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MFN TREATMENT IN MODERN TRADE: CHALLENGES AND OPPORTUNITIES

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ABSTRACT

Following Most-favourable-nation (MFN) treatment clauses were included to international investment agreements (IIAs) with the aim of applying their application in the context of international trade intention of addressing promises given by governments within free trade agreements (FTAs) to provide products and services preferential treatment when it comes to market access. MFN clauses, however, operate differently when it comes to cross-border foreign investment. The MFN treatment clauses were included because generalised due to the fact that national treatment (NT) was not systematically granted. This was done to ensure that foreign investor who is insured would receive the same treatment from host states as a third foreign financier, and they would gain access to NT immediately after the nation would agree to that. These days, the great majority of IIAs have an MFN clause that complements NT, typically in a single sentence.

KEYWORDS: **International Trade, Most-Favoured-Nation, Free Trade Agreements, National Treatment, BITs**

INTRODUCTION

When the first The most-favourable-nation (MFN) treatment paper from the International Investment Agreements Series (IIAs) of UNCTAD was released in 1999, the great majority of IIAs that States had concluded at that time contained a clause stating that the speculators (and/or investments) of the opposite party to the contract were receiving MFN treatment from the parties to the agreements. Nonetheless, significant advancements have transpired since then concerning the practice of treaties as well as the evolution of arbitral interpretations (UNCTAD 1999). MFN treatment began in the context of global trade with the goal of addressing promises given by governments as part of free trade agreements (FTA) to offer rights, even though it is a frequent aspect on international law and the application of treaties favouring products and services regarding access to the market. MFN therapy emerged as the cornerstone of the global trade framework to guarantee that member nations wouldn't treat one another unfairly in trade. National treatment (NT) is the fundamental norm of therapy that States provide to foreign investors under IIAs in order to guarantee them equal competitive possibilities external to the

host State's borders. The IIAs' standard for secondary treatment is MFN therapy. It has typically occurred prior to the host States have granted NT and provides an additional guarantee of impartiality along with impartiality. NT promises were typically not incorporated into the first bilateral investment agreements (BITs) and nations would offer MFN handling of guarantee that if NT was granted under a later accord, it would additionally cover the investors covered by the previous agreements.

Conventional BITs provide investors with their capital NT and MFN and are primarily concerned with protecting investors as well as the money they put in compliance with the rules and the host's rules nation when it has been established. However, certain BITs—and more broadly, agreements pertaining to free trade or economic partnerships—allow for the liberalisation flows of investment as well. In the pre-establishment phase, they accomplish this by giving foreign investors NT and MFN, or the ability to invest on terms that are just as beneficial as things that pertain to citizens of any third country (MFN) or the host nation (NT). The treatment criteria utilised in IIAs to make commitments to are MFN and NT, with the former predominating. Its application is crucial to promoting liberalisation since they lower obstacles and eliminate limitations to the admission of foreign capital. The extent of applicability and the utilisation of exceptions (general or national), incorporating provisions that would safeguard advantageous regional agreements and forestall "free riders" who would attempt to profit from them, would be the main topics of discussion when discussing MFN treatment in IIAs.

Although MFN was widely regarded as uncontroversial, investment officials and negotiators were more worried about how other regulations and standards may be interpreted and applied. The MFN treatment is applied using arbitral courts to resolve disputes between investors and states rules in order to resolve disputes about jurisdiction over before in the 2000 Maffezini v. Spain case, an Argentinean investor filed a claim against the Kingdom of Spain claims were not taken into consideration during the negotiating or carrying out IIAs, especially BITs, which made up the majority of IIAs. The individual making the initial BIT claim, AAPL v. Sri Lanka, 1990, attempted to apply MFN after failing to obtain a third treaty's substantive liability standard. As a result, the application of MFN was not given any thought. The Maffezini v. Spain jurisdictional ruling raised the potential to treat ISDS provisions with MFN therapy and sparked a heated discussion that hasn't ended yet. The first of several arbitral rulings pertaining to the adoption of third-party ISDS clauses that claimants deem more advantageous under the MFN treatment clause. While some of these claims, notably Maffezini v. Spain, concentrated

on the removal of an initial necessity to arbitration, others dealt with the broadening of the applicability of ISDS requirements. The discourse has been further reinforced by these awards, especially in light of the courts' very uneven logic and conclusions. States began to react or express their concerns about the growing uncertainty.

