INVESTMENT AND HUMAN RIGHTS: SENSITIZING THE ARBITRATION MECHANISM TO PROTECT HUMAN RIGHTS IN THE HOST STATE

Sheetal Narayanrao Shinde [*]

Abstract

Conflicts between international investment and human rights have become commonplace these days. The capital-importing States are faced with a dilemma as to how much protection they must accord to the investors at the cost of their human rights obligations. Structural inadequacies in the present system of investment law and arbitration mechanisms prevent proper deliberation of human rights issues. Though there is no doubt about the pre-eminence of human rights laws when juxtaposed with contractual agreements, the present system is not favourable to these issues as it suffers from a legitimacy crisis. Unless the system becomes more transparent and acceptable to all stakeholders, a proper discussion of human rights issues is neither possible nor fruitful in arbitration. This article analyses the present system of investment arbitration, along with the substantive and procedural issues that plague it in the context of protection of human rights. It also gives a brief outline of the possible changes that can be introduced in arbitration to further legitimatise the process. However, it is believed that mere changes in the mechanics of arbitration is not going to help the issue at hand; rather human rights obligations need to be incorporated in the substantive law governing international investments, i.e., bilateral investment treaties. It is believed that a systemic change is required in the arbitration process and investment law through a soft law approach to protect human rights in the host State.

I. Introduction

March 2, 2013 is a date 'which will live in infamy' in the history of foreign investments in India. A crude bomb explosion killed three anti-industry activists in the non-descript, sleepy town of Jagatsinghpur in Odisha.[1] Those were the very same people who had been fostering a mass uprising against the State policy of land acquisition for the proposed steel plant by Pohang Iron and Steel Company ["**POSCO**"] - the biggest Foreign Direct Investment ["**FDI**"] in India at the time. This was not the only incident of violence during the decade long anti-POSCO agitation. Three years prior to the incident, more than twenty people were injured when State armed police resorted to tear gas shelling and rubber bullet firing on the mob because they were resisting the progress of the project to defend their livelihood and safeguard their access to land and natural resources.[2] However, the spate of violence did not deter the mass upheaval for long. All pro-industry measures taken by the then government to provide environmental clearance were hit by the National Green Tribunal's decision to suspend those clearances.[3] The project was finally

[*] Sheetal Narayanrao Shinde is a II Year LL.B (Hons.) student at Madhusudan Law College, Cuttack, Odisha.

1 Anupam Chakravartty, *Police arrest anti-POSCO leader for bomb explosion that killed four*, DOWN TO EARTH (July 4, 2015), *available at* https://www.downtoearth.org.in/news/police-arrest-antiposco-leader-for-bomb-explosion-that-killed-four--41025.

2 Debabrata Mohanty, *Police crackdown on anti-POSCO agitators, 20 injured*, INDIAN EXPRESS (May 15, 2010), *available at* https://indianexpress.com/article/india/regional/police-crack-down-on-antiposco-agitators-20-injured/lite/.

3 Prafulla Samantray v. Union of India, Appeal No. 8 of 2011, National Green Tribunal (Principal Bench) (Mar. 30, 2012); Aesha Datta, *Green Tribunal Suspends Clearance to POSCO Project*, HINDU BUS. LINE (Mar. 30, 2012), *available at*

scrapped in 2017, and will soon be out of public memory. The only thing that will continue to intrigue the common man is the question of what compelled the State machinery to go out of its way to protect the interest of the company, at the risk of committing grave human rights violations. POSCO-India was not the only investment project wherein the sovereign State has been alleged to have committed human rights violations; be it the Bhopal Gas Tragedy, the Coca Cola Scam or the Enron fiasco, corporations have shown scant regard to people's rights when faced with business efficiency and profiteering. In such a situation, what is the role of the State? The State always finds itself in a conundrum. On the one hand, because the State is a signatory to international instruments like bilateral investment treaties ["**BITs**"], it is duty-bound to protect certain rights of foreign investors. On the other hand, the inadequate scope for adoption of regulatory measures affecting foreign investments may result in human rights violations, which the State is obligated to prevent under treaties such as the International Covenant on Civil and Political Rights ["**ICCPR**"] and the United Nations Declaration on Human Rights.

Efforts to find a solution to this conundrum have been undertaken by various transnational bodies in the form of advisories such as the Organisation for Economic Co-operation and Development ["**OECD**"], Guidelines for Multinational Enterprises, the Guiding Principles on Business and Human Rights, etc. In fact, the Guiding Principles on Business and Human Rights,[4] endorsed by the United Nations Human Rights Council on June 16, 2011, may provide the necessary framework for States to manoeuvre around this complex scenario. The principles enumerate three pillars for seamless coordination between business and human rights:[5] (1) State's duty to protect human rights through appropriate policy, regulation and adjudication; (2) corporate social responsibility to respect human rights of citizens of the host States; and (3) better access to remedies for the victims. This article concentrates on the remedy aspect of the principles by examining the manner in which claims relating to the violation of human rights can find a robust entry into the regime of international investment arbitration.

Part II of the article discusses the existing practice regarding human rights claims in investment arbitration and lays down the criticism against the same. **Part III** examines the modalities to include human rights claims into the arbitral process in a more engaging and empowering manner. Finally, in **Part IV**, the author provides a critical analysis of the concept of human rights claims in international investment arbitration regimes.

---

https://www.thehindubusinessline.com/companies/green-tribunal-suspends-clearance-to-posco-project/article20415229.ece1.

4 United Nations Human Rights Office of the High Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UN Doc. HR/PUB/11/04 (2011) [*hereinafter* "UNGPs"] ("These Guiding Principles are grounded in recognition of: (a) States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms; (b) The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights; (c) The need for rights and obligations to be matched to appropriate and effective remedies when breached. Guiding Principles should be implemented in a non-discriminatory manner, with particular attention to the rights and needs of, as well as the challenges faced by, individuals from groups or populations that may be at heightened risk of becoming vulnerable or marginalized, and with due regard to the different risks that may be faced by women and men. Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights.").

