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Cart Before the Horse: Can MFN Clauses Expand the Key Definitions in Investment Treaties?

Louise Barber (Herbert Smith Freehills) · Tuesday, September 2nd, 2014 · Herbert Smith Freehills

The debate regarding the extent to which most favoured nation ('MFN') clauses in bilateral investment treaties ('BITs') can expand the scope of application of such treaties is a well-established and evolving dialogue in investment treaty jurisprudence. However, while the issues around the extension of substantive and procedural protections in BITs have received considerable attention, the nuance around whether MFN clauses can expand the scope of application of BITs has been less closely examined.

MFN clauses are typically invoked in order to import a more favourable substantive protection, such as a broader definition of 'expropriation' or 'compensation', or more favourable procedural conditions such as bypassing a requirement to submit disputes to local courts prior to commencing arbitration. But the question of whether fundamental jurisdictional criteria like the definitions of 'investor' and 'investment' can be the subject of an MFN clause has not received the same degree of attention. Where a treaty definition contains criteria which go beyond the baseline common to most BITs, such as a requirement for an investor to have substantial business activities in its state of incorporation or a requirement for a particular degree or form of control over an investment, it could be of great assistance to a claimant to be able to rely on a less onerous definition imported from another treaty using an MFN clause.

Three investment treaty cases published over the last 18 months have shed some light on how tribunals have approached these issues. As set out below, these tribunals all considered that key definitions in the BITs should be approached as 'gateway' jurisdictional issues which determine whether the relevant BIT is applicable in the first instance. Only once these definitions have been satisfied can the protections of the BIT, including the MFN clause, be invoked.

Vanessa Ventures Ltd v. Venezuela

In *Vanessa Ventures Ltd v. Venezuela* (ICSID Case No ARB(AF)/04/6, Award, 16 January 2013), the claimant, a Canadian mining company, sought to rely on an MFN clause to expand the definition of 'investment' under the Canada-Venezuela BIT. The claimant had entered into a concession agreement with a Venezuelan Government agency in relation to the exploitation of a copper mine.

When the claimant brought an arbitration alleging expropriation, Venezuela asserted that the claimant had no qualifying investment for the purposes of the BIT, as it did not comply with the

requirement that the investment be made in accordance with the law of the host state. The investment had been purchased by the claimant from a former owner in a manner that was alleged to be in breach of Venezuelan law. The claimant sought to use the MFN clause in the Canada-Venezuela BIT to import the more favourable definition of 'investment' in the Venezuela-UK BIT, which did not include such a legality requirement.

The Tribunal rejected this proposition outright, holding that MFN treatment was only available to those investments which first qualified for protection under the BIT. In rejecting the claimant's argument, the tribunal stated (at paragraph 133) that:

> 'The benefit of the MFN provision in Article III of the Canada-Venezuela BIT can only be asserted in respect of investments that are within the scope of Article I(f) of the Canada-Venezuela BIT to begin with. The MFN clause cannot be used to expand the category of investments to which the Canada-Venezuela BIT applies.'

Accordingly, the definition of investment remained unaffected by the MFN clause.

This echoes the decision of several years earlier in Société Générale v. Dominican Republic (LCIA Case No UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008), in which a tribunal rejected a similar attempt by a claimant to expand the definition of 'investment' through the MFN clause in the France-Dominican Republic BIT. In that case, the Dominican Republic argued that the claimant's indirect shareholding did not qualify as an investment for the purposes of the BIT. The claimant sought to invoke the MFN clause in the BIT to allow it to rely on the definition of 'investment' in the Central American Free Trade Agreement – Dominican Republic, to which the respondent was also a party.

The tribunal in that case declined to make reference to other treaties, partly on the basis that the definition of 'investment' was not, in any event, exhaustive. However, on the ability of the MFN clause to have the effect desired by the claimant, the tribunal observed at paragraph 40:

> 'Each treaty defines what it considers a protected investment and who is entitled to that protection, and definitions can change from treaty to treaty. In this situation, resort to the specific text of the MFN Clause is unnecessary because it applies only to the treatment accorded to such defined investment, but not to the definition of 'investment' itself.'