CONTEXTUAL HISTORY

Although MFN treatment clauses date back to the thirteenth century, they have since become standard components of many friendship agreements. Treaties pertaining to seventeenth- and nineteenth-century trade and navigation. The early articles covered a lot of ground, including "rights, privileges, immunities and exceptions" related to trade, business, as well as navigation in addition to "duties and prohibitions" related to ships and the importing and exportation of products. These early Conditional clauses were common, implying that the recipient State has to make the same compromises in order to receive the benefits given by one State. The unwavering strategy first appeared in the latter part of the eighteenth century. One well-known The 1869 Treaty of Chevalier-Cobden serves as one example as a commerce agreement between France and Great Britain. Following During the Great Depression of 1929 and World War I, protectionist measures were place, this trend was reversed. However, following World War II, spurred by fresh initiatives of multilateralism, the Havana Charter (which was agreed in 1949 but never put into effect) reintroduced the MFN therapy strategy that is unconditional. It was replicated in the 1947 GATT, when the multilateral trade system's cornerstone—unconditional mutually beneficial agreement—was established.

The original application of the WTO's agreements most-favourable nation (MFN) treatment to trade in goods has been expanded to include trade in services and trade-related aspects of intellectual property rights. This document made an effort to standardise and expand upon the MFN clauses' implementation found in state treaties. The draft articles examine a variety of subjects, such as definitions, scope of applications, the impact of the unconditional or conditional nature of the clause, the source of therapy as well as dismissal or suspension.

EXCEPTIONS OF MOST FAVOURED NATION

The United Nations Conference on Trade and Development (UNCTAD), which was founded in 1964, has worked to grant giving developing country exports special consideration. Members of the GATT have recognised in principle that the "most favoured nation" rule needs to be loosened in order to meet the requirements of developing nations. Tariff barriers separating participating nations from the outside world are maintained by regional trade blocs

such as the North American Free Trade Agreement (NAFTA) and the European Union, which have reduced or eliminated tariffs between their constituents, have presented one more obstacle to the "most favoured nation" principle. Trade agreements typically provide for exceptions to facilitate the integration of economies within regions.

BENEFITS OF THE MOST FAVOURED NATION

The most favoured nation clause, which embodies the non-discriminatory rule in international commerce, protects smaller exporters against favourable terms obtained by larger ones while extending the benefits of trade liberalisation policies as widely as feasible. Because smaller countries are dependent on larger ones to voluntarily comply with rulings, the WTO implementation mechanism in practice can only authorise an injured, not the organisation collectively, to enforce tariffs in retribution where discrimination occurs. The following benefits are offered by the clause of the most-favourable-nation:

1. **Strengthens Free Trade**

More unrestricted commerce between nations is encouraged by the clause for the most favoured nation, which also decreases trade diversion. Given that the most affordable manufacturers able to export products to regions with the most demand, it enables more effective results.

2. **Equitable Treatment Of Underprivileged Countries**

Because they are overlooked by the major participants in international trade, smaller countries are able to gain in the section regarding the most preferred nation. The clause helps the minor nations engage in negotiations favourable trade conditions that they wouldn't otherwise be able to.

3. **Streamlines Trade Regulations**

Completing bilateral trade agreements between nations is made easier by the enforcement of the phrase "most favoured nation". If all countries are subject to the same trading rules, trade laws become rather straightforward.

4. **Increased Rivalry In Commerce**

   MFN status benefits emerging countries greatly. Gaining access to a larger market for trade goods and lower export costs due to drastically lowered tariffs and trade obstacles are the obvious benefits. These primarily result in increased trade rivalry.

5. **Removes Bureaucratic Barriers**

   Additionally, MFN removes administrative roadblocks and sets equal tariffs for all imports. Consequently, it raises consumer demand for the products, strengthening the export

industry and the economy. Additionally, it reverses the damaging impact trade protectionism had on the economy.

DISADVANTAGES OF MFN STATUS

1. **Every Member Receives The Same Benefit**

   The drawback of MFN status is that it requires the country to grant all other participants in the agreement or members of the World Trade Organisation the same trade benefits.

2. **Falls Prey To Dubious Business Methods**

   Occasionally, countries finance their own industries, enabling subsidised businesses to export goods at deeply discounted costs. Dumping is a practice that can get a country in hot water with the WTO.

3. **High Tariffs On Underdeveloped Countries**

   The WTO has been informed by developing countries that they continue to be subject to extremely high duties, often known as tariff peaks, on goods like apparel, textiles, and fish and its byproducts.

ESSENTIAL CASES

Along with the national treatment concept, the most frequent grounds for invoking the MFN principle in GATT disputes are their shared GATT foundations. But The invocation of MFN is not common separately, while clauses pertaining to trade obstacles of a technical nature, rules of origin, TRIMs, quantitative limits, and national treatment are frequently mentioned together. Consequently, there aren't many precedents. The policies pertaining to Canada's vehicles, bananas in the EU and the generalised tariff preferences programme of the EC, and the EU's prohibitions on the importation and sale of seal products—all of which raised significant concerns with MFN—are covered in the section that follows.

