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INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 3 | Issue 5

2020

Investor State Dispute Settlement and Human Rights

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ABSTRACT

While there are a number of international investment agreements (IIAs) signed till today but maximum of them fail to provide guidance as to how human rights, environmental protection should be included in and addressed in context of investment protection, protecting the right of the people of the host- state. Arbitral tribunal have been for a long time faced disputes which touch upon these issues or sometimes the disputes directly concern issues like environmental protection and human rights, they are still reluctant to address the investor-state dispute with respect to these matters. And due to this there are many instances where the human rights and environmental protection has been compromised to give levy to the investor at the cost of the rights of others. The relationship between human rights and trade is one of the central issues in the 21st century.

Investor- state agreements are considered venture and property insurance and that is why the investors do not want to sign an agreement which hampers their free working environment just like including human rights as it in some or the other way restrict certain act as we can observe in the Ethyl case.

Keywords: *Human Rights, Dispute settlement, ICSID, ISDS, BIT, most-favoured nation, United Nations*

I. INTRODUCTION

The international law in the nineteenth and the twentieth century saw progress along two lines. First, the maintenance of sovereignty of a state as a fundamental tenet and the focus of international law in a more business-like fashion, getting states to make bargains limiting their sovereign powers in exchange for concessions by other states. But at the same time, however, the international theorists, jurists, lawyers, and scholars gradually devised "a programme for the economic and material betterment of the human race."

With these development as the international agreements started it also gradually gave rise to dispute between the parties and a mechanism was needed to resolve them. After a series of

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events and organisations forming and disabling we came up with different mechanisms like ICSID, WTO, ILO, etc. Currently, the Investor-State Dispute Settlement system (ISDS) is facing a major legitimacy crisis and one important aspect of this is, while an investment treaty arbitration widens, the protection of human rights of the investment- affected communities and individuals shrinks. A negative impact on the human rights which could be triggered by the ISDS can be observed. One being, when an investment activity/activities explicitly and directly contribute towards violation of human rights for example, in a mining company which through its operations endanger the health and safety of the workmen and other local community. If in the light of those operation the host State decides to adopt measures to control or regulate the investor's operation, the investor can use the ISDS to obtain an award which is favourable to them thereby undermining the human rights of those who have suffered or could have suffered.

Given the high costs of incurring in investment disputes (both in terms of direct costs and damage awarded), States may refrain from even adopting 'risky' regulations, such as environmental and public health regulation. This effect is commonly referred to as 'regulatory chill', which is highly problematic considering that the realization of human rights depends also on the implementation of public interest regulation. By curbing the policy space that states would otherwise enjoy, ISDS contributes to erode the potentiality of the human rights body of law.[2]

Role of the investor- State dispute settlement System

ISDS is the system through which a foreign investor can initiate an international arbitral proceedings against the host government (or vice-versa) and seek monetary compensation for the State measures that impact current or future profits for the investors. Measures that have been subjected to challenge include, for example, human rights, public interest, and environmental regulations such as government bans on harmful chemicals, bans on mining, environmental restrictions on mining, requirements for environmental impact assessments, regulations regarding transport and disposal of hazardous waste, and regulations governing health insurance. Financially, the burden these arbitration disputes can place on States through monetary compensations is significant. [3]

[2] Alessandra Arcuri, Federica Violi, Human Rights and Investor-State Dispute Settlement: Changing (almost) Everything, so that Everything Stays the Same? (2019) SSRN https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3459961, last visited 25 September 2020.

[3] Daniel J. Gervais, Investor-State Dispute Settlement: Human Rights and Regulatory Lessons from Lilly v Canada (2017), hthttps://papers.ssrn.com/sol3/papers.cfm?abstract_id=3061996, last visited 20 September 2020.

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II. Can private parties use Investor-State Dispute Settlement (ISDS) mechanisms to systematically advance human rights?

