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4. The notion of treatment no less favourable 'in like situations'

20 A growing number of MFN clauses in BITs and FTAs incorporate a criterion of comparison between foreign investors and expressly state that such comparison will be made between investors and investments in 'like circumstances'[32] or in 'like situations'. CETA adopts the wording of 'in like situations' in Article 8.7.1. The consequences of the difference in wording between 'situations' and 'circumstances' in MFN clauses has not been addressed in the case law.

21 MFN treatment does not require that the situations be identical as it would otherwise deprive MFN clauses of any relevance. However, since CETA only refers to 'like situations' in Article 8.7.1 without further specification, it leaves the scope of likeness unqualified. Similar unqualified definitions as to the breadth of 'like situations' or 'like circumstances' have led to a case-by-case basis examination of all the circumstances of an investment and/or an investor. The WTO Appellate Body has compared the breadth of interpretations of 'like situations' to an 'accordion of likeness',[33] which can be broadly or narrowly construed. This leaves arbitral tribunals with a broad margin of appreciation. Depending on whether the tribunal adopts a broad or narrow interpretation, the scope of MFN treatment may be more or less significant. For instance, some tribunals have deemed MFN treatment to be limited to the import into the principal treaty of standards that had obvious equivalents in that treaty. For example, the tribunal in *Accession Mezzanine v Hungary* stated that:

> *'MFN clauses are not and should not be interpreted or applied to create new causes of action beyond those to which consent to arbitrate has been given by the Parties. … The Tribunal is of the view that an investor may properly rely only on rights set forth in the basic treaty, meaning the BIT to which the investor's home state and the host state of the investment are directly parties, but not more than that. The question should be whether the rights and benefits sought by virtue of the MFN clause are included within the arbitrable scope of the basic treaty. In the instant case, the arbitrable scope of the basic treaty is expropriation, including fact and law questions related thereto. In that light, Claimants are entitled to rely on the MFN provisions of the BIT, but only insofar as such provisions relate to expropriation.'*[34]

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22 The tribunal in *İçkale İnşaat v Turkmenistan* shared a similar view, concluding that:

> *'given the limitation of the scope of application of the MFN clause to "similar situations," it cannot be read, in good faith, to refer to standards of investment protection included in other investment treaties between a State party and a third State. The standards of protection included in other investment treaties create legal rights for the investors concerned, which may be more favorable in the sense of being additional to the standards included in the basic treaty, but such differences between applicable legal standards cannot be said to amount to "treatment accorded in similar situations," without effectively denying any meaning to the terms "similar situations."'*[35]

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[32] See eg Japan–Republic of Korea BIT (2002) art 2.2.

[33] WTO, *Japan: Taxes on Alcoholic Beverages–Report of the Appellate Body* (4 October 1996) WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 21.

[34] *Accession Mezzanine Capital LP and Danubius Kereskedőház Vagyonkezelő ZRT v Hungary*, ICSID Case No ARB/12/3, Decision on Respondent's Objection under Arbitration Rule 41(5), 16 January 2013, paras 73–74. See also *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile*, ICSID Case No ARB/01/7, Award, 25 May 2004, para 104.

[35] *İçkale İnşaat* (n 27) para 329.

23 However, in other cases, tribunals have allowed the claimant-investor to rely on the MFN clause to import into the treaty a substantive protection. For example, in *White Industries v India*, the tribunal permitted the import of the 'effective means' protection by the Australian claimant from the India-Kuwait BIT.[36] Similarly, in *EDF v Argentina*, the French claimant was able to import the 'umbrella clause' from other Argentine BITs.[37]

24 One commentator concludes that in most cases, comparing investors in 'like situations' has invited a comparison of situations regarding the competition context of investments.[38] In general, the relevant circumstances that may be taken into account are the sector of activity in which the investor is operating,[39] the sector in which the investor is active, the underlying aim of the measure at stake, the size of the company,[40] and any other relevant factor with respect to the factual situation of investors and investments in relation to the measure.[41]

25 As one commentator has noted, some treaties provide guidelines to tribunals that must rule on whether there exist similar circumstances justifying reliance on the MFN clause.[42] However, CETA does not provide any such guidelines. Under CETA, the lack of specification as to the meaning of 'like situations' implies a case-by-case basis assessment of the criteria or factors of interpretation. It grants flexibility to the CETA tribunal to decide whether to adopt a broad or narrow interpretation.

