ASSESSING THE GEOPOLITICS OF INVESTOR-STATE ARBITRATION: A *TWAILIAN* CRITIQUE FROM INDIAN PERSPECTIVE

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Abstract

Investment treaty arbitration of White Industries has opened a lot of eyes and has struck fear into the heart of the Indian Government. The wide scope of Investment treaty Arbitrations borders on a frightening range for every government involved especially Third World Countries as it derives its powers from a Bilateral Investment Treaty and other forms of treaties meant for trade. Such powers have been present from the colonial times, but their usage is being truly recognized by different institutions now. A mechanism which out rightly is set to promote trade and development in the Third World countries is strangely enough taking the opportunities away from such countries largely due to the structural development of such institutions. Signs of such bias have been in the open for quite some time but the Indian Economy is just facing the music. Several countries have been worn out due to it and strangely enough, most of the time developing countries feel the brunt of the violations caused under the Investment treaty arbitrations. In some cases, there is clear abuse of the freedom allowed by the BIT from the tribunal by not following such said principles, which result in compensation and damages amounting to millions flushed out of their economic set-up, leaving them weak. This paper will deal with the alleged bias in the two investment arbitrations that the Indian government has been a party to. The focus will also be on Regime bias, which is more focused on the forging of legal rules and the meaning acquired by a particular term and how it is interpreted by different bodies and on Doctrinal Bias, which speaks about usage of doctrines and principles under the current state of International law.

I. Introduction

The developing world is slowly losing its confidence in the Investor-State arbitration regime. It is now being construed as a genuine threat to the sovereignty of these so-called 'Third World' economies. Unlike traditional tribunals who are empowered to adjudicate upon the rights and liabilities of the parties arising out of a contract, these tribunals utilise indistinctive standards of international law to interfere with the policy space of the host nations.[200] While India's hustle with this particular form of dispute resolution is just in its nascent stage, recent incidences such as the *2G- Spectrum Scam*[201]and the *Vodafone Tax Controversy*[202] have opened the flood gates of numerous claims for Investor-State arbitrations under various Bilateral Investment Treaties (BITs). Currently India neither has the experience nor the expertise to deal with such claims. The (modern) Indian 'history' of investment arbitration spans across a time period of less than two decades which is categorically demarcated by the *Dabhol*

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[200] Stephan W. Schill, Symposium, *Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review Through Comparative Public Law*, 2012 3 (2012) *available at:* http://www.ssrn.com/link/SIEL-2012- Singapore-Conference.html, Last visited [30/07/2013][hereinafter 'Schill']; Muthucumaraswamy Sornarajah, *A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration*, *in* KARL P. SAUVANT, APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES, 39-45 (Karl P. Sauvant ed., 2008).

[201] Sumit Rai, *Does 2G License Cancellation Amount to Expropriation by India?,* (February 5, 2012), *available at*:http://blogarbitration.com/2012/02/05/does-the-2g-license-cancellation-amount-to-expropriation-by-india/, Last visited [12/09/2013]; Allen & Overy, *India: Investment treaty arbitration* (2012),*available at:* http://www.allenovery.com/SiteCollectionDocuments/India%20%20Investment%20Treaty%20Arbitration.pdf, Last visited[26/12/2012].

[202] RaagYadava et al, *Vodafone and India- A Review of Claims in Investment Arbitration*, NLSIU (Bangalore), 2012, *available at:* http://www.nls.ac.in/index.php?option=com_content&view=article&id=442:vodafone-and-india-a-review&catid=3:resources, Last visited[31/07/2013].

Arbitration (2005)[203] and *White Industries Arbitration* (2010)[204]. Although there has been a considerable paradigm shift from 2005 to 2010 vis-à-vis the recognition of 'Third World interests' there is no gainsaying that in fact, this system is still dominated by the First World.

This Article seeks to analyse this limited experience through the aid of Third World Approaches to International Law (TWAIL). Apart from being a critical assessment tool for international law[205], TWAIL also seeks to transform international law into a language of emancipation for the developing countries[206] such that it is not used for advancing the interest of the North but responds to the problems of the global South.[207] Staying true to the said objectives of the movement, this article prescribes certain modifications in the existing norms of investment treaty arbitration to cater to the interests of the developing world and consequentially restore its confidence in this particular dispute resolution mechanism.

The entire debate of an 'inherent bias' in international law and international law institutions is attributed to its colonial origins by the TWAIL scholarship[208] in the 1990s (See Part II). It was only through colonial expansion that international law achieved one of its most defining characteristics- universality.[209] The development of various international law doctrines with special reference to the Third World countries is essentially seen as an instrument of suppression under the auspices of the West's civilizing mission.[210] Towards the later part of the said discussion, a functional relationship between TWAIL and Investment Arbitration is sought to be established. Firstly, it will include the prime points of distinction between traditional international commercial arbitration and investment-treaty arbitration. Secondly, since this exercise predominately involves the analysis of arbitral awards (See Part III and Part IV), Gathii's elaboration on Regime bias becomes one of quintessential importance. Regime bias examines the internal processes by which international law is interpreted and applied in decisions affecting the Third World.[211] Apart from this, the authors also introduce the concept of 'deference' from a Third World perspective. Most arbitral tribunals adjudicating Investor-State disputes apply varying standards of deference. Our line of argument is, when such a tribunal is bestowed with the responsibility of adjudicating disputes involving developing nations, it owes a higher degree of deference in comparison to such disputes which involve the developed world economies. Whenever the Third World countries adopt an alternative development policy authorizing active state intervention

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[203] *Capital India Power Mauritius I and Energy Enterprises (Mauritius Company v. Maharashtra Power Development Corporation Limited, Maharashtra State Electricity Board and State of Maharashtra*, Int'l Comm. Arb. Case No. 12913/MS (27 April 2005), *available at* http://ita.law.uvic.ca/documents/Dabhol_award_050305.pdf,Last visited[25/07/2013] [hereinafter 'Dabhol Arbitration'].

[204] White Industries Australia Limited v. The Republic of India*,* Final Award, 30 November 2011.

[205] MakauMatua, *What is TWAIL?*, 94 AM SO'Y INTL L. 31 (2000) at 31; Gus Van Harten, *TWAIL and Dabhol Arbitration*, 3(1) TRADE L. & DEV. 131 (2011), at 134 [hereinafter 'Van Harten'].

[206] Antony Anghie B.S. Chimni, *Third World Approaches to international Law and Individual Responsibility in Internal Conflicts,* CHINESE J.INT'L LAW, 77 (2003), at 79 [hereinafter 'Anghi and Chimni'].

[207] Van Harten, *supra* note 6 at 135.

[208] Richard Falk, Jacqueline Stevens & Balakrishnan Rajgopal, *Introduction, in* INTERNATIONAL LAW AND THIRD WORLD: RESHAPING JUSTICE (Richard Falk, Jacquiline Stevens &Balakrishnan Rajgopal eds., 2008) at 5-6 [hereinafter 'Falk, Stevens and Rajgopal']; BS Chimni, *Third World Approaches to International Law : A Manifesto*, 8 INTERNATIONAL COMMUNITY LAW REVIEW 3 (2006) at 5 [hereinafter 'Chimni'].

[209] Van Harten, *supra* note 6 at 84.

[210] *Id.*

[211] James Thuo Gathii, *Thirld World Approches to International Economic Governance*, *in* INTERNATIONAL LAW AND THIRD WORLD: RESHAPING JUSTICE 264 (Richard Falk, Jacquiline Stevens &BalakrishnanRajgopal eds., Routledge 2008) [hereinafter 'Gathii'] .

in the private sphere an investor is bound to be affected.[212] Policy decisions are essentially sovereign in nature and once it is established that the conduct in question was in the larger interests of the citizens and the overall stability of the economy, the tribunal must refrain from intervening with such decisions.