For the past few years it has been observed that private companies have used ISDS mechanisms to stymie human rights. It can be understood from the case of Ethyl Corporation's 1997[4], a claim of the investor challenging the ban on import of gasoline additive methyl cyclopentadienyl manganese tricarbonyl (MMT) by Canada. What made the claim notable was that is focused towards the corporation's willingness to use ISDS in challenging the government policies which fulfil the core human rights obligations. Canadian government had instituted the ban because it believed MMT was a dangerous toxin that posed a significant public health risk, the U.S government had already banned the MMT but still Ethyl filed a claim stating that the import ban will create a negative impact on its business. It thereby directly challenged the Canadian government's ability to regulate in the interest of its citizens health.

This suit proved to be devastating, as Canada settled the suit and agreed to lift the ban entirely. In the two decades since Ethyl's successful fight against Canada, investors have used ISDS mechanisms to challenge environmental, health, and other social regulations regarding waste disposal, tobacco control, and similar social services. Because arbitral awards are enforceable against the losing party, each individual ISDS claim is a potent tool for focusing the mind of the government. Just like Canada did with Ethyl, governments may choose to abandon otherwise pro-human rights policies rather than risk a costly loss if the matter goes to arbitration.[5]

III. ISDS extensiveness

Even though ISDS have created a great impact on the international agreement formation it is still at times criticised for its ad hocness and incoherence, the lack of transparency in some cases and the unchecked conflict of interests of arbitrators. It has also been considered a threat to public interest regulations by the host states just like we observed in the Ethyl case. This is mostly because of the regulatory framework if objects. The system has been generally portrayed as a neo-classical institution, perpetuating the domination of western hegemonic powers on developing countries. At a substantive level, investor-state arbitration marginalizes the rights and interests of locally affected communities and individuals and their human rights.

[4] Ethyl Corp. v. Government of *Canada*, Award on Jurisdiction, (June 24, 1998), 38 I.L.M.708-31.
[5] Adam H. Bradlow, Human Rights Impact Litigation in ISDS: A Proposal for Enabling Private Parties to Bring Human Rights Claims Through Investor-State Dispute Settlement Mechanisms (Yale Law, (2018), https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1692&context=yjil, last visited 1 October 2020.

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These rights include a wide range of rights, from individual rights to water[6] and health[7] to collective rights of indigenous peoples over their lands.[8]

This kind of marginalization is mainly due to 2 reasons: firstly, the adverse outcome of certain disputes, or even the costs of incurring such disputes induces the host states to refrain from regulating in the interest of the public, and for the protection of individuals and communities affected by the agreement. Secondly, some issues/ subjects do not even have a standing in the arbitral tribunal even though their right might be affected by the claim under dispute. It has been stated that the ISDS can be reconciled with human rights in essence through systemic interpretation between investment and human rights law.[9] 'Harmonization' techniques that have attempted this reconciliation are discernible in some ISDS cases, where arbitrators have engaged with human rights arguments invoked by host States. Some of these arguments focus on "the (re)definition of the notion of protected investment and the reliance on the legality clause, so as to exclude investment in clear violation of fundamental human rights from investment protection"[10]; "the admissibility of human rights-based counterclaims"[11]; and "the contributory fault of investors for the purposes of reducing the awarded damages."[12] It is to be noted that despite a mushrooming literature in the field, the number of arbitral awards dealing with the clash between human rights and investors' rights is still minimal and erratic.

The people of the host state are formally excluded from legal protection within the ISDS system and to validate this point we can use the example of the *Chevron v Ecuador*[13] case. The chevron company operated in Ecuador, where it caused unprecedented damage to the huge environmental area for the time period of 28 years from 1964 to 1992 by dumping 18.5 billion gallons of toxic wastewater directly into surfaces streams and rivers. The parties came to an agreement in 1998 to settle damages but the local communities were still dissatisfied with the settlement. Therefore, started a dispute in the US which was dismissed on the basis of forum of non conveniens.

[6] Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22.
[7] Eli Lilly & Co. v. Canada, ICSID Case No. UNCT/14/2, (Mar. 16, 2017).
[8] Glamis Gold Ltd. (Claimant) v United States of America; NAFTA/UNCITRAL (8 June 2009).
[9] B. Simma, FOREIGN INVESTMENT ARBITRATION A PLACE FOR HUMAN RIGHTS? (2011) 60(3) LMU, https://epub.ub.uni-muenchen.de/23165/1/simma.pdf, accessed 24 September 2020.
[10] Phoenix Action Ltd v Czech Republic ICSID ARB/06/5 (15 April 2009).
[11] Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic ICSID Case No. ARB/07/26.
[12] Bear Creek Mining Corporation v. Republic of Peru ICSID Case No. ARB/14/21.
[13] Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador UNCITRAL, PCA Case No. 2009-23.

