



Investment Treaty Arbitration & Human Rights

“To deny people their human rights is to challenge their very humanity.”

(Nelson Mandela)

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Introduction

Present research paper focuses on the treatment of the human rights under arbitral awards. The common ground for both the subjects is to guard the genuine investor, host/home government and the third party who suffers due to expropriation or business operations of the host government. Mostly, it is thought that repercussions of bad investment are anti-environmental, anti-labor or wrongs against the state. This area is not only relevant from the perspective of fiscal or commercial interest of the countries but it takes into account the psycho-social aspect of the investment arbitral awards and the affirmative influence in protecting the human rights of the subjects of host and home countries. Hence, researcher shall be focusing on the current trends on investment arbitration and the decisions prevailing to protect the human rights in furtherance of the investment arbitral award.

Research Problem

The focal foundation of the investment arbitration awards is to address the grievances of the subject pertaining to the violations of the BITs between the countries (host and the home state) yet the violation of

the personal rights are not the subject of the arbitration at the international level.

Hypothesis

H1- Foremost consideration for the international bodies is to provide the redressal for the violation of human rights but it has been observed since decades that the decisions are confined to fiscal matters and investment arbitration forums are numb towards the sentiments of the subjects whose human rights are in question.

H2- What is expected of Bilateral Investment Treaties is to protect the genuine investors from the expropriation and actions of the states which are likely to violate the inherent rights of the subjects but due to lack in unification of the BIT model and discrepancy in the arbitration clause, International bodies aren't successful in strengthening the human rights at the global level.

Bilateral Investment Treaties and the Investment Arbitration

The protection of human rights is an important concern in the investment arbitration. In the world where we are approaching multi-disciplinary approach, one realizes that it is not only the arbitral awards which play pivotal role in the protection of these inherent rights but also the public international law comes to the rescue of the investors by relying on the conventions, protocols and multi-lateral treaties.

In this portion, researcher shall cover the impact of the investment treaty arbitration decisions on the human rights and how can we balance the protection of human rights and the adherence to the treaty decisions. If



we look at the present arrangement of arbitration, we come to the crux that it certainly is tilting towards the implications of human rights from the investor's rights.

The sustainable economic growth mandatorily approves the maintenance of the foreign investment and the human rights. From the language and the understanding of foreign investment by a lay man, it is considered as an invader (corporation) who runs business in the country and control certain part of the economic power in the host state and hence it would likely be seem to be posing a threat to the political as well as economic sovereignty of the host state. Human rights on the other hand, as defined by ICCPR and ICSECR, are the rights focused on the multitude of moral rights pertaining to the labours and the environment.¹

It is an interesting fact to observe that the investment in the international arena is about trillions of dollars and the system of arbitration in ICSID, NAFTA, SIAC etc, take into consideration the rights of the investors and not the human rights of the people in general per se and it can be said that the system has become extremely money oriented.² The issue that researcher is discussing isn't just a thought or a concern but it has been discussed in various conferences, by several NGOs and even in the Presidential election in UK by Beattie in the local newspaper which became particularly vocal and people started dialogues over it. If we see it from the point of view of the language of BIT, the protection

is afforded to the investors or rather to the "transnational migrants".

On one hand, we can say that arbitration and the human rights are one and the same thing and they perfectly complement each other in international law but in economic subject, the foreign investment and the human rights may defer because it has been seen several times that the substantial amount of arbitration decisions are in favor of the politically superior states. In order to improve this situation scholarly opinion suggests that the rule of law and respect for human rights should work in tandem to bring welfare to all.

For the investment practitioners, it is known that the human rights in the investment arbitration perform an ancillary role as per the terms and conditions of the BIT and not beyond the ambit of it in order to define the terms and the meaning of the investment as per the law agreed by the states. The concern over here is that the jurisprudence on the human rights and the current changes in the definition of the investment as well as in the practice isn't a controversy anymore but it is affecting a lot of under-developing or developing states.

It can well be seen that the balance between the human rights and the investment treaties has been attempted to be stabilized since 2007 after the report of UNCTAD to involve in the definition of the investment in a manner which shall support the political sovereignty as well as the rights of the investors and the also the protection of health, environment and the recognition of the internationally accepted labour rights.

