INTERSECTION OF HUMAN RIGHTS AND INVESTMENT ARBITRATION: THE ROAD AHEAD FOR INDIA

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ABSTRACT

International Investment Arbitration has, ironically, stayed apart from changes in other relevant domains of law as a niche body of jurisprudence. Tribunals are increasingly being forced to consider issues that arise from a human rights narrative. According to several academics, there exist 'structural disparities' wherein international investment law and public international law are concerned. The same have led the tribunals to prioritise contractual standards that the host nations have agreed upon with the investors.

Human rights are not explicitly included in earlier investment protection agreements. However, it is becoming increasingly obvious that current international events have an impact on advancements in the domain of investment protection. The harsh criticism of some areas of investment arbitration has sparked some interesting developments in the debate. While arbitral tribunals previously paid little regard to human rights law concerns, the same appears to be no longer the case. Quite opposite, recent rulings demonstrate that arbitration tribunals are becoming more open to address of human rights problems.

The article is based on a thorough examination of publicly accessible investor-state conflicts in which the parties to the dispute or third-party interveners cited human rights. It endeavours to succinctly capture the development of practice in the perspective of Hague Rules and also highlight a juxtaposition of Indian law as its stand today.

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1. INTRODUCTION

The interlink between human rights and business is not an unknown concept. The underlying connection has been enunciated across the globe in multiple jurisdictions in acatena of judicial decisions.[1] The law is emerging and countries across the globe are gradually adapting to the changing requirements. The emerging trend is visible while exploring the mode of resolution of disputes involving human rights and business.

If conflicts or differences could be sorted through traditional court mechanism, the option for alternative resolution methods should also equally be explored, given the efficacious advantages involved in the later one. Arbitration being an adjudicatory mechanism has proven to be reliable across the industries, sector and jurisdictions. If so, arbitration of human rights and business disputes can be considered to be a viable option capable of resolving when the traditional remedies such as court and judicial proceedings are found to be ineffective and unavailable.

The boundaries between human rights and international arbitration have been eroding in recent years. However, the intersection that exists between human rights and investment cannot be considered a recent development. The principles developed in investor state arbitrations have witnessed the intermingling of a human rights perspective.[2] In fact, the worldwide acknowledgment of basic human rights came after the protection of foreign investment.[3] It can be observed that by the late 1900s, state responsibilities concerning the protection that is to be afforded to the foreigner's property had eventually been recognised as the "minimum standards of protection" and had found place in contemporary international law.

It is now being increasingly accepted that the concepts of international arbitration and human rights should not be considered to be distinct and unrelated aspects. The inclusion of human right claims in investor-state conflicts has prompted greater discussion about using international arbitration to settle human rights issues. With the introduction of the "Hague Rules on Business and Human Rights Arbitration" in 2019 ("Hague

1 Rojer Mathew v. South Indian Bank Ltd. (2020) 6 SCC 1.

2. Luke Eric Peterson, *Selected Developments in IIA Arbitration and Human Right* (2009) IIA MONITOR No. 2 International Investment Agreements.

3. Pierre-Marie Dupuy, *Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law* in Pierre-Marie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (OUP 2009).

Rules"), the overlapping of human rights and international arbitration has grown even more.[4]

Through this article, the author attempts to undertake a detailed examination of the questions of human rights in investment disputes leading to arbitrations in furtherance of the attempt, this paper is divided into three sections. In the first section, the author examines the nature of human rights that arise in investment arbitrations, and how do they pan out in terms of either their existence as issues emanating from other substantive questions involved as well as their independent existence. In the following section, the author addresses how these issues have been addressed in arbitration, and the legal means that exist to address and identify them at the Indian and international levels. Finally, the author highlights the shortcomings in the Indian legal position and provides a way forward by making suggestions towards the Indian legal framework in this regard through an understanding of the aforementioned problems identified as well as inspiration taken from the international position.