26 A further question is whether (another) limitation follows from the *ejusdem generis* principle.[43] Pursuant to the *ejusdem generis* principle, MFN treatment may only be

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[36] *White Industries Australia Limited v The Republic of India,* UNCITRAL, Final Award, 30 November 2011, paras 11.2.1–11.2.9.

[37] *EDF International SA, SAUR International SA and León Participaciones Argentinas SA v Argentine Republic,* ICSID Case No ARB/03/23, Award, 11 June 2012, para 929.

[38] Daigremont 'Most Favoured Nation Treatment' (n 10) 91.

[39] See eg *SD Myers Inc v Canada*, UNCITRAL (NAFTA), Partial Award, 13 November 2000, para 250; *Pope & Talbot v Canada*, UNCITRAL (NAFTA), Award on the Merits of Phase 2, 10 April 2001, paras 100–104; *Marvin Roy Feldman Karpa v Mexico*, ICSID Case No ARB(AF)/99/1 (NAFTA), Award, 16 December 2002, paras 171–72; *Parkerings-Compagniet AS v Republic of Lithuania*, ICSID Case No ARB/05/8, Award, 11 September 2007, paras 371, 373. For a broad interpretation see *Occidental Exploration and Production Company v The Republic of Ecuador*, UNCITRAL (LCIA Case No UN3467), Final Award, 1 July 2004, para 173 ('"in like situations" cannot be interpreted in the narrow sense advanced by Ecuador as the purpose of national treatment is to protect investors as compared to local producers, and this cannot be done by addressing exclusively the sector in which that particular activity is undertaken.').

[40] See eg *SD Myers* (n 39) para 251; *Archer Daniels Midland Company and Tat & Lyle Ingredients Americas, Inc v The United Mexican States*, ICSID Case No ARB(AF)/04/5 (NAFTA), Award, 21 November 2007, para 198.

[41] See eg *İçkale İnşaat* (n 27) para 329: *'a comparison of the factual situation of the investments of the investors of the home State and that of the investments of the investors of third States, for the purpose of determining whether the treatment accorded to investors of the home State can be said to be less favorable than that accorded to investments of the investors of any third State.'*

[42] See Nikièma (n 16) 5, referring to the Investment Agreement for the COMESA Common Investment Area ('CCIA') art 17.2: *'For greater certainty, references to 'like circumstances' in paragraph 1 of this Article requires an overall examination on a case-by-case basis of all the circumstances of an investment including, inter alia: (a) its effects on third persons and the local community; (b) its effects on the local, regional or national environment, including the cumulative effects of all investments within a jurisdiction on the environment; (c) the sector the investor is in; (d) the aim of the measure concerned; (e) the regulatory process generally applied in relation to the measure concerned; and (f) other factors directly relating to the investment or investor in relation to the measure concerned; and the examination shall not be limited to or be biased towards any one factor.'*

[43] For an analysis on the impact of the *ejusdem generis* principle on MFN clauses, see Reinisch and Schreuer (n 18) ch 5, paras 156–79.

