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RECONCILING PUBLIC AND PRIVATE INTERESTS IN INVESTOR- STATE ARBITRATION

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Abstract

Investor-*State Arbitration (ISA) has been subjected to much criticism in recent times due to its negative impact on the legitimate public interests of host states majorly belonging to the developing world. ISA has structural limitations. Issues infact emerge at the stage of negotiating Bilateral Investment Treaty itself, where the 'capital-exporting' developed state are able to extract maximum protection for their investment and on the other hand the 'capital-importing' developing states undertake many obligations which at times have proved to be detrimental for their interests. The importance of foreign investment to meet developmental goals cannot be downplayed, however this should not come at the cost of local interests. The authors in this paper have traced the historical-economic developments post World War II that has shaped the current International Investment Regime. The challenges that ISA poses to public interests concerning environment, health, labour rights have also been discussed. The authors have worked upon suggestions to reconcile public and private interests in ISA.*

Keywords: *Foreign Direct Investment, Bilateral Investment Treaty, Investor-State Arbitration, Public Interests, International Investment Regime.*

I. Introduction

The period that followed World War II, led to emergence of a new era characterised by a common will to cooperate among nations towards their shared goals.[i] This phase also saw a wave of newly independent nations making efforts to mark their presence in the global affairs. A war-torn and decolonised world started looking together towards a brighter future leading to rise of an international society marked by both cooperation and conflict.[ii] It was also marked by establishment of many international organisations, the most remarkable being United Nations. Though international organisations did exist pre-second world war, however their number arose significantly during the post-war period. There was an increasing trend amongst the nations to transcend their individual interest and to cooperate with each other to reach

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common goals. Added to this, the International Court of Justice (ICJ) recognised that United Nations possess legal personality in *Reparation for Injuries Suffered in the Service of the United Nations*.[iii] The establishment of International Monetary Fund (IMF) and International Bank for Reconstruction and Development (IBRD) also charted out the way in which the international affairs especially concerning economics were shaped. However, these international organisations were influenced by will of the States especially the rich and powerful ones. Therefore, in the functioning of most of the international institutions and the legal instruments formed thereafter, it was observed that the interests of these States were protected and promoted.

The footprints of globalization started to emerge gradually in the world affairs in the late nineteenth century. The socialist countries however did not show much inclination towards riding this tide of opportunities, which were exploited to fullest by the capitalist world. The investors from capitalist states started to look for avenues for investment. First their ventures were restricted to trade, but eventually they became more focussed on investing their capital into the developing countries. This capital-wanting part of world had everything to offer to the rich investors. They had untapped natural resources, cheap labour was easily available, and regulations were lenient or yet to be formalised concerning business.[iv] In years to come these developing countries also acted as a market for the developed world. An era which witnessed proliferation of foreign investment all over the globe had begun.[v]

This paper is divided into six parts. Part I traces the developments post World War II which changed the global investment scenario. Part II highlights the varied concerns that investors from rich nation-states and capital inviting host-states had regarding investments. Part III discusses the three most essential elements of International Investment Regime (IIR), namely Foreign Direct Investment (FDI), Bilateral Investment Treaty (BIT) and Investor-State Arbitration (ISA). Part IV focusses upon the structural limitations of ISA which has implications for the public interests of the host-states, as elaborated in part V. Part VI provides suggestions for reform in the ISA and part VII concludes the paper.

II. The Conflict between Investor and Host State's Concerns

The foreign investors as highlighted in part I, had concerns regarding their investment. They did not seem to trust the newly independent nations with their invested assets. This feeling of uncertainty or doubt could be due to the nailed idea of 'white supremacy' in the global north or due a trust deficit towards the nations who were just trying to find their place in the global

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affairs after suffering centuries of foreign rule.[vi] The global north understood that the developing world did need capital to come out from their ruins of colonization, so they exploited this desperation on their part while ensuring maximum protection for their investments.

In the 1950s and 1960s, foreign investors perspective towards the government of newly independent nations and their domestic court systems was that of uncertainty and unreliability.[vii] For them, stability and trustworthiness were legitimate expectations from the host countries. They started demanding for 'extra' and more severe protection for their investment which was but natural response to their concerns.

