INVESTOR-STATE ARBITRATION (PROGRESSING TOWARDS BETTER SYSTEM OF DISPUTE SETTLEMENT)

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ABSTRACT

India, a country with extreme population and diversity, is in a great turmoil due to the recent arbitral awards going against her. There has been an absolute threat of humongous adverse awards going against India if no attention is paid towards the pendency of copious claims in the International Arbitration Tribunals. This can be understood as an early hint to make certain amendments in the existing model for BITs which actually are paving a path to these arbitrations. A question that is also taken into consideration lately by many scholars is "do we even need a BIT?"With respect to the threat of more awards going against it, the Government of India, in the year 2015, prepared and proposed a new draft model for BITs. Meanwhile, the Law Commission of India while finalizing the report on Amendments to the Arbitration and Reconciliation Act, 1996, realized the risk to International Investment treaties and after the draft model was made public for comments and suggestions, the Law Commission came up with an analysis of the draft model and suggested certain edits in the draft.

In this research article, the researcher will try to explain the concept of Investor-State Arbitration starting from the scratch, stand of different countries with respect to the ISA (both developed and developing), whether it is of any help to the developing countries, India's stand on the ISA after the first adverse award and the benefits it offers to the Investors. The researcher will also take into consideration the Draft Model BIT proposed by Government of India and Analysis of the Model Draft of the BIT done by the Law commission through its report specifically the Most Favored Nation Clause and suggest certain changes to the same.

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1. UNDERSTANDING BIT AND INVESTOR STATE ARBITRATION

Bilateral Investment Treaties (BITs) are a prerequisite today because of the growing International Investments and flourishing globalization. Every country while Investing or while doing any kind of Business where there is an involvement of large capital or an inherent threat to the capital invested, considers jotting down the rights and duties of the parties towards each other. This above everything makes the countries feel safer and more secure, and also helps in better functioning of the parties. BITs help in drawing the boundaries perfectly. These are mostly entered by the states for smooth functioning of Business and fool proof investment flow. According to the Law Commission's report 260 BITs are a part of a large trade and investment agenda which helps the Indian Government to boost investor's confidence and increase investment flows into and out of the country.[1] International Commercial Arbitration essentially according to section 2(f) of the Indian Arbitration and Conciliation Act, 1996 means

"An arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is—

(i) an individual who is a national of, or habitually resident in, any country other than India; or

(ii) a body corporate which is incorporated in any country other than India; or

(iii) an association or a body of individuals whose central management and control is exercised in any country other than India; or

(iv) the Government of a foreign country"

It is a prerequisite that one of the parties fulfills abovementioned the 4 conditions, else the dispute can't fall under the ambit of Investor-

[1]Law Commission Report, *Report No. 260*, August 2015.

State Dispute, and if any dispute arises between the parties, the Investor-State Arbitration won't come into picture.

ISA is a treaty-based form of an arbitration by which a state, essentially agrees to be a party or in advance agrees to be an object to a claim in arbitration by a private investor who claims to have suffered financial loss as a result of the conduct of the state, which ultimately resulted in violation of one or more standards that have been laid down in the treaty. The treaty talked about here is generally a Bilateral Investment Treaty[2] but there has been a shift in the recent years and nowadays many provisions for foreign investments are there in the investment chapters of regional trade agreements (RTAs)[3] and mega regional trade agreements between different countries or different blocs of countries.

The next question that comes to mind instantaneously is what exactly is a BIT? A BIT is a treaty of Bilateral Investment that two countries which want to trade with each other enter into. It is generally entered by countries for promotion and protection of the foreign investment or their own investment in foreign countries.[4] All these International agreements such as TTIP, TPP including CETA, BITs and RTAs are collectively called International Investment Agreements (IIAs). In 2015, the United Nations Conference on Trade and Development (hereinafter referred to as UNCTAD) calculated in a report that there are more than 3200 IIAs[5] which were around 2500 in the year 2006.[6] These reports in particular show that there has been a rise in the Investments done in the recent years (particularly from 2006-2015). In the year 2006 only, the total stock

[2]The Canadian Model Foreign Investment Protection (FIPA), Sec C, 2004.

