GROWING CONVERGENCE OF INTERNATIONAL ARBITRATION AND HUMAN RIGHTS

—*Meenal Garg*[*]

ABSTRACT

In spite of the growing popularity of international arbitration in resolving virtually all kinds of commercial disputes, one area of law that has largely remained untouched by arbitration is human rights violations. However, a proposal in form of a Working Group Report[1] *by a group of international lawyers has argued that international arbitration is a measure of 'great promise' to resolve business-related human rights disputes. This Working Group Report has prompted the global arbitration community to notice the overlap between human rights and arbitration. In an attempt to highlight this overlap, this paper firstly traces the history of such overlap to investment arbitrations where human rights claims are often raised before the arbitral tribunal. Then, the focus shifts towards international commercial arbitration where the author argues that there is no bar on the arbitrability of human rights disputes and throws light on the varied advantages of arbitrating human rights as against litigating human rights claims. Next, this paper recommends changes to the existing arbitral regime in light of the Working Group Report.*[2] *Lastly, this paper concludes on the note that arbitration has a huge potential to effectively adjudicate human rights claims and adoption of the same would result in a win-win situation for all the interested parties.*

1. INTRODUCTION: INVESTMENT ARBITRATION VIS-À-VIS HUMAN RIGHTS

Historically, arbitration and human rights have been viewed as two separate and incompatible branches of law. This is because arbitration was

* The author is an Associate at K.N. Legal.

1. Claes Cronstedt, Jan Eijsbouts and Robert C. Thompson, *International Business and Human Rights Arbitration*, Lawyers for Better Business ('Working Group Report') (Lawyers for Better Business, 13 February 2017) https://www.cilc.nl/cms/wp-content/uploads/2018/03/INTERNATIONAL-ARBITRATION-TO-RESOLVE-HUMAN-RIGHTS-DISPUTES-INVOLVING-BUSINESS-PROPOSAL-MAY-2017.pdf accessed 28 September 2021).
2. *Ibid.*

largely considered to be a private resolution mechanism for the resolution of contractual or civil disputes. Furthermore, given the level of freedom that the parties enjoy in arbitration, there were palpable concerns regarding the resolution of disputes involving public interest through arbitration. However, with the growing notions of arbitrability of previously non-arbitrable disputes like competition law disputes[3] etc. and the introduction of concepts like the second look doctrine, the international arbitration community is becoming increasingly aware that the relationship between arbitration and human rights is much more than meets the eye. Furthermore, the Working Group Report has recommended the adoption of international arbitration as a means to resolve business-related human rights disputes which has brought into the limelight the potential for arbitrating human rights disputes. The relevant portions of this report are discussed in a later part of this paper.

Presently, human rights-related matters have been more frequently raised before arbitral tribunals in cases of investment arbitrations.[4] These claims have been brought before the arbitral tribunal in a variety of ways by the foreign investor and the host state as well. The foreign investor usually raises a human rights argument to highlight its weaker position vis-à-vis the host state. On the other hand, the human rights argument is used as a defence by the host state to justify its actions that are in conflict with its treaty obligations. This is illustrated in case of Suez, *Sociedad General de Aguas de Barcelona SA* v. *Argentine Republic*[5] where the Claimants had made an expropriation claim under Argentina-Spain BIT and Argentina-France BIT for a tariff freeze on drinking water supply awarded to the Claimants under concession agreements. Herein the tribunal had held that the BIT was silent in the context of exclusion or inclusion of human rights and therefore, the human right obligation to provide drinking water to its citizens triumphs its obligations under BIT. Consequently, on the basis of such human rights defences, the expropriation claims were rejected.

3. Meenal Garg, *Deciding Arbitrability of Competition Law Disputes: Making a Case for Adoption of Liberal Standards by National Courts* (The RMLNLU Law Review Blog, 1 February 2018). https://rmlnlulawreview.com/2018/02/01/deciding-arbitrability-of-competition-law-disputes-making-a-case-for-adoption-of-liberal-standards-by-national-courts/ accessed 18 November 2021.
4. Urbaser SA v. Argentine Republic ICSID Case No. ARB/07/26 (8 December 2016).
5. Suez, Sociedad General de Aguas de Barcelona SA v. Argentine Republic ICSID Case No. ARB/03/19, [262] (30 July 2010).

Similarly, in *David R. Aven* v. *Republic of Costa Rica*,[6] the tribunal, while relying upon Urbaser[7] case, has held that the investors cannot avoid their obligations of protecting human rights, liability for damages etc.[8] In this case, Costa Rica had preferred a counter-claim on account of environmental damage caused by the investor. It was held that while the tribunal has jurisdiction to decide such a counter-claim, Costa Rica failed to prove this claim and the same was ultimately rejected.