5 *Id.*

II. Human Rights in Investment Arbitration: a Case of Legitimacy Crisis

Jurists are not unanimous on the expected role of human rights laws in international investment treaties. One school of thought believes that the role of human rights laws is very limited in investment treaty arbitration.[6] The underlying idea is that the investment treaty is a self-contained legal paradigm that bars the applicability of other legal rules, including human rights claims into the treaty. On the other extreme is the concept of unity of international law which states that investment law should not be interpreted in isolation of *jus cogens* norms in the areas of human rights, environmental law and social development contexts.[7] This school of thought advocates the liberal use of human rights law for the benefit of the citizens of the host State, while applying standards of protection for the investors under the investment treaty. Nevertheless, whichever interpretation is considered, it is an established fact that there is a complex relationship between the investment protection regime and human rights.[8] The thinkers of international investment law opine that this so called 'complex relationship' gets manifested in five different ways:[9] *first*, the investor or the State might commit, or be complicit in, the violation of human rights of the citizens of the host State. *Second*, the State might violate the human rights of the investor by expropriation. *Third*, the State might champion the human rights issues that interfere with the property rights of the investor.[10] *Fourth*, a party in the arbitral proceedings may invoke the practice of international human rights courts on an issue of procedure.[11] Lastly, a party may invoke international human rights norms in the application or interpretation of investment protection obligations.[12] Of the above five scenarios, the most contentious ones are the scenarios wherein either the investor violates the human rights of the masses, or the State, in the zeal of protecting the investor's rights, commits such violations. For example, in the case of the POSCO project, the State was bound by the Comprehensive Economic Cooperation Agreement with

---

6 Bruno Simma, *Foreign Investment Arbitration: A Place for Human Rights*, 60 INT'L & COMP. L. Q., 573, 578 (2011); H Mann, *International Investment Agreements, Business and Human Rights: Key Issues and Opportunities*, INT'L INST. FOR SUSTAINABLE DEV. 25–29 (Feb. 2008), *available at* https://www.iisd.org/pdf/2008/iia_business_human_rights.pdf. For relevant arbitral case law, *see* Mondev International Ltd v. United States of America, ICSID Case No. ARB(AF)/99/2, Award, ¶ 144 (Oct. 11, 2002) [*hereinafter* "Mondev International Ltd."]; Técnicas Medioambientales Tecmed, S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, ¶¶ 116–122 (May 29, 2003); Azurix Corp v. The Argentine Republic, ICSID Case No. ARB/01/12, Award, ¶¶ 311–312 (July 14, 2006); Methanex v. United States of America, Final Award on Jurisdiction and Merits, 44 ILM 1345 (Aug. 3, 2005) [*hereinafter* "Methanex"]; CMS Gas Transmission Company v. The Argentine Republic, ICSID Case No. ARB/01/8, Award, ¶¶ 114–121 (May 12, 2005).

7 Valentina Vadi, *Jus Cogens in International Investment Law and Arbitration*, 46 NETH. Y.B. INT'L L. 357, 364 (2016).

8 Sempra Energy International v. Argentine Republic, ICSID Case No ARB/02/16, Award, ¶ 332 (Sept. 28, 2007) [*hereinafter* "Sempra Energy"].

9 United Nations Commission for Trade and Development (UNCTAD), *Selected Recent Developments in IIA Arbitration and Human Rights*, ¶¶ 1-2, UN Doc. UNCTAD/WEB/DIAE/IA/2009/7 (2009).

10 Horatia Muir Watt, *The Contested Legitimacy of Investment Arbitration and the Human Rights Ordeal*, HAL ARCHIVES-OUVERTES 7 (2012), *available at* https://hal-sciencespo.archives-ouvertes.fr/hal-00972976/document [*hereinafter* "Watt"].

11 United Nations Human Rights Office of the High Commissioner, *Individual Complaint Procedures under the United Nations Human Rights Treaties*, Fact Sheet No. 7/Rev. 2 (2013) ("the two major stages in the examination of a complaint are known as the admissibility stage and the merits stage. Admissibility refers to the formal requirements that the complaint must satisfy before the relevant committee can consider its substance. Merits refer to the substance of the complaint, on the basis of which the committee decides whether or not the alleged victim's rights under the treaty have been violated.").

12 Luis Gonzalez Garcia, *The Role of Human Rights in International Investment Law,* MATRIX CHAMBERS, at 29 (Feb. 26, 2013), *available at* https://www.matrixlaw.co.uk/wp-content/uploads/2016/05/The-role-of-human-rights-in-international-investment-law.pdf; Mondev International Ltd.; *supra* note 6, at 144.

South Korea to facilitate the company in establishing the power plant. In the enthusiasm to complete the project, the company as well as the state of Odisha proactively facilitated the land acquisition to the detriment of the rights of the local populace. POSCO is not a stray example. Most of the foreign state investments in India have yielded these two outcomes—*first*, socio-economic deprivation and environmental degradation because of unregulated growth of industries, and *second*, a peculiar political dynamic emerging from a corporate-State nexus to facilitate this growth, either by misusing the law or violating it.[13] The deadly combination of both has meant unabashed human rights violations at the behest of the State, be it the case of POSCO, Enron, Coca Cola etc.

Because of the afore-stated complicated relationship, BITs as international law instruments are fraught with severe shortcomings as far as the investment arbitration system as a remedy for human right claims is concerned. Criticism against investment arbitration deals with the issues that surface after the treaty has been negotiated and a dispute has subsequently arisen.[14] The criticisms target both the substantive as well as the procedural aspect of investment arbitration.

A. Substantive Criticism to Investment Arbitration

The biggest disparagement towards the present system of investment arbitration is the 'regulatory chill' effect in critical areas of human rights and environment protection.[15] The NAFTA lawsuit[16] against Canada by the Ethyl Corporation is one of the earliest examples of the regulatory chill effect. Ethyl Corporation, a big industrial house, ran a sustained campaign against the decision of the Federal Government of Canada to ban MMT, a gasoline additive of which it was a manufacturer. The Ethyl Corporation took advantage of the NAFTA option and invoked its investor-State arbitration mechanism to sue Canada for the proposed ban. This led to the Government of Canada pulling down the proposed ban. It also publicly acknowledged that MMT was not a health hazard and paid Ethyl Corporation a hefty compensation in lieu of the withdrawal of the case from the NAFTA tribunal.

The regulatory chill effect surfaces when BITs pressurise the States to refrain from introducing domestic policy regulations to protect human rights or protection of the environment as a direct result of its obligation under international investment law. There may be two plausible reasons for such an effect. In the absence of properly incorporated human rights obligations in BITs, investors may threaten the State to initiate a costly arbitration dispute on the ground of indirect expropriation to deter States from pursuing certain regulations, such as health and safety ones, in their sovereign capacity.[17] Sometimes the BITs themselves have inbuilt provisions to limit the

---

[13] Gopal Chandra Aggrawal, *Paranoid POSCO*, ALL RIGHTS (Apr. 12, 2013), *available at* http://www.allrights.co.in/paranoid-posco/ [*hereinafter* "Aggrawal"].