[3]Jurisdiction of ICSID, 2014; CIGI (Armand De Mestral, ISA Series Paper 1, (September2015)).

[4]*Supra* note 2.

[5]UNCTAD, Reforming International Investment Governance, World Investment Report 2015, (Geneva: UN 2015).

[6]Tranz Electric Supply Co. v. Indep. Power Tranz Ltd., 8 ICSID (W.Bank) 227 (2001).

of International Investment shot up to US$ 10 Trillion[7] and hence have quite naturally led to an increase in actual as well as potential conflicts between investors and host countries.[8]

2. TAKE OF DIFFERENT COUNTRIES ON BITS AND ISA

Earlier the trend of these treaties was that these were established between a developed nation and a developing nation for promotion and protection of Investment among the countries concerned. Essentially these agreements helped in achieving 2 things: (1) these subjected the host countries to certain International rules that they must respect in order to deal with foreign investors and their Investments and (2) Investor got a remedy against the host nation to bring a claim in the International Arbitration. This trend is still followed and the latter is considered really harsh on the host nation. The reason being that the power which is delegated on the investors are autonomous and hence the same can bring a claim against the host nation even without the consent or even paying any regard to the wishes of the host nation.ISA has created a huge impact on the economy much after 1970s and the debate about it being brutal on the host nations also came during the same time. Those in favour of the ISA say that it should be seen as a key to protecting the interests of foreign investors and foreign investments against the possible failure of the host country to respect and abide by the treaty standards. It is also contended most of the times that this protection encourages the flow of foreign investments which is actually a very valid point according to the researcher also; but, what is being neglected here is that the arbitrations like these directly question the dispute resolution system of the host country and can lead to disbelief in the mass for the law of the land and the judicial system of a country.

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[7] UNCTAD, *Trade Investment Report, 2006: FDI from developing and Transitional Economies: Implication for Development*, 9, U.N. Doc. UNCTAD/WIR/2006 (Oct. 16, 2006), available at http://www.unctad.org/Templates/webflyer.asp?intItemID=3968&lang=1.

[8] *Ibid.*

BITs were originally designed to deal with capital transfers between capital-exporting (usually First World) and capital importing (usually Developing World) countries.[9] Out of Some 1200 (approx.) very few were concluded between Developed democracies,[10] with Freedom, Commerce and Navigation Agreement (Known as FCN) being an exception. This was concluded between U.S. and Italy and ultimately became the object of the decision given by ICJ. The groundbreaking Agreement which paved the way to ISA was the agreement between Mexico, US and Canada which is regarded as one of the most influential trade agreement called NAFTA in the year 1994.[11] Part B of Chapter 11 of this agreement dealt with investments and was devoted only to ISA taking into account the existing problems in Mexico. This agreement is considered the parent of the ISA but the ground breaking agreement that actually led to ISA was the US and Canada Trade Agreement which came into force from 1988 as the agreement had an Investment Chapter in it (though no express provisions of ISA).

Stating the facts, till 2015 the European Union member states have signed some 1200 BITs with other states and, as a result of the tension between the central European states, there are 190 BITs between the members of EU as well, almost all of them containing Investment Chapters. This particularly shows that the investors don't want to take a chance and always want to be on the safe side when it comes to investment in other countries.

The International Energy Charter Treaty of 1994 was the next major step.[12] This particular treaty was a link to the countries of Western and Eastern Europe, the Caucasus and Central Asia. It led to an absolute multiplication of ISA litigation. According to the UNCTAD, the Energy Charter Treaty is one of the principal

[9]Dolzer&Schreuer at 17ff. UNCTAD World Investment Report 2014.

[10]*Ibid.*

[11]NAFTA, 11 December 1992, 32 ILM 289 at 605 (entered into force 1 January 1994).

[12]Armand de Mestral, Investor State Arbitration Between Developed Democratic Countries, CIGI ISA Paper Series, Paper 1, 6.

sources of global ISA litigation. It is also very important to note that most of the pending as well as decided Arbitrations claimed have been by the investors against the State. Energy Charter Treaty is the most invoked treaty for ISA standing with 19 cases against United States, 31 with Canada making it the most popular ISA invoked nation and 21 against Mexico.[13]

Again the debate remains intact, the increasing number of BITs and RTA investment chapters are being concluded between developed democracies as well which as a direct result, is placing the democracies in a very vulnerable and unexpected position of being sued by foreign investors. Also it should be noted that there was no objections raised against the ISA until the NAFTA agreement.