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- **Lily v. Canada: Human rights lessons under Investor- State dispute[14]**

The Lilly case dealt with an ISDS complaint filed after the revocation of two Canadian patents on pharmaceutical products. Canada revoked the patent since one of the basic patentability criteria which is the utility requirement wasn't fulfilled. She filed a complaint under chapter 11 of NAFTA which is meant to protect investments. She claimed that the adoption of a "new, radically different standard for determining whether inventions fulfil that requirement" amounted to an "uncompensated expropriation", which in her opinion was a violation of Article 110 of the NAFTA.

Her second argument was that Canada has wrongly interpreted the notion of utility requirement thereby violating the obligation of the state of "fair and equitable treatment" under Article 1105 of NAFTA.

In its counter-memorial, the Government of Canada noted, first, that the claimant received due process before Canadian courts (a fact not in dispute) and was simply disappointed with the outcome of two patent trials. That did not amount to a breach of the relevant obligations. Rather, according to the respondent, "the threshold for a violation of the minimum standard of treatment is high and requires a finding of egregious or manifestly unfair behaviour" under customary international law. Specifically, Canada alleged that the claimant had failed "to prove that the theory of 'legitimate expectations' has become a rule of customary international law" protected by NAFTA Article 1105(1) and, moreover, that "regardless of its status generally in international law, it is a doctrine which fundamentally cannot be applied to judgments of the domestic judiciary acting in an adjudicative function of domestic statutory interpretation."

The Tribunal also concluded that claimant had failed to establish a factual premise of its claims. It held that the promise utility doctrine cannot form the basis of an expropriation claim under NAFTA Article 110 or a claim for a violation of minimum standard under Article 1105. The Tribunal also finds that there was not an arbitrary or discriminatory measure in violation of NAFTA Article 1110 or NAFTA Article 1105.634. The tribunal dismissed the claims without further inquiry.[15]

In some cases if the individual owner of the property has to bear a burden, which is too heavy in the light of the aim to be achieved, the measure is deemed to be disproportionate and thus more likely to lead to a finding that there was a taking of property subject to compensation.

[14] Eli Lilly & Co. v. Canada, ICSID Case No. UNCT/14/2, (Mar. 16, 2017).
[15] Supra 2, 13-22, 26.

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- **OHCHR Investor State Dispute settlement report, 2015**[16]

It puts focus on the human rights in context of an investor state dispute stating that the forwarded value of the report is on the point to identify threats to democratic and equitable international order posed by the international agreements that are not connected with human rights and by investor- State dispute settlement arbitration regimes because they reduce the State's regulatory space and do not oblige the arbitrators to give priority to human rights treaty norms.

It underlines the urgency of crafting future agreements in a way that prevents the abuses of the past and calls for a revamping of the existing 3,200 international investment agreements, more than 1,500 of which are due to expire.

- **International investment agreements, multilateral free trade agreements, WTO law and practice report 2016**[17]

Focuses on the importance of the parliament in ensuring human rights protection and promoting trade along with it.

States can commission human rights impact assessments of the impacts of their IIAs on their human rights obligations at both the international and national levels. The UN Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements is a key instrument in this regard.[18] Prior to recognition as a separate form of assessment, HRIAs were considered as aspects of social impact assessments.

- **Human Rights Council -Working Group on the Right to Development, Nineteenth session, 2018**[19]

The principles and elements of the Declaration on the Right to Development (DRTD) have certain elements and principles which mandate national and international development policies for development thereby making it an effective tool for addressing human rights issues and obstacles posed by the IIAs. Five key articles have significant bearing on investment protection within IIAs. Article 2.3 states the rights and duty of the state to formulate appropriate national

[16]OHCHR, OHCHR Investor State Dispute settlement report, (2016) https://www.ohchr.org/EN/Issues/IntOrder/Pages/InvestorStateDisputes.aspx, last visited 4 October 2020.

