of import checks on foreign manufactured drugs—applicable irrespective of whether the manufacturer was local or foreign.[493]

In the result, therefore, the majority of the jurisprudence to date on national treatment in investment treaties has preferred a relatively simple test of comparison with the most directly comparable local investor or investors in the same business sector. If a difference in treatment is detected through such a process, then the Tribunal will proceed to enquire whether the difference has a reasonable nexus to rational government policies, and is not discriminatory in its effect on foreign investors. **7.297**

D. Most-Favoured-Nation Treatment

General considerations

The majority of investment treaties contain, alongside the provision for national treatment, a general obligation on the part of each Contracting State not to afford treatment to the investors or investments of the other State less favourable than that accorded to those of third States.[494] The obligation contained in such a clause is referred to as most-favoured-nation treatment ('MFN treatment'). **7.298**

In some cases, this clause is said to apply '[i]n all matters governed by this Agreement'.[495] NAFTA adds that MFN treatment applies to 'the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.'[496] MFN treatment may be specifically linked to only some of the obligations under the treaty. The clause may also contain a qualifying phrase, requiring that the investments be 'in like circumstances'. MFN clauses, particularly those in plurilateral free trade agreements, may also contain specified exceptions or non-conforming measures that are excluded from the operation of the clause.[497] **7.299**

These variations in language may well affect the scope and interpretation of the clause. As with national treatment, there is a major distinction between those MFN clauses that impose obligations on the host State with regard to the establishment or admission of an investment (as in the case of NAFTA and subsequent free trade agreements on the North American model), and those that limit their operation to the protection of an investment duly admitted in accordance with host State law.[498] **7.300**

The potential for such differences in approach being recognised, the diverse versions of the MFN clause nevertheless share some common properties or elements. These are rarely articulated in terms in the clause itself. Yet the States' invocation of most-favoured-nation language indicates a reference to the recognised meaning of the term in international law.[499] **7.301**

---

[493] *Apotex* para 8.56, applying *Pope & Talbot*.

[494] eg UK model BIT, art 3(1) (Appendix 4 below).

[495] Agreement on the Reciprocal Promotion and Protection of Investments (Argentina-Spain) (signed 3 October 1991) 1699 UNTS 187, art X(3)(a).

[496] NAFTA, art 1103 (Appendix 1 below).

[497] eg TPPA, art 9.11 (not yet in force) (Appendix 11).

[498] Above paras 7.47 *et seq*.

[499] VCLT, art 31(3)(c); ILC 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission' (Koskenniemi, Chair) UN Doc A/CN.4/L.702, conclusion (20)(b).

7.302 MFN treatment shares with national treatment an impressive lineage in both trade and investment treaties.[500] The general approach to the interpretation of such clauses has received considerable attention from international tribunals and, on two successive occasions, from the International Law Commission.[501] Although the work of the Commission has not resolved all issues of interpretation of the clause, its 1978 Draft Articles and Commentary and its recent 2015 Report nevertheless are of assistance in clarifying and narrowing the remaining areas of difficulty.

7.303 The claim to MFN treatment is based solely on an international obligation voluntarily undertaken by the granting State.[502] As the International Law Commission put it, this is to state no more than:

> ... the obvious rule that no State is entitled to most-favoured-nation treatment by another State unless that State has undertaken an international obligation to accord such treatment. The rule follows from the principle of the sovereignty of States and their liberty of action. This liberty includes the right of States to grant special favours to some States and not to be bound by customary law to extend the same favours to others. This right is not impaired by the general duty of non-discrimination. The general duty not to discriminate between States is not breached by treating another State, its nationals, ships, products, etc., in a particularly advantageous way. Other States do not have the right to challenge such behaviour and to demand for themselves, for their nationals, ships, products, etc., the same treatment as that granted by the State concerned to a particularly favoured State. Such a claim can rightfully be made only if it is proved that the State in question has undertaken an international obligation to accord to the claiming State the same treatment as that extended to the particularly favoured State or to its nationals, ships, products, etc.[503]

7.304 Such an international obligation is most commonly granted by treaty. It is the treaty containing the grant of MFN treatment that produces the legal effect giving rise to a claim, not any treaty with a third State to which reference may be made in determining the level of treatment to be accorded.[504]

7.305 The scope of operation of such a clause is determined by reference to the following elements of the legal test:

(a) What acts of the State are capable of constituting *treatment*?
(b) What is the relevant class of persons or things — the *comparator*—whose treatment is to be compared with the class of persons protected under the MFN clause?
(c) The level of treatment accorded: is it less or no less favourable?These issues are the same, *mutatis mutandis*, as those that arise under the national treatment standard, to which reference may be made in their interpretation.[505]

---

[500] See para 7.298 *et seq* above.