The American and Canadian negotiators considered it a prerequisite[14] to include ISA in NAFTA to ensure that Mexico doesn't violate the obligations of foreign investments but it came out as a surprise when first Canada and then United States were sued by the Investors under Part B of Chapter 11. Because of this fear of the contestation with the foreign investors some Parliamentarians and Governmental ministries in Germany and France have called for abandonment of ISA from the BITs. Many other states are also considering altering their current BITs. India after the recent arbitral award going against her has even come up with a new Model BIT in 2015.

3. Benefit That it Offers to The Investors

The crux of the need for International Investment laws was based on the basic sense of distrust that was shown by the investors in the law of execution of the Public Authority and the justice delivery system of the host nation.

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[13]Foreign Affairs Trade and Development Canada, "NAFTA– Chapter 11 – Investment: Cases filed against the Government of Canada; US Department of States, "Cases filed Against the United States of America" available at www.state.gov/s/1/c3741.htm.

[14]Guillermo Aguilar Alvarez & William W. Park, "The new face of Investment Arbitration: NAFTA Chapter 11" *Yale Journal of International Law*, 28:2, 365 at 348ff (2003).

Even the CIGI's ISA paper 8[15] that is listening to investors and others: Audi Alteram Partem and the Future of Investment Law by David Schneiderman[16] also raises this concern by stating

"Investments, once made, are subject to host state vicissitudes that are, it is feared, more likely to tilt in favor of local over foreign interest"

The researcher is very much on the same page as what has been contended above. The failure of the states in delivering justice to the investors and that too in time has been the biggest concern and has always been. This is not just restricted to the developing countries where the democracies is still evolving but is there even in the well-established and almost perfectly run democracies. [17] These democracies, because of their inability to provide a fair justice delivery to the investors and because of the ignorance of the public authority when it comes to taking into account the interest of the Investors, has led to the growth in the demand for an ISA.

The rule based International Investment Laws (IILs) [18] essentially offers to go one step ahead and break this barrier. It's the Investor State Dispute Resolution, basically the Investor State Arbitration (ISA) which acts as an alternative remedy offered to both the parties to effectively and with procedural fairness dispose of a particular claim which becomes an arduous task if the justice delivery system of the host nation is followed.

The ISA essentially offers both the parties a right to be heard and there is a minimal possibility of the proceedings being biased towards any of the two parties.

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[15]Armand de Mestral, Investor State Arbitration between Developed Democratic Countries, CIGI ISA Paper Series, Paper 8.

[16]David Schneiderman "Listening to Investors (and Others): Audi Alteram Partem and Future of Inter-national Investment Laws", Investor-State Arbitration Series, July 2016, CIGI Paper No. 8.

[7]Theorde H Moran, *Multinational Corporations and the Politics of Dependence: Copper in Chile* (Princeton University Press, 1974).

[8]*Id. at* 29.

There is also a threat of the legislation of the host country changing the investment and tax policies of the country arbitrarily after the investment is done by the Investor.[19] This can lead to huge upsets in the foreign market and also lead to heavy losses to the investors. This is solved by the ISA as the Investors always have an option of bringing a claim against the arbitrary nature of the host nation. For Investors as well as for fair Justice delivery System, ISA is a Boon. Though it is many times argued that most of the judgments or the arbitral awards tilt in the favour of the Investors from capital exporting states[20] and making not much of a difference as compared to the domestic public law and justice system of the host nation but this contention while humbly respecting the view cannot be paid much of an attention as the ISA offers both the parties the right to present their case and also the right to be heard properly. If after the hearing of the case and both the parties an arbitral award is given then the contention of that award being arbitrary should not arise. Though there can be certain amendments that the researcher think can make the present system much more foolproof and that can only happen by giving a right to appeal to the party against whom the arbitral award is given.