2. HUMAN RIGHTS PRINCIPLES RECOGNIZED IN INVESTMENT ARBITRATIONS

One element of investment arbitration is the human rights debate, which is very often overlooked. It is prone to be viewed one-sidedly with one assuming that human rights issues are solely brought forward to help State parties. However, it is to be remembered that it plays an equal role in investor protection. Human rights instruments and associated jurisprudence have been used by Tribunals to provide guidance on investor-related issues such as the standard of fair and equitable treatment (FET)[5] or expropriation[6] as well as to determine nationality.[7] For that matter, human rights are not limited to governments and investors. In *Tulip v. Turley*, the Tribunal turned to the European Court of Human Rights to determine an arbitrator's duty

4. Abhisar Vidyarthi, *Hague Rules on Business and Human Rights Arbitration: What Lies Ahead?* (ARIA, Columbia Law School, 28 September 2020) http://blogs2.law.columbia.edu/aria/hague-rules-on-business-and-human-rights-arbitration-what-lies-ahead/ accessed 29 October 2021.
5. Toto Costruzioni Generali SpA v. Republic of Lebanon ICSID Case No. ARB/07/12, Decision on Jurisdiction (2009).
6. Ronald S. Lauder v. Czech Republic UNCITRAL Award (2001).
7. Ioan Micula v. Romania ICSID Case No. ARB/05/20, Decision on Jurisdiction (2008).

to provide reasons.[8] This suggests that human rights are backroom players which serve as a support system for all the main players in the conflict.

Given the pervasiveness of human rights, ignoring the actual and essential interplay between human rights and investment law, would be a flagrant denial. It is important to note that the extent to which questions of human rights may be examined in the respective arbitration is determined by the jurisdiction clause's language, the relevant legislation so construed or the specific treaty interpretation method employed after the same is construed vide party autonomy or the closest connection test.[9] However, broad methods may be deduced,such as - affinity and denial. When the tribunal takes an affinitive approach, it recognises the importance of human rights and may even use them as a criterion for evaluation. One such example is of the Tribunal in Phoenix Action v. Czech.[10] In this case, it had been observed that the safeguards provided by International Centre for Settlement of Investment Disputes (ICSID) cannot be applied in instances where the investment has resulted in a contravention of human rights of another party.

The Tribunal observed that ICSID safeguards cannot be extended to investments committed in violation of the most basic human rights principles such as investments intended to support torture or genocide.

Despite the presence of a broadly worded jurisdiction provision in Pezold v. Republic of Zimbabwe,[11] the Tribunal refused to consider indigenous rights and concluded that Bilateral Investment Treaties (BITs) do not integrate the universe of international law into issues arising under BITs.[12] The proportionality concept was likewise rejected by the judges. Such categorical denials are difficult, particularly where there are regulatory conflicts such as when the State is faced with duties under the BIT and human rights commitments on opposing fronts. The case of Santa Elena

8. Tulip Real Estate v. Republic of Turkey ICSID Case No. ARB/11/28, Decision on Annulment (2015).
9. Ursula Kriebaum, *Human Rights and International Investment Arbitration* in Thomas Schultz and Federico Ortino (eds), *The Oxford Handbook of International Arbitration* (OUP 2020).
10. Phoenix Action Ltd. v. Czech Republic ICSID Case No. ARB/06/5, Award (2009).
11. Pezold v. Republic of Zimbabwe ICSID Case No. ARB/10/15 (2012).
12. Pezold v. Republic of Zimbabwe ICSID Case No. ARB/10/15 (2012).

v. Costa Rica[13] is an example of regulatory conflict and denial. It is worth citing the Tribunal's remark:

> *"Expropriatory environmental measures, no matter how laudable and beneficial to society as a whole, are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, whether for domestic or international environmental purposes, the state's obligation to pay compensation remains."*

A. Who are the concerned players?

The contradictory judgments add to the ambiguity. Additionally, due to the absence of existence of a doctrine of precedence, it is now up to the discretion of the Tribunal to pick from a variety of options. It is confusing those tribunals which have the authority to touch upon human rights for them to be analysed, usually go into a mode of denial when direct conflicts are concerned. This is indubitably one of the most problematic factors contributing to the current legitimacy crisis.

1. *Tribunals*

The Tribunal typically has three alternatives in such regulatory issues:

- Sole Effect Doctrine:[14] The purpose of the rule is irrelevant, and the state is responsible if the investment is harmed.
- Santa Elena Police Power Doctrine:[15] This rule follows due process that is not considered to be expropriatory in nature. It can be thought of as a norm that does not discriminate and exists for the benefit of the public at large.
- Balancing:[16] In order to reach the conclusion of whether a rule shall be considered expropriatory or not, there must be an examination of whether the method employed is proportionate to the supposed public interest and the legal cover afforded to the investor's investments.