[501] ILC 'The Most Favoured Nation Clause: Draft Articles with Commentary' (Ushakov, Special Rapporteur) [1978] 2(2) YB ILC 8–73 ('1978 ILC Draft Articles' and '1978 ILC Commentary'); ILC, 'Study Group on the Most-Favoured Nation clause: Final Report' (McRae, Chair) (29 May 2015) UN Doc A/CN.4/L.852 ('2015 ILC Report').

[502] 1978 ILC Draft Articles, art 7.

[503] 1978 ILC Commentary, 24.

[504] 1978 ILC Draft Articles, art 8(1); *Anglo-Iranian Oil Co (United Kingdom v Iran)* (Preliminary Objections) [1952] ICJ Rep 93.

[505] Above paras 7.293 *et seq*.

7.306 The MFN clause forms a central part of the matrix of protections commonly agreed between States under an investment treaty. Despite its importance as a conventional provision, the clause has to date played only a limited role in arbitral jurisprudence. Almost all of the cases have concerned the question whether, and if so to what extent, such a clause may apply in relation to the dispute resolution provisions of an investment treaty. This question will be addressed as a discrete issue below, in paragraphs 7.317–7.342. It is necessary first to elucidate further the three core aspects of the clause identified above.

7.307 *Treatment.* The MFN clause concerns a comparison in the level of 'treatment' accorded by the host State to the beneficiaries of the clause as compared with those of the third State. Treatment is not defined. It may include treatment by any of the organs of government: whether by legislative measures; judicial decisions; or the conduct in fact of the executive. In each case, '[t]he mere fact of treatment is enough to set in motion the operation of the clause.'[506]

7.308 The assumption of a treaty obligation towards a third State is a sufficient but not a necessary manifestation of treatment. In Article X.7(4) of CETA, Canada and the European Union 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.' This provision must be taken to be *lex specialis.* As a matter of general international law, a treaty obligation assumed towards a third State may constitute treatment for the purpose of the MFN clause.[507] In the *Rights of Nationals of the USA in Morocco,*[508] although the Court found that the more favourable rights accorded by Morocco to France and Great Britain had ceased to apply at the relevant time, the fact that the rights were enshrined in treaties with those States would otherwise have sufficed for the purpose of establishing 'treatment'.

7.309 In the field of investment law where most of the obligations of States have been assumed bilaterally, the inclusion of an MFN clause represents a potent ratchet by which obligations assumed or concessions made in negotiations may raise the stakes in the obligations of the host State under the BIT in question. For example, in *MTD v Chile,*[509] the Malaysian investor was, through this route, able to rely upon the more specific provisions of the Croatian and Danish BITs with Chile in relation to the observance of foreign investment contracts and the obligation to grant the necessary permits.

7.310 *The comparator.* The second requisite of the test is to establish the class of persons or things in respect of which the comparison of treatment is to be undertaken: the comparator. MFN clauses in investment treaties only rarely define all elements of the comparator expressly. Typically such clauses will identify the requisite connection with the third State *ratione personae*: requiring comparison with nationals or companies of the third State. But only exceptionally does the clause itself establish a connection *ratione materiae.* NAFTA does so when requiring that the treatment be accorded 'in like circumstances.'[510] The inclusion of such

[506] 1978 ILC Commentary, 23.

[507] ibid.

[508] *Rights of Nationals of the United States of America in Morocco (France v United States of America) ('Morocco')* [1952] ICJ Rep 176, 190–7.

[509] *MTD Equity Sdn Bhd v Chile* (Award) ICSID Case No ARB/01/7, 12 ICSID Rep 6, IIC 174 (2004, Rigo Sureda P, Lalonde & Oreamuno Blanco).

[510] NAFTA, art 1103(1).

express language helps to define the comparator. The same language is also used in the definition of national treatment in a number of investment treaties. Arbitral decisions interpreting the phrase in that context may well assist in ascertaining its meaning for the purpose of an MFN clause.[511]

7.311 Many treaties do not contain such qualifying language, yet the establishment of a qualifying class for purposes of comparison is inherent in the MFN test. As a recent UNCTAD Study put it, when such language is omitted 'the Contracting Parties do not intend to dispense with the comparative context, as it would distort the entire sense and nature of the MFN treatment clause.'[512] Such a class must be established with more specificity than simply 'nationals or companies' of the third State. The test presupposes that the activities engaged in by the comparator, and thus the effect of the host State's treatment upon those activities, are comparable.