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invoked in relation to matters of the same kind as those contemplated by the clause.[44] The ILC explains in its Commentary to its Draft Articles on MFN Clauses that:

> *'No writer would deny the validity of the ejusdem generis rule which, for the purposes of the most-favoured-nation clause, derives from its very nature. It is generally admitted that a clause conferring most-favoured-nation rights in respect of a certain matter, or class of matter, can attract the rights conferred by other treaties (or unilateral acts) only in regard to the same matter or class of matter.'*[45]

27 This means that the treaty which contains the most favourable treatment and the original treaty (ie the treaty concluded between the investor's home State and the host State against which it is bringing the arbitration) must be of the same kind.[46] As the Commission of Arbitration stated in the *Ambatielos* case, MFN 'can only attract matters belonging to the same category of subject as that to which the clause relates'.[47]

28 Finally, additional specifications with respect to the notion of treatment no less favourable 'in like situations' are provided in Article 8.7.4, as further explained below.

5. MFN treatment with respect to pre- and post-establishment activities

29 Pursuant to Article 8.7.1, MFN treatment under CETA applies to the 'establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal' of investments. In other words, it covers the entire life span of the investment, from the birthing process until its final dissolution or disposition, thereby covering both pre- and post-establishment activities.

30 Referring to pre-establishment rights[48] is a very common feature of Canadian and US BITs.[49] However, this inclusion is a new development when compared to European BITs which traditionally only cover the post-establishment phase and grant investors rights once their investments are admitted in the host State, based on the host State's national law and access policies.[50] When limiting MFN treatment to the post-establishment phase, the host State retains the possibility of setting specific entry requirements for foreign investors, thereby allowing it to retain a certain degree of latitude.

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31 Extending the scope of MFN treatment to the pre-establishment phase means that the host State agrees to waive any discriminatory measure with respect to the admission and the terms of access of foreign investments and renounces the possibility of creating new ones in the future. This could explain why investment treaties which grant pre-

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[44] ILC, 'Final Report: Study Group on the Most-Favoured-Nation Clause' (n 1) para 72; UNCTAD, 'Most-Favoured-Nation Treatment: UNCTAD Series on Issues in International Investment Agreements II' (n 1) xiii ('An MFN clause is governed by the ***ejusdem generis principle***, in that it may only apply to issues belonging to the same subject matter or the same category of subjects to which the clause relates.') (emphasis in original).

[45] ILC, 'Draft Articles on Most-Favoured Nation Clauses' (n 4) commentary to art 10, 30 (emphasis in original) and see also commentary to art 4, 21.

[46] See Daigremont, 'Most Favoured Nation Treatment' (n 10) 78.

[47] *The Ambatielos Claim (Greece v United Kingdom)* XII RIAA 83, 6 March 1956, 107.

[48] It should be noted that it remains unclear whether the term 'expansion' relates to pre- or post-establishment and is likely to cover both phases depending on the specific circumstances of the case. For a clarification, see eg Canada-China BIT (2012) art 6.3 (providing a clarification on the scope of the national treatment provision): *'The concept of 'expansion' in this Article applies only with respect to sectors not subject to a prior approval process under the relevant sectoral guidelines and applicable laws, regulations and rules in force at the time of expansion. The expansion may be subject to prescribed formalities and other information requirements.'*

[49] NAFTA (1993) art 1103. See also Canadian Model FIPA (2004) art 4; US Model BIT (2012) art 4.

[50] Reinisch and Schreuer (n 18) ch 5, para 47.

establishment rights usually also provide for limitations. For instance, States may reserve their right to protect certain sectors and measures during the pre-establishment phase.[51] There are two main methods of achieving such limitations. First, the State parties may adopt a list of existing non-conforming measures, so-called positive and negative lists. Under the negative list approach, admission rights are granted to every sector and/or measure except the ones that have been excluded from the list. Alternatively, under the positive list approach, any sector and/or measure not listed is excluded. However, the process of adopting a list, whether a negative or a positive one, is often complex.[52] Second, State parties may grandfather every measure that does not comply with MFN at the date of entry into force of the treaty and prepare a negative list of 'future non-conforming measures'.[53] This approach has been adopted in some recent Canadian BITs. As further explained elsewhere (see Article 8.15, paragraph 9), the Parties have adopted a negative list approach in CETA in Annexes I and II.