On the other side, the newly independent nations of Asia and Africa who were still recovering from the distresses of colonization also faced a lot of pressure from the domestic sphere.[viii] There was burden of lifting their economy that was in tatters due to centuries of colonial rule. They had to create jobs, compete, and survive in international markets, benefit from the scientific developments that were taking place apart from building up their political setup and other major tasks.[ix] One thing was absolutely clear that they could not have relied on their domestic reserves of capital to develop their economy and ride on the horse of development. Hence, foreign investment became a necessary evil, apart from the loans for international monetary institutions such as IMF and IBRD and other countries.[x] For funding ambitious development projects, it became necessary to attract foreign investments. Developing world was aware about the fears of foreign investors and therefore started giving out assurances to the potential foreign investors regarding protection of their investments. These assurances fructified as what are known today as 'protectionist clauses' in BIT, such as national treatment, most favoured nation treatment, compensation for expropriation etc.

Thus, there was consensus ad idem, between the foreign investors and host states regarding their interests and both worked towards best possible solutions to meet their needs. These elements together created what is known today as the international investment regime. Foreign investments were attracted through conclusion of BIT. An essential feature of BIT was and still is the segment on dispute settlement. Arbitration being the most popular mechanism to resolve investor-state dispute found its way in most of the BITs.

III. Emergence of International Investment Regime

The blueprints of International Investment Law (IIL) can be traced back to nineteenth century. It has since grown and adapted as per the political and societal forces at work both in the

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domestic sphere of nation-states and internationally. The quest for achieving a balance between the interests of the developed and the developing world led to introduction of certain features in the international investment law, which are today the prominent elements of this field. For this paper three major elements, amongst many of IIL namely, Foreign Direct Investment (FDI), Bilateral Investment Treaty (BIT) and Investor State Arbitration (ISA) have been discussed.

a. Foreign Direct Investment

M. Sornarajah in his book the International Law on Foreign Investment defines foreign investment as, *"foreign investment involves the transfer of tangible or intangible assets from one country to another for the purpose of their use in that country to generate wealth under the total or partial control of the owner of the assets."*[xi] Each treaty text also defines foreign investment which signifies as to what is specifically meant by 'investment' for the purpose of that particular treaty. Being a practitioner-oriented area, more emphasis is laid upon the meaning of 'investment' as provided in the text rather than relying upon the existing theoretical definitions. Therefore, the interpretation of foreign investment tends to differ according to the treaty being analysed.

There are two modes of foreign investment namely the Foreign Direct Investment (FDI) and Foreign Portfolio Investment (FPI). Portfolio investment is represented by transfer of money for the purpose of buying shares established or managed in another country. It could also include other security instruments through which capital is raised for ventures.[xii]

Making a foreign investment is different from conducting trade. Trade may generally consist of one-time exchange of goods and money however, the decision to invest in a foreign country calls for a long term relationship between the investor and the host country.[xiii] Often the business plan of the investor is to invest resources into the project with an expectation to earn back the investment along with substantial return, during the period of investment which may in some cases may even spread across decades. An essential feature in charting out foreign investment is to lay out in advance the potential risks and threats inherent in such a long-term relationship both from a legal and a business point of view. The next step is to identify a business concept and a legal structure that is suitable not only for execution of the investment plan but also avert or at least minimise the risk during the span of investment.[xiv] In most of the cases it is the investor who is very adamant regarding their demands to be protected and advanced in such relationship, as it is the investor who puts in considerable amount of money.

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The dynamics between a host state and the investor tend to be different before and after the investment is made. Projects of huge value are generally not made under the general or domestic laws of the host country. In such cases both the parties namely the host state and the investor develop an understanding that an investment agreement suitable to both will be negotiated and thereby govern the relationship between the two parties regarding that specific investment. The general legal regime of the host country may be adhered to depending on the project specific needs and if both the parties prefer to do so. During negotiations the investor will try to seek benefits under the bilateral or multi-lateral treaties concluded by its home country with the host state, which will provide guarantees that are necessary or advantageous to the investor regarding the investment.[xv] It may so happen that the investor plays the dominant role in negotiating an agreement while the host state may take a backseat if they are too keen or anxious to attract an investor.

b. Bilateral Investment Treaty

Pre-1945 most of the trade agreements were in the form of Friendship Commerce and Navigation agreement (FCN).[xvi] During this period, these FCN were majorly concluded between United States and its European allies which generally addressed trade issues and contained rules regarding compensation in case of expropriation. After 1945, trade matters were regulated in separate treaties and FCN agreements contained more details on foreign investment. Formalising a treaty confirmed the rules that governed investment relations between two parties as the law regarding foreign investment was uncertain.