7.312 Reference to general international law confirms that the establishment of the comparator requires:

(a) identity of subject matter between the rights protected by the clause and the rights compared;[513] and
(b) that the persons of things protected by the clause belong to the same category of persons or things to those with which the comparison is made and are in the same relationship with the relevant State.[514]

These two elements together form the *ejusdem generis* rule, which 'is generally recognized and affirmed by the jurisprudence of international tribunals and national courts and by diplomatic practice.'[515]

7.313 In order to establish identity of subject matter, the interpreter must first ascertain the boundaries of the subject matter of the rights protected by the MFN clause or implied from its subject matter.[516] It is the subject matter scope of the treaty containing the MFN clause that defines the outer boundaries of the operation of the clause. It is essential to ensure that the provisions relied upon as constituting the more favourable treatment are properly applicable and will not have the effect of fundamentally subverting the carefully negotiated balance of the investment treaty being applied.[517]

7.314 The second element of the test deals with the category of persons or things being compared. In *Parkerings*,[518] the Tribunal applied the test developed in the national treatment context to hold not only that the comparator must be in the same economic and business sector as the claimant, but also that there is no justification for the difference in treatment between the two companies. In that case, the claimant alleged a failure to accord MFN treatment in the grant

[511] Paras 7.298 *et seq* above; accord: ILC 2015 Report para 76.
[512] UNCTAD, *Most-Favoured-Nation Treatment* UNCTAD/DIAE/IA/2010/1, 26.
[513] ILC 1978 Draft Articles, art 9; *Ambatielos (Greece v United Kingdom)* (Award) XII RIAA 83, 107.
[514] 1978 ILC Draft Articles, art 10.
[515] 1978 ILC Commentary, 27.
[516] 1978 ILC Draft Articles, art 9.
[517] *Accession Mezzanine Capital LP v Hungary* (Decision on Jurisdiction) ICSID Case No ARB/12/3, IIC 577 (2013, Rovine P, Lalonde & McRae) para 74, approving a statement to this effect in the first edition of this work.
[518] *Parkerings-Compagniet AS v Lithuania* (Award) ICSID Case No ARB/05/8, IIC 302 (2007, Lévy P, Lalonde & Lew) paras 371–5.

of licences to build parking garages. The Tribunal found that there were material differences between the two projects in terms of their planning implications that justified their different treatment.[519] The consequence was that the MFN clause was not engaged.

The level of treatment. The obligation to receive treatment no less favourable arises from the moment that the more favourable treatment is extended to the national of the third State[520] and ceases when such treatment is terminated or suspended.[521] **7.315**

The purpose of the 'no less favourable' requirement is to ensure equality of competitive opportunities as between investors from foreign States investing in the host State.[522] As such its operation is closely linked to scope of the comparator, since equality of treatment has to be determined by reference to whether the two investments under comparison are *ejusdem generis.* **7.316**

Application to dispute settlement provisions

The issue that remains is whether and, if so, to what extent the scope of the dispute settlement provisions in an investment treaty ('the basic treaty') may be subject to variation if they can be said to provide treatment less favourable than that accorded under another investment treaty ('the comparator treaty') entered into between the host State and a third State. **7.317**

This question has provoked considerable controversy in both investment arbitral awards and doctrine.[523] The present section will seek to demonstrate that the scope of the difference is narrower than the rhetoric of the debate would suggest and to set forth a framework for decision. The 2015 Final Report of a Study Group of the International Law Commission[524] provides some further assistance with this task, though it does not finally resolve the issues. In order to understand the contours of this controversy, it is first necessary to outline its origins. **7.318**

In *Maffezini v Spain*,[525] the investment treaty that Spain had concluded with Argentina contained a dispute settlement clause that permitted the submission of the dispute to international arbitration only if it had first been submitted to the courts of the host State and no decision had been rendered within eighteen months.[526] Spain's investment treaty with Chile, by contrast, merely contained a cooling off period of six months, with no requirement to resort to the host State courts. The claimant, an Argentinian national, had not complied with the requirement to resort to local courts. Instead, he invited the Tribunal to find that the specific provisions of the dispute resolution clause in the Argentina–Spain BIT did not constitute a bar to its jurisdiction in view of the more liberal provisions of the comparator Chile–Spain BIT. He alleged that he **7.319**

[519] ibid paras 376–430.

