

BIICL - INVESTMENT TREATY FORUM

*Europe as an Investment Treaty Actor*

*The Substance of European Investment Treaties in Global Context*

Stockholm 12 June 2015

## The European Most-Favoured-Nation Treatment Clause

*Freya Baetens*

*Associate Professor of Law, Leiden University;*

*Associate Lawyer, VVGB (Brussels Bar)*



Universiteit Leiden

The Netherlands

# Overview

1. Contextual analysis of MFN clauses in existing IIAs
2. Specific points of debate concerning 'modern' MFN clauses
3. Proposal for a European MFN clause

# Contextual analysis of MFN clauses

EU member states' investment policy, e.g.,

*Each Contracting Party shall apply to investments made in its territory by investors of the other Contracting Party a treatment which is no less favourable than that accorded to investments made by its own investors or by investors of third States, whichever is the more favourable.*

Sweden Model BIT (2002)

# Contextual analysis of MFN clauses

Investment policy of Contracting Parties, e.g.,

*Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.*

Article 41(1) Canada Model BIT

# Contextual analysis of MFN clauses

*For greater certainty, the treatment accorded by a Party under this Article means, with respect to a sub-national government, treatment accorded, in like circumstances, by that sub-national government to investors, and to investments of investors, of a non-Party.*

Article 41(3) Canada Model BIT)

- pre-establishment phase?
- dispute settlement?
- exceptions and exclusions?

# Contextual analysis of MFN clauses

EU investment policy, e.g.,

*Each Party shall accord to investors of the other Party and to covered investments, treatment no less favourable than the treatment it accords in like situations, to investors and to their investments of any third country with respect to the establishment, acquisition, expansion, conduct, the operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory.*

Article X.8(1) CETA

# Contextual analysis of MFN clauses

EU investment policy, e.g.,

*For greater certainty, the treatment accorded by a Party under 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 European Member State, treatment accorded, in like situations, by that government to investors [EU: in its territory], and to investments of such investors, of any third country.*

Article X.8(2) CETA

# Contextual analysis of MFN clauses

EU investment policy, e.g.,

*For greater certainty, the “treatment” referred to in Paragraph 1 and 2 does not include investor-to-state dispute settlement procedures provided for in other international investment treaties and other trade agreements, [....]*

Article X.8(4) CETA



# Specific points of debate

1. Exceptions to MFN treatment
2. Treaty-shopping and cherry-picking
3. MFN and dispute settlement

# Proposal for a European MFN clause

*1. Each Party shall accord to covered investors of the other Party and their investments treatment no less favourable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory. The 'treatment' referred to in this Article does not encompass the dispute resolution mechanisms in other international investment treaties and trade agreements.*

# Proposal for a European MFN clause

*2. For the purpose of this Article, investors or investments ‘in like circumstances’ are those that are located in the same area as where the measure is enacted, which may be only part of the territory of the Contracting Party. Foreign investors in other parts cannot rely upon this clause to obtain similar treatment.*

# Proposal for a European MFN clause

*3. The present Article shall not be construed so as to preclude the adoption or enforcement by a Contracting Party of measures which are necessary to protect national security, public security or public order, nor shall these provisions be construed to oblige one Contracting Party to extend to the nationals or companies of the other the benefit of any treatment, preference or privilege resulting from:*

*(a) any existing or future customs, economic or monetary union, a common market or a free trade area or similar international agreement  
[...]*

# Proposal for a European MFN clause

*(b) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation;*

*(c) any requirements resulting from an EU Member State's membership of the European Union including measures prohibiting, restricting or limiting the movement of capital to or from any third country.*

# Proposal for a European MFN clause

4. *The present Article shall not apply to any current or future foreign aid programme to promote economic development, whether under a bilateral agreement or pursuant to a multilateral arrangement or agreement, such as the OECD Agreement on Export Credits.*

5. *Investors covered by this agreement cannot rely on the present Article to obtain treatment granted under agreements of individual EU Member States.*

# Proposal for a European MFN clause

6. [...] a Party may require an investor of the other Party, or its covered investment, to provide routine information concerning that investment solely for informational or statistical purposes, provided that such requests are reasonable and not unduly burdensome. The Party shall protect any confidential information from any disclosure that would prejudice the competitive position of the investor or the covered investment. Nothing in this paragraph shall be construed to prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its laws.