13. Compañía del Desarrollo de Santa Elena SA v. Republic of Costa Rica Case No. ARB/96/1 (2000).
14. Methanex Corpn. v. United States 44 ILM 1345, Final Award on Jurisdiction and Merits (2005).
15. Compañía del Desarrollo de Santa Elena SA v. Republic of Costa Rica ICSID Case No. ARB/96/1 (2000).
16. Técnicas Medioambientales Tecmed SA v. United Mexican States ICSID Case No. ARB (AF)/00/2 (2003).

The former two theories can be found at diametrical parts of the spectrum. Adopting the single impact theory would provide investors with blanket protection, while the police power concept would provide the government with unrestricted authority. The proportionality concept, is in many ways similar to the golden rule of meanlaid down by Aristotle, and can be considered to be a feasible option for balancing conflicting interests; nevertheless, it must be implemented properly and with appropriate respect to governmental acts.

Institutional systems, on the other hand, have rules with respect to admission. A case must, in particular, fall within the jurisdiction of the arbitral tribunal, which is stated in the system's founding document. The ICSID Convention contains regulations on claim admission, which might be considered the cornerstone of this dispute-resolution mechanism. The provisions have evolved into a complex and technical body of procedural law as a result of the interpretative jurisprudence of successive ICSID Tribunals, though it should be noted that each Tribunal is free to interpret the Convention as it sees fit because the ICSID Convention lacks a doctrine of precedent.

The *Plama* case[17] is an apt example of these ideas. "*This does not mean, however, that the protections provided for by the Energy Charter Treaty cover all kinds of investments, including those contrary to domestic or international law*," it said after noting that the Energy Charter Treaty (ECT) did not contain a provision requiring the conformity of the Investment with a particular law. The tribunal determined that the substantive safeguards of the ECT cannot apply to investments made contrary to law based on the Chairman's comments during the ECT adoption session in 1994 and the introduction note to the ECT.

2. *Parties*

The irony is that the nations that complain about wide investment safeguards are the ones that draft broad and ambiguous BITs.[18] It is important to note that international law, as a discipline, has not yet reached a stage where associated human rights can be imposed as legally binding obligations

17. Plama Consortium Ltd. v. Republic of Bulgaria ICSID Case No. ARB/03/24 (2008).
18. UNCHR, Sixty-second session, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises* (22 February 2006) UN Doc E/CN.4/2006/97, p. 64.

upon companies.[19] Non-binding soft law instruments typically regulate such duties and businesses that comply with them do so voluntarily.[20] Despite international human rights treaties mandating State's governments to act in compliance with their obligation to conduct due diligence in an effort to prevent companies from indulging in violation of human rights, such host nations are not only apathetic to implementing this obligation but are often even observed to be complicit in breach of those rights.[21] In the face of such disregard from the host nations, one method that may prove effective is to employ treaties as the means to impose direct human rights responsibilities on investors. In their current form, BITs are mostly quiet and ambiguous on human rights concerns, necessitating a paradigm change.[22] Another route that States' government can take is by regulating and punishing non-state actors whose conduct is found to be in violation human rights on their territory or in areas under their authority via law and administrative procedures.[23] In fact, there has been extensive discussion on how national courts must examine the concept of 'clean hands' and dismiss investor claims in case the investors' claims have been 'dirtied' by human rights violations.[24] The notion of 'clean hands' in several BITs is brought into effect through the insertion of a clause that bestows protection upon only those investments that have been made "in compliance with the law".

Several tribunals in investor-state arbitrations have, over the years, employed the 'clean hands' theory to evaluate admissibility/jurisdictional issues to some extent. Notably, when furnished with claims pertaining to the criminal behaviour of an investor, like misrepresentations, fraud, or bribery/corruption, etc., ICSID tribunals have found that in several instances that they either do not have the jurisdiction or that the claim itself is inadmissible.

