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# The boundaries of MFN treatment: The Renta tribunal adds its melody to the cacophony

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When does a most-favoured-nation (MFN) treatment clause in an investment treaty confer jurisdiction on an investor-state arbitration tribunal? Most readers will be aware that in a series of decisions investment treaty tribunals have given very different responses to this question. On the one hand, a line of decisions suggests that, unless there is a express reference, an MFN treatment clause does not apply to dispute settlement. On the other hand, another line of decisions has approached the question with the opposite interpretative approach— a general MFN treatment clause applies to all forms of treatment—substantive and procedural.

The latest addition to this back and forth volley of decisions is the Award on Preliminary Objections of 20 March 2008 in *Renta 4 S.V.S.A., et al. v. The Russian Federation* (*Renta*). Although the *Renta* tribunal ultimately found that it had jurisdiction with respect to an expropriation claim, notwithstanding a Soviet-era restrictive investor-state arbitration clause, the Award and Separate Opinion also contain a rich discussion on the use of MFN treatment clauses to confer arbitral jurisdiction.

In *Renta*, seven Spanish entities claimed that their investments in Yukos American Depository Receipts were expropriated as a result of measures taken by the Russian government against the Yukos Oil Company. The tribunal (Charles Brower, Toby Landau and Jan Paulsson) found that it had jurisdiction under Art. 10 of the Spain/USSR BIT, which provides jurisdiction "relating to the amount or method of payment of the compensation due under Article 6 [expropriation]". This finding is of interest in itself because the tribunal distinguished earlier decisions that had suggested that where the arbitration clause refers only to disputes relating to the amount of compensation, arbitral jurisdiction does not extend to whether an expropriation had occurred. The *Renta* tribunal rejected this approach and rightly held that Art. 10 of the BIT "entrains the power to determine whether there has been a compensable event in the first place." (para. 39). This ensures that the host state cannot withhold the substantive predicate of arbitral jurisdiction—whether there was an expropriation entitling compensation.

Although the expropriation analysis is illuminating and the Award and Separate Opinion are rich and instructive on a variety of investment treaty issues (including the scope of covered investors and investments), the tribunal's discussion of MFN treatment clauses may be of the most general interest. The Claimants argued that if their case could not be brought before the tribunal because of

the restrictive conditions in Art. 10 of the BIT, they could claim the benefit of the more liberal arbitration clause in the Denmark-Russia BIT by virtue of the MFN treatment clause in Spain-USSR BIT. After treating some preliminary issues, the tribunal addressed the question of whether access to arbitration may in principle fall within the scope of MFN. In answering in the affirmative it made a number of important points. It highlighted that, given the diversity of decisions of uneven persuasiveness and relevance, there is no *jurisprudence constante* (para. 94). Relying on the ICJ's decision in *Ambietlos*, the tribunal reasoned that MFN treatment is not limited to primary or substantive obligations and that there is "no textual basis or legal rule to say that "treatment" does not encompass the host state's acceptance of international arbitration." (para. 101) The tribunal then turned to the MFN treatment clause in the Spain-USSR BIT. That clause was awkwardly drafted. Although it referred to MFN treatment, it did so in the context of a cross-reference to fair and equitable treatment. In the end the majority of the tribunal found that MFN treatment extended only to fair and equitable treatment and not to other forms of treatment including the more liberal arbitration clause in the Denmark-Russia Treaty. In his Separate Opinion, Charles Brower reasoned that the MFN treatment clause was wider and included treatment more generally. Further, he reasoned that the Danish treaty's grant of across-the-board treaty dispute arbitration is a form of fair and equitable treatment granted to third party investors (para. 22).

Since the Renta tribunal was not interpreting a general MFN treatment clause and its observations on MFN clauses are strictly *obiter dicta*, the award does not firmly plant us in a new era of *jurisprudence constante*. However, after the MFN reasoning in the December 2008 Award in *Wintershall Aktiengesellschaft v. The Argentine Republic* (denying the application of MFN to dispute resolution), it is encouraging to have a decision reaffirming that there is no principled reason to distinguish between substantive, jurisdiction or procedural treatment and apply restrictive presumptions about the scope of MFN treatment clauses.

That said, and despite the very careful attention to treaty text by the *Renta* tribunal, I question the tribunal's statement that: "Whether MFN treatment is stated in the relevant BIT to relate to investors rather than investments is in principle of no moment." (para .101). As noted by the *RosInvestCo UK Ltd. v. The Russian Federation* tribunal, arbitration is a procedural right of an investor, not an investment. A right to invoke arbitration is a personal right, a right that must be held by an investor not an investment. In discussing this issue the *Renta* tribunal's reasoning is rather cryptic when it states that the investor's gateway to MFN treatment is the status of the protected investor and the ownership of a qualifying investment. Yet this seems to beg the question of whether MFN applies in the first place to the investor. The tribunal's reasoning on this point would have benefited from the more stringent textual parsing that it applied to other issues. As it now stands, there is no *jurisprudence constante* on the significance of whether MFN treatment applies to investor, investment or both and this issue will need to be addressed in detail by future tribunals.

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