[14] Annalisa Leibold, *The Friction Between Investor Protection and Human Rights: Lessons from Foresti v. South Africa*, 38 HOUS. J. INT'L L. 215, 238 (2016) [*hereinafter* "Leibold"].

[15] Aaron Cosbey et al., *Investment and Sustainable Development: A Guide to the Use And Potential of International Investment Agreements*, INT'L INST. FOR SUSTAINABLE DEV. 13 (2004), *available at* https://www.iisd.org/pdf/2004/investment_invest_and_sd.pdf; David P. Riesenberg, *Fee Shifting In Investor-State Arbitration: Doctrine And Policy Justifying Application Of English Rule*, 60 DUKE L.J. 977, 987 (2011) [*hereinafter* "Riesenberg"].

[16] Gus Van Harten, *An Example of Regulatory Chill*, ISDS PLATFORM (May, 2015), *available at* https://isds.bilaterals.org/?an-example-of-regulatory-chill.

[17] Riesenberg, *supra* note 15, at 988. It is pertinent to mention that State's right to regulate defined as "the legal right exceptionally permitting the host state to regulate in derogation of international commitments it has undertaken by

sovereign power of the State to enforce regulations by incorporation of provisions of fair and adequate compensation.[18] For example, Phillip Morris International sought twenty-five million dollars in damages from the Government of Uruguay for imposing stricter cigarette packaging regulations than the Uruguay-Switzerland BIT allows.[19] Many BITs are negotiated in such a manner that many of the risks that they are meant to protect against are factored into costs.

The second plausible reason for the regulatory chill effect is what is called as the 'race-to-the-bottom' tendency. Developing countries suffer a significant resource differential vis-à-vis the first world nations, which account for maximum foreign investments. The negative resource differential coerces developing countries to compromise on strategic domestic policy-making to a large extent in order to lure investment. In such a restricted premise, in a primarily contractual negotiation, developing nations are faced with, as Andrew Guzman states, 'a prisoner's dilemma'.[20] According to Guzman, developing nations enter into BITs with a clause of investment protection to attract FDIs. All the developing countries will, together, be well placed in terms of preserving their sovereign authority if all of them together agree to lower investment protection. However, in natural equilibrium, each country has an incentive to defect. A country which lowers its regulatory measures and offers greater protection of investment draws more FDI. Faced with competition amongst one another, developing countries continue relaxing the regulatory regime at the cost of their human rights obligations. Such a downward regulatory spiral or 'race to the bottom' puts the issues of human rights at the backstage in investment arbitrations.

Going back to the example of POSCO, when the Memorandum of Understanding ["**MoU**"] was signed between POSCO and the state of Odisha in the year 2005, Odisha had agreed to provide 4000 acres of land for the greenfield investment. This was done even though there was not a single acre of land available with the state-owned special purpose vehicle, i.e., the Industrial Development Corporation, at that time, and nor was there any GIS-based land bank[21] available

means of an investment agreement without incurring a duty to compensate" in the presence of State interests that are of vital importance for the population involved. Though the investors may threaten the State with costly arbitration processes, of late, tribunals are giving due weightage to State's reasons for enacting measures, even if they are damaging to foreign investors. This has happened in Phillip Morris v. Uruguay. *See* Giovanni Zarra, *Right to Regulate, Margin of Appreciation and Proportionality: Current Status in Investment Arbitration in Light of Philip Morris v. Uruguay*, 14(2) CENTRO UNIVERSITÁRIO DE BRASÍLIA 95 (2017).

18 Model Text for the Indian Bilateral Investment Treaty, art. 5 (2016) [*hereinafter* "Indian Model BIT"].

19 Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award (July 8, 2016) [*hereinafter* "Philip Morris"].

20 Andrew Guzman, *Why LDCS Sign Treaties That Hurt Them: Explaining The Popularity Of Bilateral Investment Treaties,* 38 VA. J. INT'L L. ASS'N 639, 666-667 (1997) (the analysis is primarily concerned with least developed countries); Leibold, *supra* note 14, at 224.

21 GIS Land bank refers to Geographic Information System enabled land that enables the user to create interactive queries, analyse the available data and generate possible solutions through the use of artificial intelligence. After the POSCO debacle, the Government of Odisha launched GOiPLUS (Govt. of Odisha Industrial Portal for Land Use and Services), a GIS based land use and information system which provides detailed information with regards to the availability of industrial plots based on location specific attributes in terms of connectivity, rail and road linkages and other physical, health and educational infrastructure available in the vicinity of the selected industrial land, and enables prospective investors to identify suitable industrial land in Odisha from the comfort of their offices. A prospective investor can define preferred parameters such as the district, size of land required, facilities available in the vicinity, etc., based on which the portal identifies and returns information regarding the suitable and available land parcels in the State.

with the Government.[22] Instead, the state tried to keep the public in the dark regarding the regulatory laws related to the protection of human rights, the livelihood of the local population and the protection of the environment, for the sole purpose of making the land available for the project.[23] In the absence of express human rights protection clauses in the MoU, in the aftermath of POSCO exit, if the company draws the State to arbitration, there is no possible way to incorporate counter claims with respect to human rights against the company.

Apart from the 'regulatory chill' effect, the present-day investment arbitration system is fraught with a pro-investor bias at the expense of capital-importing states.[24] Though an empirical study has not yet been done to conclusively prove the pro-investor bias, the very perception of investor bias may not help investment arbitration to come out of its legitimacy crisis. Moreover, the present geo-polity is such that rich nations can squeeze the developing nations to any extent they want to ensure protection of their investment.[25]

Finally, another substantive criticism to investment arbitration as a mechanism of dispute redressal is the inconclusive nature of profit accrued to the host State in the bargain.[26] It is widely believed, and is also one of the stated objectives of the International Centre for Settlement of Investment Disputes ["**ICSID**"], that facilitating the flow of investment to third-world countries by way of investor protection carries an underlying presumption of the existence of a positive and cordial relationship between the capital exporting State and the host State.[27] However, such a 'positive and cordial relationship' has been reduced to nothing but a mirage. Empirical studies conducted worldwide have not shown any positive congruence between a lowered regulatory regime for heightened investment protection at the cost of domestic regulatory mechanism on the one hand, and the inflow of FDI on the other.[28] For example, the state of Odisha, which has displayed a pro-industry bias in the last one and half decade, boasts of only 50% conversion rate of MoUs i.e., out of 92 MoUs signed between Odisha and big business houses, only 46 industries

---

22 Arabinda Mahapatra, *As POSCO Exits Steel Project, Odisha is Left with Thousands of Felled Trees and Lost Livelihoods,* SCROLL (Mar. 22, 2017), *available at* https://scroll.in/article/832463/as-posco-exits-steel-project-odisha-is-left-with-thousands-of-felled-trees-and-broken-job-promises.

