

GLOBAL PERCEPTION ON EXCLUSION OF MFN CLAUSE FROM INDIA'S NEW MODEL BIT, 2015

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1. INTRODUCTION:

To increase liberalization, interdependence and globalization, this clause is likely to become the most important one. Countries for enhancing their economy enter into trade and for that they need investments. One of the methods to attract investment is to enter into an agreement with the other country which benefits the other nation also. Every nation trade with the intention to flourish its economy hence enters into Bilateral Investment Treaty.¹ There are many Bilateral Investment Treaty's been signed by different countries who indulge in trade and investment. It becomes necessary to read through the other countries model BIT's to look whether the treaties include the provision of most favoured nation and whether it is included after the amendments or from the formation of the model. They give a clear picture whether there are specific countries that include it or it's just a matter for some countries. For the purpose to understand the perception of the inclusion of the clause, other BIT model is to be referred specifically the most favoured nation clause. This will help us understand the different manner of incorporation of the clause and the extent of the international obligation. For the purpose, only those countries will not be referred which have a stronger and developed economy and relations but also those countries which come under developing countries and are less referred for any treaty. Such a study will clear that inclusion of the MFN clause by all the countries has a rational which is for inviting investments and giving a security to other investor to invest in other country, thus making the economy stronger.

2. DEVELOPED COUNTRIES MODEL BITS:

2.1. US MODEL BILATERAL INVESTMENT TREATY 2012:

US have entered into 46 BITs out of which 40 are in force. The treaty desire to promote the economic cooperation between them with respect to investment by nationals. There was a treaty

¹ Supra 7, Jeswald W. Salacuse

of 2004 which was modified and the new model of BIT 2012 came with some changes in it. The new model 2012 is the predecessor of the old one since there were only minute changes made to it despite the critical reviews for making some crucial amendments. The old model also contained the most favoured nation clause and the new model also didn't make any changes on this clause. Other amendments were made with regard to transparency requirements, expansion of scope of labor & environmental obligations, on financial service provisions etc. but the most favoured nation clause remained untouched. Article 4 of the new model of US BIT talks about the most favoured nation clause. It accords same treatment and non-favorable treatment to all investors with respect to establishment, management, expansion, conduct, operation, and disposition of investments. This shows that the nation provides right and safety to other party investor also who is investing in host nation by entering into the treaty. The intention behind the inclusion of the clause is to bring the investor into same phase as that of host country by providing same treatment as that given to its own investors without any discrimination. When two nations enter into a treaty they agree in investing into each other countries with some international obligations which is not only among the contracting parties but also the other states by different international treaties. US have not excluded the provision in its new model neither there was any changes made to it, hence it is the clear indication that it does not intent to exclude the clause because it is a basic provision of any BIT which harmonizes the protection of foreign investment in other territory and most importantly it acts as a linkage for many different investment treaties. To attract the investors to invest in nation and enter into the treaty, they should include this clause in the treaty which provides them the assurance that they are to be treated equally in the host country without any discrimination and have same rights as that of host state investor. Excluding some investors from the purview of benefit of most favoured nation treatment could create economic distortions to the host state's economy. Hence it becomes necessary to include this clause in treaty to attract investors to invest for the enhancement of economy by providing benefits to them, with regard to investment, by providing them less favorable treatment in host country and minimizing the risk level of domestic government intervention and favoring its host state. The involvement of the clause shows that the US is heading towards its future investment treaties and negotiations with the developments

ongoing. US-Chile Free trade agreement², mentions the clause in Article 10.3³ and US-Singapore FTA⁴ talks about it in Article 15.4⁵.

Without MFN obligation in the treaty will give an option of discriminating economically among foreign investors. It is a pillar to the trading partners, thus inviting foreign investors to invest and enhancing the international investment system. US have entered into US-Singapore FTA with the same model without any difficulty with the inclusion of most favoured nation clause in Article 15.4⁶. Most favoured nation clause have some limitations that excludes the advantage covered by multilateral agreement which appeared in Article XII (2) (b)⁷, US-Poland BIT⁸.