Another example in this context is *Bear Creek Mining Corporation*. v. *Republic of Peru*.[9] In this case, the investor had certain mining concessions which were effectively rendered useless because of protest and social unrest of local communities. When the investor raised claims on account of this act, Republic of Peru, in defence, had argued that mining would have led to adverse environment consequences which also led to social unrest. Therefore, Peru alleged that violation of these environment norms and fault of the investor leading to unrest amounted to contributory negligence. Although, ultimately the tribunal dismissed this defence as Peru failed to discharge its burden of proof, this case brings to light as to how human rights concerns can be used as a shield in investment arbitration.

In some cases, the tribunal has allowed some "non-disputing" parties to raise broader policy considerations including human rights issues before the tribunal.[10] Lastly, such an issue may come up as an ancillary issue that may be adjudicated by the arbitral tribunal to effectively adjudicate upon issues like Fair and Equitable Treatment etc.[11]

Though investment arbitration is meant to address the commercial disputes arising out of Investment Treaties, it has been opined:

> *The contrasting objectives of states and investors in relation to investment liberalization are most evident in investment disputes that touch upon non-commercial issues. The lack of an alternate*

6. David R. Aven v. Republic of Costa Rica ICSID Case No. UNCT/15/3 (18 September 2018).
7. See Urbaser (n 4).
8. See David Aven (n 6) [737-39].
9. Bear Creek Mining Corpn. v. Republic of Peru ICSID Case No. ARB/14/21(30 November 2017).
10. Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania ICSID Case No. ARB/05/22, [366] (24 July 2008).
11. Eric De Brabandere, *Human Rights Considerations in International Investment Arbitration* (2013) Grotius Centre for International Legal Studies Working Paper 001-IEL https://ssrn.com/abstract=2230305 accessed 14 September 2020.

> *mechanism to resolve the non-commercial aspects of an investment dispute has led to the scope of investment arbitration slowly expanding into the adjudication of non-investment issues.*[12]

Thus, it can be seen that the lack of an alternative forum to resolve investment treaty-related human rights issues and intermingling of human rights issues with the main dispute were the two reasons for the adjudication of human rights issues by arbitral tribunals.[13]

Today, human rights claims have become such an integral part of investment arbitration that it has essentially changed the character of investment arbitration. For example, Radi has opined that investment arbitration can now be considered as "public international law" because of the increasing reference by arbitral tribunals to public international law instruments and joinder of parties other than the host state and the investor to arbitration proceedings on humanitarian grounds. Drawing from this hypothesis, he has further argued that since a number of parties like NGOs, human rights activists, victims of human rights violations etc. are interested in the outcome of investment treaty arbitration, there is a need to evolve the norms for publishing arbitral awards to address this general public interest.[14]

Some commentators and scholars have also argued that investment treaty arbitration is not a proper forum for adjudication of human rights claims. In this respect, Fry has argued that it is incorrect to say that investment arbitration undermines human rights primarily because of two reasons: firstly, that the tribunal is under no obligation to consider human rights claims unless they have risen to the status of *jus cogens* and, secondly, that the tribunal is limited by its jurisdiction, viz. the relationship of the alleged violation to the investment.[15] Arguing on similar lines, Kube and Petersmann have extensively reviewed some popular international investment arbitration decisions and have opined that whether the arbitral tribunal has jurisdiction over the human rights violation is dependent upon

12. Barnali Choudhury, *Democratic Implications Arising from the Intersection of Investment Arbitration and Human Rights* (2009) 46 Alberta Law Review 983, 989.
13. Aceris Law, *Human Rights Law and Investment Arbitration* (Aceris Law, 25 April 2021) https://www.acerislaw.com/human-rights-law-and-investment-arbitration/ accessed 28 September 2021.
14. Yannick Radi, *The "Human Nature" of International Investment Law* (2013) Grotius Centre for International Legal Studies Working Paper 006-IEL https://ssrn.com/abstract=2278857 accessed 10 September 2020.
15. James D. Fry, *International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity* (2017) 18 Duke Journal of Comparative and International Law 77, 107.

the proximity of the relationship between the alleged human right violation and the investment.[16] This approach seems to be more logical and in support of the same; one may refer to the case of *Biloune* v. *Ghana*,[17] in which one of the issues argued before the arbitral tribunal was whether the tribunal could rule over the arrest and detention of one of the investors. The tribunal refused to rule on this issue and observed that it did not have the jurisdiction to rule over every human rights violation and its jurisdiction is limited to the claims arising out of the investment treaty. Another interesting case in this respect is *Mohd. Abdel Raouf Bahgat* v. *Arab Republic of Egypt*.[18] In this case, although the tribunal found itself inclined to award moral damages for illegal detention of the Claimant, the tribunal denied granting such damages as the BIT in question i.e. the Egypt-Finland BIT did not confer the jurisdiction on the Tribunal to award moral damages.[19] Thus, this discussion reveals that to decide a human rights violation claim, the tribunal would look into a variety of factors including the wording of the BIT, nexus of human rights violation with the treaty dispute, etc.