Metal-Tech Ltd. v. Republic of Uzbekistan

The case of *Metal-Tech Ltd. v. Republic of Uzbekistan* (ICSID Case No. ARB/10/3, Award, 4 October 2013) involved a similar attempt to circumvent an express legality requirement in the treaty definition of 'investment'. The claimant was an Israeli manufacturer of metal products which had entered into a joint venture with two Uzbek Government-owned entities for the purpose of building and operating a plant for the production of molybdenum products. When a claim was brought by the claimant under the Israel-Uzbekistan BIT in connection with the conduct of the Uzbek state towards the joint venture, Uzbekistan sought to deny the existence of a qualifying investment. This was on the basis that the investment was alleged to have been tainted by illegality

and thus to fall outside the definition of 'investment' which explicitly required that an investment be implemented in accordance with the law. In response, the claimant attempted to use the MFN clause to import the definition of 'investment' in the Greece-Uzbekistan BIT, which contained no such legality clause. In particular, the claimant noted that Article 7(c) of the Israel-Uzbekistan expressly stated that the MFN clause did not apply to extend the benefit of (among other things) the definitions of 'investment' in treaties entered into by Israel prior to 1 January 1992. By implication, the claimant argued, the definition of 'investment' in treaties from after that point ought to fall within the scope of the MFN clause.

The tribunal did not agree. It observed that the MFN clause is constrained by the use of the defined terms of 'investments' and 'investors' in the clause itself, so that its application is necessarily limited by the boundaries of these definitions. In other words (at paragraph 145):

> 'one must fall within the scope of the treaty, which is in particular circumscribed by the definition of investment and investors, to be entitled to invoke the treaty protections, of which MFN treatment forms part. Or, in fewer words, one must be under the treaty to claim through the treaty.'

The tribunal disagreed with the claimant's reading of Article 7(c). It viewed the reference to the definition of 'investment' as part of the repatriation provisions of the BIT which were also referenced in that Article, rather than as a standalone carve-out to the MFN clause from which it could be inferred that other investment definitions should be included. Rather, any ability to avoid the clear words of the definition of 'investment', including its legality requirement, would have to be stated in no uncertain terms.

Moreover, the tribunal considered that the MFN clause was concerned with ensuring the most favourable treatment, whereas '[a] definition is not a form of treatment; it simply establishes the baseline of what is entitled to MFN treatment' (at paragraph 153).

Rafat Ali Rizvi v. Republic of Indonesia

Finally, a related case, though with a slightly different emphasis, is *Rafat Ali Rizvi v. Republic of Indonesia* (ICSID Case No. ARB/11/13, Award on Jurisdiction, 16 July 2013). In this case, the claimant sought to rely on the MFN clause of the UK-Indonesia BIT to take advantage of more favourable requirements regarding the admission of investments. The claimant was a British national who had invested in several Indonesian banks through the purchase of shares. Indonesia relied on Article 2(1) of the BIT (entitled 'Scope of the Agreement') which limited its application to investments which had been 'granted admission' in accordance with the foreign investment law of Indonesia, arguing that the claimant's investment had not complied with this requirement. In response, the claimant argued that the MFN clause in the BIT entitled it to the application of the less stringent admission requirements found in a series of other BITs entered into by Indonesia.

In contrast to the cases discussed above, the claimant accepted that the definition of 'investment' did not fall within the scope of the MFN clause, but sought to distinguish the admission requirements as different from, and more substantive than, the 'gateway' issue of the treaty definitions. On this view, the point in contention (and to which the MFN clause was to be applied) was not whether there was an investment, but whether the investment was valid. In particular, the claimant asserted that the admission criteria should have been applied so as to treat the investment

no less favourably than the investments of investors from other treaty parties, particularly those in which an admission standard is not applied.

However, the tribunal did not share this view. Article 2(1) was held to establish a preliminary jurisdictional issue, in much the same way as the definition of 'investment', which set out the conditions that had to be fulfilled in order for the BIT to apply to an investment. Although it was not a definitional issue, it nevertheless determined 'a condition of access to treaty protection … that determines the scope, ratione materiae, of the treat.' (at paragraph 224). Therefore, the admission criteria had to be satisfied as a prerequisite to the protections in the BIT being triggered, including the MFN clause. As such, the MFN clause could not be invoked to overcome the fact that the investment had not been granted admission in accordance with the foreign investment law.

Conclusion

Accordingly, tribunals appear to have based their reasoning with regard to the application of MFN clauses on whether the provision for which a more favourable standard is sought can be considered a precondition to the BIT being applied. According to this limited, but consistent, line of authority, MFN clauses can only be of assistance where it has first been established that the BIT applies. However, only a narrow range of definitions has been considered to date and it will be of interest to observe the approach of future tribunals as they are faced with the application of MFN clauses to other, perhaps more challenging, jurisdictional issues.

The views expressed are those of the author.

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