19. Patrick Dumberry and Gabrielle Dumas-Aubin, *When and How Allegations of Human Rights Violations can be Raised in Investor-State Arbitration* (2012) JWIT 13 citing Luke E. Peterson and Kevin Gray (Working Paper for the Swiss Ministry for Foreign Affairs, April 2003).
20. *Ibid* (citing Janusz Symonides, *Human Rights: Concept and Standards* (Routledge 2000)).
21. Interim Report (n 18) p. 65.
22. Dumberry (n 19).
23. Robert McCorquodale and Penelope Simons, *Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law* (2007) Mod Law Rev 70(4).
24. Gustav F.W. Hamester GmbH & C.o KG v. Republic of Ghana ICSID Case No. ARB/07/24, Award (June 18, 2010) para 125.

B. Tribunals circumventing questions of human rights

States often rely on various practices and tricks in order to somehow gain benefit from international obligations and commitments concerning human rights. Out of these, one that is frequently employed is them stating that the obligations that are due to foreign investors are "*necessarily moulded and shaped through the prism of human rights*."[25] What naturally follows from this is the conclusion that there exist several situations wherein the dual sets of obligations, namely the ones under the human rights law and secondly, the ones that arise from the investment treaty law, inevitably reach a standpoint where they are in friction. Therefore, the tribunals are faced with the inescapable issue of which of these two is to precede over the other. If one studies the way in which they have dealt with it in the past, it can be observed that most tribunals have found this issue to be beyond their potential and ability, and thus, have tried to circumvent it altogether. The methods for such circumvention have been observed to be neither cogent nor consistent in the legal sense. The same has been well demonstrated through the cases of the early millennium based in Argentina. For instance, in SAUR v. Republic of Argentina[26] and EDF v. Argentina,[27] the Respondent claimed that investment treaty commitments did not supersede its duty to protect its people's human rights. Furthermore, it was also contended by them that when rights find protection under treaties concerning the international human rights of parties, such should be considered "inherently *jus cogens*." This spate of instance is where the habit of avoiding such arguments began.

The panel in Azurix v. Argentina[28] had put forth its conclusion that it failed to find reason in the argument that human rights and investment treaty rules could be contradictory. In its responses to this instance, as well as Siemens v. Argentina[29] and Vivendi II,[30] the Tribunal used similar reasoning. For instance, the Tribunal had overlooked the human rights concerns and stated that they did not need to be resolved for the Tribunal's reasoning

25. Sayantan Chanda, *Human Rights and Investment Law: The Way Forward* ICAR (20 July 2020) https://investmentandcommercialarbitrationreview.com/2020/07/human-rights-and-investment-law-the-way-forward/ accessed 28 October 2021.
26. SAUR International SA v. Republic of Argentina ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability (6 June 2012) para 328.
27. EDF International SA v. Argentina ICSID Case No. ARB/03/23, Award (11 June 2012) para 192.
28. Azurix v. Argentina ICSID Case No. ARB/01/12, Award (14 July 2006) para 261.
29. Glamis Gold Ltd. v. United States UNCITRAL, Award (8 June 2009).
30. Compania de Aguas del Aconquija SA v. Argentina ICSID Case No. ARB/97/3, Annulment Decision (19 August 2010) para 57.

to be upheld in the case of Glammis Gold v. United States[31] Furthermore, the Tribunal has also determined that when disputed investment has an effect and impact on the rights of indigenous people, the same shall be considered beyond the scope of the case. The same was held in the case of Border Timbers v. Zimbabwe.[32] In all these cases, it can be seen that a practice of evasion of addressing the human rights obligations by Tribunals started. While *Azurix* and *Siemens* reasoned that investment treaty rules and human rights were not contradictory in nature and hence there was no dispute, in *Glammis,* it was reasoned the judgment could be given and upheld without consideration the human rights issues involved. While in *Border timbers*, the courts simply refused their jurisdiction to rule over human rights disputes.

1. *Aligning substantive questions of investment and human rights*

Interpretation of the two relevant domains of international law in harmony serves to provide as a viable solution to tackle the evasiveness.[33] The Vienna Convention on the Law of Treaties (VCLT) provides legal support for this approach in Article 31(3)(c).[34] The International Law Commission has maintained for long that fragmentation of the various regimes within international law must be discouraged while the wholeness of the same as a single system must be upheld.[35] However, it is pertinent to take note of the difficulties that surface in effect as a result of the discouragement of such fragmentation when there arises a conflict between investment treaty law and human rights law.

