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Avoiding the MFN Clause: One Step Forward, Two Steps Back?

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International investment agreements (IIAs) are divided into two types: (1) bilateral investment treaties and (2) treaties with investment provisions. I would primarily focus on the first category *i.e.* bilateral investment treaties. A bilateral investment treaty (BIT) is an agreement between two countries regarding the promotion and protection of investments made by investors from one country to other country's territory, and *vice versa*.

India is not particularly new to the concept of BIT as India had signed the first BIT with the United Kingdom (UK) in 1994 and since 1994, India has signed BITs with 84 countries. Now, the reason why India had entered into BITs with other countries was because India wanted to attract foreign investment. The early 90s was the beginning of the era of liberalisation, as the then Prime Minister Mr. Narasimha Rao, along with the financial minister Mr. Manmohan Singh initiated the economic liberalisation of 1991.

India had been entering into sundry BITs but the major problem with the provisions of those agreements was identified by India in 2011, when an arbitral tribunal found India liable of violating the India-Australia Bilateral Investment Treaty. It was only in 2011 that India faced its first adverse arbitral award arising out of a BIT in the White Industries case.

White Industries was an Australian mining company and it entered into a contract with Coal India Limited for the supply of certain equipment and development of a coal mine. The dispute relating to bonus, quality and penalty payments arose in 1999 between Coal India and White Industries. The latter commenced arbitration under the ICC Arbitration Rules and secured an award in its favour as the tribunal awarded to White Industries a compensation of USD 4.08 million.

Coal India applied to the Calcutta High Court to set aside the ICC award as per the Arbitration and Conciliation Act of 1996. Subsequently, White Industries approached the Delhi High Court to enforce the same award in India. However, to the dismay of both the parties, the proceedings were not completed in due time. Moreover, to White Industries' surprise, the enforcement proceedings were stayed and therefore it filed an appeal to the Supreme Court of India. The matter couldn't be decided until 2010 and thus finally, White Industries resorted to arbitration as it invoked the arbitration clause under the India-Australia BIT.

The contention of White Industries was that it had been denied "effective means" of enforcing its rights in relation to its investment, a protection incorporated into the India-Australia BIT by virtue of an MFN clause it contained. Thus, due to an ineffectual judicial (justice) system, India paid a huge price.

This proceeding signalled the start of a new decade for India, as this case was followed by a spate of proceedings against India. The major problem with India was that the whole BIT regime was more of an investor-friendly regime rather than a balanced one. Thus, India started working on a new model and hence, India signed just one BIT between 2011 and 2015 and that with the UAE. The draft on the new model BIT was subsequently approved by the Cabinet in December 2015.

The new model BIT has significantly departed from the earlier model as this time it follows a protectionist policy and does not favour the investors much. It is very evident that the new model BIT is a result of the backlash that India has faced in the past 7 years. It is to be noted that according to the World Investment Report 2016, India was one of the top 15 most frequent respondent states in 2015, which can certainly daunt the potential investors planning to set up a business enterprise in India. Therefore, it seems pretty clear that now India, instead of adopting a balanced approach towards the investors, has chosen to be on the defensive side.

The model BIT adopted in 2015 indicates that from now on, India would give precedence to the host state's right to regulate over investment protection. This can be inferred from the various changes that have been introduced, amongst which some of them are: (1) narrowing down the definition of investment adopting an 'enterprise-based' definition of investment instead of an 'asset-based' definition; (2) providing for a number of actions which could not be decided by the arbitral tribunal; and (3) deleting the MFN clause, etc.

The MFN clause in a BIT aims to create a level-playing field for all foreign investors by prohibiting the host state from discriminating against investors from different countries. Majorly, foreign investors have preferred borrowing beneficial clauses and provisions from another BIT signed by the host state with other country. Now, it is to be noted that based on the previous model, India used to have a MFN provision in the BIT. But the MFN clause has been completely excluded in the new model BIT.

Moreover, it is not surprising that India has excluded the MFN provision due to the problems it faced in the White Industries case where Australia invoked the 'effective means' provision contained in the India-Kuwait BIT. Now it is very easy to conclude to the fact that India obviously did not want to grant the same remedy of effective means to Australia and that is why India formulated a balanced BIT.

However, it is also pertinent to note that the tribunals often import clauses of BITs entered into by a state with other countries even when that state had purposely not kept the same clause or provision. The reason why the tribunals resort to this approach is because the MFN clause aims to provide the benefit to a country and therefore in this particular case, India suffered a lot and hence finally removed the MFN provision from its new BIT.

It is highly debatable as to whether this move in the current context is favourable or not but the reason for doing that is clear to the arbitration community. India should have been cautious in adopting such a stand, as this would definitely restrict the number of investors in India as they longer could enjoy the right of having the same rights as of those investors of other nations. Moreover, the MFN clause is also important in order to ensure that every state/or investor is treated equally, without any kind of discrimination. Hence, India has definitely come forward with some new and impressive developments but with that there are also some major shortcomings which can act as an impediment to attracting foreign investments in India.

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