In case concerning *Rights of Nationals by the United States of America in Morocco (1952)*⁹ which deals with the jurisdiction which United States could exercise in Morocco. The court interpreted the decision by referring to most favoured nation clause of the agreement between US and Morocco. Hence, inclusion of clause is important to make clear distinction between what are the rights and obligations of the parties to function and what all are the restrictions which the other party is not permitted.

2.2. CANADA MODEL BILATERAL INVESTMENT TREATY 2004:

Canada has entered into 35 BITs which are in force. The preamble of the model aims at recognizing the promotion and protection of investments of investors in the territory of other party. It will be wholly a mutual beneficial business activity for the development of economic cooperation and for the promotion of sustainable development. Like the other BITs, the Canadian model of BIT has also included the most favoured nation treatment clause in its treaty.

² Free Trade Agreement between United States and Chile (2003)

³ Most Favored Nation Treatment

⁴United States-Singapore Free Trade Agreement (2003)
https://ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset_upload_file708_4036.pdf>accessed 16th November 2017

⁵ National Treatment and Most Favored Nation Treatment

⁶ ibid

⁷ Reservation of Rights

⁸Treaty between United States of America and Republic of Poland (1990)
<https://www.italaw.com/sites/default/files/laws/italaw6222.pdf>> accessed 16th November 2017

⁹ France v United States of America (1952) ICJ Rep 176

<http://www.icj-cij.org/files/case-related/11/011-19520827-JUD-01-00-EN.pdf>> accessed 27th January 2018

Article 4 of the model speaks about the most favoured nation clause, the no less favorable treatment in like circumstances to the investors and investments made by the foreign investor or the other party. This clause applies to the agreement signed on the date of entry, not on the past agreements of bilateral or multilateral. The clause is added in this treaty also as to others to give a promotion to the investment made in the other country by the foreign party and equal right to the investors. Most favoured nation treatment is a core obligation of the commercial policy to give due regard to avoiding of discrimination between the foreign investors. The treatment must be provided immediately and unconditionally to the other party as under the Havana Charter¹⁰. A similar approach was taken by the World Bank guidelines on the treatment of Foreign Direct Investment¹¹ on inclusion of MFN clause and its scope. The clause is included in BITs because it's a basic provision that every BIT follows to protect the investments of foreign investors investing in host state from being discriminated among the third country investors. It protects the investments from being treated less favorably to what is accorded to other investments of other investors. Canada-Chile FTA¹², Article G-03¹³ reads about the MFN clause and makes it clear in its text the intent to use the likeness of the circumstances as the comparison to grant the treatment. US and Canadian BITs covers the establishment and post establishment phases and explicitly states that the right applies to like circumstances rather than just mentioning the comparative context against the treatment. There is also an exception to the clause that precludes the coverage of the advantages accorded by virtue of multilateral agreements and negotiations to which the BIT partners may or may not be adhered. Canada-Chile agreement's Article G-8¹⁴ does not apply to the exception made or any derogation to TRIPS agreement. In *Vannessa Ventures Ltd v Bolivarian Republic of Venezuela case*¹⁵ the claimant attempted to expand the definition of Investment under the Canada-Venezuela BIT through the application of MFN clause of the BIT. The tribunal rejected the plea by holding that the BIT's MFN clause could only come to play only when the BIT itself applied.

¹⁰ United Nations Conference on Trade and Employment, (1948) https://www.wto.org/english/docs_e/legal_e/havana_e.pdf > accessed 10th February 2018

¹¹ The World Bank Group, "Guidelines on the Treatment of Foreign Direct Investment", 'Legal Framework for the Treatment of Foreign Investment: Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment' Vol II (1992)

¹² Canada-Chile Free Trade Agreement (1996)

¹³ Most Favoured Nation Treatment http://www.sice.oas.org/Trade/chican_e/Text_e.asp#G-03> accessed 22nd February 2018

¹⁴ Reservations and Rights http://www.sice.oas.org/Trade/chican_e/Text_e.asp#G-08> accessed 22nd February 2018

¹⁵ ICSID Case no. ARB(AF) O4/6 (2013)