[520] 1978 ILC Draft Articles, art 20.

[521] 1978 ILC Draft Articles, art 21; *Morocco* 190–7.

[522] 2015 ILC Report, para 75.

[523] cf Z Douglas, 'The MFN Clause in Investment Arbitration: Treaty Interpretation off the Rails' (2011) 2 JIDS 97 and S Schill, 'Allocating Adjudicatory Authority: Most-Favoured-Nation Clauses as a Basis of Jurisdiction—A Reply to Zachary Douglas' (2011) 2 JIDS 353. On the possibility for a middle ground see: M Paparinskis, 'MFN Clauses and International Dispute Settlement: Moving beyond *Maffezini* and *Plama*?' (2011) 26 ICSID Review–FILJ 14; JA Maupin 'Consistency in MFN-based Jurisdiction in Investor-State Arbitration: Is There Any Hope for a Consistent Approach?' (2011) 14 JIEL 157.

[524] 2015 ILC Report.

[525] *Maffezini v Spain* (Decision on Jurisdiction) ICSID Case No ARB/97/7, 5 ICSID Rep 396, IIC 85 (2000, Orrego Vicuña P, Buergenthal & Wolf) paras 38–64.

[526] Agreement on the Reciprocal Promotion and Protection of Investments (Argentina–Spain) (signed 3 October 1991, entered into force 28 September 1992) 1699 UNTS 188, art X(3)(a).

was entitled to avail himself of such treatment in view of the obligation assumed by Spain in the Argentina BIT to accord him treatment no less favourable than that of an investor from a third State.

7.320 The Tribunal observed that, as the investor could only derive its rights from the basic treaty, there was always a preliminary question as to whether the rights for which benefit was claimed by virtue of the MFN provision fell within the subject-matter scope of the basic treaty. The second question was an application of the *ejusdem generis* rule of construction. Did the dispute settlement provisions of the comparator treaty relate to the requirement of fair and equitable treatment to which the MFN clause applied?

7.321 The Tribunal considered that the protection of the rights of traders by means of dispute resolution clauses is a matter that falls within the protections afforded by treaties of commerce and navigation or investment treaties. Accordingly, Maffezini could take the benefit of the Chile–Spain BIT, and was not required to resort to the Spanish courts before invoking the jurisdiction of the arbitral tribunal. The Tribunal saw the only exceptions to the application of MFN clauses to the dispute settlement provisions of a BIT as being ones of public policy: where the parties to the basic treaty had required the exhaustion of local remedies; made the dispute settlement provisions the subject of an irrevocable fork in the road; or specified a particular arbitral forum which one of them then sought to change by invoking the MFN clause.[527]

7.322 This approach was rejected in *Salini Construttori SpA v Jordan*,[528] and, after a very full consideration, in *Plama Consortium Ltd v Bulgaria*.[529] In *Plama*, the basic treaty, between Bulgaria and Cyprus, contained a provision for international arbitration in its dispute settlement clause, which was limited to determining the amount of compensation in a case of expropriation. The claimant sought to invoke ICSID arbitration by virtue of the more generous provisions for investor–State arbitration in other comparator treaties to which Bulgaria was a party, including, for example, that between Bulgaria and Finland. The Tribunal rejected that submission, and with it the reasoning in *Maffezini*.

7.323 The *Plama* Tribunal started with the proposition that all international arbitration must be based upon an agreement of the parties, which must be clear and unambiguous, even where reached by incorporation by reference.[530] States could provide expressly that they intended the MFN clause to apply to dispute settlement (as was the case, for example, in the UK model form BIT).[531] But the fact that the MFN clause was expressed to apply 'with respect to all matters' dealt with by the basic treaty was not sufficient to alleviate the doubt as to whether the parties had really intended it to apply to the dispute settlement clause. Could it be said that the MFN clause operated so as to replace one means of dispute settlement with another? How was a tribunal to evaluate which method of dispute settlement was in fact more favourable to the investor?

---

[527] *Maffezini* paras 62–3.

[528] *Salini Costruttori SpA v Jordan* (Decision on Jurisdiction) ICSID Case No ARB/02/13, 14 ICSID Rep 306, IIC 207 (2004, Guillaume P, Cremades & Sinclair) paras 102–19.

[529] *Plama Consortium Ltd v Bulgaria* (Decision on Jurisdiction) ICSID Case No ARB/03/24, 13 ICSID Rep 272, IIC 189 (2005, Salans P, van den Berg & Veeder) paras 183–227.