Another development which should be mentioned here is that certain States have started to recognize the interplay of human rights and investment arbitration regime and therefore, they have taken steps for a more explicit mention of human rights in investment treaties. For instance, recently, the European Union has proposed[20] to amend the denial of benefits of clause of the Energy Charter Treaty[21] to include violation of human rights as a ground to deny benefits of the treaty.

To sum up this part, it can be easily seen that notwithstanding the complexities pertaining to the arbitrability of human rights in investment arbitration, '*investment arbitrations have highlighted ways in which human*

16. Vivian Kube and Ernst-Ulrich Petersmann, *Human Rights Law in International Investment Arbitration* (2016) 11 Asian Journal of WTO and International Health Law and Policy 65, 73.
17. Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Govt. of Ghana [1989] 95 ILR 84.
18. Mohd. Abdel Raouf Bahgat v. Arab Republic of Egypt-Award [2019] PCA Case No. 2012-07.
19. *Ibid* [519]-[521].
20. *EU Text Proposal for the Modernisation of the Energy Charter Treaty* (European Union, 2020) https://trade.ec.europa.eu/doclib/docs/2020/may/tradoc_158754.pdf accessed 21 November 2021.
21. Energy Charter Treaty (entered into force 16 April 1998) 2080 UNTS 100 (ECT) art. 17.

rights issues can become enmeshed with business issues.'[22] In agreement with this observation, scholars have opined that the present arbitration clauses are sufficient enough to enable the investment treaty lawyers to raise human rights claims before an investment tribunal and there is no need to introduce stronger human rights clauses.[23] Furthermore, it would not be completely wrong to say that the increasing interference of human rights in international investment arbitration is perhaps an indication that investment arbitration is becoming more human rights friendly.[24] However, at the same time, this jurisprudence also raises the question with regards to the status quo of human rights claims in international commercial arbitration. This is because it is obvious that commercial arbitration and investment arbitration are very distinct by nature. Therefore, the following sections of this paper aim to analyse this interplay of international commercial arbitration and human rights claims.

2. MAKING A CASE FOR ARBITRATION OF HUMAN RIGHTS IN INTERNATIONAL COMMERCIAL ARBITRATION

A. Comparing Apples and Oranges: Distinction between Investment Arbitration and Commercial Arbitration

The distinguishing features of international commercial arbitration from investment arbitration pose an acute problem as far as arbitration of human rights claims is concerned. This is because investment arbitration involves state parties whereas international commercial arbitration involves only private parties. Therefore, the human rights obligations of states do not exist in commercial arbitration. Furthermore, investment arbitration arises from a bilateral or multilateral treaty between states whereas international commercial arbitration arises from a contract between the parties (containing an arbitration clause to this effect). Next, the purpose of investment arbitration is to provide remedy to an investor who has been offered certain incentives for making investment in the host State and the State has not fulfilled its obligations of providing those incentives whereas the purpose of commercial arbitration is to simply resolve the disputes

22. Barnali Choudhury, *Spinning Straw into Gold: Incorporating the Business and Human Rights Agenda into International Investment Agreements* (2017) 38 University of Pennsylvania Journal of International Law 425, 461.
23. Petra Butler, *Red Riding Hood- Is Investor-State Arbitration the Big Bad Wolf*? (2017) 5 Pennsylvania State Journal of Law and International Affairs 328.
24. Silvia Steininger, *What's Human Rights Got to Do with it? An Empirical Analysis of Human Rights References in Investment Arbitration* (2018) 31 Leiden Journal of International Law 33, 35.

arising from a contract. Lastly, human rights contentions may be raised in investment arbitration to highlight the weaker position of the foreign investor and the duty of the host State to ensure basic human rights to its citizens, whereas in international commercial arbitration the disputing parties are often private parties and are usually placed on an equal footing. Although the differences enumerated here are not exhaustive, they unambiguously illuminate the problem in adjudicating human rights claims in commercial arbitration when compared with investment arbitration.