The Tribunal in SAUR[36] noted that the sets of obligations that investment treaty law and human rights law gave rise to were not compatible and hence, could not function at a similar level. Nevertheless, the Tribunal attempted to reconcile and interpret the relevant documents harmoniously by determining that it is in accordance with the right of an investor under

31. Glamis Gold Ltd. v. United States UNCITRAL, Award (8 June 2009) para 8.
32. Border Timbers Ltd. v. Zimbabwe Procedural Order No. 2, ICSID Case No. ARB/10/25 (26 June 2012) para 58.
33. Rainer Hoffman and Christian Tams (ed), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration?* (Nomos 2011).
34. D. Rosentreter, *Article 31(3)(c) of the Vienna Convention on the Law of Treaties and the Principle of Systemic Integration in International Investment Law and Arbitration* (Nomos 2015).
35. Martti Koskenniemi and Paivi Leino, *Fragmentation of International Law? Postmodern Anxieties* (2002) 15 Leiden J Int'l L 553.
36. SAUR International SA v. Republic of Argentina ICSID Case No. ARB/04/4.

the investment treaty that the duty upon Argentina to protect human rights is bestowed.

Notably, this is the most usual conclusion reached upon by Tribunals when attempting to interpret rights, emanating from the seemingly conflicting areas of law, in a harmonious manner.[37] Due to the adoption of this means of evaluation, the tribunals have reached the conclusion that there exists an exception or caveat to rights of investors, namely, the human rights obligations and responsibilities of the Government. In essence, rather than the other way around, this enables interpretation of the overall legal framework of investment treaties in consonance with the human rights legislations. However, several investing States are of the opinion that the method, i.e. defining investor rights as human rights, should be done to ensure a recognized and known basis to adjudicate on questions of investor rights.[38] This is probably unavoidable and reasonable, given the Tribunal's competence in investment treaty law rather than human rights law. In any case, the Tribunal's scope and purpose is to interpret and enforce the former rather than attempt to reconcile it with human rights obligations.[39] This further reinforces the idea that while the Tribunal may have the resources at its disposal to attempt harmonising the parties' rights and obligations under the concerned law, the diversion in this approach from evasion tactic discussed earlier arises in terms of the acknowledgement of subversion of human rights law to investment treaty law in such matters, as opposed to skirting around it as those Tribunals do that attempt to avoid the inevitable dilemma.

3. HAGUE RULES

The Hague Rules were enacted in December, 2019 in order to overcome legal and practical barriers encountered while when bringing business and human rights (BHR) disputes via the existing dispute resolution mechanisms, particularly national courts. Barriers to resolve transnational adverse BHR-related disputes in national courts include: (a) the risk that the

37. Suez Sociedad General de Aguas de Barcelona SA v. Argentina ICSID Case No. ARB/03/19, Decision on Liability (30 July 2010), paras 260, 262; CMS Gas Transmission Co. v. Argentina ICSID Case No. ARB/01/8, Award (12 May 2005), para 121.
38. Luke Eric Peterson (n 2).
39. Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic ICSID, Case No. ARB/07/26, Award, (8 December 2016), para 1143ff; Marfin Investment Group Holdings SA v. Republic of Cyprus ICSID Case No. ARB/13/27, Award (26 July 2018), para 827.

competent national court may be unable to deal with those complex BHR-related cases; (b) the risk that the parent company of an entity responsible for an infringement on human rights may be insulated from liability for the actions of its subsidiaries abroad because of jurisdictional barriers or legal principles; and (c) the overwhelming costs of litigation, etc. That apart, the claims relating to human rights have been raised in numerous investor-state disputes.

The objective of the Hague Rules is to further the cause of United Nations Guiding Principles on Business and Human Rights ("UPGP"), which seeks to secure access to remedy against business-related human rights violations. The rationale is that intersections of commercial and human rights' issues should be understood at least as broadly as the meaning such terms have under the UN Guiding Principles on Business and Human Rights. The traditional judicial system has its own disadvantages, such as delay and procedural complexity, which are the primary reasons or rational for extending the arbitration mechanism for its adjudication.