23 As per the existing laws on land acquisition by industrial enterprises, a public hearing is necessary. Ideally, in the public hearing, the land acquisition officer discusses the issues of land acquisition and the accompanying rehabilitation and resettlement policy with the people including the enterprise's commitment in corporate social responsibility. However, many a time, when the public is not aware of their rights, the State, in its copious zeal of supporting industrialization, subverts human rights of the project affected people by not including any provisions related to protection of their rights. This had happened in the case of the POSCO project.

24 J. Fry, *International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity*, 18 DUKE J. COMP. INT'L L. 77, 119 (2007). It may be noted that the initial draft Model BIT of India was criticised for being biased towards the host State. India later adopted a new Model BIT in 2016 which sought to give more protection to the investors or at least seeks to bring both investors and State on an equal footing. *See* Ashutosh Ray, *Unveiled: Indian Model BIT*, KLUWER ARB. BLOG (Jan. 18, 2016), *available at* http://arbitrationblog.kluwerarbitration.com/2016/01/18/unveiled-indian-model-bit/.

25 Leibold, *supra* note 14, at 229.

26 Christoph Schreuer, *Why Still ICSID?,* TRANSN'L DISP. MGMT. (2012), *available at* https://www.univie.ac.at/intlaw/wordpress/pdf/why_still_icsid.pdf.

27 T. Odumosu, *The Antinomies Of the (Continued) Relevance Of ICISD To The Third World*, 8(2) SAN DIEGO INT'L L. J. 345, 347 (2007).

28 C. Amirfar, *Dispute Settlement Clauses in Investor-State Arbitration: An Informed Approach to Empirical Studies About Law A Response to Professor Yackee*, 12(1) SANTA CLARA J. INT'L L. 303, 310, 313 (2014); S. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration,* 86 N.C. L. REV. 1, 313-314 (2007).

have become fully or partially operational.[29] The so-called moral high-ground of ICSID, for fostering a positive relationship between capital exporting and importing States, appears to be no different from a sophisticated form of gunboat diplomacy, where rich nations exert economic power to subvert the sovereign power of small and poor nations. The divide between capital exporting and capital importing countries is so wide, that there is an organic inbuilt distrust during the negotiation of the treaty itself. In fact, according to Liebold,[30] many BITs are fraught with "*contractual procedural unconscionability*".

B. Procedural Criticism to Investment Arbitration

The procedural criticism to investment arbitration is mainly aimed at the fairness of the mechanics of the arbitration process. The fairness of the process is doubted due to claims regarding independence and impartiality of the arbitrators, lack of transparency in the arbitral process and the high costs involved. Besides, many times, objections are raised at the nationality of the arbitrators themselves. It is argued that as the arbitrators mostly belong to the same nationality as that of the capital exporting nations, human rights issues in the host State are not dealt with impartially. This may seem to be a gross generalization, but one thing is certain: a systemic trust deficit exists. Another procedural inadequacy that creates a web of distrust is linked to the seemingly secretive nature of the arbitration process. Marc Jacob, in his seminal work on investment arbitration and human rights, has suggested that the foremost criticism against the BITs is that even though they provide the basic legal framework for large scale projects, they are traditionally negotiated and concluded outside public purview. For example, most of the investment arbitration tribunals do not have a system of Non-Governmental Organization ["**NGO**"] participation.[31] A third procedural hurdle is the resource intensive nature of Investor State disputes. In such arbitrations, the hosts States as well as the investors have to incur huge costs which sometimes become prohibitive, especially for the developing countries.[32]

The criticisms mentioned above are valid, and hence a change is required in the system. In the present age, where there is a unanimous concern of all transnational institutions towards environment and human rights protection issues, the investment arbitration mechanism needs to imbibe a more encompassing value system to perceive these issues with the necessary sensitivity and deal with them in a systemic fair manner.

III. Incorporating Human Rights Issues in Investment Arbitration: Need for Enabling a Human Rights Conducive Regime

Notwithstanding the criticisms, it is a well-accepted fact that investment arbitration does not necessarily undermine human rights.[33] However, the inherent trust deficit that has crept into the system over the years, coupled with heightened global attention towards human rights issues, has rendered the arbitration system in an isle of legitimacy crisis. Getting out of this legitimacy crisis

29 Aggrawal, *supra* note 13.
30 Leibold, *supra* note 14, at 222.
31 Marc Jacob, *International Investment Agreements and Human Rights*, sub § 2.4.2 (INEF RES. PAPER SER. NO. 03/2010).
32 UNCITRAL, *Draft Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Sixth Session*, U.N. Doc. A/CN.9/964 (Nov. 6, 2018); UNCITRAL, *Working Group III (Investor-State Dispute Settlement Reform)*, at 17, U.N. Doc. A/CN.9/WG.III/WP.149 (Sept. 5, 2018); UNCITRAL, *Working Group III (Investor-State Dispute Settlement Reform)*, at 76-92, U.N. Doc. A/CN.9/WG.III/WP.153 (Aug. 31, 2018).
33 Sempra Energy, *supra* note 8, ¶ 332; Philip Morris, *supra* note 19.

is not an easy job. States and tribunals would need to bring several policy changes to incorporate human rights issues in a more engaging manner in the arbitral process. There are different ways in which these issues can be addressed, which have been enumerated below.