It has been observed that foreign investors put forth their human rights claims before an investment arbitral tribunal where such submission tends to benefit the corporations and therefore, they would never consent to arbitrate human rights claim where there is a risk of creating a liability when no liability may exist under the national law.[25] To illustrate, let's assume there is a human rights dispute between a corporation and employees in country A which does not have very human rights friendly laws. Thus, there is a high chance of no liability being incurred by the corporation if such a human rights claim is raised before the courts of country A. On the other hand, imagine a scenario where such a claim is subject to international arbitration where the law of country B is applied which is very human rights friendly. Now, if the same issue is arbitrated by applying the laws of country B, the corporation may be held liable and be directed to pay huge compensations to its employees. Naturally, the corporation would choose the first alternative and refuse to arbitrate human rights claim to save itself from any future liability. Furthermore, traditionally human rights claims have been addressed to States and therefore it is not very problematic to raise such claims before an investment treaty arbitral tribunal to which the State is a party. However, such is not the case with international commercial arbitration where the dispute is between two private parties. Thus, it can be invariably stated that human rights claims cannot be brought in the same manner in international commercial arbitration as they have been brought before investment tribunals.

With respect to commercial arbitration, the first problem that arises regarding the arbitration of human rights disputes is the question of arbitrability of such disputes. In essence, the question of arbitrability of human rights disputes arises from the usage of the word '*commercial*' in

25. Gregory R. Day, *Private Solutions to Global Crises* (2015) 89 St John's Law Review 1079, 1106.

the New York Convention[26] which is generally known as the "commercial reservation"[27] requirement. In this regard, Eliasoph has opined that most of the signatories to the Convention have not recognized this commercial reservation. He further argues that even the States that have adopted this "commercial reservation" provide ample opportunities to negotiate arbitration agreements that fulfil both the commercial reservation as well as human rights obligations.[28] In conjunction with this observation, scholars and commentators of the states, that have rigidly recognized such reservations, have argued that such a distinction between commercial and non-commercial should be dropped. For instance, Chukwuemerie while referring to the arbitration practices prevailing in Africa has opined:

> *It is time for the law to drop the rigid classification of matters into 'commercial' and 'non-commercial' for purposes of arbitrability. It should suffice that a compromise is capable of being reached in that the parties have agreed to go to arbitration. The whittling down of party autonomy — one of the bedrocks and virtues of arbitration — in this area ought now to cease.*[29]

In this respect, it is noteworthy to mention here that the Working Group Report does not expressly refer to the arbitrability of human rights disputes. However, a thorough perusal of the Working Group Report clearly suggests that business related or only commercial human rights disputes can be arbitrated.[30] In other words, applying the principles of investment arbitration *mutatis mutandis* to international commercial arbitration, the question as to whether the arbitral tribunal has jurisdiction over a particular human rights claim would be directly dependent upon the fact as to the nexus between the alleged human rights violation and subject matter of the dispute. Additionally, as seen in investment arbitration, the wordings of the arbitration clause would also play a vital role in determining whether the

26. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 38 (New York Convention).
27. See Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th ed, OUP, 2015) paras 1.35-1.38; UNCITRAL, *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (United Nations Publication, 2016) 33-35.
28. Ian H. Eliasoph, A Missing Link: International Arbitration and the Ability of Private Actors to Enforce Human Rights Norms (2004) 10 New England Journal of International and Comparative Law 83, 108-09.
29. Andrew I. Chukwuemerie, *Arbitration and Human Rights in Africa* (2007) 7 African Human Rights Law Journal 103, 138.
30. See Working Group Report (n 1) 3-4, 8-10.

tribunal can adjudicate upon allied human rights issues. The arbitration agreement has to be worded in such a way that confers wide jurisdiction on the arbitral tribunal so as to enable it to adjudicate upon any issue, including human rights disputes, arising from the contract. Furthermore, it is only obvious to say that only civil remedies like claiming damages etc. associated with the human rights claim shall be arbitrable and the criminal aspect of the same may be left to the courts or international agencies; as the case may be. This inevitably leads to the conclusion that only the civil aspect of a human rights claim is arbitrable. This is in line with the fact that most jurisdictions already provide separate forums for adjudicating civil aspects and criminal aspects of a claim arising from one transaction.

Another aspect noted by the drafting team of the working group is the "commercial reservation" impediment and has opined that the arbitration agreement should include complete safeguards so as to ensure the enforcement of human rights related awards in accordance with international conventions.[31] Such a carefully drafted arbitration agreement can fulfil the commercial reservation requirement of the New York Convention thereby ensuring its enforcement in all signatory states. This can be done in a number of ways. Firstly, specific damages that only arise in case of possible human rights violations like moral damages can be expressly incorporated in the principal contract by virtue of which the tribunal may adjudicate human rights claims. This may be done by including a clause in the contract wherein express powers to grant moral damages are conferred on the tribunal. Another way could be to expressly include the term "allied business and human right issues" in the arbitration clause. To illustrate, the arbitration clause may be drafted as "Any or all disputes including but not limited to related business and human rights issues arising out of this contract shall be decided by a sole arbitrator mutually appointed by both the Parties, whose decision shall be final and binding on both the Parties." Such a broad arbitration clause would confer ample power on the arbitral tribunal to adjudicate upon human rights claims.