The signing of a bilateral agreement between Germany and Pakistan in 1959 had begun a new era in modern investment treaties practice. The German interest in such treaty making arose due to the loss in bulk of its earlier foreign investments in negotiated settlements after 1949, to repair the damage, it had brought about in the beginning of World War II in violation of international law.[xvii] It was Hermann Josef Abs, a banker by profession who dedicated enormous efforts towards a new initiative to protect foreign investment. It was in 1957, that Abs called for a 'Magna Carta for the Protection of Foreign Property' in the form of a global treaty which was to establish not just specific standards of protection but also a permanent arbitral tribunal charged with the application of the treaty and with the power to lay down economic sanctions against the violating states, including the non-signatories.[xviii] However, such a magnanimous approach was not possible for those times therefore Abs opted for a more modest multilateral initiative together with Sir Hartley Shawcross an English barrister. These

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efforts culminated into Abs-Shawcross draft. In 1962, the Organisation for Economic Cooperation and Development (OECD) too made its first attempt to draft a multilateral treaty. However, this attempt to create a multilateral text also did not receive much support, as the proposed convention was to be applicable not only to the members states (the capital exporting states) of the organisation but also the non-members. There emerged a huge divide between the capital-exporting and capital-importing countries regarding the recognised principles of foreign investment. OECD had to contend itself by recommending draft model for bilateral investment treaty applicable to its member states only. However, this attempt ushered an era, which was characterised by the absence of a universal treaty and dominance of bilateral treaty.

There is a basic structure that is common to all modern bilateral treaties. The treaty begins with an introductory statement establishing the aims of the treaty which generally comprise of a reciprocal commitment for promotion and protection of investment ties between the two states. This is followed by identification of the types of property which are covered and protected. The standard of treatment to be given to the foreign investor is established.[xix] The right of repatriation of profits is asserted. The nature of compensation that a foreign investor is entitled to in the event of war or civil riot is mentioned. The rules to be followed in cases of expropriation are laid down. The procedure to be followed for settlement of disputes, in case any arises in the future, is included. Arbitration has been the most adopted method of dispute settlement. However, there are obvious differences in the rules laid down based on varying investment objectives to be achieved by the two states.

c. Investor-State Arbitration

Th emergence of arbitration as the most favoured mode of dispute resolution can be connected with the 'scepticism' or 'fear' that the foreign investors had regarding submitting disputes pertaining to them to the domestic tribunals of the host state. Whether a perception or a reality, concerning politicisation of these tribunals and their natural inclination to favour the government of host State, domestic fora were unpopular amongst the foreign private persons. It is for this reason that internationalisation of settlement of disputes between foreign investors and host state arose and the following two approaches developed in this respect before adoption of arbitration.

First, gunboat diplomacy**.** This practice of settlement of dispute involved threat to use or the actual use of force by a State, to recover contractual debt owed to their nationals by host State.[xx] It recei9ved a lot of attention when Germany, Italy and Great Britain sent warships to block

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and shell Venezuelan ports in 1902.[xxi] This event led to the adoption of the Hague Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts also known as the Drago-Porter Convention which prohibited resort of any such measure. Article 1 of the convention reads as following:

"The Contracting Powers agree not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals. This undertaking is, however, not applicable when the debtor State refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any compromise from being agreed on, or, after the arbitration, fails to submit to the award."

Secondly, diplomatic protection**.** It is a mechanism where interests of the foreign investors in a dispute were endorsed by their State of nationality. This practice infact led to internationalisation of dispute settlement. Through this mechanism, the dispute between foreign private person and host state was elevated to a dispute between two nation-states, to be settled in international legal order. This system had major drawbacks. First, it led to politicisation of the process. States were under no obligation in public international law to represent the interests of their nationals. It was purely a discretionary decision so, many a times State's interests other than those of its concerned nationals crept in the way to decide whether to exercise diplomatic protection. Another limitation was that the State were not obliged to transfer to their nationals any compensation that they may have received from the host State.