4. Appeal Against Award- Public Policy and India's Stand

Article V of the New York Convention which is predominant system of rules for International Arbitration lays down an exhaustive list of 7 conditions under which the recognition and enforcement of the award may be refused. This can essentially be done under 2 sub-sections[21]:

"1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party

[19] *Id. at* 31; World Bank, *The State in a Changing World*, World Development Report 1997, 41 (New York: Oxford University Press, 1997).

[20] *Supra* note 34, at 31.

[21] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Article V, New York, 1958.

furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding, on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country."

Article V 2(b), if we try to dig a little deeper, essentially means that if the state feels that the arbitral award if recognized or enforced will be contrary to the Public Policy of the State, then the appeal against the Arbitral award can be maintained and state can set aside such awards. Now Public Policy in itself has a very wide scope of interpretation as there is no such definition of Public Policy or being opposed to the Public Policy in the Indian Arbitration and Conciliation act. Also by giving this particular subsection the ambit of appeal against an arbitral award increases many folds. This essentially helps in submitting that there is a procedural fairness in Investor-State Arbitration and the problem of arbitrary conduct of the public authority and the legislature of the states is solved through ISA.

Though it should also be noted here that in the case of Renusagar Power Co. Ltd v. General Electric Co.,[22] the Supreme Court of India has held that

"...the expression 'Public Policy' has a wider meaning in the context of a domestic award as distinguished from a foreign award."

However Professor Paulsson before the introduction of Indian Arbitration Act raised concern about India's Stand in International law and International disputes with respect to Public Policy and said that:

"...the courts of India have revealed an alarming propensity to exercise authority in a manner contrary to the legitimate expectation of the international community"[23]

The Judgment given by the Supreme Court in the Renusagar Power Co. Ltd case[24] was completely in line with the International Practice

[22]Renusagar Power Co. Ltd v/s General Electric Co., 1994 (2) Arb.L.R.405 (S.C).
[23]J. Gaya, "Judicial ambush of arbitration in India", *Law Quarterly Review*, 571 (2004).
[24]*Id at* 35.

commonly accepted in most developed arbitral Jurisdiction such as France and the United States[25] and the Supreme Court made it very clear that:

"Applying the criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to the public policy if the enforcement would be contrary to i) fundamental policy of Indian Law; or ii) the interests of India; or iii) justice or morality."

This decision on the face of it proved India's stand that it is only in exceptional circumstances, the national courts will interfere with arbitral awards given by the tribunal on grounds of public policy and also the exhaustive list of exceptional cases was also led down through the judgment.

But, the judgment given in the Renusagar case was completely ignored while giving the judgment in a 2003 case[26] by the Supreme Court and after that also there have been many judgments which have widened the scope of appeal on the basis of violation of Public Policy. The Supreme Court in the abovementioned case of Oil & Natural Gas Corp. v Saw Pipes[27] said that there is a need to give wider definition of grounds on which a particular award becomes contrary to the Public Policy. The case arose out of a dispute relating to supply of equipment for an off shore oil exploration. According to the ONGC, Saw Pipes were supposed to pay liquidated damages to them because of their non-compliance with the said terms of the contract in which timely delivery of the equipment was the essence. The matter was referred for arbitration and the tribunal held that the ONGC was unable to prove the damages suffered by it and hence cannot be awarded any arbitral award. This decision of the tribunal was challenged in the Supreme Court as violative of Public Policy. The Apex Court noted that according to law, ONGC was not at all

[25]Sameer Sattar, "Enforcement of Arbitral Awards and Public Policy". *TDM Journal*, 8(5) (2011).

[26]Oil & Natural Gas Corp. v. Saw Pipes, (2003) 5 SCC 705.

[27]*Ibid.*

required to prove that it has suffered certain loss to bring a claim for liquidated damages and if there has been a breach of contract, then the party will be entitled to damages. Hence the court set aside the arbitral award against ONGC and held that the award which is violative of the law of the country can be treated as an award contrary to the Public Policy. Also substantiating the judgment, SC also held that in addition to the three conditions laid down in Renusagar case,[28] an arbitration award can be nullified on the grounds of public policy if it is patently illegal. Explaining patently illegal SC held that an award is patently illegal if it is contrary to: i) substantive law, ii) the Indian Arbitration Act and/or iii) the terms of the contract. This also included any error of law committed by the arbitrators.[29]

The Supreme Court maintained this stand for a very long time though the decision and interference of India in International Arbitration has been criticized by many distinguished commentators for its wide interpretation of Public Policy defense.[30]

It has been contended by many commentators that the Indian Arbitration and Conciliation Act does not include the error in law as a ground for setting aside an arbitral award and hence there has been a mistake in the Interpretation of Public policy as a ground for setting aside an arbitral award.

