SCOPE OF MFN CLAUSE IN BITs- CHANGING PARADIGMS

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ABSTRACT

The article seeks to give to entail the importance of the Most Favored Nation Clause in any Bilateral Investment Treaty along with its genesis in international investment arbitration law. The paper deals with the inception story behind the M.F.N. clause and the way it gained prominence when it transcended from being a part of treaties to becoming an intrinsic part of the modern day Bilateral Investment Treaties. Maximum number of claims that are filed in the realm of International Investment Arbitration pertain to the Most Favored Nation Clause, so the reason to henceforth the reason to study and analyze the in-principle relevance of the clause. The paper seeks to trace the development of the Most Favored Nation Clause viz-a-viz its substantive and procedural application in the light of settled judicial pronouncements of the ICSID and the UNCITRAL. In the process of discussing the application of the MFN clause in Bilateral Investment treaties by various States, the paper attempts to maintain key focus on the feature of jurisdictional expansion of application of the clause as rationae materiae jurisdiction. Thus, the paper discusses and interprets the scope and purview of the clause as a natural corollary. Finally, the paper concludes by suggesting a standard test for invoking MFN clause, the need for mutual reciprocity to maintain the general equilibrium of the basic treaty.

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1. MFN: MEANING AND INTRODUCTION

Most Favoured Nation treatment (MFN, hereafter), apart from national treatment, is as entrenched a central pillar in economic law and global trading as is its historical antiquity. The meaning of MFN may simply be understood as a measure to increase trade between any two countries by providing certain trade advantages like reduced tariffs to one of the two countries. MFN means an equal, non-discriminatory trade policy which facilitates easier, smoother, hindrance-free trade between two countries. MFN clause must not be understood to create a relationship of exclusivity but of equality between two countries. MFN clauses may be of two kinds: conditional and unconditional. Illustrative of the widespread use of the MFN Provision, the Havana Charter, in its seminal stages, included it as an essential duty of its members. The members had to keep in due consideration the need and desirability of invoking the MFN Clause, so as to prevent any unfair treatment and discrimination, if they are meted out to the foreign investors while they are investing in the domestic country.

2. BACKGROUND AND DEVELOPMENT OF THE CLAUSE IN BIT'S

MFN clause is a gradual and natural incorporation in any bilateral investment treaty, which are more than 2700 in number. Dating back to the 12th century, investment law and BITs (Bilateral Investment Treaties, hereafter) between Host-States and Investor States serve mutual economic interests of the individual/private investors as well as the States. A guarantee to the procedural rights of the parties to a BIT enshrine with the MFN clause for conferring likewise positive conditions to the counterparty as to outsiders to the treaty, is the in-principle feature of the MFN proviso. However, often beyond the original contemplation of the States to address dispute settlement duties arising from tailor made BITs with MFN proviso, the shaky flexible harmony between the parties is likely to surface during Investor-State arbitration. Thus, the extent of application of the MFN clause/proviso to dispute resolution looms large which is a crucial part of discussion in the paper. Unless expressly negated or impliedly warned against utilization of the MFN proviso to secure procedural rights of dispute settlement to the recipient of the MFN clause, it is largely a matter of fact.

The course of the scope of provisions which can be incorporated through MFN clause from third party BITs in the basic treaty, in order to grant most favorable treatment to the contracting parties, is still developing. As logically construed, one of the most convenient goals of the Contracting parties to a BIT will be that the third nation investors' rights, their ambit and that the dispute settlement takes place through international investment arbitration rather than legal organs of the Host State. Henceforth, application of MFN provision invariably continues. In any case, the inherent feature of MFN provisions to mould and substitute for the provisions of the basic treaty in terms of working and freedom of the State and the rights of the investors, very few cases have been decided upon on the manner in which the MFN clauses operate specifically in the investment arbitration tribunal's jurisdiction. Conversely, non-application of the MFN provision is a rarity in a responsibility loaded competitive arena of investment arbitration amongst States.

