BALANCING THE MFN AND DISPUTE RESOLUTION CLAUSE UNDER INDIA'S DRAFT MODEL BILATERAL INVESTMENT TREATY, 2015

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1. INTRODUCTION

Bilateral Investment Treaties (BIT) are the primary legal mechanisms protecting foreign direct investments (FDI) around the world by providing the investor a number of rights against the Host state.[92] Like any other agreement, even a BIT is entered into between Contracting States after rounds of negotiation where the parties decide upon their rights and obligations. BITs in general provide protection to the foreign investments which includes 1) Equal and Fair Treatment, 2) Protection against arbitrary and discriminatory policies, 3) flexibility with respect to staffing, 4) protection against performance requirements of any kind and lastly 5) the investment shall not be expropriated. The Most Favoured Nation (MFN) Clause and the Dispute Resolution Clause finds a place in almost all the modern BITs. The MFN treatment provides that each country agreed to grant one another treatment at least as favourable as they would grant any other country.[93] In the "new" areas of the World Trade Organization Agreements, such as the General Agreement on Trade in Services and the Agreement on Trade-Related Aspects of Intellectual Property Rights, the MFN concept has usually been thought of in terms of applying to substantive provisions of those Agreements.[94] However, in *Enilio Agustin Maffezini v. The Kingdom of Spain*[95], the arbitration tribunal called upon to decide a dispute between an investor and a State was invited to decide that the MFN provision in the applicable BIT could apply to dispute settlement provisions. The Tribunal decided that the MFN provision could so apply. This decision in the *Maffezini* case has since raised questions and concerns, particularly for States that have negotiated Free Trade Agreements or Bilateral Investment Treaties containing MFN provisions.[96] What, for instance, can a State expect to be the governing dispute settlement provisions should an investor invoke the clause? This issue

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[92] Andrew Kerner, Why Should I Trust You? The Costs and Consequences of Bilateral Investment Treaties, International Studies Quarterly, Vol. 53, No. 1 (Mar., 2009), pp. 73.

[93] Michelle Sanson, Essential International Trade Law, [Cavendish Publishing (Australia) Pty. Ltd., Sydney, 2002] at p. 12.

[94] Locknie Hsu, MFN and Dispute Settlement: When the Twain Meet, 7 J. World Investment & Trade 25 2006 at p. 25.

[95] ICSID *Case* No. ARB/97/7.

[96] Organisation for Economic Co-operation and Development, *Most-Favoured-Nation Treatment in International Investment Law*, Working Paper No. 2004/2, OECD, Paris, September 2004.

became the bone of contention in the *White Industries v. Republic of India* [97][White Industries Award] when the dispute resolution clause of India-Kuwait BIT was borrowed in the India-Australia BIT and the arbitral tribunal held that White Industries could borrow the 'effective means' provision present in the India-Kuwait BIT[98] by relying on the MFN provision of the India-Australia BIT. India has been entering into a lot of BITs without fully understanding the consequences and India's regulatory system was rarely challenged under the BITs. However the White Industries Award brought into light the issues with the Indian BIT regime as White Industries took advantage of the broadly drafted MFN Clause in the India-Australia BIT which resulted in treaty shopping. This led to a decision which was never anticipated by India however the question again arose as to how can the dispute settlement clause of another BIT be borrowed using the MFN clause. In response to this award, India has made certain changes in its new 2015 Draft Model BIT which shall be discussed further in this paper.

2. DISPUTE RESOLUTION CLAUSE OR MFN: WHAT TRUMPS THE OTHER?

The fact that some MFN clauses impliedly or expressly exclude dispute settlement provisions within their scope while others are more general in their wordings, at best resulting in uncertainty as to dispute settlement, leaves considerable scope to argue competing interpretations.[99] A treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose[100] however such interpretation often leads to conflicting results. The Commission on Arbitration previously in *Ambatielos* case[101] stated that a most-favoured-nation treatment clause could be extended to cover the 'administration of justice', as long as the *ejusdem generis* principle was satisfied. The commission pointed out that this depended on the actual text of the clause taken into consideration and on 'the intention of the Contracting Parties as deduced from a reasonable interpretation of the treaty.' In the *Mafezzini* case, the Tribunal held that 'notwithstanding the fact that the basic treaty… does not refer expressly to dispute settlement as covered by the most favoured nation…there are good reasons to believe that today dispute settlement arrangements are inextricably related to the protection of foreign investors… if a