[17] OHCHR, International investment agreements, multilateral free trade agreements, WTO law and practice report (2016), https://www.ohchr.org/EN/Issues/IntOrder/Pages/InvestmentTradeAgreements.aspx, last visited 3 October 2020.

[18] Bhumika Muchhala, International Investment Agreements and Industrialization: Realizing the Right to Development and the Sustainable Development Goals (HRC, 19 April 2018) https://www.ohchr.org/Documents/Issues/Development/Session19/A_HRC_WG.2_19_CRP.5.pdf, last visited 3 October 2020.

[19] United Nations Human Rights Council, GUIDING PRINCIPLES ON HUMAN RIGHTS IMPACT ASSESSMENTS OF TRADE AND INVESTMENT AGREEMENT (UN Special Rapporteur on the Right to Food, 2011) https://undocs.org/A/HRC/19/59/Add.5, last visited 30 September 2020.

development policies; Article 3.1, the primary responsibility of the state to create favourable national and international conditions to initiate development.; Article 3.3 Cooperation of states with each other to ensure development and eliminate obstacles to improve development based on human rights sovereign equality, mutual interest and interdependence; Article 4.2 promotion of rapid development of developing countries focusing on sustained action by providing the appropriate means and facilities to foster comprehensive development, and Article 8.1 highlights the need for economic and social reforms to address all social injustices and equality of opportunity for all people, particularly ensuring an active role for women in the development process.

IV. THE INDIAN STANDPOINT

The dispute resolution mechanism under the Indian BIT is premised on the principle of exhaustion of local remedies ("ELR"), where the grievance of the investor is first addressed by the domestic courts of the host state before they are pursued in international proceedings.

The Model BIT stipulates that a foreign investor should first exhaust local remedies at least for a period of five years before commencing international arbitration.5 However, application of the principle is conditional upon the investor demonstrating that there were no available domestic legal remedies capable of reasonably providing any relief in respect of the same measure. The ISDS clause in the Model BIT can be perceived as a knee-jerk reaction resulting from a number of claims that were brought against India post-White Industries. The fact that the Model BIT does not contain the 'Most Favoured Nation' clause, shows definitive changes that claims may be decided against India under the pretext of judicial delays, as it happened in White Industries.[20]

V. REFORMING INVESTMENT ARBITRATION

If questions related to substantive reforms, including e.g. substantive standards of protection, investors' obligations or third party rights remain formally outside of the mandate, then the opportunity to address systemic issues, such as the mentioned asymmetry, shrinks dramatically. While maintaining the stance on the procedural aspects of the reform, WGIII has insisted that the mandate is flexible and broad enough to accommodate developments in substantive investment law and include some of the most compelling issues within one of the concerns already identified. This would be the case for example as regards third party rights, which

[20] Aditya Sethi, VS Pravallika, Analysis of Investor-State Dispute Settlement in the 2016 India Model BIT: An Unsettling and Recalcitrant Proposition (RMLNLU Arbitration Law, 5 May 2020), https://rmlnluseal.home.blog/2020/05/05/analysis-of-investor-state-dispute-settlement-in-the-2016-india-model-bit-an-unsettling-and-recalcitrant-proposition/, last visited 26 September 2020.

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would fall under 'correctness' of arbitral awards, or investors' obligations which could be addressed through counterclaims. Asymmetry per se has not been isolated as an additional concern by WGIII. However, states have explicitly included the 'inherent asymmetric nature of ISDS' and 'regulatory chill' among the preoccupations and principles, which should guide the UNCITRAL reform process further. Such reforms may range from reforming the UNCITRAL Arbitration rules, to developing model clauses or establishing new judicial or advisory bodies.[21]

VI. INCORPORATING HUMAN RIGHTS IN TRADE AND INVESTMENT DISPUTES

A choice to operationalize the interface between human rights, from one perspective, and international trade and investment law, then again, is the consolidation or coordination of (explicit) basic liberties in the investment or trade system itself.