Zachary Douglas critically comments on the application of MFN clauses viz-a-viz dispute settlements that:

> "*The MFN clause does not, in truth, operate automatically to 'incorporate' provisions of a third treaty so that all that remains for a tribunal to do is to interpret the amended text of the basic treaty. It is not an exercise in the construction of a static legal text that has been modified by an invisible hand prior to or upon the commencement of arbitration proceedings. The MFN clause operates to secure more favorable treatment for the claiming party; it does not operate to rewrite the terms of a treaty in respect of which the claimant is not even a signatory…. It is the 'treatment' represented by these documents that can be invoked by the investor claiming through the MFN clause in the basic treaty.*"[3]

MFN treatment, etymologically, was recognized only recently whilst trade expansion continued even before its formal acceptance as early as the twelfth century.[4] The MFN clause proliferated with the expansion of

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[3] Z. Douglas, *The MFN Clause in Investment Arbitration: Treaty Interpretation off the Rails*, 2 Journal of International Dispute Settlement 97, 105 (2011), available at http://jids.oxfordjournals.org/content/2/1/97.full.pdf+html, last seen on 15/06/2016.

[4] M.F. Houde, *Most- Favoured-Nation Treatment in International Investment Law*, OECD Working Papers on International Investment, 4, Working Paper Number OECD/WP/2004/02, Organization for Economic Cooperation and Development, (2004).

trade in the fifteenth and sixteenth centuries, and by the 1900s, was frequently found in many treaties, particularly in Friendship, Commerce and Navigation treaties, the precursors to the modern BIT.[5] So widespread was the use of the MFN Provision that the Havana Charter in its seminal stages included it as an essential duty of its members, who had to keep in due consideration the need and desirability of invoking the MFN Clause and "to give due regard to the desirability of avoiding discrimination as between foreign investors"[6], so as to prevent any unfair treatment and discrimination, if they are meted out to the foreign investors while they are investing in the domestic country.

Sadly, the MFN provision has not been appropriately implemented since its inception as also during the due course of its history till the present times. Taking cue from the example of the United States of America while comparing it with other countries, U.S.A. adopted a restrictive MFN Clause in its trade agreements before the happening of the World War 1, now opposed by many countries. As regards such a restrictive MFN Clause, if a country accords an economic leverage to another country in return for a specific compensation, the country according the leverage need only grant the same leverage only to those countries which also pay the same compensation.

As against an unconditional MFN provision, a sound rationale behind incorporating conditional MFN clause aimed at a barter and bargain of corresponding concessions and privileges to other countries without requiring similar corresponding compensation. However, such a conditional MFN clause arguably "destroyed the equality . . . [the MFN clause] was intended to secure."[7] The United States, however, changed its tune post-World War I with the expansion of its export economy and the realization that it could not penetrate international markets as effectively without an unconditional MFN clause.[8] The MFN clauses in the General Agreement on Tariffs for Trade (GATT) and the General Agreement on Trade in Services (GATS), call for MFN treatment to be

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5 Ibid.

6 Ibid.

7 See S. Vesel, *Clearing a Path through a Tangled Jurisprudence: Most-Favoured-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties*, 32 The Yale Journal of International Law 125, 125 (2007).

8 Ibid, at 130.

accorded "immediately and unconditionally", US abandoned conditional MFN clause and aligned it with the international trends.[9]

A sizeable chunk of BITs, which assure the investors of the MFN treatment, have resulted in a plethora of claims as regards the International Investment Arbitration. A notable point is that investment arbitration invites the maximum number of disputes settlement suits, out of which arbitrators have to entertain claims pertaining to the MFN Clause more often than usual compared to other international courts or tribunals pertaining to arbitration which make it even more imperative to study and analyze its relevance and jurisprudence in the modern world. The nature and essence of international investment arbitration holds so much relevance today of that it needs to be further studied and analyzed so that so that its importance can further be gauged. The subject matter of this paper shall aim to analyze and assess the importance of certain specific features of MFN in international investment arbitration jurisprudence as regards their *locus standi*. The paper also aims at highlighting that why due regard needs to be given to the MFN Clause by the investment tribunals when deciding cases pertaining to investment arbitration. International investment arbitration has had evolved in the methods for interpreting the MFN treatment standard.

3. CASES AND DISPUTES INVOLVING MFN CLAUSES

The paper aims to establish that the conflicting, varying application, by tribunals, of general rules for interpretation of treaty as per the Vienna Convention on the Law of Treaties and case specific interpretations not only make investment law devoid of a uniform pattern but also contradictory and incorrect interpretations in the light of the general international law jurisprudence.

Mafezzini v Spain[10], a first of its kind case, imported dispute settlement clause from another treaty to which Spain was a party on using the

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9 See J. Kurtz, *The Delicate Extension of MFN Treatment to Foreign Investors: Maffezini v. Kingdom of Spain*, 523, 527 in *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Todd Weiler 1st ed., 2005).