II. Specifying the scope of application of 'treatment' with respect to Canadian provinces and Member States of the European Union (Article 8.7.2)

32 The second paragraph of Article 8.7 refers to the specific governmental structure of the Parties and addresses one of the potential difficulties that may arise from it. Article 8.7.2 clarifies that:

> *'For greater certainty, the treatment accorded by a Party under paragraph 1 means, with respect to a government in Canada other than at federal level, or, with respect to a government of or in a Member State of the European Union, treatment accorded, in like situations, by that government to investors in its territory, and to investments of such investors, of a third country.'*[54]

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33 Canada is a federation with a national government and ten provincial governments and the EU a political and economic union of 27 sovereign States. Article 8.7.2 therefore clarifies that the acts of any of the Member States in the EU or of the ten provincial governments in Canada may also give rise to a breach of MFN treatment, not solely the acts of the EU or of the Canadian federal government.

34 The same specification is to be found in Chapter 9 on 'cross-border trade in services' at Article 9.5.2.[55]

III. Exclusion from the scope of Article 8.7.1 of 'treatment' accorded by a Party providing for recognition (Article 8.7.3)

35 Mutual recognition arrangements or agreements between different States are usually adopted to facilitate the cross-border provision of services. Until recently, the GATS was one of the few agreements providing an explicit provision (in its Article VII) with respect to recognition arrangements (ie acceptance of each other's standards, such as professional

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[51] Bonnell (n 9) 283–84. See also Nikièma (n 16) 8.

[52] Nikièma (n 16) 8–9. For further details on the positive/negative list approach see Article 8.15, paras 9, 54–55.

[53] Nikièma (n 16) 8–9.

[54] CETA art 8.7.2.

[55] ibid art 9.5.2.

qualifications).[56] CETA addresses this issue in Article 8.7.3, which provides for a specific exception to MFN treatment for measures providing for recognition. It states that:

> *'Paragraph 1 [ie the MFN principle] does not apply to treatment accorded by a Party providing for recognition, including through an arrangement or agreement with a third country that recognises the accreditation of testing and analysis services and service suppliers, the accreditation of repair and maintenance services and service suppliers, as well as the certification of the qualifications of or the results of or work done by those accredited services and service suppliers.'*

36 This exception is quite limited as it only applies to recognition, accreditation, and certification of qualifications. Within the limited scope of Article 8.7.3, a Party may thus grant investors of third States, or their investments, more favourable treatment of services, or more favourable treatment to suppliers, without breaching MFN treatment. However, recognition must not constitute a means of discrimination or a disguised restriction on trade in services.

37 The same exception can also be found in Article 9.5.3 CETA with respect to the MFN clause that applies to cross-border trade in services, but this is again limited to recognition, accreditation, and certification of qualifications. As one commentator points out, this exception retains the links between investment and services as investments are seen as a way to supply services.[57] For instance, the GATS distinguishes between four ways of supplying services: (i) cross-border trade; (ii) consumption abroad; (iii) commercial presence; and (iv) presence of natural persons.[58] The last two modes of supplying services can be achieved through foreign investments since commercial presence implies that a service supplier of a Party establishes a territorial presence, including through ownership in another Party's territory to provide a service, and presence of natural persons consists of persons of one Party entering the territory of another Party to supply a service.[59] As a result, regulations on services also concern regulations on investments.[60]

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IV. Exclusion of ISDS from the scope of MFN treatment (Article 8.7.4, first sentence)

38 While an MFN clause may be applied to substantive protections (ie fair and equitable treatment and umbrella clauses), it is controversial whether such a clause may also apply to procedural rights (ie recourse to local courts and exhaustion requirements, access to a particular arbitral institution, and more fundamentally consent to arbitration and its scope),[61] and especially to a dispute resolution procedure.[62] The broad drafting of most MFN clauses allows for diverging interpretations and arbitral tribunals have adopted different views. When confronted with the

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[56] Mestral and Vanhonnaeker, 'Exception Clauses in Mega-Regionals (International Investment Protection and Trade Agreements)' in Rensmann (ed), *Mega-Regional Trade Agreements* (2017) 75 (108).

