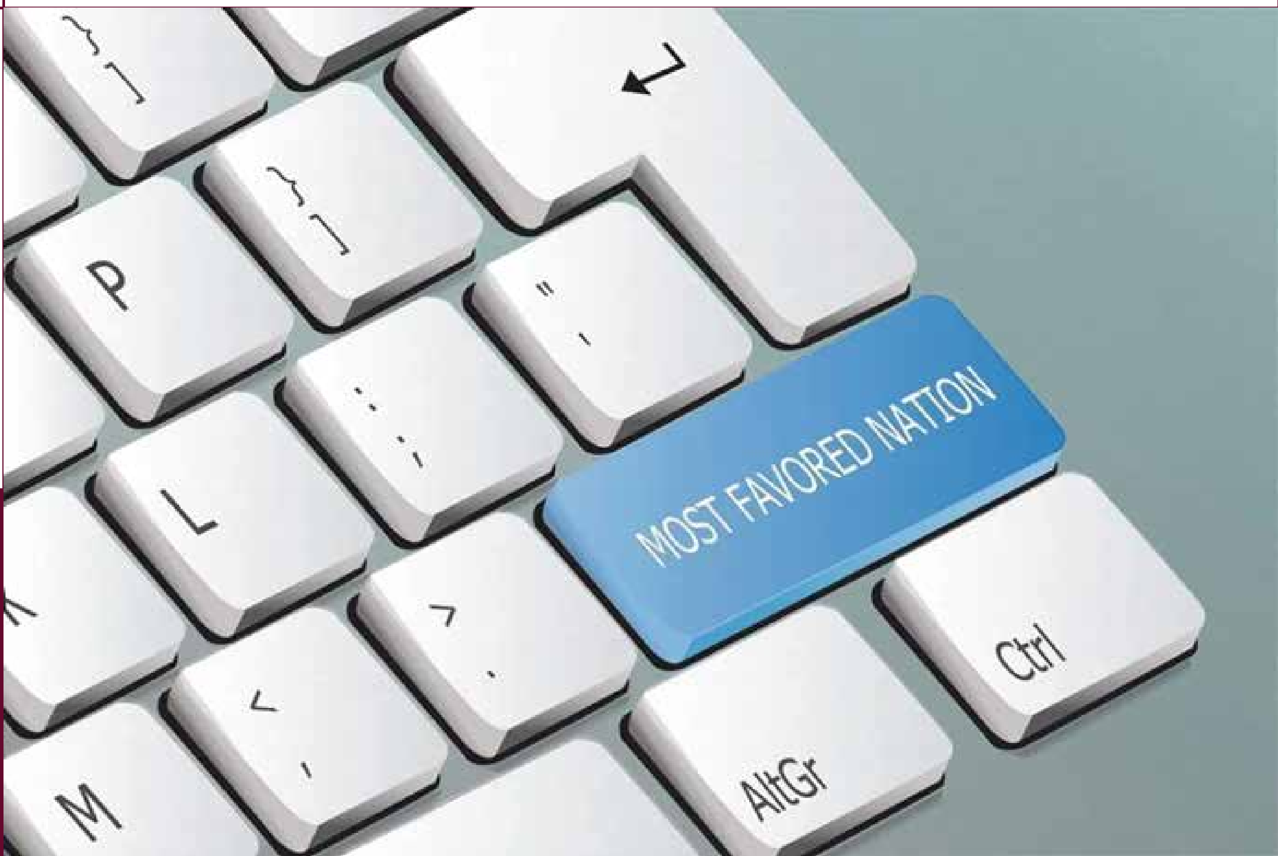
Cristal Advocates

Most Favoured Nation Clauses in Investment and Tax Treaties

An Overview



Cristal Knowledge Series
July 2024

1. Introduction

Given the prolonged timelines for recouping investments sunk into capital-intensive ventures, along with the perceived high risks of investing in developing countries, a lot of such foreign investment into Uganda is channelled through entities domiciled in jurisdictions with which it either has a Double Taxation Agreement (DTA), a Bilateral Investment Treaty (BIT), or both.

One of the reasons for this approach is the view that such agreements not only enhance investment protection but also potentially optimize economic returns for investors. Focussing on only one aspect of these agreements, this article delves into a high-level discussion of the implications, if any, of Most Favoured Nation (MFN) clauses found in BITs and DTAs.

2. MFN Clauses

While MFN clauses in BITs and DTAs may be worded variously, they broadly represent a commitment by countries party to such agreements to treat each other's foreign investors equally, providing them with treatment comparable to what they have offered to investors from other countries in similar circumstances.

However, if MFN clauses are not well drafted clearly delineating their scope, countries could encounter challenges. Investors from one treaty jurisdiction might use these MFN clauses to claim preferential benefits that investors from other countries receive under their agreements with the host country. For example, an investor from Country A could seek to claim a lower rate of taxation that an investor from Country B is enjoying as a result of a bilateral agreement with the host country. This could lead to unintended advantages for some investors and complicate the host country's legal and regulatory environment.