¹ M. Sonarajah, *International Law on Foreign Investment* (3rd, Cambridge University Press, 2010) 172-235.

² Anthony Carty, 'Critical International Law: Recent Trends in the Theory of International Law' [1991] 2-66, 2.



The more recent introduction is the concept of the economic liberalization and there is always the whistle blowing in the event of the violation of the public policy and the human rights in the host as well as home state.³

Human rights claims in BITs

One of the questions arises due to proceedings of the investment arbitration is the entertainment of the human rights claims or not? General assumption is that the matters pertaining to any rights of the investors and of the parties should be resolved by the international forums. This is largely dependent on the definition of the investment in the BITs and the horizon of the arbitration clause containing the host State's consent.

In *Urbaser vs. Argentina*⁴, tribunal upheld the jurisdiction of the state's counter claim over the violation of the human rights by the foreign investors under Spanish-Argentinean Bilateral Investment Treaties. Argentina's contention was that the foreign investor has violated the principle of good faith and did not pay much heed to the *pacta sunt servanda* by failing to comply to the concession contract.

Now the question arises whether BIT can cover such issues as to the human rights violation and to determine this, we have to go to the reading of BIT between Argentina and Spain. The Articles X in the Spain-Argentina BIT was broad enough to include the claims on the violation of the human rights. Hence, Tribunal in the present case was of the view that then BIT should be construed on the lines

of the Universal Declaration of Human Rights and other international human rights conventions and protocols.

Tribunal was of the view that Treaties must be in line with Vienna Convention, 1969 on the law of Treaties. Article 31 (3) (c) indicates that account is to be taken of all the relevant rules of international law applicable in relation between the parties, the BIT cannot be applied in a vacuum. The Tribunal while deciding upon the validity of the BIT certainly has to taken into consideration the purpose of the BIT as to promote the foreign investment but it cannot do so without taking into account the essential rules of the international law. The BIT is expected to be construed in line with the other rules of international law especially rules in the spirit of human rights.⁵

Hence, human rights are the issues which are addressed by the tribunal when deciding upon the violation of the investor's rights in furtherance of the BIT. The investor may claim the measure carried on by the government of the host state was in violation of the human rights and thus tribunal will have to decide upon the human rights claims incidental to claims of the parties.

Discussion above puts the question whether international laws will be applicable to the Bilateral investment treaties between two nationals or not? Most of the treaties are silent on the point of the applicability of the international rules and allow the domestic jurisdiction to govern the disputes. Article 42

³ Rafael Leal-Arcas, 'Towards the Multilateralization of International Investment Law' [2009] 8-17, 8.

⁴ *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*,

ICSID Case No. ARB/07/26, Award dated 8 December 2016, para. 1200.

⁵ M. Sonarajah, *International Law on Foreign Investment* (3rd, Cambridge University Press, 2010) 174.



of the ICSID Convention says that “tribunal shall decide the dispute in accordance with such international laws as applicable”.

The human rights law will be applicable to the bilateral investment disputes as far as they form the part of the international laws. Article 31 (3) (c) of the Vienna Convention, as mentioned above, is to be taken into consideration by the tribunal as the interpreter by considering the followings:

- i. The external treaty specific to human rights is applicable to the parties to the BIT. (Parties are signatory to the Human Rights treaty).
- ii. The choice of clause refers to the ‘principle of international laws’ or the general principles of the international laws’, human rights can be applied to the extent they fall within these narrower categories.

If these two norms are complied with the human rights laws will be applicable to the BIT’s claims and international laws on the human rights will be applicable on the international investment claims.

In *Mondev vs. United States*⁶, tribunal noted that the standard of the treatment, fair equitable treatment, full protection and full security or the favorable nation clause in the BIT is to be understood by taking into account the international human rights laws and the common rounds to treat another nation in the fiscal transactions and by reference to the normal sources of the

⁶ *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award dated 11 October 2002, para. 120.

international laws determining the minimum standard of the treatment of the foreign investors.⁷

Specific reference to the human rights treaty would allow adjudicatory body to interpret the investment claims in the light of the human rights instruments. For example Annex II of Brazilian-Anglo Cooperation Agreement on the Promotion of the Investments laid down that “investors should bear in mind the human rights norms while carrying on the trade and business with the host state’s human rights obligations. Likewise the preamble of the 2018-EU-Singapore Free Trade Agreement implies that the parties should take into account the Universal Declaration of the Human Rights adopted by the General Assembly of the United Nations.⁸