31. *Business and Human Rights Arbitration Project Report* (Centre for International Legal Cooperation 2018) http://www.cilc.nl/cms/wp-content/uploads/2018/03/BHR-Arbitration.-Report-Drafting-Team-Meeting-25-26-January-2018.pdf accessed 7 September 2020; See also New York Convention 1958.

B. The Grass is Greener on the other side: Why Arbitration is better?

At the outset, it is necessary to mention that advocating international arbitration as a mechanism to resolve human rights disputes does not mean replacing the existing or rather the conventional dispute resolution mechanisms. In this respect, the Working Group Report notes that contemporary human rights monitoring agencies like European Court of Human Rights, the African Court on Human and Peoples' Rights, the Inter-American Court of Human Rights, etc. only come into picture when a State is accused of violating human rights. Therefore, any arbitration of private or business related human rights disputes would not trample on the authority of such institutions and rather complement such institutions in protecting human rights on a more private/individual level.[32] The main idea behind it is to introduce arbitration as an alternative mechanism and reasons as to why the same can be more effective than the former.[33] In summary, the parties may choose international arbitration because of the advantages offered by it such as neutrality, confidentiality, control over procedure and appointment of arbitrators, and of course, quicker resolution of disputes. Additionally, the Guiding Principles on Business and Human Rights also state that it is the duty of the State to ensure that an effective remedy is made available to human rights victims.[34] Though these principles do not expressly refer to arbitration but due to the varied advantages of arbitration, the same may be deemed to be included under the ambit of the phrase '*effective remedy*'.

The present trend seems to point to the fact that multinational enterprises and corporate houses are becoming increasingly aware that any human rights lawsuit adversely affects its reputation in the long run. Moreover, it is not uncommon to see that a disgruntled employee may fabricate a false lawsuit for the sole purpose of blackmailing or extorting his former employers. Arbitration can prove to be instrumental in such cases as companies can incorporate confidentiality of arbitration proceedings in the arbitration agreement to prevent any injurious publicity. A related concern to this confidentiality aspect raised by Human Rights NGOs and other activists is

32. See Working Group Report (n 1) 24.
33. Alison Berthet, *Arbitration: A New Forum for Business and Human Rights Disputes?* (Practical Law Arbitration Blog, 16 October 2017) http://arbitrationblog.practicallaw.com/arbitration-a-new-forum-for-business-and-human-rights-disputes/ accessed 2 September 2020.
34. *Guiding Principles on Business and Human Rights* (UN Human Rights: Office of the High Commissioner 2011) https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf accessed 3 September 2020.

that the arbitration proceedings should be made de facto transparent so as to ensure impartial and fair rulings. Rogers, while referring to such public interests, has opined that international commercial arbitration already encompasses plenty of transparency through mandatory disclosures.[35] In addition to this, it is argued that it would be better if the proceedings are kept confidential and it is only after the making of an award should the proceedings and the award be publicised. The reason for this suggestion is that it would protect the interests of good corporations from suffering any injury from bogus disputes and at the same time publishing awards would ensure a fair decision. Thus, publishing of awards after completion of arbitral proceedings would ensure appropriate balancing of conflicting interests. Moreover, in case the arbitral tribunal gives a wrong or biased decision, the same may be set aside by the enforcing court in accordance with international principles. At this juncture, one may argue that such appellate mechanisms are also available in national courts. However, it is a settled principle of law that under the New York Convention, limited grounds for refusing enforcement are provided which are much narrower than the grounds for appeal available before National Courts.[36] Logically, this implies that enforcing courts are less likely to set aside an award making arbitration more advantageous in enforcing remedies than pursuing claims before national courts.

Some commentators have opined that the transparency principles enshrined under UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration[37] may be used as a basis to devise similar transparency rules for business related human rights arbitration.[38] In this respect, while a detailed discussion on this suggestion can be saved for another time, it is evident that even if the draftsmen considers such rules as the basis of evolving transparency norms, the primary focus should be to balance the interests of the corporations as well as the victims while recognizing the fundamental differences between international commercial arbitration and international investment arbitration. This is because transparency in

35. Catherine A. Rogers, *Transparency in International Commercial Arbitration* (2006) 54 University of Kansas Law Review 1301.
36. New York Convention 1958, art. 5.
37. *UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration* (UNCITRAL 2014) https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/rules-on-transparency-e.pdf accessed 28 September 2021.
38. Antoine Duval and Catherine Dunmore, *The Case for a Court of Arbitration for Business and Human Rights* (2018) ASSER Institute: Centre for International & European Law Policy Brief 2018-02 https://ssrn.com/abstract=3188102 accessed 25 August 2020.

investment arbitration assumes importance because of State's responsibility and accountability in protecting human rights. This accountability does not exist in case of corporations and individuals. Furthermore, in this author's opinion a corporation can be easily put in bad light for violating human rights even if the claims are false whereas this is not so in case of a State. Moreover, as a side note, lack of better transparency measures should not be viewed as a deal-breaker and at the most, these rules can be termed as a desirable attribute to increase the popularity of arbitration as a mode of resolving human rights claims.