Part III and IV of this article are devoted to the analysis of two awards passed by respective tribunals against India. *Dabhol Arbitration* was based on a long-term investment arrangement between Dabhol Power Corporation (DPC) established by Enron (a US based Private Corporation) and Maharashtra State Electricity Board (MSEB), Government of Maharashtra and Maharashtra Power Development Corporation (MDPCL) all of which are public entities. The dispute had given rise to four international arbitrations out of which only one award is available publicly which is the subject of our analysis. Similar to the arbitrations stemming from BITs this award is also an example of collisions over the legal boundaries between the public and private sphere.[213] According to Van Harten, aspects of the Arbitration, *relating to the structure and process of the arbitration as well as the content of the tribunal's award, offer reasons to support perceptions of Regime bias in international arbitration*.[214] The project was cancelled as it was highly admonitory from the stand-point of policy, consumer interests and cost of the project.[215] Even the World Bank characterised the project as non-feasible and prejudicial to the interests of the Indian parties.[216] Despite such *prima facie* infirmities, the tribunal assumed the jurisdiction of adjudicating a policy decision in a situation where it should have characterised the steps taken by the Indian government as legitimate and abstained from meddling with the same.

On the other hand, *White Industries Arbitration* (Part IV) is a classic example of TWAIL theory in practice. Although the majority of the issues were decided in favour of India, the Tribunal by the application of the *Most Favoured Nation Treatment* (MFN) doctrine in fact, rules in favour of the investor. The blanket application of MFN clauses in various disputes involving developing countries has rendered them defenceless against exorbitant claims from the foreign investor. A doctrine which is essentially colonial in nature lay dormant up to the year 2000[217]. But once in vogue, this doctrine has given rise to many evils such as "treaty shopping" which allow an investor to cherry pick provisions form the BITs other than the one under which he is entitled protection. It is a general observation that an investor from a developed country generally chooses provisions from the BIT with another developed country. After discussing the merits of the award passed in the *White Industries Arbitration,* the authors will trace the historical development of this doctrine (Part V). The history reveals that the nature of the doctrine is imperialistic and that its interpretation and application suffers from a colonial hangover. The problem especially in the Indian context is that we are following the same model BIT with minor alterations since our first BIT with United Kingdom in 1994.[218]As

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[212] Amr A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neo-liberalism*, 41(2) HARV. INT'L L.J. 419 (2000), at 424 [hereinafter 'Shalakany'].
[213]*Id.* at 429.
[214] Van Harten, *supra* note 6 at 148.
[215] Preeti Kundra, *Looking Beyond the Dabhol Debacle: Examining its Causes and Undertaking its Lessons,* 41 VAND J. TRANSNAT'L L. 907 (2008) 912; *ibid* at 137 [hereinafter 'Kundra'].
[216] Kundra, *supra* note 16 at 907.
[217] Emilio AgustínMaffezini v.The Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, January 25 2000 [hereinafter 'Maffezini Case'].
[218] Department of Economic Affairs, Government of India, *Indian Model Text of Bilateral Investment Promotion and Protection Agreement (BIPA)*, *available at*:http://finmin.nic.in/the_ministry/dept_eco_affairs/investment_div/invest_index.htm#Indian%20Model%20Text%20BIPA,Last visited[20/07/2013].

on July 2012, India has signed 82 BITs out of which 10 have not yet entered into force[219], all of which have a MFN clause.

It is true that investment arbitration and the institutions involved in it have tended to resolve the dispute in favour of the economic interests of the North. As a result of this, several developing countries have refused to comply with the arbitral awards which levy heavy monetary obligations on these countries. Many developing countries like Venezuela have started withdrawing membership from the ICSID which is a strong evidence of the pessimism prevailing among these countries with regards to Investor-State arbitration. The system is considered as a blatant violation of sovereignty. In such circumstances, if this mechanism wants to succeed, it must respond to the Third World interests (See Part VI).

Third World Approaches to International Law: A Brief Understanding

The history of TWAIL can be broadly characterised into two phases with its fulcrum point around the 'New International Economic Order' (NIEO) movement. The TWAIL scholarship that existed before the NIEO indicated that the colonial international law characterised the non-European nations as barbaric, backward and violent who needed to be civilised, redeemed and pacified.[220] International law was a system that legitimized the conquest and exploitation by the Europeans over the rest of the world.[221] Further, they did not out-rightly adopt a rejectionist tendency towards international law. They believed that the contents of international law could be transformed according to the aspirations of the Third World.[222] This notion is still carried forward by the Later TWAIL scholarship. The Early TWAIL scholars also advocated in favour of 'sovereign equality' and 'non-intervention' especially the concept of Permanent Sovereignty over Natural Resources.[223]

NIEO movement in the 1960s and 1970s fundamentally argued for the reformation of the global economic order and to strike a balance between the labour and raw material producing Third World countries and the predominately Industrial West.[224] The early TWAIL scholars had place immense faith in The United Nations system for the restructuring of the world economic order. Using their majority, a group of seventy-seven countries[225] organised itself to float the Charter of Economic Rights and Duties of State which sought to re-introduce the *Calvo Doctrine* along with the right of a state to nationalise foreign-owned property and the right of such State to use municipal law instead of international law to measure compensation after such nationalisation.[226] In the early 1970s these countries were also successful in getting preferential access to developed markets.[227] All the efforts made by the developing

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[219] Ministry of Finance, Government of India, *Bilateral Investment Promotion and Protection Agreements (BIPA)*, *available at:* http://finmin.nic.in/bipa/bipa_index.asp?pageid=1, Last visited [22/07/2013].
[220] Henry J. Richardson III, *Gulf Crisis and African-American Interests Under International Law*, 87 AM. J. INT'L L. (1993) at 42; Ruth Gordon*, Saving Failed States: Sometimes a Neocoknialist Notion*, 12 AM. UJ.INT'L L. &POL'Y903 (1997).
[221] CARL SCHMITT, NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF JUS PUBLICUM EUROPAEUM(G.V. Ulman Trans., 2003); ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW, 310 (Cambridge University Press, 2005).
[222] Anghie & Chimni, *supra* note 7 at 81.
[223] Gathii, *supra* note 12 at 260.
[224] *Id.*
[225] Falk, Stevens & Rajagopal*, supra* note 9, at 2.
[226] ANTHONY **ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW** 221 (Cambridge University Press, 2004).
[227] Micheal Finger, J. & Schuler*, Implementation of Uruguay Round Commitments, World Bank working paper* (1999) No. 2215, 1.

nations went in vain as their voices met deaf years of the developed world. For example, the *Texaco* arbitration[228] de-legitimized the nationalisation of oil concessions by Libya by stating that a newly independent country would be bound by the existing norms of international law. By protecting the status-quo of international law, the new States were denied any effective power to change the unfair norms of international law that existed. Despite several General Assembly Resolutions articulating the notions of the Third World politically, NIEO proved to be a failure with little effect on the redistribution of global wealth.[229]

Later TWAIL scholarship was a result of the failure of the NIEO and other Third World initiatives. Instead of considering colonisation as external or incidental to international law, they started to examine the effects of colonisation on international law. A different yet simple structuring of the history of international law led to one of the most glaring yet fundamental propositions of TWAIL that colonialism was central to the formation of international law.[230]

It was principally through colonial expansion that international law achieved one of its defining characteristics-universality. The doctrines used for the assimilation of the non-European world into this universal system of international law including the fundamental concept of sovereignty itself-were shaped by the relationships of power and subrogation inherent in the colonial relationship.[231] The historical reference of 'uncivilised' is now replaced by the qualms of (under) development and traditional notions of violence are replaced by economic superimposition and the barbarism is now construed in terms of deficiency in democratisation, good governance, war against terror etc. for which there is a need for international intervention similar to the imperial intervention of the colonial times.[232]