A. States should raise Human Rights Obligations

The UN High Commissioner for Human Rights encourages States to raise human rights obligations in their pleading before arbitral tribunals.[34] However, many a time, States seem to be reluctant to raise those claims due to fear of possible reprisal from foreign economic powers, such as investors pulling their investments out of the host State and rating the host State low in the ease of business parameters. Besides, States normally do not prefer to enter the arena of issues relating to human rights, as the most glaring violations are carried out in complicity[35] with the host States themselves. Further, there seems to be an institutional indifference in the direct invocation of human rights in the investment arbitration regime. For example, the Model BIT's of China, France, Germany, the United Kingdom and the United States do not contain any provisions regarding human rights.[36] This grim scenario is very well captured by Hirsch when he notes that the "*structural differences between public international law and international investment law have led investment tribunals to grant precedence to the contractual or consensual rules that have been agreed upon by host states and investors*".[37]

However, the present system, though mostly negatively disposed towards human rights claims in investment arbitration, is not entirely adversarial to the host State raising human rights obligations either. In *Sempra Energy International* v. *The Argentine Republic* ["**Sempra**"][38] the tribunal acknowledged that there exists a complex relationship among investment treaties, emergency and

---

34 UNGPs, *supra* note 4.

35 Klaus M. Leisinger, *On Corporate Responsibility for Human Rights, in* HUMANISM IN BUSINESS 175, 203 (Heiko Spitzeck et al. eds., 2009).

36 THE BELT AND ROAD INITIATIVE: LAW, ECONOMICS AND POLITICS 514 (Julien Chaisse & Jedrzej Gorski eds., 2018).

37 Robert M. Hirsch, *Interactions Between Investment & Non-Investment Obligations, in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 31 (Peter Nuchlinski et al. eds., 2008).

38 Sempra Energy, *supra* note 8. A US company, in this case, invested US$350 million in two Argentinean gas distribution companies Camuzzi Gas Pampeana [*hereinafter* "CGP"] (37.10%) and Camuzzi Gas del Sur [*hereinafter* "CGS"] (38.78%). During the privatization of Argentina's national gas transport and distribution monopoly in the early 1990s, CGP and CGS had been granted licenses for gas distribution in seven Argentine provinces. In order to attract foreign investment, at the time of privatization, Argentina introduced a regulatory framework that included several advantageous features including: the calculation of tariffs for gas distribution in US dollars and their conversion into pesos at the prevailing exchange rate at the time of billing; semi-annual adjustments of tariffs according to the changes in the US Producer Price Index [*hereinafter* "PPI"]; the commitment that there would be no price freeze applicable to the tariff system without compensation. The Government honoured these obligations during 1993-1999.
In view of the economic crisis that started developing in Argentina in the late 1990s, the Government and the licensees agreed to the postponement of the tariff adjustments. However, on August 18, 2000, a judicial injunction was granted at the request of the Argentine Ombudsman, with the result that PPI adjustments became indefinitely suspended. The Government also stopped reimbursing the subsidies. Finally, on January 2, 2002, the Government enacted the "Emergency Law", which abrogated the right to calculate tariffs in US dollars. The substantial devaluation of peso led to a severe decrease in licensees' profits. The Law also definitively abolished PPI adjustments.
In December 2001, Sempra initiated ICSID arbitral proceedings under the 1991 Argentina-US BIT. It argued that by failing to respect the regulatory framework, Argentina had expropriated the Claimant's investment, breached the fair and equitable treatment obligation, taken arbitrary and discriminatory measures and violated the "umbrella clause".

human rights laws.[39] The tribunal also highlighted the importance of examining and determining two questions: (1) whether the State has exhausted all its options to cope with the crisis, and (2) whether compromising the BIT agreement is necessary to safeguard the human rights involved in the crisis. The logical deduction of the above award is that human rights issues can be given precedence over the contractual agreement in limited and extremely urgent situations. Apart from *Sempra*, certain provisions in the international investment rules, provide room for entertaining human rights claims raised by the host State, albeit indirectly. For example, Article 42(1) of ICSID, by proclaiming rules of international law as the applicable law in circumstances of disagreement between the parties regarding the applicable law, hints towards the inclusion of human rights claims in the arbitration proceedings.

However, it is high time that proper institutional mechanisms are put in place for the host States to raise the claims, instead of relying on the indirect references in the existing statutes. At the forefront, human rights claims need to be included in the BIT itself. A case in example is the Model BIT of the Government of India, finalized in 2016.[40] While it does not expressly mention protection of human rights, it includes some very noteworthy provisions that will assist in ensuring that human rights are not violated at the behest of the BIT. The Model BIT gives a robust statutory recognition to corporate social responsibility.[41] It mandates the investor to voluntarily incorporate international corporate social responsibility standards in their policy. By doing so, the investor may support various social causes in the host State. Additionally, the Model BIT clearly gives scope for necessary State measures under the 'General Exception' that includes measures by the State to protect human rights and the environment. [42] Another example is the Intra-MERCOSUR Agreement which includes a "best efforts" obligation for investors to respect the human rights of people involved in investment activities.[43] Similarly, as per the data published by UNCTAD, at least 13 recent International Investment Agreements ["**IIAs**"] refer to internationally recognized standards of corporate social responsibility in areas of labour, human rights and the like. Also, at least 6 recently concluded IIAs such as Morocco–Nigeria BIT (2016), EFTA–Georgia FTA (2016), CETA (2016), Armenia–EU Comprehensive and Enhanced Partnership Agreement (2017), Argentina–Chile FTA (2017), the Organization for Economic Co-operation and Development (OECD) are more specific, referring to global standards such as the Sustainable Development Goals.[44] Such a clear provision in the IIAs itself is a welcome step towards preventing abuse of human rights by investors in the host State.

Apart from incorporating human rights in the BIT itself, States must be more forthcoming in raising them before tribunals. In the last decade, there have been numerous instances wherein States have tried defending their measures violating the provisions of BITs on the grounds of

39 *Id.* at 332.
40 Indian Model BIT, *supra* note 18.
41 *Id.* at art. 12.
42 *Id.* at art. 32.
43 UNCTAD, *Recent Developments in the International Investment Regime,* UNCTAD IIA ISSUES NOTE ISSUE NO. 1, at 5, UN Doc. UNCTAD/DIAE/PCB/INF/2018/1 (May 2018), *available at* https://unctad.org/en/PublicationsLibrary/diaepcbinf2018d1_en.pdf.
44 *Id.* at 8.