With the emergence of globalisation, even the simplest of manufacturing activities takes place in multiple jurisdictions. In such cases, national courts may be limited by their territorial jurisdiction but this is not the case in arbitrations which have no cross boundary jurisdictional problems.[39] At this juncture, though human rights have acquired a universal definition (that is not disputed by this author for the purposes of this paper), involvement of multiple States may lead to jurisdictional objections, multiple proceedings etc. that would result in unnecessary delay. However, because of the fact that the jurisdiction of an arbitral tribunal stems from an agreement or a contract, such proceedings can take place virtually anywhere in the world irrespective of the fact as to where the cause of action arose or where the alleged violation took place. Therefore, the problem of choice amongst multiple territorial jurisdictions can be avoided by opting for arbitration.

Another advantage of arbitration is the joinder of parties. In reality, most of the international tribunals that are empowered to deal with human rights violations do not allow non-state parties to initiate proceedings before such tribunals[40] and even in cases where an individual may initiate proceedings, such proceedings can be initiated only against states.[41] However, the arbitration agreement gives a *locus standi* to the contracting parties and even to non-contracting parties, provided that the parties have consented to

39. Avnita Lakhani, *The Role of Citizens and the Future of International Law: A Paradigm for a Changing World* (2006) 8 Cardozo Journal of Conflict Resolution 159, 186.
40. *American Declaration of the Rights and Duties of Man*, OAS Res XXX (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 61(1) (1992); *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights* (adopted 10 June 1998, entered into force 25 January 2004), art. 5.
41. *Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights*, as amended) (ECHR), art. 34.

their participation, irrespective of the fact whether the parties are state or non-state parties.[42]

Lastly, arbitration is well known for specialised arbitrators who can effectively resolve even the most complex disputes. This means that complex human rights claims such as those which also involve environmental issues, labour law issues etc. can be effectively adjudicated by a specialised arbitral tribunal.

Therefore, to sum up this section, it is submitted that as long as the dispute has a nexus to the subject matter of the contract, it can be effectively adjudicated by an arbitral tribunal.

3. AMENDING EXISTING PRACTICES: MAKING INTERNATIONAL ARBITRATION HUMAN RIGHTS FRIENDLY

Now that it has been established that human rights claims are more than capable of being arbitrated, the author now turns to the more crucial aspect of the problem. At the cost of repetition, it is reiterated here that in spite of all the advantages that arbitration has to offer, it is merely an alternative for dispute resolution as far as human rights claims are concerned. Therefore, it is necessary to incorporate certain changes in the present arbitration regime to ensure that arbitration enjoys a preferred position when the parties decide the dispute resolution forum in context of human rights violations. Furthermore, change is necessary as arbitrating human rights brings additional challenges and issues along with it. This is because originally, the system of international commercial arbitration was never meant to resolve human rights disputes that are of public law nature.

A. Pre-Arbitration Mechanisms

It has been opined that it is very difficult to imagine that the alleged oppressor and the victim whose human rights have been violated sit together and mutually agree to submit their disputes to arbitration.[43] While recognizing this impediment, the Working Group Report has suggested that the corporations incorporate clauses that allow third party beneficiaries like the victims etc. to institute arbitral proceedings.[44]

42. See Lakhani (n 39) 192-198.
43. See Chukwuemerie (n 29) 135-36.
44. See Working Group Report (n 1).

Alford has opined that most of the corporations are good citizens whose main concern is to promote their global image by utilising their position over their vendors, suppliers and other associates along the supply chain so that the latter are not involved in any human rights abuse matters.[45] He suggests that the good corporations can incorporate an arbitration clause with their associates to ensure compliance with human rights standards. Such arbitration clauses can also prove to be instrumental in countries where adequate human rights enforcement agencies do not exist. Whilst such a mechanism may appear to be lucrative, it has limited scope. First, Alford's argument is only applicable to good corporations. It has already been seen that the so called bad corporations or even some good corporations would not agree to arbitration of human rights disputes where the national law is not very human right friendly. Second, it can be employed only by powerful corporations with abundant bargaining power. Third, the mechanism is only a means of prevention of possible future human rights violations but does not strictly fall within the ambit of the phrase "arbitration of human rights disputes." This is because such a clause only gives a justifiable ground to the good corporation to terminate the contract so as to oust its liability at the onset of such disputes in order to protect its brand image and expose the actual violator. However, such arbitration clauses do not provide whether the claim arising from the alleged human right violation is arbitrable or not.