2.3. ITALY MODEL BILATERAL INVESTMENT TREATY 2003:

This BIT also contains the most favoured nation clause in Article III of its agreement. It also talks about the less favorable treatment to the investment and to the investor of the foreign party. The preamble of the model BIT establishes favorable conditions to enhance its economy by providing same treatment to foreign investor and equal treatment to their investments in the territory. Italy has signed the 84 BITs in total out of which 72 are in force. Most favoured nation clause is the most significant instrument in economic liberalization. It helps avoid the economic deformation by providing investors the equal treatment in the host countries. MFN clause it used as the tool for initiating a dispute in a dispute resolution mechanism. In *Salini Construttori Spa and Italy trade Spa v Jordon case*¹⁶, the Italy-Jordon BIT, 1996 clause on amount owned to claimant for the construction of the dam in Jordon. The court ruled in the case that MFN clause of this BIT cannot be used as the rule to import the broader dispute resolution provision from Jordon-BIT since the Italy-Jordon BIT clearly mentions that it applies for the ICSID arbitration of treaty claims and not to the contract claims.

This model BIT also contains the most favoured nation clause as the other BITs in lieu to bring the investors and investment made by them in same phase without discriminating them and giving equal right and obligation to the investments made by the foreign country. This clause promises to not favor and give privilege to other investors than the foreign investors.

2.4. GERMAN MODEL BILATERAL INVESTMENT TREATY 2008:

Article 3 of the model deals with the most favoured nation clause and also laid down what deemed to be less favorable. Any type of different treatment in event of discrimination and impediment to sale of products which is accorded by the country more to its own investors investment than to foreign party is treated as the less favorable treatment which creates discrimination. This BIT also aims at creating favorable treatment to investment in the territory recognizing that such contractual protection and encouragement are apt for the enhancement of

¹⁶ ICSID Case no. ARB/02/13 (2006)

economy and business along with increasing the prosperity between the nations. The very first BIT was signed between Germany and Pakistan in 1959 which also has included the MFN clause. Inclusion of MFN clause in investment is important to ensure equality of competitive conditions between the foreign investors of different nationalities. Germany has signed the highest BITs of around 133 in number. In *Daimler Financial Services AG v Argentina case*¹⁷, the MFN clause of Argentina-Germany BIT was looked to consider the scope to bypass a procedural requirement that all disputes be submitted to local courts for 18 months before going to international arbitration. This BIT model also incorporates the MFN clause with the aim to eliminate the chances of discrimination and giving an equal competitive environment to foreign investors investing in host country.

2.5. UNITED KINGDOM MODEL BILATERAL INVESTMENT TREATY 2008:

Article 3 of the model BIT incorporates the most favoured nation treatment clause with the same provision of no less favorable treatment to the investments made by the foreign investors. Any maintenance, use, enjoyment or disposal of investment shall be accorded the same treatment to what is accorded to its own nationals or companies. Inclusion of the clause seeks to ensure equality of treatment and conditions between the investors by offering protection to investors and their investments. In *Anglo- Iranian oil company case*¹⁸, United Kingdom invoked the MFN clause of the agreement signed between them to seek the treatment envisaged in treaty of friendship, establishment of commerce of 1934. In *RosInvestCo UK Ltd v Russia case*¹⁹ the extension of MFN clause of UK-Russia BIT to dispute resolution provision was at question. In another case, *Garanti Koza v Turkmenistan*²⁰, there was a dispute between the UK Construction Company and Turkmenistan over the failure to pay for the work. In this case the most favoured nation clause was used to invoke a state's consent to a particular arbitral tribunal found in another BIT. UK has entered into total 106 BITs.

Hence, inclusion of the MFN clause is always present in every BIT which helps not only in spreading equality but also to resolve dispute in case it arises. The party can invoke another BIT's MFN clause for the matter.