human rights protection.[45] However, the defence was either not fully discussed or not accepted. On the other hand, *Phillip Morris* v. *Uruguay*[46] serves as an example of a landmark arbitral award where the tribunal favoured public health measures against the commercial interest of the investor. There are a few other examples where the host States have taken the plea of domestic human rights and environmental provisions in the arbitrations against the investor. The most important case in this regard is *The Pacific Rim* v. *El Salvador*,[47] where the tribunal held that the State can make regulations to enforce the domestic constitutional requirement of sustainable development, despite the existence of a BIT. In other cases like *Al tamini* v. *Oman*[48] and *Perenco* v. *Ecuador*,[49] the arbitral tribunal accepted the host State's argument regarding protection of human rights and the environment and decided against the investor. Another example is *Urbaser* v. *Argentina*[50] wherein the tribunal noted that investors can be subject to the duties prevailing under different branches of international law, including human rights. In doing so, the tribunal looked at international conventions and referred to the Universal Declaration on Human Rights ["**UDHR**"], the International Covenant on Economic, Social and Cultural Rights ["**ICESCR**"] and the International Labour Organization Declaration of Principles concerning Multilateral Enterprises and Social Policy.[51]

Though it might appear that host States have successfully raised human rights and environmental protection claims in investment arbitrations, such cases are too few to generalise. If right to water and right to environment arguments can be successfully used by some of the States, why can't the right to protection of cultural heritage, right to forests, or the right to freedom of religion claims be successfully pursued? However, it is obvious that tribunals are not likely to reach such conclusions on their own, and it largely depends upon the disputing parties to introduce human rights arguments in their support. Once the State injects human rights arguments to support its position, a conscientious tribunal has no choice but to focus on the human rights issues.[52] Tribunals are willing to respond to the parties' position where cases are fully argued and quality evidence to rule in favour of human rights claim is expressly available. The tribunals are not averse to take note of expert reports, environment assessment studies, anthropological reports etc., and accord ample evidentiary value to them in arriving at a decision.[53] Hence, it is the host State's responsibility to properly frame its arguments regarding

---

45 Azurix Corp v. The Argentine Republic, ICSID Case No. ARB/01/12, Award (July 14, 2006); SAUR International SA v. Republic of Argentina, ICSID Case No. ARB/04/4, Award (May 22, 2014); Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Award (Apr. 9, 2015) [*hereinafter* "Suez"]; Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award (July 24, 2008) [*hereinafter* "Biwater"].

46 Philip Morris, *supra* note 19.

47 Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12, Award, ¶ 8.38 (Oct. 14, 2016) [*hereinafter* "Pac Rim"].

48 Adel A Hamadi Al Tamimi v. Sultanate of Oman, ICSID Case No. ARB/11/33, Award (Nov. 3, 2015).

49 Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador), ICSID Case No. ARB/08/6, Interim decision on the Environmental Counterclaim (Aug. 11, 2015).

50 Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia ur Partzuergoa v. Argentina, ICSID Case No ARB/07/26, Decision on Claimant's Request to Disqualify an Arbitrator, ¶ 1159 (Aug. 12, 2010).

51 Stefanie Schacherer, *Urbaser v. Argentina*, INVESTMENT TREATY NEWS (Oct. 18, 2018), *available at* https://www.iisd.org/itn/2018/10/18/urbaser-v-argentina/.

52 Susan L. Karamanian, *The Place of Human Rights in Investor-State Arbitration*, 17(2) LEWIS & CLARK L. REV. 423, 430 (2013).

53 Pac Rim, *supra* note 47, ¶¶ 6.125, 7.14, 8.34.

human rights claims and adequately back them up with strong and relevant evidence, instead of relying on rhetoric. Further, when human rights violation by the investor is argued, the tribunals may take interest in, *inter alia*, the overall picture of the party's behaviour, the antecedents and previous history of human rights violations. For example, in *Phillips Morgan v. Uruguay*,[54] the tribunal took cognizance of Uruguay's continued insistence of the paramountcy of public health measures in all its public policy, as well as the investor's history of disregarding public health measures. Finally, the tribunals may enquire into the legitimacy of the State action; a State which itself is complicit in violating human rights may not successfully take recourse to human rights claims. Hence, States must show earnestness in furthering their argument before investment tribunals.

B. Participation of Third Parties like NGOs and Rights Groups in Arbitration

It is noticed that States often display a conservative approach to human rights claims in investment arbitrations. Accordingly, allowing NGOs and human rights organizations to participate as *amicus curiae* will help the tribunal in assessing the underlying human rights issue in a more comprehensive manner. For example, in *Methanex Corp* v. *USA*,[55] NGO participation was seen for the first time. The same trend has been continuing in many other international investment dispute arbitration cases such as in *Suez Vivendi* v. *Argentina*[56] and *Glamis Gold* v. *United States*.[57] Presently, the amended Rule 37(2) of the ICSID Rules provides an institutional instrument to the tribunals to call for *amicus curiae* briefs in cases, notwithstanding opposition by either party. For example, in *Biwater* v. *Tanzani*,[58] an *amicus curiae* brief was accepted by the tribunal even though one party opposed it.

Despite all mechanisms being in place, there has been a negative undercurrent among the parties to arbitration regarding acceptance of *amicus curiae* briefs.[59] Parties fear that these briefs may interfere with their strategy, result in an increase in costs and delay and pose a risk to confidentiality. In some cases, the tribunals have denied admitting these briefs even in cases of public interest.[60] Such practices need to stop to allow proper representation of human rights

54 Philip Morris, *supra* note 19.

55 Methanex, *supra* note 6; Barton Legum, *NAFTA Chapter Eleven Arbitral Tribunal: Methanex Corporation v. United States of America, Final Award on Jurisdiction and Merits - Introductory Note to Methanex Corporation v. United States of America - May 23, 2005*, 44(6) ILM 1343, 1344 (Nov. 2005).

56 Suez, *supra* note 45 (Argentina had urged the Tribunal to take into account the fact that the concession dealt with water and impacted the human right to that resource. The Tribunal also noted that an amicus curiae brief submitted by a group of five NGOs had made similar arguments.).

57 Glamis Gold Ltd. v. United States, Award, 48 ILM 1035 (June 8, 2009) (In Glamis, at least three sets of written arguments were accepted, one by a coalition of non-governmental organizations, one by a business association and one by the locally-based Quechan Indian Tribe, whose sacred sites and traditions were affected by the proposed mining project).