The Hague Rules establish a series of procedures for resolving disputes about the impact of commercial operations on human rights. The Hague Rules are based on the United Nations Commission on International Trade Law's ("UNCITRAL Rules") Arbitration Rules with changes to handle particular difficulties that are expected to occur in commercial and human rights conflicts. The breadth and range of the Hague Rules are not restricted by the kind of party (claimant or respondent) or the subject-matter of the dispute, as is the case with the UNCITRAL Rules. The Hague Rules apply to any issues that the parties to an arbitration agreement have decided to settle by arbitration under the Hague Rules. Business entities, people, labour unions and groups, States, State entities, international organisations and civil society organisations, as well as any other parties of any sort, might all be considered such parties. The Hague Rules purposely do not define the phrases 'business', 'human rights', or 'business and human rights', which is intriguing.

The Working Group on the Hague Rules highlighted that usually the jurisdictions having corrupt administrative and judicial mechanisms experience instances of grave human rights violations.[40] Due to the

40. Cleary Gottlieb, *The Launch of the Hague Rules on Business and Human Rights Arbitration* (Alert Memorandum, 29 January 2020) https://www.clearygottlieb.com/-/media/files/alert-memos-2020/the-launch-of-the-hague-rules-on-business-and-human-rights-arbitration.pdf accessed 30 October 2021.

politically influenced judiciary and inordinate delays, among other factors, there is a denial of justice.[41] Therefore, the Rules aim to extend the benefits of arbitration to the disputes related to human rights violations especially in states where there is rampant corruption and the national courts fail to provide an effective remedy. They aim to protect and uphold the rights of the victims of business-related human rights abuses while safeguarding them against the domestic encumbrances.[42]

A. Certain relevant provisions of the Hague Rules

Article 1(2) of the Rules provides that the disputes submitted to arbitration under these Rules shall be deemed to have arisen from a commercial relationship between the parties. This is for the purposes of Article 1 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This deeming provision is added to opt into the New York Convention and to waiver of potential defences to its application.

Article 1(6) shows the importance of collaborative settlement mechanism with respect to business and human right disputes as they encourage parties to endeavour to resolve any dispute in good faith through negotiation, conciliation, mediation, facilitation, or other collaborative settlement mechanisms, at any time including after arbitration proceedings have been commenced.

In order to avoid any conflict of interest whose nationals are parties or of any State that is a party to the dispute, Article 11(1)(d) of the Rules specify that the presiding or sole arbitrator cannot be a national of States.

Article 26 provides for an expedited procedure. The ICSID Convention Arbitration Rules, the SCC Arbitration Rules, the SIAC Arbitration Rules and the HKIAC Administered Arbitration Rules all have comparable provisions. This provision would be a useful tool for dealing with baseless allegations made in order to frighten the other party or damage their reputation.

41. Shavana Haythornthwaite, *The Hague Rules on Business and Human Rights Arbitration: Noteworthy or Not Worthy for Victims of Human Rights Violations?* (Kluwer Arbitration Blog, 5 May 2021) http://arbitrationblog.kluwerarbitration.com/2020/05/05/the-hague-rules-on-business-and-human-rightsarbitration-noteworthy-or-not-worthy-for-victims-of-human-rights-violations/ accessed 29 October 2021.
42. Vidyarthi (n 4).

Since the public interests are involved in the business- human rights disputes, under Rule 38, the Tribunals can allow disclosure of information to the public. The tribunal has to consider public interests, confidentiality concerns of the parties, and the potential for aggravating conflicts amongst the relevant stakeholders.

Article 45 of the Hague Rules mandates the award to be in writing. The Tribunal must clarify the grounds for its decision and ensure that the award is in accordance with human rights. This implies that the award must be consistent with the internationally recognized standards of international human rights. Furthermore, this also indicates that the award must comply with globally recognised human rights as well as public policy standards under the law of the seat and likely sites of enforcement.

As a result, the Hague Rules should be applauded for their goal of correcting human rights transgressions. While the Rules are universal, they do allow parties to change or opt out of some elements that may or may not be relevant to the requirements of disputants. The Rules are built on the principle of consent but they do not address the enforcement of arbitral rulings.

In some circumstances, undemocratic, underequipped, and politically motivated legal institutions that limit access to redress pose a significant barrier. It is also unclear how the Rules will work with concepts like *forum non conveniens*, certain sorts of business structures and contractual rules like statutes of limitation which frequently impede remedial actions. Given that the Rules are founded on consent, it is also difficult to explain why corporations would agree to arbitrate here, despite the aforementioned principles of *forum non conveniens*.