The difficulties faced with such mechanisms of dispute resolution led to introduction of an arbitration clause into the contracts concluded between the host State and foreign investors. In the nineteenth century, this clause which was of compromissory nature and provided jurisdiction to arbitration tribunals to settle any dispute that arose from execution and interpretation of those contracts. This mechanism withdrew the obligation that the home State of foreign national played till now. The emerging practice of settling disputes through arbitration, restricted the parties of dispute to the concerned foreign private companies and the government of the host State. These 'state contracts' were the first instrument to lay down arbitration as a method of dispute resolution to settle disputes of such nature much before the present form of international investment agreements came into picture.

Arbitration in simplest terms, is the dispute resolving technique in which two parties, consensually approach a third neutral party for amicably resolving their issues. If a BIT

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provides for Investor- State Arbitration (ISA), it means that the investors have been given the right to initiate arbitral proceedings and seek redressal against the host-state, if the host-state has violated any of its obligations under the BIT.[xxii] There are several advantages that arbitration offers, thereby making it the most preferred method of resolving disputes in investment treaties in which multi-millions are at stake. ISA offers an alternative to the investor, who hesitates to get entangled in complex procedure of national courts of the host state. Infact, in 1966 International Centre for the Settlement of Investment Disputes (ICSID) was created by States for resolution of dispute in a neutral arbitration fora, away from the politicised and delayed means of settlement through national courts.[xxiii] This step it was believed will strengthen the partnership between countries in the cause of economic development by building mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it.[xxiv] Another reason for parties to choose arbitration over litigation is the autonomy of party in choosing the arbitrators before whom they will submit their dispute. This kind of choice is not available in litigation, where parties cannot decide which judge will preside over their case. Arbitrators are generally experts in their field. Unlike judges they tend to specialise in particular types of disputes and parties accordingly can make selection of arbitrators based on what expertise is suitable for resolution of their dispute.[xxv]There are associated advantages of such specialisation. With expertise the arbitrators can render a decision faster as compared to a traditional court.[xxvi] Moreover, with a higher level of expertise the error committed in decision making of arbitrators is less.[xxvii] Another reason for foreign investors, to prefer arbitration is the element of confidentiality. ISA is a confidential process which means that only the parties to dispute can attend the proceedings. Such characteristics make arbitration a speedy and cost-effective mechanism and most sorted way of dispute resolution.

IV. Structural Faults in Investor-State Arbitration

In the present times, ISA has come to receive much criticism due to the inherent complexities that the system involves. Primary issue with ISA is that it is based on the blueprint of ICA which resolves disputes between two private parties. One of the primary characteristics of this system is confidentiality. Apart from the parties involved in the dispute, no other person is allowed to be a part of the process. Confidentiality of process also entails that no document without the prior consent of the parties is published which includes the award as well.[xxviii]. Investors who donot appreciate their investment matters to be discussed in open courts for whatever reason and would rather prefer their disputes to be resolved behind closed doors,

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away from public scrutiny show inclination towards arbitration. However, element of confidentiality being a part of ISA is unwelcomed. In most of the Investor-State dispute, it is the public interest that is at stake. Unlike commercial arbitration in which the profit-making interests of two private parties are at stake, ISA involve public concerns regarding environment, health, human rights, public safety, public resources such as forests, rivers, mines etc.[xxix] It is the citizens of these nation-states that get affected from an unfavourable award. Therefore, an opportunity to the public to represent and defend their interests should be provided in ISA.

Another structural challenge that the ISA poses is that of privately appointed arbitrators deciding over matters which otherwise come under the jurisdiction of sovereign states. It is the judiciary of a nation that has been given the authority to enforce rights and obligations of its citizens.[xxx] However the mechanism of ISA confers this authority on party-appointed arbitrators. This brings the principles of judicial authority and party-autonomy in conflict. One of the major reasons for parties to choose arbitration over traditional court is to appoint an expert as arbitrator, thereby giving them a feeling of being more in control of the whole process. However, the fact that arbitrators can transgress the authority which belongs to a sovereign state, through their award, is irksome.

ISA has also faced severe criticism due to the perception, which is difficult to prove but strongly exists, is that of ISA favouring rich foreign investors from the Global North.[xxxi] It is an observation that developing nations in order to invite FDI, often are at the receiving end of the bargaining process of BIT. This in turn gives them disadvantage in the ISA as well. ISA is perceived to be an elitist process as arbitrators in most of the cases are white-male belonging to the developed western world. It is also observed that it is only handful of arbitrators and legal firms that are engaged in maximum arbitration cases, thereby creating a kind of monopoly of these arbitrators over the whole system.[xxxii] Hence, the unequal representation of rich foreign investors and State makes the system unfavourable for dispute resolution. Such opaque characteristics have often subjected the appropriateness of ISA as a dispute resolution mechanism to severe criticism.