58 Biwater, *supra* note 45.

59 *Secretive World Bank Tribunal Bans Public and Media Participation in Bechtel Lawsuit over Access to Water*, CIEL.ORG (Feb. 12, 2003), *available at* https://www.ciel.org/news/secretive-world-bank-tribunal-bans-public-and-media-participation-in-bechtel-lawsuit-over-access-to-water/; Aguas del Tunari SA v. The Republic of Bolivia, ICSID Case No. ARB/03/02, Award (Oct. 21, 2005) [*hereinafter* "Aguas del Tunari SA"]; *see also* Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 VAND. J. TRANSNAT'L L. 775 (2008); Katia Fach Gomez, *Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favourably for the Public Interest,* 35(2) FORDHAM INT'L L. J. 510, 547-50 (2012).

60 Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe, ICSID Case No. ARB/10/25, Procedural Order No. 2 (June 26, 2012); *Human Rights Inapplicable in International Investment Arbitration? A Commentary on the Non-Admission of ECCHR and Indigenous*

groups in investment disputes. The usefulness of an *amicus curiae* brief is derived from the jurisprudence of international law, which accepts and promotes participation of the civil society in investment disputes.[61] Such practices tend to reduce the so-called opaqueness associated with the investment disputes and thereby bring transparency and legitimacy to the arbitration process.

C. Allowing Individuals to Sue Investors for Human Rights Violations

Another way of incorporating human right issues in investment arbitration is to allow the individuals of the host State to sue the investors for human rights violations. According to Todd Weiler, "*[b]y grafting such a human right's claim mechanism onto the existing structure of international investment protection treaties, one can both recognize the growing place of the transnational corporation in [human rights] law and practice and improve upon the Achilles heel of [human rights] - effective enforcement.*".[62] There is a subtle difference between the human rights claims raised by NGOs before tribunals by way of *amicus curiae* submissions, and by individuals of host State suing the investors. In the first case, they are not a party to the arbitration and only act as a friend of the tribunal in so far as bringing in a better and more elaborate analysis of the issue, technical expertise and a holistic view point of the problem. However, in the second case, the entity is itself a party to the arbitration, and can raise claims. Every society has 'human rights crusaders' who can take up this role to sue the investors whenever the allegations of human rights violation surfaces. Such a mechanism helps the civil society to fulfil its responsibility of checking human rights violations by direct involvement in the arbitration process, thereby ensuring effective enforcement.

D. Improving the Precession of Human Rights Law

Some commentators opine that investment treaties are being exploited by investors to circumvent stringent domestic human rights laws.[63] Investors prefer arbitration over ordinary court proceedings as bringing human rights' claims in arbitration is comparatively difficult. Accordingly, by invoking the clause of investor protection and going for arbitration, the investors can bypass the normal legal channels and domestic laws that are enacted to protect human rights. Hence, as opined by Gus Van Harten, the precision of human rights law must be improved by limiting the application of investor protection in favour of human rights considerations.[64] True, limited investor protection may act as a negative incentive for investors to choose the host State as a destination. But again, investor protection is not the only parameter that determines FDI flow in a country. Other value additions like quality workforce, better environment, sustainable development goals, etc., would go a long way in enhancing the bargaining power of the host State. The investors consider protection against political and

---

Communities as Amici Curiae before the ICSID Tribunal, EUROPEAN CENTRE FOR CONSTITUTIONAL AND HUMAN RIGHTS (July 2012), *available at* https://www.ecchr.eu/fileadmin/Kommentare_Konferenzberichte_Weiteres/Kommentar_ICSID_tribunal_-_Human_Rights_Inapplicable.pdf; Aguas del Tunari SA, *supra* note 59 (where *amicus curiae* submissions were denied).

61 Fransesco Francioni, *Access to Justice, Denial of Justice and International Investment law*, 20(4) EUR. J. INT'L L. 729, 740 (2009).

62 Todd Weiler, *Balancing Human Rights and Investor Protection: A New Approach for a different Legal Order*, 27 BOS. C. INT'L COMP. L. REV. 429, 450 (2004).

63 Watt, *supra* note 10, ¶ 7.

64 Gus Van Harten, *Guatemala's Peace Accords In a Free Trade Area of the Americas*, 3(1) YALE HUM. RTS. & DEV. L. J. 113, 146-158 (2000).

regulatory risks to be of greater importance than investment incentives.[65] Once the bargaining power of the State increases, BITs will not have an adverse effect towards investment, despite the limited degree of investor protection. An interplay of all the points discussed above may bring about the desired legitimacy to investment arbitration in order to deal with human rights issues.

IV. Feasibility of Inclusion of Human Rights in Investment Arbitration: a Critique

Across the world there is a drive to modulate investment treaties in a manner such that human rights issues get addressed comprehensively in the investor-State arbitration mechanism. However, it cannot be denied that investment treaty agreements are essentially contractual agreements between two consenting parties and the arbitral tribunal derives its jurisdiction from the agreement between the parties itself. Hence, unless any specific provision is expressly included in the treaty, which is the substantive law governing the agreement, the remedies can neither be uniform nor effective. It may be noted here that while other international law principles may be applied by tribunals, in absence of express provisions in the agreement itself, some tribunals may consider human rights claims favourably, whereas others may reject them as non-maintainable. Having said that, the inclusion of a specific provision for protecting human rights in international investment agreements is easier said than done, as it is governed by various externalities.

First, investment law is made to protect economic interests, where profit is the overriding objective. There is an inherent conflict between the fundamental aims of the investment, which is nothing but profiteering, and the intangible, non-economic and often lofty ideas of human rights. Hence, an interface between the corporate interest of the transnationals and human rights obligations is very difficult to establish.

Second, investment laws are a by-product of a power differential between States. Since BITs originated to facilitate the flow of investment to the developing nations, as the idea in vogue was to attract FDI, a developing nation had to be prepared for substantial concessions to the transnationals. This scenario has not changed much in today's world in the sense that it is still difficult for small States to incorporate stricter responsibility and obligations on the part of the investor. This situation is more aggravated in the proverbial 'race-to-bottom' scenario. If a State, today, tries to incorporate stricter obligations for the investor, there is a chance that it may lose out on investments. Hence, the incentive for a narrowly negotiated BIT is almost non-existent, especially when the State has very little bargaining power.

Third, the argument that investment treaties should respect international human rights laws is easier said than done. As Robert Jennings laments, it is not clear what does and does not constitute international law.[66] The same exasperation is exhibited by Jan Klabbers when he exhorts that in the era of globalization and privatization, it is no longer clear what exactly

---

65 WORLD BANK GROUP (WBG), GLOBAL INVESTMENT COMPETITIVENESS REPORT 2017/2018: FOREIGN INVESTOR PERSPECTIVES AND POLICY IMPLICATIONS (2018).