3. Bilateral Investment Treaties

Uganda has BITs with the Netherlands, France, Denmark, Switzerland, and Germany. Although BITs with China, Belgium, Zimbabwe, Nigeria, Cuba, Eritrea, South Africa, and Egypt, are signed, they are not yet in force. All these agreements incorporate within them a most favoured nation clause.

The MFN clauses in these agreements are worded differently in some instances only providing the MFN treatment or combining it with the obligation to provide national treatment (NT). The MFN treatment requires a host country to treat investors from a treaty partner at least as favourably as it treats investors from any third country. Essentially, it ensures that investors from the treaty partner receive the best treatment that the host country offers to any foreign investor.

The National treatment obligation goes a step further requiring the host country to treat foreign investors no less favourably than it treats its own domestic investors. It aims to eliminate any discrimination between foreign and local investors, ensuring that foreign investors enjoy the same rights, privileges, and protections as domestic investors.

Often, BITs exclude the application of MFN and NT clauses to tax matters, and this is consistently the approach taken with all of Uganda's BITs. Taxation is a critical aspect of national sovereignty, allowing countries to design tax policies tailored to their economic and social objectives. By excluding tax matters from MFN clauses, countries retain the flexibility to implement and adjust tax regimes without being constrained by the need to offer identical terms to all foreign investors.

4. Double Tax Treaties

Unlike trade and investment agreements, where MFN clauses are customary, they are included in DTAs only as exceptions if countries deem them appropriate. These clauses allow countries to provide equal treatment to their respective taxpayers on specific income items—such as technical fees, dividends, interest, and royalties—similar to the rates offered to third parties.

Without careful consideration, a situation may arise where a treaty state, upon entering an agreement with a third state offering more favourable tax treatment, must also extend the same benefits to investors under an existing DTA with an MFN clause.

Therefore, while an MFN clause can enhance a country's leverage in future negotiations by demonstrating the benefits of reduced tax rates to investors, the potential costs can be substantial. This is especially true if the same reduced rates can be extended to parties not originally involved in the specific agreement, triggered by the MFN clause.

Uganda has DTAs with the Netherlands, UK, Denmark, India, Italy, Mauritius, Norway, South Africa, Zambia, and Belgium but none of these has a most favoured nation clause.

5. Conclusion

As evident from the preceding discussion, Uganda has approached MFN clauses cautiously. While traditionally including them in investment and trade agreements, Uganda has hesitated to incorporate them into tax treaties. This approach preserves fiscal autonomy, allowing tax policies to be tailored to domestic revenue needs and economic priorities without the obligation to offer identical benefits to all treaty partners.

Contacts for this Publication

Denis Yekoyasi Kakembo

Denis is the Managing Partner of the Firm. He is qualified both as a Lawyer and Chartered Accountant with UK training and vast experience serving local, regional and international companies in Sub Saharan Africa. He is recognized as a notable corporate and commercial law practitioner in Uganda.

Before joining Cristal Advocates, Denis spent nearly 10 years at Deloitte, an international professional services firm, where he started his career and rose to senior roles. While with Deloitte, he worked and lived in Uganda, Kenya, Tanzania and the United Kingdom.

Education

a) Master of Laws in Petroleum Taxation and Finance with distinction - University of Dundee, UK
b) Certified Public Accountant (Uganda) - ICPAU
c) Certified Chartered Accountant (“ACCA”) – ACCA
d) Post Graduate Diploma in Legal Practice - Law Development Center, Uganda
e) Bachelor of Laws degree - Makerere University, Uganda

John Teira

John is a Partner with the firm but presently on sabbatical leave. Before joining Cristal, he worked as a Private Secretary to the President of Uganda. Prior to this role, he had worked with Shonubi Musoke & Company Advocates and Post Bank Uganda Limited.

John is presently a Member of Parliament representing Bugabula County North in Kamuli District in Uganda National Assembly.

Education

a) Post Graduate Diploma in Legal Practice - Law Development Centre, Uganda
b) Bachelor of Laws (Honours) - Makerere University, Uganda
c) Diploma in Law (First Class) - Law Development Centre, Uganda
d) Basic Philosophy of Public Service Administrative Communication - Uganda Management Institute, Uganda

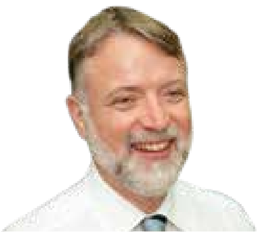
Dickens Asiimwe Katta

Dickens is a Partner at Firm where he also leads the oil and gas practice. Before joining Cristal Advocates, Dicken had served as Company Secretary of the Uganda Refinery Holding Company Limited (URHC) and the Uganda National Oil Company (UNOC) where he played key role in its formation.

Prior to joining the UNOC, Dickens had spent five years as Legal Counsel at the Petroleum Directorate of the Ministry of Energy and Mineral Development, where he evaluated several oil and gas transactions, negotiated contracts, and participated in the preparation of Uganda’s oil laws and regulations.