¹⁷ ICSID Case no. ARB/05/1 (2012)

¹⁸ United Kingdom v Iran (1952) ICJ Rep 93

¹⁹ SCC Case no. V 079/2005 (2010)

²⁰ ICSID Case no ARB/11/20 (2013)

2.6. FRANCE MODEL BILATERAL INVESTMENT TREATY 2006:

France has signed 104 BIT's as whole. Article 4 of the model of BIT deals with the most favoured nation clause talking about non grant of less favorable treatment to foreign countries than that of host country. The most favoured nation clause is incorporated in this BIT, also like the other BITs, which shows that the clause is one of the most important provision to be added in BIT like the other clause for giving them an affirmation to invest in our nation and the treatment granted to them will be same as the nation product without discrimination. In *case EDF International SA, Saur International and Leon Participaciones Argentinas SA v Argentina*²¹, the France-Argentina BIT's MFN clause was used by the tribunal for resolving the case. Hence, it shows that the presence of clause is of utmost importance to not just provide a fair treatment but also to resolve a dispute. In *Frank Charles Arif v Moldova case*²², also the tribunal referred to the MFN clause of Moldova-France BIT. Hence, to liberalize trade and to maintain the interdependence of the investment this clause is needed to provide the security to investors, no less favorable treatment or discrimination, so that they can invest in our country hence increase the economy.²³

3. DEVELOPING COUNTRIES MODEL BITs:

3.1. COLOMBIA MODEL BIT 2007:

Article III²⁴ of the model talks about the promotion, admission and protection of investments. The clause speaks about the no less favorable treatment with respect to investments made in country by the foreign investors. This clause does not explicitly mention the term most favoured nation rather mentions about the non-discriminatory action to be followed with the investors and the investments made by them. It is a developing country which entered into 16 bilateral investments treaties out of which 7 are in force.

²¹ ICSID Case no ARB/03/23 (2012)

²² ICSID Case no ARB/11/23 (2013)

²³ Supra 15, Gaurav Rai

²⁴ Promotion, Admission and Protection of Investments https://www.italaw.com/documents/inv_model_bit_colombia.pdf> accessed 24th February 2018

3.2. AGREEMENT BETWEEN SRI LANKA AND THE GOVERNMENT OF REPUBLIC OF INDONESIA:

Sri Lanka and Indonesia both are the developing countries which entered into agreement concerning the promotion and protection of Investments. The agreement explicitly mentions the most favoured nation provision in the agreement under the Article III giving protection to investments by the other national contracting party ensuring fair and equitable treatment with no discriminatory measures. The no less favorable treatment to the investment is also to be accorded by each contracting party of the third state. Indonesia has entered into 42 BIT's as a whole out of which 26 are in force on the other hand Sri Lanka entered into 28 BIT's out of which 25 are in force. Developing countries also take notice of the most favoured nation provision to make sure that the investor and the investment are not discriminated by the other party.

3.3. AGREEMENT BETWEEN THE GOVERNMENT OF THE KINGDOM OF COMBODIA AND KINGDOM OF THAILAND:

Both the countries signed the agreement for the promotion and protection of investments. Article 4 of the agreement, "Treatment of Investment", states about the equal treatment of investments of the investors and no less favorable treatment to be accorded to the other contracting parties to the third state. Like the other countries it also talks about the most favoured nation clause without the explicit mention of the term. Thailand entered into 39 BIT's of which 36 are in force while Cambodia entered into 23 treaties out of which 12 are in force. Hence, it shows that such small countries also necessarily includes the most favoured nation clause in their agreement no matter with whom they are entering to treaty.

3.4. AGREEMENT BETWEEN THE REPUBLIC OF KENYA AND THE BURUNDI:

This agreement is entered into for the Reciprocal Promotion and protection in relation to foreign investments on 2009 between the two developing countries. Article 4 of the agreement explicitly mentions the most favoured nation treatment allowing for the same treatment with respect to investment and investor of other nation. The Burundi has signed 9 treaties as a whole and 6 are in force, on the other side Kenya has signed 19 BIT's out of which 11 are in force. No matter how small is country and the number of BIT's are signed, one thing remain constant, is the inclusion of most favoured nation treatment.