10 *Emilio Agustín Maffezini* v. *The Kingdom of Spain*, ARB/97/7 (International Centre for Settlement of Investment Disputes).

MFN clause from the basic treaty, thereby relieving the claimant from submitting to Spanish courts spanning a period of eighteen months prior to utilizing international arbitration method. An outlay of the MFN clause in Spain- Argentina BIT in its Article IV states that:

"In all matters subject to this Agreement, this treatment shall not be less favourable than that extended by each Party to the investments made in its territory by investors of a third country."

The investor, Mafezzini invoked the MFN provisions of Article IV to invoke and apply Article 10(2) of the Chile-Spain BIT which did not require eighteen month period for domestic courts to resolved disputes before submitting to arbitration. Article 10(2) of the Chile-Spain BIT required only six months period for negotiations.

Confronting arguments on the extent of the applicability of the MFN clause, the respondents had contended its application limited to substantive protection contemplated in BIT rather dispute settlement clause. Mafezzini tribunal held that access to arbitration represents a part of substantive protection of investors so that MFN was equally applicable to both substantive and procedural provisions of the BIT despite the lack of explicit reference in the MFN clause to dispute settlement provisions.[11] Mafezzini case was relied upon by a number of investment tribunal such as ICSID[12] and the UNCITRAL.[13] In *Plama v Bulgaria*[14] case, the tribunal held that *"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 unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them."* The case indicated that application of MFN provision in a basic treaty cannot be said to include jurisdictional aspects simply because MFN is not an agreement to arbitrate. However, as held in National Grid Transco PLC v. Argentine Republic, the tribunal concurred with the Mafezzini ratio to allow the investor to borrow from UK-Argentina BIT application of a more favourable dispute resolution mechanism by bypassing the local

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11 Ibid.

12 *Siemens AG* v. *Argentine Republic*, ARB/02/8 (International Centre for Settlement of Investment Disputes).

13 *National Grid Transco PLC* v. *Argentine Republic*, (United Nations Commission on International Trade Law).

14 *Plama Consortium Ltd.* v. *Bulgaria*, ARB/03/24 (International Centre for Settlement of Investment Disputes).

Argentinian court's jurisdiction. Thus, National Grid is one of the judgments in which claimants have sought to use MFN clauses to avoid litigating the dispute in local courts before submitting it to international arbitration.

Tribunals followed the Mafezzini rationale[15] employing the MFN clause in multiple ways such as strictly following *via* exclusion of 18-months local remedies requirement; extension to broadly worded dispute settlement clauses (including expropriation claims) with implicit objects of wide jurisdiction, rationae materiae.[16] True example of the latter construction of the Mafezzini rationale was found in *RosInvest v Russia.* A fit example of wide reliance on the MFN in the basic treaty is *Garanti Koza v Turkmenistan*[17]. Establishing jurisdiction of ICSID, way beyond the original intent and contemplation of arbitration agreement, it borrowed the choice of arbitration forum from another BIT. This case testifies that MFN has become a powerful tool for investors in not only removing procedural requirements for access to arbitral courts but also to create new arbitration agreements.[18] However, there is no uniformity in following the Maffezini rationale. In *Plama v Bulgaria* case stands on the forefront of dissenters to Maffezini and has a respectable number of its own followers[19] including the *Telenor*[20] and *Tpa Shum*[21] *cases* of ICSID. Expanding MFN clause to BIT procedural provisions can indeed be criticized on many levels. For example, Zachary Douglas persuasively counteracts expansion of MFN clause to dispute settlement clauses.[22] The application of the MFN provision in the basic treaty for the incorporation of the Dispute Settlement Mechanism requires complete

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15 *Daimler Financial Services AG* v. *Argentina*, ARB/05/1 (International Centre for Settlement of Investment Disputes).

16 *RosInvest Co. UK Ltd.* v. *The Russian Federation*, V079/2005 (SCC).

17 *Garanti Koza L.L.P.* v. *Turkmenistan*, ARB/11/20 (International Centre for Settlement of Investment Disputes).

18 M.S. Dragana, *Fork-in-the-Road Clause*, 48 in *Proceedings of Novi Sad Faculty of Law* 491, 513 (2014).

19 *Salini Costruttori SpA and Italstrade SpA* v. *The Hashemite Kingdom of Jordan*, ARB/02/13 (International Centre for Settlement of Investment Disputes).