[97] *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award (30 November, 2011).
[98] Article 4(5) of the India-Kuwait BIT provides that '*each contracting party shall…provide effective means of asserting claims and enforcing rights with respect to investments*…'.
[99] Aniekan Iboro Ukpe, Applicability Of The Most-Favoured-Nation Clause To Dispute Settlement Provisions In Bilateral Investment Treaties: A Uniform Approach?.
[100] Art. 31, Vienna Convention on the Law of Treaties, 1969.
[101] The Ambatielos case (*Greece v UK*), Award of March 1956, UNRIAA, 1963, Vol. XII at 107.

third-party treaty contains provisions for the settlement of disputes that are more favourable… than those in the basic treaty, such provisions may be extended to the beneficiary of the MFN clause…'[102]. *The Siemens AG v. The Argentine Republic*[103] which had very similar facts to the *Mafezzini* case adjudged the question whether the claimant could rely on the MFN provisions of that BIT to benefit from a more favourable treatment in the dispute settlement clause of the Argentina-Chile BIT and went on to declare that 'In fact, the purpose of the MFN clause is to eliminate the effect of specially negotiated provisions unless they have been excepted'. Lastly, in the *Tecmed* case,[104] the Spanish claimant sought to rely on the MFN clause contained in the 1995 Spain-Mexico BIT in order to secure the 'retroactive application' of the BIT's substantive provisions and at the same time, relying on the *Maffezini* decision to invoke the application of the MFN treatment contained in the 1998 Austria-Mexico BIT. The tribunal dismissed the claimant's argument even without considering the relevant provisions of the Austria-Mexico BIT. It found that: 'matters relating to the application over time of the Spain-Mexico BIT, which involve more the time dimension of application of its substantive provisions rather than matters of procedure or jurisdiction, due to their significance and importance, go to the *core* of matters that must be deemed to be specifically negotiated by the Contracting Parties. The *Salini*[105] and *Plama*[106] cases marked a trail of what can be described as a more rationale jurisprudence in the interpretation and application of MFN clauses. The cases re-examine the broad statements of principles in the *Maffezini* and *Siemen* cases and represents a shift from that position, further re-emphasizing the over-ridding importance of the intention of parties [as expressed in clear words] rather than the object and purpose of BITs in determining the scope of application of a MFN clause. Therefore, we see a paradigm shift in the application of the MFN clause in dispute settlement provisions from the *Mafezzini* regime to *Salini* or *Plama* regime. The intention of the parties while negotiating the agreement has to be given utmost importance before determining the scope of MFN clause. This provides predictability in the investment arbitration regime and combats treaty shopping.

[102] *Supra* at. 4, ¶54-56.
[103] *Siemens AG v The Argentine Republic*, ICSID case NO. ARB/02/8. Decision of August 3, 2001.
[104] *Tecnicas Mediorarubientales Tecmed SA v The United Mexican States*, ICSID case NO. ARB(AF)/00/2, Award of May 29, 2003.
[105] *Salini Costruttori SpA and Italstrade SpA v Jordan*, ICSID Case No. ARB/02/13 decision of November 15, 2004.
[106] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/ 03/24, decision of February 8, 2005.

In the White Industries Award, the tribunal's analysis to extend the scope of MFN clause to dispute settlement can be presumed to be erroneous. Article 4 of the Indo-Australian BIT provides that, "A Contracting Party shall at all times treat its investments in its own territory on a basis no less favourable than that accorded to investments of investors of any third country". Since the 'investment' in the given case was the ICC Award that was pending to be enforced in the Indian courts, the maximum scope to which the MFN could have been applicable was that the award of a Kuwaiti investor shall be accorded same treatment as the award of an Australian investor. However, by no stretch of imagination could it be presumed that the parties intended to extend the scope of MFN clause to dispute settlement. The tribunal without satisfactory reasons rejected the Coal India's argument that such extension of the scope of MFN clause would 'subvert the negotiated balance of the BIT'.[107] The tribunal in *White Industries case* distinguished between substantive obligations and procedural rights in the application of MFN clauses to support its conclusion that the MFN clause is applicable to the former:

> *[T]he concern…to this effect [that an MFN clause fundamentally subverts the carefully negotiated balance of the BIT] is confirmed to the use of an MFN clause to obtain the benefit of a dispute resolution clause in another treaty. However, that is not the situation in the present case, which is qualitatively different. Here White is not seeking to put in issue the dispute resolution provisions of the BIT, but is instead availing itself of the right to rely on more favourable substantive provisions in the third-party treaty. This does not 'subvert' the negotiated balance of the BIT. Instead, it achieves exactly the result which the parties intended by the incorporation in the BIT of an MFN clause.*[108]