V. Impact on Public Interests of Host States

ISA has recently emerged as a tool of affluent multinational corporations to attain unwarranted priority for the protection of their revenues over legitimate local public interests.[xxxiii] The host countries in many cases find themselves restricted to bring positive policy reforms for the nationals fearing they donot violate any of the BIT provisions. Investors are quick at

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challenging government's policy if they feel that their investments or desired profits are at stake. In these pursuits many a times, legitimate local public interests are at stake, when arbitration by these corporations are brought against government's policy on matters of public health, environment protection, taxation and labour rights. In *Philip Morris v. Uruguay*[xxxiv], the tobacco giant challenged the anti-smoking measures enacted by the Ministry of Health of Uruguay. The company argued that compulsory large warning labels on cigarette packs prevent it from effectively displaying its trademarks, causing a substantial loss of market share.

In *Pac Rim v. El Salvador*[xxxv], the company was denied license in the light of project's environmental risks, including potential pollution of drinking water. In another case relating to environment, *Vattenfall v. Germany*[xxxvi] Swedish energy multi-national Vattenfall sued the German government and demanded US $1,9 billion plus interest in compensation for the restrictions that was imposed in one of its power plants that utilised coal. Ultimately, the case was resolved out of the court only after Germany agreed to show leniency in its environmental standards, which however has drastic impact on the Elbe River and its wildlife.

In labour conditions related cases, one French company Veolia filed an arbitration claim in 2012, under Egypt-France BIT, pertaining to its contract with the government to provide waste management services. The dispute concerns Egypt alleged refusal to modify the contract in response to inflation and the enactment of new labour legislation which provided for raise in monthly minimum wage from 400 to 700 Egyptian pounds ($69 to $99).[xxxvii] In another case *Piero Foresti v. South Africa*[xxxviii] , the Italian investors sued South Africa over its Black Economic Empowerment Act which aimed to redress some of the injustices of the apartheid regime by transferring some portion of the share into the hands of black investors. The dispute was closed in 2010, after the investors received new licences, requiring much lower divestment of shares.[xxxix]

In *Vodafone International Holdings v Republic of India*[xl] pertains to India's demand from Vodafone to pay taxes on its $11Billion transaction of purchasing Indian-based Hutchison Whampoa's telecom assets in 2007. Vodafone refused to pay the tax and directly invoked international arbitration against India claiming that such action on the part of India violated the 'fair and equitable treatment' guaranteed to Vodafone under the India–Netherlands BIT.

The rich investors are not even concerned if the host country undergoes financial crises and thereby takes measures to protect its citizens. A classic example of this is the *CMS and 40 other companies v. Argentina*[xli] , when the host state froze utility rates in energy, water etc., and

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devalued its currency in the response to its 2001-2002 financial crises, it was hit by over forty lawsuits from investors. Big Companies like CMS Energy (US), Suez and Vivendi(France), Anglian Water (UK) and Aguas de Barcelona(Spain) demanded multimillion compensation packaged for revenue loses.

Along with public interests, huge amount of public money is also at stake. If foreign investment benefits the public at large, then a detrimental ISA award will also adversely affect. Therefore it is necessary that citizens have full knowledge of what goes in ISA and are also allowed to take part in the proceedings therefore calling for structural reforms of this dispute resolution mechanism. It especially becomes vital in cases where developing nations are involved as many times, huge costs are imposed on the award debtor which affects other developmental pursuits of a nation. For instance, in *White Industries Australia Ltd. v. Republic of India*[xlii] a whooping cost of 4.08 million Australian Dollars was imposed on the respondent. Awards like these, prove to be harmful for the interests of citizens of such countries as compensation is paid through the public exchequer.

VI. Suggestions

World community has established the current international investment regime through decades of work. Hence, overthrowing a system is never the intelligent step. Due to absence of suitable alternatives, the better approach is to introduce reforms in the functioning of current setup to mitigate the damages that are being caused to the host states.[xliii] While deciding the terms of a treaty it is essential that a balance is struck between the rights of foreign investor and the rights of a sovereign state. Too harsh a treaty terms may discourage the foreign investors, while liberal treaty terms favouring investors may have repercussions for the home state in introducing developmental reforms for its citizens.

