

National Treatment and Most Favoured Nation Treatment

International Institute for Sustainable Development

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National Treatment (NT) and Most Favoured Nation (MFN) Treatment: Overview of discussion

- I. Introduction
- II. Typical post-establishment NT and MFN: language and meaning
- III. Extending NT and MFN to pre-establishment
- IV. MFN and the relationship to other treaties, including investment treaties

- Origin in trade law
- Goal of promoting non-discrimination and a level playing field between foreign and domestic investors
- No customary international law obligation on MFN and NT
- Most investment treaties include such provisions, but not all
- Different approaches regarding pre-establishment and post-establishment NT and MFN

EXAMPLE OF POST ESTABLISHMENT NT and MFN

Article 3 Hungary – Ukraine BIT



- 1. Each Contracting Party shall in its territory accord investments and returns of investors of the other Contracting Party treatment which is ... not less favourable than that which it accords to investments and returns of its own investors or to investments and returns of investors of any third State
- 2. Each Contracting Party shall in its territory accord to investors of the other Contracting Party, as regards management, maintenance, use, enjoyment or disposal of their investment, treatment which is ... not less favourable than that which it accords to its own investors or of any third State,

EXAMPLE OF LIMITED NATIONAL TREATMENT:

Article III Russia – Canada BIT:



- (2) Each Contracting Party shall grant to investments or returns of investors of the other Contracting Party in its own territory treatment no less favourable than that which it grants to investments or returns of investors of any third State.
- (3) Each Contracting Party shall grant investors of the other Contracting Party in its territory, as regards their *management, use, enjoyment or disposal* of their investments or investors of any third State.
- (4) In addition to the provisions of paragraphs (2) and (3) of this Article, each Contracting Party shall, to the extent possible and *in accordance with its laws and regulations*, grant to investments or returns of investors of the other Contracting Party a treatment no less favourable than that it grants to investments or returns of its own investors.

- NT and MFN are comparisons, not absolute levels of treatment
- But: Who do we compare and when?
- Use of “in like circumstances” gives some indication
- Similar question arises in the trade field: ‘Like’ products v. investments ‘in like circumstances’: Should the comparison go beyond competitive considerations?
- Example: Occidental v Ecuador regarding VAT: comparing flower, mining and seafood exporters to oil exporters

“In Like Circumstances”

ARTICLE I Definitions

(f) "nondiscriminatory" treatment means treatment that is at least as favorable as the better of national treatment or most-favored nation treatment;

(g) "national treatment" means treatment that is at least as favorable as the most favorable treatment accorded by a Party to companies or nationals of that Party *in like circumstances*;

(h) "most-favored nation treatment" means treatment that is at least as favorable as that accorded by a Party to companies and nationals of third parties *in like circumstances*;

ARTICLE II Treatment of Investment

1. Each Party shall permit, in accordance with its relevant laws and regulations, and treat investment and associated activities on a nondiscriminatory basis, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Annex to this Treaty.

III. Pre-establishment rights

Typical pre-establishment NT and MFN language

*“Each Party shall accord to investors of another Party treatment no less favorable than that it accords, [in like circumstances], to its own investors or investors of another state with respect to **the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.**”*

Consequences of inclusion of liberalization commitments in treaties

- Foreign investors can invest on same terms as domestic investors
- Inclusion in treaties “locks liberalization in”
- Penalties for any changes:
- Impact of MFN on this area not yet tested

Investment Liberalization: Questions governments should ask

- Do you want to lock in liberalization or do you want to decide unilaterally and leave space for changes?
- What sectors do you want to liberalize?
- What sectors do you want to protect?
- What other types of measures do you want to protect?

Setting limits to investment liberalization in treaties

Negative list / top-down approach:
Coverage of all sectors and laws
except:

List of excluded sectors,
sub sectors

List of excluded measures
for included sectors

Positive list / Bottom-up approach:
Coverage only of listed sectors
(GATS)

List of included sectors

List of excluded sub-sectors
List of excluded measures
for included sectors

IV. MFN and the relationship to other treaties, including investment treaties

- Today: About 3000 bilateral and regional investment treaties or FTAs with investment chapters
- How do these 3000 agreements inter-act??
- Can the MFN clause lead to the import of substantive protection provisions from other IIAs?
- Can the MFN clause lead to the import of procedural provisions from other IIAs?
- Can it undo the benefits of modern clauses and protections of policy space?

EXAMPLES:

- **Bayindir v Pakistan (2005):** Importation of FET clause from Pakistan-CH BIT into Pakistan-Turkey BIT.
- **White Industries v India (2012):** Importation of ‘effective means clause’ to assert claims and enforce rights from India-Kuwait BIT into India-Australia BIT

EXAMPLE: Cases against Argentina

Spain-Argentina BIT: 18-months waiting period to go to domestic courts before commencing arbitration

- **Maffezini v Spain (2000); ... ; Hochtief v. Argentina (2011) ...** → *Jurisdiction upheld*
- **Wintershall (2008); ... ; Daimler v Argentina (2012)**
→ *Jurisdiction denied*

EXAMPLE: Importing ICSID jurisdiction

Garanti Koza LLP v. Turkmenistan (2013)

Addressing the MFN issue:

EXAMPLE: Footnote to Article 6 ACIA on MFN



For greater certainty

(a) this Article shall not apply to investor-State dispute settlement procedures that are available in other agreements to which Member States are party; and

(b) in relation to investments falling within the scope of this Agreement, any preferential treatment granted by a Member State to investors of any other Member State or a non-Member State and to their investments, under any existing or future agreements or arrangements to which a Member State is a party shall be extended on a most-favoured-nation basis to all Member States.

Addressing the MFN Issue by excluding treatment under past (investment) agreements from the scope of the MFN clause



Annex III to the 2004 Canadian Model Investment Agreement

1. Article 4 (MFN) shall not apply to treatment accorded under all bilateral or multilateral international agreements in force or signed prior to the date of entry into force of this Agreement.

Excluding treatment under past and future agreements from the scope of the MFN clause:

SADC Model BIT template

4.4. Notwithstanding any other provision of this Agreement, the provisions of this Article shall not apply to concessions, advantages, exemptions or other measures that may result from:

(a) a bilateral investment treaty or free trade agreement [that entered into force prior to this agreement]; or

(b) any multilateral or regional agreement relating to investment or economic integration in which a State Party is participating or may participate.

THANK YOU!