[57] Daigremont, 'Most Favoured Nation Treatment' (n 10) 79.

[58] WTO, 'The General Agreement on Trade in Services (GATS): Objectives, Coverage and Disciplines' (*Services: GATS*) <https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm#4> accessed 14 February 2022.

[59] ibid.

[60] Daigremont, 'Most Favoured Nation Treatment' (n 10) 79–80.

[61] See Sabahi, Rubins and Wallace, *Investor-State Arbitration* (2nd edn, 2019) 559.

[62] See Junngam, 'An MFN Clause and BIT Dispute Settlement: A Host State's Implied Consent to Arbitration by Reference' (2010) 15 *UCLA J Intl L & Foreign Aff* 399.

question of whether ISDS forms part of 'treatment' within the meaning of an MFN clause, tribunals have accordingly reached diverging conclusions.[63]

39 The tribunal in *Maffezini v Spain*[64] had to decide whether an MFN clause made it possible to import more favourable ISDS provisions in a third-party treaty into the original treaty. The investor was seeking to circumvent the requirement of the Spain-Argentina BIT to first bring the dispute before the host State's domestic courts for a period of 18 months before resorting to international arbitration. The investor relied on Article IV of the Spain-Argentina BIT which provided that '[i]n all matters subject to this Agreement, this treatment shall not be less favorable than that extended by each Party to the investments made in its territory by investors of a third country',[65] and invited the ICSID tribunal to apply the more favourable provisions of the Spain-Chile BIT that allowed it to proceed straight to arbitration (after a six-month negotiation period).[66] The tribunal upheld the arguments of the investor claimant and explained that:

> *'[T]oday dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights of traders under treaties of commerce. … [I]f a third-party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favoured nation clause as they are fully compatible with the ejusdem generis principle.'*[67]

40 This decision led to a considerable debate among academics and practitioners as to the application of MFN clauses to ISDS.[68] Some tribunals have followed the *Maffezini* approach,[69] while others have departed from it, taking the view that an MFN clause could not be used to import procedural rules, unless clearly and expressly indicated.[70]

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[63] Sicard-Mirabal and Derains, *Introduction to Investor-State Arbitration* (2018) 57–58.

[64] *Emilio Agustín Maffezini v Kingdom of Spain*, ICSID Case No ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000.

[65] ibid para 38 (internal quotation marks omitted).

[66] ibid paras 63–64.

[67] ibid paras 54, 56.

[68] Reinisch and Schreuer (n 18) ch 5, para 341. For criticisms of the judgment see eg Rubins, Papanastasiou and Kinsella, *International Investment, Political Risk, and Dispute Resolution: A Practitioner's Guide* (2005) 232–34; Hamida, 'MFN Clause and Procedural Matters: Seeking Solutions from WTO Experiences' (2009) 6(1) *TDM* <https://www.transnational-dispute-management.com/article.asp?key=1355> accessed 14 February 2022; McLachlan, Shore and Weiniger, *International Investment Arbitration: Substantive Principles* (2nd edn, 2017) 347–50; Douglas, 'The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails' (2011) 2 *JIDS* 97, 102.

[69] See eg *Siemens AG* (n 6) para 102 and 103 (the dispute settlement mechanism 'is part of the treatment of foreign investors and investments and of the advantages accessible through a MFN clause'); *Hochtief AG v The Argentine Republic*, ICSID Case No ARB/07/31, Decision on Jurisdiction, 24 October 2011, para 73 ('… there can be no doubt that the settlement of disputes is an "activity in connection with investments"…').