Globalisation is having more delirious consequences on the sovereignty of Third World countries. National sovereignty suffers from a critical rupture at this moment of post-colonial liberalisation. This global capitalist hierarchy is no different from the imperialistic circuits of international domination. Armed with the international finance and trade institutions to enforce their *neo-liberal agenda,* international law threatens to reduce democracy to a set of elected representatives who irrespective of political affiliations are compelled to pursue the same economic and social goals.[233] The economic and social independence of Third World Countries is undermined by the policies and laws dictated by First World and the institutions that it controls.[234]

A. Approaches adopted by the Later TWAIL Scholars

Unlike the Early TWAIL scholars which provided for alternatives to international rule in the form of National Economic Control or the New International Economic Order various scholars from the Later TWAIL scholarship examines the internal processes by which international law is interpreted and applied to decisions affecting the Third

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[228] BP Exploration Company (Libya) Limited v. Government of the Libyan Arab Republic, 53 I.L.R. 297 (1997).
[229] Shalakany, *supra* note 13 at 420.
[230] Anghie&Chimni, *supra* note 7 at 84.
[231] Antony Anghie, *Finding the peripheries; Sovereignty and Colonialism in 19th International Law,* 40(1) HARV. INT'L L.J. 1 (1999).
[232] Chimni, *supra* note 9 at 3.
[233] Chimni, *supra* note 9 at 3.
[234] *Id.*

World.[235] With reference to the *Dabhol Arbitration* these approaches have been utilised to review the structure, process and reasons of the award.

According to the idea of Regime bias, International law is not a neutral set of rules but an instrument employed in context of power relations among western and Third World States, International Law reflects an underlying bias against the countries that were colonized and remain 'other' in International society.[236]

Further, the notion of deference is used to designate a margin of appreciation, a space for manoeuvre within which host state conduct should be exempted from review by a tribunal.[237] The authors argue that in case of developing economy or a country in crisis the degree of deference should be higher and that such countries should not be made accountable for policy decisions advance towards achieving its own vital/ national interest.

i. Regime Bias:

Regime bias is a methodological extension of the TWAIL ideology. Since it is difficult to pin-point inherent Third World bias in the international rules and norms, Regime bias focuses on:

> "…*the way in which rules of international trade, commerce and investment are crafted applied and applied and adjudicated between Third World and Developed countries and the interest of international capital. Regime bias therefore refer to examining the choices made between alternative ways of crafting legal rules, meaning ascribed to the particular rule whether in its application by a n administrative agency, or at the adjudication by a domestic judicial body, or an international tribunal*"[238]

Regime bias is a tool which examines the way in which any international tribunal or adjudicatory authority applies existing rules and norms of international law. TWAIL is fundamentally oppositional not only to the existing international law but also equally precludes any conclusions based on international law which are inconsistent with the interests of the vulnerable group of the global economic order.[239] It is not the plain reading or formation of rules *per se* which determines that the outcome are adverse to the interest of the Third World countries but its application and interpretation which would expose the double standards of the world economic order.[240]

Put in this way, Regime bias appears to replicate only a subtler form of the pre-colonial and colonial attitudes of Western exploitation of Third World States whereby Western States would make the rules that subjected colonial territories to their domination, and later applied these rules when disputes arose, interpreting and applying these rules themselves, all to enhance their aggrandizement and to promote the prosperity of the international economic system.

Hence, this thesis is premised on the notion that Regime bias in international dispute resolution seeks to marginalize the interest of Third World States and their peoples, where such disputes involve the economic interest of Western

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[235] Van Harten, *supra* note 6, at 136.
[236] Ikechi Mgbeoji, *The Civilised Self and the Barbaric Other: Imperial Delusions of Order and the Challenges of Human Security*, *in* INTERNATIONAL LAW AND THIRD WORLD: RESHAPING JUSTICE(Richard Falk, Jacquiline Stevens & Balakrishnan Rajgopal eds., 2008) at 152-153, *supra* note 9.
[237] Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law,* 16 EURJ INT'L LAW 907 (2005).
[238] Gathii, *supra* note 12, at 262.
[239] *Id.*
[240] *Id.* at 264.

Industrialized States or where such economic interests includes the furtherance of the capitalist oriented global economic system.

It is true that the developing nations must attract long-term foreign investments to sustain their growth rates in the modern times which will not migrate to the capital importing nations unless it includes the additional luggage of an arbitration clause. It is also true that arbitration is a far more peaceful, convenient and direct mechanism than either "gunboat diplomacy" or "diplomatic protection model" but this doesn't imply that this system is free from bias against the Third World. John Paulsson, a prominent scholar from the North contends that bias in arbitration is a thing of the past. According to him, "Developing countries that have come of age are hardly the perplexed and powerless victims of esoteric arbitrations they might have one been." According to him, arbitration is a superior mechanisms among the available dispute settlement mechanisms and hence something which is "to be mastered rather than complained about."[241] However one pertinent observation is in order to arrive at the said conclusion most examples of the awards on which Paulsson relies are straightforward private disputes with no public policy element.[242]

At this juncture, it is important to distinguish between traditional international commercial arbitration and Investor-State arbitration. Investor-State arbitration, unlike any other form of dispute settlement mechanism under international law, provides for international adjudication of domestic public law along with international investment law.[243] Further Investor-State arbitration differs from international commercial arbitration in the nature of disputes. While commercial arbitrations determine contractual obligations of the parties, Investor-State arbitration disputes are in essence public law disputes which decide upon the lawfulness of the exercise of public authority by States. Lastly, since there is no requirement of exhaustion of local remedies in such proceedings the tribunals are in effect replacing the domestic courts of the Host State.[244]

ii. Deference*:*

As an extension of TWAIL, the authors contend that international tribunals should exhibit higher degree or standard of deference in disputes involving Third World countries and their interests. Deference refers to the notion that international tribunals which assessing the obligations of a state party under a BIT must respect the sovereignty of the State which includes policy decisions. Deference is also characterised as an interpretive tool which provides for a 'breathing space' within which State conduct can be exempted from judicial review. Hence, deference refers to a limitation in a tribunal's scrutiny concerning the decisions taken by the host state. Various aspects relating deference vis-à-vis investment arbitration were captured in *S.D. Myers v. Canada.*[245] The Tribunal stated:

> "(Investment treaty tribunals) *d[o] not have an open-ended mandate to second-guess government decision-making. Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive. The ordinary remedy, if*

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[241] Jan Paulsson, *Third World Participation in International Investment Arbitration*,2 FOREIGN INVESTMENT L.J. 19 (1987) at 21.
[242] Shalakany, *supra* note 13 at 429.
[243] Schill, *supra* note 1 at 4.
[244] *Id.* at 11.
[245] S.D. Myers, Inc v. Canada, UNCITRAL (NAFTA), Partial Award, 13 November 2000.

there were one, for errors in modern governments is through internal political and legal processes, including elections. …must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders."

Deference, in that understanding, is a parameter of the relationship between international and domestic law and protects a state's domestic policy space against control by international law and international tribunals. Likewise, the Tribunal in *Tecmed v. Mexico*[246]observed that, in determining whether a regulatory act constituted an indirect expropriation,

"the analysis starts at the due deference owing to the State when defining the issues that affect its public policy or the interests of society as a whole, as well as the actions that will be implemented to protect such values, such situation does not prevent the Arbitral Tribunal, without thereby questioning such due deference, from examining […] whether such measures are reasonable with respect to their goals, the deprivation of economic rights and the legitimate expectations of who suffered such deprivation."

International investment law and Investor-State arbitration perform the important function of protecting foreign investments against illegitimate government interference. At the same time, it is important that States do not feel unduly prejudiced by the system of international investment protection and continue to be able to both accept arbitration as a legitimate way for settling investment disputes and remain able to implement legitimate domestic public policies.[247]

Failing to apply appropriate standards of deference should also constitute Regime bias. International Financial Institutions such as ICC Arbitration, UNCITRAL, WTO Dispute Settlement Body, ICSID are all subservient to interests of the developed world. There have been several occasions where the Tribunals have failed to apply necessary standards of deference and have assume extraordinary jurisdiction thereby impinging the sovereign sphere of Third World countries.