The discussions up to this point have been largely focused on drafting suitable arbitration clauses that empower arbitral tribunal to adjudicate upon human rights claims but the question arises what would be the position if there does not exist any such pre-dispute clause. The logical solution in such a scenario would be that the parties may agree to an ad hoc arbitration with the human rights victims. This can have multiple advantages for corporations. Firstly and most obviously, it can prevent erosion of the goodwill of the corporation resulting from the culpable actions of their business associates. Secondly, it can further benefit such corporations to gain additional goodwill and fulfil their corporate social responsibility.[46] On the other hand, genuine victims can enjoy the benefits of a speedy adjudication by a specialised body of experts in case they agree to arbitrate their human rights claims. Thus, it would be a win-win situation for all.

45. Roger P. Alford, *Arbitrating Human Rights* (2008) 83 Notre Dame Law Review 505, 529.
46. Juan Pablo Calderón-Meza, *Arbitration for Human Rights: Seeking Civil Redress for Corporate Atrocity Crimes* (2016) 57 Harvard International Law Journal 60, 63-64 https://harvardilj.org/wp-content/uploads/sites/15/Calderon-Meza_0615.pdf accessed 28 September 2021.

B. Applicable Law

Childress has pointed out that the working group report does not expressly state the applicable law while arbitrating human rights.[47] In other words, the question is whether the national law or the customary law pertaining to human rights would be applicable in arbitral proceedings. Leaning towards the latter, he argues that rather than completely giving up on national law, the courts of different jurisdictions need to bring in line their human rights norms or negotiate a multinational convention that singularly defines human rights violations across the globe.[48] In this respect, this author partly agrees with Childress in as much as it is indeed a shortfall of the working group report that it did not recommend the law applicable to the arbitral proceedings. This problem becomes more pressing considering the fact that different standards under different jurisdictions exist with respect to the liability of a corporation for human rights violation. One way this anomaly can be addressed is by relying on multilateral human rights conventions such as the European Convention on Human Rights,[49] etc. However, at the same time, it is argued that this is not exactly a fault in the arbitral regime but instead it is attributable to the failure in evolving universally acceptable human rights adjudication standards. To elaborate upon the same, it is realistic to assume here that it is very difficult that the nations are able to negotiate a multinational treaty or convention for uniform application of the human rights law. Now, this does not mean that human rights arbitration becomes impractical. At most, this lack of clarity can create a difference of opinion amongst the parties regarding the applicable law. But under no circumstances can this lacuna make the whole proposal of arbitration of human rights undesirable. Parties can easily reduce the ambiguities of applicable law while deciding upon the seat of arbitration and clearly specifying the applicable law in the arbitration clause itself.

C. Specialised body of Experts

On the other hand, a most crucial and urgent change which needs to be incorporated in the arbitral rules of various arbitration institutions is to set up a panel of arbitrators who are sensitive to human rights issues and

47. Donald Earl Childress III, *Is an International Arbitral Tribunal the Answer to the Challenges of Litigating Transnational Human Rights Cases in a Post-Kiobel World*? 19 UCLA Journal of International Legal and Foreign Affairs 31, 43.
48. *Ibid*, at 46-48.
49. *Convention for the Protection of Human Rights and Fundamental Freedoms* (European Convention on Human Rights, as amended) (ECHR).

more specifically, have experience and expertise in business related human rights disputes. This lack of human rights arbitrators is a problem prevalent in both international commercial arbitration and investment arbitration. In the context of investment arbitration, it has been observed:

> *... [T]he large majority of... [investment arbitrators]... [have] a private or commercial law rather than a public law or public international law background and... thus [they] tend to see international human rights as a potential, or probable, cause of political disturbances, intruding in their 'purely legal', autonomous field, with its ground rules being determined by neo-liberal thought*.[50]

In an attempt to resolve this problem, the Working Group Report has suggested the appointment of arbitrators that have a strong human rights background.[51] In this respect, this author fairly concedes to the fact that there is a dearth of arbitrators who are well conversant with both commercial and human rights aspects of a dispute. This is obviously attributable to the traditional notions of viewing business disputes and human rights violations as unconnected branches of law. Nevertheless, this implies that it would take a long time to establish panels of such arbitrators in all the major arbitral institutions of the world. Similarly, some commentators have opined that instead of establishing specialist arbitrator panels in various arbitral institutions, a permanent body namely '*Court of Arbitration for Business and Human Rights*' may be established on lines of the already established Court of Arbitration for Sports.[52] Now, assuming that such an alternative is as viable as the creation of specialist benches, it would again take a lot of time to appoint qualified arbitrators that are competent to resolve or adjudicate on such types of disputes. Therefore, as per this author and as a short term solution, it is proposed that a human rights expert is appointed in all cases where human rights claim and contention is raised before an arbitral tribunaland such expert shall submit his expert opinion to the arbitral tribunal.[53] While recognizing party autonomy which is the underlying principle of arbitration, this author clarifies here that though it would be the prerogative of the parties as to whether they want to provide for such appointment in the arbitration agreement itself, or to bestow such

50. Bruno Simma, *Foreign Investment Arbitration: A Place for Human Rights*? (2011) 60 International and Comparative Law Quarterly 573, 576.
51. See Working Group Report (n 1).
52. See Duval and Dunmore (n 38).
53. See Choudhury (n 22) 480.

powers of appointment on the arbitral tribunal, it is imperative that a human rights expert is necessarily appointed.