First, transparency. One of the major steps to reform ISA will be to introduce transparency in the system, this can be ensured by allowing third party participation and publication of awards in public domain.[xliv] ISA cannot operate like the International Commercial Arbitration in which there are two or more private parties involved in adjudication of private rights. In the case of Investor-State Arbitration, one party is generally a sovereign state, which is accountable to its people for its actions and omissions. The resources involved are a public trust and money utilised to proceed in arbitration and later pay compensation if imposed, is public fund. Hence the citizens have a right to know about proceedings and defend their rights in ISA.

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Secondly, introducing scientific evidence. When the affected parties establish scientific evidence regarding how a particular step of the investor was influencing public interests of the host state, the tribunals are more likely to consider such concerns. This could be because scientific evidence provides the reasonable basis for a state's claim that investor's measures are affecting its rights. For example, in *Phillip Morris* the tribunal infact relied heavily on the scientific evidence.

Thirdly, including amicus curiae and independent experts. Submissions from *amicus curiae* (latin term for a friend of court) can assist the tribunal in weighing concerns of both foreign investors and the host state. However, amicus curiae has limited participation rights.[xlv] To tackle this problem an alternative in the form of an independent expert can be appointed by the tribunal who can more effectively assist in evaluating the public interest of the host state and the concerns of foreign investors. Such expert can also assist the tribunal with evaluation of scientific evidence, determination of socio-economic aspects of the measure and also help the tribunal in determining that whether a measure taken by the host state is actually directed towards the welfare of its citizens.[xlvi] For strengthening the role of an independent expert in investor-state arbitration, a provision facilitating the same can likewise be incorporated in the IIA itself, providing for appointment of an independent expert that in cases which involve public interests.

Fourthly, introduction of specific provisions in the BIT. Clauses providing for 'denial of benefit' in cases where the act of investor has specifically affected the environmental, labour and other human rights of the host state. Such provisions could also be helpful in determining the quantum of compensation where the tribunal must consider if the investor has engaged in any activity that was infact harmful for the public interests. Developing countries can also mobilise for inclusion of clauses providing for differential treatment in application of investment standards. In treaties between developed and developing countries, the state could also include provisions requiring the developed state to enable and actively promote investments in the developing state. Such mutually benefitting provisions in IIA will aid both the parties to achieve their respective developmental goals and also help them to respect their obligations under the agreement. Such provisions will smoothen management of disputes in ISA if any arises.

Fifthly, in certain disputes which relate to public interests of the host state, arbitration may not be the best way of resolution. Due to a particular way in which arbitration is conducted, which

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borrows its modus operandi from commercial arbitration privity, confidentiality are not suitable characteristics when interest of public at large are involved. For instance, South Africa has removed ISDS for settling investment related disputes and is instead promoting settlement of disputes in domestic courts and through state-to-state dispute settlement.[xlvii] India too has specified a condition in its Model BIT 2015 providing for exhaustion of local remedies for five years before approaching an international arbitral tribunal.

VII. Conclusion

In conclusion, it is accepted that foreign investment is beneficial for economic development. It creates employment, promotes research thus generating and disseminating knowledge, technology and creates spillover effects for other industries. It can also build human capital, contribute to international trade integration, promote competitive business and entrepreneurial pursuits. But these benefits donot come automatically and appropriate framework and policies need to be in one place to realise these gains. Bilateral Investment Treaty is one such tool used to attract foreign investment necessary for a country's progress.

However, foreign investment should not affect state's developmental goals. The International Investment Regime cannot remain focussed only on promotion and protection of investor's interests but in the modern times also has to safeguard the legitimate interests of public. Investor-State Arbitration cannot operate like the commercial arbitration as the nature of parties and their respective interests vary. While the former one also involves interests of the citizens of a sovereign state, the latter only defend interests of two private parties. Therefore, either the arbitration system itself has to reform, least it is replaced with other methods of resolving such disputes as for the sake of protecting foreign investment, public welfare at large cannot be put at stake. Since the importance of FDI cannot be minimised, a way around must be found out to balance all interests first in bilateral investment treaties and the same should be mirrored in investor-state arbitration.

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