The subsequent section seeks to analyze the *Dabhol Arbitration* which in the opinion of the authors is a glaring example of Regime bias.

The Dabhol Arbitration

Dabhol Power Project was a $ 2.8 billion project involving the construction of a natural gas powered electricity plants. It was one of the several projects approved by the Government of India in the 1990s for encouraging foreign investment and privatization of energy sector.[248]

The project remained controversial since its inception due to the lack of transparency[249], environmental concerns and non-compliance with the standard bidding process of India[250] etc. and all amongst the taint of corrupt

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[246] Tecnias Medioambientales Tecmed S.A. v The United Mexican States, ICSID Case No.ARB(AF)/00/2, Final Award,29 May 2003, para 112.
[247] Schill, *supra* note 1, at 27.
[248] Jeswald w. Salacuse, *Renegotiating international project agreements*, 24 FORDHAM INT'L L.J.1319, (2000) at 1344 [hereinafter 'Salacuse'].
[249] Kundra, *supra* note 16 at 912.

practices.[251] A detailed examination of the terms of the Power Purchase Agreement (PPA) and other documents such as the Shareholders Agreement (SHA), Guarantee of the State of Maharashtra reveal that the project was highly admonitory from the stand-point of policy, consumer interests and cost of the project.[252] Even the World Bank characterised the project as non-feasible and prejudicial to the interests of the Indian parties.

Table 1: The comparative analysis of the economic rights and obligations

DPC	**State of Maharashtra, MSEB and MPDCL**
Rights: • Claim of guarantee from State of Maharashtra which was further backed by a counter-guarantee of Government of India. • Proposed profit and return at 28% per annum Liabilities and Obligations Modest penalties for failures and breaches of the PPA	Rights • 17% return subject to an arithmetic increase in the tariffs at the rate of 14.5% every year over a period of twenty years. Liabilities: Compulsory purchase of 90% of the produce irrespective of the market demand by MSEB over the project life-time

Despite this, the project was approved but even when it was underway the oppositions were persistent. The steps taken by the government authorities to curb those protests tantamount to gross violations of Human Rights like excessive use of force, arbitrary detentions and infringement of the right to livelihood.

The public opinion on the policies of the then government was substantially reflected in the State elections of 1995. The new coalition government of Bhartiya Janta Party (BJP) and Shivsena established a high level committee to review the viability of the Dabhol Project and based on the report of the said committee the government decided to cancel the project[253]. In response to the steps taken by the government, Enron initiated arbitration proceedings under the PPA in London and the State government pursued action before the domestic courts alleging violations

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[250] Kirit S. Parikh, *Thinking Through the Enron Issue*, 36(17) Econ. & Pol. Wkly. 1463 (28 April 2008); Van Harten, *supra* note 6, at 137.
[251] Van Harten, *supra* note 6, at 138.
[252] Deeptha Mathavan, *From Dabhol to Ratnagiri: The Electricity Act of 2003 and Reform of India's Power Sector,* 47 COLUM. J. TRANSNATIONAL 387 (2008) at 403; Van Harten, *supra* note 6, at 139.
[253] Kundra, *supra* note 16 at 917.

of the said agreement. The disputes ended when both the parties mutually agreed to re-negotiation of the terms of the agreement.[254]

Later, in the year 2000, the Maharashtra government declared that it is financially incapable of meeting its obligations under the agreement[255] and thereafter, within a span of months, yet again alleged the breaching the terms of the PPA and ceased payments. The Government of India also declined to make any payments under the counter-guarantee agreement as it also held DPC to be in breach of its obligations.[256]

As a result of all such developments, four international arbitrations were initiated against Indian governmental entities:

1) DPC referred to arbitration under the PPA in London.[257]
2) Bechtel a co-owner of DPC, referred a claim under the DPC Shareholders Agreement (SHA) to ICC Arbitration in New York.
3) Bechtel and General Electric, as a co-owner of DPC, launched claims for approximately $ 1.3 billion under Indian BITs with Mauritius and the Netherlands.[258]
4) The US government brought a State-to-State claim against India after the US Overseas Private Investment Corporation was made to pay a sum of $ 110 million to Enron, General Electric, Bechtel and Bank of America in lieu of risk insurance for the Dabhol Project.

Out of these four claims, the only publicly available award was made in the ICC Arbitration instituted by Bechtel under the SHA and all the other proceedings were terminated after a settlement was negotiated between the governments and the other parties to the dispute.[259]

The ICC Arbitration was initiated by Bechtel, which held 10% shares in the Dabhol Power Corporation under the SHA against the MPDCL who became a party to the SHA after the re-negotiations in 1996 after an interim award was passed by the ICC Tribunal in London.[260] There are several anomalies in the arbitral award which the authors wish to highlight. They are:

A. Structure of the Tribunal:

The arbitration clause provided for the procedure of the appointment of arbitrators and the constitution of the tribunal. Once the Indian parties did not participate in the standard procedure of appointment the alternative procedure prescribed in the clause ensured that the make-up of the tribunal was such that the tribunal had a greater affinity towards the US corporate interests. Accordingly, in a situation where either of the parties fails to appoint

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[254] Van Harten, *supra* note 6, at 141.
[255] Salacuse, *supra* note 49, at 919; *Id.* at 137.
[256] Kundra, *supra* note 16, at 919.
[257] *Id.* at 922.
[258] John J Kerr & Janet Whittaker, *Dabhol Dispute- Legal questions remain unresolved,* 1 CONSTRUCTION L. INT'L 17 (2006); Van Harten, *supra* note 6, at 143.
[259] Ronald J. Bettauer, *Indian and International Arbitration: The Dabhol Experience*, 41 GEO. WASH INT'L L. REV. 381, 384-385 (2009); Van Harten, *supra* note 6 at 133.
[260] Dabhol Arbitration, *supra* note 4,at 3,4.

their arbitrator, the other party could make an application to the Chief Justice of the District Court of the Southern District of New York.[261] On the basis of this, the following were appointed as the arbitrators:

1. James H. Carter, Commercial Lawyer in US, appointed by Bechtel
2. Johnathan Rosner, Commercial Lawyer in US, appointed by the Chief Justice.
3. Louis A. Craco, Presiding arbitrator, Commercial Lawyer in US, appointed by the mutual consent of the other arbitrators

The structure of the tribunal is a basic indication of the fact that it lacked impartial and neutral elements.

Seat of Arbitration and the governing rules:

New York was designated as the seat of arbitration and hence, as per Article V of the New York Convention, the courts of New York would decide upon the matter if the award is liable to be set aside. Also, it is worth noting that it was an institutional arbitration conducted as per the ICC Arbitration Rules and most of the US firms who were a party to the dispute were either a member of the ICC or the US Council of International Business, the National Committee of the ICC. Hence, it is a reasonable presumption that the proceedings were more inclined to the tune of the interests of the firms than the Indian parties.[262]

Interpretation and construction of the facts:

The characterisation and interpretation of the facts leading to the dispute was clearly to the prejudice of the Indian parties. The entire failure and breakdown of the Dabhol Project was attributed to the political turmoil in the State of Maharashtra and the changes in the energy policies.[263] On the other hand, the portrayal of the project and the foreign investors was no less than that of a 'messiah' who could remedy the 'acute shortfall of power' in India. The tribunal mentions that the foreign investment was made upon the confidence of the 'assurances' provided by the government entities in India (137).[264] The tribunal made no mention of the economic shortcomings of the project or any of the other substantial ancillary concerns as a result of which the project was always surrounded by a cobweb of controversies. The manner in which the facts were construed enabled the Tribunal to exercise jurisdiction over the regulatory sphere of Maharashtrian Government. The Tribunal was ineffective in applying due standards of deference. Given the nature and consequences of the project, the decision of the new government was legitimate. The closure of the project was in fact, one of the prime reasons for their elections. The decision of the tribunal shakes the foundation of representation of people and democracy. It forces the developing countries to subjugate themselves to the social and economic goals determined by the dominating countries despite its effect upon their own development.