4. INDIAN POSITION

The issue of enforcement of an arbitral award touching the aspect of human rights has to pass the test of domestic legislation. The (Indian) Arbitration and Conciliation Act, 1996 acknowledges that *"certain disputes may not be submitted to arbitration"*[43] and mandates that an arbitral award shall be set aside if "*the subject-matter of the dispute is not capable of settlement by arbitration under the law*".[44] If the subject matter is not arbitrable, the Tribunal shall not have jurisdiction to adjudicate the same.

43. Arbitration and Conciliation Act, 1996 s. 2(3).
44. Arbitration and Conciliation Act, 1996 s. 34(2)(b) and 48(2).

Evidently, the legislature has not specifically enumerated the categories of non-arbitrable disputes in the Act, leaving the question for judicial interpretation. There are handful of judgments which deal with the issue of arbitrability.

The Supreme Court of India in Booz Allen and Hamilton Inc v. SBI Home Finance Ltd.,[45] enunciated the 'nature of rights test' declaring the following two categories of disputes as non-arbitrable. First, disputes which are reserved by the lawmakers to be determined exclusively by public fora; and second, disputes which, by necessary implication, stand excluded from adjudication by an arbitration tribunal and as such tribunal lacks the authority to provide an effective remedy. The latter category covered disputes relating to actions *in rem* which determined legal obligations of an individual/party with the world at large and were therefore *'unsuited for arbitrations'* and could only be adjudicated by courts or public tribunals.

The court clarified that actions *in personam* describe the actions that determine the rights and interests of the parties themselves in the subject matter of the case. On the other hand, actions *in rem* reflect actions that determine the parties' title to the property and their rights therein, and does not solely refer to actions among themselves but also against all persons that may at any time claim an interest in the concernedproperty.[46] Notably, actions *in rem* also have an *ergaomnes* effect.

In the end, the Court decided that rights *in rem* could not be arbitrated. However, it did clarify that this is not an inflexible rule, and that subordinate rights *in personam* arising from broader *in rem* rights are nevertheless arbitrable. Therefore, if there exists a right to damages for personal injury in a criminal case, the dispute might then be referred for resolution to the process of arbitration. Conversely, a married couple who wishes to separate may resort to arbitration to sketch out the terms on which their separation

45. Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd. (2011) 5 SCC 532 : AIR 2011 SC 2507.

46. It was held that "37. *It may be noticed that the cases referred to above relate to actions in rem. A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals. Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject-matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property.*"

shall take place because such an agreement only governs their personal obligations.

In Vidya Drolia v. Durga Trading Corpn.,[47] the Supreme Court noted that a positive finding with respect to any of the following determinations would render the dispute non-arbitrable:

(i) *"when cause of action and subject matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem;*

(ii) *when cause of action and subject matter of the dispute affects third party rights; have ergaomnes effect; require centralized adjudication, and mutual adjudication would not be appropriate and enforceable;*

(iii) *when cause of action and subject matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable; and*

(iv) *when the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s)."*

For maintaining objectivity and predictability in the arbitration procedure and developing a cogent understanding of the contours of human rights in India, it is important to identify three broad categories of human rights enforceable in India. *First*, human rights relating to life, liberty, equality, and dignity of the individual, which have been guaranteed by the Indian Constitution; *second*, human rights with respect to the environment emanating from the Environment Protection Act, 1986 and other allied enactments; and *third*, rights with respect to employment recognized under Indian labour law enactments.

It may be noted at the outset that a plethora of human rights such as the right to free speech, freedom of religion, etc. have been accommodated under the Constitutional mechanism and are desirably in the exclusive domain of public courts. Therefore, it is important to examine and explore the possibility of arbitration in India in only the latter two categories through the application of the tests enunciated by the Indian courts in *Booz Allen* and *Vidya Drolia* to determine the arbitrability of disputes and analyzing the impact of contemporary global developments on human rights arbitration. Certain other human rights such as the employee's right to compensation

47. Vidya Drolia v. Durga Trading Corpn. (2021) 2 SCC 1 : 2020 SCC OnLine SC 1018.

against environmental decay or accidents due to unsafe working conditions should be arbitrable in light of the speedy and confidential nature of the arbitral mechanisms.