[530] ibid paras 198–200.

[531] UK model BIT (Appendix 4 below) art 3(3).

7.324 The Tribunal then found that the three decisions relied upon in *Maffezini* were not authority for the proposition which it had enunciated.[532] In fact, in both the *Morocco* and *Anglo-Iranian* cases, the ICJ had rejected the application of the MFN clause to dispute resolution. In the former case, that rejection was because the comparator treaties relied upon had been terminated, and could not therefore be regarded as having been incorporated permanently by reference.[533] In the latter case, the Court rejected the application of MFN to jurisdictional matters.[534] In *Ambatielos*, the Arbitration Commission was concerned with the scope of the substantive protection from denial of justice, rather than with a jurisdictional provision in the basic treaty.

7.325 The Tribunal finally rejected the reasoning in *Maffezini*. It found that, so far from promoting the harmonization of dispute settlement provisions, the application of an MFN approach to dispute settlement would rather produce a 'chaotic situation'.[535] Moreover, the public policy exceptions outlined in *Maffezini* were not based on authority. Rather, they were in fact reasons that fundamentally undermined the rationale for the rule that the *Maffezini* Tribunal had endorsed.[536] This analysis led the Tribunal to substitute instead a simple rule of construction to the effect that an MFN provision would not incorporate by reference dispute settlement provisions in another treaty unless the MFN provision in the basic treaty leaves no doubt that this was the intention of the Contracting Parties.[537]

7.326 This reasoned critique did not quiet the controversy. Over the last decade, arbitral tribunals have continued to divide on the issue. A number of subsequent decisions have followed *Maffezini*.[538] Most (but not all)[539] such cases have concerned a basic treaty containing the eighteen-month local court rule that was in issue in *Maffezini* itself.[540]

7.327 A number of other tribunals have, for various reasons, found that the arbitration clause in the principal investment treaty could not be extended by reference to the different provisions of dispute resolution clauses in other investment treaties through an application of the MFN provision.[541]

---

[532] *Anglo-Iranian Oil Co (United Kingdom v Iran)* (Jurisdiction) [1952] ICJ Rep 93; *Morocco* [1953] ICJ Rep 10; (Award) (1956) XII RIAA 83, 107.

[533] *Morocco* 196.

[534] *Anglo-Iranian* 109.

[535] *Plama* para 219.

[536] ibid para 221.

[537] ibid para 223.

[538] eg *Siemens AG v Argentina* (Decision on Jurisdiction) ICSID Case No ARB/02/8, 12 ICSID Rep 174, IIC 226 (2004, Rigo Sureda P, Bello Janeiro & Brower); *Suez Sociedad General de Aguas de Barcelona SA v Argentina* (Decision on Jurisdiction) ICSID Case No ARB/03/17, IIC 236 (2006, Salacuse P, Kaufmann-Kohler & Nikken) para 66; *Impregilo SpA v Argentina* (Award) ICSID Case No ARB/07/17, IIC 498 (2011, Danelius P, Brower & Stern (dissenting)); *Hochtief AG v Argentina* (Decision on Jurisdiction) ICSID Case No ARB/07/31, IIC 513 (2011, Lowe P, Brower & Thomas (dissenting)); *RosInvest Co UK Ltd v Russia* (Award on Jurisdiction) SCC Case No V079/2005, IIC 315 (SCC, 2007, Böckstiegel C, Berman & Steyn) para 128; *Teinver SA v Argentina* (Decision on Jurisdiction) ICSID Case No ARB/09/1, IIC 570 (2012, Buergenthal P, Álvarez & Hossain (dissenting in part)) paras 168–72.

[539] See notably *RosInvest* (Award on Jurisdiction).

[540] The 2015 ILC Report para 124 notes that, of the eighteen cases so far where an MFN provision has been invoked successfully, twelve have related to the same provision obliging the claimant to submit a claim before the local courts and litigate for 18 months before invoking dispute settlement under the BIT.