Abhorrent exercise of Jurisdiction:

A tribunal mustn't go beyond the scope of the agreement under which it is constituted. This is an established practice of arbitration. However, here the tribunal allowed Bechtel to advance claims against MSEB and the State of Maharashtra which were not the parties to the dispute. By expanding the various sources of law the tribunal assumed the authority to adjudge the policy decisions associated to the project.

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[261] *Id.* at 6.
[262] Van Harten, *supra* note 6, at 151.
[263] Dabhol Arbitration, *supra* note 4, at 2,26.
[264] *Id.* at 20.

According to clause 8.1 of the SHA:

> "*8.1 Arbitration. If any dispute or claim (other than over a price per share as described in Section 6.3(c)) between two or more Shareholders or between one or more Shareholders and the Company (in this Section 8.1, each a "disputing party") arising out of this Agreement or any of the Organizational Agreement (in this section 8.1, a "claim") has not been resolved by mutual agreement on or before the 30th day following the first notice of the subject matter of the claim to or from the disputing parties, then the disputing party can refer to arbitration under the following provisions:"*

The clause provides ample clarity to the fact that arbitration can only be brought against or by a Shareholder. MSEB and the State of Maharashtra were not a party to the SHA and hence, not a Shareholder within the meaning of the Agreement. However, the tribunal sought to induct them as parties in the capacity of 'affiliates' of the MPDCL. The term 'affiliate' was defined under Section 1.1 of the Agreement as to include "with respect to any Person, any other Person that (i) owns or controls the first person" in matters of "voting or granting consents with respect to matters in which it or its Affiliates are involved as the Parties to a Project Contract (Section 5.4).

The decisions of the Maharashtra State government to terminate the project because of its non-feasibility or any change in the energy policies of the state of the country are purely 'sovereign' acts and not in the capacity of the parties to the project contract. Therefore, MSEB and the State of Maharashtra were wrongly inducted.

The tribunal interpreted the conduct of the India parties under "the applicable body of international law including the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards as well as certain international agreements to which India is a party creating a legal framework within which private investment in that country could be made"[265] without justifying how these sources of international law were applicable to a contractual dispute.[266] The tribunal also made a reference to various BITs without mentioning a single provision in the SHA which permitted it to make such exuberant incorporations.

To summarise, the tribunal had made a decision in favour of the claimants in the issues of fact, jurisdiction, and merits and also to a certain extent in the issue of damages. The award failed to account for or even state the unfair nature of the PPA. In the opinion of the authors, the tribunal should have also considered the negative review of the World Bank and Human Rights Watch and the detailed host of problems with the project.

The tribunal does reveal having considered the position of the Indian parties[267], its evidences and legal submissions *in absentia* but it fails to refer to any of the above information in any of its reasoning or the main-body of the award.

The award rendered in the Dabhol Arbitration is the only publicly available award against India before White Industries Limited. The material fallacies of the award raise suspicions over the confidential awards. Dabhol Arbitration metes out as a clear-cut case where contractual arbitrations are used to discipline governments which respond to the interests of developing countries.

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[265] *Id.* at 18.
[266] *Id.*
[267] *Id.* at 19.

White Industries Arbitration

In 1989, a Public Sector Undertaking of Government of India i.e. Coal India entered into a contractual agreement with White Industries, an Australia based Company for the supply of technology related to coal mining development. Dispute arose soon, which lead to ICC arbitration as prescribed according to rules of the contract and the award was given in the favour of White Industries Australia Limited (WAIL) in 2002.

Now, both sides proceeded to the Indian Judiciary for the respective actions: Coal India moved Calcutta High Court for the setting aside of the award and White Industries moved Delhi High Court for the enforcement of the same. Generally, if a suit is filed which is directly and substantially in issue between the parties in a previously instituted suit, then the Court should not proceed with the same. Keeping this very principal in mind i.e. *res sub judice*, White Industries moved Supreme Court to stay the Calcutta proceedings which will be highlighted further as the wrong step in terms of litigation strategy. Supreme Court heard and stayed the proceedings in Calcutta High Court and the transfer petition was dismissed later on. Calcutta High Court, which had its hearing stayed due to the Supreme Court order, would have to recommence the hearing of the dispute. At this point, White Industries should have sought the transfer of its application of enforcement from Delhi High Court to Calcutta High Court but instead, it filed an application. This application sought to quash the setting aside proceedings in the Calcutta High Court, challenging the scope of jurisdiction, but on the basis of *Bhatia*[268] the petition was dismissed, as was the appeal, which was challenged in the Supreme Court.

At this point the proceedings in Delhi High Court were stayed under the pretext of waiting for a decision from the Supreme Court under *res sub judice*. The proceedings stayed could have been challenged, but clearly White Industries wanted to wait for the decision of the Supreme Court. This could be seen as them holding out for the opportune moment and trying to build their case on it. In 2008, the appeal from Calcutta HC was being heard in Supreme Court, days after the decision of *Ventura Global Engineering*[269].This should have meant that the appeal be dismissed altogether, but the bench instructed this matter to a larger bench, citing differences in the opinions of the judges presiding on the bench (Katju, J dissenting). And in 2011, the matter came for the hearing against a three judge bench. Subsequently, the matter was kept to be heard from a constitutional bench.

The enforcement procedure has taken almost a whole decade and still the decision is not clear. But one thing can be commented that Indian Judiciary has never overlooked the proceedings of the case, in all forums. White Industries should have known better while approaching the Supreme Court or even different forums under the High Courts that the proceedings might stretch over an elongated period, not due to any bias or ineffectiveness of the judiciary but due to the volume of cases which does not allow any swift procedure to take place. Further, the matter induced a constitution bench, highlighting its importance.

But in the end, without waiting for the constitution bench to decide the matter, White Industries approached the issue via a violation of the Bilateral Investment Treaty and made the Government of India a party, implicating the Public Sector Undertaking of Coal India. White Industries brought out a whole new dimension not only to Investment Arbitration but also to Arbitration as a whole in India. It is the only International Arbitration with an Award passed in current parlance with plenty of such disputes in the pipeline; this award is surely going to be viewed

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[268] Bhatia International v. Bulk Trading S.A., AIR 2002 SC 1432.
[269] Ventura Global Engineering v. Satyam Computers, (2008) 4 SCC 190.

as an important development for investors all over the world. As discussed earlier, although most of the issues were decided in the favour of India, the decision is in fact, in favour of the Investor. The authors shall summarily discuss all the issues before commenting on the interpretation and application of the MFN clause by the tribunal.

A. Admissibility and Jurisdiction:

The principal question before the tribunal was whether WIAL was an investor or whether the manufacturing agreement constituted an investment within the meaning of BIT[270]. Heavy debate was done upon the applicability of *Salini Test*[271] and the contribution of the alleged investment on the in the economic development of the host nation India[272]. On this point, the tribunal held that the *Salini Test* doesn't apply as it is not the party to the ICSID convention.

The original dispute arose upon the forfeiture of bank Guarantee rendered by WIAL. Therefore, it was essential to determine the nature of this Bank Guarantee. The tribunal accepted the contention of WIAL to the extent that is a 'risk' within the purview of the *Salini Test.* However, it ruled the issue in favour of India considering the fact that a Bank Guarantee is not an asset and does give rise to any substantive right. WIAL also contended that the award passed by the ICC tribunal also forms a part of the investment as it adjudicated the right and liabilities of the part under the investment contract[273] and that if it is not thus considered, it would be easily set aside by the courts in India. India placed heavy reliance on the GEA Group[274] arguing that an award is not a part of the investment. On this, the tribunal contends that an award is to be to treated as an investment and that the position of India[275] is an incorrect departure from the jurisprudence in the treatment of awards.