Though the decision is in clear contravention of arbitration law and practice[31] but still public policy remains to be a salient weapon for appeal against the arbitral award. Essentially the reason for this is that public policy is highly subjective in nature and till the time an exhaustive list of Public Policy is not prepared and included in any convention, it can give ample ground for making an appeal against the arbitral awards.

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[28]*Supra* note 37.

[29]*Supra* note 40.

[30]S. Kachwaha, "Enforcement of Arbitration Awards in India", *Asian International*, 4 (2008).

[31]Mitsubishi case, (473 US at 638).

Also, in 2010, the Bombay High Court in Western Maharashtra Development Corporation Ltd. v Bajaj Auto Ltd[32] relied on the Judgment in ONGC case and set aside an arbitral award on the grounds of it being patently illegal. In the Judgment the HC stated that the arbitrators failed to apply the provisions of Indian Company law correctly and as a result the award became contrary to the substantive law which is violative of the Public Policy. This decision is also regarded as an undue court influence[33] under the guise of Public Policy.

5. CHANGING TRENDS IN INDIA AND THE MODEL BIT

Due to the developments in the International Investments and International Arbitration Market and the judgments given by the Apex court and the High Court, scholars started considering India a bad market for Investment and International Arbitration. These decision took India back to England's pre 1979 phase when the Courts could interfere and review the merits of an Arbitral Award or arbitral decision for that matter through a procedure thereby reflecting the country's image to bea bad-for-investment country.

India, soon realized that the concerns posed upon her were quite true and there was an absolute need to keep pace with its rapidly growing economy as well as the changing trend in the International market. Hence India decided to bring legislative amendments in order to make the system fool proof and to counter the problems created by the earlier decisions on an International level. Government of India launched a consultation paper in 2010 recommending certain changes to the Arbitration Act in order to minimize the issue of judicial intervention.[34] After certain changes were proposed, Indian Courts started showing due deference to arbitral awards. One of the best examples of the same being Penn Racquet Sports v Mayor

[32]Western Maharashtra Development Corporation Ltd. v Bajaj Auto Ltd., [2010] 154 ComCas 593 (Bom).

[33]*Ibid.*

[34]P Nair's "India at a gateway?", GAR Vol. 6(1), available at http://www.globalarbitrationreview.com/journal/article/28916/India-gateway.

International Ltd.[35] in which the High Court of Delhi held that the arbitral award given by the ICC was not contrary to the public policy. The Court went one step ahead and also held that the ground of public policy should be interpreted much narrowly when it comes to enforcement of a foreign arbitral award.

India till 2015, has signed 83 BITs[36] of which 74 are in force and also many free trade agreements which have investment chapters similar to the BITs (11 FTAs with chapters on Investment).[37] In the year 1994, India started its BIT program and had faced no such harsh arbitral award until 2010; in other words, BITs in India did not attract much of an attention[38] and also, there was almost zero involvement in Investor-State Arbitration in the year 2010, because of the evolution and changes suggested, saw a huge escalation in India's involvement with ITA (Investment Treaty Arbitration)[39] and 2011 was the year when India received its first adverse award in the case of White Industries Australia Limited v. Republic of India.[40] In this particular case the Australian Investors contending the Most Favored Nation clause of India-Australia BIT, argued for the importation of favorable substantive provision related to effective means of asserting claims and enforcing rights given in the India-Kuwait BIT into the India-Australia BIT. As explained in the Law Commission report MFN clauses can be understood with a simple example given in the law commission report:

"Let us assume three States: A (the granting State), B (the beneficiary State) and C (the third State). Further assume that States A and B have entered into a treaty containing the MFN clause. Now, if State A extends certain benefits to State C, State B can invoke the MFN clause in the treaty to ensure that State A extends the same benefits to

[35]Penn Racquet Sports v. Mayor International Ltd., 2011 (122) DRJ 117.