Some BIT provide provision exclusive protection to the human rights, such as the right to public health, protection of the environment, labour standards and the corporate social responsibility. The clause of fair and equitable treatment and prohibition against the unlawful government expropriation. In US.BIT Model, it is specifically laid down that access to justice and due process is the part of the obligation of the host state. Hence, it is implied in the BIT models of distinct BIT model of countries to provide domestic remedies to the investor(s);

“fair and equitable treatment” includes the obligation not to deny justice in criminal,

⁷ *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award dated 12 April 2002, para. 87.

⁸ US. BIT MODEL Section 5(2).



civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world."⁹

In the same manner, even the NPM (Non Precluded Measure) clause of the BIT may pursue the human rights by providing limitations on the State's liability in the investment claims if the claim is in furtherance of violation of any human rights. Under such clause, state can take appropriate measures to protect human rights without curtailing any of the investment treaty obligations. Article 17 of the Canada-Cameroon BIT, for example, provides that "each of the Parties may adopt or enforce a measure necessary: (i) to protect human, animal or plant life or health".

Foreign investors raises the question as to the violation of the human rights under BIT as to the due process of law, arbitrary detention, unlawful expropriation, property related issues, taxation in retrospective nature. The focal point to be realised is that these issues are raised mostly wherein the foreign investor is the physical person rather than a legal entity.

On this point, there is a very important case *Biloune vs. Ghana*¹⁰, where Mr. Biloune claimed damages for the expropriation and the deportation to Togo. Tribunal in this case observed that the liability of the state is admitted only regarding the approved enterprise and hence the right of Mr. Boune is not be decided in furtherance of the arbitration under the treaty. It is also to be noted that the agreement to arbitrate in the dispute was not in furtherance of the BIT but

separate contract wherein the agreement was only to prefer arbitrate in the matters connected with the investment.

If there was an arbitration in respect of all matters connected therewith or all the disputes then the situation would have been different. The assumption is the matter of expropriation and the deprivation fall within the ambit of full protection and security in the BIT.

Separation of the human rights in BITs

Generally in the event of the policy making, domestic jurisdiction does not pay much attention to the human rights as it is confined to establish a system which is favorable to the host state and this leads to the problem. Also, the system which is established is particularly more politically and economically viable than to pay much attention towards the human rights of the general public involved in the issue.

Take the example of India; it came up with the new BIT model in 2016 in order to curtail the number of arbitration awards which were hiking against India. The definition of the investment is confined to the economic integration between the countries and the jurisdiction in the event violation of the rights of the investors are subjected to the local jurisdiction initially and after passing five years, the parties are allowed to go for the arbitration. Also, the enforceability of the awards are subjected to the public policy of the state which can be manipulated or claimed.

Though States try their best to comply with the human rights protocols and conventions

⁹ *Ibid.*

¹⁰ *Biloune and Marine Drive Complex v. Ghana* (Award on Jurisdiction and Liability - 27 Oct 1989).



by UN but at the same time, when it comes to the investment dispute and its arbitration, it is considered purely corporate in nature. The major problem occurs when those BITs only focus on the rights of the investors and states by mentioning exclusively in the language of the BIT. There is no preference/place to the environmental rights or other human rights as to the labours in BIT document.

In one of the famous case, an investor claimed on the basis of human rights, from the government of Ghana, the expulsion and the detention of the property of foreign investor. The arbitral tribunal ruled that it does not have jurisdiction over the human rights issues and only via foreign investment violation, it can assist.¹¹ The question arises here that how come the jurisprudence which is deeply rooted in the natural law and the concept of morality is not considered while framing the BIT model? The answer lies in the persuasion of the economic liberty and the protection of the sovereignty of the state. Additionally, arbitral tribunals prefer the rights of the investors and the host state and not the human rights of the host state's citizens. Furthermore, the separation lies due to various factors such as:

1. No public participation in the BIT's arbitrations. The confidentiality afforded to the BITs arbitrations is somehow very important for the parties concerned but the public participation would ensure the compliance to the rules of human rights if they are allowed to sit in the proceedings. It can be concluded that the arbitrations pertaining to the investment in the international arena is very complicated and put in the separate box where there is

no place of human rights but just the facts are taken into consideration, which led to the dispute.