Amenability of Coal India to the tribunal's jurisdiction.

The entire argument of WIAL was dependent upon the fact that Cola India was a Public Sector unit and since the appointment of Board of directors was regulated the president and the majority share was held by the Government of India, it's amenable to the jurisdiction of the tribunal.

On the other hand, India based its objectives on the 'effective control' test propounded on *Nicaragua*[276]. India further contended that since there is no sovereign interference, there cannot be any treaty violations. The tribunal ruled that since there is nothing on record to show any direct or indirect influence of Government of India on Coal

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[270] *Art.1(c): "investment" means every kind of asset, including intellectual property rights, invested by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and investment policies of that Contracting Party, and in particular, though not exclusively, includes:*
(i) moveable and immovable property as well as other rights such as mortgages, liens, or pledges;
(ii) shares, stocks, bonds and debentures and any other form of participation in a company;
(iii) right to money or to any performance having a financial value, contractual or otherwise;
(iv) business concessions and any other rights required to conduct economic activity and having economic value conferred by law or under a contract, including rights to search for, extract and utilise oil and other minerals;
(v) activities associated with investments, such as th-e organisation and operation of business facilities, the acquisition, exercise and disposition of property rights including intellectual property rights.

[271] SaipemS.p.A. v.The People's Republic of Bangladesh, ICSID Case No.ARB/05/7, Decision on Jurisdiction, 21 March 2007;SaliniCostruttoriSpA v Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001.

[272] Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia, ICSID Case No. ARB/05/10, Decision on Jurisdiction, 16 April 2009.

[273] *Id*, at 41.

[274] GEA Group Aktiengesellschaft v. Ukraine case, ICSID Case No.ARB/08/16, Final Award, 31 March 2011.

[275] Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984).

[276] 1986 I.C.J. 14.

India Limited[277], Coal India Limited is not amenable to the jurisdiction of the tribunal. Before moving on to the core issues of delay caused in the Indian courts the authors would briefly mention that since Coal India Limited is not amenable to its jurisdiction, WIAL's claims under Art.9 which related to violation of free and non-discriminatory investment due to improper retention of Bank Guarantee must fail as these acts cannot be attributed to India.

Denial of Justice and the breach of Fair and Equitable standards:

WIAL contented that the exercise of jurisdiction for setting aside the arbitral award was improper which amounted to denial of Justice and breach of Fair and Equitable standards[278]. Also, the award passed by the ICC tribunal remained due for enforcement for a period of 9 years in the India courts and India, being a party to the New York Convention, is obliged to enforce the award without timely delay,[279] failing which it has not fulfilled the Legitimate Expectations of the investors. The Fair and Equitable standards have evolved in 2 tracks. 1) Personal safety, denial of justice and due process 2) any actor miss that infringing a sense of fairness equity and unreasonableness.

The tribunal held that as far as setting aside of awards and enforcement is concerned, WAIL had full knowledge of the existing legal position and its expectations with respect to India being an unsafe place for enforcement doesn't hold water as there is no conduct on the part of India or Coal India Limited to the detriment of WIAL. WIAL also makes contentions regarding Coal India Limited's delaying tactics and the inefficiency of the Courts to provide remedy on a timely basis but all these contentions do not form a concrete basis for the violation of Fair and Equitable standards.

India's Liability under MFN clause:

The MFN clause allows the claimants to borrow provisions from other treaties and by the Host State, if those provisions are more favourable than that to those contracts in the treaty between host State and investor. Accordingly, WAIL sought to incorporate and extend the application of Art 4(5) of India-Kuwait BIT in the India-Australia BIT by the virtue of the MFN clause incorporated thereunder. The relevant clause of the India-Kuwait BIT read as under:

> "*Each Contracting State shall maintain a favourable environment for investments in its territory by investors of the other Contracting State. Each Contracting State shall in accordance with its applicable laws and regulations provide effective means of asserting claims and enforcing rights with respect to investments and ensure to investors of the other Contracting State the right of access to its courts of justice administrative tribunals and agencies and all other bodies exercising adjudicatory authority, and the right to employ persons of their choice, for the purpose of the assertion of claims and the enforcement of rights with respect to their investments.*"

India contented that during its negotiations with Kuwait, "strong and unusual emphasis on application of national laws" to suit the requirements of the countries and hence the application of Art. 4(5) *in toto* must be rejected.

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[277] Gustav F Hamester GmbH ad Co KG v Ghana,ICSID Case No.ARB/07/24, Final Award, 18 June 2010,para 179.

[278] Lowen Group Inc v. United States of America, 7 ICSID Rep 421, Decision on Respondent's Objection to Competence and Jurisdiction, 5 January 2001.

[279] Medioambientales Tecmed v. United Mexican States (2004) 32 ILM 133.

Further, there is no effective denial or differential of "treatment" in comparison to any investor of other country as most of the delay was caused by the faulty litigation tactics of White Industries itself.

The Tribunal held that, under Art.4 (2) known as 'MFN', the contentions relating to proceedings being delayed by the court has to be system in a twofold manner. Firstly, the 3.5 year delay in the Local courts, held by tribunal as the delay in Delhi High Court seems extraordinary- allowing several applications, filing of rejoinders et al, but there was no indefinite delay on part of courts here and the delay in Supreme Court, wherein the tribunal concluded there was no unnecessary delay on the part of the Court. Moreover, WIAL has failed to show any tangible proof that the Judiciary deliberately delayed the enforcement of the award. As a part of India's contention under asserting claims and enforcing rights under 'effective means standard'[280], there wasn't any denial of justice by this delay rather it was held that there is a failure on the part of the Judicial system showing lax to address the issue and that the delay served as an injustice to the parties involved and the tribunal resorted that procedure of the lower courts was in standard and proper but the delay in the Apex Court was a failure which served to violation of the obligations, concluding that India is in Breach of Article 4(2).

Essentially, the White Tribunal used the MFN route to incorporate a treaty which India did not have with Australia. Then the incorporated treaty provision (Article (5) of the Kuwait-India BIT) was interpreted with reference to *Chevron* ignoring the difference in language in the treaty provisions and the prior precedents on the point. The exceptional facts in *Chevron* were also not reflected upon. The resultant award was thus, with respect, erroneous. The subsequent section seeks to go beyond the plain analysis of the award *per se*, into the origins of the MFN doctrine and illustrate how the doctrine and its resultant application or interpretation is intrinsically biased.

The Colonial Origins of MFN and Doctrinal Bias

A. Understanding the Doctrine:

The most favoured nation or MFN clause arguably allows claimants to "borrow" from the provisions of other treaties entered by the host state, if those provisions are more favourable that those contained in the treaty between the host State and the investor's State. For an instance, Article 4 of the US Model BIT provides:

> "*Each Party shall accord investors [and investments] of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of any non-party with respect to establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.*"

In *Maffezini* v. *Spain*[281], the MFN clause extended to "all matters to this agreement".[282]The broad language of the clause provided both substantive and procedural rights pertinent to investment including the dispute resolution clause due to which the claimant was justified in waiving the requirement of exhausting all local remedies before commencing the arbitration.

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[280] Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984).
[281] Maffezini Case, *supra* note 18.
[282] La Republica Argentina, *Acuerdo Para La Promocion Y La Proteccion ReciprocaDe Inversiones Entre La Republica Argentina Y El Reino De España* (1991), *available at*: http://www.sice.oas.org/investment/bitsbycountry/bits/arg_spain_s.pdf,Last visited [12/09/2013].