3.5. AGREEMENT BETWEEN EGYPT AND MALAYSIA:

Government of Egypt and Malaysia entered into the agreement for the promotion and protection of agreement with the aim to strengthen the economy and industrial cooperation by creating the favorable conditions for investments made by the other contracting party investor. Article 3 of the agreement says that the fair and equitable treatment must be provided to the contracting parties and no less favorable treatment than what is accorded to the investments made by investors of any third state. The most favoured nation must not be misunderstood with providing special privilege or benefit of any treatment. Egypt entered into 100 BIT's and Malaysia entered into 66 treaties out of which 49 are in force.

2.3.6 Agreement between the Myanmar and Philippines:

Both the countries entered into agreement for the promotion and protection of Investments. Article III of the agreement speaks about the treatment to be provided to the investments made by the foreign investor to the contracting party territory. Treatment shall not be less favorable as regard to management, maintenance, use, enjoyment or disposal of investments. Philippines have entered into 37 treaties on the other hand Myanmar just entered into 9 BIT's but they both have the MFN clause in their agreement to avoid discrimination. In case *Asian Agricultural Product v Sri Lanka*²⁵, the issue of importing liability standards from other BIT was at question. The MFN clause of Sri Lanka-UK BIT was used to apply the liability standards incorporated in Sri Lanka-Switzerland BIT. Similar decision was taken by the tribunal in *Maffezzini v Spain case*²⁶ where by virtue of the MFN clause the claimant got the right to import the more favorable jurisdictional provision to resort for its dispute. In another case, *Tza Yap Shum v Peru*²⁷, the tribunal rejected the use of most favoured nation clause from other BIT to bypass the narrow interpretation of provision.

In *MCI Power Group and New Turbine Inc v Ecuador case*²⁸, MFN clause was used to expand the scope of BIT to which tribunal disagreed since the investment was not covered under the BIT. In another case, claimant attempted to use MFN clause of BIT to retroactively apply the protections to investment which was not covered in treaty.

²⁵ ICSID Case no ARB/87/3 (1990)

²⁶ ICSID Case no ARB/97/7 (2000)

²⁷ ICSID Case no ARB/07/6 IIC 677 (2015)

²⁸ ICSID Case no ARB/03/6 (2007)

4. CONCLUSION:

The inclusion of MFN clause in any BIT is meant to provide protection to the investor investing in the territory of contracting party. This provision of treatment is a treaty based obligation which every treaty incorporates specifically. Inclusion of the treatment puts the investment and also the foreign investor in a safer zone from being discriminated against the other investments of the party. Developed countries are explained with their MFN clause with the intention to make it clear that every BIT has this provision in its model BIT with the aim to strengthen its economy by inviting investment from the foreign countries. Foreign investors will invest in host country only when they find that their investments are equally kept in platform as that of other contracting party and is accorded the same treatment.²⁹ Every BIT incorporates this provision either expressly or by merging it with some other provision but they do provide this treatment to make their relations across border. It's not just the case that developed countries do it, even the developing countries has taken up this provision in their BITs. Even they follow the basic understanding of inclusion of MFN in a BIT which has its role from the very beginning³⁰. There is always a fear for foreign investors to get discriminated by the host country in terms of their investment if such a clause is not incorporated in the treaty because in such case the host country will favor its investors and investment made by them keeping aside the foreign investments, thus treating them unequally. For this reason they always enter in treaty with countries which have incorporated this clause so that they also have equal say and if in case they are accorded less favorable treatment they can approach to the tribunal for justice, in such a case this provision is treated as the international obligation to provide this treatment. Every BIT has incorporated this clause to avoid the situation of discrimination and also as an obligation to treat the other contracting parties equally. The aim of BIT is always to attract investment to its county, strengthen its relations, flourish the economy and create an environment of competition and grow. With the inclusion of MFN provision it becomes very easy for the investors to fulfill this aim without the fear of any discrimination and any sort of favorable treatment. This is the only reason why every model has incorporated this provision without any change in terms. Whole of the MFN clause is meant to keep the contracting parties in equal phase where the host state will not discriminate the beneficiary state and equal rights are given to everyone in same circumstances.

²⁹ Supra 14, Andrew Newcombe and Lluís Paradell

³⁰ Supra 8, M. Sornarajah