[36]Law Commission Report, *Report No. 260*, August 2015.

[37]Gaurav Banerji, GAR Investment Treaty Know how, India, 2015.

[38]*Supra* note 53.

[39]Prabhash Ranjan, "Can BIT claims be made Against India for the action of the Indian Judiciary?", *National Law University of Jodhpur Law Review*, 1, 87-92 (2013).

[40]UNCITRAL, Final Award (30 November 2011).

her provided the granted benefits to State C falls within the scope of application of the MFN clause of the treaty between A and B. MFN treatment in international investment law aims to create a level-playing field for all foreign investors by prohibiting Host State from discriminating between investors from different countries."

The MFN provision essentially in case of India and Australia is that "A contracting party shall at all times treat investments in its own territory on a basis no less favorable than that accorded to investments or investors of third country. Hence the tribunal allowed Australia to borrow a beneficiary substantive provision from another BIT into the primary BIT which did not have the same provision. After this particular case there has been a huge increase in the number of claims against India from various investors and under various BITs. These claims include challenges to regulatory measures such as cancellation of telecom licenses and retrospective tax imposition. According to the law commission report no. 260, there are fourteen known pending proceedings of claims brought against India. Hence, the question that now arises is whether there is a balance between India's regulatory powers and Investment protection and whether there is a need to make certain changes in its BIT program.[41]

The Government came up with a draft model in the year 2015 for Bilateral Investment Treaty,[42] with an aim to provide protection to the foreign Investors in India and Indian Investors in the foreign country, maintaining a balance between the investor's rights and the Government's obligations. Law commission studied the Model BIT and then came up with a report suggesting certain changes and also suggested the draft for all these sections. The Model BIT now does not contain the Most Favored Nation clause which actually will decrease the number of arbitral awards going against the nation and

[41] *Id.* at 55; Prabhash Ranjan, "India and Bilateral Investment Treaties- A changing Landscape", *ICSID Review*, 1-32 (2014).

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

will ensure that foreign Investors shall not be able to borrow provisions that strengthen their case from other BITs but does it solve the problem of imbalance between the foreign investors and the Government is still a question left unanswered. Also it is necessary to note here that Government of India has not given any explanation regarding the exclusion of the Most Favored Nation clause but as said above the only possible reason can be to limit the liability of the State. If this draft model is passed then again the foreign investors will be exposed to risk of discriminatory action of the state in application of domestic measures. The solution to this can be an MFN clause where there is a restriction to the treaty shopping or a clause that can limit the extremely wide ambit of the MFN clause.

6. CONCLUSION

The countries because of the globalization and huge capital flow are very much interdependent with each other and hence there is an utmost need to be in good relation with other countries so that they can sustain a symbiotic relation with each other. Through Investor-State Arbitration, not only the relation between the Investor and the host state ruins but the relation and the capital flow between two countries involved gets hampered as well. There are a lot of ways through which an Investor-State dispute can be resolved but mostly the parties choose to go for arbitration intentionally without paying much attention to the huge cost involved in the arbitral proceedings. It's high time that the Government of different countries to take initiatives, and to include in their BITs, certain clauses for alternative dispute settlement so that the relation of the nations involved does not get much affected. Also the BITs are prerequisite in any international investment and it is completely wrong to say that developing countries like India do not need a BIT. It works almost in the same way as a contract between two parties where certain set of rights and duties are laid down and the parties are required to follow and work in the ambit of these rights and duties. Investor-State Arbitration is a concept which is still in its evolving phase and recent developments in ISA show that it plays a pivotal role in every

investment chapter in a treaty. It also helps in finishing the disputes in a fast track manner. India as a country is still not very comfortable with its present draft model and there is a dire need of the hour to make a fool proof and a perfect draft model. The Most Favored Nation Clause removed from the new model can be considered a win-lose situation, win for the host nation and a loss to the foreign Investors, as again, an imbalance is produced between the power of the investor and the host nation and a threat of discriminatory action against the Investor still lies making India a country which is not very fit for making huge investments. Again there are certain amendments to the model suggested by the Law commission and hopefully India will come out one day as a better market for both local and foreign investors.