History:

Most Favoured Nation clause (MFN) is one of the staple clauses of investment treaties all over. It was never majorly controversial or influential; it was included in the agreement to assure the party agreeing to the investment treaty that it will be treated equally with all the regulations being availed by the other country. Hence, it has also been adopted by WTO as one of its core principles. A typical MFN clause provides that, States party to a treaty will provide treatment no less favorable than that offered to third parties[283]. This allows for the investors to carry a sense of security as the investment amounts are huge, and if any losses occur then there should be a way out for them to get reasonable compensation and damages. This concept has been used from the time inter-trade began, and in the manner of documentation this was first used in the *Open Door Policy*. It has always been mishandled and misinterpreted like every other clause empowering any relations related to economic and financial powers[284].

The usage of such treaties by Indian Contingent dates back to the British colonisation. The prime objective of colonisation was to promote and protect the economic interests of the colonising State. In order to facilitate the process, the colonising State made huge infrastructural investments in the colonies. This entanglement of politics with foreign investment is considered as a causative factor which necessitated colonisation.[285] As Friden remarks, "*Colonies held up as much colonial capital as much as this capital was holding colonisation*."[286]During this time, the United Kingdom entered into various *Friendships, Commerce and Navigation Treaties (FCN Treaties)* and all the subjects and territories of colony would be bound by custom to follow such trade agreements, which allowed them to reap the benefits whilst being obligated to enforce at the same time. The most preliminary forms of MFN can be made out in the "Automatic Inclusion Clauses" whereby once a country enters into a FCN treaty with the UK, it gains market access and equal protection across *all British Dominions in Asia and Europe*.[287] The MFN Clauses got more defined when the Automatic Inclusion Clauses were replaced by a "Nevertheless Clause" while such clauses restricted the market access the also provided reciprocal most-favoured treatment.[288]

After this the treaties started including Companies and vessels in its jurisdiction. All of this happened when India did not have an independent identity in global economic and political relations. It was therefore unable to influence such decisions. Nevertheless, India helped the treaty usage and interpretation to grow. After independence, the country made its own economic and diplomatic identity which leads to a different regime implementation involving no regulation of FDI[289] but soon this policy was found out to be ineffective, stomping the overall development with no significant development to show.[290]Then in 1993, the policy and financial regulations were finally put through knife for the world to invest.

Around 1993, India signed with the European Union a third-generation Cooperation Agreement on Partnership and Development, wherein Art. 11 speaks about reciprocally providing a favourable climate and non-discrimination

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[283] U.S Department of State, *Model Bilateral Investment Treaty* (20 April, 2012), *available at:* http://www.state.gov/documents/organization/188371.pdf Last visited [12/09/2013].
[284] Stanley K. Hornbeck, *The Most Favoured National Clause,* AM. J. INTERNATIONAL 395, 1909.
[285] Devashish Krishan, *India and International Investment Laws, in*. BIMAL N. PATEL, INDIA AND INTERNATIONAL LAW VOL. 2 277, 286 (Bimal Patel ed., 2008) [hereinafter 'Krishan'].
[286] *Id.*
[287] *Id.* at 287.
[288] *Id.* at 289.
[289] MICHAEL HUDSON, GLOBAL FRACTURE: THE NEW INTERNATIONAL ECONOMIC ORDER (2005).
[290] CHAN WAHN KIM, ECONOMICS LIBERALISATION AND INDIA'S FOREIGN POLICY100 (2006).

between the member States, allowing for the start of foreign investments in the country with legal protection being availed to them according to their needs, providing them a growing environment for development. Codification of different standards, with the necessary discretion to be availed to each state was started and Bilateral Investment Treaties (BIT) were formed out of it, with the application of municipal laws being submissive to international application of law. The best feature of such treaties was that the disputes were directly referred to international arbitration.

In general, the first BIT was signed between Germany and Pakistan in 1959 and the first claim relating to the jurisprudence did not come until 2000 in the case *of Maffezini v Kingdom of Spain*[291]. But the International Court of Justice had propounded jurisprudence for the same in *Anglo-Iranian Oil Co.*[292]*,* succeeded by *Rights of U.S. Nationals*[293] in which the court propounded that until both the parties and related treaties are in force and active, the claimant could use the powers of third parties in an extensive manner under consular jurisdiction. In finality, the interpretation was put to rest by the *Ambatielos Case*[294]*,* which related the MFN clause to every matter relating to commerce and navigation, interpreting the bare text and also concerning the principles of Justice, Equity and Conscience.

It is evident from the history of Investment treaties during the time of colonisation that the development of MFN treatment is closely linked with colonisation *per se*.[295] The doctrine of MFN treatment was born out of colonial needs and imposition of imperialistic order. MFN clause had developed for the sake of colonial administrative convenience.[296] The doctrine as it stands today is nothing more than a manifestation of colonial objectives i.e. promotion and protection of the economic interests of the First World.[297] This doctrine provides for unfettered market access and protection of the First World countries to the detriment of the Third World nations owing to their capital-importing status. The entire WTO system, to which this doctrine is of core importance, stands as an evidence of this extended period of colonisation in the guise of neo-liberal agendas.[298]

The colonial origins of various doctrines of international law give rise to an interesting phenomenon known as *doctrinal bias*. This form of bias focuses on the doctrines relied upon by the arbitrators to reach to their decisions, the legal validity and the current state of acceptance of the doctrine under international law.[299] For example, The Libyan Oil concessions arbitrations are often regarded as instances of flagrant bias in which a developing country's pursuit of its independent development strategy was hampered by subjecting it to the jurisdiction of biased international doctrines.[300] Post colonisation, the Third World countries view political and economic sovereignty as a leeway for escaping the evils of colonisation and an unjust legal order which was a creation of a small consortium of States which has projected its law of domination as the international law governing the entire world.[301] All doctrines of

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[291] Maffezini Case, *supra* note 18.
[292] U.K v. Iran, 1952 I.C.J. 93 (July 22).
[293] Rights of Nationals of the United States of America in Morocco, 1952I.C.J. 93, 176.
[294] Greece v. United Kingdom, 12 R.I.A.A. 91, 106.
[295] Krishan, *supra* note 86.
[296] *Id.*
[297] *Id.* at 285.
[298] Gathii, *supra* note 12 at 261.
[299] Shalakany, *supra* note 13, at 445.
[300] *Id.*
[301] *Id.*

international law like the MFN produce inescapable outcomes favouring Western economic interests.[302] As M. Sornarajah rightly puts forth:

> "…*If international commercial arbitration is to escape from the charge of bias, it should dismantle the existing structure which is based on doctrines associated with neo-colonistic efforts at the preservation of economic dominance and move towards more acceptable standards which seek a balance between capital exporting States and those of capital importing States.*"[303]

Precedents and current scenario:

There are several cases against the usage, application for MFN Clause, such as *Tecmed v Mexico*[304], in which the tribunal highlighted the importance of specific clauses being inserted in the BIT between two parties. Hence, any clause from a BIT relating to a third party defeats the purpose and should not be allowed. The same was followed in *Salini v Jordan*[305] with *Palma v Bulgaria*[306] trying to overrule *Maffezini* in toto, saying that MFN clauses should not be applicable to dispute settlements. Other cases typifying the disallowance of MFN clauses on a general basis were *M.C.I. Power Grp. v. Republic of Ecuador*[307], *Telenor Mobile A.S. v. Republic of Hungary*[308], *Berschader v. Russian Federation*[309] and *Tza Yap Shum v. Republic of Peru*[310].

From the above discussion it is clear the White Industries is an example of both doctrinal bias and Regime bias.