[541] eg *Telenor Mobile Communications AS v Hungary* (Award) ICSID Case No ARB/04/15, IIC 248 (2006, Goode P, Allard & Marriott); *Wintershall Aktiengesellschaft v Argentina* (Award) ICSID Case No ARB/04/14, IIC 357 (2008, Nariman P, Bernardini & Torres Bernárdez), also citing with approval the first edition of this

7.328 The decision in *Maffezini* produced a further downstream effect in the practice of States. In the negotiations for CAFTA, the contracting States opposed the proposition that the scope of the dispute settlement provision in an investment treaty could be altered through the operation of an MFN clause. They included a footnote in the negotiating history of the Agreement recording that they 'share the understanding and intent that this clause does not encompass international dispute resolution mechanisms such as those contained in Section C of this chapter, and therefore could not reasonably lead to a conclusion similar to that of the *Maffezini* case.'[542]

7.329 Subsequent free trade agreements have been even more explicit. Article 139(2) of the China–New Zealand Free Trade Agreement qualifies the MFN provision, adding that '[f]or greater certainty, the obligation in this article does not encompass a requirement to extend to investors of the other Party dispute resolution procedures other than those set out in this chapter.'[543] Article 9.3 of the TPPA is to the same effect as is Article X.7(4) of CETA. These provisions deal with the matter expressly for the purpose of the particular treaties. They also provide some indication of a wider disquiet amongst States from many different regions of the world (capital exporting and capital importing) at the implications of the use by arbitral tribunals of an MFN clause to vary the scope of the dispute settlement provisions of the basic treaty. Against that background it is now possible to return to consider the basic approach to this question.

7.330 The starting point is the proper construction of the dispute settlement provision in the basic treaty itself. The jurisdiction of an investment arbitral tribunal depends upon the consent in writing of the parties.[544] 'Consent of the parties is', as the Executive Directors of the World Bank put it in their Report on the ICSID Convention, 'the cornerstone of the jurisdiction of the Centre.'[545]

7.331 The establishment of the mutual consent of both parties requires careful attention to the written instrument by which such consent is given: the arbitration agreement. The proper approach to the construction of an agreement to arbitrate in the investment context was authoritatively laid down at an early stage in the development of the jurisprudence in *Amco v Indonesia:*

> [A] convention to arbitrate is not to be construed restrictively, nor, as a matter of fact, broadly or liberally. It is to be construed in a way which leads to find out and to respect the common will of the parties: such a method of interpretation is but the application of the fundamental principle pacta sunt servanda, a principle common indeed to all legal systems of internal law and to international law. Moreover—and this is again a general principle of law—any

work; *Berschader v Russia* (Award) SCC No 080/2004, IIC 314 (SCC, 2006, Sjövall C, Lebedev & Weiler (dissenting)); *ICS Inspection and Control Services Ltd v Argentina* (Decision on Jurisdiction) PCA Case No 2010-9, IIC 528 (2012, Dupuy P, Lalonde & Torres Bernárdez) para 282; *Daimler Financial Services AG v Argentina* (Award) ICSID Case No ARB/05/1, IIC 560 (2012, Dupuy P, Bello Janeiro & Brower) para 169–170; *Kiliç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v Turkmenistan* (Award) ICISD Case No ARB/10/1, IIC 595 (2013, Rowley P, Sands & Park (dissenting)) para 7.3.9.

[542] Draft CAFTA dated 28 January 2004 <http://www.sice.oas.org/TPD/USA_CAFTA/Jan28draft/Chap10_e.pdf>(last accessed 18 April 2016), art 10.4(2)

[543] New Zealand–China Free Trade Agreement (signed 7 April 2008, entered into force 1 October 2008) [2008] NZTS 19, art 139(2).

[544] ICSID Convention, art 25(1).

[545] ICSID, 'Report of the Executive Directors on the Convention' (1965) para 23.

convention, including conventions to arbitrate, should be construed in good faith, that is to say by taking into account the consequences of the commitments the parties may be considered as having reasonably and legitimately envisaged.[546]

7.332 The agreement to arbitrate is autonomous. It is separable from the substantive obligations to which it applies. This is a general principle of international arbitration law. As it was put in *Elf Aquitaine v NIOC:*

> The autonomy of the arbitration clause is a principle of international law that has been consistently applied in decisions rendered in international arbitrations, in the writings of the most qualified publicists on international arbitration, in arbitration regulations adopted by international organizations and in treaties.[547]

This principle is not limited to commercial arbitration. It applies also to investment arbitration.[548]

7.333 It is also a basic principle of international law that the existence and application of a substantive obligation is a separate question to the conferral of jurisdiction upon an international tribunal.[549] Whatever the source or nature of the substantive obligation, 'jurisdiction always depends upon consent.'[550]

7.334 The consent of the parties to arbitrate is contained in the dispute resolution clause in the basic treaty. It is by means of that arbitration agreement that the parties confer jurisdiction upon the tribunal.