[70] See eg *Salini Costruttori SpA and Italstrade SpA v The Hashemite Kingdom of Jordan*, ICSID Case No ARB/02/13, Decision on Jurisdiction, 9 November 2004, paras 112–19; *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction, 8 February 2005, para 219 ('Such a chaotic situation – actually counterproductive to harmonization – cannot be the presumed intent of Contracting Parties') and para 240: *'The most favored nation provision of the Bulgaria-Cyprus BIT, read with other BITs to which Bulgaria is a Contracting Party (in particular the Bulgaria-Finland BIT), cannot be interpreted as providing the Respondent's consent to submit the dispute with the Claimant under the Bulgaria-Cyprus BIT to ICSID arbitration or entitling the Claimant to rely in the present case on dispute settlement provisions contained in these other BITs.'* See also *Vladimir Berschader and Moïse Berschader v The Russian Federation*, SCC Case No 080/2004, Award, 21 April 2006, paras 180–81; *Wintershall Aktiengesellschaft v The Argentine Republic*, ICSID Case No ARB/04/14, Award, 8 December 2008,

Accordingly, in (non-CETA) cases, the question remains whether an MFN clause allows an investor to overcome jurisdictional or procedural prerequisites.[71]

41 CETA gives a firm answer to this question with regard to cases before the CETA Tribunal. Article 8.7.4 clarifies that the MFN clause cannot be used to import broader or less restrictive ISDS provisions from other treaties with investment provisions into a dispute under CETA.[72] Accordingly, the first sentence of Article 8.7.4 reads:

> *'For greater certainty, the 'treatment' referred to in paragraphs 1 and 2 does not include procedures for the resolution of investment disputes between investors and states provided for in other international investment treaties and other trade agreements.'*

42 MFN clauses in other recent BITs and FTAs have also expressly provided that they do not apply to ISDS. A study published by UNCTAD concludes that one-third of the BITs entered into between 2012 and 2014 contain such an exception.[73]

V. Substantive obligations in other BITs and FTAs not in themselves 'treatment' (Article 8.7.4, second sentence)

43 An additional question is whether MFN treatment may be relied upon to import more favourable substantive treatment[74] from other treaties without the claimant investor having to identify a specific investor effectively benefiting from this more favourable treatment.

44 Until recently, it was generally understood that an MFN clause allows an investor to rely on more favourable provisions of investment treaties concluded between the host State and third States.[75] As a result, it had been relatively uncontroversial that (i) the promise that an investment or investor would be treated in a more favourable manner was sufficient to constitute 'treatment' for the purposes of MFN clauses,[76] and that (ii) an MFN clause grants a claimant the right to benefit from substantive guarantees contained in third treaties.[77] However, it has been recently suggested that

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paras 160–197 (para 167: the MFN clause did not apply to ISDS, '*unless of course the MFN clause in the basic treaty clearly and unambiguously indicates that it should be so interpreted*') (emphasis in original); *ICS Inspection and Control Services Limited (United Kingdom) v The Argentine Republic*, UNCITRAL (PCA No 2010–9), Award on Jurisdiction, 10 February 2012, paras 274–317; *Daimler Financial Services AG v The Argentine Republic*, ICSID Case No ARB/05/1, Award, 22 August 2012, paras 184–98; *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v Turkmenistan*, ICSID Case No ARB/10/1, Award, 2 July 2013, ss 7.1.1–7.3.9.

[71] ILC, 'Final Report: Study Group on the Most-Favoured-Nation Clause' (n 1) paras 91–114. See also McLachlan, Shore and Weiniger (n 68) 352–53.

[72] Bonnell (n 9) 288–89.

[73] UNCTAD, 'IIA Issues Note: Taking Stocks of IIA Reforms' (2016) 9 <https://unctad.org/system/files/official-document/webdiaepcb2016d3_en.pdf> accessed 14 February 2022.