In *Ros Invest Co. v. Russia*[311], an interesting contention was made against the claimant who wanted to "cherry-pick" favourable clauses with total disregard to the context of the BIT. The claimant had resort to Denmark-Russia BIT to make its expropriation claims against taxations. The respondent State argued that the Denmark-Russia BIT and the dispute resolution clause thereunder had a specific crave out for taxation and therefore, while invoking the MFN in relation to the applicable Treaty the limitations under the importing treaty must also be considered. The tribunal however rejected this contention and allowed the UK investor to enjoy the most favourable dispute resolution provision that was divested from the agreement's taxation or other exceptions.

The MFN clause must refer to 'treatment' as against 'treaty shopping'. According to Zackary Douglas:[312]

> "*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*

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[302] Gathii, *supra* note 12, at 261.
[303] Shalakany, *supra* note 13, at 446.
[304] TecnicasMedioambienctalesTecmed, S.A. v United Mexican States, ICSID Case No.ARB (AF)/00/2, Final Award, 29 May 2003; 19ICSID REV. 158 (2004).
[305] ICSID Case No.ARB/02/13, Decision on Jurisdiction, 29 November 2004; 20 ICSID REV. 148 (2005).
[306] ICSID Case No. ARB/03/24, Decision on Jurisdiction,8 February 2005; 20 ICSID REV. 262 (2005).
[307] ICSID Case No. ARB/03/6, Decision on Application for Annulment, 19 October2009 (disallowing the usage of MFN Clause to import the entry into the force date of another treaty).
[308] ICSID Case No ARB/04/15, Final Award, 13 September 2006; 21 ICSID REV.603 (2006); (Raising the issue of fair and equitable treatment using MFN).
[309] SCC Case No. 080/2004, Final Award, 21 April 2006.
[310] ICSID Case No.ARB/07/6 (Pending).
[311] RosInvestCo UK Ltd. v.The Russian Federation, SCC Case No.Arb. V079/2005, Final Award, 12 September 2010.
[312] Zachkary Douglas, *The MFN clause in Investment Arbitration: Treaty Interpretation off the Rails*, 2 J. INTL. DISPUTE SETTLE.97,114 (2011).

MFN clause operates to secure more favourable 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. Let us not forget that the more favourable treatment can be granted to an investor of a third state by means of a domestic legislative enactment or by any other act of state (judicial decision, administrative circular and so on). It would be wrong to suppose that the documents recording this treatment are 'incorporated' into the basic treaty by the operation of the MFN clause. It is the 'treatment' represented by these documents that can be invoked by the investor claiming through the MFN clause in the basic treaty (emphasis in original)."

There were also set precedents wherein the Tribunals have divulged from the traditional interpretation of MFN clauses owing to special circumstances. Article 4(5) of the India-Kuwait BIT was inserted because it would have the effect of fundamentally subverting the carefully negotiated balance of the BIT in question. The tribunal also failed to have applied appropriate standards of deference by disrespecting the treaty-making powers of India, including the authoritative by the respective parties. The tribunal must not re-write treaty obligations they disagree with for policy reasons.[313]

Conclusion

The TWAIL perspective provides us with an analytical tool for the review of India's investment arbitration experience. The TWAIL approach asserts that international law reflects the power relation between Western and Third World interests which hasn't changed substantially since the colonial times, as said Investment treaties are more like International law translated over the years with respect to power struggle.

In the review of the two major arbitral awards against India, three points were discussed. Firstly, international rules were a product of colonisation and they still suffer from a colonial hangover. Most doctrines of international law were developed as instrumentalities of continuing imperial dominance and hence they are inherently biased towards Third World interests. In the 21st century it is impossible for the developing countries to sustain growth levels without Foreign Direct Investment because of which they are left with no other choice but to accept doctrines like the MFN.

Secondly, by elaborating on the concept of Regime bias it has been illustrated that irrespective of the origins of the rules of international law the outcomes of such international adjudication processes are bound to be adversarial to the Third World countries because the current system which is responsible for the application and interpretation of these rules is in itself subservient to the interests of the Global North.

Lastly and more importantly, investment arbitration has been used as a mechanism to discipline governments which respond to Third World interests. Investment arbitration is increasingly becoming the means of impinging upon the sovereignty of developing States. The arbitrators have reconfigured the role of international adjudication as a forum for the review of sovereign decision makers.[314]Combined with the broad discretion under the treaties and the potent remedies at their disposal, the arbitrators have positioned themselves as the overseers of sovereigns.[315] While most

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[313] Schill, *supra* note 1, at 5.
[314] GUS VAN HARTEN, SOVEREIGN CHOICES AND SOVEREIGN CONSTRAINTS, Oxford Univ. Press .(Forthcoming). The authors would like to extend sincere thanks to Prof. Gus Van Harten for his constructive inputs on the article and also for permitting to cite from his forthcoming book.
[315] *Id.*

authors argue that the tribunals have shown deference with varying degrees[316] Prof. Van Harten shows that on the record, the arbitrators, with few exceptions, did not appear to show restraint in any of various forms.[317] This evidence contradicted widespread claims, including by arbitrators and other participants in Investor-State arbitration, that the system is 'balanced'. It was also despite the fact that the arbitrators were evidently aware (or can reasonably be assumed to be aware) of one or more options for restraint. On many occasions, they were presented with a viable case for restraint that was endorsed by a party in the arbitration, by a previous tribunal, or in courts. In some cases, restraint appeared to be warranted clearly by the terms of the treaty or a relevant contract. In others, it was open to the tribunal due to ambiguous language in the treaty or the track record of judges or other adjudicators. Yet the arbitrators declined *en masse* to adopt restraint.[318]

The final question which needs to be addressed is how the system should respond to Third World interests. Where critics of the TWAIL scholarship contend that TWAIL offers no positive agenda for action or reform in international law and reforms[319] most TWAIL scholars continue to believe in its ability to reform the international order. The reason that the NIEO movement got some recognition on the international front was that it was propelled by the G-77. The current situation also demands the developing countries to stay united in presenting the desirable norms.

In the case of Investment Treaties the countries have various alternatives. First, countries could completely withdraw from the treaty system. But the non-feasibility of this option has already been discussed with reference to developing nations. Second, the countries could exclude arbitration clauses from their treaties. Countries like Venezuela and Argentina have signaled their return to the *Calvo Doctrine*.[320]However this option is also not viable in Indian context. Foreign investors have no confidence in the Indian judicial system in such a situation an arbitration agreement is a necessary baggage. The most appropriate option for India is to adopt the 'balanced treaty' approach. This approach enables the host state to identify the circumstances in which it would regulate foreign investment and thereby avoid treaty liability by inserting express provisions to that effect. The State can include a list of exceptions or preclusion of liability which could include measures taken to protect public health, morals and public welfare.

Ultimately it is always up to the developing country to consistently contest the outcomes adverse to them, with the alternatives that serve their best interests, rather than merely focusing on bias as the inevitable outcome on the colonial origins of international rules or the asymmetrical nature of the bargaining power. In light of recent events such as The Vodafone tax controversy where the notice of arbitration has been served under India-Netherlands BIT, as well as under 2G Spectrum Scam by *Sistema* among others, India still has the time to revitalize and recalibrate its investment treaty regime in order to protect its vital interest.

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316 Schill,*supra* note 1.

317 Van Harten, *supra* note 115. Van Harten's study's findings contradict other commentators' suggestions that investment treaty tribunals 'often refer to the notion of deference' (SW Schill, *Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review,* 3 J. INTL. DISPUTE SETTLE.5 (2012).)or that they 'are in the process of embracing balancing and proportionality' (A Stone Sweet, *Investor-State Arbitration: Proportionality's New Frontier,* 4 LAW AND ETHICS OF HUMAN RIGHTS 47, 62 (2010).

318 Van Harten, *supra* note 6.

319 Jose Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 881 (2003).

320 M. Sornarajah, *Mutations of Neo-Liberalism in International Investment Law,* 3(1) TRADE L. & DEV. 203, 228 (2011).