7.335 The parties may expressly incorporate into that agreement other provisions by reference, provided that the reference is such as to make the other clause part of the arbitration agreement.[551] Thus an arbitration agreement in a comparator treaty may be applied to the basic treaty by means of a provision that expressly so states. An example of this approach is art 3(3) of the UK model BIT.[552]

7.336 In the absence of such an express incorporation, the tribunal must proceed to determine its jurisdiction by reference to the scope and application of the arbitration agreement pursuant to which it has been constituted. Where the arbitration agreement refers to a dispute arising 'under the Agreement', it will be called upon to refer to that investment treaty for the purpose of determining the scope *ratione personae, ratione materiae* and *ratione temporis* of the

---

[546] *Amco Asia Corp v Indonesia* (Decision on Jurisdiction) ICSID Case No ARB/81/1, 1 ICSID Rep 389 (1983, Goldman P, Foighel & Rubin) para 14.

[547] *Elf Aquitaine Iran v National Iranian Oil Co* (Preliminary Award) XI YB Comm Arb 97 (14 January 1982) para 256; see also *TOPCO v Libya* (1975) 55 ILR 354, 407–12, paras 16–8; S Schwebel, *International Arbitration: Three Salient Problems* (1987) part I.

[548] Schreuer 260, para 25.622; *Duke Energy International Peru Investments No 1 Ltd v Peru* (Decision on Annulment) ICSID Case No ARB/03/28, IIC 483 (2011, McLachlan P, Hascher & Tomka) para 131.

[549] *East Timor (Portugal v Australia)* [1995] ICJ Rep 90.

[550] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)* (Decision on Jurisdiction and Admissibility) [2006] ICJ Rep 6, 52, para 125.

[551] UNCITRAL Model Law on International Commercial Arbitration, art 7(6) (Option 1).

[552] Appendix 4 below. In *Garanti Koza LLP v Turkmenistan* (Decision on Jurisdiction) ICSID Case No ARB/11/20, IIC 601 (2013, Townsend P, Lambrou & Boisson de Chazournes (dissenting)), the basic treaty contained a consent to arbitration with the possibility of ICSID arbitration by agreement, failing which ad hoc arbitration would apply. The Tribunal invoked art 3(3) to enable the claimant to take advantage of the provisions of a comparator treaty referring to ICSID arbitration as the default dispute mechanism.

consent to arbitrate. These provisions form the outer boundaries of the jurisdiction of the tribunal.

7.337 A person that does not meet the criteria under the BIT to be an investor cannot become an investor by invoking an MFN provision.[553] The same is true for the scope of investments covered by the treaty *ratione materiae.*[554] Nor can reference to the MFN provision change the application of the basic treaty *ratione temporis,* such that it would be capable of conferring rights in respect of State conduct producing effects prior to the entry into force of the treaty.[555] In each case, it is the basic treaty alone that establishes the scope of the parties' consent to jurisdiction.

7.338 The balance struck by the State Parties to an investment treaty in giving their consent to particular dispute settlement options is often the subject of careful negotiation between the State parties, selecting from a range of different techniques. Absent express provision, it is not to be presumed that this can be disrupted by an investor selecting at will from an assorted menu of other options provided in other treaties, negotiated with other State parties and in other circumstances. It is in any event not possible to imply a hierarchy of favour to dispute settlement provisions. The clauses themselves do not do this and it would be invidious for international tribunals to be finding (in the absence of specific evidence) that host State adjudication of treaty rights was necessarily inferior to international arbitration. The same point could be made with even more force in the case of a comparison between ICSID and other forms of arbitration that the State parties may have specified in particular investment treaties.[556]

7.339 The conclusion is that reference to obligations to other states by means of an MFN clause cannot be used (in the absence of express words of incorporation by reference to the arbitration agreement) to enlarge the jurisdiction of the tribunal from that agreed between the State Parties to the basic treaty. Such an enlargement was contended for in *Plama* and rejected by the Tribunal.[557]

7.340 This leaves an additional question. Where the tribunal has jurisdiction under the basic treaty, may it apply the MFN clause to provide more favourable treatment to the investor in respect of the procedural conditions pursuant to which that jurisdiction may be exercised? This kind of potential engagement of the MFN clause to the dispute resolution provisions of an investment treaty is materially different from its effect on the jurisdiction of the tribunal.

---

[553] *HICEE BV v Slovakia* (Partial Award) PCA Case No 2009-11, IIC 514 (2011, Berman P, Brower & Tomka) para 149; 2015 ILC Report 2015 paras 105 & 166.