66 Noor Khadim, *Is Spade always a Spade? The Protection of Basic Human Rights and Indigenous Rights under Investment Treaties*, THE ARTVOCATE (Mar. 6, 2017), *available at* http://theartvocate.blogspot.com/2017/03/is-spade-always-spade-protection-of.html?q=governance+gap [*hereinafter* "Khadim"].

international law is.[67] This problem is exacerbated as international institutions for the protection of human rights such as the United Nations ["**UN**"], are unable to prevent human rights violations.[68] A key weakness of UN human rights bodies is that, unlike the UN Security Council, they don't have enforcement power. They are basically fora for constructive dialogue and engagement among cooperating nations, but lack the teeth to effectively protect rights where a State is not willing to cooperate. To give more insight into the fluid character of international law, especially with respect to human rights, the variation in tolerance limit for human rights violations from State to State is not only perceptible, but glaring too. What constitutes a human rights violation in India may not be considered as a human rights violation in Sudan. The tolerance limit of certain totalitarian regimes has been traditionally very high. In such a scenario, uniform application of an international legal framework is destined to become chaotic. However, having said so, it is pertinent to mention that while the degree of protection of human rights differ across regimes and states, various international instruments on human rights such as UDHR, ICCPR, ECHR and ICESCR provide a basic minimum platform for human rights regulations that should be complied with.

Fourth, the basic incongruence between private liberty and public rights has been very aptly identified by Anne Peters, Jan Klabbers and Ger Ulfstein in their seminal work on 'The Constitutionalising of International Law'.[69] They argue that in investor-State contracts, through BIT instruments or otherwise, the policy options of the State are constrained in favour of investment protection, whereas concomitant regulations imposing obligations upon the investor, are not enforced by international institutions. Through the ICSID and BIT model, public interest has been vested in private hands; thereby marginalising specific global public interests with low economic output, like human rights or environment protection. Such incongruence is difficult for the tribunal to mitigate. Many critics opine that the various methods of improving transparency of the arbitral process, like participation of civil society through *amicus curiae* briefs or participation of individual right activists, essentially mean the inclusion of further private persons, who are not the representative voice of the mass, in deciding an issue of public interest.[70] Instead, institutional mechanisms need to be strengthened to analyse international law with a proper perspective.

Fifth, the principle of governance gap as suggested by Audrey Maclin and Penelope Simons,[71] puts investment law in the right perspective and points out the lacunae in the arbitration process. According to the said principle, States are forthcoming to imbibe human rights principles in their domestic policy making, including regulations to multinational enterprises ["**MNE**"]. However, such policy-making is limited to their jurisdiction alone and does not have extra-territorial application. Accordingly, if such MNEs happen to have bases or be partners to States with weak governance or a repressive regime, they tend to commit, abet or be complicit in the violation of human rights. There is no ready-made solution to address the issue of governance gap, the best

---

67 JAN KLABBERS ET AL., THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 339-340 (1st ed. 2011) [*hereinafter* "Klabers et al."].

68 Khadim, *supra* note 66.

69 KLABBERS ET AL., *supra* note 67.

70 Tomoko Ishikawa, *Third Party Participation in Investment Treaty Arbitration*, 59(2) INT'L & COMP. L. Q. 373, 393 (2010).

71 PENELOPE SIMONS & AUDREY MACKLIN, THE GOVERNANCE GAP: EXTRACTIVE INDUSTRIES, HUMAN RIGHTS, AND THE HOME STATE ADVANTAGE 422 (Daniel Drache ed., 2014).

solution is if investors themselves exhibit self-control. Finally, when the host State itself joins hands with the corporates to violate human rights, building the above-mentioned interface becomes difficult.

From the discussion above, it is evident that even after the inclusion of human rights-sensitive measures in the arbitration system, structural problems continue to exist in the investment law regime. An investment arbitration mechanism that is truly conducive to human rights can be built by ensuring equal emphasis on sensitization of the arbitration mechanism and incorporation of human rights obligations in substantive law.

V. Conclusion

International investment arbitration is not necessarily against human rights laws. The friction between the two is noticed sometimes because both operate in two entirely different planes. Using hard law to enforce human rights to bridge the governance gap may result in compromising the very essence of BITs, i.e., promoting economic development. In such a scenario, the application of soft laws[72] in investment arbitration appears to be a more relevant and effective proposition. John Ruggie, a distinguished scholar on international law, opines that the responsibility of governance over the transnational corporates' behaviour should be vested with the States within the territory of which the corporates operate and ventures to bridge the governance gap by extra-territorial laws should be discouraged.[73] He provides a framework of principles: binding and non-binding norms for the States, and non-binding responsibilities on the corporates. He suggests that the observance of such non-binding responsibilities must be subjected to scrutiny by the public and public opinion is the best judge to decide.[74] This framework can be achieved not by hard laws, but by extending to all the stake-holders, the "*implications of existing standards [and] integrating them within a single, logically coherent and comprehensive template*".[75] Such soft law approach needs to permeate more into the investment arbitration system to fill the vacuum between strong law, a paradigm not acceptable to investors, and absolutely no-law, a system no sovereign State can accede to on its own volition. Soft laws aiming at a consultative approach through the inclusion of various stake holders can bring about the much-needed legitimacy and transparency to investment arbitration. Hopefully, with a proper soft law paradigm and better public scrutiny, like a 'court of public opinion', in place in the international investment system, the States may not face a POSCO- India-like situation, where the State allegedly allowed the corporate to act in a law-less arena and later subjected it to a hard law regime, thereby resulting in poor negotiation and scrapping of the project. The interface between investment protection and human rights law can be more engaging only when all

---

72 Soft laws include John Ruggie's 'Protect, Respect and Remedy Framework' and the UN 'Guiding Principles on Business and Human Rights', tort law and transnational business human rights self-regulation.

73 John Gerard Ruggie, *Life in the Global Public Domain: Response to Commentaries on the UN Guiding Principles and the Proposed Treaty on Business and Human Rights,* SSRN (Jan. 25, 2015), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2554726.

74 Sally Wheeler, *Global Production, CSR and Human Rights: The Courts of Public Opinion and the Social License to Operate*, INT'L J. HUM. RTS. 757 (2015).

75 John Gerard Ruggie (Special Representative of the Secretary General)*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations' protect, Respect and Remedy' Framework*, ¶ 14, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).

stakeholders interact positively to shed the traditional opaqueness of the investment arbitration process.