Education

a) Master of Laws in Petroleum Law and Policy with merit - University of Dundee, UK
b) Post Graduate Diploma in Legal Practice - Law Development Center, Uganda
e) Bachelor of Laws degree - Makerere University, Uganda



Bill Page

Bill is a Senior Advisor at the Firm and is a leading global energy and tax practitioner with extensive international experience.

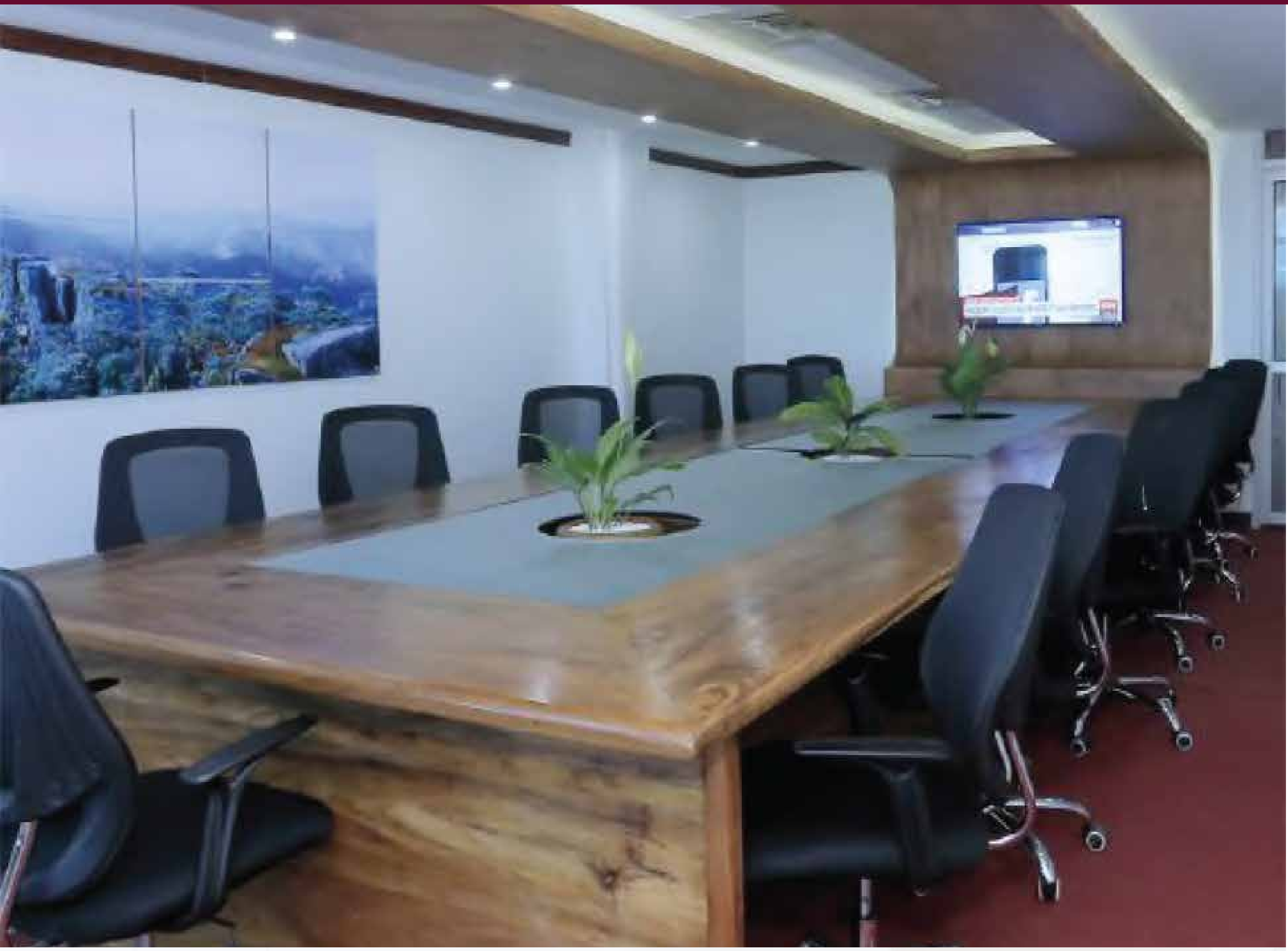
From 1986 to 1998, Bill worked in London with the UK tax authorities and Big Four accounting firms. From 1998 to 2004, he was based in Kazakhstan, working across the Caspian region with Deloitte during a period of major infrastructure development for crude oil production.

From 2004 to 2008, Bill worked in Russia, leading Deloitte's oil and gas industry group and establishing the firm's Sakhalin office. In 2009, he moved to East Africa, where he led Deloitte’s energy and resources industry group in Uganda, Kenya, Tanzania, Rwanda, Ethiopia, and Mozambique. Initially based in Kampala, Uganda, he later relocated to Dar es Salaam, Tanzania.

In 2014, Bill returned to the UK to support Deloitte UK teams on projects investing in Africa and remained a key member of Deloitte UK's energy and resource practice until his retirement in September 2018.

Education

Bill is a graduate of Oxford University and completed his inspectors’ training with the UK Inland Revenue in 1989.



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