20 *Telenor Mobile Communications AS* v. *The Republic of Hungary*, ARB/04/15 (International Centre for Settlement of Investment Disputes).

21 *Tza Yap Shum* v. *The Republic of Peru*, ARB/07/6 (International Centre for Settlement of Investment Disputes).

22 See Z. Douglas, *The MFN Clause in Investment Arbitration: Treaty Interpretation off the Rails*, 2 Journal of International Dispute Settlement 97, 104 (2011).

absence of any doubt as to the intentions of the Contracting Parties to the contrary. The requirement of interpretation of clear intentions as to the rebuttable presumption of the dispute settlement mechanism or arbitration clause was principally recognised by the *Plama*[23] tribunal.

Once MFN gained importance in matters of admissibility and jurisdiction, with optimistic promises for expanding rationae materiae jurisdiction, or even creating new arbitration agreements, the original purpose of the MFN to provide substantive protection was changed to a litigation tool. MFN has thus become more important for the post-breach or post-dispute phase than for the substantive protection of investment itself. MFN clause does not operate by default rather be claimed to create rights for the beneficiary. Not in consonance with the rationale of Maffezini, a bold proposition of incorporation of MFN benefits into the basic treaty represents only a "post hoc intellectual construct" is a practical impossibility.

The tribunal treated provisions of Kuwait-India treaty (other treaty) as obligation of India to invoke them via MFN clause from the Australia-India treaty (basic treaty) to resolve issues of Australian investment for effective judicial resolution. The tribunal made the provision effective from the moment of investment rather than claim submission. [24] Denying claims of denial of justice by the White Industries, the tribunal retroactively effected specific obligations on Indian State.[25] The theory of automatic operation of the MFN is equally implausible here too since it was beyond reasonable contemplation of the White Industries to invoke Kuwait-India BIT provisions, more precisely, at least not until post domestic proceedings. The tribunals erred, as in a number of other cases approving procedural benefits to the claimants, when it assumed that MFN automatically incorporates benefits from third party treaties.[26] Enjoyment of the benefits of "effective means" clause ought to have required submission of the claim to such effect. Implication-wise, such an artificial, inadequate approach not only for effective substantive investment protection but also construction of State responsibility led

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23 Supra *note* 16.

24 *White Industries Australia Ltd.* v. *The Republic of India*, (United Nations Commission on International Trade Law), 30 November 2011.

25 Ibid.

26 P. Acconci, *The Most-Favoured-Nation Treatment and the Law on Foreign Investment*, 363, 372 in Oxford *Handbook of International Investment Law* (2008).

India to amend its model BIT bringing substantial changes including the MFN clause.[27]

4. CHALLENGES IN THE MFN LANDSCAPE

Ejusdem Generis principle, concerning the extent of application of MFN provision, is a more specific rule of understanding. The quagmire as regards of the extent of the advantages that can be taken out from the third party treaty by enforcing of an MFN clause brings about the use of the ejusdem generis principle. The application of the principle is not as easy as it seems lucid. According to this, "An MFN clause can only attract matters belonging to the *same category of subject* as that to *which the clause itself relates*". The interpretation and use of a particular MFN clause must be taken into account based on what is inscribed in the text of the provision and as per the general norms of interpretation as entrenched in Article 3.1 of the Vienna Convention. The principle enshrines a common understanding that runs through the reasoning deployed in their decisions despite little reliance on the principle by the tribunals who rendered judgments on MFN provision and dispute resolution.

If the main subject of the MFN provision in the basic treaty is restricted to substantive questions of law, then the provision cannot be applied so as to take the benefit of procedural rights as regards the third party treaty. The more onerous question is whether the person who is to be benefitted by the use of the MFN provision that does relate to procedural provisions may opt and select which procedural benefits could be more reliable than others. To address this, while the *International Law Commission's 1978 Draft Articles* on *Most-Favored-Nation Clauses* give out a much generalized point of view, they are not specific enough to aid in solving the problem at hand that arises in the investment treaty context. Draft articles 9 and 10 pertain to the beneficiary State being entitled to rights or treatment "within the limits of the subject-matter of the clause." The commentary goes on to suggest that the phrase "within the limits of the subject-matter of the clause" contains an implicit reference to a concept of likeness. The investment law tribunals are still exploring the jurisprudential notions of 'likeness' as

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[27] A. Ray, *New Indian Model BIT on the Anvil*, Kluwer Arbitration Blog, available at: http://kluwerarbitrationblog.com/2015/01/09/new-indian-model-bit-on-the-anvil/ last seen on 7 April 2016.

regards the extent of application of MFN provision in a third party treaty.