- **Canada - Vehicle Safety Regulations (DS139)**

In accordance with the Agreement on Automobile Products of 1966 between the United States and the Canadian government granted duty-free handling of automobiles, subject to distributors (the Big Three and other parties, referred to as "Auto Pact members") fulfilling specific requirements (such as meeting the Canadian value-added requirement, which varied but generally needed rates of at least 60%). The scheme was designed to remove tariffs from automobile imports by any company that met the requirements. Nonetheless, The Auto Pact designation was forbidden by the Free Trade Agreement between the United States and Canada from being extended to any new businesses. After the implementation of the following the North American Free Trade Agreement (NAFTA), treatment persisted. In essence, this implied

that Canada's founding Auto Pact members could import cars without paying duty as long as they fulfilled the above requirements, however, there was a charge for non-members of 6.1% (rate as of February 2000), even though each of these businesses produced and provided comparable goods as well as services.

The Ministry of Trade, Industry, and Economy (METI) viewed this as a major trade regulations issue and asked for two-way talks with Canada in July 1998 as part of WTO processes for resolving disputes. In November of that year, Japan aimed to establish a panel, and in February of 1999, the panel was formed to examine the complaint from Japan combined with a comparable complaint from the EU. The Appellate Body published its findings in May 2000, whereas the panel published its report in February. In both reports affirmed almost all of Japan's claims, concluding that the action in question breached GATT Articles I:1 (MFN treatment); broke the SCM Agreement; violated treatment of a country under GATS Article XVII); and breached Article III: (national treatment). However, The panel was reversed by the Appellate body judgement that the waiver of duties breached Article XVII of the GATS (national treatment) and Article II of the GATS (MFN treatment), contending that there was insufficient data to justify the panel's ruling.

MFN CLAUSES' APPLICATION TO DISPUTE RESOLUTION CLAUSES

1. Tribunals Dismissing MFN Clause Applications in Conflict Resolution Clauses

MFN clauses' applicability to dispute resolution provisions is disputed by a number of tribunals, arbitrators, and commentators where there isn't clear language to that effect. For instance, the tribunal ruled in Plama that "unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them," "an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty." Based on a review of the article's language and exceptions, the tribunal found that the disputed MFN section was not able to be understood to relate to the resolution of disputes.

Commentators, arbitrators, and tribunals have disapproved of the usage of MFN clauses, which would increase the extent of a deal or the extent of agreement to disagree with resolution as stipulated in the core treaty, based on comparable principles of treaty interpretation. For instance, a number of tribunals have ruled that in order requires a base treaty's MFN clause to be activated, there must be an "investor" and an "investment" in the sense of that treaty. Therefore, one cannot rely on MFN clauses to increase a treaty's temporal scope or to bring in additional advantageous, larger definitions of "investment" or "investors."

2. Courts That Agree Using MFN Sections To Provisions Pertaining To Dispute Resolution

The use of MFN sections in the resolution of disputes provisions is acknowledged by other tribunals and observers, at least conceptually. As per the Maffezini tribunal's ruling, "the beneficiary of the most favoured nation clause may be extended to include provisions in a third-party treaty for the settlement of disputes that are more favourable to the protection of the investor's rights and interests than those in the basic treaty." The investor should "not be able to override public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in question," as per Maffezini panel, which acknowledged that this principle had limitations. For that court, a variety of Many factors (even though they aren't present in the circumstances at hand) can limit an investor's ability to apply an MFN clause for resolving disputes:

- Investors are not permitted to invoke the most popular country provision in relation to a third-party contract that excludes this condition in order to circumvent the use of all available local remedies requirements;
- It is forbidden for investors to employ MFN clauses in order to get around fork in the road clauses; they are also prohibited from changing the arbitration agreement's specified arbitration forum (like ICSID) in order to request that the arbitration be moved to a new venue;
- They are prohibited from changing the arbitration agreement's specified arbitration system, which includes highly institutionalised rules of procedure (like NAFTA).

"Other elements of public policy limiting the operation of the clause will no doubt be identified by the parties or tribunals," the Maffezini tribunal added. Therefore, even in cases when an investor is allowed to employ an MFN clause by a tribunal for settlement of disputes, the conditions of the agreement, whether expressed in writing or not restrictions on the MFN clause's scope, may affect its use. It might also be influenced by how a tribunal defines certain requirements for resolving disputes in terms of admission or jurisdiction.

CONCLUSION

A foundational element of the multilateral commerce system, the most advantageous country (MFN) principle seeks to supplant power-based policies with a rules-based one. It says that

nations need to treat all of their trading partners fairly and refrain from favouring goods or services provided by a particular trading partner. Stated differently, a nation that accords preferential treatment to one nation must do the same to all of its constituent nations. The MFN provision was frequently included in bilateral trade agreements prior to the GATT, demonstrating the long history of the MFN idea. It is now a crucial tool for the economic liberalisation of the investment sector. Economic distortions that could arise from more selective liberalisation on a country-by-country basis are avoided by the MFN principle. In essence, it promotes more unrestricted trade through increasing trade formation and decreasing trade diversion between countries.

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