This statement if of the arbitral tribunal does not explain what distinguishes substantive provisions from dispute resolution clauses in the application of MFN clauses. Nor does it explain why the application of an MFN clause to substantive provisions does not 'subvert the negotiated balance of the BIT'[109]

3. HOW THE NEW DRAFT MODEL INDIAN BIT, 2015 PROPOSES TO TACKLE THIS?

[107] *Supra* note 6 at ¶11.2.4.
[108] *Ibid* at ¶11.2.2.-11.2.4.
[109] Chales Stampford et al, Rethinking International Law and Justice, [Ashgate Publishing Ltd., Surrey, 2015] at p. 129.

An MFN provision guarantees an investor treatment not less favourable than that afforded to other investors claiming under other investment treaties concluded by the same host state. After the *White Industries* fiasco, the Government of India undertook a review of the text of its 2003 Model. In March 2015, the Government made public a new draft Model Indian Bilateral Investment Treaty[110]which has done away with the MFN provisions from the treaty. The removal of the MFN provision in the Draft Model means that investors will now not be able to rely on potentially beneficial provisions, whether procedural or substantive, in other BITs. Although, The Government of India has not given any substantive reason for such a step but it seems that the motive behind not incorporating an MFN provision is to ensure that foreign investors are not able to borrow beneficial provisions from other Indian BITs (Treaty Shopping).[111] The major reason of worry for India with the MFN provisions is the use of this provision by foreign investors to borrow beneficial substantive and procedural provisions from other BITs. The absence of an MFN provision will surely prevent the foreign investor from indulging in such borrowing. The finalized draft shall be used to negotiate any new BIT entered into by the Government, including the much anticipated US-India BIT. In addition, it would be used to renegotiate the 72 currently active BITs of India.

4. CONCLUSION

Promoting and boosting foreign investment continue to be the Government's prime agenda. However, the increasing threats of investor claims against the Government of India along with its previous experience in the White Industries case have left the Government of India a little apprehensive. This is reflected in the 2015 Draft Model, which deviates from regular BIT provisions and brings into question whether India's next-generation BITs will provide meaningful protection for foreign investors in India like the Most Favoured Nation protection. By limiting such protections to the investors, the Government is discouraging the foreign investors to invest in India as they would not be accorded due protection as they are provided in other nations. This is not an insignificant issue given the increasing outward investment from India. In the light of all these reasons, we see that it is important for the Government of India to revise its stand on the current 2015 draft Model BIT as the same can heavily affect the foreign investments in India thus affecting the economy negatively.

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[110] Model Text for the Indian Bilateral Investment Treaty, March 2015, available at: https://mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf.

[111] Report No. 260, Analysis of the 2015 Draft Model Indian Bilateral Investment Treaty, Law Commission of India, Government of India, August 2015, p. 24 para 3.4.4.

We see that in the *White Industries* case, the tribunal first of all decided the rights of White Industries under the Contract did amount to an 'investment' and the award rendered by ICC was a crystallization of such award hence making it as well a part of 'investment'. However, the tribunal rightfully decided that the delay in the judicial process to get such award enforced does not amount to either expropriation or a violation of Fair and Equitable Treatment clause. Nevertheless, the arbitral tribunal erroneously imported 'effective means' test from the India-Kuwait BIT using the MFN clause to decide that 'Indian judiciary's inability to deal with White's jurisdictional claims and the failure by the Supreme Court in hearing the appeal for 5 years is in violation of India's international obligations thus awarding $4 billion award against India. The author above through a number of cases have tracked the progress how the scope of MFN has reduced with time and it is not encouraged to use the same in dispute settlement clauses but the same thing happened in White Industries case which has resurfaced this confusion.

The Government of India as a response to the White Industries case has decided to delete the MFN Clause in the 2015 Draft Model BIT as a result of which foreign investors will be exposed to the risk of discriminatory treatment by the Host State in application of domestic measures. Thus, absence of an MFN provision does not balance investment protection with regulation. In order to achieve this balance, India could consider having an MFN provision whose scope is restricted to the application of domestic measures. This will ensure non-discriminatory treatment to foreign investor, and, at the same time, will not allow a foreign investor to indulge in 'treaty shopping'. The Model BIT needs to adopt progressive steps which take into account the interest of Indian Inc. The drafters of such BITs should be careful that such changes in the Model Draft should not defeat the very purpose for which such treaties are concluded. They must find the fine balance between investor rights, investor responsibilities and State's regulatory powers.