Incorporating legislative as well as substantive aspect, MFN clause, however, has made it's a noticeable presence only in the realm of international realm of law on the procedural front rather than the substantive one. As a matter of fact, the foundation of the Most Favored Nation Clause was done on the substantive basis while outside the scope of the investment arena, the benefits of the substantive aspect of the MFN Clause are still given foremost importance. Although there are plethora of illustrations which depict that MFN has been successfully mooted in cases to entail substantive advantages as regards the third party treaties, but in some of these of these cases, the reasoning rendered by the tribunals endorsing the MFN Clause does not seem to be apt, reason being that they follow same assumption of automatic inclusion of the MFN Clause and its benefits, and do not pay due heed to the consideration of the facts of the case.

Expanding the fair and equitable clause on the basis of MFN clause, the tribunal in *MTD v. Chile*, by borrowing the more precise FET guarantees from Chile-Denmark, Chile-Croatia BITs arguing a receptive nature of the Chile- Malaysia BIT so as to encompass substantive guarantees from other BITs mandated consequential legal obligations. In the environment where local remedies are excluded, where complex investment structures can hide both the nationality of beneficiaries and international origin of an obligation, it is not plausible to argue State responsibility for an obligation which has not been made known to the State, and for which the State will unlikely be given a chance to correct. The assumption of automatic operation of the MFN clause creates precisely such scenario, risks absurd results and ultimately amounts to retroactive application of a norm from another treaty.

Could there have been any other situation under which India and Chile could not have been at fault and held liable for the breach of a provision taken from somewhere else? If the investor filed a suit for granting them the permission by taking the MFN proviso in due consideration, the Chilean authorities would or would not have seceded to it. There would have been a scenario where they would have complied with it, when the investor would ask for the enforcement of the effective clause in the Indian Courts. Only in that scenario, would it have been apt and cogent to expect from the state to agree with such a duty. Treaty shopping invoking MFN clause affects investment treaty arbitration. Either a

limited application or its removal was meant to be a priority in the new BIT Model drafted based on the suggestions of the 246th Law Commission Report.

There is a fundamental distinction between what ensued in the case of *MTD Equity Sdn. Bhd. and MTD Chile S.A. v Republic of Chile* as compared to *Asian Agricultural Products Ltd v Sri Lanka,* and *MS Gas Transmission Company v Argentina.*

In the MTD case, the sole reason as to why even though there was no mention of a prescribed FET Standard, the Tribunal decided to incorporate it from the BIT's of Croatia and Denmark because both of them incorporated a duty to grant the fundamental permit subsequent to grant of an investment. The Tribunal endorsed that, as regards the essence of the Treaty's MFN clause, even though such obligations were not explicitly part of the FET standard under the Chile-Malaysia-BIT, the Tribunal held them to be implicitly so and therefore held the state liable.

Whereas, in the case of *Asian Agricultural Products Ltd v Sri Lanka,* the reason why the Tribunal didn't rely on the Sri Lanka-UK BIT was that first of all there was no standing BIT between China and Sri Lanka and even though the claimant tried to construe the general provision embodying the "full protection and security" standard in Article 2 of the BIT, as "strict liability", the Tribunal didn't buy their argument, because it was nowhere stated in that BIT, and since there was ambiguity thereto.

The same was the case in the situation of *CMS Gas Transmission Company v Argentina,* where neither the parties, nor the provisions of the BIT had opted a particular law which could be applied in case of a dispute (in addition to the rules of the BIT itself).

Under the ICSID Convention, in such situations, as what is stated in the Article 42(1) of the convention, *"The Tribunal shall apply the law of the Contracting State party to the dispute […] and such rules of international law as may be applicable."*

So on comparing, it can be deduced that If there is ambiguity not only the BIT between the concerned parties but also in the borrowed BIT, then the Tribunal on its discretion can, use the concerned International and the Domestic Law of the Contracting Parties to that effect.