[554] *Tecnicas Medioambientales Tecmed SA v Mexico* (Award) ICSID Case No ARB(AF)/00/2, 10 ICSID Rep 134, IIC 247 (ICSID(AF), 2003, Grigera Naón P, Bernal Verea & Fernández Rozas) para 69.

[555] *Société Générale v Dominican Republic* (Decision on Jurisdiction) LCIA Case No UN 7927, IIC 366 (2008, Orrego Vicuña P, Bishop & Cremades) para 41.

[556] The position is different where the States have expressly agreed to apply MFN to the dispute settlement clause, as in art 3(3) of the UK model BIT: *Garanti Koza.*

[557] A similar result (though in each case on different grounds) is reached in three cases construing the effect of an MFN clause on a dispute settlement clause that is expressly limited *ratione materiae* to disputes as to the amount of compensation for expropriation: *Berschader v Russia* (Award); *Renta 4 SVSA v Russia* (Award on Preliminary Objections) SCC No 24/2007, IIC 369 (2009, Paulsson C, Landau & Brower (dissenting)) (operation of MFN clause excluded because expressly limited to FET obligation) and *Austrian Airlines v Slovakia* (Award) IIC 434 (UNCITRAL, 2009, Kaufman-Kohler C, Trapl & Brower (dissenting)) (specific limitation in dispute settlement clause overrides general MFN clause). Contra: *RosInvest Co UK Ltd v Russia* (Award on Jurisdiction) SCC No V 079/2005, IIC 315 (2007, Böckstiegel C, Berman & Steyn).

A number of the arguments of principle that compellingly support the proposition that an MFN clause may not be used to enlarge the jurisdiction of the tribunal do not necessarily apply where the clause is invoked in relation to issues of procedural treatment that do not call into question the tribunal's jurisdiction.

7.341 *Maffezini* and the majority of cases that have followed its approach have concerned the eighteen-month local court resort clause contained in investment treaties concluded by Argentina. A preliminary question in such cases that distinguishes them from the argument raised in *Plama* is the proper characterisation and application of such a clause. There is a substantial body of authority for the proposition that such a clause is an integral part of the conferral of jurisdiction upon the tribunal pursuant to the agreement to arbitrate. This is a view that has been taken by a number of tribunals considering this issue[558] and accords with the approach taken by the International Court in the construction of consent to its own jurisdiction.[559] The alternative view, which has also subsequently secured high authority, is that the eighteen-month rule is a procedural pre-condition that is not jurisdictional.[560] In any event, the express requirement of this clause of submission to a 'court of competent jurisdiction' calls for close attention to the evidence as to whether such a court was indeed available for the resolution of the dispute. The local court must have jurisdiction *ratione personae, materiae* and *temporis* to adjudicate the claimant's claim and be reasonably available to do so within the prescribed time. If that were not the case, the conditions inherent in the clause could not operate to preclude earlier submission to arbitration.[561] It is therefore important not to overstate the wider significance of a body of case law provoked by a clause that may not in fact have been properly engaged in the proceedings in which it was invoked or whose application to the fundamental issue of jurisdiction is contestable.

7.342 Provided the tribunal is properly endowed with the jurisdiction according to the scope of the arbitration agreement in the basic treaty, construed according to its parameters, it may be possible for the claimant to invoke the MFN clause in order to invoke procedural advantages accorded to more favoured investors by reference to other treaties, unless the parties have expressly excluded the MFN clause altogether from applying to the dispute resolution provisions.

3. An Approach to the Determination of Contested Rights

7.343 In the light of the foregoing review of both the basis and character of treatment obligations in Section 1 of this chapter, and the consideration of the modern application of the rights in investment arbitral awards in Section 2, it is now possible to summarise the results of the enquiry. It is important to be clear about the function of the conclusions set out below. They are not intended to form a prescriptive set of rules. One must bear in mind that States have designedly chosen to use open-textured language in their treaty confirmations of investor protection. It may be easier to reach agreement on general language. Particular prescriptions may only serve to expose differences between the parties and their legal systems, rather

[558] *Wintershall Aktiengesellschaft* para 143; *ICS Inspection and Control Services Ltd* para 362.
[559] *Armed Activities on the Territory of the Congo (New Application: 2002)* para 88.
[560] *BG Group plc v Argentina* 134 S Ct 1198 (2014).
[561] *Urbaser SA v Argentina* (Decision on Jurisdiction) ICSID Case No ARB/07/26 (2012, Bucher P, Martinez-Fraga & McLachlan).