D. Level playing field

Another contemporary problem is the inequality of arms between the victims and the respondent corporations. The Working Group has recommended the establishment of a fund to financially support the victims.[54] However, in this author's opinion, the creation of such a fund can only provide limited support or less than desirable support against the corporations that possess a huge army of highly qualified lawyers at their disposal. Therefore, alternatives like third party funding may be more suitable in such cases, but then again, it would be prudent to mention here that not all legal systems have accepted the practices of third-party funding or litigation funding. Another alternative could be that funds may be provided by the good corporation(s) in case they consent to join in on the arbitration proceedings as already discussed above. This may be done on the direction of the arbitral tribunal or willingly. In the first scenario, corporations have deep pockets and hence, they may be directed to bear the costs of arbitration. Since in arbitration, costs usually follow the event and therefore, good corporations would be able to recover their costs in case of frivolous claims. In the second scenario, if good corporations bear the expenses on their own initiative or even generally support such arbitrations, it would put such corporations in good light and project them as human right friendly which is a valued trait in today's business world.

E. Role of State

Lastly, the author urges here that nations around the world recognize the benefits that international arbitration has to offer as far as human rights violations are concerned and use their bargaining power to make it mandatory for all corporations to enter into a prescribed arbitration agreement that confers jurisdiction upon the arbitral forum regarding human rights adjudication as a precondition of doing business in its territory.[55] A more practical way would be that states incorporate human rights compatible arbitration clauses in contracts entered into between state owned enterprises and private entities. This could easily promote human rights arbitration and would also go a long way in reaffirming a state's commitment to protection of human rights. Furthermore, it would

54. See Working Group Report (n 1).
55. See also Day (n 25) 1116-20.

be upon the legislature and judiciary of the states to make their arbitration law compatible with human rights arbitration. This can be done by broadly interpreting the concept of arbitrability which would be the function of courts. However, if the judiciary is unable to broadly interpret the concept of arbitrability within the existing framework, then the burden would fall on the legislature to pave way for a human rights friendly arbitration regime by suitably amending its arbitration law.

4. CONCLUDING REMARKS

The research and the discussion have shown that much ink has been spilled to draw out the relationship between human rights and international arbitration. Arbitrating human rights is not entirely a new concept and its origin may be traced back to investment arbitration cases. In spite of this development, the global arbitration community is still somewhat resolute to hold on to the "taboo" of non-arbitration of human rights, at least in the context of international commercial arbitration. Though this taboo cannot be termed as baseless, it does not mean that there is no scope for arbitration of human rights claims.

It can be seen that there is no absolute bar on arbitrability of human rights disputes as far as the commercial reservation of the New York Convention is concerned. The real test to ensure arbitrability of human rights disputes is to draft the arbitration agreement or the investment treaty (as the case may be) in such a way that the alleged human rights disputes bear a direct or indirect nexus to the subject matter of dispute. Furthermore, the characteristics of international arbitration provide both the parties as well as the interested stakeholders with varied advantages that can help them to overcome the obstacles faced while litigating such claims before national or even international human rights disputes adjudicating bodies. Furthermore, it has been seen that most of the recommendations of the Working Group Report aim to strengthen arbitration as the primary forum for the resolution of business and human rights disputes.

Therefore, in conclusion, this author strongly believes and endorses that it would be unwise to cling on to outdated concepts of arbitrability and it is time to open the doors of international arbitration to human rights disputes arising from business or commercial relationships. It has been opined that arbitration of human rights would become the industry standard and those corporations that do not accept this notion will find it difficult to compete.[56]

56. Claes Cronstedt and Robert C. Thompson, *A Proposal for an International Arbitration Tribunal on Business and Human Rights* (2016) 57 Harvard International

Provided that suitable adjustments are made in the arbitration agreements and in the rules of various arbitral institutions, the distant future where all human rights claims arising out of commercial disputes are referred to arbitration does not seem to be too far-fetched.

Law Journal 66, 68 https://harvardilj.org/wp-content/uploads/sites/15/Cronstedt-and-Thompson_0615.pdf accessed 28 September 2021.