The position on arbitrability of labour disputes in India has been explored by the High Court of Bombay in Kingfisher Airlines Ltd. v. Prithvi Malhotra[48] wherein labour disputes were held to be non-arbitrable under the Arbitration and Conciliation Act, 1996. The High Court reasoned that the overall objective and scheme of resolution of labour disputes under the Industrial Disputes Act, 1947 clearly indicate that such disputes were non-arbitrable and public policy warranted that they were reserved exclusively for judicial fora.

However, arbitrations can still be commenced in circumstances where there are subordinate rights emanating from *in rem* labour law actions. Consider a scenario where a supplier-retailer contract provides that an affirmative finding regarding violation of human rights by a party shall lead to immediate termination of the contract and questions of human rights violation will be determined by arbitration. In such a situation, if the retailer seeks to terminate the contract citing human rights violation by the supplier (such as forced labour or unsafe working conditions for employees), it will have to commence arbitration in pursuance of the supplier-retailer contract. Such arbitration will not be barred by the *Booz Allen Test* since the court, in that case, has unequivocally affirmed the arbitrability of subordinate rights *in personam*, emanating from the broader *in rem* rights. Termination of the supplier-retailer contract will qualify as a subordinate right *in personam* emanating from the broader *in rem* human rights and would therefore be arbitrable.

The aforementioned hypothetical scenario, however, does not touch upon the possibility of a private compensatory remedy in human rights disputes for the actual aggrieved party. It only addresses the question of arbitrations commenced by parties having subordinate rights (termination of the contract in that case) emanating from the broader human rights violation. Effectively, labour law disputes are non-arbitrable in light of the *in rem* principle in India and an individual/labour union has to approach the competent authority under the scheme of the relevant legislations for redressal of grievances and availing compensations.

48. Kingfisher Airlines Ltd. v. Prithvi Malhotra 2012 SCC OnLine Bom 1704.

It is important to highlight that Bangladesh's Accord on Fire and Building Safety in Bangladesh (the Accord) is one such multilateral agreement between various corporations, trade unions, and non-governmental organizations which aims at the protection of human rights for the textile industry workers in Bangladesh. The consent to arbitrate disputes arising out of the Accord is contained in Clause 5 and the Accord has witnessed two arbitrations regarding human rights violations against global fashion brands till date. Such an arrangement offers advantages to both parties in so far as confidentiality in arbitration mechanisms protects the reputation of business corporations and also provides a cheap and quick remedy for the aggrieved individuals.

5. CONCLUSION

The Hague Rules strive to achieve another milestone in providing a quick and affordable adjudication of human rights violations which has the potential of changing the global arbitration landscape. Rather than international law, investment arbitration is frequently connected with commercial arbitration. As a result, the techniques are more commercial in character than public. The stakes, however, are far higher in this situation, with critical policy problems like public health, the environment and water on the line. Human rights violations are unavoidable in investor-state disputes. As a result, in cases wherein the investment has been affected due to the occurrence of a violation of human rights, the same shall then become a conflict concerning investment and the same shall then be arbitrable. Governments must uphold both treaty safeguards and human rights responsibilities because the hierarchy of the concept of superiority between investment treaties and human rights has not found acknowledgement under the international laws.

As a result, BITs must be interpreted consistently.

India should not shy away from bringing necessary policy changes to allow resolution of human rights disputes through arbitration. The *in-rem* principle that in the *Booz Allen* case was enunciated by the court may be diluted to accommodate a parallel compensatory mechanism for any damages attributable to the actions of a corporate entity. Apprehensions regarding abuse of arbitral processes in such human rights disputes, especially coercion and lack of independence of arbitrators due to the uneven financial standing of aggrieved individuals vis-à-vis corporate giants, can be withered away by accommodating for post-dispute arbitral agreements in the Indian statutory scheme, effectively ensuring that an individual has the choice to opt for arbitration after the occurrence of the

dispute, thus not caging him in the confines of unfair arbitration clauses and trusting him to make an informed and conscious choice in light of his interests involved. The Hague Rules, 2019 open up a new paradigm in international arbitration and it will be interesting to witness the approach of the Indian policy makers in adapting to a rapidly changing global arbitration landscape.