Free trade shapes part, or possibly is lined up with, the worldwide view for the structure to promote the human rights, singular self-sufficiency, and the free improvement of one's character through business. Free trade can help an "individual's right to trade the fruits of her labour in exchange for foreign goods and services needed for personal self-development in dignity." [22]

Investor- state isn't about free trade; it is about venture and "property" insurance. In Lilly, the backhanded confiscation contention applied to an unmistakable sort of "property," notwithstanding, Lilly's protest difficulties the measures utilized by domestic courts, after fair treatment, to conclude that two licenses were invalid. To contend that nullification is an infringement of the patent proprietor's human rights (protection of property) is a gigantic advance, one that this Article will not take. This clarifies why an established methodology appears to be dangerous in an ISDS setting.

Contractarian approaches

Agreement based methodologies have been recommended to expand the degree and nature of standards that international trade tribunals can use to decipher economic deals. This appears to be especially pertinent in an ISDS setting in light of the fact that a critical aspect of the IIAs, in particular the BIT system, "was developed on the basis of a contractual way of thinking, lifting contractual claims out of a domestic context and into an international law context." Put

[21] Supra 1.

[22] Margie-Lys Jaime, RELYING UPON PARTIES INTERPRETATION IN TREATY-BASED INVESTOR-STATE DISPUTE SETTLEMENT: FILLING THE GAPS IN INTERNATIONAL INVESTMENT AGREEMENTS (2010) 46 GEO.J.INT'L https://heinonline.org/HOL/LandingPage?handle=hein.journals/geojintl46&div=14&id=&page=, last visited 6 October 2020.

differently, ISDS is perhaps best seen as private law while trade law as public law.

Filling normative lacunae

Any court interpreting a legal text, whether a contract, statute or treaty, may be called upon not just to interpret it, but also to fill lacunae. Lacunae may be said to exist for several reasons, including that terms are left undefined; that definitions they contain are unclear; or that there are missing elements and interstices in the texts.

Incomplete contracts

It may be difficult to argue before an ISDS tribunal that it must consider human rights texts because an investment treaty (or the investment chapter of a trade treaty like NAFTA) is "incomplete." Yet, the conflict between the object and purpose of the investment chapter (to protect property) and the object and purpose of the IP chapter of an IIA (forming part of a balanced and effective innovation policy) must be reconciled.[23]

This opens a door for an ISDS tribunal to bring human rights and other key public policy objectives in its analytical mix, especially in cases where the specific solutions proposed in the last Part of this Article have not been applied to the applicable IIA.

VII. CONCLUSION

At its presumptive worth, the serious issue with ISDS is that it endows foreign investors with unique powers and leaves individuals in the host nation impaired, making an outlandish imbalance. Where foreign investor are given the privilege to enjoy the avenues to access to justice it cannot be said the same for investment affected people. We have observed it through the various case laws how the government of the states even after trying are unable to receive a favourable judgement which protects the human rights. Eventually states do not prefer going for a dispute settlement mechanism due to its cost and the outcome is always more or less in favour of the investor. This shows that investment- affected communities are the one who are left impoverished by the system of dispute settlement, which itself was meant to promote the development and protection of the rights in the first place. This issue has been taken by scholars and has been called upon by the participating states in the UNCITRAL meetings addressing these concerns and to make reforms.

It can be perceived that there has been a lot of efforts have been made to include human rights and harmonize them with the international agreements and execute it in the dispute settlement system. The States have tried it and international organisations have endeavoured to influence

[23] Supra 2, 46.

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the IIAs to include human right protecting but a little has been done. We can scrutinize that the Human rights impact assessment has several advantages like measuring the impact according to the legal obligations entrenched in the international human rights instruments; Assessing multiple impacts rather than just focusing on a single element by interdepending and inter-relating the human rights; creating a pressure on the duty- bearers and authorities to protect the rights of the rights- holders and demanding justification for their policies in human rights terms; engaging international and national human rights actors; Calling attention to the importance of participation, transparency and empowerment in the process of conducting HRIAs as well as in the negotiation and implementation of the IIA itself; and, focusing on social impacts on the most vulnerable and disadvantaged persons and groups in society.

Even though efforts have been made it is in my opinion just on the initial stage. Till the time IIAs do not recognise the adverse impact of not including the human rights, protection of environment etc. no change can be made.

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 [ISSN 2581-5369]