2. As arbitrators are exceptionally practice in the field of corporate law, their knowledge in the human rights isn't considered a valuable factor at the time of the appointment. Also, the role of arbitrators as discussed in the thesis is very neutral and can be considered to be selfish because they are always looking for the future business in place of arbitrating on the human rights grounds. Their core focus is the business and corporate and investment law and not the jurisprudence on the human rights.
3. The MNCs who file against the host state may pose a threat to the state's sovereignty as it possess major portion of the economic development in the host state by providing services and facilities to the host state's nationals. This is a case in point that since the beginning of the thesis, we have been discussing the investor's rights and the concept of arbitration but what about the laborers and the adverse impact on the environment of the country?

Of course there are laws to maintain and protect the rights of the citizens in the domestic jurisdiction but what about the private contracts between the MNCs and the employees of the host state in the country? There are exceptions provided in the MOUs or the private contracts that initially all the disputes are subjected to the jurisdiction of the community of MNCs and afterwards the rights can be

¹¹ *Biloune and Marine Drive Complex v. Ghana* (Award on Jurisdiction and Liability - 27 Oct 1989).



pursued under domestic jurisdiction. Even there are cases which exclusively prohibit the freedom of trade to the employees which is strictly prohibited in the Indian Contract Act, 1872. Taking the example of the economic crises in 2000s in Argentina, the arbitration clearly indicates that the enforcement of the private contracts and the treaty obligations were preferred more than the economic standing and the socially backwards condition of the country.

The risk stabilization clause along with the private contracts and the BITs would constitute an assurance of the compliance to the human rights in the domestic jurisdiction. The clause aims to provide the protection to the investors against the violation of human rights and puts restrictions on the government procedures and the policies which would likely impact the commercial and the human rights of the investors. But again, there is no mention of the rights of the host state's citizens. It is also considered as the freeze clause which ipso facto forbids the legislation which may affect the business of the investor or may give reasonable notice to comply with the policies.

Thus, it can be said that current BIT network is confined to protect the investment and other fiscal related rights of the investors and the host state. The patchwork is filled with so many gas which provide valuable rights to the MNCs in the host state but isn't able to protect its own citizens. Take the Bhopal Gas Leak case, a lot of MC Mehta cases against the giant industrial MNCs in India and what not! It is suggested that BITs should be restructured in the manner that shall not only boom the economy of the host state but also protects the rights of the citizens of the host

state. Sure, it is an easy argument that though there are expropriations or the damages to the society and they are well compensated for those wrongs but at the same time there should be the concept of strict liability or the absolute liability in the event of undertaking the business involving risk to the public and state at large.

Covid Pandemic and Investment Arbitration

Covid Pandemic has impacted over 150 nations and its adverse effect can be seen vividly on entire world. It becomes inevitable to think how largely investment is effected due to ongoing epithets of the covid. Bilateral Investment Treaties, as we have seen, promotes the fair and equitable treatment to the investors and the host government by providing full protection and security to the business and the personas. Measures by the government to curtail the effect of the covid-19 may give rise to investment claims under BITs.

The past witnesses that arbitral tribunals has accepted the adverse effects of the economic crises but has rendered the decision of the enterprise unfair and inequitable. However, this approach may differ in these times when national health is at stake. As we know, government has put ban on national and international travels and nationalized essential commodities which is unpropitious to the BITs promises.

The unequal treatment by the state is against the implications of the FET clause wherein state is under the liability to treat the home government's investor with utmost fairness and to equity with *due regard to the circumstances*. The usage of the term above



'due regard to the circumstances' means that the state may take the immunity from the liability (undertaken under BIT) under exceptional circumstances. This exception has been availed multiple number of times and one the examples is FET concern Argentina where in the state faces crises 2000-2001.

In *L&E vs. Argentina*¹², tribunal recognized the impact of the economic crises and laid down that state is not under the liability to pay the damages to the investors in furtherance of the action taken on the plea of necessity yet state went too far by totally dismantling the legal remedies to attract the foreign investors and hence acted against the FET clause under the BIT.

