contra legem*, contrary to the general rule of interpretation under article 31 of the VCLT – by the established jurisprudence of international tribunals,[313] the ILC[314] and the doctrine.[315] This constituted treaty override, thereby violating public international law (articles 26-27 and 31(1) of the VCLT) and Indian constitutional law (article 51(c) of the Indian Constitution).

Considering the above conclusions, it is worth reiterating that the investment and business operations of *Steria*, *Concentrix* and *Nestlé* in India constituted genuine and good faith international commerce between their states of origin and India. It was uncontested by the SCI and the Indian tax authorities.[316] Accordingly, the SCI's judgment is also at odds with the overarching purpose of Indian tax treaties with the Netherlands, France and Switzerland, which is to enhance international commerce by means of the elimination of double taxation without creating opportunities for tax avoidance. This judgment undermines such purpose insofar as it significantly diminishes the legal certainty and predictability of operation of the MFN clauses under the mentioned tax treaties, and may continue to do so much beyond, i.e. the requirement of extra notification via section 90 of the ITA might be read from each and every provision of Indian tax treaties that is beneficial to taxpayers.

In the opinion of these authors, the negative consequences of the SCI's judgment for the investment and business operations of *Steria*, *Concentrix* and *Nestlé* in India were so severe that they may be considered as violations of the FET standard under Indian BITs with the

312. Cf. PCIJ's advisory opinion of 15 Sept. 1923 in *Acquisition of Polish Nationality*, 1923 P.C.I.J. (ser. B) No. 7, p. 21.
313. *See*, for example ICJ's advisory opinion of 18 July 1950 in *Interpretation of Peace Treaties (Second Phase)*, (Advisory Opinion) [1950] ICJ Rep, pp. 221, 229; ICJ's judgment of 27 Aug. 1952 in R*ights of Nationals of the United States of America in Morocco (France v United States of America)*, [1952] ICJ Repository, pp. 176, 196.
314. ILC, *supra* n. 14, at paras. 6, 11, pp. 219, 221, respectively.
315. Sinclair, *supra* n. 14, at p. 118; Engelen, *supra* n. 14, at pp. 172-185.
316. *See* sec. 3.1.5.

Netherlands, France and Switzerland. In particular, the SCI appears to render its judgment in contradiction to the principle of good faith and against principles of legal certainty in respect of Indian tax treaties with the mentioned states. Because the investors (taxpayers) engaged in good faith activities in India without any tax avoidance motive and artificial arrangements, the principles of legal certainty and predictability ought to fully protect them and ensure benefits under Indian tax treaties.[317] Therefore, the acts of the Indian executive (Indian tax authorities) and judiciary (SCI) powers appear to be at odds with one of the core elements of the FET standard under the India-Neth. BIT (1995), the France-India BIT (1997) and the Switz.-India BIT (1997) – the principle of legal certainty – examined in light of the rule of law and the principle of good faith. That is to say, it can be reasonably assumed that the Indian tax authorities and the SCI seemed to violate the expectations of Steria, Concentrix and *Nestlé* that MFN clauses under the India-Netherlands Income and Capital Tax Treaty (1988), the France-India Income and Capital Tax Treaty (1992) and the India-Switzerland Income Tax Treaty (1994) "will be applied as they stand at the time when the legally relevant transaction takes place and in compliance with the then existing regulatory framework".[318] Indeed, at the time of making investments in India in good faith (no tax avoidance motifs whatsoever), Steria, Concentrix and *Nestlé* relied on the reasonable assumption that the mentioned MFN clauses will apply automatically, as self-executing legal norms, without a need for a separate notification under section 90 of the ITA, and that the Indian tax authorities and, in case of a dispute, courts, will interpret tax treaties in accordance with the VCLT's rule and principles of interpretation. That did not happen.

As a result, the following specific research question shall be answered in the affirmative: can the interpretation of the MFN clauses by the Indian executive and judiciary powers be reasonably considered as a violation of the FET standards under the Indian BITs due to a serious misapplication of the VCTL's rule and principles of interpretation? By analogy, a serious failure in the proper application of the VCLT to interpret the MFN clauses in other tax treaties may lead to a violation of the FET standard in other IIAs. The interplay between an interpretation of MFN clauses in tax treaties in accordance with the VCLT and the FET standard in light of the rule of law supports that observation. Namely, the rule of law enhances the conclusion that an inconsistent interpretation and application of MFN clauses in tax treaties violates the FET standard under IIAs – the principle of legal certainty – to the extent to which such inconsistency precludes taxpayers (investors) from reasonably foreseeing the effects of operation of the MFN clauses.[319] The case study shows that the interpretation and application of MFN clauses in tax treaties by the Indian tax authorities and the SCI was significantly inconsistent with that provided by the Dutch, French and Swiss tax authorities, as well as the Indian case law (the High Court of Delhi). It also shows that Steria, Concentrix and *Nestlé*, at the time of making investments in India, could not reasonably foresee that the MFN clauses under Indian tax treaties with the Netherlands, France and Switzerland will not operate at all due to the interpretation provided by the Indian tax authorities and the SCI, i.e. the interpretation considerably inconsistent with the case law of the High Court of Delhi, the practice of foreign tax authorities and courts as well as the interpretation at odds with the VCLT.

317. Cf. Freedman, *supra* n. 199, at p. 356; Zimmer, *supra* n. 199, at sec. 5.
318. *Cairn* (2020), para. 1786.
319. *See* sec. 2.2.

Finally, the entire analysis allows to answer in the affirmative the following general research question: can the VCLT's rule and principles of interpretation assist in ensuring a compatibility between an application of the MFN clauses in tax treaties with the FET standards in IIAs? Indeed, had Indian tax authorities and the SCI applied the VCLT's rule and principles of interpretation properly, their application of the MFN clauses in Indian tax treaties with the Netherlands, France and Switzerland would be compatible with the FET standard under Indian BITs with those states. The same conclusion is valid in respect of all other MFN clauses in tax treaties and the FET standard in IIAs. Consequently, the VCLT's rule and principles of interpretation can assist in ensuring a compatibility between an application of the MFN clauses in tax treaties with the FET standard in IIAs. The rule of law and the principle of good faith are also of assistance, creating a broader legal framework within which the VCLT operates.

In its essence, the article offers guidance to domestic courts that in the interpretation of tax treaties they should follow the VCLT, because if they fail to do so, there is a risk that the combined actions of the executive and the judiciary in the context of tax treaty interpretation may result in a violation of the FET standard in investment treaties. Conversely, if the rules of the VCLT are respected, tax treaties and investment treaties could coexist peacefully. Tax and investment policy makers can assure the peaceful coexistence of tax treaties and investment treaties by following a whole-of-government approach in that regard. It "involves improving inter-departmental networks within governments, such as between tax agencies and investment ministries, as well as between tax policymakers and tax administrators".[320] Such an approach enhances the rule of law and increases legal certainty in tax and investment domains.[321]

320. A. Castonguay, *Draft Guidance For Officials - Attachment A*, in *Relationship of tax, trade and investment agreements. Co-Coordinators' Report* para. 82 (Committee of Experts on International Cooperation in Tax Matters, Twenty-eighth session, 19-22 Mar. 2024).

321. This goes well beyond tax treaty matters: e.g. it is relevant for ensuring a proper interaction between Pillar Two rules and IIAs. *See* UNCTAD, *supra* n. 80, at pp. 15-16.