[74] For examples of substantive treatment in the investment case law, see *MTD Equity* (n 34) paras 100–04 and 187 (obligation to accord permits); *Siemens AG v The Argentine Republic*, ICSID Case No ARB/02/8, Award, 6 February 2007, paras 341 and 353 ('fair market value' for the evaluation of a compensation); *Bayindir Insaat Turizm Ticaret ve Sanayiti AŞ v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award, 27 August 2009, paras 412–20; *Continental Casualty Company v The Argentine Republic*, ICSID Case No ARB/03/9, Decision on Jurisdiction, 22 February 2006, paras 55–56, 94 (capital transfers); *Rumeli Telkom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Republic of Kazakhstan*, ICSID Case No ARB/05/16, Award, 29 July 2008, para 575 (import treatment clauses).

[75] Batifort and Heath, 'The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization' (2017) 111 *AJIL* 873, 873.

[76] Bonnell (n 9) 258.

[77] Dolzer and Schreuer (n 18) 211.

an existing more favourable treatment is necessary in order to rely on an MFN clause.[78] CETA follows this approach.

45 Pursuant to the second sentence of Article 8.7.4 CETA, the Parties agree that '[s]ubstantive obligations in other international investment treaties and other trade agreements do not in themselves constitute "treatment", and thus cannot give rise to a breach of this article, absent measures adopted by a Party pursuant to such obligations'. Article 8.7.4 CETA thereby extends the limitation of MFN treatment to any substantive obligations in third treaties, unless measures implementing them have been adopted. As a result, only effective treatment granted by each Party to third parties' investors or investments falls within the scope of Article 8.7.1, not just commitments made vis-à-vis third countries. One commentator summarises that MFN treatment under CETA thus forbids '*de facto* discrimination, not *de jure* discrimination arising from differences in clauses or in formulations in investment agreements'.[79]

46 As one commentator has observed, this exception may add an additional impediment for the claimant investor, which must not only prove that the host State has granted a more favourable commitment to a third State in a treaty but also that it has implemented that commitment.[80] Another commentator has noted that it also means that the host State may be able to rely on its own breach of the provision in a third treaty as a defence to prevent a commitment from a third treaty being imported into CETA through the MFN clause.[81]

VI. Extension and exclusion of MFN treatment in CETA

47 Article 8.7 is not the only MFN clause applicable to investments and investors in CETA. Through other clauses, MFN treatment also extends to cross-border trade in (i) services (Chapter Nine); (ii) investments in financial services (Chapter Thirteen); and (iii) international maritime transport services (Chapter Fourteen).

48 Article 9.5 in the chapter on 'Services' extends MFN treatment to cross-border trade in services. The MFN clause in Chapter 9 replicates the language of paragraphs 1 to 3 of Article 8.7, but logically not the exemptions of paragraph 4 which are meaningless outside the investment chapter. It provides:

> '*1. Each Party shall accord to service suppliers and services of the other Party treatment no less favourable than that it accords, in like situations, to service suppliers and services of a third country.*
> *2. For greater certainty, the treatment accorded by a Party pursuant to paragraph 1 means, with respect to a government in Canada other than at the federal level, or, with respect to a government of or in a Member State of the European Union, the treatment accorded, in like situations, by that government in its territory to services or service suppliers of a third country.*
> *3. Paragraph 1 does not apply to treatment accorded by a Party under an existing or future measure providing for recognition, including through an arrangement or agreement with a third country that recognises the accreditation of testing and analysis services and service suppliers, the accreditation of repair and maintenance services and service suppliers, as well as the certification of the qualifications of, or the results of, or work done by, those accredited services and service suppliers.*'

[78] See eg Batifort and Heath (n 75); cf Schill, 'MFN Clauses as Bilateral Commitments to Multilateralism: A Reply to Simon Batifort and J. Benton Heath' (2017) 111 *AJIL* 914.
[79] Daigremont, 'Most Favoured Nation Treatment' (n 10) 88.
[80] Dionysiou, *CETA's Investment Chapter*: *A Rule of Law Perspective* (2021) 87.
[81] Bonnell (n 9) 289.

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