The concept of self-operation of the MFN Clause does not provide the requisite impetus to initiate the substantive protection of the investments in the due course of their implementation and operation, as it may appear at the primary instance. On the contrary, it rather gives way to the usage of the MFN Clause as an instrument for litigation with the only objective to put forth and build the state responsibility. Had it been opposite to the aforesaid, investors would have, then, initiated a suit, keeping in mind the MFN Clause. Thereafter, the tribunals would have prohibited the automatic operation of the clause upon initiation of the claim.

The more settled dialogue is the expansive application of the MFN clause to receive either a more favorable substantive protection or opt for a more convenient procedural requirement. However, the issue of application of the clause to invoke key treaty definitions from another BIT has received only a negative response from the international investment arbitration judicial agencies. In a nutshell, the MFN clause in BITs does not have an unlimited application. The limited role of MFN clause was clarified in the case of *Vanessa Ventures Ltd v. Venezuela*[28]. In this case, the application of the MFN clause by the party States so as to rely upon and invoke the basic jurisprudential criteria such as treaty definitions of 'investment' or 'investors' from another BIT was checked and rejected.

In fact, in the case of *Société Générale v. Dominican Republic*[29], the tribunal rejected the application of MFN provision on the jurisprudential and foundational concepts and key definitions of the basic treaty.

'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.'

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[28] *Vanessa Ventures Ltd* v. *Venezuela,* ARB (AF)/04/6 (International Centre for Settlement of Investment Disputes).

[29] *Société Générale* v. *Dominican Republic*, UN 7927 (London Court of International Arbitration).

5. CONCLUSION

Evidently, MFN cannot be conveniently invoked to expand the key definitions of BITs merely to evade the more onerous responsibility of investor party States. Thus, the more challenging jurisdictional issues do not follow the consistent set of line of application of the MFN clause. In fact, most of the judgments by tribunals rely upon a consistent, common ground of reasoning that the test for application of MFN clause in BITs is whether the provision for which a more favorable standard is sought can be considered a precondition to the BIT being applied.[30]

There is no universal meaning prescribed to MFN clauses but varies according to its contextual application. It is only when the requisite treatment meted out to the investor is not fulfilled, then the claim under the clause can be initiated. Investment Tribunals set a precedent when they interpreted the MFN Clause in such a way that it broadened its ambit on both the procedural and the substantive front. The increased importance of the MFN clause to either create new agreements or delimit the rationae materiae jurisdiction drifts main purposes of substantive protection by MFN to a potent litigation tool by the States. MFN has, thus, become more relevant for the post-breach or post-dispute phase than for the substantive protection of investment itself. The changes in both the substantive and procedural aspects have completely transformed the original stance and the way the MFN Clause was perceived by changing its place and locating it from the arena of international duties of the States which they were expected to follow when they had to deal with the international investments in the process of their establishment and future working and limited it to only an arbitral claim in the field of investment arbitration, completely bereft from the original duty that the State Parties had to comply with under the IIA.

The dim aspect of the application of MFN provision in a basic treaty is that the process of negotiation gets succumbed to the effects of replacement of provisions by the application of the MFN provision. Apart from shaking the general equilibrium of the basic treaty, an unconditional MFN clause also creates legal difficulties due to zero

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[30] Louise Barber, Cart before the Horse: Can MFN Clauses Expand the Key Definitions in Investment Treaties?, *Kluwer Arbitration Blog, available at: http://kluwerarbitration blog.com/2014/09/02/cart-before-the-horse-can-mfn-clauses-expand-the-key-definitions-in-investment-treaties/,* last seen on 15 July 2016.

reciprocity of most favorable treatment by the beneficiary State to the granting State. Thus, the changing paradigm in the purview of application of the MFN provision to BITs, perhaps, demands a sound after-thought. The propositions of renewed importance of conditional MFN provisions with limited, narrow meaning unlike what an unconditional, ever expansive and unchecked MFN provision endorses is not at all a worthless idea. In fact, the general equilibrium of any bilateral investment treaty can only be achieved by either legal bar or a strict judicial scrutiny of the unbridled application of MFN provisions on the touchstone of a unanimously standardized test. One such suggested standard test by the authors of the article is that the application of the MFN provision ought not to compromise with the minimal onerous responsibilities of the beneficiary State entailed in the basic treaty expressly or impliedly while seeking substantive protection or procedural convenience. Although the test is not new to the concept, however, the present legal difficulties caused by the unclear limits to the application of MFN provision require a fresh thought. Also, there is an urgent need to develop the concept of mutual reciprocity to enable the granting State equally enjoy the fruits of such a provision.