Developing Administrable MFN Enforcement Policy

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Note: These slides are intended for educational purposes only. They do not necessarily reflect all the relevant issues

J. Baker Summary: Ways MFNs May Harm Competition

- Collusive Theories
 - Facilitating coordination
 - Dampening competition
- Exclusionary Theories
 - Raising rivals' /entrants' costs
- Increase Seller Bargaining Power

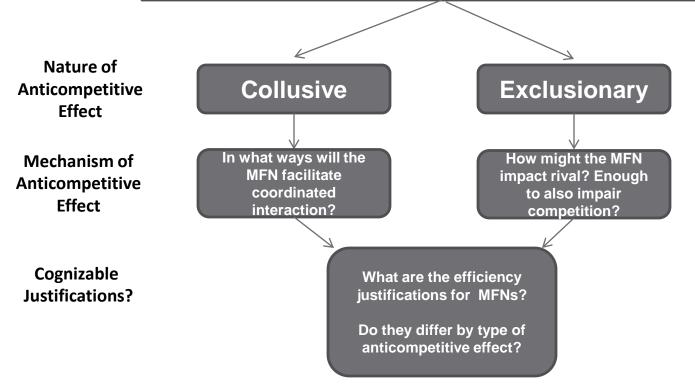
J. Chevalier Summary: Potential Efficiencies from MFNs

- Opportunism
 - Hold-up on relationship-specific investments
 - Contractual rigidity
- Transaction cost reduction
 - Switching/information costs
- Time inconsistency
- Quality commitment
- Risk reduction/distribution

Efficiencies can manifest differently in across types of MFNs, markets, industries, etc.

A. Gavil Summary: Visualizing the ROR Framework

First Principles Does the MFN arise in a context that indicates it has the potential for significant anticompetitive effects? (What are the relevant factors?)



Illustrative Evidence of Harmful Effects

- Upstream Effects
 - Increased input costs to buyers without MFNs
 - Increased input costs, even to buyers with MFNs
- Downstream Effects
 - Increased/maintained supra-competitive prices
 - Entry deterred; smaller rivals exit or shrink
 - Innovation deterred
- Comparisons could be:
 - Over time (before/after)
 - Across markets with/without MFNs

Required proof under rule of reason related to theory of harm

Illustrative Evidence of Beneficial Effects

- Lower prices
 - Evidence of discounts extended
- Additional transactions
- Efficient longer term contracts adopted
- Increased investment and new product innovation
- Delays avoided

Relevant evidence related to specifics of efficiency claims

Illustrative MFN Characteristics Checklist

More Worrisome

- Jointly adopted by horizontal agreement
- Provided by large sellers with market power
- Provided by most likely maverick
- Received by largest buyers
- Multiple MFNs with high market coverage
- Highly significant input
- Airtight MFN, w/ audit rights/penalties
- Retroactive MFN; larger penalties
- MFN-plus
- Only claimed rationale is: largest buyer "deserves" lowest price
- Only rationale is: "we did not care about the price, only that we did not pay more than others."

Less Worrisome

- Provided only by smaller sellers that lack market power
- Received only by smaller buyers
- Unconcentrated markets
- Input with close substitutes
- Part of long-term contract with locked-in assets
- Monopolist seller and non-competing buyers (TBD)
- Significant risks of opportunism and delay that would deter investment
- Input has uncertain value for innovative new product, with resulting hold-out problem
- Involves promise of full product line, not the lowest price