In another case, *Sempra vs. Argentina*¹³, tribunal accepted the impact of the crises but considered the actions by the state as against the assurance under FET provision of the BIT. It was held that State has gone beyond the required extent to cope up with the effect of the crises and has violated the rights of the investors by choosing the measures which has effected the expectations of the home government.

State's Defenses in Investment Arbitration

With the current pandemic, state will not be able to fulfill its obligations in the public international law. Thus the question arises what are the exceptions to non-performance? Let's take into consideration the following doctrine to escape the liability:

1. **Force Majeure:** as per the reading of article 23 of International Law

Commission (Draft Articles on the Responsibility of State for Internationally Wrongful Acts), the plea of the force majeure can be availed due to the unforeseen and irresistible circumstances that are beyond the state's control and secondly which makes it materially impossible to perform the obligations.

Due to the current scenario, state can hardly perform normally and providing full protection and security by assuring equitable treatment seems impossible. However, one wrong choice of the option to cope up with the repercussions of the covid and it may undermine the implication of the doctrine of Force Majeure. Thus, in the future investment arbitration disputes, state will have to show that the pandemic resulted in the complete denial of access of the facilities from performing its obligations.

2. **State of Necessity:** It is another exception to the non-performance of the obligations under public international law. As per Article 25 of ILC, State may avail the immunity on the pretext of state of necessity on the following grounds:

- i. The State faces a grave and imminent peril.
- ii. The peril threatens an essential interest of the State.
- iii. The State's act is the only means to safeguard this interest.

On the ground of the health and welfare of the Nation, the tribunal decides the matter on the basis of the circumstances and the situation.

¹² LG&E Energy Corporation v. Argentine Republic, ICSID Case No. ARB/02/01, Decision on Liability, 3 October 2006, 139.

¹³ Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16 Award, 28 September 2007, 303.



In *National Grid vs. Argentina*, it was held that:

“In the instant case, the actions of the Respondent had as an objective the protection of social stability and the maintenance of essential services vital to the health and welfare of the population, an objective which is recognized in the framework of the international law of human rights.”¹⁴

Current pandemic without any doubt is vividly a grave and imminent perils that threatens the essential interest(s) of the state and requires the state to take appropriate measure for the protection of the population and its health system. While the international community tries to define robust guidelines to tackle the pandemic, States should be aware that unless the means taken are the only means to safeguard what are clearly essential interests, a defense of the state of necessity may fail as a matter of public international law.

Conclusion & Suggestions

It is concluded that the liability of the State(s) under BIT(s) is to protect the investor and to afford legal remedies in the event of the violation. The controversies regarding the BIT are mostly due to the denial of human rights by host state which are undertaken under international law. The assumption regarding BIT is that it governs the fiscal relationship between the countries, investors and the host state then where investors should go for their human rights? Can it be dealt under arbitration under BITs or some other adjudicating authority has the jurisdiction?

After the perusal of distinct cases, researcher comes to the conclusion that it is up to the tribunal to decide the matters connected with the human rights assured under BITs under the heads of FET, FPS and Favourable Treatment clauses.

However, due to the current pandemic, the relief is granted to the state in furtherance of force majeure and state of necessity doctrines provided if state can provide vivid proof of vulnerability.

Researcher wants to suggest the followings:

1- Under BIT(s), there should be specific mention for the compliance of the human rights conventions and protocols to avoid confusion on the matters of jurisdiction. Normally, the subject of investment is stringent in nature and includes fiscal relations between the parties but if we provide mandatory compliance to the human rights as accepted in public law, it will assure the investor better treatment by the host state.

2- It isn't just the international compliance but if we can provide essential laws for the protection of the investors under our domestic set up then it will attract more investment in the country. Recent new BIT model of India delays the international arbitration remedy available to the investors and the host states and thus it is suggested that India and other countries should keep the investor's right at priority and should be adjudicated by an expert on international investment law.

3- In continuance to the second suggestion, researcher would like to suggest the

¹⁴ *National Grid plc v. The Argentine Republic*, UNCITRAL Case, Award, 3 November 2008, 245.



establishment of a separate body for the adjudication of the international investment claims. The body shall have an expertise in the matter of commercial and investment arbitration which will lessen the burden on High courts and the Supreme Court of India.

